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Articles

Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms

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Some groups use endemic social norms rather than formal law to regulate their intellectual property (IP). This qualitative empirical study extends and critiques existing work on this topic by examining how roller derby skaters guarantee exclusive use of the pseudonyms under which they compete. Roller derby names are a central part of this countercultural, all-girl sport, adding to its distinctive combination of punk and camp. Skaters have developed an elaborate rule structure, registration system, and governance regime to protect the uniqueness of their pseudonyms. The development of this extralegal governance scheme despite the ready availability of IP theories (e.g., trademark, right of publicity) to protect derby names shows that IP norms emerge independently of law's substantive (un)availability, so long as the relevant group is close-knit and the norms are welfare enhancing. These groups are especially likely to craft formal regulation and registration schemes to buttress informal norms where the relevant community is identity constitutive and where the intangible goods arise from nonmarket production. This study also suggests another way of thinking about the problem of supplying property systems, casts (further) doubt on the coherence of the prevailing neoclassical economic assumptions underlying IP law, and reflects on what it means for rules to be law.

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Introduction: Norms in IP's Positive Space

The idea that law provides a shared framework against which we all frame our conduct—a notion known as "legal centralism"—may seem so instinctive that it need not be questioned. The old maxim *ignorantia legis neminem excusat* assumes that people are charged with knowledge of (and, ideally, deterred by) criminal law.[1] And as Robert Mnookin and Lewis Kornhauser famously put it in the context of private law, parties "do not bargain . . . in a vacuum; they bargain in the shadow of the law."[2] Fortunately, though, some scholars thought to question the assumption of law's centrality for the average person and found, surprisingly, that it's often not valid. In fact, people often act not in the shadow of law but without any

1. *See* Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 766 (2010) ("The concept of deterrence is quite simple—it is the omission of a criminal act because of the fear of sanctions or punishment.").

2. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

consciousness of law whatsoever. Robert Ellickson's study of ranchers in far northern California provided the cornerstone account that called legal centralism into question. His study of Shasta County cattlemen found that ranchers' rules and practices governing cattle trespass bore no relationship to applicable tort law and were instead the product of organically emergent, entirely informal, but still highly effective, social norms.[3] Nobel Laureate Elinor Ostrom's work has similarly revealed that in the context of natural resource management, parties often work together to create private governance of resource commons in efficiency-enhancing ways that operate independently of state regulation.[4] Lisa Bernstein has also shown that some professional groups, such as Amsterdam diamond merchants and Memphis cotton traders, have developed industry norms to govern their businesses despite the ready availability of state-created law.[5] These accounts strike at the heart of legal centralism; they suggest that actors create norms independently of, not in reaction to, law.

More recently, commentators have investigated professional groups that generate valuable intellectual property (IP) but regulate it by means of informal norms rather than formal law. Emmanuelle Fauchart and Eric von Hippel's work on French chefs made the first move in this direction.[6] It is critical to chefs' professional success and advancement that they receive credit for the IP—recipes—that they create. Fauchart and von Hippel found that French chefs use a system of simple, stable social norms to regulate attribution for and use of these recipes by other chefs.[7] The result is a regulatory system that operates at minimal cost but still creates value and achieves compliance by assuring all chefs that their recipes are protected from free riding. In one sense this replicates the results of earlier work on social norms, finding that close-knit groups often develop norms-based systems that enhance efficiency.[8] But this study, in contrast to earlier work,

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3. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 40 (3d prtg. 1994) ("[L]egal rules hardly ever influence the settlement of cattle-trespass disputes in Shasta County.").

4. *See* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 61 (1990) ("On the contrary, what one observes in these cases is the ongoing, side-by-side existence of private property and communal property in settings in which the individuals involved have exercised considerable control over institutional arrangements and property rights.").

5. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992) [hereinafter Bernstein, *Opting Out*]; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724 (2001) [hereinafter Bernstein, *Private Commercial Law*].

6. *See generally* Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008).

7. *See id.* at 192–96 (enumerating social norms regulating attribution among chefs and presenting evidence of their enforcement).

8. *See, e.g.*, Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L.

suggested a legal centralist account for why actors opt for norm-based instead of law-based systems. As the authors explain, "conditions [are] favorable to norm-based IP systems" when "any extant law-based . . . IP protection [is] inadequate or unsatisfactory in some way."[9]

Other work has investigated similar spheres located in IP's "negative space"[10]—areas where intellectual property law cannot or does not reach and where subcultures or professions also create informal, norm-based property systems to regulate the intangible goods that law does not. Jacob Loshin has shown that magicians rely on informal professional rules to make sure their illusions are not used without attribution or exposed to the public.[11] Dotan Oliar and Chris Sprigman's work on stand-up comedians reveals a similar norm-based dynamic at play, governing the creation, production, and protection of jokes in that subculture.[12] Law occupies a central place in each of these accounts: Loshin as well as Oliar and Sprigman devote a major subpart of their respective articles to articulating both substantive and practical reasons why extant IP law does not well serve magicians or stand-up comedians.[13] Oliar and Sprigman suggest a causal link between law's unavailability and comedians' choice to use a norm-based system of protection: "The absence of lawsuits [between rival comedians] is not terribly surprising. . . . [C]opyright law does not provide comedians with a cost effective way of protecting the essence of their creativity."[14] While not a major claim of this scholarship, the suggestion appears to be that these extralegal norms arise *because* IP law is substantively or practically

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REV. 1787, 1859–60 (2008) (describing findings in the context of joke-stealing among comedians that suggest norms serve to avert market failure).

9. Fauchart & von Hippel, *supra* note 6, at 199.

10. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1764 (2006) (coining this phrase); *see also* Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 322–25 (2011) (discussing in general terms the idea of IP's negative space).

11. Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, *in* LAW AND MAGIC: A COLLECTION OF ESSAYS 123, 136–37 (Christine A. Corcos ed., 2010).

12. Oliar & Sprigman, *supra* note 8, at 1812.

13. *See* Loshin, *supra* note 11, at 130–34 (describing how copyright, patent, and trade secret law fail to provide significant protection for magicians' IP); Oliar & Sprigman, *supra* note 8, at 1799–809 (listing practical and doctrinal hurdles to protecting stand-up comics' jokes by means of formal IP law).

14. Oliar & Sprigman, *supra* note 8, at 1789–90. Not all work in this vein, it should be noted, takes a legal centralist stance or even suggests an account for why actors opt for norm-based instead of law-based IP systems. Rebecca Tushnet's study of norms governing fan-fiction creators, for example, simply traces the development of these norms without explicitly or implicitly suggesting law's role in their evolution. *See* Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 153 (2007) (discussing attribution norms governing subcultural creation on the Internet); *see also* Jacqueline D. Lipton, *Copyright's* Twilight *Zone: Digital Copyright Lessons from the Vampire Blogosphere*, 70 MD. L. REV. 1, 20 (2010) ("Optimally, legislators would create laws that reinforce acceptable norms about permissible online uses of copyrighted works. This way, norms could regulate on their own while the law's expressive and enforcement functions would help fill in the gaps and bolster the effectiveness of norm regulation." (footnotes omitted)).

unavailable to regulate the intangible goods created by these professional groups.[15]

This Article extends and critiques these stories of norm emergence by analyzing a distinctive instance of the extralegal regulation of IP: roller derby pseudonyms. Women's roller derby is an increasingly popular sport that is equal parts athletic contest and rock-and-roll spectacle. One of derby's most recognizable features is that its participants skate not under their real names but using amusing pseudonyms that fit with derby's campy, punk aesthetic. Maintaining the uniqueness of these names is important for skaters, both to avoid confusion and because derby names are a constitutive feature of skaters' identities within the derby community. As a result, derby girls[16] have invented an elaborate system of name registration, monitoring, and enforcement using a combination of formal norms, informal norms, and even a small degree of formal law.

Roller derby provides a novel site for investigating IP norm development that adds to the current understandings of this issue in two ways.[17] The first is a twist on the current literature about IP norms. Derby girls are unlike the magicians, chefs, and comedians that have been the subjects of similar investigations in one salient respect: there are areas of law (trademark, right of publicity) substantively applicable to the IP they create.

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15. *See* Loshin, *supra* note 11, at 134–35 (outlining the inapplicability of IP law to illusions as central in causing magicians to opt for norms); Oliar & Sprigman, *supra* note 8, at 1799–809 (identifying the practical and doctrinal inapplicability of IP law to comedians to regulate jokes).

16. I use the term *derby girl* (or, alternatively, *rollergirl*) here and throughout this Article because it is the term of choice used throughout the subculture to identify the sport's participants. This usage is evident in the names of leagues (Los Angeles's Angel City Derby Girls), books about the sport (Shauna Cross's *Derby Girl*), and blogs (*Big Derby Girls Don't Cry*). While referring to women as "girls" may reasonably be understood as dismissive or even demeaning in some contexts, just the contrary is true in roller derby. *Cf.* Robin Brontsema, *A Queer Revolution: Reconceptualizing the Debate over Linguistic Reclamation*, 17 COLO. RES. LINGUISTICS, June 2004, at 1, 4–5, *available at* http://www.colorado.edu/ling/CRIL/Volume17_Issue1/paper_BRONTSEMA.pdf (describing the LGBT community's reclamation of the term *queer* in an attempt to defuse the word of its derogatory connotations).

17. It bears emphasizing that in this Article, I seek only to investigate the development of extralegal IP *governance systems*. There is also a rich and interesting literature on the phenomenon of IP's creation independent of the existence of legal or norm-based protection. *See, e.g.*, Raustiala & Sprigman, *supra* note 10, at 1691 (arguing that fashion's proliferation in the absence of any IP protection is efficient); *see also* Katherine J. Strandburg, *Curiosity-Driven Research and University Technology Transfer*, *in* UNIVERSITY ENTREPRENEURSHIP AND TECHNOLOGY TRANSFER: PROCESS, DESIGN, AND INTELLECTUAL PROPERTY 93, 96–99 (Gary D. Libecap ed., 2005) (discussing "curiosity-driven" allotment of research resources among scientists on the basis of interest in the content of the research). *But see* C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1180–84 (2009) (questioning Raustiala and Sprigman's efficiency thesis).

What distinguishes fashion designers and academics from chefs, magicians, and comedians (as well as roller derby girls, as we shall see) is that the former create IP largely irrespective of the presence of governance and the incentives it promises, while the latter create IP only pursuant to an elaborate norm-based governance regime that operates outside the boundaries of the state. While the two issues are not unrelated, I will focus exclusively on the emergence and development of extralegal IP governance (not the production of IP itself) in this Article.

And yet they do not, opting to invent an elaborate series of name-uniqueness norms and rules instead. This fact alone undermines the sufficiency of legal centralism as an explanation for IP norm emergence, illustrating that such norms may arise even if—and in fact regardless of whether—law provides a plausible governance option.

But having established that the prevailing legal centralist account does not fully explain the development of extralegal IP governance, it remains necessary to account for why this development does take place. The non-legal centralist story about the development of organic, unwritten social norms helps to provide such an account,[18] but it can only go so far because roller derby's name regulation system consists of more than shared, informal understandings. Rather, derby girls have developed an elaborate, formal scheme of registration, regulation, and enforcement that requires ongoing modification and administration.

The formality of roller derby's name regulation system raises an iteration of what Elinor Ostrom has called "the problem of supply."[19] The time and effort spent by the women who created and maintained this system swamped any marginal benefit they derived from the system in the form of name security. Exploring why derby girls undertook to do this in the absence of traditional forms of compensation yields a conjecture that helps to explain the development of formal norm-based systems in similar contexts. It may be the very absence of traditional forms of remuneration that explains why the derby girls who created and maintained the name regulation system were inspired to do so. For example, derby girls' names are the result of nonmarket production—that is, they are part of a nonprofit endeavor.[20] As I explain in more detail later, it is the volunteer character of derby that, somewhat counterintuitively, explains the development of its elaborate extralegal name regulation system. The other feature is the sport's identity-constitutive character. People don't do derby just for exercise but usually because it becomes a part of who they are—"I'm a derby girl" is a very common self-descriptive for skaters. This feature also helps to explain the willingness of skaters to create, administer, and obey the subculture's rules about name uniqueness even in the absence of state enforcement.[21]

This Article elaborates the foregoing claims in several parts. Part I provides a brief background of roller derby and then situates the practice of using skate names within the context of the sport, explaining their meaning

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18. *See supra* notes 3–5 and accompanying text.

19. *See* OSTROM, *supra* note 4, at 42 (defining the "problem of supply" as the concern that welfare-enhancing institutions may not be supplied due to collective-action problems).

20. Derby girls are not professionals, in that they don't get paid to skate. In fact, they usually have to pay in order to be part of a league.

21. *See* GEORGE A. AKERLOF & RACHEL E. KRANTON, IDENTITY ECONOMICS: HOW OUR IDENTITIES SHAPE OUR WORK, WAGES, AND WELL-BEING 42–46, 59 (2010) (arguing that people who derive "identity utility" from their work tend to be more diligent and efficient, and identifying the military as one example of this phenomenon).

and significance for rollergirls. Part II describes the system derby girls have developed to maintain the uniqueness of their pseudonyms, including consideration of formal rules, informal norms, and state-sanctioned law. Part III explores the significance of this case study, explaining how it complicates extant accounts of IP norm emergence, indicates a countertheory for the development of user-generated governance systems, suggests an expanded account for why people create property systems at all, and reflects on the implications of this inquiry for the question of what it means for rules to be law. Finally, the conclusion reflects briefly on the future, and possible end, of derby names.

I. What's in a (Derby) Name? How Derby Names Emerged and What They Mean

A. Contemporary Roller Derby: A Brief Overview

Although this Article focuses only on roller derby's relatively recent contemporary incarnation, the sport has actually long been part of American culture. As long ago as the 1880s, crowds flocked to see roller skaters compete in multiday marathon races so grueling that the competitors sometimes died afterward.[22] Derby took its modern form during the depths of the Great Depression, when Chicago impresario Leo Seltzer introduced women and violence into the sport, earning brief but roaring success.[23] For the next several decades, roller derby made temporary, localized splashes of popularity in mainstream American culture, thanks to a crowd-pleasing mix of fast sport and dramatic spectacle.[24] Five million fans attended roller derbies in 1940, followed by a quiet period during World War II.[25] In the late 1940s, CBS began to televise roller derby bouts weekly, and roller derby events at Madison Square Garden regularly sold out.[26] In the late 1960s, roller derby was popular enough in the Bay Area that it often drew more fans to the Alameda County Stadium than the Oakland Raiders did.[27] By the late twentieth century, though, derby appeared to be dying a slow, tacky death.

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22. Seriously. During the first major roller skating marathon held at Madison Square Garden in 1885, William Donovan of Elmira, New York, emerged victorious by skating for six days straight—and then died within a week due to exhaustion. JENNIFER "KASEY BOMBER" BARBEE & ALEX "AXLES OF EVIL" COHEN, DOWN AND DERBY: THE INSIDER'S GUIDE TO ROLLER DERBY 11–12 (2010).

23. CATHERINE MABE, ROLLER DERBY: THE HISTORY AND ALL-GIRL REVIVAL OF THE GREATEST SPORT ON WHEELS 21, 31 (2007).

24. *See id.* at 41–48 (briefly chronicling the history of roller derby in the United States from the 1950s to the 1970s).

25. 2 WILLIAM H. YOUNG & NANCY K. YOUNG, *Roller Derby*, *in* WORLD WAR II AND THE POSTWAR YEARS IN AMERICA: A HISTORICAL AND CULTURAL ENCYCLOPEDIA 594, 595–96 (2010).

26. *Id.* at 596.

27. BARBEE & COHEN, *supra* note 22, at 21.

Two network television derby shows featured spandex-clad skaters and scripted violence,[28] but each justifiably failed and was mercifully cancelled.

But just as roller derby finally appeared to expire as a mainstream cultural phenomenon, it enjoyed a sudden and rapid revival of a different sort. The rebirth of contemporary roller derby traces to Austin, Texas, where a group of rowdy women gathered and reimagined the sport as a mix between an all-girl, full-contact sport and a chaotic rock-and-roll show.[29] The first bouts went off in late 2002, and they set a model that other roller derby leagues around the world would soon imitate.[30] The contests between the teams were real rather than staged (as many of the early roller derby bouts had been),[31] but they were punctuated by outrageous theatrics. Skaters wore sexy costumes,[32] announcers mixed sports commentary with comedy, and DJs set the bouts to an edgy punk-rock soundtrack.[33] The resulting spectacle was a perfect fit with Austin's well-known alternative subculture, and similar leagues emerged in other urban centers soon after.[34] The next five years saw derby spread explosively. From a mere handful of leagues in 2003, the sport grew to over 440 leagues scattered throughout North America, Europe, and Australia by 2009.[35] While derby remains a niche activity, it edges ever closer to the cultural mainstream, as illustrated by the 2009 release of a major motion picture about the sport.[36]

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28. The shows were ABC's *Rock-n-Rollergames* in the late 1980s and TNN's *RollerJam* in the late 1990s. *Id.* at 25–27; MABE, *supra* note 23, at 51, 54–58.

29. In the words of this meeting's organizer, "There's gonna be live music, midgets, fire breathers, and multimedia presentations, all sponsored by bars, that will battle it out through roller derby . . . . We're all gonna be superstars!" BARBEE & COHEN, *supra* note 22, at 32–33.

30. *See id.* at 42–43, 52–59 (describing the first public bout in Austin and the spread of roller derby to other parts of the country); MABE, *supra* note 23, at 61, 63, 66 (noting that the 2002 roller derby bouts in Austin created a model for future roller derby leagues); Telephone Interview with Ivanna S. Pankin, San Diego Derby Dolls (Sept. 17, 2010) (observing that AZRD started around the same time as, and independently of, the first Austin-based league); E-mail from Demolicious, L.A. Derby Dolls, to author (Sept. 24, 2010, 10:04 PM) (same for L.A. Derby Dolls).

31. While the in-bout action of present-day, all-girl roller derby has never been staged, twentieth-century derby bouts were often scripted in the same manner as professional wrestling. *See* MABE, *supra* note 23, at 107–09 (describing the athletic character of modern roller derby).

32. Short skirts and fishnets were and are a common combination, leading to the derby-specific contusion known as "track rash" from falling and skidding in such an outfit at high speed. *See id.* at 120 (discussing the variety of injuries that can result from high-speed collisions between masonite and fishnet-clad flesh).

33. MABE, *supra* note 23, at 73.

34. The independent inception of very similar derby leagues supplies a fascinating and puzzling example of harmonic convergence. A roller derby league grew out of the punk scene in Phoenix, Arizona, in 2003, entirely independently of the emergence of derby in Austin. Interview with Ivanna S. Pankin, *supra* note 30. L.A. Derby Dolls began in early 2004, also unrelated to the Texas phenomenon. E-mail from Demolicious, *supra* note 30.

35. BARBEE & COHEN, *supra* note 22, at 71.

36. *See* WHIP IT (Mandate Pictures 2009) (featuring a screenplay by former L.A. Derby Doll Maggie Mayhem (Shauna Cross) and starring several derby girls, including L.A. Derby Dolls Iron Maiven and Krissy Krash). The film enjoyed critical, if not commercial, success. *See Review of*

What explains derby's explosive growth in the past decade? It clearly offers a compelling spectacle. But a demand-side explanation can't account (at least, can't solely account) for the popularity of roller derby in a world already overcrowded with ways to keep people entertained on a Saturday night. One (and perhaps the) major driver of derby's expansion is the women and men who are so drawn to the sport that they devote their spare time and scarce resources to be part of it. So what is the nature of this draw? Derby's constituents are obviously inspired to participate for different reasons, but at least three predominate.[37] First, derby can provide a sense of community. The roller derby world is the archetypal close-knit subculture, with all the benefits (camaraderie, a sense of belonging) and flaws (insularity, a tendency toward noxious gossip) that such worlds possess. Many skaters join derby leagues because they have just moved to a new locality and are seeking a group of like-minded people with whom to make friends. Second, derby can provide a strong sense of individual identity. As we shall see, becoming part of the derby world often involves inventing a new persona both to reveal to the public in bouts and to use in the derby world. Even when this is not the case, being part of derby can bring out qualities of character excellence in those who can survive the rigors of training. Skaters must conquer fear of injury, learn to engage in and withstand high-speed physical contact, fight through pain and fatigue, and exhibit self-discipline in order to succeed. Finally, derby can provide a taste of fame. Aside from the skaters who hope that it may catapult them to stardom,[38] bouts give everyone on the teams a chance to feel like a superstar, if only briefly. For the hour that a bout lasts, derby girls—who are not famous otherwise—get to enjoy the (literal and figurative) spotlight as fans that sometimes number in the thousands cheer them on.[39]

Independently of the reasons for its resurgence, twenty-first century roller derby shares many essential features with its earlier counterparts—the basic rules of the sport, the presence of female competitors, and a unique blend of serious sport with a campy extravaganza. In several respects relevant to this Article, though, contemporary roller derby is different. First, while earlier incarnations of the sport were often staged (much as profes-

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Whip It, ROTTEN TOMATOES, http://www.rottentomatoes.com/m/whip_it/ (indicating an 84% positive rating from critics and a 72% positive rating from viewers).

37. *See* BARBEE & COHEN, *supra* note 22, at 72–73 (seeking to explain roller derby's appeal).

38. Occasionally, this happens. *See supra* note 36 (discussing L.A. Derby Dolls featured in *Whip It*).

39. The L.A. Derby Dolls regularly sell out their 1,700 person venue. John Rogers, *Roller Derby a Smash Hit with Teen Girls*, L.A. DAILY NEWS (May 30, 2011), http://www.dailynews.com/news/ci_18171277. Seattle's Rat City Rollergirls compete in Key Arena, while the Minnesota Rollergirls and Portland's Rose City Rollers play in front of many thousands of fans in large urban arenas. *See* Hurt Reynolds, *Rat City Breaks Modern Attendance Record*, DERBY NEWS NETWORK (June 7, 2010), http://www.derbynewsnetwork.com/2010/06/rat_city_breaks_modern_attendance_record (reporting that the Rat City Rollergirls had over 6,000 people in attendance for their championship match).

sional wrestling matches are), modern roller derby involves real, unscripted competition between teams of skaters.[40] Second, while twentieth-century derby was (or at least always aspired to be) professional, today's roller derby is not.[41] To the contrary, skaters usually have to pay league dues in order to participate. This feature dovetails with derby's all-inclusive air, where the criteria for membership are a willingness to work hard and a desire to be part of a community rather than pure athletic ability.[42] Third, while historical derby tended to be coed, modern derby is almost exclusively an all-female sport.[43] Fourth, while derby's appeal is increasingly broad, it has existed primarily as an alternative subculture—a counterculture, really—rather than as a mainstream phenomenon. Indeed, what draws many of its participants is that derby is a way of creating community and competing athletically that is also adamantly anti-mainstream.[44] Finally, and most importantly for this project, modern roller derby skaters compete not under their birth names, but under colorful pseudonyms that reflect and constitute the sport's campy, punk aesthetic.

B. The Origins and Meaning of Derby Names

Nicknames are common in all sports, but contemporary women's roller derby has taken this to a new level by publicly identifying skaters almost exclusively by means of facetious pseudonyms called "derby names" or "skate names." An ideal derby name typically has three components: it sounds something like a real name (i.e., has a plausible first name–last name

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40. Spectators often leave bouts wrongly thinking that the action is scripted (like pro wrestling), which is a testament to how compelling derby can be. Derby promoters often feel obligated to explain to viewers that the sport is not staged. *See* MABE, *supra* note 23, at 107–08 (rebutting the suggestion that contemporary all-girl derby bouts are staged).

41. At least, not yet. Many (though not all) derby girls have expressed enthusiasm about the possibility of the sport becoming professional. Telephone Interview with The Boogiewoman, San Diego Derby Dolls (Sept. 1, 2010) (observing that many skaters have interest in converting derby from an amateur to a professional sport).

42. *See* BARBEE & COHEN, *supra* note 22, at 72 ("Roller derby . . . welcome[s] everyone, regardless of their athletic ability."). This is not to say that any woman who applies will automatically make a team. Lack of commitment or sufficient skill will disqualify "fresh meat" skaters who want to compete in any league. But the standards for inclusion are not as cutthroat as purely competition-oriented sports, as illustrated by the rarity with which skaters who make a team are cut, even when they are past their prime and ineffective.

43. There are men's roller derby teams, such as the New York Shock Exchange and the Harm City (Baltimore) Homicide, but they are by far outnumbered by women's teams. *Compare Men's Roller Derby Leagues*, MEN'S ROLLER DERBY ASS'N, http://www.mensderbycoalition.com/leagues/ (listing nineteen official men's leagues and nineteen other men's leagues that are not yet members of the Men's Roller Derby Association), *with Member Leagues*, WOMEN'S FLAT TRACK DERBY ASS'N, http://wftda.com/leagues (listing 133 women's full Women's Flat Track Derby Association (WFTDA) member leagues and noting that there are 68 apprentice leagues not yet members of the WFTDA). There are, however, many hundreds of derby dudes who contribute to the sport's success by announcing, helping with tech, or refereeing bouts.

44. The original Texas derby girl Sparkle Plenty described this phenomenon: "I think [derby] girls across the world were looking for something non-traditional . . . . Not just scrapbooking." BARBEE & COHEN, *supra* note 22, at 72.

construction), it connects to derby in some meaningful way (i.e., it suggests that the skater is fierce, fast, or tough), and it creates some sense of an overall persona.[45] L.A. Derby Dolls blocker Tara Armov furnishes an example of a derby "A-name." "Tara" is a standard woman's first name, while "Armov" is a plausible-sounding last name. The name also suggests that Tara is tough enough that she'll tear your arm off.[46] And the vaguely Slavic overtones of her moniker suggest an Eastern Bloc motif that Tara plays up by using faux Cyrillic lettering on her helmet.[47]

The practice of using pseudonyms has created a patchwork of derby names that are simultaneously fierce and funny. Derby names may refer to great actresses (Grace Killy, Sophia LoRenegade), not-so-great actresses (Gori Spelling), or miscreant heiresses (Paris Killton).[48] Pseudonyms invoke ancient art (Venus de Maul'r) and pop culture (Killo Kitty) alike. Skaters name-check favorite bands (Joy Collision) or musicians both popular (Beonslay) and niche (Stiv Skator[49]). Multiple monikers may reference the same public figure (Kristi Yamagotcha, Kristi Imahootchie). Some names don't refer to people or things but are just amusing puns (Anne R. Kissed, Anna Notherthing). A skate name may refer back to derby itself (Helen Wheels, Axles of Evil). Names can emphasize a skater's fierceness (Eva

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45. As this suggests, not all derby names are created equal. *See* Interview with Mila Minute, L.A. Derby Dolls, in L.A., Cal. (Apr. 9, 2010) (separating names into "A," "B," and "C" echelons of quality). This leads to the (largely but not completely tongue-in-cheek) phenomenon of "name envy." *See, e.g.*, Posting of Michi-chan to roller_girls@yahoogroups.com (Aug. 29, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/24109 ("If I had a skate name like that (Hell O'Kittie), I would guard it with my life.").

46. To my knowledge, Tara has never actually done this, though some commentators have suggested that she would try to eat opposing skaters alive. *See* DF, *Blood & Fishnets: L.A. Derby Doll Championship Bout @ the Doll Factory, 12/8/07*, LOSANJEALOUS (Dec. 11, 2007), http://www.losanjealous.com/2007/12/11/blood-fishnets-la-derby-doll-championship-bout-the-doll-factory-12807/ (conjecturing that "if eating opposing jammers alive were a legal move, Tara would happily resort to this tactic").

47. It also provides a nice corollary-name option for her spouse, who goes by Busta Armov. *See Meet the L.A. Derby Dolls*, L.A. DERBY DOLLS, http://elpueblo.derbydolls.com/la/meetthedolls/referees/busta.html (introducing Busta Armov).

48. The celebrities who are name-checked by derby girls have not, to my knowledge, complained about the unauthorized plays on their names. Tori Spelling has actually reached out to Gori Spelling and seems enthusiastic about having a derby doppelganger. *See* Bill Horn, *Bill Horn's Photo*, LOCKERZ, http://plixi.com/p/35318739 (displaying a picture of Tori smiling and posing with Gori). There are counterexamples, such as Starbucks Coffee's threat to sue the Rat City Rollergirls for employing a very similar logo to the java leviathan. *Logo Dispute: A Whip Forward*, SEATTLE POST-INTELLIGENCER (May 29, 2008), http://www.seattlepi.com/local/opinion/article/Logo-Dispute-A-whip-forward-1274888.php. After an outpouring of public criticism, Starbucks dropped the threat of suit without filing a complaint. Jonah Spangenthal-Lee, *Starbucks Backs Off, Leaving Rat City Rollergirls Logo Intact*, STRANGER (Sept. 18, 2008, 3:00 PM), http://slog.thestranger.com/2008/09/starbucks_backs_off_rat_city_rollergirls. Frito-Lay also opposed a trademark application filed by Crackerjack of the Mad Rollin' Dolls (Madison, Wisconsin), about which I'll say more later. *See infra* note 190 and accompanying text.

49. Stiv's name refers to the late Stiv Bators, front man of the early punk outfit The Dead Boys. *See generally* Obituary, *Stiv Bators, 40, Singer with Dead Boys Band*, N.Y. TIMES, June 6, 1990, at D23.

Destruction, Anita Kill) or downplay it (Sparkle Plenty). Some derby sobriquets could function easily as porn names (Tae Kwon Ho), a few are outright gynecological (Vulvarine), and still others are just gross (Emma Rhoids). Political events both happy (Paris Troika) and tragic (Blanche Davidian) may be invoked. A few require a bit of historical knowledge (Reyna Terror) or literary awareness (Penny Dreadful, Madame Ovary) to decode. Derby names may pay homage to the spirit of a place you love (Louise Ze Animal, Fleur de Lethal, Dumaine Attraction[50]). Almost all skate names are in English, but some allude to phrases more familiar to foreign ears (Bette Noir, Fox Sake). Names chosen at the early dawn of derby's resurgence tended to be more abstract and conceptual (Suzy Snakeeyes, Tawdry Tempest), while a few are simply inscrutable (Lux, V. Lee). My personal favorite is Raven Seaward of the L.A. Derby Dolls, whose name was inspired by the television show *Arrested Development*.[51]

While possible to trace the rebirth of derby to a particular place and time, the origin of the practice of skating under pseudonyms remains somewhat more difficult to identify. The first Austin bout featured invented names, and participants had been using them long beforehand during the lead-up to public competition.[52] Nicknames had also been a familiar—though not pervasive—part of twentieth-century derby.[53] Legendarily fierce 1960s skater Ann Calvello was famed as the "Demon of the Derby."[54] More importantly, though, the notion of competing under derby names was a perfect fit with the recent reimagination of the sport as a punk-rock spectacle that allowed, and encouraged, participants to develop outrageous public personas. The practice of using skate names has at least as much to do with happenstance, though, as conscious design. Derby pioneer Ivanna S. Pankin's classic derby name predated her founding of Arizona Roller Derby in 2003. Rather, it was a handle and e-mail address she used as a musician in Phoenix's punk-rock scene.[55] When she publicized her nascent roller derby league using the alias Ivanna S. Pankin, and Austin skaters were already using skate names, the leagues that popped up in their wake followed suit

50. It is not a coincidence that all of these women skate for the New Orleans Roller Girls, who have to an unusually high degree expressed their support for the post-Katrina comeback of their city with their derby names. Telephone Interview with Louise Ze Animal, New Orleans Rollergirls (May 17, 2010).

51. *See 5 Tips on How to Create Your Roller Derby Name*, CAROLINE ON CRACK (July 13, 2010), http://www.carolineoncrack.com/2010/07/13/la-derby-dollsroller-derby-names/ (quoting Raven as saying, "Granted, not everybody understands the true genius of this name the first time they read it, but the look on people's faces when it finally comes together is priceless"). Get it?

52. BARBEE & COHEN, *supra* note 22, at 33.

53. *See id.* at 18–19, 21 (describing the rivalry between Midge "Toughie" Brashun and Gerry Murray, and the development of skater personalities such as Joanie "Blonde Bomber" Weston and Ann "Demon of the Derby" Calvello).

54. *See* MABE, *supra* note 23, at 52–53 (discussing Calvello's legendary and colorful career).

55. *See* Interview with Ivanna S. Pankin, *supra* note 30 (recounting the origins of her derby name).

and also used aliases.[56] The practice of using colorful nicknames has been used by virtually all derby leagues and skaters since.

Nicknames are more than just an amusing quirk of roller derby subculture. They serve a variety of practical functions for fans and skaters alike. From a fan's perspective, the use of fanciful skate names sets derby apart from other sports competitions. The dark irony and overtly violent references communicated by many derby names combines with the sport's punk aesthetic to enhance the countercultural appeal of derby and the spectacle that surrounds a bout. After all, it's easier to imagine "Jenna Cyde" or "Celia Fate" as vicious, hard-hitting derby demons than "Jane Smith" or "Sally Jones." Using fanciful skate names also communicates that while derby is a serious athletic competition, it is unlike most mainstream American sports in that it still manages to maintain a sense of humor about itself.[57] Indeed, derby names are often the most identifiable and memorable part of bouts for first-time viewers.[58]

Derby pseudonyms are at least as important to the skaters who adopt them as they are to the viewing public.[59] First, nicknames serve a simple, trademark-like function of facilitating derby girls' notoriety to the viewing public by differentiating skaters from one another. Derby names are, in this sense, like individual brand names that allow fans to tell skaters apart and more readily link their exploits on the track to an articulated identity. Obviously, standard government names can serve this function as well, but derby names are often particularly good source identifiers because they are tied to aesthetic features that fill out distinct personas.[60] And unlike real names (and standard trademarks), derby names also serve an identity-*concealing* function in that they can separate a competitor's derby persona from her real-life identity, obscuring the latter from derby fans and the world more generally. This is important for skaters who have professional careers

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56. *See id.* (explaining this phenomenon).

57. Compare, for example, the suffocatingly serious NFL, where players can be fined for excessive celebration, with the short-lived but more free-spirited XFL, where players were invited to use nicknames as formal identifiers. *See, e.g.*, Harvey Araton, *Dash of the XFL Goes a Long Way*, N.Y. TIMES, Jan. 28, 2004, at D1 (discussing Rod Smart, who infamously played with "He Hate Me" emblazoned on his jersey). The approach taken by most derby people toward their sport closely approximates the old Zen saying, "Act always as if the future of the Universe depended on what you did, while laughing at yourself for thinking that whatever you do makes any difference." *See* MIHALY CSIKSZENTMIHALYI, FINDING FLOW: THE PSYCHOLOGY OF ENGAGEMENT WITH EVERYDAY LIFE 133 (1997) (quoting this saying).

58. This is true in part because derby can be a challenging sport to understand; first-time observers may have no idea how points are scored or what strategies are being deployed (said this writer from personal experience).

59. *See* Interview with The Boogiewoman, *supra* note 41 (saying "it's so much more fun" to use pseudonyms than real names).

60. For example, Tara Armov has faux Cyrillic lettering on her helmet and Cherrylicious features cherry decals on her helmet and her face. *See* DF, *supra* note 46 (describing Tara Armov's gear); *Cherrylicious, #NC-17 (Captain)*, L.A. DERBY DOLLS, http://derbydolls.com/rosters/fight-crew/7269201 (introducing Cherrylicious).

(law, medicine) in which participating in derby as an extracurricular activity may be looked down on.[61] Relatedly, made-up names can also decrease the chances that overzealous fans (or, more concerningly, stalkers) will be able to identify and track down skaters.[62]

Second, skate names facilitate skaters' abilities to develop identities within the roller derby world. Many participants are drawn to derby because it provides a welcome contrast to the everyday grind and provides a space that permits them to explore aspects of their personalities that cannot find expression in their daily lives. For these skaters, derby supplies a space for self-discovery and self-expression as well as a fun extracurricular activity. A skate name is often the central vehicle by which this self-expression is effected.[63] As one derby girl wrote,

> I would hate to have to go by my real name . . . [because] there is a distinct difference between my derby persona (Dread Pirate Robyn) and Elizabeth. Elizabeth is the fat girl who watches way too much reality tv and considers knee-length skirts and shoes in ANY color but black, brown, or white to be too risque. Elizabeth NEVER wears her hair in wild ways, or dances in public, or does anything to draw attention to herself. The Dread Pirate Robyn usually sports [L]eia buns, owns several miniskirts, and loves her banana yellow 5 inch wedges more than any other shoe ever. Robyn has even been know[n] to go to *gasp* bars and sometimes even dance![64]

Not all skaters adopt names (and personas) that are at odds with their daily existences.[65] But even so, derby girls typically invest themselves in the

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61. One skater who works as a lawyer explained that when she appears in court, she doesn't want the judge imagining her in skates and fishnets. Interview with Louise Ze Animal, *supra* note 50.

62. *See* Interview with Hydra, Texas Rollergirls, in Austin, Tex. (June 7, 2010) (discussing the risk of stalkers and explaining that made-up names are a helpful way to shield skaters' identities from them).

63. *See* Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 397 (2011) (observing that personal names serve associative functions by locating someone's place in a social network). As Heymann notes, "[i]nitiation into other social structures . . . may be accompanied by new names that represent the new associations." *Id.*

64. Posting of Dread Pirate Robyn to roller_girls@yahoogroups.com (Dec. 4, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37773; *see also* Posting of Circuit Breaker, Suburbia Roller Derby, to roller_girls@yahoogroups.com (Dec. 4, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37777 (following up on Robyn's post by adding, "I AGREE!!! I sometimes forget that I even have a birth name"). Still other skaters prefer derby names because it avoids having to force fans to pronounce their challenging foreign last names (a concern to which this author is very sympathetic). *See, e.g.*, Posting of Minx, Fort Wayne Derby Girls, to roller_girls@yahoogroups.com (Dec. 4, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37765 (resisting the suggestion that skaters should use government names by observing, "Although I'm very proud of my Slovak heritage[,] . . . can you pronounce my last name by looking at it?").

65. *See, e.g.*, Posting of Kat A. Lyst to roller_girls@yahoogroups.com (May 9, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/8802 ("I think your [derby] persona should fit your personality.").

sport and the subculture that surrounds it to an extent that is hard for outsiders to comprehend,[66] so that their identities (for which their derby names are the repositories) are wound up with derby even if their derby personas are not that distinct from their outside lives. "Your skate name," observed one derby girl, "becomes part of you."[67]

Finally, derby names are inextricably bound up with the sense of community that the sport provides for its participants. As we'll see later, derby girls can't have their names officially registered until they've demonstrated a base level of commitment to their leagues, and often this means that the moment when a derby girl's name is made official is celebrated as the moment when her inclusion in the derby world is complete.[68] And once a skater secures a name, it's how other people in the derby world will refer to her in all settings—not only during bouts, but at practices, social events, and online—so much so that even teammates may not know one another's real names.[69] In some cases, skaters come to find that they use their skate name rather than their government name even outside a derby context.[70] The community-constitutive dynamic is twofold: not only does conferring a derby name make a participant feel like a true derby insider, but the use of derby names demarcates the scope of the derby world itself. You know you've left workaday life behind and entered the insular derby community (whether at a practice, a team dinner, or a night out at a bar) when people stop calling you "Jane Smith" and instead refer to you as "Sasha Haughtbich."[71] For this

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66. *See* BARBEE & COHEN, *supra* note 22, at 116 ("There is no part-time in roller derby.").

67. Posting of Paris Troika, Tucson Roller Derby, to roller_girls@yahoogroups.com (Mar. 12, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/6519; *see also* Heymann, *supra* note 63, at 385 (observing that names are primary indicators of—albeit separate from—personal identity).

68. *See* Posting of Ginger Snap, Gotham Girls Roller Derby, to roller_girls@yahoogroups.com (Dec. 22, 2005), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/3870 (observing that the waiting period "makes the ac[tu]al 'naming' so much more exciting and more of an opportunity to go out and celebrate!"); *see also* Posting of Cat O'Ninetails to roller_girls@yahoogroups.com (Jan. 13, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/4244 ("Now that we have names on the official roster, [our relatively new] league feels much more legitimate.").

69. *Cf.* Interview with Ivanna S. Pankin, *supra* note 30 (observing that few derby people know her real name and that most would still call her Ivanna even if she wanted to go by her real name).

70. *See, e.g.*, E-mail from Fighty Aphrodite, B.ay A.rea D.erby Girls, to Mighty Aphrodite, Lonestar Rollergirls (Jan. 23, 2006) (on file with author) ("Fighty has become my nom de guerre on and off the (flat) track and the name that has stuck to me like glue.").

71. It bears briefly noting that a small number of skaters have begun skating under their legal names. *See, e.g.*, Justice Feelgood Marshall, *Killbox Retires (Sort Of)*, DERBY NEWS NETWORK (Dec. 2008), http://www.derbynewsnetwork.com/blogs/justice_feelgood_marshall/2008/12/killbox_retires_sort (announcing and fomenting discussion about the decision of top Detroit Derby Girls jammer Killbox to skate under her legal name instead). Explanations given for this move include a desire to gain personal, rather than pseudonymous, fame and a desire to make derby seem more like other mainstream sports in order to gain a more widespread fan base. Skaters on "Team Legit," an all-star team composed of skaters from flat-track leagues that competes on banked tracks, skate mostly under their government names, purportedly because they want to distance themselves from the theatricality of old-school (staged) banked-track derby. Interview with Hydra, *supra* note 62.

reason, the name registration system described in more detail below has always been explicitly limited to "all-girl, skater owned & operated, DIY, punk-rock style leagues."[72]

II. The Master Roster: IP Norms Governing Roller Derby Names

A. Derby Names as IP: The Desire for Name Exclusivity and the Need for Regulation

Derby girls have created a distinctive subculture, and their names both vivify this subculture and locate their place in it. But even though derby names are theoretically unlimited, skaters frequently choose names that turn out to be identical (or very similar to) ones that other derby girls have thought of first.[73] Countless skaters have likely thought of the outstanding name "Princess Slay-Ya," for example, but it was first used by (and thus exclusively belongs to, for reasons we shall shortly see) one of the Kansas City Roller Warriors.[74] One might suppose that because derby comprises a basically decent community where people share common interests and make close friends, there would be no objections if other skaters decided to use names identical or very similar to preexisting ones.

Nope. However much derby may embody communal sharing norms in many respects, name usage represents a glaring exception. Derby girls react with anxiety and rancor to the discovery that others have sought to skate under names similar to theirs.[75] Name repetition, and even similarity,

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Some of Team Legit's skaters, though, compete under invented, but realistic, names because they still prefer to separate their real identities from their derby personas. *Id.*

Derby girls skating under their birth names remain a small minority. *See* Posting of Grand Poohbah to roller_girls@yahoogroups.com (Dec. 3, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37760 (observing that the trend toward real names is weak because only "[o]ne league's travel team, and perhaps about ten random skaters from other leagues around the country[,] have switched to 'real names'").

72. Posting of Hydra, Texas Rollergirls, to roller_girls@yahoogroups.com (June 14, 2005), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/1385.

73. *See* Interview with Ivanna S. Pankin, *supra* note 30 (explaining that overlapping names arise from unintentional coincidence, not intentional "name theft"). The problem of overlapping names is almost always a product of what copyright law calls independent creation, rather than intentional copying—despite frequent accusations of "name theft." *See, e.g.*, Posting of Kylie McLeod to roller_girls@yahoogroups.com (Feb. 3, 2010), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/38238 (discussing "the shame of using a stolen name"). Most skaters appear to recognize this. *See, e.g.*, Posting of Fighty Irish to roller_girls@yahoogroups.com (Feb. 22, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/5789 ("[I] thought [I] 'came up' with 'Estee Slaughter.' [I]t's been done (congrats on that one!) . . . . [G]oddamn collective consciousness[.]"). I suspect they invoke the term *theft* simply to access the moral gravity of property rights, not because they think someone has actually copied their names.

74. *See* Elaina B. & Soylent Mean, *International Rollergirls' Master Roster*, INT'L ROLLERGIRLS' MASTER ROSTER, http://www.twoevils.org/rollergirls/ [hereinafter *Master Roster*] (listing "Princess Slay-Ya" as a registered derby name).

75. This conclusion not only confounds one's likely guess about how derby girls would operate; it also lies in contrast to how other groups informally regulate their IP. *See* Loshin, *supra* note 11,

triggers rage in skaters who feel they have superior rights in their derby aliases: "When you bite on someone's style you look like a douche and so uncool. . . . Just imagine finding out at 2:30am in a bar when you are not completely sober that the person you are talking to has an almost identical name as yours. . . . [It's] SUPER ANNOYING . . . ."[76]

Another window into the seriousness with which some rollergirls take their names is the intensity with which many skaters pester those in charge of registering names with demands, objections, and concerns about possible infringing names.[77] Name conflicts have resulted in serious animosity, harassment,[78] and even intimations of violence.[79]

These reactions may seem puzzling to those outside the derby world. After all, derby is characterized by a collaborative spirit that seems at odds with these highly individualistic and exclusive claims to skate names. If

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at 136–37 (observing that sharing secrets about illusions is a central feature of the informal norm system that magicians have created to govern their professional subculture).

76. Posting of Cheap Trixie to roller_girls@yahoogroups.com (Feb. 22, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/5745; *see also* Posting of Magenta Mortuary to roller_girls@yahoogroups.com (Aug. 17, 2008), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/32095 (complaining forcefully about another skater's being registered as merely "Magenta").

77. *See* Posting of Soylent Mean, Minnesota Rollergirls, to roller_girls@yahoogroups.com (Oct. 9, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/25298 ("[A]bove all else—please be respectful of all the time that Paige, Jelly and I put into the master roster. Sending us emails, calling us, or spamming our MySpace page because you personally sent your very own name two days ago and *how dare we not have the roster updated yet* . . . well, it's just not appreciated."); *see also* Telephone Interview with Soylent Mean, Minnesota RollerGirls (May 12, 2010) (describing the vitriol with which rollergirls complain about name infringement).

78. *See* Posting of Hydra, Texas Rollergirls, to roller_girls@yahoogroups.com (June 23, 2005), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/1463 ("I've heard of regular, brutal ha[r]assments as well. . . . It's not cool & people get PISSED! Believe me, I know.").

79. Some of these threats are clearly facetious. *See, e.g.*, Posting of Fighty Irish, B.ay A.rea D.erby Girls to roller_girls@yahoogroups.com (Feb. 22, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/5732 ("[I] will defend both 'Fighty' and 'Irish' to the death. '[F]resh meat': you've been warned . . . :)"). Other indications of name disputes leading to possible physical altercations appear more serious. *See, e.g.*, Posting of Ivanna S. Pankin to roller_girls@yahoogroups.com (Jan. 23, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/4493 (recounting that L.A. Derby Dolls's Juana Beat'n and Arizona Roller Derby's Jojuanna Beatin "were starting to make plans to meet behind the bike racks over their names").

Not all derby girls care this much about the uniqueness of their names. *See, e.g.*, Posting of Minimum Rage, Denver Roller Dolls, to roller_girls@yahoogroups.com (Feb. 6, 2010), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/38269 ("Some skaters are more open to having someone with a name close to their own and some are not at all. It completely depends on the skater—I've seen it go both ways."); Posting of Nameless Whorror, Montreal Roller Derby, to roller_girls@yahoogroups.com (Dec. 7, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37814 (noting that while the Master Roster had registered the very similar name "NameLes," Nameless Whorror "personally do[es] not mind . . . but can understand how it can be annoying"). Indifference to overlapping name use is likely the exception rather than the rule. *See, e.g.*, Posting of Killer Vee to roller_girls@yahoogroups.com (Aug. 19, 2008), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/32141 (rejecting the suggestion that names need not be unique by saying, "Pfffffft. I'm keeping my name and I want it all for myself!").

derby girls think of each other as sisters, why wouldn't this share-and-share-alike goodwill transfer over to name usage? Moreover, unlike many other intangible goods, derby names have no market value[80] and require expending only some trivial transaction costs to acquire. And the geographic dispersion of derby leagues appears to obviate any concerns about confusion, at least in many cases. Finally, one might think that a skater who discovers that her moniker is already in use would prefer to avoid any conflict and just select one of the other theoretically infinite skate names that one can imagine. In light of all this, the question remains: Why would a skater in, say, Kansas City object to a skater in Boston or San Diego using the same pseudonym in the context of a mere extracurricular activity?

Derby girls care about maintaining the uniqueness of their aliases for three primary reasons. First, names in derby function as trademarks do in the commercial world: they ensure that skaters will not be confused with one another and that the viewing public can tell skaters apart.[81] This is particularly true in the context of actual bouts, when announcers rely on derby names to relay action to spectators over a public-address system. Particularly given the chaotic nature of the typical derby jam, having skaters with similar or identical names on the track at the same time would be impossibly confusing for announcers and fans alike.[82] And it may initially seem that the likelihood of confusion would be small given the wide array of possible names and the vast number of derby girls throughout the nation, and indeed,

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80. No norms or rules stop derby girls from selling one another their names, but no evidence indicates that this has ever happened. There are some examples of skaters donatively transferring their names to one another, though. *See, e.g.*, E-mail from Fighty Almighty, L.A. Derby Dolls to masterroster@gmail.com (Nov. 18, 2008, 11:42 AM) (on file with author) (bestowing ownership of the name Ruby Bruiseday on another skater); Interview with Mila Minute, *supra* note 45 (noting that Mila was given her name by Leia Mout). In an interesting twist, one rollergirl posted on the Yahoo! board, cryptically saying that she had thought of a great but still unregistered skate name and that any deserving and interested skaters should e-mail her so she could disclose it to them. *See* Posting of Sasha Haughtbich, Tampa Bay Derby Darlins, to roller_girls@yahoogroups.com (Aug. 19, 2008), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/32148 ("I have a name that I've been sitting on for almost 2 years now and still love—no one has it even still, so if you're looking for a good name or know someone who is, send me an email . . . ."). What is interesting about this is that she did not simply post the name for all to see and use, but wanted to keep control over it, not so that she could sell it, but so that she could make sure the name went to good use. *Id.* Also, a number of rollergirls have publicly sought suggestions for their names, often producing numerous promising options. *See, e.g.*, Posting of Soylent Mean, Minnesota Rollergirls, to roller_girls@yahoogroups.com (Jan. 24, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/4527 (commenting on a thread that was seeking robot-themed derby names and that produced tens of suggestions, including the immortal "Terminate Whore").

81. *Cf.* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 625 (2004) (differentiating between "source distinctiveness," which describes the identification of a mark with its source, and "differential distinctiveness," which describes the separation of marks from each other).

82. *See* Interview with Soylent Mean, *supra* note 77 (describing this problem with names that are spelled differently but sound the same); *see also, e.g.*, E-mail from Isabelle Ringer, San Diego Derby Dolls, to author (Feb. 11, 2011, 3:29 PM) (relating an e-mail exchange in which she declined to give Izabelle Ringer of the Rose City Rollers permission to register her name).

the world. But as competition becomes increasingly interleague, with regional and national competitions frequently sanctioned by the international Women's Flat-Track Derby Association (WFTDA), the chances that two identically named skaters in leagues thousands of miles apart could skate against one another no longer seem so slim.[83] This concern also arises outside the context of competition. Major tournaments will draw derby girls from all over just as spectators, and the annual RollerCon tournament is only one instance of the many large-scale social events that bring together skaters and derby aficionados from around the country, raising the likelihood that name confusion could occur.[84]

Second, and probably more importantly, though, skaters care about the uniqueness of their names despite their lack of discernible market value because skate names are a repository for the identities that skaters work so hard to create in a subculture that is profoundly important to them. As we have seen, skaters use their names as the focal point around which their subcultural identities are built, so that their competitive style and derby personality are associated with their name.[85] Using a skater's preexisting name—or even using a name very similar to a skater's preexisting name—effects a dignitary harm on several levels. First, it may detract from the hard-earned social capital that a skater has built up within the derby world, even where the senior skater's fame is sufficiently strong that no one is likely to confuse the junior skater with her. Second, overlapping name use violates one of the central tenets of the derby world, the "don't be a douchebag rule,"[86] so that not honoring the uniqueness of a preexisting skate name communicates disrespect in the same way as an intentional, if costless, trespass to land.[87] "It's the principle," explained one rollergirl, "that you don't steal other people's shit, whether it be a stamp off your desk at work (don't ask) or

83. *See* Posting of Paris Troika, *supra* note 67 ("[N]ow that we've had a national tournament and these types of events are going to get even more common . . . the last thing you want is two chicks with the same name skating in a championship or something.").

84. *See* Posting of Tara Armov, L.A. Derby Dolls, to roller_girls@yahoogroups.com (Mar. 11, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/6518 ("Just wait until you get to Rollercon or any other large gathering of rollergirls . . . you'll see why firsthand the suggestion of geography keeping everyone distinct won't work!").

85. *See supra* notes 59–72 and accompanying text.

86. Despite appearances, the "don't be a douchebag" rule is a pervasive principle within the derby community that is taken very seriously. It expresses the importance of basic consideration—especially that skaters should not put their own personal concerns ahead of the well-being of the derby community at large—in a way consistent with derby's punk-rock attitude. *See* Telephone Interview with Hurt Reynolds (Aug. 2010) (discussing the rule); *see also, e.g.*, BARBEE & COHEN, *supra* note 22, at 204 (quoting Charm City Roller Girl Dolly Rocket admonishing league-switching skaters, "DON'T be a douche").

87. *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 166 (Wis. 1997) (affirming a trial court punitive damages award of $100,000 for a "brazen" but costless trespass to land); *cf.* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1851 (2007) ("'No punching' is the direct analogue of 'No taking.'").

a derby name."[88] Finally, names are typically a product of careful thought and effort, so that they express not just the holder's identity, but also her cleverness.[89] Having multiple skaters use the same sobriquet dilutes that sense of ingenuity by making it seem commonplace.

Third, the gravity with which name infringement is treated in the derby world may seem puzzling because derby nicknames are theoretically infinite, so that overlap need only spur skaters to pick a new one from an inexhaustible commons. In other words, the derby name problem initially appears to be a pure coordination game,[90] whereby skaters simply want to make sure they all choose separate, but equally appealing, aliases. But this doesn't work for a couple reasons. First, many skaters contest whether derby names actually do comprise an inexhaustible commons.[91] Newer rollergirls in particular often complain that with existing names numbering in the five figures, it's often necessary to think of many possible nicknames before finding one that is unclaimed, so that newer skaters often have to settle for a sixth-choice skate name.[92] Second, not all names are created equal. Even if there is an infinitude of possible names, only some of those names will suit a skater's personality and style, so that a world in which skate names must be unique

88. Posting of Cyn Vicious, Gem City Rollergirls, to roller_girls@yahoogroups.com (Feb. 21, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/5726.

89. *See, e.g.*, Posting of Dolly Destructo, Toronto Roller Derby, to roller_girls@yahoogroups.com (June 21, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/22067 (identifying the wittiness of her team's name—"Chicks Ahoy!"—as one of the reasons that its protection is important to her).

90. *See* Andrew M. Colman, *Salience and Focusing in Pure Coordination Games*, 4 J. ECON. METHODOLOGY 61, 61 (1997) ("The defining property of a pure coordination game is complete agreement among players' utility functions. In such a game the players['] . . . interests are not in conflict: the players are motivated solely to coordinate their strategies in order to obtain an outcome that is best for both (or all) of them.").

91. *Compare* Posting of Jelly HoNut to roller_girls@yahoogroups.com (July 26, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/23228 ("By the end of this week the international roster will exceed 9000 names. Lack of creativity is not the main issue; it's difficult for our new sisters to not only find a name they like and that's appropriate for the sport, but also to find one that's unique enough to satisfy the masses."), *with* Posting of Fishnet Funeral, Inland Empire Derby Divas, to roller_girls@yahoogroups.com (July 27, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/23265 ("[Two thousand] plus names do not excuse lack of creativity. [A]re there only a few thousand names in the world to name 4 billion people???? [N]ope. Look at my name for instance . . . fishnets and death stuff are the foundation of new derby . . . and [I] was the first one, as of seven months ago . . . to even have a name with fishnet in it.").

92. Interview with The Boogiewoman, *supra* note 41 (observing that a lot of newer skaters are competing under names they are not excited about because of scarcity). Many older-school skaters respond that this concern is baseless and that newer skaters have unique advantages, such as making reference to cultural personas or phenomena that did not exist at the dawn of contemporary derby's resurgence. *See, e.g.*, Interview with Ivanna S. Pankin, *supra* note 30 (disagreeing with this concern and noting that derby girls were complaining that all the good names had been taken back when the Master Roster was first created).

may well cause a newer skater to experience a much lower chance of being able to claim a name that truly suits her.[93]

So while derby name regulation may initially appear to be a solution to a mere coordination game where the goal is simply to make sure that there is no overlap between equally appealing choices,[94] it's actually closer to a competition game akin to the prisoner's dilemma.[95] Not all names are created equal, so requiring skaters to defer to preexisting chosen names may require them to forgo one or even several strongly preferred names, ending up instead with their second or even seventh choice.[96] For many skaters, then, the best individual choice from a purely selfish perspective would be to deviate from the name-uniqueness norm and grab whatever name they want (even if it's already in use), while everyone else respects the rules (so that there's no threat of someone infringing the defecting skater's chosen name).[97] But in practical terms, defection tends to be a bad strategy because it threatens a cascade of noncompliance that could lead to countless skaters sharing the same name and to general chaos and dissension in the derby world. Derby girls tempted to defect thus still tend to comply with the derby-name-uniqueness norm as a second-best strategy that assures them that while they may not be able to have their ideal name, they can at least be confident that when they find a reasonably agreeable, unclaimed name, it will be theirs alone.[98]

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93. *See* Interview with The Boogiewoman, *supra* note 41 (describing how she originally wanted the derby name "Abra Cadaver," but it had already been registered).

94. The classic example of a pure coordination game is the U.S. rule for driving on the right side of the road. Drivers are largely indifferent to which side of the road they drive on, so rules requiring driving on the right have the Pareto optimal effect of avoiding accidents while costing drivers nothing.

95. *See* Steven Kuhn, *Prisoner's Dilemma*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 22, 2007), http://plato.stanford.edu/entries/prisoner-dilemma (observing that the prisoner's dilemma "illustrates a conflict between individual and group rationality" in that "[a] group whose members pursue rational self-interest may all end up worse off than a group whose members act contrary to rational self-interest").

96. *See* Interview with The Boogiewoman, *supra* note 41 (lamenting this outcome in particular for newer skaters).

97. Because skaters may strongly prefer one name to another and because there is not an infinite number of equally good names available, requiring them to defer to name-uniqueness norms is not Pareto optimal. Individual preferences on this point vary to some extent. Many skaters may not want to take a name that is already in use, but others appear not to care, perhaps because the appeal of the name to them is sufficient to overcome its lack of uniqueness. *See, e.g.*, E-mail from Isabelle Ringer to author, *supra* note 82 (explaining that Izabelle Ringer of the Rose City Rollergirls wanted to keep her name even though she was aware that Isabelle Ringer had registered and used it first).

98. *See, e.g.*, Posting of Panic Attack, B.ay A.rea D.erby Girls, to roller_girls@yahoogroups.com (Mar. 11, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/6520 ("If need be, find a new [name]. It's not that hard. BUT . . . don't get all muffled if someone who's established calls you out for a similar name. . . . Come up with as many names as you can, use the ole control F trick on the [Master Roster] to search names and go from there.").

B. *The Master Roster and Beyond: How Norms Regulate Derby Names*

Assuring exclusive use of skate names is a problem, but it's one for which the law provides plausible solutions. Derby names are at least plausibly subject to IP protection under federal and state law. In fact, the trademark provisions of the federal Lanham Act seem designed to address rollergirls' precise concerns, namely that other skaters will create confusion about or dilute their performance identities.[99] While federal protection for government names is generally not permitted,[100] this concern does not apply to stage names, which are generally considered valid subject matter of trademark law.[101] Even without registering their names with the Patent and Trademark Office (PTO), skaters may well enjoy common law trademark protection for their name,[102] albeit limited to the geographical area within which they have used the name in connection with their persona.[103] Indeed, several derby girls have successfully trademarked their names as service marks.[104]

Skaters may also be able to deploy laws prohibiting unfair exploitation of identity to prevent other derby girls from competing in ways that unfairly trade on their preexisting identities. If a new skater began competing pub-

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99. *See* Lanham Act § 32, 15 U.S.C. § 1114 (2006) (providing remedies for infringement of registered marks); *id.* § 43(a), (c), 15 U.S.C. § 1125(a), (c) (prohibiting infringement of both registered and unregistered trademarks on a confusion-based theory and prohibiting dilution of "famous" marks).

100. *See id.* § 2(e)(4), 15 U.S.C. § 1052 (barring trademark registration for any mark that "is primarily merely a surname").

101. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7:18, at 7-42 (4th ed. 2011) ("[P]seudonyms and nicknames of living individuals may be protected against commercial appropriation."); *see, e.g.*, Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 130 (1979) (upholding the registration of the "Crazylegs" nickname for former football star Elroy Hirsch).

102. *See* Lanham Act § 43(a), 15 U.S.C. § 1125(a) (enabling recovery even for infringement of unregistered marks). Derby names would likely be service marks rather than trademarks because skaters are not goods. One might also question whether skating under a derby name is a use in commerce, since derby girls are not paid to skate. But since derby is a money-seeking business (although often not a very profitable one), and "use in commerce" has been broadly defined "according to the customary practices of a particular industry," Planetary Motion, Inc. v. Techplosion, Inc., 261 F.3d 1188, 1198 (11th Cir. 2001), skating under a derby name likely falls within this capacious understanding of the term.

103. *See* United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97–98 (1918) (holding that common law trademark rights are limited to the geographical area within which they have been used in connection with the appurtenant goods or services). Registering skate names with the PTO would earn skaters presumptive nationwide protection of their mark, but this option is somewhat costly (federal registration costs about $750) and would not allow skaters to enjoin competing uses unless they could show a reasonable likelihood that another skater's use of the same name would cause confusion with their derby identity. *See* Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 364–65 (2d Cir. 1959) (holding that a court will not issue an injunction under the Lanham Act against an infringing use by a defendant who adopted the mark in good faith in a remote geographic area unless the plaintiff shows intent to use the mark in that area).

104. For example, Ivanna S. Pankin of the San Diego Derby Dolls registered her derby name as a service mark in connection with "[e]ntertainment services, namely, participation in roller derby," effective May 4, 2010. IVANNA S. PANKIN, Registration No. 3,783,638.

licly under the name of a preexisting, famous skater, that would fairly clearly amount to a "false designation of [the] origin" of the services.[105] People would think they were seeing the famous skater but would actually be seeing some novice interloper, and federal law provides a civil cause of action against such false attribution.[106] Many states also have right-of-publicity laws preventing unauthorized use of another's identity.[107] Taking a prior skater's name would implicate these statutes as well, assuming that the subsequent skater attempted to copy the persona of the prior skater exactly, rather than just using general tropes.[108] Bringing suit under either a trademark or right-of-publicity theory would entitle prevailing skaters to both money damages and injunctive relief, so that even if a derby girl could not prove that infringement of her name had caused financial harm, she could at least get a court order preventing the other skater from using it.

And yet the ready availability of formal law as a means of effecting name regulation is not, as one might imagine, the end of this story. On the contrary, it is just the beginning because the roller derby world has eschewed trademark and other IP law almost completely as a means of protecting skate names, turning instead to its own skater-created and -operated system of name regulation and registration. This elaborate, and largely extralegal, system incorporates three different forms of regulation—formal rules, informal norms, and (in some instances) traditional law itself—each of which I describe in turn below.

1. Formal Rules for Registration and Regulation

a. Registration.—Assuring the uniqueness of roller derby names requires some shared, public means by which all incoming skaters can ascertain what names are already in use. This was unnecessary at the inception of roller derby's revival in the early 2000s for two reasons. First, teams were so few and skaters so tightly knit that the odds of name overlap were low,[109] and everyone generally knew whether a proposed name was already

105. Lanham Act § 43(a), 15 U.S.C. § 1125(a).

106. *See id.* § 43(a)(1)(A), 15 U.S.C. § 1125(a)(1)(A) (prohibiting the use in commerce of any false designations of origin and false or misleading description of facts in connection with goods or services).

107. *E.g.*, CAL. CIV. CODE § 3344 (West 1999) (imposing liability for the unauthorized appropriation of elements of another's personality—including another's name, voice, signature, photograph, or likeness); CAL. CIV. CODE § 3344.1 (West Supp. 2012) (same for a deceased personality).

108. *See* Nurmi v. Peterson, No. CV-88-5436-WMB, 1989 WL 407484, at *3 (C.D. Cal. Mar. 31, 1989) (denying a right-of-publicity suit filed by an actress playing Vampira against an actress playing Elvira because Elvira was not an exact copy of the Vampira character but only used some similar "props, clothes, and mannerisms").

109. Though not zero, as the very early conflict between two skaters who wanted to use the name "Trouble" illustrates. *See infra* notes 122–23 and accompanying text.

in use.[110] Also, early on, unused derby names were so plentiful that there was no real scarcity. Even as late as 2005, derby folks were so cavalier about name use that they created an online thread listing clever skate names they had thought of in order for others to take.[111] Within just a few years, however, this changed. First, in a classic Demsetzian transition, skaters became more numerous, names grew scarcer, and skaters ceased to think of them as an inexhaustible commons, instead becoming more covetous of them.[112] Second, as the sport grew geographically and in terms of size, there were eventually sufficient skaters dispersed widely enough that word of mouth proved inadequate to prevent name repetition. As demand for names increased, and casual enforcement increasingly failed, derby name regulation godmother and former WFTDA president Hydra stepped in to create the ur-version of what has since become known as the Master Roster.[113] The Master Roster began as a humble Excel spreadsheet that noted the same basic data about names that it still does today: a skater's derby name, the date that the name was entered on the Master Roster, and the skater's team affiliation.[114] For a few years, Hydra managed to maintain the Master Roster largely by informal means: skaters would submit names, and Hydra would search the sheet for similar or identical names and register the submitted name if no conflicts arose.[115]

As derby began to grow from a handful of grassroots leagues into a nationwide phenomenon, though, the sheer volume of name registration became untenable. In late 2005, Hydra handed off the Master Roster duties to a team of skaters—Paige Burner, Soylent Mean, and Jelly HoNut—who shared responsibility for registering submitted names.[116] But this method necessitated a time-sucking and often ineffective search process for each name. In early 2006, there were 2,585 registered names on the Master Roster, and the increasing pace of submission required the Roster's

110. *See* Interview with Ivanna S. Pankin, *supra* note 30 (indicating that in the earliest days of derby, there was so much interchange between the handful of startup leagues that name overlap would never have happened).

111. *See* Posting of angelravah to roller_girls@yahoogroups.com (Nov. 30, 2005), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/3339 (soliciting name suggestions for an unnamed derby girl and establishing a forum in which users could suggest potential derby names for other users to adopt).

112. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347, 350 (1967) (arguing that property rights arise as people react to changes in the costs and benefits of using certain resources or taking certain actions).

113. Interview with Hydra, *supra* note 62.

114. *Id.*

115. *See id.* (describing the early name registration process).

116. Posting of Hydra, Texas Rollergirls, to roller_girls@yahoogroups.com (Dec. 28, 2005), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/3916 ("I'm retiring from updating the master roster. Please send everything related to the master roster to Paige Burner . . . .").

administrators to release an updated version of the spreadsheet every week.[117] Soon after, the administrators released an online version of the Master Roster with a search algorithm that enabled skaters to evaluate whether their proposed name was similar to a preexisting one and even how close the proximity was.[118] This new functionality and increased accessibility enhanced the efficiency of name registration significantly, and by late 2007, the number of registered names had already exceeded 10,000.[119] This version of the Master Roster remains publicly available online,[120] and while there are (and have been for some time) movements afoot to supplant it with a newer, better version, it remains for now the dominant, unique means by which roller derby girls can register their skate names.

b. Regulation.—The development of a registry for roller derby names was roughly paralleled by the creation of informal norms that determined basic ground rules determining who could register names and how registration had to take place. From roller derby's earliest recrudescence, skaters understood the basic norm against using preexisting skate names.[121] This did not mean, though, that disputes over name priority did not emerge. On the contrary, the first such conflict emerged between skaters in two of the initial roller derby leagues, Arizona Roller Derby and TXRD Lonestar Rollergirls, pitting against one another two skaters who wanted (aptly enough) to go by the moniker "Trouble."[122] In the absence of a well-developed regulatory system, as well as disagreement about who had superior rights to the name, both Troubles continued to use the name in an uneasy détente.[123]

Perhaps spurred on by this and other nascent name conflicts, Hydra circulated a short list of five simple rules that created procedures for registration and reflected the preexisting substantive norms that skaters could not register names that were already in use and that they should contact for permission rollergirls who had names similar to the one they wanted to

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117. *See* Posting of Soylent Mean, Minnesota Rollergirls, to roller_girls@yahoogroups.com (Mar. 3, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/6174 (noting that the Master Roster is updated weekly); Posting of Soylent Mean, Minnesota Rollergirls, to roller_girls@yahoogroups.com (Mar. 3, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/6186 (announcing that the Master Roster contained 2,585 registered names).

118. Interview with Soylent Mean, *supra* note 77.

119. By late 2007 (the earliest date for which a formal count was available), the number of registered derby names had exceeded 10,000 (with 420 teams). Posting of Soylent Mean, Minnesota Rollergirls, to roller_girls@yahoogroups.com (Oct. 20, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/25593.

120. *Master Roster*, *supra* note 74.

121. *See* Posting of Paris Troika, *supra* note 67 ("It's just not kosher to copy another girl's name[;] an 'unwritten rule' of sorts.").

122. Interview with Hydra, *supra* note 62.

123. *Id.*

register.[124] When Paige and Soylent took over the administration of the Master Roster about a year later, they circulated for the derby community's review a much more elaborate series of rules designed to formalize and centralize the substance and procedure of derby name regulation.[125] In announcing these rules, the Master Roster's administrators observed that the Roster "is put together on a volunteer basis to ensure that all rollergirls feel rewarded for their creativity by maintaining exclusiveness for their names."[126] These same basic rules persist today, where they find fixed expression on the same website that houses the current Master Roster.[127] Three core principles govern derby name regulation. First is a uniqueness requirement: only one skater can skate under a given name.[128] The second instantiates the idea of priority: where two names are identical or excessively similar, the skater with the earlier claim to the name has the right to use it.[129] The third creates elemental standards for resolving overlapping name conflicts: where two names are reasonably similar, the second skater must ask the first skater for permission to use the name.[130] This permission must be in writing and submitted to the Master Roster's administrators in order to authenticate it.[131] Names that are very similar to preexisting names but that

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124. *See* Posting of Hydra, *supra* note 72 (creating the thread "master roster guidelines—read them and live them!").

125. Posting of Soylent Mean, Minnesota Rollergirls, to roller_girls@yahoogroups.com (Apr. 27, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/8510 (creating a thread proposing and seeking feedback about name regulation rules); *cf.* Administrative Procedure Act § 4, 5 U.S.C. § 553 (2006) (establishing procedures for notice-and-comment rulemaking).

126. Posting of Soylent Mean, *supra* note 125.

127. Elaina B. et al., *Master Roster Rules*, INT'L ROLLERGIRLS' MASTER ROSTER, http://twoevils.org/rollergirls/rules.html (last updated Sept. 29, 2011) [hereinafter *Master Roster Rules*].

128. *Id.* ("Duplicate and similar league and skater names are *strongly* discouraged, and not allowed without permission from the original skater(s)/league(s)."). This rule implies that if two skaters agree to use the same name, overlapping name use would be allowed. There are a handful of examples where two skaters have agreed to use the same name. *See, e.g.*, *Master Roster*, *supra* note 74 (including entries for two skaters registered as "Megahurtz," among other duplicate names).

129. *Master Roster Rules*, *supra* note 127. This principle tracks (although it does not consciously model) the ancient and pervasive property principle of "first in time, first in right." *See generally* Lawrence Berger, *An Analysis of the Doctrine that "First in Time Is First in Right,"* 64 NEB. L. REV. 349 (1985) (describing the far-reaching legal and cultural significance of the principle).

130. *Master Roster Rules*, *supra* note 127. And this principle tracks (but, again, does not consciously model) the right to exclude, which some scholars have argued is the *sine qua non* of property law. *E.g.*, Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

131. *Master Roster Rules*, *supra* note 127; *see also* Posting of Paige Burner, Arizona Roller Derby, to roller_girls@yahoogroups.com (Jan. 27, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/4742 ("[I]f two skaters agree to share a name, then I need to see that agreement in writing from the established skater.").

have been approved via written permission by the senior skater are listed on the Master Roster with the note "(cleared)."[132]

The Master Roster's name search feature allows users to determine the degrees of similarity between a proposed name and existing names,[133] and this result strongly determines the likelihood that a name will be accepted or rejected. The derby name checker returns one of five results, alerting users that a proposed moniker's degree of similarity to preexisting ones is either "very high," "high," "medium," "low," or "very low." Names of very high similarity are "almost guaranteed to be rejected," while names of very low similarity are likely to be accepted.[134] For example, inputting the name "Nurse Wretched"[135] into the name checker returns the result that the name is identical to a preexisting name ("Nurse Wretched"), of high similarity to another preexisting name ("Nurse Ratchet"), and of low similarity to yet another one ("Wretched").[136] This name would almost certainly be rejected by the Master Roster's administrators. These results are advisory rather than dispositive, though: the administrators retain discretion over the acceptance and rejection of all proposed derby names,[137] which is particularly salient in cases where a name has a nontrivial degree of similarity to a preexisting one.[138]

The Master Roster's substantive rules are supported by a number of formal registration procedures. For instance, skaters are advised not to submit a name until they have been participating in derby for at least a couple of

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132. *Master Roster*, *supra* note 74; Posting of Monichrome, Toronto Roller Derby, to roller_girls@yahoogroups.com (Feb. 7, 2011), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/41639 ("If you have a letter/email from the skater who claimed the name first, and she clears your similar-but-different name, then your name will show (cleared) next to it [on the Roster].").

133. *Master Roster*, *supra* note 74 (offering users the chance to "[c]heck a new name for uniqueness"). Minnesota Rollergirl Soylent Mean, who works as an IT professional, wrote the code for the derby name checker. Interview with Soylent Mean, *supra* note 77. The code operates by breaking down existing names into their constituent phonetic parts and then comparing those parts with the phonemes in proposed names. *Id.*

134. *See Roller Derby Name Checker: "Nurse Wretched,"* INT'L ROLLERGIRLS' MASTER ROSTER, http://twoevils.org/rollergirls/similarity.cgi?name=nurse+wretched (assessing the similarity of "Nurse Wretched" to preexisting names and finding it too similar and therefore likely to be rejected).

135. This is a derby name suggested by a friend and nurse who occasionally volunteers for the L.A. Derby Dolls.

136. *Roller Derby Name Checker: "Nurse Wretched," supra* note 134.

137. *See id.* ("Please note that passing this test does *not* guarantee that your name will be accepted. Similarly, failing this test is not a guarantee that it will be rejected, but it does raise the chance that it will be."); *see also Master Roster Rules*, *supra* note 127 ("Even if you meet all name requirements, rejection is still at the discretion of the roster maintainers.").

138. Despite the Master Roster's administrators' formal reservation of authority over name decisions to themselves, much of this authority is delegated to senior-registered skaters, who retain ultimate authority over whether to allow names that are similar, or in some rare cases, identical to their own. *See infra* note 142 and accompanying text; *see also Master Roster*, *supra* note 74 (indicating that senior registrant Ida Stroya formally permitted Ida Stroyder to skate under that highly similar name).

months[139] in order to avoid wastefully registering a name to beginning skaters who end up dropping out or failing to make a team.[140] The submission of names to the Master Roster is initially organized by a designated skater within each league, a "name wrangler," who aggregates the names of qualifying new skaters, vets them for validity, and submits them in batches to the Master Roster administrators.[141] Priority in cases of identical submissions is determined by the date stamp on the e-mail received by the Master Roster's administrators. In other words, registration is a matter of filing priority, not actual use, so that if two skaters simultaneously seek to register the same name, the Master Roster's administrators will register the first submission they receive, regardless of which skater adopted the name first.[142]

The process of adding names to the registry raises a correlative problem: what to do with names of skaters who have quit or retired? This problem looms more and more as the number of derby girls grows ever larger and names grow ever scarcer. Skaters (and name wranglers) are encouraged to notify the Master Roster's administrators when they are no longer using their names,[143] and leagues often submit lists of names to the Master Roster that are to be deleted.[144] Name removal does not happen as often as it should, and certainly not as often as name addition happens, for several reasons. First, incentives to retire one's own name are weak. There are no

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139. *Master Roster Rules*, *supra* note 127 ("Make sure that your skater(s) are really committed to your league before putting their names on the roster.").

140. Posting of JadeFu to roller_girls@yahoogroups.com (Mar. 30, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/7419 ("[Y]ou generally don't register names until you've been skating a few months and pass a skills assessment so you know the girl's going to stick around.").

141. *See, e.g.*, Posting of Nameless Whorror, Montreal Roller Derby, to roller_girls@yahoogroups.com (Dec. 3, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37752 ("[O]ur name wrangler . . . double check[s] herself that the [submitted] names are not taken or too similar."); *Master Roster Rules*, *supra* note 127 ("Have one person in your league send in master roster updates.").

142. *See Master Roster Rules*, *supra* note 127 ("Updates are processed on a first-come-first-serve basis. That means that a name that wasn't on the master roster when you submitted it to us might be rejected because somebody sent the same name in a day earlier."). By contrast, common law trademark rights accrue upon first use in trade in a particular geographic area. U.S. PATENT AND TRADEMARK OFFICE, BASIC FACTS ABOUT TRADEMARKS 1 (2010) (explaining that trademark rights in the U.S. generally arise upon the first use of the mark in commerce); *see* United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 100 (1918) (identifying both priority of adoption and geographic area as factors that go to whether the use of a trademark is infringing and holding that a party who first used a mark in Massachusetts was estopped from obtaining an injunction against a party who later used the same mark in Kentucky).

143. *Master Roster Rules*, *supra* note 127 ("Due to the overwhelming amount of names on the master roster[,] *PLEASE delete skaters who are no longer with your league.* We will cap league rosters at 140 names and will not register new names until you delete old names that are no longer in use.").

144. Proposed deletions are not effected immediately. Rather, the administrators list a name as "TBD" (To Be Deleted) with a deletion date in order to give a skater notice in the event that her name was wrongly proposed for removal. *See Master Roster*, *supra* note 74 (listing several names with "TBD" and a deletion date).

ways to sanction skaters who have left derby without doing the courtesy of notifying the Master Roster that their names are now available. Second, skaters often change their minds about retirement, so any derby girl who has even a sliver of interest in returning to the sport will be disinclined to give up her name. And third, even when disused names are purged from the Master Roster, skaters may not want a "used" name because using it may seem derivative rather than original and because it may have unwanted associations with its prior user. As a result of all this, turnover in names tends to be slow, and the Master Roster contains many names of skaters who have become inactive,[145] despite best efforts by name wranglers and list administrators.[146]

2. *Informal Norms for Adjudication and Enforcement.*—The formal rules governing name registration and regulation completely resolve some issues. It's clear from the Master Roster procedures *how* a name should be registered, for example. But these rules determine what names can be registered only in broad terms. This breadth leaves two gaps that have to be filled by informal norms: adjudication (determining when a submitted name infringes a registered name) and enforcement (assuring compliance with name-uniqueness principles once a violation has been established).

a. *Adjudication.*—Some applications of the formal rules governing derby names are simple and straightforward. If a proposed name is identical to an existing registered one, another skater cannot use that proposed name.[147] But sometimes the question is harder to answer. Is "Fighty Aphrodite" too close to the registered name "Mighty Aphrodite"? Is "AphroDIEte" too close to "Mighty Aphrodite"? These disputes about similar but not identical names are not resolved by the straightforward principles articulated by the Master Roster's creators and administrators,[148] but instead on the basis of informal norms and subcultural practices.

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145. *See* Posting of Trailer Trish, E-Ville Roller Derby, to roller_girls@yahoogroups.com (Dec. 3, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37754 (observing a high incidence of inactive skater names remaining on the Master Roster).

146. *See, e.g.*, Posting of Paige Burner to roller_girls@yahoogroups.com (Dec. 16, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/26657 (proposing over five hundred names for deletion).

147. There are a handful of exceptions. For example, Rose City Roller Megahurtz agreed to let a Gotham Girl skate under the same name. *See Master Roster*, *supra* note 74 (listing the two Megahurtzes and indicating that Rose City's Megahurtz has been duly notified of the conflict). Fewer than twenty other identical name pairs exist on the Master Roster, which illustrates the strength of the name-uniqueness principle. *Id.*

148. This is not terribly far off from similar line-drawing issues that arise with frequency in IP, such as notoriously hard-to-resolve issues like substantial similarity or fair use in copyright or likelihood of confusion in trademark. *See, e.g.*, Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEXAS L. REV. 1799, 1858–59 (2007) ("[F]air use decisions are hotly contested and difficult to make and to predict.").

The number and variety of disputes over similar but not identical derby names allows identification of a number of criteria that skaters use in resolving these conflicts.[149] Three criteria predominate. First, and most importantly, the skater who registered the name first has presumptive priority, as the Master Roster rules indicate.[150] The priority-of-registration principle prevails even when the registrant does not appear to have been the name's first user:

> [I]t's just not cool to rip off someone else. Yeah, you may have actually had the idea first, but they acted on it. We had that in our league. Fujiyama Mama's first name was Ginger Vitus. She started posting on [the RollerGirls] board and before we sent our roster in someone else had registered it. We don't know if she "ripped the name off" or if she just registered first, but Fujiyama Mama had to find a new name—which by the way is up for grabs. But I'm not telling her new name until we get it registered :)[.][151]

Also central to adjudication is the degree of similarity between the two names. Some names are identical save for a single letter (e.g., Mighty Aphrodite and Fighty Aphrodite). Others overlap because one name contains, but makes a significant variation on, another (e.g., Drew Blood and Nancy Drew-Blood). While in trademark-likelihood-of-confusion analysis the idea of similarity typically encompasses sight, sound, and meaning,[152] in derby it's almost all about sound. Skaters are worried that excessively simi-

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149. These informal norms overlap to an interesting extent with the dominant way of resolving likelihood-of-confusion issues in the trademark setting. Courts evaluating likelihood of confusion also consider the similarity of the marks at issue and the proximity of the products represented by the marks. *See* Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961) (outlining nonexclusive factors for consideration in likelihood-of-confusion analysis). Moreover, skaters sometimes feel that they have common law-like rights in their names that arise by virtue of use even before the name is formally registered on the Master Roster. *E.g.*, Posting of Chrome Molly to roller_girls@yahoogroups.com (Feb. 5, 2010), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/38266 (signing her post "Chrome Molly #4130 (ain't listed yet, but IT'S MY NAME)").

150. *See supra* note 129 and accompanying text.

151. Posting of Cyn Vicious, Gem City Rollergirls, to roller_girls@yahoogroups.com (Feb. 22, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/5801. Derby girls even defer to the first-to-register rule when the prior registration was a mistake and they should have been registered first:

> I believe the Lady Gagya you saw was from my team. She sent her name in before the other one, but somehow our name requests got lost. So we were never told . . . if our names were rejected or accepted because they apparently never saw our email. She has changed her name to Jersey Vicious for this season . . . .

Posting of Inskatiable to roller_girls@yahoogroups.com (Feb. 6, 2011), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/41629.

152. Sally Beauty Co. v. Beautyco, Inc., 304 F.3d 964, 972 (10th Cir. 2002) (citing King of the Mountain Sports, Inc. v. Chrysler Corp., 185 F.3d 1084, 1090 (10th Cir. 1999)) (stating that likelihood-of-confusion analysis in trademark law considers several nonexhaustive factors, including similarity between the marks, and that similarity between the marks depends on sight, sound, and meaning).

lar names will confuse fans when uttered mid-bout by announcers,[153] so that names that sound very similar will be more likely to be found infringing.[154]

Moreover, skaters invoke—often explicitly—the familiar trademark notion of likelihood of confusion to articulate the possible harm caused by similar names and to determine whether a proposed name infringes a registered one.[155] Two possible drivers of likely confusion are geography (proximity of the relevant leagues increases the chances of confusion) and form of derby (confusion is more likely if the skaters both compete in banked- or flat-track leagues). The former has been taken more seriously in this regard, with some skaters suggesting that geographically disparate skaters should have no objection to overlap in names (and other skaters disputing this assertion).[156] The banked-track–flat-track distinction tends to have little weight, though, especially as derby girls increasingly compete on both surfaces rather than exclusively on just one.[157]

Other considerations emerge from disputes about derby name rights, albeit less prominently. Lapse of time between a junior user's adoption of a name and the senior user's contacting her about the dispute may make a difference. This is both because not policing your name may suggest a lack of diligence by the senior user and because it becomes increasingly difficult for skaters to switch names after they have spent substantial time using them.[158] Some skaters have suggested that the identity of a junior user may

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153. *See* E-mail from Fighty Almighty (then known as Fighty Aphrodite) to Mighty Aphrodite, *supra* note 70 (explaining her position in the dispute over the name "Fighty Aphrodite").

154. *See* Posting of Cyn Vicious, Gem City Rollergirls, to roller_girls@yahoogroups.com (Jan. 23, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/4515 ("We told our girls . . . very clearly that they could not duplicate an existing player/team/league name, even if it was spelled differently.").

155. Posting of Michi-chan to roller_girls@yahoogroups.com (Nov. 10, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/26081 (stating, as an example, that "if there was another skater named Snot Rocket, [it] would not be good for the reputation of the original Snot Rocket and there would be confusion").

156. *Compare* Posting of Hooligal, London Rockin' Rollers, to roller_girls@yahoogroups.com (Feb. 5, 2010), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/38261 ("Maybe each country could have their own[;] . . . would it be a big deal if there was a Ghetto Blasther in [C]anada and a Ghetto Blasters team in the UK?"), *with* Posting of Dolly Destructo, Toronto Roller Derby, to roller_girls@yahoogroups.com (June 21, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/22055 ("I'd be pissed if you use my team name. . . . Maybe across the continent, but you're . . . not far enough [from] me."). Courts have adopted a similar line of reasoning in trademark law where senior registered users can enjoin junior users of the same mark in a different geographical area upon showing of intent to do business under the mark in that area. *E.g.*, Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 365 (2d Cir. 1959).

157. *See* Posting of Fighty Irish, B.ay A.rea D.erby Girls, to roller_girls@yahoogroups.com (Feb. 22, 2006, 4:07 AM), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/5731 ("IT DOESN'T MATTER IF YOU'RE BANKED TRACK, FLAT TRACK OR ON MARS—WE ALL SHARE THE SAME ROSTER FOR THE TIME BEING SO WE MUST RESPECT THE ORIGINAL PLAYER WHO LAID CLAIM TO THE NAME.").

158. *Cf.* Interview with The Boogiewoman, *supra* note 41 (discussing the difficulty of changing names once they have been established).

be partially outcome determinative, so that a talented and effective skater would get more latitude for using a similar name than a poor one.[159] Derby girls who perform inadequate due diligence by making half-hearted attempts to identify the presence of preexisting names are unlikely to convince senior registrants to allow the use of similar names, perhaps because their lack of effort suggests bad faith. The tone of skaters' discussions about disputed names clearly affects outcomes. A junior user who acts surly and entitled, rather than polite and deferential, when seeking the senior user's permission to use a similar name is much less likely to gain that consent. As one roller-girl observed, "We're all really proud of our names, and it could get ugly when someone isn't polite."[160] Finally, the quality of the proposed name may partially determine the outcome of these disputes. Monikers that are uncreative or nonsensical variations on preexisting ones may be seen as unthreatening enough that the senior user is indifferent to their use.[161]

b. Enforcement.—Assuming that there is agreement that two names are in conflict (i.e., where they are either identical or substantially similar), an additional issue remains: How are a skater's superior name rights enforced? The Master Roster administrators can decline to register a name, but as an informal organization, they lack any coercive force, so a skater who consciously uses an overlapping name cannot be fined or thrown in jail. And yet despite the total absence of formal coercive sanctions, the incidence of repetitive name use is small, thanks to informal enforcement norms. This raises two related puzzles: How do skaters enforce rules governing derby name uniqueness, and why is the level of compliance so high?

The answer to the *how* question is straightforward. The primary means of enforcement is simply personal contact and interaction that relies on skaters' strong incentives to maintain the uniqueness of their own names.[162]

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159. *See, e.g.*, Posting of Sweet N. Lowdown to roller_girls@yahoogroups.com (Feb. 8, 2010), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/38285 ("[I] want to be known for my skating, not my catchy name and if people get us confused sometimes, [I] only hope it'll be a compliment to the other skater."). *But see* Posting of Michi-chan, *supra* note 155 ("I think that the skate name is the skater's personal reputation. Imagine if there was another skater named Snot Rocket who skated pretty bad . . . . That would not be good for the reputation of the original Snot Rocket and there would be confusion.").

160. Posting of Convictina Brawl, Tallahassee Rollergirls, to roller_girls@yahoogroups.com (June 21, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/22074; *see also* Posting of Made'n Texas, Dallas Derby Devils, to roller_girls@yahoogroups.com (Mar. 8, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/6336 (observing that her league avoided using the name "The Dallas Derby Dolls" because the L.A. Derby Dolls "politely" objected).

161. *See, e.g.*, Posting of Markie D. Sod, L.A. Derby Dolls, to FB_news@yahoogroups.com (on file with author) (expressing a lack of concern over several derivations of her name, such as Marquee d'Sawed, because "they actually just sound lame & arent [sic] exactly like my own").

162. *See* Posting of Evilyne Tensions, E-Ville Roller Derby, to roller_girls@yahoogroups.com (June 21, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/22077 ("[I]f you're using a unique name, you have every reason in the world to get it registered and make sure it stays unique.").

These exchanges usually take the form of an e-mail exchange between the skater who wants to use a name and the one who has registered a similar one.[163] Skaters exhibit a high degree of deference to the first-to-register rule:

> ANYTIME someone has had a REALLY similar name to mine over the last few years, it's been remedied directly with that skater. On TWO [occasions,] skaters (living nowhere near me) have added parts to their name so it wouldn't be so close to mine. Everyone wants their individuality . . . including the skaters picking names close to existing skaters.[164]

Interactions relating to name conflicts incorporate some or all of the informal norms discussed above and usually (though not always) resolve name disputes to skaters' satisfaction.[165] For instance, Fighty Aphrodite agreed to change her name (to "Fighty Irish" and eventually to "Fighty Almighty") after receiving complaints from Mighty Aphrodite.[166] Other skaters have added elements to their names to make them more distinct from preexisting ones.[167] In one instance, skaters agreed on a geographic sharing arrangement designed to reduce the likelihood that the skaters' similar names would cause them to be confused with one another.[168] There are a few well-known incidents of name conflicts in which a skater simply refused to give

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163. The earliest written rules invited this kind of informal adjudication. *See* Posting of Hydra, *supra* note 72 ("Resolve your own disputes. . . . If you have a beef with someone's name, contact them or their league about it. I have no powers of enforcement & prefer to stay out of conflicts between leagues & skaters.").

164. *E.g.*, Posting of Havoc, Sisters of Mayhem Roller Derby, to roller_girls@yahoogroups.com (Aug. 18, 2008), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/32120.

165. *See, e.g.*, Posting of Chrome Molly, *supra* note 149 (observing that she disputed the rejection of her originally proposed name but concluding that "in the spirit of not being that douchebag I honored the registry"); Posting of Roxy Moron, Lehigh Valley Rollergirls, to roller_girls@yahoogroups.com (June 21, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/22057 ("You know, my team name is the Hissy Fits and we had to get permission from the retired skater 'Hissy Fit' to be able to use the name. So they are somewhat strict about it. Which seems fair."); *cf.* Posting of Made'n Texas, *supra* note 160 (explaining that her league's original proposed name, "The Dallas Derby Dolls," was opposed by the L.A. Derby Dolls and then was changed to "Dallas Derby Devils"); Posting of Zombiegirl, Throttle Rockets, to roller_girls@yahoogroups.com (Mar. 8, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/6365 (noting that a Minnesota derby team called the Rockits asked for permission from the Seattle-based Throttle Rockets when adopting their team name).

166. Posting of Fighty Irish, *supra* note 157 ("[I] foolishly did not read the roster closely enough when I came up with the brilliant nom de guerre 'Fighty Aphrodite.' [Y]ou best believe [I] heard from 'Mighty Aphrodite' of the TXRD . . . . [I] am now . . . Fighty Irish.").

167. *See supra* note 164 and accompanying text (discussing instances where skaters have added elements to their names to make them distinct from other names).

168. In the geographic sharing arrangement, registrant Drew Blood of Seattle's Rat City Rollergirls permitted second-comer Nancy Drew-Blood of the B.ay A.rea D.erby Girls to use that name (presumably because of their geographical distance) but only on the condition that if Nancy Drew-Blood wanted to compete in the same tournament as Drew Blood, she would have to do so under an alternate name. Posting of Nancy Drew-Blood, B.ay A.rea D.erby Girls, to BadGirlsLeague@yahoogroups.com (Dec. 30, 2005, 11:38 AM) (on file with author).

up a conflicting name, despite the animosity her choice fomented.[169] These unresolved name disputes, though, probably overstate the incidence of noncompliance because of the extent to which the presence of the Master Roster fends off name infringement in the first place. The dog that didn't bark in this context is the number of times that skaters use the Master Roster to determine that their proposed name is too similar to a preexisting one and defer to the system by simply seeking another name. While it's impossible to measure absence of evidence, the number of times the Master Roster (while far from perfectly effective)[170] successfully fends off name conflicts is almost certainly far greater than the number of name conflicts it fails to deter.

The Master Roster's overall efficacy in coordinating nonconflicting skate name usage and averting related conflicts raises a related puzzle. What causes skaters to buy into the prevailing derby name regulation system in the absence of coercive authority or threat of sanctions?[171] From a welfare perspective, this high degree of compliance seems puzzling because actors are often presumed to follow law only to the extent that law can make noncompliance more costly than compliance.[172] So why should derby girls comply with these rules absent any state-imposed cost for noncompliance? There are several answers to this question, each of which draws from a different branch of the norms literature.

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169. Isabelle Ringer of the San Diego Derby Dolls learned that a skater from the Rose City Rollers of Portland was skating as Izabelle Ringer. E-mail from Isabelle Ringer to author, *supra* note 82. Isabelle, the prior registrant, objected to Izabelle's name via e-mail and offered to let Izabelle skate under it until the end of the season before choosing a new name. *Id.* Izabelle simply refused to change and continued to skate under the infringing name, though of course the Master Roster administrators did not register her name. *Id.*

170. The Master Roster system depends on (overworked) humans for monitoring, compliance, and enforcement, and it is thus necessarily vulnerable to human error. The most common error is the registration of names that arguably infringe preexisting ones. *See, e.g.*, Posting of Mercy Less to roller_girls@yahoogroups.com (Dec. 4, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37766 (observing that "[n]ew kids are getting names *approved* that are almost identical to an existing skater's, without her permission"); Posting of Lippy Wrongstockings to roller_girls@yahoogroups.com (Dec. 6, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37812 ("[W]e have a skater BareLeigh Legal who has had her name for almost 2 years and I noticed an Oly [Rollers from Olympia, Washington,] skater with Barely Legal registered this year. Those are the exact same names in my opinion. So the humans are letting them through too.").

171. *See* Posting of Morbid Mangler, Fabulous Sin City Roller Girls, to roller_girls@yahoogroups.com (Oct. 23, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37215 ("It's YOUR name to keep, as long as you are on the international roster and no one else has taken it first!").

172. This is the classic Holmesian "bad man" theory of why people comply with law. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (describing the "bad man" as one "who cares only for the material consequences which such knowledge [of the law] enables him to predict").

First, people may follow norms because they fear sanctions. Flouting derby name norms may not give rise to civil damages or criminal liability,[173] but it is by no means sanctionless.[174] Rather, the informal sanctions that skaters inflict on one another for violating name-uniqueness norms effectuate compliance to a large extent.[175] Skaters unanimously agree that choosing a name that has clearly been adopted by another skater—even a skater in another league—without permission would be egregiously socially unacceptable within the derby community and lead to ostracism.[176] As one derby girl observed,

> Registering with [the Master Roster] is voluntary . . . but there are rules as to what can be registered. It's not just a free-for-all send your name in and it's yours, it has to not conflict with one that's already on the list. And while there are no derby police that are going to tell you that you can't skate under a certain name, it's kinda like bathing. Bathing is voluntary and no one can MAKE you bathe, but if you choose not to bathe, there will be consequences from your community. Similarly, registering your skate name is voluntary, but there are consequences from the derby community if you choose not to register your name because you're using a duplicate name.[177]

And since being part of a community is central to the derby experience, the kind of shaming that flouting name-priority norms would engender would undermine entirely the advantages of being part of derby in the first place.

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173. *See* Posting of TJohnston to roller_girls@yahoogroups.com (Feb. 8, 2010), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/38291 (describing the Master Roster system as "a courtesy thing").

174. As I discuss in more detail below, the system is not legally enforceable but depends on rollergirls themselves to enforce it—as they readily do.

175. *Cf.* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 357 (1997) (articulating a theory of norm enforcement that is maintained by the withdrawal of esteem by group members from those who violate norms).

176. Posting of Red Davies to roller_girls@yahoogroups.com (Oct. 23, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37217 ("The [Master Roster] is an honor system. There is absolutely nothing stopping anyone using the same name as you other than the close-knit derby community applying the douchebag rule.").

177. Posting of Evilyne Tensions, *supra* note 162; *see also* ELLICKSON, *supra* note 3, at 57 (observing the central role of "truthful negative gossip" as a form of intragroup sanction); Interview with Hydra, *supra* note 62 (answering the question, "Can you just ignore the Master Roster?" by saying, "You can if you want to be an asshole!"); Posting of Kylie McLeod, *supra* note 73 ("[T]he shame of using a stolen name should be enough to prevent name thievery. I'm certain that . . . any skater/team/league using an obviously stolen name would be laughed off the track.").

In a counterexample that illustrates the point, "renegade" leagues (which operate outside authority of WFTDA) tend to be less respectful of the Master Roster's name-uniqueness norm. *See, e.g.*, Posting of Suicide Jane, Renegade Roller Derby, to roller_girls@yahoogroups.com (Aug. 19, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/32138 ("I know who I am[.] If you want my name[,] who cares[?]"). *But cf.* Posting of Nafreaki, President, Renegade Roller Derby, to roller_girls@yahoogroups.com (Jan. 27, 2011), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/41497 (seeking information about registering names on the Master Roster).

Second, derby girls may follow these norms not only because they fear the stick of shaming sanctions, but also because they seek the carrot of group acceptance. Another leading account of norm compliance looks to the desire of group members to signal to one another that they are good cooperators, both to gain acceptance and to increase the chance that others in the group will choose to cooperate with them.[178] To take one particularly salient instance in the derby setting, name adoption typically happens at the outset of a skater's career. Newbie derby girls ("fresh meat," in subcultural parlance) often compare the first few months of their participation in the sport to military boot camp, both in terms of the physical pain it inflicts and in terms of the need to fit in with a new group and defer to authority.[179] So as a practical matter, the likelihood that a relatively new skater would rebel against established norms about name uniqueness at the same time that she is seeking to fit into a new, foreign, and sometimes threatening world is vanishingly small.[180]

Finally, the role of path dependence in norm compliance cannot be ignored. Another theory for norm compliance is epistemic: people may comply with norms because conforming to a salient, preexisting social practice saves information costs (in other words, provides the mental path of least resistance).[181] This account has to be a major driver explaining why derby girls use the Master Roster and obey its related norms: given the existence of a readily available means of name regulation, it's hard to imagine why they would take the time and trouble to use any other method, such as the costly federal trademark registration system. Indeed, derby girls who do not use the Master Roster often explain that they failed to do so only because they did not know that it existed, suggesting that the only thing standing in the way of near-total compliance is the relatively small information cost of finding out that the Master Roster is out there.[182]

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178. *See* Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 768 (1998) (propounding this theory).

179. *See* Interview with The Boogiewoman, *supra* note 41 (describing the mix of novelty and uncertainty experienced by name-choosing newbies as the "perfect recipe for obedience").

180. *See* Posting of Mercy Less to roller_girls@yahoogroups.com (July 13, 2008), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/31270 ("Please respect the fact that a girl skating under her name for 3–5 years on the national level has built a reputation you haven't put in enough work yet to understand, and it's not okay to use her exact name, even if you'll never play outside Needles, California."). These leagues usually comply once they are apprised of the importance of and procedures for proper name registration.

181. *See* STEVEN A. HETCHER, NORMS IN A WIRED WORLD 193 (2004) (propounding an epistemic theory of norm compliance).

182. *See, e.g.*, Posting of Ms. D'Fiant, Savannah Derby Devils, to roller_girls@yahoogroups.com (Mar. 8, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/6352 ("I apologize for not asking permission [to use derby names for a new league]. When we started, we were very much in the dark and now there's been so much work going into it that I'm reluctant to change. If this is a real problem, please email me and we can talk offline.").

And if these sanctions do not work, there is always the oldest form of self-help: violence.[183] Skaters have (perhaps facetiously) invoked threats of physical harm against those who fail to respect the derby world's rules and norms of name usage. As one rollergirl put it, "sure there's no laws in place—you don't even have to register your derby name—it's COURTESY. Ref might not see you smash me in the face—but I know, and trust me baby, I'm comin for ya."[184] Added another, "I totally agree with the not stealing/copying of names .... Someone once said imitation was the best form of flattery.... So flatter me and then let me kick your a$$."[185] These threats are just talk, after all, and should be taken with a grain of salt. There is no evidence (that I've seen, anyway) of a derby girl beating up someone who used her name without permission. But in a sport where skaters are skilled at using full-body blocks at high speeds in the course of competition, the idea of using violence to lay down the law against those who flout shared norms about name usage certainly does not seem completely implausible.[186]

3. Formal Law.—The foregoing system of non-state regulation comprises the nearly exclusive means by which derby girls seek to assure the uniqueness of their names. In some instances, though, rollergirls have turned to formal law as an alternative or supplemental form of protection. For example, Ivanna S. Pankin and Trish the Dish, a famous derby couple whose roots in the sport trace to its resurgence in the early 2000s, have both sought and received registration of their names on the Principal Trademark Register.[187] The pair decided to register their names not only because they are integrally involved with the derby community as active skaters for the San Diego Derby Dolls, but also because they co-own and operate a business, Sin City Skates, that connects their financial livelihood to the derby world.[188] Skaters who are featured in the Nintendo Wii game *Jam City Rollergirls*[189] had their names registered as trademarks as a result of their

183. *Cf.* ELLICKSON, *supra* note 3, at 58–59 ("Ranchers who run herds at large freely admit that they worry that their trespassing cattle might meet with violence.").

184. Posting of Dolly Destructo, *supra* note 89.

185. Posting of Bri to roller_girls@yahoogroups.com (Mar. 11, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/6522.

186. In at least one instance, a name dispute appeared to be headed toward violence, though it apparently did not go that far. *See* Posting of Ivanna S. Pankin, *supra* note 79 (recounting how Juana Beat'n and Jojuanna Beatin "were starting to make plans to meet behind the bike racks over their names").

187. IVANNA S. PANKIN, Registration No. 3,783,638; TRISH THE DISH, Registration No. 3,736,738. Texas Rollergirl Crackerjack sought trademark registration for her skate name in 2008 but was opposed by Frito-Lay (owner of the trademark in Cracker Jack popcorn candy). *See infra* note 190.

188. Interview with Ivanna S. Pankin, *supra* note 30 (explaining her and Trish's motivations for federally registering their skate names as trademarks).

189. *See Home*, JAM CITY ROLLERGIRLS, http://www.jamcityrollergirls.com/ (last updated Jan. 24, 2010) (describing the game).

involvement in a mainstream commercial endeavor.[190] Many derby leagues, such as the L.A. Derby Dolls, have sought and received trademark protection for their league names.[191] Other leagues are also registered with the appropriate state agencies as limited liability corporations.[192]

Formal law also affects derby name regulation in that skaters may find their ability to control their names limited by contract. All skaters have to sign agreements prior to being allowed to skate with their leagues, primarily to hold the leagues harmless for any physical injuries suffered in the course of competition or practice. The L.A. Derby Dolls also require participants to cede to the league the right to license the names and likenesses of skaters for film, television, or other purposes (e.g., action figure dolls, such as the popular model featuring Iron Maiven). Pursuant to this agreement, skaters get a percentage of any royalties derived from uses of their names. And at least one derby girl has successfully threatened suit for an unauthorized use of her skate name by derby outsiders. Arizona Roller Derby skater Babe Ruthless objected when she discovered that her derby moniker was to be the name of the protagonist in the film *Whip It*.[193] With some help from legal counsel

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190. These thirty registrations were all accepted, with one exception: Frito-Lay opposed the application of Texas Rollergirl (now Mad Rollin' Doll) and WFTDA president Crackerjack. *See* Justice Feelgood Marshall, *Bout Preview: Frito-Lay vs. Crackerjack*, DERBY NEWS NETWORK (Apr. 9, 2009), http://www.derbynewsnetwork.com/blogs/justice_feelgood_marshall/2009/04/bout_preview_frito_lay_vs_crackerjack (discussing Frito-Lay's opposition to Crackerjack's PTO registration). The opposition proceedings between Frito-Lay and Crackerjack are still ongoing. E-mail from Crackerjack to author (Feb. 25, 2011, 10:54 AM). The Wii game has been released, though, and Crackerjack's character appears in it merely as "CJ." *Compare Teams*, JAM CITY ROLLERGIRLS, http://www.jamcityrollergirls.com/index-2.html (listing "CJ" among the Mad Rollin' Dolls), *with Play Derby with the Dairyland Dolls—On Your Wii!*, MAD ROLLIN' DOLLS, http://www.madrollindolls.com/index.php/news-blog/297-play-derby-with-dds-on-your-wii ("Dairyland Dolls skaters and alumnae featured in the game include Chop Suzzy, Jewels of DeNile, Mouse, Carrie A. HackSAW, Vanna White Trash, and Crackerjack.").

191. The L.A. Derby Dolls is comprised of five teams, such as the Fight Crew and the Tough Cookies. The league has trademarked "Derby Dolls," DERBY DOLLS, Registration No. 3,063,277, and is working on trademarking the names of its individual constituent teams. Many other leagues, such as TXRD Lonestar Rollergirls, Minnesota RollerGirls, and Gotham Girls Roller Derby, have registered their league names as trademarks with the PTO. TXRD LONESTAR ROLLERGIRLS, Registration No. 3,147,369; MINNESOTA ROLLERGIRLS, Registration No. 3,504,624; GOTHAM GIRLS ROLLER DERBY, Registration No. 3,675,094.

192. *See, e.g.*, Posting of Abby Noxious, President, Harrisburg Area Roller Derby, to roller_girls@yahoogroups.com (Feb. 26, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/5929 (discussing the registration of Harrisburg Area Roller Derby as an LLC with the Pennsylvania Department of State).

193. *See* Posting of Babe Ruthless, Arizona Roller Derby, to roller_girls@yahoogroups.com (June 26, 2008), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/30921 (complaining that Shauna Cross, screenwriter of *Whip It*, used her name without permission and that "[o]nce this movie comes out I will look like a huge poser"). Other skaters in the thread almost unanimously responded that the use of Babe's name, even if unauthorized, would be flattering and reflect well on her (as long as the character using the name was cool). *See, e.g.*, Posting of Holly Gohardly, Coach, Charm City Roller Girls, to roller_girls@yahoogroups.com (June 27, 2008), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/30929 ("That's exciting unless the movie character is really lame, then I would really be worried.").

provided by WFTDA, Babe received some compensation from the film's production company in a confidential settlement.[194]

All of these instances of formal regulation represent attempts to protect derby girls' names and identities from infringement by actors external to the derby world. Ivanna S. Pankin registered her name as a trademark largely because she wanted to make sure that competitors outside the derby world could not free ride on her business goodwill. Babe Ruthless's concern about unauthorized use of her moniker was directed at a film production company, not at another roller derby girl. In these and other instances, the Master Roster did sufficient work to assure the skaters that no one else would compete under their derby names. It remains necessary to invoke formal law only outside contexts that, and against individuals who, are not governed by roller derby's name-exclusivity norms.

III. Labor and Love, Creation and Law: The Master Roster's Lessons for IP Regulation

This descriptive account of the roller derby name regulation system generates three categories of insights about IP norms and law. First, to the extent that the Master Roster and its related rule structure resemble other IP norm systems, it reflects on the existing accounts of why actors opt for norms rather than formal law, showing how these theories succeed and fail in accounting for the development of roller derby's nonlegal IP regulation. Second, to the extent that the Master Roster is a distinctive site of IP norm emergence, it generates insights about how and why nonlegal rules and norms develop, and are preferable to formal law, in the context of nonmarket production by identity-constitutive communities. Finally, these two themes in turn engender insights about user-generated governance systems, the increasing marginality of traditional IP, and the status of rules as law.

A. The Merits and Limits of Current Norm-Emergence Accounts

Why do some groups use norms rather than law to regulate their IP? One explanation looks to necessity. Some of the recent scholarship about IP and norms has suggested that actors employ norms when copyright, trademark, or patent law fails to offer workable ways to protect the intangible goods they create. These shortfalls may be substantive. That is, while physical property law takes pretty much any land or chattel as its object,[195] IP is more fickle. Federal copyright, for example, extends only to fixed works, excluding from its ambit of protection such obviously original and valuable

194. Because the settlement was confidential, it is unclear what form the compensation took. Interview with Hydra, *supra* note 62.

195. There are exceptions: the law still largely prohibits property in babies and organs. Kimberly D. Krawiec, *Foreword* to *Show Me the Money: Making Markets in Forbidden Exchange*, 72 LAW & CONTEMP. PROBS., at i, ii, vii–viii (2009).

works as jazz improvisation or spoken-word poetry.[196] So, the theory goes, where IP law does not apply to particular intangible goods, such as jokes or magic tricks or recipes,[197] these substantive shortfalls must be remedied by the development of corollary norms. IP law protection might also be unavailable to some groups because it is impractical. Oliar and Sprigman, for example, suggest that comedians use norms instead of law partly because enforcing copyright in jokes would be prohibitively costly (in dollars and in transaction costs).[198] In its substantive or practical variations, this intimation is a legal centralist account, one that indicates that the geography of norms is primarily determined by the unavailability of law.

A legal centralist theory of norm emergence clearly cannot explain the development of the Master Roster. Trademark or other legal rights could readily be deployed to preserve derby name uniqueness and indeed have been in some cases.[199] Nor does law's available avenue for name protection seem to create substantive rules that are ill-suited to derby girls' needs. To the contrary, the nonlegal regulatory system derby girls have created on their own actually looks quite a lot like trademark law. It employs a registration-based priority system, it focuses on likelihood of confusion when evaluating name infringement, and within that analysis, it employs many of the same considerations that courts have used to determine the presence of likely confusion. So what differentiates roller derby girls from other groups that have created extralegal systems for governing their IP is that law offers roll-ergirls a plausible avenue for protecting the IP they create. Yet despite the availability of this avenue, derby girls don't take advantage of it, at least not as a means of regulating name uniqueness among themselves.[200]

One could, of course, plausibly theorize that derby girls would like to use trademark law to protect their names but cannot because it is simply too expensive. The process of acquiring and enforcing federal trademarks would almost certainly be cost prohibitive for most rollergirls,[201] but as we have seen, the evidence gives no indication that the Master Roster developed in

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196. *See* 17 U.S.C. § 102(a) (2006) (limiting federal copyright protection to "original works of authorship fixed in any tangible medium of expression").

197. *See* Fauchart & von Hippel, *supra* note 6, at 187 (observing that formal IP law is substantively unavailable to chefs); Loshin, *supra* note 11, at 130–34 (observing that formal IP law is substantively unavailable to magicians); Oliar & Sprigman, *supra* note 8, at 1799–809 (observing that formal IP law is substantively unavailable to comedians).

198. *See* Oliar & Sprigman, *supra* note 8, at 1790 ("[C]opyright law does not provide comedians with a cost effective way of protecting the essence of their creativity."); *see also id.* at 1799–801 (outlining practical barriers to comedians' use of formal copyright law to protect their routines).

199. *See supra* notes 187–91 and accompanying text.

200. As we have seen, some derby girls and leagues have turned to trademark law in order to secure their rights against entities outside the derby world. *See supra* notes 187–91 and accompanying text.

201. *See* Interview with Ivanna S. Pankin, *supra* note 30 (suggesting that most skaters, especially younger ones, cannot justify spending their rent money on trademark filing fees and attorneys' fees).

conscious contradistinction to trademark law. To the contrary, as I explain in more detail below, its creators indicated that the Master Roster and its related norms grew up independently of, rather than as a second-best response to the absence of, available legal alternatives.[202]

Given the inadequacy of a legal centralist theory for the creation of the Master Roster, perhaps the other leading theory for the development of norms instead of law, a non-legal centralist account, can illuminate it instead. Ellickson's *Order Without Law* is the cornerstone non-legal centralist explanation for the evolution of extralegal norm systems as forms of governance. Ellickson showed that some groups, like Shasta County ranchers, develop norms independently and in complete ignorance of law, often crafting rules that are at odds with substantive law that would otherwise be available.[203] This happens, he argued, where groups are close-knit, the norms are efficiency enhancing, and the norms govern workaday matters.[204]

In some respects, this story seems to provide a sufficient account for the development of the Master Roster. Derby epitomizes the close-knit community: it is extremely insular and provides a sense of connection and a rich social network for its participants. These qualities assure that the derby world bears the core indicia of close-knit groups: that informal power and relevant information are both widely shared.[205] Name-enforcement power is widely distributed throughout the derby world, from the Master Roster's administrators at the top, through name wranglers at the league level, to individual skaters who enforce shaming sanctions at an individual level. Information about name usage is also widely shared, thanks largely to the Master Roster itself as well as to the visible mechanisms (e.g., the roller_girls Yahoo! message board) and less visible ones (e.g., a truly robust rumor mill) that enable the dissemination of information with lightning quickness.

Prevailing derby name norms also bring numerous efficiency advantages to their users.[206] Registering one's name on the Master Roster

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202. *See* E-mail from Hydra, Texas Rollergirls, to author (Nov. 21, 2011, 3:16 PM) (confirming that the founders of the Master Roster never paused to consider using trademark, or any other kind of IP law, to regulate derby names).

203. ELLICKSON, *supra* note 3, at 48–53.

204. *See id.* at 167 ("[M]embers of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another." (emphasis omitted)).

205. *See id.* at 177–78 ("A group is *close-knit* when informal power is broadly distributed among group members and the information pertinent to informal control circulates easily among them.").

206. While revealed preferences would suggest that the Master Roster is welfare enhancing, it may have some nonobvious welfare costs. First, the Master Roster's priority system rewards earlier skaters, not necessarily better ones ("better" in the sense of superior competitors athletically or more devoted in their commitment to helping to support and develop their league and the derby world generally). This time-priority structure could have the welfare-negative effect of conferring a valuable amenity (more coveted names) on less deserving skaters.

Second, the Master Roster's strict property-rule structure, which discourages sharing arrangements, may overprotect derby names. Owners tend to overvalue the goods they possess, an

saves the time, trouble, and expense of going through formal trademark-registration procedures. While registering a trademark typically costs in the neighborhood of $1,000 (inclusive of legal fees), the Master Roster requires only the trivial trouble of complying with relevant procedures and sending an e-mail. Derby's do-it-yourself name registration system also provides much lower cost enforcement, permitting skaters to cheaply and easily self-police rather than having to employ lawyers and state apparatus.[207] All of these savings are particularly salient in derby, where many participants are impecunious and would find the costs of federal trademark registration prohibitive, even if they were inclined to take advantage of it.[208]

A non-legal centralist story can do more to explain the emergence of the Master Roster than its legal centralist counterpart can. In other respects, though, it falls short. While theory works well to explain the organic development of informal norms, it cannot fully account for the emergence of formal, centrally controlled governance regimes, such as derby's name registration system. Such features include the Master Roster itself (a complex registration system requiring constant management), as well as its attendant formal rules (written instantiations of preexisting norms requiring the intervention of authority figures), neither of which have an analogue in the entirely informal governance regimes such as the ones used by comedians, French chefs, and magicians. This formal–informal dichotomy is not merely a descriptive matter. Derby name regulation requires not only an account of the spontaneous arising of informal order,[209] but also of the development of this first-level informal order into a second-level system that is centralized and formalized (i.e., written) in a way that requires the initial and ongoing intervention of creators and administrators. I explore, and seek to explain, this distinct feature of the Master Roster and its related rules in the following subpart.

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effect that may be particularly pronounced where goods are connected to owners' identities. *See* Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194–97 (1991) (describing the endowment effect). If this is true of derby names (which does not seem implausible given the intensity with which skaters respond to name infringement), then the Master Roster should seek to temper, rather than reflexively protect, derby girls' strong ownership instincts. For example, it may be more efficient for the Master Roster system to formally incorporate sharing arrangements for geographically disparate skaters rather than give derby girls property-rule-like vetoes over any similar names, regardless of context.

207. *See* Interview with Hydra, *supra* note 62 (conjecturing that rollergirls would not use lawyers to settle name disputes because it would be too expensive); *cf.* Sprigman & Oliar, *supra* note 8, at 1799–801 (arguing that practical as well as substantive concerns prevent comedians from turning to IP law).

208. *See supra* note 201 and accompanying text.

209. *See generally* 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 35–54 (1973) (discussing the spontaneous, efficient evolution of informal order).

B. *Beyond Informal Order: Explaining the Development of Formal Rules Regulating Derby Names*

The Master Roster and its attendant rules are formal principles that look very different from most of the other extralegal IP systems that other scholars have studied. Creating and maintaining this regime requires much more effort by founders and administrators than informal systems, which may arise over time, organically, and without the intervention of any member of the relevant group. Explaining the move from informal order to formal (albeit still extralegal) regulation requires examination of two questions. First, why didn't derby girls simply turn to federal trademark law when the necessity for formalization arose? And second, what moved a handful of skaters to take on the significant burden of creating and administering the Master Roster and its related rules in the absence of any monetary compensation?

1. Trademark Law's Irrelevance to Derby Norms.—Early on, it became obvious that derby's name regulation system could not depend solely on the kind of unspoken understandings that effectively governed relations between Shasta County ranchers or magicians or French chefs. Derby girls could not avoid using repetitive names unless there was a written, shared, widely available source that indicated both which names had already been taken as well as when they had been initially registered. While it might be possible for word of mouth to regulate uniqueness within individual leagues, or even within regional derby communities, when derby went nationwide and skaters began to number in the hundreds (and eventually thousands and tens of thousands), informal organization was clearly inadequate.

This moment (which occurred not long after contemporary derby enjoyed its initial resurgence) represents the threshold when some degree of formalization became necessary in order to maintain name uniqueness throughout the derby community. At this point, one obvious route for creating the kind of public, shared information about name priority would have been to require skaters to apply to have their names registered as federal trademarks. This would result in successful applicants having their skate names placed on the PTO's searchable Principal Register, enabling future skaters to figure out which names had been protected and when that protection had begun. This still suggests that a legal centralist story is plausible—that derby girls wanted to register their names with the PTO but were forced by the fees and trouble of the system to create a simpler alternative.[210]

The evidence, though, does not bear out this account. On the contrary, the developers of the Master Roster never contemplated using trademark law, creating an internal name regulation system without consciously thinking about law as a plausible alternative.[211] The overlap between some elements

210. *See supra* note 201 and accompanying text.

211. *See supra* note 202 and accompanying text.

of the derby name regulation system and trademark law—the *Polaroid* factors,[212] first-to-register priority—may at first blush seem to suggest that the Master Roster's substantive norms were intentionally modeled on federal trademark law. However, any similarity between trademark law and derby norms is likely due not to law's conscious or unconscious influence, but instead to the shared policy goals of these two bodies of law (e.g., avoiding consumer confusion) and common instincts about fairness (e.g., first in time, first in right). Most rollergirls appear to have a general knowledge that law exists and may be available to them,[213] but they tend to misunderstand law's application[214] and instead look to the derby world's internal norms when discussing name regulation.[215]

That the Master Roster emerged independently of trademark law appears to have been a product of happenstance rather than path dependence. This does not mean, though, that the derby world's system for regulating name uniqueness does not bear distinctive advantages that federal trademark law does not deliver. Using the Master Roster rather than some preset body of law allows the substantive rules and principles of derby name regulation to be created and controlled by skaters themselves. This bears a number of practical advantages. First, the informal manner in which derby girls enforce their name regulation rules creates a variety of flexible outcomes, in contrast with the binary approach of formal law, which tends to require all-or-nothing, winner–loser outcomes. Instead of issuing draconian cease-and-desist letters, derby girls can contact one another to propose, for example, geographic sharing arrangements, agreements to use conflicting names for limited times, or (in a handful of cases) sharing identical names. This flexibility and informality also makes interactions less threatening and more consistent with derby's spirit of sisterhood. And while forgoing trademark means that derby girls cannot take advantage of certain remedies available

212. *See* Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961) (outlining non-exclusive factors for consideration in the likelihood-of-confusion analysis).

213. *See, e.g.*, Posting of ifuritala to roller_girls@yahoogroups.com (Feb. 17, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/34586 (referencing the Bratz dolls case, Bryant v. Mattel, Inc., Nos. CV 04-9049 SGL (RNBx), CV 04-09059, CV 05-2727, 2008 WL 5598275 (C.D. Cal. Dec. 3, 2008), *vacated sub nom.* Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904 (9th Cir. 2010), in the context of a discussion about roller derby and noncompete agreements); Posting of Mercy, B.ay A.rea D.erby Girls, to roller_girls@yahoogroups.com (Jan. 5, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/16737 (seeking input on the process and cost of securing trademark protection for a league's names and logos).

214. *See, e.g.*, Posting of Betty.D.Bombshell to roller_girls@yahoogroups.com (Apr. 25, 2011), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/42435 (suggesting that copyright is available to protect derby names); Posting of Willy Callit to roller_girls@yahoogroups.com (Nov. 10, 2007), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/26080 (same).

215. *See, e.g.*, Posting of Paige Burner, Arizona Roller Derby, & Grace Killy, Milwaukee Rollergirls, to roller_girls@yahoogroups.com (Jan. 30, 2008), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/27440 (recounting the details of a "legal dispute" over the team name "Bruisers" that invokes only internal derby norms of fairness rather than formal IP law).

under the Lanham Act, such as money damages, these remedies are out of all proportion in relation to a skater's goal: to secure the uniqueness of her pseudonym within the derby world.[216]

Second, the organic, bottom-up character of skate name regulation allows optimization of those rules for the derby community. For example, while the considerations that derby girls use to resolve infringement in the case of name similarity look a lot like the *Polaroid* factors,[217] some of the factors used by federal courts are irrelevant (derby girls apparently pay no mind to consumer sophistication, for example), while others are applied in just the opposite manner within the derby world (some derby girls consider the low quality of the competing name to be a factor inveighing against, rather than for, infringement[218]). And while the reach of federal trademark protection is geographically limited to the United States, the Master Roster provides international rights to name exclusivity. More generally, the creation of an internal name regulation system assures that name governance will remain consistent with the distinctive values of the roller derby world.[219] The very idea of creating a name regulation system rather than using a preexisting one comports with the derby world's do-it-yourself ideology and guarantees that the instincts of rollergirls, rather than federal judges or PTO employees, will determine the outcome of name conflicts.

Finally, rollergirls prefer the Master Roster's self-created, extralegal character also because the derby world possesses both skepticism about, and sometimes even hostility toward, outsiders. Other scholarship on norm-based governance has found that insular communities tend to exhibit suspicion toward those who are not members of their group.[220] In such groups, turning to lawyers to solve conflicts may be construed either as a sign of betrayal (because it exposes the internal affairs of the group to outsiders and possibly also to state actors) or even of weakness (because it demonstrates

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216. Moreover, as I explain in more detail below, *see infra* notes 221–22 and accompanying text, engaging the apparatus of the federal judicial system would itself be offensive to roller derby's countercultural, do-it-yourself style.

217. *See supra* note 149 (discussing overlap between roller derby's informal standards for name infringement and the *Polaroid* factors for likelihood of confusion).

218. *See supra* note 161 and accompanying text.

219. *Cf.* T.D. Thornton, *Aw, Nuts: Why You Can't Give Your Thoroughbred an Obscene Name*, SLATE (Sept. 26, 2007), http://www.slate.com/articles/sports/sports_nut/2007/09/aw_nuts.html (describing the formal, extralegal racehorse name registration system that was designed, apparently without success, to eliminate tactless horse names).

220. *See, e.g.*, CSIKSZENTMIHALYI, *supra* note 57, at 91 (attributing conflicts between different groups to a human tendency to "assume that people who differ from us . . . have goals at cross-purposes from ours, and therefore must be watched with suspicion"); ELLICKSON, *supra* note 3, at 252 (declaring that when a group's legal system is controlled by outsiders, the group is likely to view the system as illegitimate, using the Muslim response to Soviet control of central Asia as an example); CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 157 (2003) (asserting that a diversity of communities "increases the likelihood of mutual suspicion" between different groups); *see also id.* at 112–13 (attributing political extremism to group polarization and the effects of psychologically separating group members from society by cultivating suspicion of nonmembers).

that you feel the need to get someone else to solve your problems for you).[221] In the highly insular world of roller derby, these effects are even more pronounced. The derby world comprises a counterculture as well as a subculture, so its members tend to have a particularly strong aversion to law and lawyers. This is because derby girls are rightly suspicious of the idea that mainstream law embodies their countercultural (and oftentimes antiauthoritarian) values and perhaps also because the paradigmatic suit-wearing, briefcase-wielding attorney is the cultural antipode of the tattoo-sporting, rebellious rollergirl.[222]

2. *Explaining Why the Master Roster Arose.*—The foregoing section explained why skaters created the Master Roster from scratch rather than using available federal law. But this still leaves us with one more puzzle: Why did the Master Roster even arise in the first instance? After all, while organic processes may cause informal norm governance to arise, this cannot explain why formal regulation systems, like the Master Roster's registry and attendant written rules, initially develop. Formal property systems, legal or extralegal, require the intervention of individual actors to distill existing shared beliefs into writing and then require continued administration and enforcement of those rules.[223]

The existence of the Master Roster presents an iteration of what Elinor Ostrom has called the problem of supply.[224] Formal property regulation systems like the Master Roster are public goods much like roads or the military: they create widely distributed social benefits that require the investment of time and effort by a number of individuals for whom the costs of their creation far exceed any marginal benefits they can extract from the system's existence.[225] This cost–benefit disparity raises a basic puzzle: Why would

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221. *See* ELLICKSON, *supra* note 3, at 60–62 (describing the "no lawsuits" norm among Shasta County ranchers); *id.* at 250–51 (describing similar norms among Maine lobstermen and Wisconsin business executives).

222. *Cf.* Posting of Busta Armov to roller_girls@yahoogroups.com (Jan. 19, 2011), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/41401 (observing the relative dearth of legal knowledge in the roller derby world and encouraging roller derby lawyers to band together to educate derby girls about IP). There are, obviously, exceptions to the rule that lawyers do not belong in the derby world, but the lawyer-rollergirls I've spoken to have mostly asked me to keep their professional status secret, which sort of proves the point. *See supra* note 61 and accompanying text.

223. *See* Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 52 (1990) (positing the necessity of "the kind of individual who has to be there to create, maintain, and protect a property regime").

224. *See supra* note 19 and accompanying text; *see also* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1245 (1968) (suggesting that the provision of public goods is impossible absent markets or the state).

225. *See* Rose, *supra* note 223, at 50 (observing that parties must give up their first-choice course of action in order to maintain a common property system); *see also* Russell Hardin, *The Free Rider Problem*, STAN. ENCYCLOPEDIA OF PHIL. (May 21, 2003), http://plato.stanford.edu/archives/fall2008/entries/free-rider/ (noting that collective action requires at least one person in the system to be "de facto altruistic").

any one individual provide such a system in the first instance? The state usually answers this problem. Public goods are typically provided by the government and funded by taxpayers (hence we have a military, roads, and a state-run system of property law and a judicial and executive apparatus to enforce it).[226] Even outside the public sphere, extralegal property systems may still arise if a group that benefits economically from the provision of extralegal regulation of information goods pays for the creation and ongoing maintenance of such a system to provide that regulation.[227] The Master Roster fits neither model, though. It evolved and continues to succeed even though derby is not a for-profit activity and even though the Master Roster's creators and administrators aren't paid a dime for their efforts.

This latter fact in particular appears to confound traditional rational-choice theory, which assumes that individual wealth maximization drives human conduct.[228] Traditional rational-choice theory obviously fails to explain why early derby pioneers Hydra, Soylent Mean, and Paige Burner created and administered the Master Roster. The time and trouble it cost them to generate this system far outweighed the value that accrued to each of them individually by securing the uniqueness of their derby names,[229] as is the case with the creation of any public good.[230] From the perspective of individual wealth enhancement, these women would have been far better off spending a grand and getting federal trademark registration, which would have been much less costly than investing an enormous amount of effort in starting and perpetuating a novel name registration regime for thousands of other skaters.

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226. *See* Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 388–89 (1954) (positing that while a market-based system could in theory achieve a similarly optimal distribution of resources as a public system, the incentive to capture selfish benefit makes optimality in a self-policing system impossible).

227. *See, e.g.*, Bernstein, *Opting Out*, *supra* note 5, at 148–50 (discussing the benefits of extralegal arbitration and contract-enforcement mechanisms in diamond trading); Bernstein, *Private Commercial Law*, *supra* note 5, at 1739–44 (noting the advantages of private arbitration and unique rules for contract enforcement in the cotton industry); Thornton, *supra* note 219 (describing the formal, extralegal system for regulating racehorse names); *see also* SCREEN ACTORS GUILD, SCREEN ACTORS GUILD MEMBERSHIP RULES AND REGULATIONS 15, *available at* http://www.sag.org/files/sag/documents/SAG_Membership_Rules_0.pdf ("It is the Guild's objective that no member use a professional name which is the same as, or resembles so closely as to tend to be confused with, the name of any other member. The Name Duplication Committee of the Guild, through consultation and mediation with the members involved, will work towards an equitable resolution of name duplication disputes.").

228. *Compare* Rose, *supra* note 223, at 39 ("[F]or property regimes to function, some of us have to have other-regarding preference orderings that the classical property theory would not predict . . . ."), *with* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3–10 (8th ed. 2011) (outlining the baseline assumptions animating rational-choice approach to legal analysis).

229. *See* Interview with Ivanna S. Pankin, *supra* note 30 (asking why Paige Burner would masochistically do so much work on the Master Roster in the absence of any obvious recompense and comparing her to Mother Teresa for her efforts).

230. *See supra* note 225 and accompanying text.

The existence of the Master Roster seems less confounding if we take a broader view of what welfare means, a view that defines the term to include any form of self-betterment, rather than just pecuniary gain.[231] People often engage in nonmarket activities in order to gain rewards that are nonmonetary but still personally valuable.[232] Members of online communities, such as Wikipedia, often contribute to the formation and content output of those communities not because they expect a financial payoff, but because they seek to have status and notoriety as big players within those insular, self-contained worlds.[233] From this perspective, it's pretty clear that working on the Master Roster enhanced its creators' individual welfare, even if it didn't enhance their individual wealth. The rollergirls who developed and maintain the Master Roster accrued a number of nonpecuniary amenities, such as power (as the gatekeepers of all skaters' names), status (recognition from any derby person who wants to register a name), and praise (which is entirely justified given their unflagging commitment and hard work).[234]

But to reduce the emergence of the Master Roster to an equation that looks solely to wealth—or even to welfare—maximization may miss the spirit of altruism that inspired its development.[235] The skaters who created

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231. *See* Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1557 (1998) (arguing that the assumption of interdependent utilities—that an actor increases his welfare by increasing that of another—can help to rationalize altruistic conduct).

232. *See, e.g.*, Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 538–47 (2003) (analyzing and explaining the emergence of altruistic file-sharing norms on peer-to-peer file-swapping networks); *see also* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 369–72 (1997) (articulating a "hero" theory of norm development in which people within a community engage in activities in order to earn status within that community).

233. *See, e.g.*, CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 141 (2008) (observing that Wikipedia "exists . . . as an act of love").

234. Countless message board posts laud Paige Burner and Soylent Mean, as well as Hydra before them, for taking on the burden of creating and maintaining the name registration system. *See, e.g.*, Posting of Cargarza777, Arizona Roller Derby, to roller_girls@yahoogroups.com (Feb. 3, 2006), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/5069 ("Paige you're AWESOME . . . and you work so damn hard!"). Paige Burner in particular made truly Herculean efforts toward the end of her tenure as the Master Roster's administrator, spending as many as forty hours a week outside of her work obligations to review and register names—even though she had long since retired as an active skater for Arizona Roller Derby. *See* Interview with Hydra, *supra* note 62 (explaining how much time Paige was spending on the Master Roster around that period).

235. The meaning—and existence—of altruism is hotly contested. *See* Hila Keren, *Considering Affective Consideration*, 40 GOLDEN GATE U. L. REV. 165, 192–93 (2010) (reviewing opposing viewpoints in the "monumental literature" on the existence and nature of altruism). Here, I invoke the idea of altruism to refer to acts performed largely out of concern for others or for some external cause, rather than solely to better oneself. The line between self- and other-regarding preferences is concededly blurry, since many people—such as derby girls—may contribute to a community both because they want to enhance that community and because they believe their actions will redound to their individual benefit (e.g., by earning subcultural status or praise). This is consistent with the growing consensus in the psychological literature, which acknowledges at least some place for altruism in human motivation. *See* Jane Allyn Piliavin & Hong-Wen Charng, *Altruism: A Review of Recent Theory and Research*, 16 ANN. REV. SOC. 27, 27 (1990) (noting this growing consensus).

and maintain the Master Roster did so to a large degree not because they were seeking some monetary or hedonic payoff but because they wanted to enhance the derby world itself. Regulating derby names did more than merely coordinate conduct; it enhanced and contributed to the community that comprises the heart of roller derby. The Master Roster replaced name conflict and confusion with coordination and collaboration. And by encouraging individual interaction as the primary means for name-conflict resolution, it channeled disputes into personal conversations that sometimes resulted in friendly resolutions—and outright friendships—that are part of the glue that holds the derby world together.[236] Moreover, the substantive choices made by the Master Roster's creators and administrators help reflect and reinforce the values of the derby world. The Master Roster rewards and incentivizes ingenuity (in rewarding those who first think of names), encourages self-actualization (by delegating enforcement to league name wranglers and individual rollergirls), and models the kinds of values that the derby community ideally seeks to realize (information sharing, volunteerism, collaborative creation).[237]

This explanation questions, but does not undermine entirely, rational-choice accounts of how and why property systems arise. Rather, it is an explanation that looks to a richer notion of how individuals derive value from the work they engage in and what motivates us to work at all. Numerous scholars have challenged the long-standing assumption that people work only in exchange for tangible rewards. This traditional cost–benefit approach makes sense only in a commercial setting, where actors are presumed to be sharp-dealing individualists who are always seeking to maximize their wealth at each other's expense. By contrast, though, in many other settings, social rather than market norms are at play, and actors are motivated not by accumulating dollars but by a sense of altruism and similar other-regarding preferences.[238] This is why, for example, it's appropriate to pay for your

236. On occasion, a name dispute can transition into a friendship. *See, e.g.*, E-mail from Fighty Almighty, Rat City Rollergirls, to author (Oct. 9, 2008, 9:26 PM) (forwarding January 2006 correspondence between Mighty Aphrodite of the Lonestar Rollergirls and the then-named Fighty Aphrodite of the B.ay A.rea D.erby Girls concerning a heated dispute over their derby names); Posting from Fighty Irish, *supra* note 157 (admitting fault in the dispute for "not read[ing] the roster closely enough"); E-mail from Fighty Almighty to author (Oct. 9, 2008, 9:35 PM) (forwarding April 2007 correspondence between Fighty Almighty and the Cape Fear Roller Girls defending Mighty Aphrodite's name on Mighty's behalf); and E-mail from Fighty Almighty to author (Oct. 9, 2008, 9:33 PM) (forwarding March 2007 correspondence between Mighty Aphrodite and the renamed Fighty Almighty in which the two expressed camaraderie over the enforcement of naming rights and planned to meet socially in Austin, Texas). *Cf.* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 178 (2006) (arguing that antidiscrimination law should be structured to encourage employers and the state to engage in constructive dialogue with employees about termination and discipline decisions).

237. *Cf.* Rose, *supra* note 223, at 56–57 (arguing that the theoretical underpinnings of a property law regime convey a narrative that both speaks to and constitutes a moral community).

238. *See* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 75–82 (rev. ed. 2009) (comparing market norms and social norms).

meal at a restaurant but not to fork over $100 to reimburse a friend as you leave his or her dinner party.[239] Yochai Benkler has invoked this insight to help explain the remarkable productivity of networked creation on the Internet.[240] Such creation, he suggests, occurs at least in part due to the power of nonmonetary incentives, whether fame within a particular community or an altruistic desire to enhance a community in which a person feels deeply and individually invested.[241]

The Master Roster is clearly a product of social rather than market norms. Its developers and administrators were inspired to create it not because they wanted to make a buck[242] but for the same reason that derby girls (and guys) spend their free time volunteering for the sport: because they are deeply individually invested in the sport and want to contribute to building the derby community and making it better. That the Master Roster's creators and administrators received no monetary recompense may thus actually help to explain, rather than confound, the creation of the derby name regulation system. Research has shown that actors often do more and better work when they are not financially compensated (at least as compared to how they do when offered moderate, rather than exorbitant, compensation).[243] This appears to be because the absence of payment forces our conduct to be framed in terms of altruism and community betterment, which can be more compelling forces than a salary.[244] Related work has found that where actors feel personally invested in their work, the sense of identity enhancement they derive from that work is a much more powerful driver of efficiency than salaries.[245] The identity-constitutive character of the

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239. *Cf.* Carol M. Rose, *Whither Commodification?*, *in* RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 402, 409 (Martha M. Ertman & Joan C. Williams eds., 2005) (observing that it is socially acceptable to bring a bottle of wine to a friend's dinner party but that to bring the equivalent amount in cash would cause serious offense).

240. *See* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 92–97 (2006) (referring to examples such as blood banks and amateur sports as helping to explain nonmarket peer production in networked settings).

241. *Id.*

242. And they may have been able to do this, for example, by charging rollergirls or leagues a reasonable fee to register their names on the Master Roster. Some derby girls have suggested that they would be happy to comply with such a system. *See* Posting of Ivanna S. Pankin to roller_girls@yahoogroups.com (May 15, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/35430 (proposing, and finding widespread support for, a $1 fee to register names).

243. *See, e.g.*, ARIELY, *supra* note 238, at 79 (noting that the same group of lawyers who refused to help the elderly for $30 per hour agreed to do so a year later on a purely volunteer basis); *see also* John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT. L.J. 203, 204–05 (2008) (pointing out the number and quality of creative works produced with no commercial motivation).

244. *See* ARIELY, *supra* note 238, at 94 ("Money, as it turns out, is very often the most expensive way to motivate people. Social norms are not only cheaper, but often more effective as well.").

245. *See* AKERLOF & KRANTON, *supra* note 21, at 42–43 (noting that "insiders" who identify with their firms do not need monetary rewards to induce them to work hard, but "outsiders" need

Master Roster's creation is particularly pronounced because skate names are a central part of derby girls' subcultural (and personal) identities.[246] More generally, though, the Master Roster is simply one instance of roller derby's volunteerist ethic, in which everyone who is a part of the community contributes her time for love, not for money.

C. *Beyond Law and Norms: More Lessons Law Can Learn from Roller Derby*

It is not new that people often act from motivations more obscure than external rewards. To take just one example, property scholars have investigated the motivations underlying gift economies for some time.[247] Nor is it new that regulation takes place outside the context of formal law. Numerous scholars have provided thick descriptions of informal, norm-based regulation systems. Lisa Bernstein, for example, famously chronicled the elaborate and long-standing formal systems of extralegal dispute resolution employed by Amsterdam diamond merchants and Memphis cotton traders.[248] But roller derby's Master Roster does not fit squarely within any of these accounts. It is a formal system that arose in the absence of market forces or the state, posing a particularly difficult iteration of the problem of supply.

As I discussed above, solving this novel problem requires us to relax traditional rational-choice assumptions about what moves people to engage in labor. Numerous scholars have investigated the proliferation of Internet-based production in the absence of traditional motivations.[249] The prevalence of user-generated content (UGC) such as group weblogs or fan fiction or aggregated opinion (e.g., Yelp!) is familiar. Less familiar is the category illustrated by the Master Roster: user-generated governance system(s) (UGGS). Explaining the emergence of UGGS raises a harder problem than explaining the emergence of UGC. After all, people may write a blog because they love writing or because they want fame or attention. But why would people create the system that enables UGC to be created? There is at least one other highly salient example of a UGGS that helps to develop a conjecture for why such systems emerge.

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wages to compensate them for their "loss in identity utility"); *cf.* DANIEL H. PINK, DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US 88–92 (2009) (extolling "autonomous motivation" as a means of enhancing output and increasing well-being).

246. *Cf.* Heymann, *supra* note 63, at 445 (observing that names are primary indicators of, albeit separate from, personal identity).

247. *See, e.g.*, Michael G. Flaherty, *The Gift Economy*, 68 SOC. FORCES 650, 650 (1989) (book review) (noting that gift economies are motivated by a desire for "the social construction of intimacy and community" as opposed to more tangible economic factors).

248. *See supra* note 5 and accompanying text. Much the same may be true in the context of intangible goods, where members of the Screen Actors Guild and owners of racehorses also opt for their own governance systems rather than the ones law provides. SCREEN ACTORS GUILD, *supra* note 227; Thornton, *supra* note 219.

249. *See, e.g.*, *supra* notes 232–33 and accompanying text.

The well-known online encyclopedia, Wikipedia, not only provides objective content about the world but also has its own elaborate system of governance that, like the Master Roster, was developed and continues to be administered entirely by volunteers.[250] Wikipedians and derby girls have more in common than one might expect. Both groups consist of a networked community that is distributed physically but woven together by a common interest. The intensity with which Wikipedia's members share their idiosyncratic interest makes their community close-knit in a social, if not a physical, way.[251] Moreover, Wikipedians and derby people alike share a deep sense of personal investment in their work, so that their contributions to the good governance of that world enhance not only their beloved subculture, but also their own identities.[252] Finally, members of both groups contribute to community governance not because they fear coercion or for some monetary reward, but because of some less tangible motivation—perhaps, one could say, for love. The commonalities between these two groups indicate that UGGS tend to develop spontaneously to govern the nonmarket production of IP by identity-constitutive communities. This in turn suggests a more textured answer to the familiar problem of supply. Public goods arise not only when the state mandates them or when interested parties will pay for them, but also when they are labors of love.[253]

This study of the Master Roster not only adumbrates the story of why property systems emerge but also contributes to a growing critique of how IP regulation should be constructed. The skaters who created the Master Roster did so in the absence of pecuniary motivation. Indeed, the entire derby world arose in the absence of traditional profit motivations. All the parts of the derby world, from uncopyrightable elements like live sports performance, to

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250. *See* David A. Hoffman & Salil K. Mehra, *Wikitruth Through Wikiorder*, 59 EMORY L.J. 151, 157 (2009) ("Wikipedia remains a site largely run and created by volunteers.").

251. *See* BENKLER, *supra* note 240, at 72 (arguing that Wikipedians comply with the site's rules because they share "a dedication . . . to objective writing" and appreciate "open discourse . . . aimed at consensus").

252. The nomenclature used by members of each group to describe themselves illustrates the point. To take one of about a million examples, consider a blog post, entitled "I'm a Derby Girl," from a woman describing her decision to join a league. *I'm a Derby Girl*, HOPENMINDED.COM (Nov. 9, 2009, 12:10 PM), http://hopenminded.com/2009/11/09/im-a-derby-girl/. Similarly, those who contribute substantially to Wikipedia refer to themselves as "Wikipedians." Wikipedia, *Wikipedia: Wikipedians*, http://en.wikipedia.org/wiki/Wikipedia:Wikipedians (last modified Feb. 10, 2012); *see also* Wikipedia, *Motivations of Wikipedia Contributors*, http://en.wikipedia.org/wiki/Motivations_of_Wikipedia_Contributors (last modified Feb. 15, 2011) (recounting that a common theme among anecdotal testimonials of people who contribute to Wikipedia is that they enjoy "being part of the Wikipedia community").

253. *See* Hoffman & Mehra, *supra* note 250, at 208 (observing that in addition to Adam Smith's traditional dichotomy between market exchange and state coercion as primary drivers of action, "[i]n our user-generated world, we might add labors of love"). What constitutes a "labor of love" is elusive. One way to think about it would be that labors of love are those which confound the traditional rational-choice notion that we work in exchange for some recompense, monetary or otherwise. Labors of love can't be explained by this equation because cost and benefit collapse into one—the labor *is* the reward.

those subject to trademark protection like derby names, to those that are copyrightable like original team logos, have this feature in common: they were made with no (or at least very little) profit as their core motivation. Much creation, especially on the Internet, happens in the absence of traditional pecuniary motivation. This point is so familiar that Samuel Johnson's famous dictum—"No man but a blockhead ever wrote, except for money"[254]—is valuable only to illustrate that even august men of letters can utter complete drivel at times.

But while nonfinancial motivations for creation have long been recognized, they have also been dismissed as marginal, rather than central, to a dominantly financial story of why creation happens. The Constitution itself suggests that a utilitarian quid pro quo lies at the heart of creators' and inventors' motivations,[255] and leading IP commentators continue to accept uncritically this standard incentivist account.[256] But critics of this approach increasingly suggest that shared infrastructure and altruistic motivations lie at the heart of, rather than as a mere sidelight to, the story of IP production.[257] Much IP production would not be possible without infrastructure resources that are best managed as commons, such as essential facilities, basic scientific research, and the Internet itself.[258] And the advent of the Internet has also exposed, and perhaps even fueled, the extent to which nonmarket production is a primary, rather than an incidental, contributor to our cultural environment.[259]

One might rightly answer: So what?[260] Extralegal regulation has long existed comfortably alongside legal regulation for centuries, and courts have

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254. 2 JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON, LL.D. 14 (Oxford Univ. Press 1904) (1791).

255. *See* U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power "[t]o 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").

256. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 40–41 (2003) (expounding this traditional economic account of copyright).

257. *See* YOCHAI BENKLER, THE PENGUIN AND THE LEVIATHAN: THE TRIUMPH OF COOPERATION OVER SELF-INTEREST 169–201 (2011) (illustrating the interplay between pecuniary motivations and intrinsic motivations and how they influence people's actions); Brett Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 974–78 (2005) (making the case that open-access infrastructure allows the freer production of goods and releases the market and government from having to "pick[] winners"); *cf.* Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89, 102–05 (2003) (questioning whether "the whole realm of intellectual endeavor [should] be considered" a public domain because of the degree to which intellectual creations are synergistic and rely upon each other).

258. *See generally* Frischmann, *supra* note 257 (outlining the positive externalities generated by a commons system in managing policy regimes, including intellectual property).

259. *Cf.* BENKLER, *supra* note 257, at 169–201 (arguing that nonmarket motivations, in addition to economic self-interest, can be a driver of human action or economic production).

260. *See* Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 CARDOZO L. REV. 1437, 1447–65 (2010)

developed bodies of law to mediate the extent to which law should stay separate from or incorporate customary norms.[261] And the existence of authors who wrote for a living has not stopped other authors from writing for other reasons, as the fact that Mark Twain and Emily Dickinson were contemporaries illustrates.[262] I think this dismissal of the issue is too sanguine for several reasons. First, as nonmarket production begins to approach, or even overwhelm, the level of traditional market-based production, the potential for conflicts between them arises. This potential has already been realized in the derby setting, where commercial leviathans Frito-Lay and Starbucks have pursued (or at least threatened) trademark actions against derby teams and girls.[263] However these cases may be resolved, the conflict is an ill-fitting one because the mark owners and the derby users are seeking very different things—securing economic monopoly on the one hand, and self-expression and identity on the other. And even in the absence of this practical concern, there is something concerning about the increasing likelihood that the foundation of our blackletter IP law is premised on an empirical fact about motivation that does not match the way much (even if not all) modern creative production actually happens. This concern is magnified by findings that market and nonmarket incentives tend to trade off with one another in a zero-sum manner rather than existing in equilibrium.[264]

Finally, this story about regulation within the roller derby world is also a story about sports, law, and what the former can tell us about the latter. The idea that sports and law are connected is familiar in one sense. The field

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(identifying several practical and normative barriers towards widespread intellectual production outside of the normal IP regime but ultimately concluding that society should "modify the current legal regime so that it can foster intellectual production in both [IP and open] environments simultaneously").

261. *See, e.g.*, Ghen v. Rich, 8 F. 159, 159–62 (D. Mass. 1881) (using New England whaling customs to resolve a dispute about found property). The secondary literature on custom's relationship to law is too large to be catalogued here. For an interesting and relevant discussion, compare Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1980–82 (2007), resisting the use of custom in copyright, with Richard A. Epstein, *Some Reflections on Custom in the IP Universe*, 93 VA. L. REV. IN BRIEF 223, 225–29 (2008), defending the use of custom in copyright.

262. Mark Twain was first published in 1851. RON POWERS, MARK TWAIN: A LIFE 55 (2005). He frequently received payment for his works and lectures. *See* JEROME LOVING, MARK TWAIN: THE ADVENTURES OF SAMUEL L. CLEMENS 172 (2010) (enumerating in detail Twain's payments for his writings in the early 1870s). During the same period as Twain, Emily Dickinson continued to write even though her works were largely unpublished and thus she was unpaid. *See* POLLY LONGSWORTH, THE WORLD OF EMILY DICKINSON 1–4 (1990) (describing Dickinson's early poetry studies in the 1850s and ultimate lack of publication before her death).

263. *See supra* notes 48, 190.

264. *See, e.g.*, ARIELY, *supra* note 238, at 78–80 (discussing an experiment in which subjects who were asked to perform a task as a favor to the researchers worked harder than subjects who were paid fifty cents to perform the same task and explaining that the paid subjects did not think of themselves as doing a favor *and* getting paid, because once market incentives entered the picture, social incentives were pushed out).

of "sports law" has enthusiasts throughout academia and practice. As it's currently understood, though, sports law is about how law (torts, contracts, IP) applies to sports. A related, but virtually untouched, line of inquiry is what the regulation of sports tells us about law. Some philosophers have used sports to exemplify general theories. Rawls, for example, used baseball to illustrate his practice conception of rules.[265] But the possibility that the rule systems that govern sports may tell us something about state-created legal regimes has largely remained ignored by scholars engaged in legal philosophy.[266]

Roller derby's regulation of skate names raises at least one issue that reflects on the nature of law more generally. Throughout this Article, I have contrasted derby's "norms" or "rules" with IP "law." I am not alone in doing this. This linguistic distinction pervades both the traditional work on social norms as well as the more recent literature about IP's negative space.[267] Even skaters themselves are well aware that the Master Roster does not trigger state-enforceable rights as trademark and copyright would, and they refer to the Master Roster and its attendant rules as not "legal."[268] Yet this well-accepted distinction warrants interrogation.[269] An entire field of study—analytical jurisprudence—has developed to evaluate what it means for a rule to be law, and space constraints mean that I can only gesture at this issue, rather than addressing it in anything like complete detail.[270] That said, we can plausibly examine this question using Bentham's account of the essential features of law[271]: law must regulate behavior, be enforceable, and

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265. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 25 (1955).

266. *See* Mitchell N. Berman, *"Let 'em Play": A Study in the Jurisprudence of Sports*, 99 GEO. L.J. 1325, 1329–31 (2011) (discussing the lack of interest in sports as an object of study among legal philosophers). Berman's work is a welcome exception to this general rule that legal scholars are uninterested in sports' lessons for law. *See generally id.*; *see also* Mitchell N. Berman, *Replay*, 99 CALIF. L. REV. 1683, 1730–36 (2011) (drawing from football replay practices an argument that juries finding for acquittal in criminal cases should have to choose between two verdicts—not guilty and not proven—as is the case in Scots law).

267. *See, e.g.*, ELLICKSON, *supra* note 3, at 52–53 (suggesting that "norms, not legal rules," are central to dispute resolution among Shasta County ranchers); Loshin, *supra* note 11, at 134–35 (contrasting magicians' use of norms to protect their IP with IP law, which is substantively unavailable to the magicians); *supra* note 10 and accompanying text (introducing the term *negative space*).

268. *See supra* notes 176–77, 184 and accompanying text.

269. Thanks to my colleague John Tehranian for pushing me to investigate the coherence of the law–norm distinction in this setting.

270. Cornerstone works on this centuries-old debate include JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (London, John Murray 1832), RONALD DWORKIN, LAW'S EMPIRE (1986), and H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

271. This is far from the only way to think about this issue. See the sources cited in note 260, *supra*, for an illustration of alternative perspectives. I use Bentham's formulation merely as a helpful framework to illustrate the complexity introduced by asking whether derby's Master Roster is law. For a good recent overview of the major strains within analytical jurisprudence (as well as a critique of them and a countertheory), see SCOTT J. SHAPIRO, LEGALITY 193–233, 282–306 (2011). *See also* Ian P. Farrell, *On the Value of Jurisprudence*, 90 TEXAS L. REV. 187 (2011) (reviewing SHAPIRO, *supra*).

enjoy legitimacy.[272] In light of these criteria, though, one may well ask how the derby name regulation system is *not* law. It incentivizes a series of desired social practices and deters undesirable ones. It is written down in a central location that allows skaters to have a shared understanding of its content and allows skaters to determine what conduct is permissible. It comes with a series of sanctions that relevant actors understand and comply with. And it has enough legitimacy that the relevant group takes it seriously and obeys it almost without exception.

A familiar colloquial distinction between formal rules and law is that the latter emanates from the state and carries the force of coercive sanctions by government actors. Observers of informal IP norms have suggested that norms may determine *behavior* but that they only become *law* when adopted by state actors.[273] But this only pushes the question back one level: why should we regard state origination as law's primary definitional criterion? A typical answer is that rules emanating from government have breadth and (at least in democratic countries) legitimacy that informal rule structures do not.[274] And yet roller derby (and other subcultures obedient to extralegal rules, such as Wikipedia or even the world of racehorses) confounds this instinct about legitimacy. If anything, derby girls have more respect for and deference to their own do-it-yourself rules than to state-imposed law, toward which their antiauthoritarianism generates skepticism.[275]

As the foregoing discussion illustrates, whether roller derby's Master Roster is law is a complex question that can't be resolved in this brief discussion, not least because it depends on contested visions of what it means for a system of rules to be law. But I do want to suggest one variation on this inquiry that might shed some light on how we think about this issue more generally. I've been asking whether derby's Master Roster is law, much as analytical jurisprudes tend to seek some intrinsic quality that some rule systems share in common that make them law, while differentiating other rule systems that lack that quality as not-law. Scott Shapiro called this the

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272. *See* JEREMY BENTHAM, OF LAWS IN GENERAL 1–17 (H.L.A. Hart ed., 1970) (defining a "law").

273. *See, e.g.*, Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 949 (1997) (suggesting that laws are only necessary where social norms fail to function efficiently); *cf.* Henry E. Smith, *Does Equity Pass the Laugh Test?: A Response to Oliar and Sprigman*, 95 VA. L. REV. IN BRIEF 9, 12–13 (2009) (analyzing whether the IP norms of stand-up comedy should be incorporated into law).

274. *See* Allan Ides, *Judicial Supremacy and the Law of the Constitution*, 47 UCLA L. REV. 491, 494 (1999) ("To be treated as a law, the order must have a claim to authority that society recognizes as legitimate. In a representative democracy such as ours, this means that the order must emanate from an institution of government with the accepted authority to impose the order, and it must be produced by that institution through a manner in which the institution is authorized to proceed.").

275. *Cf.* Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 173, 239 (2002) (observing that the public often regards plagiarism norms as more legitimate than intellectual property laws).

"Identity Question."[276] He explains that "What is law?" can be understood "as a search for the identity of law" and that "the task is a taxonomical one. When we say that a given rule is a legal rule, what makes it a *legal* rule, and not a rule of etiquette, chess, Catholicism, Microsoft, morality, or my friend's conception of morality?"[277]

This version of the Identity Question divides rule systems into a neat binary, where some rule systems are law and others are not. What I want to at least gesture at briefly before concluding is whether the binary law–not-law distinction may be the only—or even the best—way to think about this question. One alternative might be to abandon the search for a Platonic feature that makes a rule system *law*, and instead to identify a series of features that can make rule systems more or less law-like. Instead of asking "Is the Master Roster law?" we might instead inquire, "To what extent does the Master Roster possess qualities of law-iness?"[278] This approach would abandon the cleanliness of analytical jurisprudence's identity question, which sharply sorts the world into law and not-law systems. But considering law (or law-iness) a quality that systems can possess with matters of degree, rather than something that exists as a binary presence or absence, might be more descriptively accurate, and possibly more useful, given the complexity and range of rule systems that populate our cultural ecology.

Conclusion: The Twilight of Derby Names?

The story of derby name regulation may be reaching its end, even as roller derby itself appears to be growing inexorably. It is this growth that has threatened the viability of the Master Roster and the current name regulation regime in two ways. First, as derby girls begin to number in the thousands, and possibly soon the tens of thousands, their sheer volume may overwhelm the capacity of the volunteers who administer the Master Roster.[279] Even as

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276. SHAPIRO, *supra* note 271, at 8.

277. *Id.* at 12; *see also id.* at 10–12 (discussing the nature of "What is law?" in more detail).

278. *Cf. The Colbert Report: The Word—Truthiness* (Comedy Central television broadcast Oct. 17, 2005), *available at* http://www.colbertnation.com/the-colbert-report-videos/24039/october-17-2005/the-word---truthiness (coining and defining the term *truthiness*). Apologies to Stephen Colbert. Not that he's ever going to read this footnote.

279. *See* Posting of Minimum Rage, *supra* note 79 (suggesting that the volume of names created by derby's substantially increased popularity renders the current Master Roster structure untenable). This debate continues at the time of this Article's publication. Some skaters are so upset with ongoing delays in name registration that they want to abandon the Master Roster altogether. *See, e.g.*, Posting of Froggybluesock to roller_girls@yahoogroups.com (Apr. 25, 2011), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/42436 ("[The Master Roster] works? We're certainly not dealing with the same website. I don't discredit the amount of work that [the Roster administrators] are dealing with, but the fact is that this system is broken. If I can skate under one name [f]or 8 months to be rejected because a name was approved six months into my wait time? [sic] I'm sorry, I'll keep my name and go unregistered, but thanks."). Other derby girls warn that such abandonment could portend disaster. *See, e.g.*, Posting of Betty.D.Bombshell, *supra* note 214 ("Once we as [a] sport abandon the [Master Roster,] it will do

of late 2009, there was a massive backlog of registrations pending because the quantity of applications simply couldn't be processed.[280] This happened despite the fact that the Master Roster's main administrator, Paige Burner, worked tirelessly in her spare time, and on a pro bono basis, to keep up with the onslaught of submissions.[281] As a result, derby bigwigs have contemplated schemes that might ease the burden on the current system. One option would be to increase the automated character of the system, so that skaters (or, more plausibly, name wranglers) could register names themselves rather than having an administrator review each name independently.[282] For example, names with a low degree of similarity to preexisting names could be automatically registered, while names with a high degree of similarity to preexisting names could be automatically rejected. This approach would narrow considerably the number of proposed names that the administrators have to vet. Another, simpler way to winnow down the workload for the Master Roster's administrators would be to charge leagues (or skaters) a nominal fee to register their names.[283] Even a $10 registration fee per name would eliminate some of the nonserious requests, but this fee hardly seems high enough to exclude skaters who are impecunious.[284] Yet none of these reforms have caught on, and numerous leagues have begun to ask whether the enormous

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irreparable damage to the tradition of derby names. . . . [The Master Roster's] place in the history of modern derby is never going to be duplicated.").

280. *See* Posting of Grace N Motion, Reno Roller Girls, to roller_girls@yahoogroups.com (Oct. 7, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37036 (indicating about a six-month backlog of name registration).

281. *See* Posting of Ivanna S. Pankin to roller_girls@yahoogroups.com (Dec. 3, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37758 (observing that Paige Burner was spending eight hours per day working on name registration in late 2009). At the end of 2010, Paige Burner finally stepped down as the Master Roster's administrator, and her responsibilities were taken up by a derby girl who used to go by Metal Vixen but now—irony of ironies—is one of the small number of skaters who competes under her real name. Telephone Interview with Elaina B., Lehigh Valley Rollergirls (Apr. 26, 2011). In the first several months of Elaina's work on the Master Roster, she was able to reduce the registration backlog significantly. *Id.*

282. *See* Posting of Ivanna S. Pankin to roller_girls@yahoogroups.com (Dec. 4, 2009), *available at* http://sports.groups.yahoo.com/group/roller_girls/message/37789 (discussing options for automating the Master Roster). This approach might also provide an interesting entry point for crowd sourcing. Names that are neither strongly similar nor dissimilar to preexisting ones could be evaluated for excessive similarity by the entire derby community, such as by posting proposed names on a public list for all to review. One approach would be to have names that were not objected to after one month become valid names. Interview with Hurt Reynolds, *supra* note 86.

283. *See supra* note 242. Monetizing the Master Roster could, however, undermine its success by making it seem like a for-pay chore rather than a labor of love. *See* PINK, *supra* note 245, at 37 ("[R]ewards can perform a weird sort of behavioral alchemy: They can transform an interesting task into a drudge. They can turn play into work.").

284. At least one skater has even advocated a Thunderdome-style battle to the death at the annual RollerCon between skaters who are disputing similar names. Posting of Chrome Molly, *supra* note 149. I'm pretty sure she was joking.

difficulties associated with name regulation are worth the fun of having skaters compete under fanciful pseudonyms.[285]

But derby's extralegal system of name regulation might evaporate for a different reason. Many influential members of the derby community believe that the sport can find mainstream appeal, so that it becomes a full-fledged professional sport rather than an extracurricular pastime. Fanciful pseudonyms may represent a hurdle to the professionalization of derby to the extent that they may cause the sport to be treated as a silly entertainment rather than a serious athletic endeavor.[286] A related concern is that derby names preclude skaters from receiving the individualized recognition that their excellence merits because it hides their real identities.[287] If derby were to become fully professional, the practice of skating under pseudonyms might die out completely. After all, using derby names is central to the sport's countercultural character, and many skaters who want derby to have mainstream popularity think that skate names are one of the main features preventing the general public from taking it seriously. But even if derby did become professional while also seeking to maintain its use of pseudonyms, this could undermine the Master Roster regime for a separate reason. Were the sport to be governed by profit rather than community norms, the informal organization and shaming sanctions that currently assure name uniqueness may well fall by the wayside. A highly capitalized professional derby league could withstand the costs of widespread trademark registration, infringement suits, and contractual rights limitations that are unheard of in derby at present.

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285. The Sockit Wenches of Seattle's Rat City Rollergirls seriously considered skating under their government names in 2011 because of the difficulty of securing and maintaining pseudonyms. E-mail from Fighty Almighty to author (Feb. 14, 2012, 9:39 PM). Their attempt was discouraged by the league, which cited privacy of rollergirls and confusion of fans as their main objections. *Id.* Ultimately, the Sockit Wenches ended up using skate names, like the rest of RCRG. *Id.*

286. As one skater observed,

> I'm not in love with [derby names] anymore because they are a bastion of the old days when it was all performance and not a sport. It's amazing that we still have to contend with that perception but we do. I watch a lot of derby online. And when you're watching it on a screen and the whole thing is very professional, the names stick out and seem silly. Down with derby names!

E-mail from Mickispeedia to author (Oct. 12, 2011, 2:58 PM). Momentum for the professionalization of roller derby is gathering. *E.g.*, Suicide Seats, *Voices from the Stands: Is Professional Derby Closer than We Think?*, ROLLER DERBY INSIDE TRACK (July 27, 2011) http://www.rollerderbyinsidetrack.com/2011/07/voices-from-the-stands-is-professional-derby-closer-than-we-think/. Enthusiasm for this outcome is widespread but not universal. Some derby skaters would prefer that the sport remain insular and community-oriented. *See* E-mail from Fighty Almighty to author (Feb. 16, 2012, 4:22 PM) (suggesting that despite what most skaters say "out loud," in truth many of them "don't want the sport to go pro . . . because only an elite few would actually MAKE a pro team").

287. This is at least part of the impetus for many derby girls' skating under their government names—they want people to recognize them for their excellence, not to associate their feats with some mysterious pseudonym. *See supra* note 71.

Derby name regulation is only one part of the overarching narrative of roller derby's resurgence as an all-girl amalgam of rock-and-roll and full-contact sport. The women (and, it should be said, men) who have contributed to this development since the early 2000s combined vision, ingenuity, and an enormous amount of hard work to invent a cultural phenomenon and a subculture unlike any other. The Master Roster and its related rules comprise a story within this story, one bearing lessons for the study of law, social norms, IP, and property. Roller derby's name regulation system causes us to question prevailing legal centralist theories for IP norm emergence. It also suggests a conjecture explaining the development of user-generated governance systems in nonmarket settings. It suggests a richer answer to the problem of supply and adds a note to the growing sense that an IP system based on pecuniary considerations is ill fitting in a cultural milieu increasingly dominated by nonmarket forces. It even reflects on the nature of what it means for a regulatory system to be law. All this reminds us of the possibility that lessons about law may be found not only in libraries and courtrooms, but also in sporting venues, roller rinks, and other places where we are least likely to expect them.

The Myth of the Customary Law Merchant

Emily Kadens*

Legal scholars from many disciplines—including law and economics, commercial law, and cyber law—have for decades clung to the story of the so-called law merchant as unassailable proof that private ordering can work. According to this story, medieval merchants created a perfect private legal system out of commercial customs. As this customary law was uniformly and universally adopted across Europe, it facilitated international trade. The law merchant myth is false on many levels, but this Article takes aim at two of its fundamental principles: that uniform and universal customary merchant law could have existed and that merchants needed it to exist. The Article argues that the most widespread aspects of commercial law arose from contract and statute rather than custom. What custom the merchants applied often did not become uniform and universal because custom usually could not be transplanted and remain the same from place to place. Yet, the use of local custom did not hamper international trade because intermediaries such as brokers ensured that medieval merchants had no need for a transnational law.

Advocates of private ordering have fallen in love with the Middle Ages. Scholars in fields ranging from domestic and international sales law, cyber law, law and economics, sports law, and aviation law, as well as judges and casebook authors have made the medieval law merchant into the archetypal sophisticated legal system that private groups can create when not impeded by the intermeddling of the state.[1] In the mercatorists'[2] retelling, the law

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1. There is an enormous literature in the various legal fields that has borrowed the law merchant theory, even excluding references merely to the "new" law merchant. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004) ("The law merchant emerged from the customary practices of international traders . . . ."); Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 635 (7th Cir. 2010) (Posner, J., concurring) ("The common law of contracts evolved from the law merchant . . . ."); U.C.C. § 1-301 cmt. 3 (2001) ("Application of the Code . . . may be justified . . . by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries."); IAN AYRES & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 2, 6 (7th ed. 2008) ("Based upon the customs of merchants, and strongly impressed by an international character, the Law Merchant existed as a body of rules and principles pertaining to merchants and mercantile transactions, distinct from the ordinary law of the land."); BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE 30–36 (1990) (supporting libertarian political–economic policy with the law

merchant evolved from merchant practices, as traders experimented to find the most efficient commercial methods. Bubbling up from below and

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merchant); HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 341–44 (1983) (discussing the law merchant's formative role in legal history); A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 108–40 (2003) (discussing the law merchant's relationship with international relations); ANA M. LÓPEZ RODRÍGUEZ, LEX MERCATORIA AND HARMONIZATION OF CONTRACT LAW IN THE EU 87 (2003) ("[There] emerged 'a body of truly international customary rules governing the cosmopolitan community of international merchants' on the high seas and in the conduct of fairs. Merchants had in fact created a superior law, the *lex mercatoria, ius mercatorum* or *law merchant*, which constituted a solid legal basis for the great development of commerce in the Middle Ages. For several hundred years uniform rules of law, those of the law merchant, were applied throughout the market tribunals of the various European trade centers." (footnotes omitted)); RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 278 (6th ed. 1998) ("Cosmopolitan in nature and inherently superior to the general law, the law merchant by the end of the medieval period had become the very foundation of an expanding commerce throughout the Western world."); Harold J. Berman & Felix J. Dasser, *The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy*, *in* LEX MERCATORIA AND ARBITRATION 53, 61 (Thomas E. Carbonneau ed., rev. ed. 1998) (describing the centuries-old existence of an international business built on "an ongoing autonomous customary legal order"); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1647 (1996) ("The traditional account of the 'law merchant' . . . provides a model for how lawmakers might respond."); Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317, 320 (1984) ("Multinational enterprises, the vehicles of much of the world's commerce, are normally associated with particular countries, but are essentially international in character. They are analogous to the medieval merchants whose activities were superimposed on a patchwork of local sovereignties and were hardly amenable to local regulation."); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 475 (2000) (arguing that a *lex mercatoria* "could, with appropriate adaptation, contribute to the development of international copyright standards"); Ken Foster, *Is There a Global Sports Law?*, 2 ENT. L. 1, 10 (2003) ("*Lex sportiva* deliberately invokes the concept of *lex mercatoria*."); Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT'L L. 347, 356 (2001) (stating that the original *lex mercatoria* was based on mercantile custom in the Middle Ages); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 1019–21 (1994) (analogizing cyber law to the medieval law merchant as a "bottom up" customary law); Brian F. Havel & Gabriel S. Sanchez, *The Emerging* Lex Aviatica, 42 GEO. J. INT'L L. 639, 658–59 (2011) (analogizing a proposed global aviation regulatory system to the law merchant); David R. Johnson & David Post, *Law and Borders—the Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1389 (1996) ("Perhaps the most apt analogy to the rise of a separate law of Cyberspace is the origin of the Law Merchant—a distinct set of rules that developed with the new, rapid boundary-crossing trade of the Middle Ages."); Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANSNAT'L L. 487, 490–91 (1995) (describing conflict-of-law rules that developed independently of government as part of "the supranational *lex mercatoria*"); Paul R. Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 2 (1990) (studying reputation mechanisms during the medieval revival of trade when, "without the benefit of state enforcement of contracts or an established body of commercial law, merchants evolved their own private code of laws (the *Law Merchant*) with disputes adjudicated by a judge who might be a local official or a private merchant"); Irineu Strenger, *La notion de* lex mercatoria *en droit du commerce international*, 227 RECUEIL DES COURS 207, 253–60 (1992) (conjuring up images of the ancient law merchant as autonomous, cosmopolitan, and transnational); Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265, 269, 275–76 (2003) (drawing a parallel between the law merchant and e-commerce).

2. *Mercatorists* here refers to modern advocates of the *lex mercatoria* theory.

independent of government involvement, the best of these practices spread across Europe. The uniformity and universality of the resulting customary rules facilitated transnational trade in a world of parochial local jurisdictions hostile to foreign merchants and lacking unifying states.[3] As a consequence, no matter where in Europe they traveled, traders could rely upon these merchant-devised customs to provide default rules and to fill in gaps around negotiated contracts.[4] Should disputes arise, the traders could have

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3. BENSON, *supra* note 1, at 30–31 (observing that the law merchant provided means to overcome "substantial barriers" to international trade); LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 10–11 (1983) ("[T]he plurality of local customs introduced confusion into transactions; they gave rise to hostility towards foreign customs and they ultimately led to mercantile confrontations."); Johnson & Post, *supra* note 1, at 1389 ("Nor could the local lord easily establish meaningful rules for a sphere of activity that he barely understood and that was executed in locations beyond his control. The result of this jurisdictional confusion was the development of a new legal system—*Lex Mercatoria*."); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1596 (2003) ("[B]ecause many commercial transactions were, by definition, transnational, it was desirable to have a uniform transnational body of law that did not vary according to the nationalities of the contracting parties.").

4. *See* BENSON, *supra* note 1, at 32 ("Where conflicts arose, practices that were the most efficient at facilitating commercial interaction supplanted those that were less efficient."); CLIVE M. SCHMITTHOFF, *The Unification of the Law of International Trade*, *in* CLIVE M. SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 206, 206 (Chia-Jui Cheng ed., 1988) (recounting that the law merchant "arose in the Middle Ages [as] a body of truly international customary rules governing the cosmopolitan community of international merchants who travelled through the civilised world from port to port and fair to fair"); TRAKMAN, *supra* note 3, at 11 ("The most viable mercantile practices were enforced in the Law Merchant . . . ."); Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New* Lex Mercatoria?, 15 ARB. INT'L 115, 117 (1999) ("Its special characteristics were that it was first of all transnational. Secondly, it was based on a common origin and a faithful reflection of mercantile customs." (footnote omitted)); Bruce L. Benson, *Law Merchant*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 500, 500 (Peter Newman ed., 1998) ("*Lex mercatoria*, the Law Merchant, generally refers to the customary law governing European commercial interactions during the medieval period. Despite its customary nature, however, the medieval Law Merchant constituted a true system of law . . . . Virtually every aspect of commercial transactions in Europe was governed for several centuries by this privately produced, privately adjudicated and privately enforced body of law."); Thomas E. Carbonneau & Marc S. Firestone, *Transnational Law-Making: Assessing the Impact of the Vienna Convention and the Viability of Arbitral Adjudication*, 1 EMORY J. INT'L DISP. RESOL. 51, 57 (1986) ("Prior to the emergence of modern nation-states, trading transactions were conducted within a largely self-regulatory, customary framework free of any significant national government constraints. These self-imposed rules of commercial conduct and dispute resolution, which became known as the law merchant or *lex mercatoria*, applied in nearly all regions of Europe." (footnote omitted)); Charl Hugo, *The Legal Nature of the Uniform Customs and Practice for Documentary Credits:* Lex mercatoria, *Custom, or Contracts?*, 6 S. AFR. MERCANTILE L.J. 143, 144–45 (1994) ("[*Lex mercatoria* was] in essence custom of a universal nature applied by the special mercantile courts throughout Europe to a special social class—the merchants. In this sense it can be described as law which operated on a supranational level."); Milgrom, North & Weingast, *supra* note 1, at 5 ("[B]y the end of the 11th century, the Law Merchant came to govern most commercial transactions in Europe, providing a uniform set of standards across large numbers of locations." (citation omitted)); Trakman, *supra* note 1, at 271 ("It is clear that the existence of a Law Merchant was widely known and that it was resorted to by medieval merchants."); Zywicki, *supra* note 3, at 1593 (calling the law merchant a "collection of informal procedures and customary law" that was "largely universal").

confidence that the merchant-created and merchant-staffed courts would apply the *lex mercatoria* customs as rules of decision.[5]

The law merchant story has such intrinsic appeal and carries so much weight in the literature of so many areas of legal scholarship that the efforts of numerous historians to expose it for the myth that it is have been met with skepticism at best.[6] More commonly, the mercatorists have ignored the

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5. *See, e.g.*, SCHMITTHOFF, *supra* note 4, at 207 ("The remarkable feature of the old law merchant was that it was developed by the international business community itself and not by lawyers."); Baron, *supra* note 4, at 117 ("[The law merchant] was developed and promoted by mercantile corporations and the special jurisdiction of the mercantile courts, business practice and the special courts of the great markets and fairs . . . and recognized the capacity of the merchants to regulate their own affairs through their customs, their usages, and their practices." (footnote omitted)); Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 1, 19–20 (2006) (calling the law merchant "quintessentially independent from the state both in terms of production and enforcement"); Cremades & Plehn, *supra* note 1, at 319 ("The Lex Mercatoria was largely self-enforcing; a party who refused to comply with a merchant court's decision risked his reputation and could be excluded from trading at the all-important fairs where the merchant courts were located. Parties to a dispute rarely needed the aid of the local sovereign to enforce a merchant court's decision. The ability of the merchant class to both generate and enforce its own norms of behavior allowed it to achieve a large degree of independence from these local sovereigns." (footnote omitted)); Hardy, *supra* note 1, at 1020–21 ("Special courts grew up to enforce the Law Merchant. These were merchant courts in every sense: their jurisdiction was that of commercial transactions, and their judges were drawn from the ranks of the merchant class itself on the basis of experience and seniority."); Leon Trakman, Ex Aequo et Bono*: Demystifying an Ancient Concept*, 8 CHI. J. INT'L L. 621, 629 (2008) ("These merchant judges resolved disputes among itinerant merchants at regional fairs, markets, towns, and ports—outside the jurisdiction of courts and judges who administered the law of local princes."); Trakman, *supra* note 1, at 271 ("The distinctive feature of the cosmopolitan, medieval Law Merchant was the asserted reliance by merchants on a legal system devised primarily by merchants themselves for the dispensation of justice in disputes among them.").

6. *See generally* MARY ELIZABETH BASILE, JANE FAIR BESTOR, DANIEL R. COQUILLETTE & CHARLES DONAHUE, JR., *LEX MERCATORIA* AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE (1998) [hereinafter BASILE] (reviewing the history of the *lex mercatoria* theory, explaining that the English had no concept of a transnational law merchant and demonstrating that the law merchant was primarily a procedural concept); JAMES STEVEN ROGERS, THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES: A STUDY OF THE ORIGINS OF ANGLO-AMERICAN COMMERCIAL LAW 12–20 (1995) (demonstrating that English common law courts were competent to adjudicate commercial disputes); J.H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295 (1979) (debunking the story of the incorporation of the law merchant into English common law under Mansfield); Albrecht Cordes, *The Search for a Medieval* Lex mercatoria, *reprinted in* FROM *LEX MERCATORIA* TO COMMERCIAL LAW 53 (Vito Piergiovanni ed., 2005) (arguing against the universality of rules facilitating transnational trade); Charles Donahue, Jr., *Benvenuto Stracca's* De Mercatura*: Was There a* Lex mercatoria *in Sixteenth-Century Italy?*, *in* FROM *LEX MERCATORIA* TO COMMERCIAL LAW, *supra*, at 69 (concluding that Benvenuto Stracca's *De mercatura* does not prove that there was a separate *lex mercatoria* in sixteenth-century Italy); Charles Donahue, Jr., *Equity in the Courts of Merchants*, 72 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS [LEGAL HIST. REV.] 1 (2004) (Neth.) (showing that civil courts were able to resolve commercial disputes using the *ius commune*—the learned Roman and canon laws—rather than any special merchant custom); Charles Donahue, Jr., *Medieval and Early Modern* Lex mercatoria*: An Attempt at the* Probatio Diabolica, 5 CHI. J. INT'L L. 21 (2004) [hereinafter Donahue, *Medieval and Early Modern*] (pointing out that no treatises or codifications of merchant-created customary commercial law seem to have been written by merchants and that the concept of a customary law merchant was unknown to the leading commercial jurist of the sixteenth century); Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the*

existence of challenges to their theory.[7] The story simply holds too much symbolic power for modern advocates of private ordering looking to give the underpinning of historical legitimacy to their political and economic theories about how law is and should be made.[8]

Medieval Merchant Law, 5 CHI. J. INT'L L. 39 (2004) (arguing that commercial law did not develop in isolation from the state); Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval "Law Merchant,"* 21 AM. U. INT'L L. REV. 685 (2006) (demonstrating that English fair courts were neither merchant established nor staffed by merchant judges, that these courts did not judge according to a substantive law merchant, and that the rules they expressed were not uniform and universal even within England); Oliver Volckart & Antje Mangels, *Are the Roots of the Modern* Lex Mercatoria *Really Medieval?*, 65 S. ECON. J. 427 (1999) (using economic history to demonstrate that no *lex mercatoria* could have formed in the eleventh century); Alain Wijffels, *Business Relations Between Merchants in Sixteenth-Century Belgian Practice-Orientated Civil Law Literature*, *in* FROM *LEX MERCATORIA* TO COMMERCIAL LAW, *supra*, at 255 (showing that merchant custom was local). A few legal scholars have begun to acknowledge the historical criticisms. *See* Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 527–28 (2005) (citing several criticisms of a uniform *lex mercatoria* and expressing similar skepticism); Ralf Michaels, *The Mirage of Non-state Governance*, 2010 UTAH L. REV. 31, 37–38 (citing several criticisms of a uniform *lex mercatoria* and stating that "[*l*]*ex mercatoria* as non-state law is a myth"); Ralf Michaels, *The True* Lex Mercatoria*: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447, 453–54 (2007) (citing sources rebuking *lex mercatoria* as non-state law).

7. For a nonexhaustive list of articles (excluding student notes) in American law reviews from the last three years that refer explicitly and positively to the medieval law merchant story, see Benito Arruñada, *Institutional Support of the Firm: A Theory of Business Registries*, 2 J. LEGAL ANALYSIS 525, 532 n.8 (2010); H. Allen Blair, *Hard Cases Under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretative Challenges*, 21 DUKE J. COMP. & INT'L L. 269, 276 (2011); Isaac DiIanni, *The Role of Competition in the Market for Adjudication*, 18 SUP. CT. ECON. REV. 203, 227 (2010); Bryan Druzin, *Buying Commercial Law: Choice of Law, Choice of Forum, and Network Externalities*, 18 TUL. J. INT'L & COMP. L. 131, 161–62 (2009); Bryan Druzin, *Law Without the State: The Theory of High Engagement and the Emergence of Spontaneous Legal Order Within Commercial Systems*, 41 GEO. J. INT'L L. 559, 582–84 (2010); Nuno Garoupa & Carlos Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT'L L.J. 287, 328–29 (2011); Ronald J. Gilson, Henry Hansmann & Mariana Pargendler, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475, 502 (2011); Frederick B. Jonassen, *The Law and the Host of* The Canterbury Tales, 43 J. MARSHALL L. REV. 51, 59–60 (2009); Yvonne C.L. Lee, *The Governance of Contemporary Sovereign Wealth Funds*, 6 HASTINGS BUS. L.J. 197, 226 (2010); Amnon Lehavi & Amir N. Licht, *BITs and Pieces of Property*, 36 YALE J. INT'L L. 115, 149 (2011); Michael W. McConnell, *Non-state Governance*, 2010 UTAH L. REV. 7, 8; Michael L. Rustad & Maria Vittoria Onufrio, *The Exportability of the Principles of Software: Lost in Translation?*, 2 HASTINGS SCI. & TECH. L.J. 25, 44 (2010); Timothy Sandefur, *Does the State Create the Market—And Should It Pursue Efficiency?*, 33 HARV. J.L. & PUB. POL'Y 779, 785 (2010); Gregory C. Shaffer, *How Business Shapes Law: A Socio-legal Framework*, 42 CONN. L. REV. 147, 167 (2009); Martha Simo Tumnde, *Harmonization of Business Law in Cameroon: Issues, Challenges and Prospects*, 25 TUL. EUR. & CIV. L.F. 119, 132 (2010); and Jeffrey C. Tuomala, Marbury v. Madison *and the Foundation of Law*, 4 LIBERTY U. L. REV. 297, 320 (2010).

8. Nikitas E. Hatzimihail, *The Many Lives—and Faces—of* Lex Mercatoria*: History as Genealogy in International Business Law*, LAW & CONTEMP. PROBS., Summer 2008, at 169, 173 ("'History' adds to the symbolic capital of *lex mercatoria* and confers on it . . . a venerable pedigree. . . . That the mercatorists' historical imagery persists in spite of these refutations suggests that what matters, for the debate, is not so much what actually happened, but what projections into the past align best with present circumstances and what constructions of the past are used to justify explanations of the present."); *see also* BENSON, *supra* note 1, at 30 ("[T]he 'Law Merchant[]' effectively shatters the myth that government must define and enforce 'the rules of the game.'");

Inconveniently, however, the historical evidence does not bear out the law merchant tale. To the extent that merchants did indeed invent a special set of uniform and universal rules governing long-distance trade across premodern Europe, those legal rules usually arose from contract and legislation rather than from custom. Commercial custom did exist, but it was primarily local.

The reason for this, this Article argues, relates to the nature of custom and legal borrowing. Unless merchant customs arose spontaneously and identically in every place they were found,[9] then the *lex mercatoria* story

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TRAKMAN, *supra* note 3, at 40 ("Just as the medieval Law Merchant revealed that the progress of law lay in the actual practices of businessmen, so conventional trade demands that law adapt to the current course of international commerce. Just as medieval adjudicators sought to ascertain the conduct of merchants within the framework of business itself, a similar obligation now rests upon the upholders of this modern Law Merchant to develop trade law on a similarly commercial foundation."); Carbonneau & Firestone, *supra* note 4, at 59 ("Malynes' recognition of the non-national status of the law merchant is significant, illustrating that the interest of the commercial community in a uniform law should not be defeated by national political rivalries or local pride."); Caruso, *supra* note 5, at 50–51 ("Widely practiced in the Middle Ages, then buried for a long time under a dominant Westphalian logic, lex mercatoria is again in vogue. The successful 'privatization' of merchants' disputes rests upon the intuition that when private parties deal with one another across state borders, there are good reasons to depart from state-based rules or courts, and to switch instead to private mechanisms for lawmaking and dispute resolution." (footnotes omitted)); Leon E. Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage*, 12 J. MAR. L. & COM. 1, 5 (1980) ("The socio-economic features which typified this ancient Law Merchant also constituted the reasons for its subsistence. There was the underlying need to promote trade based upon freedom . . . . Rulers who sought by means of national law to rigidify this free commerce would inhibit the success of exchanges in the market place . . . . The only law which could effectively enhance the activities of merchants under these conditions would be suppletive law, *i.e.*, law which recognized the capacity of merchants to regulate their own affairs through their customs, their usages, and their practices.").

9. It is entirely possible that sales rules did arise more or less identically and spontaneously in every market of Europe. First, medieval European countries shared only two foundational sets of legal rules: the Roman law and the Germanic customs. If sales rules evolved solely from these foundations, it would not be surprising that many areas ended up with the same laws. Second, every sale involves the same set of fundamental legal problems, and only a limited number of possible viable solutions exist. Thus, again, many markets could have arrived at identical rules. However, such laws of the sale of goods would apply to all sales, not just those involving merchants engaged in supralocal commerce. The hypothesis of the law merchant theory is that long-distance traders had to develop their own *unique* rules in order to transcend the differences among local customary law. *See, e.g.*, BENSON, *supra* note 1, at 32 ("By the twelfth century, mercantile law had developed to a level where alien merchants had substantial protection in disputes with local merchants and 'against the vagaries of local laws and customs.'"); Gilson, Hansmann & Pargendler, *supra* note 7, at 502 ("The medieval law merchant, a transnational body of commercial law—distinct from the general law of the era, and with its own separate courts—arose among merchants across Europe . . . ."); Hardy, *supra* note 1, at 1020 ("[T]he Law Merchant existed in some sense apart from and in addition to the ordinary rules of law that applied to non-merchant transactions."); Hatzimihail, *supra* note 8, at 171, 177 ("[A]ll mercatorists seem to share a minimum degree of commitment to, and desire for, the existence of certain norms . . . distinct from—and possibly transcending—'traditional' state law and 'municipal' legal forms and institutions. . . . Schmitthoff presents medieval law as a body, a complex of customary rules that are truly international. These rules were thus not created by political institutions and sovereigns of 'local' scope."); Trakman, *supra* note 5, at 630 ("Cosmopolitan in nature and adaptable in operation, the Law Merchant was meant to transcend the law of local princes . . . .").

implicitly assumes that the users of those customs transmitted them from market to market and fair to fair.[10] The literature of legal transplants is extensive, but transplant scholars do not appear to have inquired into the characteristics of laws that can be borrowed successfully.[11] Most studies of legal transplants concern fully expressed, normally written rules.[12] The hypothesis of this Article is that such rules can be borrowed or shared in part because they are sufficiently capable of a definite and bounded articulation. The borrower or sharer can, in other words, state the rule and describe how it works or what it is supposed to accomplish.[13] Unlike lawmaking that originates in the express consent of the legislator or the contracting parties, lawmaking through custom rarely fulfills the criteria of definiteness and articulation. Custom often lacks the sort of boundaries and definition created by the expression of a publicly or privately legislated rule at the point of its enactment. This suggests that it is highly improbable that medieval merchants could have created, transmitted, and maintained a body of commercial customs that remained uniform from place to place.

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10. *See, e.g.*, Baron, *supra* note 4, at 116 ("[T]he laws of particular towns, usually those that were trade centres, inevitably grew into dominant codes of custom of transterritorial proportions."); Zywicki, *supra* note 3, at 1595 ("[T]he law merchant eventually migrated to England through the pressures of international trade as England joined the family of commercial nations.").

11. Classification of legal transplants tends to focus on the recipient legal system rather than on the type of law borrowed. *See, e.g.*, Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163, 181 (2003) (arguing that the means of transplant and the character of reception are the best predictors of long-term transplant success); Inga Markovits, *Exporting Law Reform—But Will It Travel?*, 37 CORNELL INT'L L.J. 95, 98–102 (2004) (categorizing transplants in terms of how much effort is required by the recipient to make the transplant successful); Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 845–67 (2003) (classifying transplants by the reason for the adoption of the transplant); Max Rheinstein, *Types of Reception*, ANNALES DE LA FACULTÉ DE DROIT D'ISTANBUL, no. 6, 1956, at 31, 31–33 (differentiating between imposed and voluntary legal transplants). The author would like to thank Lisa Kinzer at The University of Texas School of Law for her excellent research assistance into legal transplants.

12. *See, e.g.*, Berkowitz et al., *supra* note 11, at 173 (borrowing of French and German civil codes); Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711, 738 (2009) (borrowing of contract terms); Miller, *supra* note 11, at 848–50 (borrowing of administrative regulations); Joel M. Ngugi, *Promissory Estoppel: The Life History of an Ideal Legal Transplant*, 41 U. RICH. L. REV. 425, 493–97 (2007) (borrowing of judicial doctrine); Bradley J. Nicholson, *Legal Borrowing and the Origins of Slave Law in the British Colonies*, 38 AM. J. LEGAL HIST. 38, 42 (1994) (borrowing of medieval English vagabond laws); Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 273 (2003) (borrowing of the U.S. Constitution); Jan M. Smits, *Import and Export of Legal Models: The Dutch Experience*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 551, 553–54 (2003) (borrowing of Dutch civil code).

13. *See, e.g.*, Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199, 209–13 (1994) (discussing the importance of articulating the transplant so that the recipient community will accurately understand and implement the rule); Edward M. Wise, *Transplant of Legal Patterns*, 38 AM. J. COMP. L. (SUPP.) 1, 6 (1990) ("[I]t helps if the foreign system has been set out in writing, in a familiar language, in a form open to easy consultation, in a more or less systematic fashion, [and] in detail . . . .").

Nevertheless, because this Article does not challenge the claim that many merchants across Europe employed bills of exchange or insurance policies, or made partnership agreements that might have taken similar forms and included nearly identical language, one could maintain that these largely invariant contracts formed a transnational law merchant. Certainly contracting is private ordering, but in making contracts, medieval merchants did not create a special form of private ordering that differentiated either long-distance traders from others of the time or the medieval business environment from the modern one. Furthermore, if only the contract forms became widespread, while the underlying gap-filling customs remained local, such a law merchant would merely describe a set of express contractual terms without giving judges and arbitrators a widely shared body of customary law by which to decide cases. This is not the sort of law merchant to which its modern advocates want to point to justify the jurisprudence underlying Article 2 of the Uniform Commercial Code, World Bank-sponsored economic-development policies, decision making in international commercial arbitration, or theories of private ordering in the business world.

The mercatorists might object that medieval merchants could not have carried out the international commerce in which they unquestionably engaged without an overarching transnational law that insulated them from the vagaries of local courts and provided rules in the absence of a law-making state. In fact, the traders managed quite well without a shared law merchant because contracting was not itself international. Merchants did business face-to-face, and even the Middle Ages had default jurisdictional and conflicts-of-law rules. Furthermore, where foreign merchants gathered, so did intermediaries such as brokers, hostellers, and notaries. These professions existed to mediate differences between buyers and sellers. And when disputes arose, the decision makers may rarely have settled them on the basis of customary rules of decision. Court records instead suggest that most disagreements rested on questions of fact, good faith, and fairness rather than law.

The Article begins by presenting a definition of custom that permits us to distinguish between legislative or contractual rules made through express consent and custom made through behavior, and between nonbinding practices and binding legal customs. This definition demonstrates that most of the areas of commerce long thought to compose a broadly shared law merchant evolved from contract or legislation rather than custom. Of course, custom did play at least a gap-filling role in these widespread commercial techniques. Part II, however, argues that the gap fillers were usually not uniform and universal but rather local and contested, and then attempts to explain why custom could not provide a system of uniform rules of decision. Instead, as Part III shows, merchants sometimes felt it necessary to turn to judicial decisions and statutes to establish clearer commercial rules than custom could provide. Finally, Part IV offers evidence that medieval

merchants could have completed sales transactions successfully without requiring an exceptional, transnational law merchant.

I. Custom Versus Contract

Contracts and customs both represent forms of private ordering. Yet some types of medieval commercial private ordering, such as the bill of exchange or the marine insurance policy, demonstrated the ability to spread and become relatively uniform and universal, while other aspects, such as many gap-filling customs, did not. The difference seems to lie in the transferability of express rules arising from contract and statute as opposed to the variability and localism of underarticulated rules arising from behavior. A sharper definition of custom than is commonly used in modern scholarship will help make this distinction clearer.

According to Alan Watson, godfather of the theory of legal borrowing, transplanting rules from one society to another is a "fertile source of [legal] development."[14] But in the growing list of studies of legal transplants, the evidence of the transmission of an unwritten custom from its birthplace to another community is slim.[15] One well-known example of borrowed custom suggests the reasons why such transplants do not happen often. During the Middle Ages, established German towns exported their urban law to newly settled "daughter" towns across Germany and Eastern Europe.[16] Where the "mother" town's law was customary, unwritten, and not preserved in an ordered form in the memory of a speaker of the oral law, the daughter town could often not know its own law until a dispute arose and the town sent the question to the lay judges of the mother (or grandmother) town for a ruling.[17] That the adoption of its laws by a daughter town was often the reason a

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14. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95 (2d ed. 1993).

15. *Cf.* ALAN WATSON, LEGAL ORIGINS AND LEGAL CHANGE 95 (1991) (discussing the transmission of medieval Saxon custom and claiming "even custom transplants"). However, Watson is referring to a written version of that custom in the form of Eike von Repgow's thirteenth-century *Sachsenspiegel*. *Id.* A written custom is no different from a written statute. Compare the difficulties surrounding borrowing of the unwritten English constitutional structure, called the Westminster model. *See* Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 315–19 (1995) (discussing Israel's struggles in borrowing the English Westminster model because of the difficulty of determining the content of rules—such as the guarantee of civil rights—which were never fully expressed or written in England); Andrew Harding, *The 'Westminster Model' Constitution Overseas: Transplantation, Adaptation, and Development in Commonwealth States*, 4 OXFORD U. COMMONWEALTH L.J. 143, 147–48 (2004) (stating that "the unwritten nature of the Westminster constitution, especially its important conventions, [was] clearly inappropriate for export" and noting that all but one or two of the recipients chose to commit the constitution to writing); Tracy Robinson, *Gender, Nation and the Common Law Constitution*, 28 OXFORD J. LEGAL STUD. 735, 742–43 (2008) (noting that lawyers in the Caribbean felt somewhat like "poets" in trying to interpret their Westminster constitution, relying on local history to try to make sense of the model).

16. JOHN P. DAWSON, THE ORACLES OF THE LAW 157 (1968).

17. ALAN WATSON, SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY 35 (1984); *see also* DAWSON, *supra* note 16, at 162–65 (giving examples of cases put to the mother towns).

mother town wrote down its laws demonstrates the difficulty of transporting oral custom from place to place.[18]

By contrast, merchants could share contractual mechanisms easily. Merchant *A* learned about a new way of transferring funds or establishing an agency relationship created by Merchant *B*, and he duplicated the terms. Perhaps he used the same notary who drew up the first document or one of the contract-form books that existed in the Middle Ages. New terms that came to be added to the contract by innovative parties could similarly spread through imitation.

The contract of marine insurance offers an apt example. Italian merchants evolved insurance from earlier forms of risk-shifting contracts during the fourteenth century.[19] They then carried that contract with them to other parts of Europe so that by the mid-fifteenth century the technique had become widely known.[20] At first, the Italians retained control over the insurance industry, even in foreign cities. Until the 1540s, for instance, Italians wrote all insurance policies issued in London, and they drafted the contracts in Italian. By the late 1540s, the English began to underwrite policies themselves, first using the old Italian contracts and then, in the following decade, translating them into English.[21] At first, the English policies repeated their Italian predecessors; but the English observed the innovations introduced in the Antwerp insurance market, and by the 1570s, English policies had adopted Antwerp rules by taking over certain clauses from Antwerp-issued policies.[22]

Similarly, every bankruptcy law established in northern Europe during the sixteenth century derived ultimately from the statutory systems created in the late-medieval northern Italian towns, and those towns adapted their law from laws created during the Roman Empire.[23] Each urban or national statute altered the rules somewhat to reflect local preferences or perhaps to attempt to improve upon what went before. Nonetheless, once again the pattern of borrowing is clear. The Italian laws were originally written in Latin, a language known across Europe. The organization of the bankruptcy

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18. WATSON, *supra* note 17, at 35.

19. 1 J.P. VAN NIEKERK, THE DEVELOPMENT OF THE PRINCIPLES OF INSURANCE LAW IN THE NETHERLANDS FROM 1500–1800, at 5–7 (1998).

20. *Id.* at 7; The Verie True Note and Manner of the Common or Ordinarie Pollicies After th'Order of Barsalona (British Library, Add. MS 48020, fol. 346r.) (c. 1580) [hereinafter The Verie True Note] (claiming Lombards brought insurance usage to London from Barcelona).

21. David Ibbetson, *Law and Custom: Insurance in Sixteenth-Century England*, 29 J. LEGAL HIST. 291, 292 (2008).

22. Guido Rossi, *The London "Booke of Orders": A 16th Century Civil Law Code in England*, 19 MAASTRICHT J. EUR. & COMP. L. (forthcoming 2012).

23. JEAN HILAIRE, INTRODUCTION HISTORIQUE AU DROIT COMMERCIAL 307 (1986); *see also* Dave De ruysscher, *Designing the Limits of Creditworthiness: Insolvency in Antwerp Bankruptcy Legislation and Practice (16th–17th Centuries)*, 76 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS [LEGAL HIST. REV.] 307, 311 (2008) (Neth.) (explaining how Antwerp's liquidation procedure was influenced by Italian law).

process could be observed by foreign merchants and explained by those involved in it, and that information could be carried to other parts of Europe.[24] This sort of legal borrowing has happened repeatedly throughout Western history.

To understand why custom does not lend itself to borrowing as readily as contracts or statutes, we must first establish a meaning for the term *custom*. The mercatorists tend to use the word loosely to refer to whatever merchants did. As a result of such inexactness, scholars inadvertently elide distinct categories of rules, which hinders careful discussion about the history of commercial law. Without being able to distinguish between customary rules on the one hand and contracts, statutes, and nonbinding business techniques on the other, we cannot accurately test claims about the purview and limits of spontaneous legal ordering.

A. The Definition of Custom

The definition of custom offered here is that developed by the medieval Roman law jurists. It focuses on the narrow use of the term *custom* as referring to a form of legally binding rules. According to the great fourteenth-century jurist Bartolus of Sassoferato, a custom consisted of a repeat behavior to which the relevant majority of the community had tacitly consented to be bound to perform.[25] This definition requires some unpacking. Custom for medieval jurists was law. Latin, like most European languages besides English, has two words to describe law, and having two words helps to avoid confusion when talking about custom as law. The Latin word denoting the general concept of law is *ius*, while the word for enacted law is *lex*. *Ius*, in the view of the medieval jurists, had at least two components: enacted law (*lex*) and custom.

But if custom was *ius*, it was law of a quite different quality than *lex*. The latter was imposed through statutes and the texts of the Roman and canon law. Custom was made bottom-up by the behavior of a specific community. The law giver created *lex* at a particular moment in time by his express consent. The community established custom over a period of time by performing certain actions repeatedly in such a way as implicitly to indicate that the members had accepted that they must perform such actions. *Lex* came into force prospectively at the moment of its enactment. Custom, and its binding nature, had to be deduced by looking backward at the behavior of the community.

Custom and *lex*, therefore, were, in theory, fairly easily distinguished: tacit versus express consent, repeated acts versus a single moment of

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24. *See, e.g.*, Strangers and the Bankruptcy Laws (National Archives, SP 12/146 f. 232) (c. 1580) (quoting English merchants comparing English bankruptcy law to Dutch and Flemish bankruptcy law).

25. BARTOLUS, IN PRIMAM DIGESTI VETERIS PARTEM COMMENTARIA 19r. (Turin, Nicholaus Beuilaquam 1574) (*repetitio ad* Dig. 1.3.32, §§ 6–7).

creation, and retrospective versus prospective. The real difficulty lay in distinguishing between mere repeat behavior (usage) and repeat behavior to which the community had tacitly consented to be bound (custom). Bartolus pointed out that in common speech the word *custom* had three meanings.[26] It could be used to describe an act an individual did routinely; what we might more accurately call a habit. Next, it could refer to a practice that some group of people followed, which Bartolus called a usage (*usus seu mos*).[27] For Bartolus, a usage was a "fact" describing behavior, but it was not itself a rule of decision that obligated the parties legally. In the third meaning, *custom* was the law that resulted from a usage followed by the majority of the community once they had tacitly consented to be bound to perform that usage. In the view of the jurists, only this final category was the province of legal discussion, and only it created a legally obligatory rule of behavior.[28] Thus, the distinction between usage and custom was that between what people *may* do and what they *must* do.

The question of how a nonbinding usage was found to be, and articulated as, a binding custom vexed the medieval jurists, as it does modern scholars.[29] Arguably, the difficulty of determining where usage ends and custom begins is not a problem to be solved but is instead a characteristic inherent and unavoidable in the process of bottom-up rule making. Although the jurists said that a "usage of something is required for the introduction of a custom,"[30] mere repeated acts, even if performed by the entire community, did not suffice to show that a usage was binding. The thirteenth-century

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26. *Id.* (*repetitio ad* Dig. 1.3.32, § 6). Bartolus briefly summarized the three meanings:

> First, therefore, I ask what custom is. And lest we should enter into ambiguity, let it be known that according to the doctors custom is understood to have three meanings. The first is something done from the habits of men . . . which [sort of] custom also occurs in animals . . . , and we are not speaking of it here. Second, custom is derived from the acts of many people, and this is called a usage or mores. . . . Third, custom is derived from the law that results from the usage or mores of many people, and this is what we are talking about here. ["Primo igitur quaero, Quid sit [con]suetudo? Et ne in aequiuocum procedamus, sciendam est s[ecundu]m doct[orum] q[uod] [con]suetudo sumitur trib[us] mod[is]. Primo pro assuefactione hominis. Quae [con]suetudo accidit et[iam] in animalibus . . . & de hoc non loquimur hic. Secundo accipitur [con]suetudo, pro facto plurium personarum, & istud appellatur usus seu mos. Tertio accipit [con]suetudo p[ro] iure, quod resultat ex usu seu moribus plurium personarum, & sic loquitur hic."].

Id. (citations omitted).

27. *Id.*

28. *Id.*

29. *See* JAMES M. DONOVAN, LEGAL ANTHROPOLOGY: AN INTRODUCTION 12–13 (2008) (describing various conflicting attempts to create a principled typology of social norms and concluding that "no accepted, principled typology of social norms is currently available"); Emanuele Conte, *Roman Law vs Custom in a Changing Society: Italy in the Twelfth and Thirteenth Centuries*, *in* CUSTOM: THE DEVELOPMENT AND USE OF A LEGAL CONCEPT IN THE MIDDLE AGES 33, 34 (Per Anderson & Mia Münster-Swendsen eds., 2009) ("In fact, for Savigny—as for everyone else—it was easy to define the abstract idea of custom, but difficult to analyze its real content.").

30. L. WAELKENS, LA THÉORIE DE LA COUTUME CHEZ JACQUES DE RÉVIGNY 489 (*repetitio ad* Dig. 1.3.32, § 4) (1984) ("exigitur ad consuetudinem usus rei inducende").

French law professor Jacques de Révigny used the examples of a mill at which the whole city milled its grain or the habit of all the men of a city to go on pilgrimage to Santiago de Compostela in Spain:

> [I]f they go [on pilgrimage] over the course of ten or twenty years, you must conclude that they therefore *may* go. I say the same concerning the mill. Everyone has gone to your mill for ten or twenty years. You can conclude that there is therefore a practice that they may go, [but] not that they can be compelled [to go].[31]

In other words, for a usage to become a custom, it must switch from being permissive to being mandatory.

For the medieval jurists, the factor distinguishing usage from custom was the existence in the latter of the tacit consent of the majority of the community.[32] Thus, the community did not need to articulate the custom to be bound to it. But tacit consent was, by its nature, difficult to prove, and this is one place the jurists' theory began to run into significant problems. Many jurists contended that the demonstration of tacit consent required someone to behave contrary to the usage and consequently to incur the objection of others.[33] This objection might take the form of community sanction or could be raised in the context of a lawsuit.[34] From that point,

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31. *Id.* at 490 (*repetitio ad* Dig. 1.3.32, § 4) ("Set si iuerunt, x. uel xx. anni sunt elapsi, debes concludere: ergo possunt ire. Sic dico de molendino. Omnes iuerunt ad molendinum tuum per annos x. uel xx. Posses concludere: ergo consuetudo est quod est quod possent ire, non possent compelli.").

32. *Id.* at 485–86 (*repetitio ad* Dig. 1.3.32, § 2) ("[Q]uia statutum est habito tractatu in communi et expresso quod sit ius in futurum. Set si sic tacite uteretur populus uel maior pars populi una die, non est statutum nec est ius consuetudinarium, nisi sequatur tantum tempus quod exigitur ad consuetudinem inducendam. Vnde dico quod 'expressum' et 'tacitum' sunt differentie et per quas differunt statutum et consuetudo . . . .").

33. *Id.* at 488 (*repetitio ad* Dig. 1.3.32, § 4).

34. The jurists clearly expected litigation to be one of the forms in which the adjudication of contrary acts would occur, since they debated how many lawsuits were required to establish the existence of tacit consent. *See, e.g.*, GLOSSA ORDINARIA at Dig. 1.3.32 v. *inveterata* ("But how is a custom introduced during the decade? Response: if it had been twice litigated in that time, or a judge rejected a suit or a complaint as contrary to the language of the custom. . . . Likewise during a decade, thus if the [lord in] power twice judged in the same spirit in during a council that had been convoked, henceforth this should be the custom, though not based on badly adjudged examples, but on well judged ones. Or say that not one but many examples." ["[S]ed qualiter decennio consuetudo introducitur? R[esponsum] si bis fuerit iudicatum in illo tempore, vel libellum, vel querimoniam propositam contra talem consuetudinem spreuerit iudex . . . vt si Potestas bis iudicabit concilio co[n]uocato eo animo, vt sit consuetudo deinceps. [V]el non exe[m]plis male iudicantis, sed bene sic. Vel dic no[n] exe[m]plis vni[us] sed multorum."]); *see also* WAELKENS, *supra* note 30, at 493 (*repetitio ad* Dig. 1.3.32, § 6) ("Thus, someone wishes to prove a custom. If he proves that it had been adjudged between Titius and Maevius, and secondly that it had been adjudged between others, the judge before whom the custom is proved should look into the first sentence and into the second." ["Vnde aliquis uult probare consuetudinem. Si probat quod ita fuit iudicatum inter Titium et Meuium, item quod secudo fuit iudicatum inter alios, iudex coram quo probatur consuetudo inquiret in prima sententia et in secunda."] (citations omitted)).

Some jurists recognized that the assumption that customs would be determined through multiple lawsuits raised a question about the extent of the community's consent. Litigation meant that at

assuming that the objection successfully established the majority's consent, the community knew itself to be bound.

This raises a neat issue of temporality in the usage–custom time frame. Custom, as a backward-looking form of law, is only known to exist once the tacit consent is proven, but the tacit consent could have been in place well before a contrary act gave reason for it to be proved. Thus, the demonstration of a custom is evidence of something that might already have existed for years. The only difference after proof of consent is that the community knows it must henceforth follow the custom, whereas before, when the practice was, technically, only a usage, they followed it because they felt that they may do so. Of course, as long as no one had acted contrary to the practice, it was not necessary to determine whether the behavior was a usage or a custom because the community was acting unanimously regardless of the actual legal status of the practice.

This definition of custom, though it may be criticized as too limiting and though it certainly (as the jurists realized) has its weaknesses, has two advantages here. First, the jurists' definition was widely accepted during the Middle Ages as explaining how customs functioned as law. As the learned definition found its way into vernacular discussions of customary law, it may even have been familiar to the merchants and to judges in urban and fair courts.[35] Second, the definition allows us to separate a legislated or contractual rule made by express consent from a customary rule made by behavior tacitly consented to, and to separate a merely habitual practice, such as using a common form contract, from a practice that the community agrees is binding, such as an understanding that a thief in the chain of title does not vitiate a good-faith purchase for value.[36]

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least one party was arguing, in good faith, against the custom, and multiple suits indicated that multiple people in the community disagreed that a certain behavior was binding on them.

35. *See, e.g.*, JEAN BOUTILLIER, SOMME RURALE 3 (Louis Chardonas le Caron ed., Paris, Barthelemy Macé 1603) ("[U]nwritten law is custom . . . held and kept up in common knowledge [notoriously] and equivalent to law by the approbation of the old people of the land, such that no one is seen presently to do the opposite." ["Droict non escrit est la coustume . . . tenuë & gardée notoirement, & equipolle à loy par l'approbation des anciens du païs, en maniere qu'on n'ait point veu entre les presens le contraire."]); PHILIPS WIELANT, PRACTIJCKE CIVILE 27, pt. 1, cap. 29 (Amsterdam, Cornelis Claesz. 1598) (defining custom as "an unwritten law, introduced by usages and acts continually repeated by people or by practitioners, which are publicly followed, without the opposition of the majority of the people, for [a] long enough time to prescribe a custom" ["Costume is recht niet gescreve[n] inbrocht by usantien ende co[n]tinuele acten van anderlingen ofte practisienen openbaerlijck gheuseert, sonder weder seggen vander meeste menichte van volcke soe langen tijt als om costume te moge[n] prescriberen."]).

36. *Cf.* H.L.A. HART, THE CONCEPT OF LAW 44–45 (2d ed. 1994) ("The first [question] is whether 'custom as such' is law or not. . . . Failure to take off a hat to a lady is not a breach of any rule of law; it has no legal status save that of being permitted by law. This shows that custom is law only if it is one of a class of customs which is 'recognized' as law by a particular legal system."); K.N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 275 (William S. Hein & Co. 2002) (1941) (arguing that the concepts of custom and mores "are ambiguous. They *fuse* and *confuse* the notion of 'practice' (say, a moderately discernible line of actual behavior) with the notion of 'standard' (say, an actually held

In other words, just because merchants all opted to use a particular form contract or just because they all used the same wording in a bill of exchange did not make that form or that wording a custom in the narrow sense of a legally binding rule. The form and the bill were essentially business techniques rather than law. As with modern financial and commercial mechanisms, the business techniques of medieval merchants could become widespread, but they did not necessarily become law unless, for instance, a court or legislator adopted some or all of their constituent parts and made them so, or a group of merchants chose to refuse to accept a contract or bill unless it contained certain language. If a court found that a bill of exchange was invalid because it was missing certain words or that a term should be implied in a contract that lacked it because all contracts of that sort must be assumed to have that provision, then the court was retrospectively finding (or creating) a custom and thus turned the contractual language or implied term into law.[37] Short of that, the contract language remained a usage that bound no one but the parties expressly opting to employ it no matter how common the particular form had become.[38]

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ideal of what the proper line of actual behavior should be)"); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (defining *norms* as "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both"); Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. (AM. ECON. ASS'N PAPERS & PROC.) 365, 365 (1997) (defining a social norm as "a rule that is neither promulgated by an official source, such as a court or a legislature, nor enforced by the threat of legal sanctions, yet is regularly complied with (otherwise it wouldn't be a rule)" and including in this category "rules of etiquette, including norms of proper dress and table manners; the rules of grammar; and customary law in prepolitical societies and private associations").

37. It is necessary here to distinguish between custom being used to interpret contract and implied contract because the two may look very similar. Although both depend upon tacit consent, they are distinguishable in the quality and timing of that consent. In contract, a limited number of opposing or complementary parties, e.g., buyer and seller, voluntarily agree to be bound to the implied terms at the moment they make the contract. With a custom, the community has over time tacitly assented to be bound by a certain law whether or not the members of the community would choose that rule at any given moment of contracting. Thus, implied contract assumes the agreement of two or more particular parties at a moment of private lawmaking. Custom assumes the agreement of a whole community established over a period of time in an act of public lawmaking. As such, custom is law, and if the parties do not want it to control an agreement, they must contract around it (if they may). By contrast, were a dispute to arise about whether an implied term was included in their contract, the party asserting it would have to show that his counterparty had agreed to it, albeit tacitly. *See* Walter Ullmann, *Bartolus on Customary Law*, 52 JURIDICAL REV. 265, 270 (1940) (describing Bartolus's discussion of the difference between contract and custom).

38. *See* Cordes, *supra* note 6, at 62–63 ("As early as the tenth and eleventh centuries, notaries in Genoa and Pisa drew up certain contracts in company law, namely the commenda contracts, in a fully standardized form. Those formulas had most likely proved their practical merit; at the same time all participants must have become acquainted with them and have learned to conduct business using these standardized contracts. It is crucial in this context, though, that there is not the slightest hint that a privilege *had* to be granted in a certain way or that a contract *had* to be drafted with those standard formulas. This would have been a precondition for a fixed body of law." (footnote omitted)).

B. *The Contractual and Statutory Law Merchant*

If we take Bartolus's definition of custom as repeat behavior to which the community has tacitly consented to be bound and apply it to the constituent elements of commercial law, we will see that those aspects of commerce that the original law merchant apologists of the sixteenth and seventeenth centuries described as uniform and universal originated in contract or statute rather than custom. For mercatorists today, the law merchant primarily concerns sales transactions,[39] and sales rules may well have originated in custom. But when the term *law merchant* was used in the past to refer to substantive commercial rules, it did not encompass the law of sales. Instead, the law merchant concerned those mercantile technologies whose use distinguished merchants and bankers from mere local traders: bills of exchange, insurance, brokers, proto-corporate structures, maritime shipping, and bankruptcy.

The invocation of the term *law merchant* to refer to a uniform and universal merchant-created customary body of law is an invention of the nineteenth and twentieth centuries. It appears in the famous history of commercial law by the *Volksgeist*-influenced scholar Levin Goldschmidt in nineteenth-century Germany;[40] in the brief, accessible book on the law merchant by William Mitchell in 1904;[41] in the writings about modern transnational law by Berthold Goldman in the 1960s;[42] in the popular survey history of Western law by Harold Berman in 1983;[43] and in the books and articles by the libertarian legal and economic theorists Leon Trakman and Bruce Benson in the 1980s and 1990s.[44] However, these oft-cited works, each relying on the unproven and undocumented assertions made by its forerunners,[45] have not managed to put forth persuasive evidence to support their authors' visions of the law merchant.

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39. BERMAN, *supra* note 1, at 334 ("The law merchant governed not only the sale, in the strict sense, but also other aspects of commercial transactions . . . ."); Kenneth C. Randall & John E. Norris, *A New Paradigm for International Business Transactions*, 71 WASH. U. L.Q. 599, 608 (1993) ("The law merchant included what is now the law of admiralty, as well as rules respecting negotiable paper and sales.").

40. LEVIN GOLDSCHMIDT, HANDBUCH DES HANDELSRECHTS (Stuttgart, Verlag von Ferdinand Enke 1891); Laura R. Ford, *Max Weber on Property: An Effort in Interpretive Understanding*, 6 SOCIO-LEGAL REV. 24, 32–33 (2010) (reviewing Goldschmidt's views on commercial law history).

41. WILLIAM MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT (1904).

42. *See* Hatzimihail, *supra* note 8, at 178 ("The key legal concept in Schmitthoff's story of medieval *lex mercatoria* is custom . . . .").

43. BERMAN, *supra* note 1.

44. *See supra* notes 1–4.

45. A handful of examples illustrate the point. Cremades and Plehn claim that

> [t]he Lex Mercatoria was largely self-enforcing; a party who refused to comply with a merchant court's decision risked his reputation and could be excluded from trading at the all-important fairs where the merchant courts were located. Parties to a dispute rarely needed the aid of the local sovereign to enforce a merchant court's decision. The ability of the merchant class to both generate and enforce its own norms of

> behavior allowed it to achieve a large degree of independence from these local sovereigns.

Cremades & Plehn, *supra* note 1, at 319 (footnote omitted). These significant claims are supported by a single citation to Leon Trakman. *Id.* at 319 n.13 (citing Trakman, *supra* note 8, at 7, 15). Page fifteen concerns merchant judges. Trakman says that these judges "were generally selected from the ranks of the merchant class on the basis of their commercial experience, their objectivity and their seniority within the community of merchants." Trakman, *supra* note 8, at 15. He goes on to explain that lay merchant judges were used rather than lawyers because of their superior knowledge of commerce and the needs of merchants. *Id.* In support of these details, he cites nothing. In support of his more general claim that "[t]he use of 'merchant' judges was a . . . feature of the Law Merchant era," he cites MITCHELL, *supra* note 41, at 55 (providing only vague comments about merchant judges), 69 (discussing the creation of commercial courts by the king of France in the sixteenth century, but see the details on page 68 about the royal appointment of merchant court judges), and 71 (discussing the hanse-reeve in Germany, about whom, on page 70, Mitchell states "[t]here is no evidence to show that the hanse-reeve was . . . as a general rule elected by the merchants" and discussing the seventeenth-century commercial court of Leipzig, which was composed of "partly laymen and partly jurists"). Trakman, *supra* note 8, at 15. Trakman also cites 1 GERARD MALYNES, CONSUETUDO, VEL, LEX MERCATORIA 309 (3d ed. London, J. Redmayne 1685). On that page, Malynes speaks only of the procedures in merchant courts. On the previous page, he mentions the "Priors and Consuls" who presided over the courts, but he does not describe them or their qualifications in any way. MALYNES, *supra*, at 308. Finally, Trakman cites generally, without pincites, BOROUGH CUSTOMS (Selden Society vol. 21, Mary Bateson ed., 1906) (not indicating volume); GOLDSCHMIDT, *supra* note 40, and ROBERT SABATINO LOPEZ, THE COMMERCIAL REVOLUTION OF THE MIDDLE AGES, 950–1350 (1971). The *Borough Customs* book concerns only local English courts, which were presided over by the lord or his representative, not by merchant judges. Sachs, *supra* note 6, at 693–94. Lopez does not appear to discuss merchant courts at all. Goldschmidt does not appear to provide support for Trakman's claims, and indeed in his most specific discussion of merchant courts, in Italy, he states that the judges on the commercial courts consisted of at least one Roman law-trained lawyer. GOLDSCHMIDT, *supra* note 40, at 170–71. At page seven, in addition to several general statements about the history of medieval commerce, Trakman makes sweeping claims unsupported by evidence, such as: "The law did little more than echo the existing sentiments of the merchant community," and "The success of the concept of freedom among merchants lay in the community enjoyment which could readily be achieved by the growth of a pliable merchant regime, uninhibited by an aloof system of peremptory law." The claim that "[s]upply and demand were conveniently satisfied in an unfettered exchange of goods and services," is supported by a list of classical liberal and utilitarian works of political economy, such as Adam Smith, John Stuart Mill, and David Ricardo. Trakman, *supra* note 8, at 7. Such sources prove nothing about medieval commerce.

Also ultimately tracing back to Leon Trakman is Johnson and Post's observation: "Nor could the local lord easily establish meaningful rules for a sphere of activity that he barely understood and that was executed in locations beyond his control. The result of this jurisdictional confusion was the development of a new legal system—*Lex Mercatoria.*" Johnson & Post, *supra* note 1, at 1389. Johnson and Post cite Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 647 (1989), where Benson cites TRAKMAN, *supra* note 3, at 13. Trakman there writes about merchant court procedure and judges without making the claim that commercial courts were necessary because of the inability of princes to regulate commerce. *Id.*

For another example, consider a similar claim by Professor Hardy that the law merchant

> was simply an enforceable set of customary practices that inured to the benefit of merchants, and that was reasonably uniform across all the jurisdictions involved in the trade fairs. Two key elements of the Law Merchant for our purposes were first, that no statute or other authoritative pronouncement of law gave rise to its existence, and second, that the Law Merchant existed in some sense apart from and in addition to the ordinary rules of law that applied to non-merchant transactions.

Hardy, *supra* note 1, at 1020 (footnote omitted). For the second sentence, Hardy cites nothing. For the first sentence, Hardy cites TRAKMAN, *supra* note 3, at 11–12. Trakman, in turn, cites *Bank of Conway v. Stary*, 200 N.W. 505, 508 (N.D. 1924); *Bank of Conway* cites 3 JAMES KENT,

Unquestionably, the phrase *lex mercatoria* and others like it, such as *ius mercatorum* (right of merchants) and *usus mercatorum* (practice of merchants), have existed since the Middle Ages.[46] But no one has demonstrated a premodern belief that such terms referred to a transnational, substantive customary law.[47] Quite to the contrary, references to the law, right, or custom of merchants made between approximately the eleventh and sixteenth centuries most commonly signified special rules of procedure or proof,[48] and less often fair-court jurisdiction,[49] local market privileges granted to merchants by lords,[50] or location- or trade-specific ways of doing business that may or may not have risen to the level of binding customary

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COMMENTARIES ON AMERICAN LAW 2 (14th ed., Boston, Little, Brown, & Co. 1896); and Kent cites 4 WILLIAM BLACKSTONE, COMMENTARIES *67, who writes, "[I]n mercantile questions . . . the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to." TRAKMAN, *supra* note 3, at 11–12. For this point, Blackstone cites nothing.

Benson makes similar claims in two places. First, he contends that "[v]irtually every aspect of commercial transactions in Europe was governed for several centuries by this privately produced, privately adjudicated and privately enforced body of law." Benson, *supra* note 4, at 500. Benson cites WYNDHAM ANSTIS BEWES, THE ROMANCE OF THE LAW MERCHANT 1 (photo. reprint 1986) (1923), but Bewes merely states, without support, that "the law merchant was indeed the law of the merchants" and that "it was applied to all transactions of a mercantile character between merchants." Benson also cites TRAKMAN, *supra* note 3, at 13, which, as discussed above, is speaking of courts and procedure and is not on point.

A few pages later, Benson claims that "[b]y the twelfth century all important principles of commercial law were international in character." Benson, *supra* note 4, at 503. Benson cites MITCHELL, *supra* note 41, at 7–9, who makes the point that the law merchant was actually "vague and indefinite," *id.* at 8, and while generally similar, varied in its particulars from place to place. Furthermore, Mitchell's evidence comes primarily from the thirteenth and fourteenth centuries.

Benson also cites BEWES, *supra*, at 138. Bewes, while discussing only the uniformity of the law of the fairs, quotes from PAUL HUVELIN, ESSAI HISTORIQUE SUR LE DROIT DES MARCHÉS & DES FOIRES 596 (Paris, Arthur Rousseau 1897). Huvelin refers to the uniformity only of fair law "in its essential features." *Id.* But presumably the part Benson likes is Huvelin's statement (as translated by Bewes) that "thus emerges the conception of the law merchant, outside and above civil statutes and local commercial usages" ["ainsi se dégage la conception d'un droit des marchands, qui reste en dehors et au-dessus des statuts civils et des usages commerciaux locaux"]. For this point, Huvelin cites GOLDSCHMIDT, *supra* note 40, at 132–33, where Goldschmidt lists the handful of mercantile rules he believed were uniform and universal. As pointed out below at note 98, when researched, some of these rules turn out not to be uniform or universal.

46. Cordes, *supra* note 6, at 57–58, 62; Donahue, *Medieval and Early Modern*, *supra* note 6, at 27.

47. *See* BASILE, *supra* note 6, at 128 ("The idea of the *lex mercatoria* as positive law in the international community is not part of the English medieval record." (footnote omitted)); Sachs, *supra* note 6, at 788 (arguing that because the evidence implied that *lex mercatoria* signified what law was appropriate for merchants rather than a specific, applicable body of law, "one cannot conclude that the practice of mercantile law was . . . part of a single legal system, a 'law universal throughout the world'").

48. *See* Baker, *supra* note 6, at 300 ("[I]t is doubtful whether any distinctions were made at all between the law merchant and the common law. When medieval lawyers distinguished systems of 'law' they usually had procedure in mind."); Cordes, *supra* note 6, at 57–58 (describing how the earliest recordings of the phrase *lex mercatoria* originate from the law of procedure and evidence).

49. BASILE, *supra* note 6, at 51–53 (quoting and discussing an unpublished Common Pleas opinion from 1296 speaking of the jurisdiction of law merchant at fair courts).

50. *See, e.g.*, Cordes, *supra* note 6, at 62 n.33 (explaining the use of *ius mercatorum* in the Early and High Middle Ages to signify "a personal right granted by the emperor or a prince").

rules.[51] At least one scholar has persuasively argued that references to the law merchant may have been no more than a trope expressing the vague perception that the people involved in long-distance trade—merchants[52]—had procedural or evidentiary requirements and business practices that differed from those of local tradesmen and retailers.[53]

Unfortunately for the mercatorists' story, during the medieval heyday of private compilations of local and regional custom, not a single one of the many literate and civically involved merchants of Europe appears to have attempted to write down a list or explanation of merchant sales customs.[54] And merchants did write. In the fourteenth century, the Florentine merchant Francesco Balducci Pegolotti wrote a lengthy merchant manual.[55] He spent pages discussing such practical matters as weights and measures, currency changing, and bills of exchange, but nowhere does he mention a single custom about the sale of goods. When John Browne, a merchant of Bristol, wrote a small handbook of instruction for his son in the late sixteenth century,[56] he gave guidance on the measure of cloth; the value of moneys; and the making of bills of lading, insurance policies, letters of obligation, and other documents. But as for advice about buying and selling, he wrote only

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51. A 1278 case from Southampton provides an apt illustration of the early uses of the phrase *lex mercatoria*. The buyer claimed that the seller had falsely sold him wool of substandard quality. The record mentioned the law merchant in three senses. First, the king ordered two judges to inquire into the matter so that "swift and competent amends thereof [may] be made according to the law merchant." Second, the plaintiff, making his complaint, explained that although he had "in good faith and according to the custom [of merchants] handed them to [the seller] to be kept until he had sent for them," the seller had allowed some of the wool to be removed by his own men while in his custody. (The translator here inexplicably translates "secundum consuetudinem mercatorum" as "according to the custom of the country.") Third, the question arose whether the plaintiff had given the defendant an adequate summons, and on that issue, "the citizens and other merchants of Winchester present testify that such previous notice suffices for answering a merchant according to the law merchant." Thus, in this case alone, it could be said that the law merchant referred to rules of procedure (notice), possibly either some unnamed but supposedly known substantive rules of decision or simply the order to act fairly and equitably (ensuring amends), and common merchant practices that did not necessarily imply a legally binding rule (leaving goods with a seller). 2 SELECT CASES CONCERNING THE LAW MERCHANT 28–29 (Selden Society vol. 46, Hubert Hall ed., 1930).

52. Until about the sixteenth century and continuing in some places until the eighteenth, the word *merchant* referred to long-distance traders and not to local retailers. It is also in this sense that the modern advocates of the *lex mercatoria* seem to use the term. Kadens, *supra* note 6, at 44–45 & n.24.

53. *See* Sachs, *supra* note 6, at 694, 780, 788 ("Within [the fair-court records of] St. Ives, the use of the phrase '*secundum legem mercatoriam*' did not invoke a specific body of substantive principles . . . but rather referred indefinitely to whatever principles might be appropriate to the case, according to a mixture of local custom and contemporary notions of fair dealing . . . ."); *see also* Baker, *supra* note 6, at 316 ("The 'law merchant' had become a figure of speech for what we now call mercantile law: that branch of ordinary English law which happens to govern merchants' affairs.").

54. Donahue, *Medieval and Early Modern*, *supra* note 6, at 28.

55. FRANCESCO BALDUCCI PEGOLOTTI, LA PRATICA DELLA MERCATURA (Allan Evans ed., Medieval Academy 1936).

56. JOHN BROWNE, THE MARCHANTS AVIZO (London, Richard Field 1589).

that his son should ask around to find out how things were done at each market and then follow the local laws and customs.[57] Around 1643, the Antwerp company Van Colen-de Groote produced an internal handbook for its merchants.[58] Once again, the manual spent pages on merchandise quality, weights and measures, and currency exchange but included not a word about the customs governing the sale of goods. Yet of all the aspects of commerce in which premodern merchants engaged, sales rules were the most likely to have arisen from custom rather than contract or statute.[59]

The seventeenth-century English merchant author Gerard Malynes was among the first to use the term *lex mercatoria* to denote the substantive rules governing long-distance commerce. Based on the content of his book, *Consuetudo vel lex mercatoria*,[60] by *law merchant* Malynes meant rules concerning weights and measures and the exchange of money, monetary instruments (particularly letters of credit and bills of exchange), suretyship and agency, maritime commercial law, banking and usury, bankruptcy, arbitration, and merchant courts. While Malynes focused on the constituent parts of the sales transaction—merchandise and payment—he barely touched upon the law of the contract of sale itself.[61] The closest he came with regard to the law of sales to the sort of extensive cataloguing of concrete rules that he provided for monetary instruments,[62] maritime law,[63] agency,[64] and the rest was a page-long description of a sample contract for the sale of cloth between an English and a Dutch merchant,[65] a sentence about the warranty of merchantability,[66] a few sentences about limitations on damages,[67] two

57. *Id.* at 2, 4 ("[B]efore you enterprise any thing, doe you after curteous and gentle manner aske counsel, either of some Marchant in the Ship, or your Hoste, or of some English man: how you are to deale about your wares, both touching the landing it, the customing it, the selling it, the receauing of your moneyes, the buying of any wares againe . . . . [W]hen you be in the countrey of Spaine or else where . . . learne what be their ciuill lawes and customes, and be carefull to keepe them.").

58. JAN DENUCÉ, KOOPMANSLEERBOEKEN VAN DE XVIe EN XVIIe EEUWEN IN HANDSCHRIFT (1941).

59. They may, of course, also have come from the Roman law, which had well-developed laws of sale.

60. GERARD MALYNES, CONSUETUDO, VEL LEX MERCATORIA, OR THE ANCIENT LAW-MERCHANT (London, Adam Islip 1622); *see also* BASILE, *supra* note 6, at 124 (asserting that the seventeenth-century English authors were among the first to use *lex mercatoria* to denote substantive merchant law).

61. MALYNES, *supra* note 60, at p. 3 of the unpaginated dedicatory epistle "To the Courteous Reader" (explaining that he will be discussing the "three Essentiall Parts of Trafficke," which all go to the sales transaction).

62. *Id.* at 378–424.

63. *E.g.*, *id.* at 121–22 (describing procedure in maritime suits); *id.* at 134–41 (explaining charter parties and freighting rules); *id.* at 146–56, 159–66, 197–99 (discussing maritime insurance rules); *id.* at 175–82 (providing an abridged version of the 1614 Hanseatic sea laws).

64. *Id.* at 111–19 (providing detailed rules about factors and agents).

65. *Id.* at 123–24.

66. *Id.* at 125.

67. *Id.* at 127.

paragraphs of examples of payment terms in contracts concerning the West Indies trade,[68] and a page-long description of how futures contracts worked.[69] Notably, in referring to the law of merchant contracts he repeatedly cited not custom but the civilian—that is, medieval and early modern Roman law—jurists.[70]

This typology of the law merchant as including the rules of the various subjects of commercial law except contracts of sale would remain consistent for centuries. The earliest national commercial code, the French Code of 1673, included nothing on sales but a great deal on monetary instruments, bankruptcy, merchant-court jurisdiction, and partnership.[71] In 1718, Giles Jacob's *Lex Mercatoria: Or, the Merchant's Companion* spent all of its three hundred pages on maritime commerce, factors, partnership, and international commercial treaties.[72] The five hundred pages Wyndham Beawes devoted to law in his 1752 *Lex Mercatoria Rediviva* concerned, again, maritime commerce, insurance, arbitration, banking, bills and notes, brokers, and bankruptcy.[73] He also added one and one-half pages of basic contract law, which mentioned nothing specific to long-distance trade.[74]

Yet, while sales law may well have been created through custom, it should be obvious upon reflection that bills, bankruptcy, partnership, brokerage, insurance, and the other aspects of commercial law considered synonymous with the law merchant could not. Instead, they must have been the result of deliberate contracting or legislation—both of which required express consent given at a particular moment in time and which were intended to have prospective force.

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68. *Id.* at 129–30.

69. *Id.* at 203–04.

70. *See, e.g.*, *id.* at 92 ("The Civilians . . . do admit that a man may sell deerer unto an expert man, than unto a simple man . . . ."); *id.* at 127 ("[I]t will not be impertinent to note the observations and opinions of Civilians concerning Merchants Contracts, which they have distinguished to be Solemne, Publike or Private . . . to the end all controversies may bee avoided in the said Merchants Contracts. The Civilians writing, *De Contractibus Mercatorum*, or of Merchants Contracts make many distinctions . . . ."); *id.* at 128 ("The penalties or forefeitures upon any Contract . . . are consequently much approoved by all Civilians, and by their Law allowed."); *id.* ("To enter into consideration of some Verball Contracts, some Customes are be observed, which the Civilians make questionable.").

71. 19 FRANÇOIS-ANDRÉ ISAMBERT, RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANÇAISES, DEPUIS L'AN 420, JUSQU'A LA RÉVOLUTION DE 1789, at 92–107 (Paris, Belin-Leprieur 1829). The code consisted of twelve titles. The longest titles concerned letters of exchange, bankruptcy, partnerships, and the jurisdiction of the commercial courts. Other titles identified the category of persons (merchants) subject to the code, regulated apprenticeships, prohibited brokers from acting on their own account, established bookkeeping requirements, regulated imprisonment for debt, and detailed the rules of separation of marital property.

72. *See generally* GILES JACOB, LEX MERCATORIA: OR, THE MERCHANT'S COMPANION (London, Eliz. Nutt & R. Gosling 1718).

73. *See generally* WYNDHAM BEAWES, LEX MERCATORIA REDIVIVA: OR, THE MERCHANT'S DIRECTORY (London, John Moore 1752).

74. *Id.* at 403–04.

Consider, for instance, the quintessential category of the law merchant: bills of exchange.[75] No other aspect of the historical commercial law seems to fit better the mythical law merchant image of universal, merchant-created rules. Bills of exchange grew out of commercial practice and eventually came to be employed (more or less) uniformly across Europe.[76] Neither the Roman law nor the existing customary law had anything similar. In addition, bills of exchange fulfilled the criteria commonly associated with custom. The transactors interacted repeatedly and in the same fashion over a long period of time; the transactions were reciprocal because merchants would at different times have been debtors and creditors; the transactors were for quite a long time basically of a homogeneous social status; and they faced strong social sanctions against default given the importance of good faith and reputation for determining creditworthiness in this society.[77]

According to the definition of custom offered above, merchants would have established their customs through repeated action to which nearly everyone involved tacitly consented to be bound. The key is tacit consent. While we have no evidence of the precise invention of bills of exchange, and while we know that it evolved from similar types of contracts, we can imagine the moment of invention when some merchants complained to each other about the danger and difficulty of moving their money (all in silver or gold coins) from one place to another. When Tomaso in Genoa mentioned to

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75. In the least complicated, most textbook situation, the exchange involved four parties in two different locations. Assume a merchant in Amsterdam wished to make a payment to a merchant in Paris. The Amsterdam merchant, the *deliverer*, lent money to an exchange agent—often but not always a banker—in Amsterdam, the *drawer*. The drawer gave the deliverer a bill of exchange drawn on the drawer's agent in Paris, the *payor*. The deliverer sent the bill to the merchant in Paris, the *payee*, who presented it to the payor for payment. Permutations of this basic structure abounded. The exchange could involve three, or only two, people, could occur within a single location and in a single currency (the so-called dry exchange), or could flow in the reverse direction—the first party taking money drawn on a correspondent rather than lending money, etc. For an accessible early modern description of the other possibilities, see JOHN SCARLETT, THE STILE OF EXCHANGES CONTAINING BOTH THEIR LAW & CUSTOM AS PRACTISED NOW IN THE MOST CONSIDERABLE PLACES OF EXCHANGE IN EUROPE 1–7 (London, John Bringhurst 1682).

76. *See* MALACHY POSTLETHWAYT, THE UNIVERSAL DICTIONARY OF TRADE AND COMMERCE 254 (London, John & Paul Knapton 1751) (1723) ("Foreign bills of exchange have long been looked on as the most obligatory and convenient paper-security, that is amongst merchants; not so much by virtue of the laws of any country, as in conformity to the universal customs and usages established among traders themselves, by a kind of unanimous concurrence, for the facilitating a general commerce throughout the world.").

77. MATHIAS MARESCHAL, TRAICTÉ DES CHANGES ET RECHANGES, LICITES, ET ILLICITES. ET MOYENS DE POURVOIR AUX FRAUDES DES BANQUEROUTES 11 (Paris, Nicolas Buon 1625) ("[L]e principal fondement de la Negotiatio[n] est sur le Credit[e] & reputation"); *see also* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 714 & n.14 (1999) (noting the "general accepted premise that unwritten commercial customs are most likely to arise and endure in situations where transactors interact on a repeat basis, over a long period of time, in relatively similar transactions"); Richard A. Epstein, *The Path to* The T.J. Hooper*: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 11–16 (1992) (exploring the reasons that custom emerges and stating that "[t]he key conditions . . . are reciprocity and high frequency").

Giuseppe that he needed to send money to Jacques in Marseille to pay for some silk, Giuseppe had an idea. "Listen," he said, "Carlo in Marseille owes me about that much money. If you give me the money you want to send to Jacques, I will give you a letter to send to Jacques telling him to go to Carlo and have him pay to Jacques the money he owes to me. That way, both the debts are paid." How could such a transaction have arisen without the transactors explicitly laying out the rules of their deal? They could not have achieved their end through repeat behavior to which they tacitly consented. In other words, the bill-of-exchange transaction grew out of contract, not custom.

The same is true for many areas of commercial law. Marine insurance, for instance, would have originated when parties expressly decided to transfer the risk of a sea voyage through insurance. Similarly, the various forms of partnership and proto-corporations invented in the premodern era would have originated when parties agreed to divide up labor and capital in different ways. Such transactions required nonsimultaneous cooperative behavior in which the transactors would have wanted to know in advance the terms to which they had agreed. This cooperation would be extremely difficult to achieve without *ex ante* express consent. Thus, where cooperation is necessary, contract (or legislation) is the more likely source of the rule.

Sometimes contract could not solve problems any better than custom could, and in these cases, merchants encouraged local governments to pass statutes. The prime example is the bankruptcy statutes that appeared in the northern Italian towns during the late Middle Ages. Debt-collection mechanisms did not have to be legislated. In medieval northern Europe, the practice developed that creditors of an insolvent debtor had the right to swoop in and take possession of as much of the debtor's property as they could lay their hands on, up to the amount of their debts—first come, first served regardless of any priorities.[78] This had obvious disadvantages, as the best connected, most powerful, and most informed creditors could seize all of the debtor's estate and leave nothing for the bulk of the creditors.[79]

Consequently, across Europe between the thirteenth and sixteenth centuries, as commerce became more sophisticated and the use of credit spread, governments instituted recognizably modern bankruptcy systems that enforced creditor collective action.[80] Tacit consent was not going to solve the problem because the creditors could be anywhere and would not necessarily be repeat players or even be able to identify each other, and because they were unlikely to acquiesce silently to giving up their right to grab what might be significant assets. Contract would not work either

78. HILAIRE, *supra* note 23, at 313.

79. *See* BARBARA WINCHESTER, TUDOR FAMILY PORTRAIT 294–96 (1955) (describing the 1553 bankruptcy of the Johnson Company (English wool merchants), whose many creditors had to fight over the assets on a first come, first served basis).

80. HILAIRE, *supra* note 23, at 315.

because early modern bankruptcy was involuntary. The creditors put the debtor into bankruptcy, so the debtor would have no ability to contract *ex ante* for pro rata distribution in the event of insolvency.[81]

It could be objected that this distinction—between contract and custom, and even between local statute and custom—is a mere semantic quibble. Does the category of origination make any difference when the impetus for the rule came from the merchants rather than the state? The distinction is indeed important with relation to the mercatorists' claims about what the medieval law merchant proves about private ordering. Mercatorists deploy the *lex mercatoria* example to demonstrate that groups can regulate themselves through custom without the interference of the state in order to support their policy prescriptions that private ordering is better than state ordering and that state ordering crowds out the space for private ordering. But the law merchant theory only has teeth, from a modern perspective, if it included actual custom; that is, if it consisted of binding, gap-filling rules made bottom-up by merchants based on their repeated practices rather than through contracting or legislation. Modern advocates of the law merchant believe that it did, and still does, embody customary rules that all merchants would know—and consequently would not bother to memorialize in their contracts—and that courts and arbitrators should apply when deciding disputes. But if the historical law merchant, to the extent that it is said to be composed of special uniform and universal transnational rules, was nothing more than express form contracts that everyone used, then it is an empty concept. We do not need a special phrase to describe the fact that merchants historically used contracts any more than we need one to describe the same fact now.

II. The Nature of Custom

The distinction offered in the previous part between custom and contract ignored what may have been the most important role custom played in commerce. Contracts inevitably had gaps, and some of those gaps were filled by custom.[82] Despite the existence of gap-filling customs, however, we

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81. *Id.* at 308–09.

82. *See* ENRICO BENSA, HISTOIRE DU CONTRAT D'ASSURANCE AU MOYEN ÂGE 42 (Jules Valéry trans., Paris, Ancienne Librarie Thorin et Fils 1897) (describing an early fifteenth-century Genoese opinion of counsel (*consilium*) concerning marine insurance explaining that all such policies listed in detail the risks assumed by the insurer and adding that "by the common, unwritten custom of the land and by the common and tacit understanding of those making the contract," the policies were to be understood to exclude damage caused by the fraud or barratry of the ship's captain ["Bene fateor pro veritate quod ex communi consuetudine patriae non scripta et ex communi tacito intellectu hos contractus ineuntium, excipitur unus casus tantum quo periculum pertineat ad facientes se assecurari, scilicet quando probatur res amissas fraude et machinatione patroni ad hoc excogitata."]); Julius Caesar Papers (British Library, Add. MS 12505, fol. 203r.) (Mar. 8, 1584) (regarding a marine insurance contract, counsel refers to "the express agreeme[n]t between the parties [that] the saide instrume[n]t shall bee understood in most beneficiall maner according to th'use and customs of the [royal] exchange"); *id.* at fol. 204r. (June 18, 1583) ("[T]hey further in the

lack evidence that they became a uniform and universal part of the *lex mercatoria* other than, perhaps, at a very high level of generality. Instead, the evidence suggests that substantive customs remained geographically local or confined to a particular network of repeat players. Subpart II(A) offers evidence suggesting that custom was often contested because it was not universal. Subpart II(B) attempts to explain why custom did not lend itself to uniformity across space or trading networks.

A. Contested Custom

If merchant custom constituted a widely recognized uniform and universal set of laws, we might expect litigants to disagree over whether a custom applied to their particular facts but not to argue about whether it existed at all. Traders who wished to maintain a good reputation for honesty and abiding by the rules would presumably have had little incentive to deny customs they realized everyone knew. As in any modern dispute, however, medieval merchants wanted to win and would make the arguments they felt best guaranteed an overall positive outcome, even if that might involve lying and cheating that they believed they could get away with.[83]

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saide co[n]tract and bargaine covenau[n]ted and agreed that the saide pollicy or bill of assurance wth all things therein co[n]teined sholde bee understood and construed according to the ancient custome of merchants, and to the use of Lo[m]bard streate and of the [royal] exchange in London."); James Oldham, *Insurance Litigation Involving the* Zong *and Other British Slave Ships, 1780–1807*, 28 J. LEGAL HIST. 299, 300–02, 307 (2007) (discussing gap-filling custom providing interpretations of the standard marine insurance contract); Wijffels, *supra* note 6, at 271, 275 (citing sixteenth-century legal opinions to the effect that custom could be used to interpret contracts).

83. On the frauds of merchants, see, for example, PHILIPPE BORNIER, ORDONNANCE DE LOUIS XIV SUR LE COMMERCE 23 (new ed., Paris, Compagnie des Libraires-Associés 1757) ("[I]t is very important that this Ordinance be religiously observed, especially in this century, when it appears that the good faith and probity of centuries past have greatly degenerated." ["[I]l est très important que cette Ordonnance soit religieusement observée, sur-tout en ce siécle [sic], où il semble que la bonne foi & la probité des siécles [sic] passés ont fort dégénéré."]); 19 ISAMBERT, *supra* note 71, at 93 (preface to French commercial code of 1673: "[W]e believed it to be an obligation to provide for the continuance [of commercial development] regulations capable of assuring among merchants the good faith against fraud and of preventing the obstacles that turn them away from their work by lengthy lawsuits that consume their profits." ["[N]ous avons cru être obligé de pourvoir à leur durée, par des réglemens capables d'assurer parmi les négocians la bonne foi contre la fraude, et prévenir les obstacles qui les détournent de leur emploi, par la longueur des procès, et consomment en frais le plus liquide de ce qu'ils ont acquis."]); JOHANNES PHOONSEN, WISSEL-STYL TOT AMSTERDAM pt. 2, at 120 (Amsterdam, Andries van Damme & Joannes Ratelband 1711) (1676) (describing a 1666 ordinance of Frankfurt and recounting the town council explaining that it had promulgated the rules "based on diverse complaints that have been made to us, that for some time great abuses have been introduced with regard to the letters of exchange drawn on this city either at the fairs or at other times, these causing much disorder and confusion and long and contentious suits, and which it is good to remedy in order to prevent the decline and the ruin of business and to avoid the hardship that these abuses could cause our free fairs" ["zu wissen welcher gestalt wir aus denen uns vorkommenen Klagen befunden daß nun eine zeithero mit denn Wechselbrieffen so auff diese Stadt oder dero Messen gerichtet allerhand Unordnung und Mißbräuche eingerissen. Weil dan solches nicht geringe Ungelegenheit, Confusion und kostbare langwürige Process und Rechtfertigung verursachet und dahero zu besorgen da deme nicht begenet werden solte daß hierauß anders nichts als eine Zerruttung der Negotien und Wechselhandlung zu nicht geringen Ubbruch, Schaden und Nachtheil der alhiesigen hoch befreyeten Wessen entstehen

In the seventeenth century, we hear of disputes concerning the length of the usance period. Usance, the time between the drawing of a bill of exchange and the date it came due in another city, was perhaps the most widespread custom exclusive to merchants.[84] Usances between cities were so well established that merchant manuals published lists of them.[85] Traditionally, an usance lasted a month, regardless of how many days the month had.[86] And yet, despite the strength and even universality of this custom, enough disputes arose over the question of whether a month-long usance lasted twenty-eight days or depended upon the length of the specific month of the usance period at issue that the drafters of the French commercial code of 1673 felt it necessary to set the length of usance in France at thirty days.[87]

Similarly, in a sixteenth-century insurance case heard by the English Court of Admiralty, one set of insurers—trying to wriggle out of paying on a claim—asserted that an insurance policy good for one year should use the common law method of determining the length of a month as twenty-eight days despite the fact that "the chiefest merchants in London, Englishmen, Italians, Frenchmen, Dutchmen, Spaniards, and [Portuguese], the chiefest and most eminent public notaries Englishmen and strangers, the Lord Mayor of London and his brethren, the commissioners for the hearing and determining of causes of assurance upon their oaths" testified that according to

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mochte"]); 1 LÉOPOLD GILLIODTS-VAN SEVEREN, CARTULAIRE DE L'ANCIENNE ESTAPLE DE BRUGES 233 (1904) [hereinafter GILLIODTS-VAN SEVEREN, CARTULAIRE] (recounting complaints of Scottish merchants in 1359 of sharp practices of Bruges merchants); Sachs, *supra* note 6, at 706 (discussing evidence that some merchants appeared repeatedly as defendants in different cases); Volckart & Mangels, *supra* note 6, at 438 (quoting writings by monk Alpert of Metz from 1020, which provide one of the earliest descriptions of merchants and explains how they would try to defraud their creditors by "persistently den[ying the debt] and immediately swear[ing] to have taken nothing. When one is discovered to have committed public perjury they maintain that nobody can prove this. When the object is so small that it can be concealed in one hand he uses the other hand to [take the oath] that it does not exist"); *see also* BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 65 (1926) ("[T]he force of custom, the glamour of tradition, if it stood alone, would not be enough to counteract the temptations of appetite or lust or the dictates of self-interest.").

84. One indication that usance was a customary development comes from its name, which means usage.

85. *E.g.*, MALYNES, *supra* note 60, at 392–93. *But see* BORNIER, *supra* note 83, at 248 (explaining that the rule applied only for bills payable within France but that merchants drawing bills in foreign countries needed to conform to the local custom of that country); FRANÇOIS DE BOUTARIC, EXPLICATION DE L'ORDONNANCE DE LOUIS XIV ROI DE FRANCE ET DE NAVARRE CONCERNANT LE COMMERCE 45 (Toulouse, Gaspard Henault & Jean-François Forest 1743) (acknowledging that when trading in foreign countries "it is necessary to conform oneself to the rule determined by custom or the law of the prince" in that country ["il faut se conformer à ce qui se trouve reglé par la Coûtume ou par la Loi du Prince"]).

86. ANDRÉ VANDENBOSSCHE, CONTRIBUTION À L'HISTOIRE DES SOURCES DU DROIT COMMERCIAL: UN COMMENTAIRE MANUSCRIT DE L'ORDONNANCE DE MARS 1673, at 67 (1976).

87. 1 JACQUES SAVARY, LE PARFAIT NEGOCIANT 150 (new ed. Geneva, Cramer & Philibert 1752); *see also* Baker, *supra* note 6, at 312 (describing a 1600 case in which an English jury rendered a special verdict that, by the custom of merchants, usance meant one month).

custom twelve months meant a calendar year "in all merchantlike contracts and business."[88] The court found in favor of the custom.[89]

Another case challenging an apparently well-known custom arose in the aldermanic court of Bruges in 1439. The Spanish iron merchants trading in that town brought suit against the Spanish wool merchants there disputing the correct way to apportion the damages that the merchandise carried for them by the Spanish shipping fleet had incurred during shipment. The iron merchants argued that the terms of the charter party (under which they would pay less) should control, while the wool merchants wanted to be governed by the "ancient custom maintained between them about this."[90] The court held that the custom should apply and said that if the iron merchants felt otherwise, they should pursue their suit in Spain.[91]

This case is noteworthy in two respects. First, the wool merchants referred to a specific custom they had developed with the iron merchants, not to a general mercantile custom. The pleading of custom as belonging to a particular place or region or as part of a particular trade or trading network was very common.[92] Second, the only evidence the mercatorists can provide that a true, systematic law merchant existed comes from maritime law, which was early codified.[93] Yet here is a case from the fifteenth century demonstrating that merchant communities that had been doing business in Bruges for over a century by that time still did not agree about when a custom governing general averages—one of the fundaments of maritime law—applied.

In many other instances, the parties disagreed about the content of the alleged custom. In sixteenth-century Antwerp, a seller proffered a jury (*turba*) of eleven experts to prove that where a fraudulent buyer had transferred the goods to a third party, "the ancient Antwerp custom, often confirmed by judicial decisions, [held that] an unpaid seller could attach and reclaim the goods sold, whether in possession of the buyer or of a third party,

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88. Julius Caesar Papers, *supra* note 82, at fol. 203r. (Mar. 8, 1584) (spelling modernized and a few minor words omitted without ellipses). For a description of the case, see Ibbetson, *supra* note 21, at 302–03. It should be noted that the same issue had come up the year before and was decided the same way. Julius Caesar Papers, *supra* note 82, at fol. 203r. (June 18, 1583).

89. Julius Caesar Papers, *supra* note 82, at fol. 203v.

90. 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 619 ("selonc lanchienne coustume sur ce entre eulx entretenue").

91. *Id.* ("Et par ainsi quil semble ausdis marchans de fer quils en doivent plus avoir par vertu desdictes chartres parties faictes a Bilbar, quilz le poursuient en Espaigne, devant le Roy ou les seigneurs de son noble conseil, ou ailleurs en Espaigne, ou bon leur semblera.").

92. Baker, *supra* note 6, at 319 (describing instances where custom that developed between merchants from London and Venice was claimed in court); Wijffels, *supra* note 6, at 255–57, 265, 266 n.29, 270 (recounting sixteenth-century opinions of counsel from the Low Countries repeatedly making reference to the custom of the bourse of Antwerp or the custom of Bruges). In addition to the other examples discussed in this section, see also 2 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 17 (discussing a citation from 1453 to maritime customs of France).

93. *See* BERMAN, *supra* note 1, at 340–41 (listing examples of early maritime codes, the earliest of which was adopted around 1095).

when the former had run away immediately or shortly after having obtained the transfer of the goods."[94] The transferee, by contrast, produced six lawyers to attest that "in the case of a fugitive buyer, the seller was to enjoy priority in being repossessed only if the goods were found among the buyer's goods, but not if they had meanwhile been transferred with a title to a third party."[95] The lawyer giving an advisory opinion on behalf of the defrauded seller opined that the *turba* should be followed because it conformed with the learned (Roman and canon) law.[96] This dispute is particularly interesting because mercatorist tradition going back to Levin Goldschmidt considers the rule that a thief in the chain of title will not vitiate a good-faith purchase for value one of the undisputed pieces of evidence that a uniform and universal customary law merchant existed.[97]

Custom could also vary across different trading networks. The seventeenth-century French parliamentary attorney Matthias Mareschal related the story of a person who drew a bill on a merchant of Rouen. When presented with the bill three days after it was due, the merchant on whom the bill was drawn could not pay because he had gone bankrupt. A dispute arose over who bore the risk of the bankruptcy. Because commercial usages could vary from town to town, before ruling the Parlement of Paris felt it necessary to pose the question to six merchants of Paris, three of whom traded at the fairs of Lyon and three of whom traded in Rouen.[98] The problem with such consultation, wrote Mareschal, was that even the merchants consulted often could not advise the judge with certainty.[99]

The customs in most of these examples were quite fundamental: a certain percentage of the damage, a certain number of days, and a certain division of risk. Yet the rules did not become unified. One reason may be

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94. Wijffels, *supra* note 6, at 270 (internal quotation marks omitted).

95. *Id.* (internal quotation marks omitted).

96. *Id.*

97. BERMAN, *supra* note 1, at 349; GOLDSCHMIDT, *supra* note 40, at 133. *But see* Sachs, *supra* note 6, at 778–79 (demonstrating that it was not a universally followed custom); *see also* Aldermanic Court Decision (Mar. 21, 1408) (Stadsarchief Brugge, Groenenboek A, fol. 53v.–54r. (modern numbering)) (containing a decision by aldermen that if goods left with a pawnbroker were stolen and sold to a bona fide purchaser, they could be reclaimed by the true owner, unless the goods were purchased in a *vrije jaermaercten*, literally: free annual fair, or a market *ouvert*); 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 594 (noting that Hansa merchants in Bruges could get restitution of goods even if they were sold in the open market).

98. MARESCHAL, *supra* note 77, at 15–16.

99. *Id.* at 16–17 ("Car bien souuent les Iuges s'y trouuent empeschez à iuger, & mandent des gens experts en Negoce, lesquels eux-mesmes n'en peuuent bailler aduis bien asseuré."); *see also* 1 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 371, 374–75 (1992) (relating a case concerning whether the debtor or the creditor bore the risk of the bankruptcy of a banking house on which the debtor drew the draft with which it paid the creditor and illustrating that the court took into account evidence of bankers' customs according to which creditors presenting drafts for payment on the same day would have been paid before closing time if the bank was located to the east of Mansion House, London, but not until the following day if the bank was located to the west of Mansion House). The author thanks Professor Oldham for this reference.

that merchants had neither need for nor expectation of uniform and universal customs. In the medieval mind, custom belonged to the specific community that created it. Medieval merchants believed custom to be personal, not international.[100] Indeed, in carrying out trade, merchants expected to follow the local laws and customs, as the English author of a seventeenth-century merchant manual instructed:

> In the concluding of a *Bill of Exchange*, if the *Parties* and *Bro[k]ers* only treat about the Course, not mentioning any other Conditions, then the other Conditions are supposed to be such, as the Custom of the Place, to which the Bill must be directed, ordinarily allows of, not only in respect of the Time of Payment, and the Species in which the Bill must be paid, but in all other respects.[101]

As long as the merchants knew the practices of the group of people with whom they did business, the fact that commercial customs were not uniform and universal made little difference to them. Disputes surfaced when they did not know the local rules, and this would become increasingly common as commerce opened up and members began trading across networks with people or in locations with which they were unfamiliar.

B. The Non-unifying Nature of Custom

According to the mercatorists, the medieval law merchant consisted of uniform and universal merchant-created customs. Part I disputed the claim that most of those aspects of premodern commercial practice that might in fact have been relatively widespread originated in custom at all, and the previous subpart pointed to evidence suggesting that many customs that did form were not uniform and universal. This subpart attempts to explain why shared custom—defined as before, as law made through behavior to which the community has tacitly consented—usually could not have been a shared source of identical mercantile practices across Europe.

To demonstrate how difficult it would have been to pin down a simple rule that yielded a dependable account of the content of a specific custom, this subpart offers an elementary—and entirely provisional—tripartite typology of custom ranging from those that are (1) rule-like, to those that are (2) under-articulated, to those that are (3) invented only at the moment of

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100. Donald R. Kelley, *"Second Nature": The Idea of Custom in European Law, Society, and Culture*, *in* THE TRANSMISSION OF CULTURE IN EARLY MODERN EUROPE 131, 137 (Anthony Grafton & Ann Blair eds., 1990); MARTHA C. HOWELL, COMMERCE BEFORE CAPITALISM IN EUROPE, 1300–1600, at 56 (2010) ("[C]ustomary law was by definition local and particular . . . ."). In the Netherlands, for instance, in the sixteenth century, the Emperor ordered the customs to be consolidated, written, and promulgated. R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW 36–37 (D.E.L. Johnston trans., 1992). Almost six hundred local customs were abrogated in favor of consolidated regional customs, leaving ninety-six to be fully homologated, while another eight hundred thirty-two were merely reduced to writing. *Id.* at 37–38. This should remind us that custom was a form of law that only worked in communities of limited size.

101. SCARLETT, *supra* note 75, at 14; *see also supra* note 57.

dispute resolution. Within these categories, customs had a greater or lesser tendency to demonstrate certain non-uniting characteristics. First, the same general custom could be expressed in various and inexact ways, which argues against uniformity across communities. Second, customs, even after they had been once or twice established in court, remained susceptible to the influence of equitable considerations each time they had to be re-remembered. These influences could result in significant alterations to the content of the rule, leading it to vary from place to place. Third, custom lent itself to manipulation, for it originated in behavior that was not necessarily understood to represent a binding rule until after some member of the community did the opposite and was sanctioned. Disputants could claim, with apparent certainty, that a particular custom existed even though, in fact, no one had previously realized it and, in some cases, even though no such custom did genuinely exist. While such indeterminacy did not prevent communities from governing themselves with customary law, these factors contributed to making custom too amorphous and malleable a social phenomenon to be successfully transplanted from one location to another while still remaining the same.

On one extreme of the proposed typology sits that subset of highly rule-like customs that had such clearly defined limits that a single formula could express the totality of the rule. These customs would likely have represented simple, frequently repeated behaviors, performed by one person independently and requiring no discretion. They may have generally involved a specified numerical limit, such as a number of days, that was easy to remember and to police. An example might be the baker's dozen. It stands for the custom that in the sale of rolls, twelve means thirteen. Such a well-defined custom within a restricted community of bakers could not only have great stability and staying power but also portability. It could, in other words, theoretically become uniform and universal.

And yet, that may rarely have occurred. Despite the fact that it might have been a simple matter for a community of bakers to establish as unambiguous a custom as the baker's dozen, evidence suggests that it was difficult to make some types of well-defined customs universal. First, customs arise in small, closely knit communities in which the expected behavior can be both modeled and policed. Where a custom concerned a mere coordinating rule in which no one particular formulation of the rule was necessarily superior or more efficient, different communities or trading networks could evolve different rules. Until those networks interacted with each other, they would have no reason to know that others did not share their rule.[102]

102. Lisa Bernstein found the same phenomenon in her study of the writing of industry regulations in the late nineteenth and early twentieth centuries. Disputes proliferated as trade became more national, and when industry members sat down to draft national rules, they discovered that each region had different practices. Bernstein, *supra* note 77, at 719, 721, 724–27.

We have a telling example of this phenomenon from Paris in 1628. A bill of exchange would specify that it was payable on a certain number of days after presentation, or it would say that it was payable on sight. However, "on sight" came routinely to mean that the bearer could protest for nonpayment only after a prescribed grace period of several days.[103] A case concerning the number of days of grace on a sight bill came before the royal court of the Châtelet of Paris.[104] One party claimed that these so-called days of grace lasted ten days and the other that they lasted eight.[105] To resolve the dispute, the court first

> heard out several notable burghers and bankers, together with the masters and officers of the six guilds of merchants[106] of the town of Paris about the form and usage that they were accustomed to follow in the protest of letters of exchange and the time in which the protest must be made. These were all unanimous that until then the usage had been that the letters of exchange were protested in eight or ten days after their maturity, but that the said time had not yet been limited by any ordinance, and all the said burghers, bankers, and officers of the six guilds requested the court, in judging the suit, to regulate and prescribe the time within which the protest of letters of exchange must be made for the good and utility of commerce.[107]

The court picked ten days and ruled accordingly.[108]

Second, dispute resolution that followed divergent paths in different places could have resulted in disuniting the substance of even a rule-like custom. We can hypothesize an example based on a real case. Some years after the Parisian court chose to make the days of grace on a sight bill ten

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103. 1 SAVARY, *supra* note 87, at 161–62.

104. *Id.* at 165.

105. *Id.*

106. A perhaps imperfect translation of the "Gardes de six Corps des Marchands." *See* 2 JACQUES SAVARY DES BRUSLONS, DICTIONNAIRE UNIVERSEL DE COMMERCE 1441–42 (new ed. Paris, La Veuve Estienne 1741) (*s.v.* Garde).

107. 1 SAVARY, *supra* note 87, at 165–66 (ellipses omitted in the translation). The original text states:

> la Cour après avoir entendu plusieurs notables Bourgeois & Banquiers, ensemble les Maîtres, & Gardes des six Corps des Marchands de la Ville de Paris . . . sur la forme & l'usage qu'ils avoient accoutumé de garder aux protests des lettres de change, & le tems dans lequel le protest se devoit faire . . . lesquels auroient tous unanimément dit que jusques alors l'usage avoit été, que les lettres de change avoient été protestées dans les huit ou dix jours après l'échéance d'icelles, quoique ledit tems n'eût encore été limité par aucune Ordonnance, & tous lesdits Bourgeois, Banquiers, & Gardes des six Corps, auroient requis la Cour en jugeant le Procès vouloir régler & prescrire le tems dans lequel les protests des letters de change se devroient faire pour le bien & utilité du Commerce. La Cour, dis-je, auroit ordonné par cette Arrêt, *que tous porteurs de letters de change en cette Ville de Paris, seroient tenus de faire le protest d'icelles dans les dix jours d'échéance desdites lettres* . . . .

Id.; *see also* BORNIER, *supra* note 83, at 233–36 (detailing the different customs concerning the time for protest in cities all over Europe).

108. 1 SAVARY, *supra* note 87, at 166.

days rather than eight, a new question arose among the merchants of Paris: when were the days of grace to begin, on the day the payee presented the bill for payment or on the day after? Once again, a court had to decide. This time it was the Parlement of Paris that held that the days of grace began the day after presentation.[109]

Now imagine that Parisian merchants had exported their pre-judicially-defined custom of an eight-day grace period to another town. At some point, the question would arise in the borrower town of when the counting began. If the court in that town held that the grace period began on the day of presentation, then the custom could come to be understood as a nine-day grace period. As such, the custom in the borrower town would begin to diverge from that of the lender town. Thus, even a very rule-like custom would not necessarily remain consistent with its origins if it left any space for discretion by a decision maker or the community.[110]

The divergence between the customs of different localities could become even more acute, though oddly perhaps less immediately obvious, in the second category of the typology: indeterminate customs that lack well-defined boundaries. The hypothetical example here is the custom that the seller delivers. Despite its apparent clarity, this rule is far from definitive. As Richard Craswell has explained,

> some merchants might frame the custom as a bright-line rule: "Sellers should always provide free delivery, no matter what the circumstances." Some might frame it as a bright-line rule qualified by an open-ended exception: "Sellers should *normally* provide free delivery, but in extreme circumstances this obligation might not apply." And some might frame it as a completely general standard—for example, "Sellers should provide free delivery whenever failure to do so would amount to bad faith" . . . .[111]

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109. *Id.*

110. *Cf.* Henry Serruys, *Remains of Mongol Customs in China During the Early Ming Period*, 16 MONUMENTA SERICA 137, 173–74 (1957) (discussing Mongol marriage practices, in which a brother was "bound" to wed the widow of his brother). However, while the custom of a brother marrying his brother's widow may have been widespread, it varied in its details from place to place within the Mongol empire. In some provinces the oldest younger brother had a right of first refusal, and upon rejection, the widow would be offered along until the youngest male relation was expected to take her. In such regions, brothers older than the deceased were not allowed to marry the widow. Later, in other provinces, the custom evolved to permit the older brother to marry the widow. *Id.* at 173–74 & n.106.

111. Richard Craswell, *Do Trade Customs Exist?*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 118, 127 (Jody S. Kraus & Steven D. Walt eds., 2000). George Schroeder made a similar point in the context of football customs:

> To be sure, there are still unwritten rules of sportsmanship. But considering it's not written down anywhere, it's perhaps not surprising that the code has become elastic. Pull your starters in the fourth quarter? Or at halftime? OK, but when do you stop passing?
>
> . . . .

In the context of a medieval town in which a usage arose amongst merchants through repeat behavior, the seller's act of delivering would be bounded by his experience and the expectations of buyers. Those sellers who delivered only in the neighborhood, for instance, would not have reason to contemplate whether the rule was "seller delivers only in the neighborhood," or "seller delivers everywhere in town," or "seller delivers everywhere close to town," or "seller delivers everywhere." Those sellers whose customers were foreign merchants might think that "seller delivers" just meant sending the goods to the buyer's hostel in town. And those sellers who did not deliver, either because of the nature of their business or because of the practice to which they had become accustomed with their particular customers, might not know of the general usage at all or might think it applied to other sellers but not to them. In this sort of custom, the behavior in question is heterogeneous enough that it could be performed somewhat differently by each person without incurring sanctions for nonconformity with the custom.[112]

To see how these characteristics would play out as the usage "seller delivers" became a custom, assume that a dispute arose between Buyer and Seller about whether the town had a custom that sellers would deliver. For the purposes of this hypothetical, we must understand that the parties had no oral or written contractual term about delivery and that the question of a delivery custom had never explicitly arisen before in this community. Consequently, the only evidence that a custom that the seller delivers existed was repeated behavior (delivery) by many, but perhaps not all, of the sellers in the community.

Given the jurists' distinction between usages that one may do and customs that one must do, the parties to this dispute could not know *ex ante* whether the norm "seller delivers" was binding. Any resolution of that

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> There's still a debate to be had over how much is too much, and when and how it's best to hit the brakes. But those unwritten rules remain up for interpretation. And like the game, they're also evolving. Maybe 90 points would be too much, but is anyone sure? We know what the Ol' Ball Coach thinks: "As long as you let your backups play, nobody cares (about the score)," he said.

George Schroeder, *Winning Is Paramount, but Winning Impressively Is Almost as Important*, SPORTS ILLUSTRATED (Oct. 14, 2011), http://sportsillustrated.cnn.com/2011/writers/george_schroeder/10/14/running-up-the-score/index.html.

112. *See* LLEWELLYN & HOEBEL, *supra* note 36, at 275–76 ("[S]uch terms as 'custom' and 'mores' have come to lend a seeming solidity to any supposed lines of behavior to which they are applied, and a seeming uniformity to phenomena which range in fact from the barely emergent hit-or-miss, wobbly groping which *may* some day find following enough to become a practice, on through to an established and nearly undeviating manner in which all but idiots behave. The terms obscure also the very important range of unnoticed or unrebuked scatter of behavior around the 'line' [of acceptable behavior] concerned. Even on the 'normative' side, that of the accepted standard, they obscure the question of how many hold the standard to be proper, and how uniformly they hold it so, and who may be feeling differently . . . ."); MALINOWSKI, *supra* note 83, at 31 (explaining that the customs of the Trobriand tribe "are essentially elastic and adjustable, leaving a considerable latitude within which their fulfilment is regarded as satisfactory").

question would have to await a dispute that originated when a seller refused to deliver and the buyer, with community backing, objected, perhaps in the form of nonlegal sanctions, perhaps in the form of a lawsuit.

If a buyer brought suit and claimed a custom, he would have to prove its existence, and medieval courts had well-established procedural rules for this.[113] The process usually involved polling representatives of the community, either through the interrogation of expert witnesses or through the use of a jury-like mechanism called a *turba*.[114] In the *enquête par turbe*—or investigation by jury—a group, traditionally composed of ten leading men,[115] was told the custom claimed and called upon to "report faithfully what they know and believe and see to be the use concerning that custom."[116]

Even if every witness or juror consulted in the case at hand believed that a norm existed that the seller delivers, their articulation of the precise contours of that rule would depend both upon the framing of the question and their own experience of the behavior. Assume that the question of first impression before the court was whether a seller who manufactured leather goods must deliver to a buyer who lived just outside the town walls. Ten merchants were consulted on the question. Merchant *A* might believe that all sellers in the town had to deliver but only within six blocks of the seller's shop, because that was as far as *A* or the sellers he knew had ever delivered. Merchant *B* might believe that the seller had to deliver if the goods cost above a certain amount, because that reflected his experience. Merchant *C* might believe that sellers delivered if convenient, because that was what he assumed sellers did. Merchant *D* might believe that sellers had to deliver within the town walls only, because he had never heard of anyone being asked to do otherwise. Merchant *E* might believe that shoemakers, like himself, had to deliver but did not know whether other sorts of leatherworkers did as well. And so on down the line.

The experts articulated the rule, if they considered a rule to exist, as they understood it from their own behavior and that which they had observed in others. Customs, by their nature, arise from repeating an act and not from the abstract expression of a rule. But the members of the community, if even they recognized the existence of a common behavior, may not know whether

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113. David Ibbetson, *Custom in Medieval Law*, *in* THE NATURE OF CUSTOMARY LAW 151, 158–60 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007).

114. *See* 2 SELECT CASES CONCERNING THE LAW MERCHANT, *supra* note 51, at 14–15 (providing an example of an inquisition requested by an English court of experts in Bordeaux in 1276).

115. *See* GLOSSA ORDINARIA at Dig. 47.10.7.5 v. *turba* ("A *turbe* is made up of ten men" ["Turba. quae sit ex decem"]). A *turbe* could be composed of laypeople, merchants, or even lawyers, depending upon the situation. *E.g.*, PHOONSEN, *supra* note 83, pt. 2, at 7–9 (describing a *turbe* from 1663 composed of ten lawyers practicing before the city court concerning bill protests).

116. CH. V. LANGLOIS, TEXTES RELATIFS À L'HISTOIRE DU PARLEMENT DEPUIS LES ORIGINES JUSQU'EN 1314, at 79 § 58 (Paris, Picard 1888) (reproducing an ordinance of the King of France from 1270 establishing the procedure of a *turba*).

their own engagement with the action reflects the full limits of the custom. As Hayek explained,

> The process of a gradual articulation in words of what had long been an established practice must have been a slow and complex one. The first fumbling attempts to express in words what most obeyed in practice would usually not succeed in expressing only, or exhausting all of, what the individuals did in fact take into account in the determination of their actions. The unarticulated rules will therefore usually contain both more and less than what the verbal formula succeeds in expressing.[117]

Thus, if the experts polled were asked only whether a seller had to deliver in a fact situation in which the buyer lived just outside the city walls, and they found he did, does the new custom "seller delivers" mean delivery close to town, or delivery anywhere, or delivery within a certain distance outside the walls, or delivery only outside the walls but not inside, etc.? The reality is that, until the dispute and the concurrent need to begin to express the custom in words arose, the pattern of behavior that had taken root in the community might have included all, some, or none of these possibilities. The articulation of a custom was to some degree itself an act of invention.[118]

Even customs that began as a shared vocabulary with similar meanings could often have grown apart. Assume that after Town *A* had established that "seller delivers" was a custom, at least in cases in which the buyer lived close to town, *A*'s merchants exported that custom to Town *B*. Unless *B* repeatedly sent back to *A* for rulings on the meaning of the custom, the content of *B*'s seller-delivers custom would likely begin to diverge from that of *A*. Because medieval custom was oral, realized through behavior, and reliant on memory, it tended to evolve as the decision makers permitted their memories and judgment to be swayed by biases or equitable concerns. As David Ibbetson, the prominent English legal historian, has perceptively observed,

> That something was customary was a backward-looking reason for a forward-looking conclusion, and the more the conclusion was desired the flimsier might be the reason provide[d] for treating it as law. . . . [T]he aim in practically every dispute was to achieve consistency with the past at the same time as getting the result which was thought to be right . . . .[119]

Custom that was indeterminate rather than rule-like could consequently evolve over time as the community decided whether or not to impose

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117. 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 77–78 (1973) (footnote omitted).

118. *Id.* at 78 ("The process of articulation will thus sometimes in effect, though not in intention, produce new rules.").

119. Ibbetson, *supra* note 113, at 174–75; *see also* The Verie True Note, *supra* note 20, at fol. 347r. ("[I]f they will not be iudged by lawe (as they saie and sweare they ought not but only by them selves) the world must neades iudge them to be p[ar]ciall and evill dealers . . . .").

sanctions based upon factors unrelated to an offender's failure to perform the usage correctly. Jurors could "remember" the custom in different ways under the influence of the passage of time; self-serving ends; sympathy or antipathy for the parties in a case; or some sense of fairness, compassion, or righteous indignation.[120]

Medieval judges were apparently aware of custom's malleability at the hands of fallible, manipulable memories.[121] At the conclusion of his huge thirteenth-century collection of the laws of the Beauvaisis, Philip de Beaumanoir wrote,

> I have arrived at the end of what I undertook in my heart to do, that is to write a book on the customs of Beauvais. . . . And since the truth is that customs come to an end because of young jurors who do not know the old customs, so that in the future the opposite of what we have put into this book will be observed to happen, we pray to all to excuse us, for when we wrote the book, we wrote as far as we could what was enforced or should have been done ordinarily in Beauvais; and the corruption of the time to come should not bring us into ill repute, or be blamed on our book.[122]

If custom could change even after it had been recorded in writing, it could also change when transmitted orally from one place to another untethered

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120. An anthropologist discovered a similar result while investigating adjudication in an African customary-law tribal court:

> [Ngoni tribal] courts have continually to deal with new situations and to make decisions which are unprecedented. This is done under the guise of drawing attention to some good Ngoni custom which has been neglected. Thus for example a man came to court saying that he was always quarrelling with his wife and that he wished to divorce her. The bench granted the divorce and awarded the woman 30*s*. damages. The litigant protested. The junior member of the bench, a man aged about 25 years, said, "Don't you know, it has always been the custom in this court to award 30*s*. damages against men who divorce their wives." Yet this was a comparatively recent practice and the litigant's protest seemed, to me, to be quite justified. The young man had been on the bench only about eighteen months.

J.A. Barnes, *History in a Changing Society*, 11 RHODES-LIVINGSTONE J. 1, 5–6 (1951). For other discussions of the flexibility of custom, see MALINOWSKI, *supra* note 83, at 80–81 (discussing accepted and well-established "evasions" of what superficially appear to be strict and mandatory customs); Craswell, *supra* note 111, at 139 ("[I]t is easy to find cases where the court's own view of the merits of a practice has clearly influenced its ruling on the legal issues involving customs."); and Thomas Barfield, Neamat Nojumi & J. Alexander Thier, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*, U.S. INST. PEACE, 6–7 (Nov. 2006), http://www.usip.org/files/file/clash_two_goods.pdf ("[F]ar from being timeless and unchanging, [customary law systems] are subject to a great deal of manipulation and internal contest. . . . The fundamental goal of [a customary court] process is to restore community harmony, which is generally achieved by arriving at an equitable settlement that corrects harm done to honor and/or property.").

121. *See* RANULF DE GLANVILL, THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL, 73–74, bk. vii. c. 1 (G.D.G. Hall ed., 1965) (admitting that custom will be influenced by equity).

122. THE *COUTUMES DE BEAUVAISIS* OF PHILIPPE DE BEAUMANOIR 725, ¶ 1982 (F.R.P. Akehurst trans., Univ. of Pa. Press 1992) (1283); *see also* Ibbetson, *supra* note 21, at 305 (discussing customs concerning life insurance that changed in the twenty years after a compilation of insurance customs was written in London in the late sixteenth century).

from a central court or the control of a single group of wise men or experts. As a consequence, the apparent similarity of the custom "seller delivers" in different towns could mask significant differences of meaning and application.[123]

The witnesses asked to define the custom "seller delivers" engaged in a certain degree of lawmaking as they, in good faith, attempted to articulate as a rule the various permutations of a behavior they recognized as shared at some level of generality by the members of the community.[124] But litigants and experts did not always act in good faith, or at least they did more legislating than simply articulating. The hypothetical above of "seller delivers" assumed that the majority of sellers in the town did indeed deliver. But in some instances, parties seeking to win their suits and believing that they needed a custom to provide a rule of decision in their favor could also assert customs that either did not exist or that were not yet recognized to exist even as a usage. A fascinating manuscript from the late sixteenth century illustrates how this third category in the typology—invented custom—worked.

The manuscript is anonymous. It is a polemic against looking to custom to interpret the standard form contracts used in the London insurance industry of the time. The author explained that when a loss occurred and the policyholder or the underwriters believed some ambiguity might exist about the obligation to pay, the parties each obtained what the author called a "perrera."[125] A *parere* was a French bastardization of the Italian *mi pare* ("it seems to me"), and it referred to advisory opinions given by leading merchants, commercial courts, and later, commercial lawyers in business disputes.[126] The manuscript author, however, used the term differently. For him, a perrera was a statement of a supposed custom. As he described the process, each party, worried about litigation, would write up a statement of the custom he proposed with a description of the facts of the case, while altering the names to disguise the perrera's origins. The perrera's creator then gave the paper to a friend (the more respected, the better), and the friend attested that he was of the opinion that the custom was as stated. The friend passed the paper on to another friend who made the same notation, and so on. The perrera was then given to a broker (hopefully a foreigner, because that obfuscated the trail more effectively), and the broker would also attest to the

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123. *See* Cordes, *supra* note 6, at 66–67 (pointing out that superficial similarity hides subsurface differences in the supposedly universal maritime law of medieval Europe).

124. Ibbetson, *supra* note 113, at 168–69 ("Behind the guise of their finding of the custom [the jury] would, perhaps unwittingly, have been creating it, in exactly the same way as a common law judge finding and applying a rule would be engaged in an incremental exercise of law-creation.").

125. A Note Shewinge the Maner of a Devise Called a Perrera (British Library, Add. MS 48020, fol. 348r.) (n.d.); *see also* MALYNES, *supra* note 60, at 156 (discussing an insurance dispute in which he was involved on which were consulted "the sea-lawes and customes, and the Paracer . . . of all experienced Merchants").

126. 2 SAVARY, *supra* note 87, at p. 2 of unpaginated preface to 1688 edition.

custom and then "getteth xl or lx hands or more thereunto, Englishmen and strangers."[127] If the insured was lucky, some of the signatories to his perrera would include his insurers, who signed against their interest.[128]

"Now when the matter cometh to arbitrement both parties sheweth their perreras, the one being repugnant to the other[,] [y]et diverse of the assurers hands to both."[129] The arbitrators considered the signatures on each document and selected the perrera signed by the merchants, brokers, and insurers they respected more. The arbitrators were also often influenced by the wealth of the disputants. According to the manuscript author, the arbitrators would favor the position of the underwriters, who were usually richer and who did business with them more frequently. As the author wrote, the arbitrators and underwriters went by the rule, "do for me and I will do for thee."[130]

The customs claimed in the perreras were not necessarily genuine. The perreras never explained or justified their assertions, and none of the people who signed the papers would "dare swear the same is true."[131] Yet the custom set out in the winning perrera "of force must be credited and also forthwith prescribed for an order or custom whereby men must be judged," even if the custom were a fabrication "devised or drawn forth of uncertain heads whereof perchance the same was never or but a small time before recorded."[132] If the signatories had been individually questioned about the supposed custom, "they will be found of diverse opinions according to the discretion of the party."[133] Yet once the arbitrators or court had selected the custom stated in one of the perreras, their decision established the existence of the rule.[134]

Of course, the possibly disingenuous claim of custom did not always convince a court. In 1315, an English plaintiff claimed that the law merchant concerning the distraint of a foreign merchant's goods was the same "in all and every fair throughout the whole realm."[135] The defendant disagreed that this was the case, and the court was forced to call an inquest of merchants

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127. A Note Shewinge the Maner of a Devise Called a Perrera, *supra* note 125, at fol. 348r. (spelling modernized).

128. *Id.* at fol. 348r.–v.

129. *Id.* at fol. 348v. (spelling modernized).

130. *Id.* (spelling modernized).

131. *Id.* (spelling modernized).

132. *Id.* (spelling modernized).

133. *Id.* (spelling modernized); *see also* J.A. BRUTAILS, LA COUTUME D'ANDORRE 134 (1904) (relating that when asked about the rights of widows to intestate succession to their husband's property, the local notables gave the author five different and contradictory answers about what the rule was).

134. A Note Shewinge the Maner of a Devise Called a Perrera, *supra* note 125, at fol. 348v. (spelling modernized).

135. 2 SELECT CASES CONCERNING THE LAW MERCHANT, *supra* note 51, at 87. No result of this inquest is reported.

from four major towns across the country.[136] Despite the plaintiff's argument, a few decades earlier, the renowned thirteenth-century treatise about the law merchant that has so often been held up as proof of the existence of a systematic *lex mercatoria* had admitted that attachment of merchants' goods was done "in such different ways in different parts [of the kingdom] that no one at all was able to know or to learn the process of mercantile law in this respect."[137]

How could it happen in a society in which norms of all sorts, and mercantile norms in particular, played such an important role that disputants could get away with manufacturing a custom? In fact, such fabrication probably occurred with some regularity on account of two characteristics of custom.[138] First, because custom formed from behavior rather than from verbal expression, most members of a community would rarely have reason, prior to a dispute, to define their actions as a form of law. They might only be vaguely aware of their habitual acts or that others did the same thing. When a question arose as to whether the community behaved in certain ways under particular conditions, it would be tempting to extrapolate from what one thought people would or should do in those circumstances to assuming that is what they indeed did.[139] And since any relevant behavior, or lack thereof, was in the past and might not have been noteworthy at the time, it could be difficult to prove the contrary.

Second, custom also permitted gaps to remain that became apparent only when a dispute arose or a community undertook to write its custom down.[140] For instance, a seventeenth-century merchant manual describes what appears to have been a famous dispute in 1673 over how long a bearer

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136. *Id.* at 88.

137. *Lex mercatoria*, *reprinted in* BASILE, *supra* note 6, app. at 9. For an example of a polemical use of the *Lex mercatoria* treatise, see BASILE, *supra* note 6, at 128–39. Stephen Sachs has similarly shown how many of the rules claimed since the nineteenth century to demonstrate a uniform and universal law merchant actually varied from place to place. Sachs, *supra* note 6, at 788.

138. *Cf.* SALLY FALK MOORE, SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW ON KILIMANJARO, 1880–1980, at 194 (1986) ("[H]istorically rooted and locally generated, the adaptation (and even invention) of 'custom' has always been an ongoing enterprise.").

139. *Cf.* Simon Roberts, *The Recording of Customary Law: Some Problems of Method*, *in* 1 FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF *LEX NON SCRIPTA* 331, 333 (Alison Dundes Renteln & Alan Dundes eds., 1994) (concerning ascertaining African custom from witnesses, "there is the risk of distortion on the part of the informant: he may tell you what he thinks you would like the answer to be; what he would like the answer to be; or, what the answer might have been in the past").

140. *See, e.g.*, SELECT CASES IN MANORIAL COURTS 1250–1550, at 132–33 (Selden Society vol. 114, L.R. Poos & Lloyd Bonfield eds., 1998) (describing a 1331 case in which the jurors at an English manor court, being asked about which party had greater right to property according to the customs of the manor, responded that "they do not know, because this situation never occurred among them").

had to present a sight bill after it had been negotiated to him.[141] The bearer took the bill to the payor, only to find that the payor, who had held the money for many months in anticipation of paying the bill, was now a prisoner of war and stripped of his possessions. The merchants consulted in the litigation could not agree on which side bore the risk in such situation. Some felt that the drawer was liable because the bill was payable on a certain number of days' sight, leaving the bearer the choice of when to present it. Others believed that, given the fact that the payor had been ready to pay, the bearer delayed at his own risk. Apparently, no custom existed to resolve the issue, though it is difficult to believe that it had never arisen before.[142]

Significant gaps could exist because premodern communities were able to govern themselves for hundreds of years without knowing precisely the content of their supposed customs and even without recognizing that some portion of the community disagreed with the majority about the meaning of certain customary rules. One well-documented example of the ability of communities to accommodate the indeterminacy of their customs comes from the recording of customs in sixteenth-century France.[143] In the year 1500, about two-thirds of what is now modern France was governed by oral customary law.[144] This presented an obstacle to the increasingly centralized French government and its increasingly sophisticated system of hierarchical courts. While the customs might have been broadly similar over large areas, the details differed in significant ways.[145] Adding to the complexity, no one was quite certain about the territorial extent of each custom, making it even more difficult for courts to function, for they not only had to find the custom—often by convening a *turba*—but also had to determine the correct custom to find for the parties' locality.[146]

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141. JACQUES DUPUIS DE LA SERRA, L'ART DES LETTRES DE CHANGE, *reprinted in* 1 SAVARY, *supra* note 87, after p. 856. For a discussion of the sight-bill issue, see *supra* text accompanying notes 102–09.

142. This account comes from DE LA SERRA, *supra* note 141, at 20–21, ¶¶ 5–14. The story is also mentioned by Anonymous in VANDENBOSSCHE, *supra* note 86, at 65–67, who says that the 1673 French commercial code should have included a rule dealing with this situation. *See also* PHOONSEN, *supra* note 83, pt. 2, at 140 (Danzig exchange ordinance of 1701 lamenting "the absences which are found in the laws and statutes which have been made on this subject [such gaps having] been used as a pretext or excuse for the irregular procedures that have arisen" ["die bißherige Ermangelung eines in dergleichen Sachen beschriebenen Rechtens zum pretext des unbefugten Verfahrens angezegen werden wollen"]). In a similar situation, writing about fifty years earlier, Gerard Malynes recounted a disagreement that arose at a fair in Germany over whether a bystander could unwittingly become surety for a buyer. He explained that "[t]he opinion of Merchants was demanded, wherein there was great diversitie." This forced the court to turn to the civil law. MALYNES, *supra* note 60, at 94.

143. *See generally* John P. Dawson, *The Codification of the French Customs*, 38 MICH. L. REV. 765 (1940) (describing the process of homologating customs).

144. *Id.* at 766.

145. *Id.* at 767.

146. *Id.* at 767–68.

To remedy these problems, a succession of French kings ordered the customs of the various towns and regions of northern France to be codified.[147] This process took over eighty years, beginning around 1497,[148] and involved sending parliamentary lawyers out into the country, where they summoned large local assemblies composed of representatives from each of the Three Estates.[149] These assemblies would discuss and decide on the content of their customs, ultimately voting by majority rule.[150] The minutes of many of these assemblies have been preserved, and they demonstrate two relevant trends. First, on occasion when a custom was stated, some members of the assembly would disagree with the meaning given to it by the rest, claiming that "since time immemorial," it had meant something different.[151] Second, the assemblies discovered gaps that needed filling.[152] Yet for hundreds of years the towns and villages of France had been able to govern themselves based on these customs that, when the assemblies attempted to articulate them, could not be defined with certainty.

The flexible articulation of patterns of behavior, the role of equity in determining how courts decided questions of custom, the incentives for parties to invent rules of decision, and the ability of communities to manage without fully worked-out law provides the background against which to understand the repeated admonition in merchant manuals and the writings of learned jurists that commercial courts should decide cases *ex aequo et bono*.[153] Equity, which had judges and arbitrators looking to facts, fairness, and good faith rather than customary rules of decision, might usually have been the only way to settle disputes. This could explain why litigants frequently did not assert a custom in lawsuits and why we have rather little evidence of formal proofs being made of commercial custom. Custom or usage was probably more often an indirect rather than direct mechanism. In other words, instead of claiming "I win because such-and-such custom controls," the party said, "I win because my behavior conformed with what other people do, and this is evidence that I acted in good faith and dealt fairly." The judges or arbitrators did apply the rule that merchants should act fairly and in good faith, and litigants could demonstrate that they followed

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147. *Id.* at 770–72.

148. *Id.* at 775; VAN CAENEGEM, *supra* note 100, at 36 n.5.

149. Dawson, *supra* note 143, at 773 n.26, 774.

150. *Id.* at 778–80.

151. *See, e.g.*, François Olivier Martin, *Un document inédit sur les travaux préparatoires de l'ancienne coutume de Paris*, 42 NOUVELLE REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 192, 210–12 (1918) (providing a transcript of the commission drafting custom of Paris debating correct custom concerning payments due to the lord upon the sale of property).

152. Dawson, *supra* note 143, at 781.

153. TRAKMAN, *supra* note 3, at 12 (citing examples); JEAN TOUBEAU, LES INSTITUTES DU DROIT CONSULAIRE OU LA JURISPRUDENCE DES MARCHANDS 14, 78–79 (Paris, Jean Guignard 1682) (citing civilian jurists on the importance of equity and good faith in deciding merchant disputes and adding that in his time, conciliar judges were to judge based on equity, good faith, and the positive laws and ordinances concerning commerce).

that rule by pointing to their adherence to a regular community practice rather than through the proof of a binding custom.

These observations about the nature of custom are not meant to imply that custom did not exist or that it was unable to provide an effective means of dispute resolution. The formation of custom through adjudication appears to have created rules much like those created through common law adjudication. Law arising from custom, like that arising from the common law, formed in response to questions raised by particular sets of facts. The custom "seller delivers" does control in *this* case, in which the buyer lives close to town, but it does not control in the next case, in which the buyer lives a greater distance from the town, because the custom as we state it in the second case is "seller delivers to buyers who live close to town." By contrast, what custom could not do was provide generalizable, abstract rules.[154] As a French jurist "observed in the seventeenth century, only 'where the crops are showing' could customary law protect possession."[155]

The pliability of custom, the difficulty of proving it with any assurance, and the complexity of transmitting it from place to place may have been an important reason that courts of appeals throughout continental Europe, and even trial courts in the Italian cities, looked to Roman and canon law (*ius commune*) rather than to merchant custom in resolving commercial disputes.[156] They did not do so from a prejudice against custom, for in certain other areas of law, such as real property and inheritance, where customs were more stable and earlier put into writing, courts did apply the local customary law.[157] But for mercantile cases, the judges often found it easier to turn to the clear, sophisticated, and usually adequate rules of the Roman law.

In sum, custom is a slippery type of law to try to borrow or share. Prior to a dispute, the members of a community would not necessarily even have been consciously aware of the existence of a usage, let alone a binding custom. When experts or jurors attempted to express what had theretofore been only actions, their articulations were unlikely to capture precisely the contours of the alleged custom. Custom, like common law, was better at solving specific disputes on specific facts than at creating abstract rules. These factors made custom, again like the common law, difficult to transmit.

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154. Ibbetson, *supra* note 21, at 301.

155. Kelley, *supra* note 100, at 141.

156. *See, e.g.*, Wijffels, *supra* note 6, at 261–64 (providing numerous examples of cases resolved on the learned laws). For example, the decisions of the Genoese Rota, the premier merchant court in Europe, whose opinions were cited by other courts as authoritative, used Roman law. MARCUS ANTONIUS BELLONUS, DECISIONES ROTAE GENUAE DE MERCATURA (3d ed., Frankfurt, Martinum Lechlerum 1592).

157. *See, e.g.*, FRANÇOIS HOTMAN, ANTITRIBONIAN OU DISCOURS D'UN GRAND ET RENOMME IURISCONSULTE DE NOSTRE TEMPS 36–37 (Paris, Ieremie Perier 1603) (commenting on the need of lawyers to know customary property law, as well as marriage and inheritance customs, in order to work in French courts).

In addition, as malleable descriptions of behavior, custom accommodated equitable decision making that took into account the totality of the situation in each case. For the same reasons, claims of custom were exposed to cheating because witnesses and jurors could be persuaded that what ought to be the practice actually was. Consequently, over time, the natural evolution of a community's behavior or court decisions introducing variations might alter the contours of the custom. This means that even if a custom could have been transplanted from one community to another and perhaps started out the same in both places, the custom of the two locations would not necessarily have remained identical.[158] These observations argue against the existence during the Middle Ages of a *lex mercatoria* composed of uniform and universal merchant customs.

The implications of this claim for the law merchant story are significant. If customs were local, even if the various types of contracts that merchants used were universal, then an assumption by merchants that all of commercial law was uniform and universal would result in many disputes.[159] For example, assume that the insurance policies of London and Antwerp were very similar on their faces. They both functioned the same way, and they shared much of the same express language. However, the gap-filling customs in London differed from those in Antwerp. If a London underwriter sold an insurance policy to an Antwerp merchant, and if the merchants believed that uniform and universal customs existed, then they would assume that the gap-filling customs were the same and would not try to reconcile their in-reality variant understandings at the time of contracting. Should a disagreement arise concerning a gap-filling custom, each party would feel that he was correct and acting in good faith because he was following his own local custom, which he had believed the other party also to be following.

Several responses could result from this scenario. First, merchants might quickly realize that no uniform and universal law merchant existed and stop acting as if it did. Second, merchants from many places could get together and expressly agree to reconcile their customs. This, however, represents an act of legislated lawmaking rather than the evolution of a binding custom through repeat behavior. Third, merchants might never have believed in the existence of a uniform and universal customary law merchant and therefore always made sure to inquire about local rules and practices. No traces of the first scenario remain, though it is possible that it happened so early (probably by the eleventh century) that all evidence of it is now lost. The second scenario did occur, but perhaps only when the rules were eventually written down in either private or public law codes. The third scenario also happened, as attested to in merchant manuals advising mer-

158. A similar effect can be seen in the common law of the various states of the United States.

159. *Cf.* Trakman, *supra* note 1, at 271 (making the unproven claim that it was "clear that the existence of a Law Merchant was widely known and that it was resorted to by medieval merchants").

chants to inquire about and follow the local laws and customs.[160] None of these three possibilities, however, allow for a transnational customary law merchant that lasted hundreds of years, as depicted in the traditional *lex mercatoria* myth.

III. Calls for Legislation

As a result of the instability of custom, merchants sometimes had good reason to want an authoritative institution—e.g., court, public legislature, or guild—to establish a rule for them.[161] A statute or judicial decision could resolve the confusion that arose when the lack of a single superior solution allowed competing customs to come into being, and the process of creating the legislation could fill in gaps and resolve long-standing uncertainties.[162] Enacted laws also provided judges with more defined rules of decision that obviated the need to summon expert witnesses and *turbae*—with the possi-

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160. *See, e.g.*, *supra* notes 57–59 and accompanying text.

161. See, for example, the comments of a modern law merchant skeptic on the drawbacks of customary law:

> Romantic hindsight at the law merchant tends to overlook its weaknesses: the uncertainty of custom recorded in so many different reports or not recorded at all; differences between solutions of the same issues adopted in neighboring cities, and gaps of mercantile practice. It appears that business circles were very much interested in mechanisms which would provide a more effective resolution of commercial disputes. These solutions became feasible when larger territorial states started to develop an active policy in economic matters.

Jürgen Basedow, *The State's Private Law and the Economy—Commercial Law as an Amalgam of Public and Private Rule-Making*, 56 AM. J. COMP. L. 703, 705 (2008).

162. For example, in 1676, an Amsterdam merchant and highly respected, often-quoted expert on bills of exchange named Johannes Phoonsen listed ten unresolved issues in the law of bills as they related to bankruptcy and then commented:

> To prevent these and similar and hundreds of other questions, disputes, and inconveniences that arise in exchange that I could list and describe, it is only necessary to make a precise order and regulation based on which everyone could regulate and guide themselves, written with knowledge, ordained, and legislated. For it is astonishing and to be complained about that, in this city, which is assuredly the leading commercial and exchange locale in the whole world, no badly-needed ordinance, required and useful to prevent disputes, exists but only a few orders and regulations established from time to time . . . .
>
> [Tot preveneringe van dese en diergelijke, en honderden van questien, disputen en inconvenienten, ik omtrent veelderley voorval in de Wissel-handel soude konnen op tellen en voorstellen, behoefden maar een wel geraisonneerde vaste voet, regelment en ordre, waar na men sig te reguleren en te richten hadde, met kennis ingestelt, beraamt en gestatueert te werden; sijnde overwonderens waardig, en beklaaglijk, dat in dese de voornaamste handel- en Wissel-plaats van de geheele Weerelt, geene soo seer noodige, en tot voorkomige van vele geschillen gerequireerde en dienstige, Wissel-ordonnantie gevonden werd, maar alleen eenige weynige Keuren en Ordonnantien nu en dan gestatueert . . . .]

PHOONSEN, *supra* note 83, pt. 1, at 332–36.

bility of invention that process introduced—each time an alleged custom came up for dispute.[163]

The way the mercatorists tell the story, the state imposed formal commercial law on the merchants to the detriment of the efficient *lex mercatoria*.[164] While that may have happened in some instances,[165] it does not account for all of the legislation that came to exist. As noted above in the example of the French merchants asking the court to select between the customs of eight or ten days of grace,[166] sometimes it was the merchants who turned to judges and legislators to establish rules.

Commercial courts had a front-row seat to the uncertainty that could arise when regulation was left to custom. For example, the length of time a payee on a bill of exchange had to seek payment of a protested letter of exchange from the drawer and from endorsers up the chain "often [gave rise to] intense disputes between merchants, which greatly troubled commerce."[167] Consequently, the question came frequently before courts, moving the judges and consuls of the Parisian merchant court to take action. In 1662, they convoked a meeting of the former consuls and other notable bankers and merchants to advise them on the means of remedying this abuse.[168] The group created a set of rules establishing time limits for protests and notice, and presented them to the Parlement of Paris.[169] Parlement passed a bill and petitioned the King to ratify it, which he did in January 1664.[170] The preamble of the King's declaration recounted the bill's origin in the concerns of the

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163. *Cf.* Robert L. Hecht, *How the Tea Association Serves Its Members*, 51 TEA & COFFEE TRADE J. 321, 321 (1926) (stating that one of the purposes behind the formation of the Tea Association of the United States was to "procure uniformity and certainty in the customs and usages of said trade and commerce, to settle differences between the members of the association, and to promote a more enlarged and friendly intercourse among business men connected with the trade").

164. Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (*Lex Mercatoria*)*, 19 HARV. INT'L L.J. 221, 227–28 (1978); Carbonneau & Firestone, *supra* note 4, at 61–62; Cremades & Plehn, *supra* note 1, at 319–20; Trakman, *supra* note 8, at 15, 22–24.

165. *E.g.*, 19 ISAMBERT, *supra* note 71, at 101 (documenting title 6, article 2 of the 1673 French commercial code, which banned compound interest, which French merchants commonly charged); VANDENBOSSCHE, *supra* note 86, at 81, 83 (giving the response of one early commentator to this provision: "This article is entirely contrary to the usage of the exchange of Lyon, and when, in litigation, one wished to allege the rule in this article, the court ignores it" ["Cet article est entièrement contraire à l'usage de la place de Lion, et, lorsque dans les procez on a voulu alléguer la disposition de cet article, la cour n'y a eu aucun égard."]). This critical commentary comes from an anonymous manuscript work ("Anonymous") that its editor dates to 1678–1686. The identity of the author of the Anonymous presents an interesting puzzle. He was, from all appearances, a Roman law-trained lawyer with an extensive knowledge of commercial practice. Vandenbossche expresses the belief that the author was a practicing attorney. *Id.* at 9.

166. *See supra* notes 103–08 and accompanying text.

167. 1 SAVARY, *supra* note 87, at 179 ("[I]l y avoit souvent de grandes contestations entre les Négocians, qui troubloient beaucoup le Commerce.").

168. *Id.* at 180.

169. *Id.*

170. *Id.* at 180–81.

> judges and consuls of our good city of Paris, [who,] having recognized through long usage the prejudice that merchants endure in the absence of a definitive regulation concerning the acceptance, guaranteeing, and protest of letters of exchange . . . , have presented their request to our court of Parlement in the said place, with the intent that there should be provided a good regulation of the making and negotiation of these said letters of exchange.[171]

The regulation of bills of exchanges impelled a great deal of similar legislation. The preambles of numerous seventeenth-century statutes across Europe relate that the rules were made because "the merchants of this town . . . requested that we establish some ordinances concerning exchange, for the advancement of commerce and to prevent disorders, disputes, and costly suits, which arise too often."[172] Most of the regulations concerned coordinating rules dealing primarily with the acceptance and protest of bills. Such rules were unlikely to reflect the law merchant story of governments taking over commercial law or the rent seeking or regulatory capture by the most powerful merchants. First, as merchants acted variously as payors and payees, a rule that benefited debtors would disadvantage those same people when they were creditors. Thus no single, coherent group had a readily apparent interest in joining together to seek rents and try either to get regulation or to influence the choice of the rule.

Second, the specific content of private-law coordinating rules was meaningless to the law giver. As long as a rule existed that kept commerce flowing and disputes out of court, the government neither cared about, nor necessarily had the power to insist upon, the content of the rule. In addition, many of these exchange statutes came from city governments, and in most major trading towns, the merchant class controlled, entirely or in part, the city council. For instance, the government of Amsterdam, to name one of the most extreme examples, was dominated by merchants throughout the

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171. 18 ISAMBERT, *supra* note 71, at 28–29 ("[L]es juges et consuls de notre bonne ville de Paris ayant reconnu par un long usage le préjudice que reçoivent les négocians, faute d'un réglement certain pour l'acceptation, cautionnement et protêt de lettres de change, . . . auroient présenté leur requête à notre cour de parlement dudit lieu, tendante à ce qu'il fût pourvu d'un bon réglement sur le fait et négoce desdites lettres de change.").

172. PHOONSEN, *supra* note 83, pt. 2, at 218 (reprinting a statute of Breslau of 1672: "Demnach die löblicke Kauffmanschafft alhier ben uns Ansuchung gethan daß wir zu befürdrung der Comercien, abwendung allerhand Unordnungen und verhütung vieler wachsenden Streitigteiten und kostbahrer processen, selbst mit einer gewissen Wechsel Ordnung versehen mochten"); *id.* at 120 (documenting a Frankfurt exchange statute of 1667 explaining that, "both for ourselves and for the good of the many good and honest merchants who have requested this of us, we have decided to promulgate a stable regulation, on which everyone can base themselves in the future, on the subject of letters of exchange drawn on this city, whether during the fairs or at other times" ["so well für uns selbsten als auff dienstfleissiges Unhalten und Bitten verscheidener Kauff- und Handels-leuthen zu begegnen und dessentwegen ein Einsehen zu haben auch wie es ins kunsstige in unseren Messen und darzwischen in Kauff- und wechselshandlung zu halten gewisse Verordnung zu machen bewegt und gemüziget worden"]).

seventeenth century.[173] Such men had no reason to pass legislation antithetical either to their own businesses or to that of their social and commercial associates.

Finally, some quite basic legal matters of significance to commerce ended up in front of civil courts frequently enough to suggest that the merchants could not adequately police the rules themselves. According to one of the leading mercatorists, the law merchant created a rule of agency under which the agent did not "acquire any independent rights and liabilities of his own. The Law Merchant generally perceived of 'agency' as a factual relationship—a useful conduit pipe in establishing a link between the principal and distant merchants or carriers."[174] Despite this supposed agreement, a town register of Bruges that recorded grants of privileges and judicial opinions of particular importance to the city includes copies of eleven decisions handed down by the aldermanic court between 1410 and 1413 concerning the liability of a principal for debts incurred by his agent.[175] While one could imagine a scenario in which a rule about principals and agents arose through tacit agreement, policed by merchants and their nonlegal sanctions, the number of cases in this short period of time indicates the disinclination of the principal to accept responsibility for his agent's debts. If the liability of the principal for his agent was a custom of merchants, it was not one they were hesitant to contest in court.

The occasional preference of merchants for legislation or court decisions does not demonstrate the superiority of legislation or the inefficiency of custom. Merchants merely seemed to realize that custom could not serve all purposes equally effectively. If they needed hard and fast rules that all parties could know *ex ante*, they needed a statute. If they wanted a uniform rule in a coordination situation in which more than one reasonable solution existed, they were better off having some authority impose the rule. And when a rule was controversial—perhaps because it placed significantly more risk on one side, such as the agency cases discussed above—then a custom might give rise to endless weaseling as the burdened party tried to reduce his liability. On the other hand, custom offered more room for equitable development when the parties were close-knit, repeat players who wanted less imposed, enacted law and more reliance on good faith, accommodation, and fair dealing in situations in which the risks were more evenly shared.

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173. D.J. Roorda, *Het Hollandse regentenpatriciaat in de 17e eeuw*, *in* VADERLANDS VERLEDEN IN VEELVOUD 232, 238–39 (G.A.M. Beekelaar et al. eds., 1975).

174. TRAKMAN, *supra* note 3, at 14.

175. 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 473–74.

IV. The Unnecessary Law Merchant

The law merchant story rests on the assumption that medieval merchants needed a body of transnational law in order to permit cross-border trade, which would otherwise have been impossible. One scholar has gone so far as to claim that the law merchant was necessary because few conflicts-of-law rules existed prior to the emergence of modern nation-states in the seventeenth century.[176] Without attempting to write a voluminous history of premodern commerce, this part points to four factors demonstrating the falsity of these ahistorical presuppositions undergirding the law merchant myth. First, contracting was largely done face-to-face, meaning it was clear what law governed the contract. Second, towns had well-developed choice-of-law rules. Third, arbitrators were often selected from the residences of the disputants and therefore could apply local customs as necessary. Fourth, merchants used brokers and other intermediaries who knew the laws of the town.

The mercatorists are not incorrect in worrying about foreign merchants' encounters with local law. Medieval merchants did not make their contracts in a stateless legal vacuum or a legal universe of solely noncommercial feudal law. In fact, merchants—foreign and local—found themselves hemmed in by the laws and regulations of many jurisdictions and organizations. City aldermen, for example, promulgated extensive rules governing what merchants could sell, for how much, where, when, and to whom.[177]

In addition to the town regulations, guilds or the local organization of the foreign nation to which traders belonged controlled many aspects of their members' commercial practices. The northern Germans who did business in Bruges, for instance, belonged to the German Hansa and were organized under the Hansa's private legislative rules, both those sent out to the local offices (called kontors) by the central administration in Lübeck and by the local governors of each kontor.[178] Local merchants and those who serviced

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176. A prominent commentator on the law merchant theory summarizes this claim:

> Schmitthoff notes that in the period before the seventeenth century, there were hardly any conflict rules relating to transnational commercial transactions. The absence of conflict rules should, according to Schmithoff, be explained by the existence of the *law merchant*, a cosmopolitan mercantile law based upon customs and applied to transnational disputes by the market tribunals of the various European trade centers.

FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA 15 (1992).

177. 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 249 (describing the 1362 privileges granted to merchants of Nuremburg regulating quality of cloth made in Flanders); 6 LÉOPOLD GILLIODTS-VAN SEVEREN, INVENTAIRE DES CHARTES 5–13 (Bruges, Gaillard 1871–1878) [hereinafter GILLIODTS-VAN SEVEREN, INVENTAIRE] (explaining the 1470 renewal of charter of staple in Bruges establishing who could sell cloth where and of what sort); JAMES M. MURRAY, BRUGES, CRADLE OF CAPITALISM, 1280–1390, at 63–73 (2005) (describing the commercial geography of Bruges).

178. 3 KONSTANTIN HÖHLBAUM, HANSISCHES URKUNDENBUCH 344 (Halle, Verlag der Buchhandlung des Waisenhauses 1882–1886); *id.* at 56 (discussing the ordinance of Hansa

them, such as brokers and hostellers, also belonged to guilds.[179] In the eleventh century, these were fraternal protection organizations, created so that merchants from a town could travel together and fight off bandits on the road or mobs at the markets.[180] As trade developed and towns became more important, the guilds, far from being benevolent agents of free trade, became locally based monopolistic organizations designed to limit competition and change.[181] Rather than use the power of the guild to pursue cheaters and benefit trade, the guilds facilitated anticompetitive behaviors such as price fixing and interdicting product innovations that threatened their exclusive position.[182]

How did foreign and local traders mediate all of these particular rules without the assistance of an overarching transnational law merchant? From the beginning of the so-called commercial revolution in the eleventh century through the early modern era, commerce was normally done face-to-face. During the high Middle Ages, merchants traveled to fairs, markets, and towns to meet with buyers, bringing their goods with them.[183] Later, some merchants might be sedentary, but they still hired a local agent or sent a factor to live in foreign towns and act on their behalf.[184] The merchants conducted their trade in well-defined commercial spaces: the cloth hall for cloth sales, the spice market for spices, the wool staple (the town that had the monopoly on wool sales) for wool. These markets were governed by city-appointed wardens responsible for ensuring product quality.[185] Often, though not always, the buyer had the opportunity to inspect the goods before purchasing. If he did not, it was assumed that he would inspect them very soon after the sale, while the seller was still available, and some city laws

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merchants over sale of Poperingse cloth from 1347); 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 277–79 (providing the regulations of Hansa kontor in Bruges from 1375).

179. Anke Greve, *Brokerage and Trade in Medieval Bruges: Regulation and Reality*, *in* INTERNATIONAL TRADE IN THE LOW COUNTRIES (14TH–16TH CENTURIES): MERCHANTS, ORGANIZATION, INFRASTRUCTURE 37, 39 (Peter Stabel, Bruno Blondé & Anke Greve eds., 2000).

180. Volckart & Mangels, *supra* note 6, at 437.

181. EDWIN S. HUNT & JAMES M. MURRAY, A HISTORY OF BUSINESS IN MEDIEVAL EUROPE, 1200–1550, at 35 (1999).

182. *E.g.*, Aldermanic Court Decision (Stadsarchief Brugge, Register Civiele Sententies 1447–1453, fol. 56r.–v.) (punishing an importer of madder not dried according to the guild regulations); *id.* at fol. 53v. (punishing a seller who sold oil in containers no longer proper under regulations); 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 524 (describing complaints by foreign merchants of price fixing by merchants in Bruges).

183. Volkart & Mangels, *supra* note 6, at 436.

184. HUNT & MURRAY, *supra* note 181, at 55–56.

185. *See, e.g.*, 6 GILLIODTS-VAN SEVEREN, INVENTAIRE, *supra* note 177, at 11–12 (describing the regulations giving wardens of cloth hall the right to fine sellers for cloth that did not meet requirements).

limited the buyer's rights to reject nonconforming goods after a certain time.[186]

In other words, medieval commerce did not consist of a seller in one country selling the prospect of future goods to a buyer in another. Merchants may have crossed national borders to make sales, but contracts did not. The locus of the contract was almost always clear, and the default medieval conflicts-of-law rule was *lex loci contractus*—the law of the place where the contract was made controls.[187] We see this rule expressed in urban legislation. For instance, in the privilege granted by Bruges to the Hansa merchants, the town established the rule that in contracts made between Hansa members, the parties could choose to be governed by their own law and have their disputes heard by the Hansa governors. But in transactions between a Hansa merchant and a non-Hansa merchant, the laws and customs of Bruges controlled, and the aldermanic court had jurisdiction.[188]

When courts were not competent to decide on the governing law, a common solution was to appoint arbitrators from the disputants' nations.[189] The arbitrators' decision could be read into the court record and approved and adopted by the court.[190] Presumably, one reason for using arbitrators from the same town or country as the parties was that they could be assumed to know any relevant customs from the parties' places of residence.

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186. 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 227–28 (explaining the privileges granted to English merchants in 1359 by the Count of Flanders limiting the right of return after inspection).

187. Wijffels, *supra* note 6, at 269 n.35; *see also* Aldermanic Court Decision (Stadsarchief Brugge, Cartul. Oude Wittenboek, fol. 160r.) (Apr. 10, 1381) (describing a dispute before aldermen of Bruges over refused payment on a letter of exchange where the aldermen instructed the litigants to take the case to Paris where the contract was made); 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 45 (explaining the charter of privilege granted by the Countess of Flanders to the German merchants in 1253 ordering that disputes concerning debts be resolved "secundum legem loci" and that in all matters not addressed in the privilege, the custom and law of the county would control).

188. 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 613 (rules permitting Hansa merchants to have disputes between them judged by their own Hansa governors and requiring disputes between Hansa merchants and merchants of other nationalities to come before the aldermen of Bruges); *see also id.* at 212 (describing a regulation from 1350 allowing English merchants to use their own law and courts to govern contracts between them); *id.* at 246 (discussing privileges granted by three main towns of Flanders to merchants of Nuremberg in 1362 allowing them self-governance but requiring disputes over contracts for sale of enumerated goods to be brought before aldermen of the towns).

189. *E.g.*, Aldermanic Court Decision (Stadsarchief Brugge, Register Civiele Sententies 1447–1453, fol. 40r.) (describing a dispute between an English merchant and a Bruges merchant, who agreed on an English arbitrator and an arbitrator from Bruges); 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 685 (asserting that Italian merchants were used as arbitrators when disputants were from Italy); 2 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 9 (reporting a dispute in Bruges between merchants from Lucca that was submitted to merchant-arbitrators from Lucca residing in Bruges).

190. *See, e.g.*, Aldermanic Court Decision (Stadsarchief Brugge, Register Civiele Sententies 1447–1453, fol. 62v.–63r.) (describing an arbitration decision written in Italian and translated orally by one of the arbitrators into French to be read into the record).

Arbitrators, therefore, had no need to apply a transnational law merchant. And because the arbitrators, like the judges themselves in cases they heard, did not have to explain their reasoning or state the law or custom they had applied, the court record contained nothing that could operate as precedent for the future.[191]

The answer to the question of how foreign merchants would know the local laws is surprisingly simple. Many towns required foreigners to use a city-certified broker when concluding transactions.[192] "One can never value highly enough the role of brokers of all sorts."[193] They facilitated transactions in towns in which merchants from many nations gathered.[194] They were experts on the market; they knew the local customs, the gossip, and the rulings of the courts;[195] they knew where to find sellers with goods to sell and buyers who wanted to buy them; and they knew about the reputation and creditworthiness of the traders doing business in town.[196] Brokers were also expected to serve as neutral expert witnesses in court, testifying to the transaction and its terms.[197] They could even act as attorneys for absent merchant-litigants.[198] In Arras, France, brokers had the right to sit as judges in commercial disputes.[199] Thus, brokers not only knew the laws and customs, but they also helped create them.

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191. *Id. passim*; *cf.* Benson, *supra* note 4, at 503 (claiming rulings in merchant courts gave detailed justifications and that merchant court records were maintained).

192. KATHRYN L. REYERSON, THE ART OF THE DEAL: INTERMEDIARIES OF TRADE IN MEDIEVAL MONTPELLIER 92–93, 178 (2002) (explaining that Bruges forbade foreigners to engage in retail trade and required them to use brokers for wholesale trade and that Prato forbade sales of cloth not organized by a local broker); 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 81 (displaying a charter of 1293 granted by Count Guy of Flanders to brokers of Bruges ordering that no foreigner or citizen of the town could buy or sell merchandise without having a broker with them).

193. 1 V. VÁZQUEZ DE PRADA, LETTRES MARCHANDES D'ANVERS 69 (1960) ("On n'estimera jamais assez haut le rôle des courtiers de toutes sortes.").

194. J.A. van Houtte, *Makelaars en waarden te Brugge van de 13e tot de 16e eeuw*, 5 BIJDRAGEN VOOR DE GESCHIEDENIS DER NEDERLANDEN 1, 1 (1950).

195. 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 243, 247 (listing privileges granted to merchants of Nuremberg by the towns of Ghent, Bruges, and Ypres in 1362, including the provision that "no broker shall perform brokerage services without knowledge of selling and merchandise" ["gheen makelare makelaerdie hebben zal, zonder de ghene die over den coop of coopmanscepe wesen zal"]); *see also* BORNIER, *supra* note 83, at 247 ("[A]s merchants, or those who are obliged to draw letters of exchange, may not know the usance or practice [of a city], there is in the major commercial cities ordinarily the seneschals or agents of the Exchange, who know the ins and outs of the business of banking, and who are there to give advice about the customary practice [of the town] and about the probability [of repayment] or the solvency of the financier, and to which [agent] it is necessary to address oneself." ["[C]omme les Négocians ou ceux qui sont obligés de tirer Letters de Change, ne connoissent pas l'usance ou pratique, il y a ordinairement dans les Villes de grand commerce des Sensals ou Courtiers de Change, qui entendent l'intrigue du Négoce de la Banque, & qui sont établis pour donner avis sur ce qu'on a accoûtumé de pratiquer, & sur la probabilité ou solvabilité des traitans, & à quel Marchand il faut s'addresser."]).

196. Greve, *supra* note 179, at 42; van Houtte, *supra* note 194, at 1.

197. Greve, *supra* note 179, at 43; van Houtte, *supra* note 194, at 28.

198. Van Houtte, *supra* note 194, at 23–25.

199. *Id.* at 28 n.1.

In some towns, brokers worked for hostellers.[200] While in Italy, foreign merchants had to live in compounds; in many northern cities they were not segregated.[201] Instead, they found rooms in hostels, and the hosteller became their warehouseman, local guide, credit reference, surety, newsmonger, and sometimes agent.[202] The hostellers thus had an incentive to ensure that foreign merchants knew the ways of the town and succeeded in conducting their business there effectively.

Alongside brokers and hostellers were other intermediaries, such as the notaries who drew up contracts. When the merchants of Ypres attended the fairs of Champagne in the thirteenth century, they took the town secretary with them. He could draw up the contracts and letters obligatory, which were then officialized by the town aldermen upon the merchants' return. This ensured that the law of Ypres, not the law of Champagne or some hypothetical law of the fair, controlled.[203] In medieval Bruges, foreign notaries—and by the fifteenth century also their Flemish counterparts—set up business in the center of town.[204] These were not mere passersby, but rather long-term residents whose profession it was to know the local law as well as the law of the foreign nations represented by their clients.

Merchants, too, occasionally settled for long periods in foreign towns. Sometimes they even became citizens.[205] These merchants served as middlemen, communicating across cultures and customs, and helping their countrymen navigate local laws and mores.[206] Given all these adjuncts to trade, foreign merchants, who might remain in a town for months during the pendency of a fair and return there regularly each year, had plenty of avenues by which to learn whatever local laws and customs governed the contracts they made. They did not require a law merchant in order to conduct trade.

Finally, it is possible that our modern assumption that commercial disputes needed to be resolved by legal rules of decision is inaccurate for the Middle Ages. The evidence of records of judicial and arbitral opinions is late and difficult to analyze. But in the opinions that we have, from courts that are not applying the learned laws as a matter of course,[207] the judicial and arbitral decisions nearly always discuss only the facts of the case and the

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200. Greve, *supra* note 179, at 42; van Houtte, *supra* note 194, at 12.

201. Peter Stabel, *De gewenste vreemdeling: Italiaanse kooplieden en stedelijke maatschappij in het laat-middeleeuws Brugge*, 4 JAARBOEK VOOR MIDDELEEUWSE GESCHIEDENIS 189, 198 (2001).

202. MURRAY, *supra* note 177, at 73, 191–92, 199, 212–13 (explaining that a hosteller's business "depended on the collection and exchange of trade information").

203. GUILLAUME DES MAREZ, LA LETTRE DE FOIRE À YPRES AU XIIIE SIÈCLE. CONTRIBUTION À L'ÉTUDE DES PAPIERS DE CRÉDIT 15–16 (1901).

204. Stabel, *supra* note 201, at 210.

205. *Id.* at 199.

206. *Id.*

207. The Rota of Genoa, the most respected commercial court of the late Middle Ages and early modern era, is an example of a court applying almost exclusively *ius commune* to resolve commercial disputes.

outcome without stating a rule of decision.[208] Of course, the decision makers may have based the outcome on an unexpressed rule, including the rule of good faith, but in customary legal systems, disputes seem to turn most frequently on questions of fact rather than questions of law.[209] From what court records permit us to see, the majority of commercial disputes centered on issues such as "he owes me money, and he did not pay," or "he sent me nonconforming goods," or "those goods are mine, and I have the documents to prove it."[210] In many instances, the resolution was probably a matter of examining the evidence, hearing the statements of the parties, questioning witnesses and experts, and deciding who had the more convincing story, who had acted in bad faith, or what would be a fair outcome. Law would not necessarily have come into the case at all.

Conclusion

If merchants did not create uniform and universal customs but rather used local law when they needed to supplement their common contract forms and, in some instances, even asked the courts and governments to legislate a rule for them precisely because of the instability of custom, then not only does this challenge the law merchant myth, but it also calls into question the assumption of many international commercial arbitrators and of Article Two of the Uniform Commercial Code that decision makers should look to merchant usage to decide disputes. If custom is local or network dependent, then only trading partners who are proven to belong to the same trading community should be held to know the custom and to understand it in the same way. And because customs evolve, the fact that an entire industry might articulate a custom similarly does not mean that the decision maker is freed from inquiring into the specific meaning each community within that industry actually assigns to the custom. Furthermore, decision makers and advocates of private ordering should be aware that the premodern evidence suggests that customs do not exist in every instance in which they are claimed, despite

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208. Ibbetson, *supra* note 113, at 168 (discussing English opinions). This pattern holds true for the records of the opinions of the aldermen of Bruges in the fifteenth century and for the opinions of the judges of the commercial court of Lyon in the seventeenth century. Where the rule of decision can be deduced, it is usually because one of the parties pled a custom or statute. *See, e.g.*, Aldermanic Court Decisions (Aug. 28, 1448) (Stadsarchief Brugge, Register Civiele Sententies 1447–1453, fols. 56r.–v.) (pleading charter of the jurors of madder); 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 618–19 (highlighting a pleading custom of shippers in Spain); *cf.* 2 *id.* at 6 (describing a defendant pleading the merchant custom concerning bill of exchange ["selon la coutume en tel cas entretenue entre les marchands"] and the court finding for the plaintiff).

209. Lloyd Bonfield, *The Nature of Customary Law in the Manor Courts of Medieval England*, 31 COMP. STUD. SOC. & HIST. 514, 521 (1989).

210. *See, e.g.*, 1 GILLIODTS-VAN SEVEREN, CARTULAIRE, *supra* note 83, at 692–93 (describing an aldermanic court decision from 1448 interpreting a surety agreement for the payment of a debt); *id.* at 705, 707–08 (recounting disputes from 1449 over quality of wool in which wool was sent to experts for their assessment); 2 *id.* at 3 (summarizing a dispute from 1451 over quality of animal skins); *id.* at 9 (discussing a case where a hosteller denied that he took delivery of three tons of Scottish butter).

testimony asserting that people do behave in a certain way. Even when the parties admit to the existence of the custom, the witnesses and experts engage, knowingly or not, in a certain degree of invention. The decision maker participates in this process of construction by selecting among competing articulations of the alleged custom. In such circumstances, the custom chosen does not necessarily reflect the *ex ante* expectations of the parties, nor does it necessarily reflect the merchants' efficient self-governance.

Book Reviews

The Supreme Court's New Battlefield

GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA. By Adam Winkler. New York, New York: W.W. Norton & Co., 2011. 361 pages. $27.95.

Reviewed by Josh Blackman*

I. Introduction

In 2008, one of the three libertarian lawyers who fought *District of Columbia v. Heller*[1] all the way to the Supreme Court victoriously proclaimed, "The Second Amendment [i]s [b]ack, [b]aby[!]"[2] But where was it for the first two centuries of our Republic? Adam Winkler's *Gunfight* tells the story of the battle over the right to bear arms in America.[3]

The flow of *Gunfight*, which reads more like a page-turning novel than an academic work, can best be described as a finely designed tapestry—several intricately woven threads cross and intersect throughout the chapters to form a rich, full discourse of the story of gun rights and gun control in America. The first thread tells the captivating story of *District of Columbia v. Heller*, the landmark case where the Supreme Court recognized an individual right to keep and bear arms.[4] This history, recreated through personal interviews with all of the key actors, is developed in each chapter in small transitional bites, providing a gripping narrative of the progress of the case from inception to decision.

The second thread introduces the genesis of the modern-day gun control movement, pejoratively labeled by Winkler as the "gun grabbers," who aspire for complete civilian disarmament.[5] The third thread explores the evolution of the so-called "gun nuts," who instinctively oppose any limitation

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1. 554 U.S. 570 (2008).

2. Clark Neily, District of Columbia v. Heller*: The Second Amendment Is Back, Baby*, 2007–2008 CATO SUP. CT. REV. 127, 127 (2008).

3. ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (2011).

4. *Heller*, 554 U.S. at 595.

5. WINKLER, *supra* note 3, at 15–43.

on the right to keep and bear arms, no matter how reasonable or sensible.[6] The extreme gun grabbers and gun nuts have declared the Second Amendment as the Supreme Court's new battlefield: a sharp culture war divided along firmly entrenched ideological fronts, with no choice of a middle ground. But as Winkler's balanced, important, and timely work shows, this has not always been the case in America.

The fourth thread—and really the vein that circulates Winkler's thesis throughout the work—is the relationship between gun rights and gun control in the American tradition. This balance has ebbed and flowed along with numerous social movements in our nation's history: from Revolution,[7] to Reconstruction,[8] to the Frontier,[9] to Prohibition,[10] to the Civil Rights Era,[11] to the present.[12] Protection of the right to keep and bear arms, or the infringement thereof, has been closely linked with issues of race and equality—socially disfavored or insular groups have often been the first to be disarmed.

Though a fifth thread that threatens to unravel the entire tapestry is loose—what is the relevance of this history to the development of modern Second Amendment jurisprudence?—the Supreme Court, and not Winkler, is to blame for this shortfall. *Heller* has set forth an uneasy temporal relationship between the original understanding of the Second Amendment—that is, how the right would have been understood at the time of its ratification in 1791—and the role that the two centuries of cultural and legal development that Winkler chronicles should play in the constitutionality of gun control laws. Winkler does not fully connect this history with the future, short of making the lamentable, though largely anachronistic, argument that "[a]s the history of the right to bear arms and gun control shows, there is a middle ground in which gun rights and laws providing for public safety from gun violence can coexist."[13]

Winkler's magisterial work is by far the fairest and most well-balanced book I have read about gun control in America. Winkler, better than any scholar today, can peel back the veneer of the heated rhetoric and drill to the core of what this issue is about—keeping society safe and minimizing harm from guns, while at the same time protecting the right of people to defend themselves.[14] With its appeal to both academic and popular audiences,

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6. *Id.* at 45–92.
7. *Id.* at 95–122.
8. *Id.* at 123–48.
9. *Id.* at 149–79.
10. *Id.* at 181–224.
11. *Id.* at 231–47.
12. *Id.* at 247–62.
13. *Id.* at 295–96.
14. I have also written about the Supreme Court's balancing of the social costs of many of our rights, including the right to keep and bear arms. *See* Josh Blackman, *The Constitutionality of*

Gunfight will bring some much-needed clarity to the fog of the Supreme Court's new battlefield.

II. "A well regulated Militia, being necessary to the security of a free State . . . ."

From the beginning of our Republic, the right to keep and bear arms has played an important role in our American tradition. Ratified in 1791, the Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[15] These twenty-seven words, and the two clauses of the Amendment, engender more controversy than perhaps any other constitutional provision today. So what does the Second Amendment mean? Or perhaps a better question is: What did it mean in 1791?

The conventional understanding of the Second Amendment focused on the first clause, and found that the Amendment was "merely about protecting state militias from being disarmed by the federal government."[16] This view posits that the states feared that the federal government, which possessed the power to control the state militias under Article I, Section Eight, would disarm the state militias, leaving the states helpless against a tyrannical central government.[17] The Second Amendment guaranteed the right of members of the state militia to remain armed against such a threat. In *United States v. Miller*,[18] the Supreme Court—though it did not explicitly adopt this rationale—held consistently with this view and it became constitutional dogma.[19]

In the 1970s, a different theory of the Second Amendment emerged based on an alternative reading on early American history. This alternative model was introduced in a groundbreaking *Michigan Law Review* article authored by Don Kates. Kates—a "Kennedy liberal" civil rights lawyer who carried an M1 carbine rifle while protecting a civil rights activist in North Carolina in 1963[20]—posited that the Framers of the Constitution were not solely concerned with the federal government disarming state militias, but rather sought to protect an individual "right of the people" to keep and bear

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Social Cost, 34 HARV. J.L. PUB. POL'Y 951, 1031 (2011) (advancing a framework that balances the positive and negative externalities of the Second Amendment).

15. U.S. CONST. amend. II.

16. WINKLER, *supra* note 3, at 95.

17. *Id.* at 24.

18. 307 U.S. 174 (1939).

19. *See id.* at 178 (holding that absent evidence of a "reasonable relationship to the preservation or efficiency of a well regulated militia," the Second Amendment did not protect the plaintiffs' right to possess an unregistered firearm); WINKLER, *supra* note 3, at 24–25 (explaining that in the decades following the decision, lower courts interpreted *Miller* as an endorsement of the militia theory, and the Supreme Court "never objected").

20. WINKLER, *supra* note 3, at 105–06.

arms.[21] To address the direct reference to the militia in the first clause, Kates relied on the writings of George Mason, the author of the Virginia Declaration of Rights—largely viewed as a progenitor of the Constitution's Bill of Rights.[22] Mason wrote, "Who are the militia? They consist now of the whole people."[23] In essence, the Second Amendment protected the right of all people. Further, the Framers "also used the words 'bear arms' in nonmilitary contexts."[24]

At first, Kates's theory was met with widespread opposition. Chief Justice Burger famously said in an interview in 1991 that the theory of the individual right to keep and bear arms was "one of the greatest pieces of fraud—I repeat the word 'fraud'—on the American public by special interest groups that I have ever seen in my lifetime."[25] After nearly two decades of ridicule from the bench and the ivory tower, Kates's argument was vindicated in a *Yale Law Journal* article by Sanford Levinson titled "The Embarrassing Second Amendment," which maintained that the "darling[s] of the professoriate"[26] and the "elite bar [were] so opposed to the idea of private gun ownership that [they] simply ignored the Second Amendment and Kates's powerful argument."[27] Contemporaneously with Levinson's article came a profusion of scholarship advancing the individual view of the Second Amendment.[28] Ultimately, the Supreme Court adopted—in large part—the individual model of the Second Amendment in *District of Columbia v. Heller*.

III. Telling the Story of *District of Columbia v. Heller*

The plot of *District of Columbia v. Heller* is the stuff of Hollywood magic and of Supreme Court lore. Throughout the book, Winkler expertly intersperses the chronology of the case, using it to cinematically segue into and out of the history of gun rights in America in several scenes. The Second Amendment's constitutional shootout began with an unlikely, ragtag bunch of three libertarian lawyers: Clark Neily, Bob Levy, and Alan Gura. Neily—a veteran civil rights litigator at the Institute for Justice—inspired by a recent Fifth Circuit case finding that the Second Amendment protects an

21. *Id.* at 109–10 (discussing Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 213–18 (1983)).

22. *Id.*

23. *Id.* at 109.

24. *Id.* at 110.

25. *Id.* at 25.

26. Transcript of Oral Argument at 7, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).

27. WINKLER, *supra* note 3, at 111 (discussing Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989)).

28. *Id.* at 111–12.

individual right to keep and bear arms,[29] decided over drinks that he wanted to bring a test case to the Supreme Court.[30] Bob Levy—a self-made millionaire and committed libertarian—agreed to bankroll Neily's case.[31] With this agreement, the story began.

Second, the lawyers located their ideal target, setting their sights on shooting down the District of Columbia's complete ban on private ownership of handguns. This statute, the most draconian in the nation, had the added benefit of being enforced directly by the federal government, and not the states—thus, there would be no need to worry about incorporation.[32]

Third, the lawyers had to cast their case with six sympathetic plaintiffs. Shelly Parker, the lead plaintiff, had been harassed by drug dealers in her home near Capitol Hill, and wanted a gun for self-defense.[33] Tom Palmer, an openly gay man, was able to turn away a violent group of homophobes because he was carrying—albeit illegally—a pistol.[34] The eponymous, and most famous plaintiff was Dick Heller, a security guard who was able to carry a pistol at work when guarding the lives of federal judges, but not at his home across the street from a violent abandoned housing project.[35] Because Neily was unable to take the lead in litigating this case due to the Institute for Justice's focus on economic-liberty and property-rights cases, the duo needed to find an attorney to fight this battle;[36] enter Alan Gura. Gura accepted the case for little money, with the promise that he would be able to argue the case all the way to the Supreme Court.[37] The cast was set, and litigation commenced. The lawyers suffered an unsurprising loss at the District Court for the District of Columbia, though this was only the first step on the road to the Supreme Court.[38]

Fourth, in a classic David-versus-Goliath struggle at the D.C. Circuit Court of Appeals, the libertarian litigators were forced to confront an unlikely foe. No, not the Brady Campaign, or some other gun grabber, but rather the National Rifle Association! The NRA was leery of anyone bringing a case to the Supreme Court for fear that a loss would be worse than maintaining the status quo.[39] None of the Justices, with the exception of Justice Thomas,[40] had ever opined on the Second Amendment. The NRA

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29. United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001); WINKLER, *supra* note 3, at 47–49.

30. WINKLER, *supra* note 3, at 47.

31. *Id.* at 53–54.

32. *Id.* at 50–51.

33. *Id.* at 60.

34. *Id.* at 21.

35. *Id.* at 42.

36. *Id.* at 52, 54.

37. *Id.* at 55–56.

38. *Id.* at 62–63.

39. *Id.* at 7.

40. Printz v. United States, 521 U.S. 898, 936–39 (1997) (Thomas, J., concurring).

was afraid of this uncertainty. Further, "[t]he NRA's most effective fund-raising strategy was to threaten gun owners that the government was coming to get their guns."[41] A victory at the Court could make those threats less frightening and lucrative. The NRA sought to "wrest control over the D.C. gun lawsuit"[42] by trying to consolidate the trio's case with an NRA case that was doomed to fail for lack of standing in the district court.[43] However, this effort failed.

Fifth, following the trio's victory in the D.C. Circuit,[44] the NRA moved its strategy from the courts to Congress by lobbying for the District of Columbia Personal Protection Act, a bill that would have repealed the District of Columbia's gun ban and mooted the suit.[45] Yet, that bill stalled following the shootings at Virginia Tech.[46] Against the advice of many in the gun control community, the District of Columbia decided to appeal the case to the Supreme Court to set the final stage for the shootout at One First Street.

Sixth, Winkler regales the reader with the high drama of the argument at the Supreme Court, the climax of the story. Walter Dellinger was retained to argue the case for the District of Columbia.[47] He quickly realized his primary argument—that the history of the Second Amendment supported only a collective right—would not appeal to five Justices, and switched to his fallback position that the Court should defer to the D.C. city council's judgment and uphold the law.[48] Justice Kennedy, the decisive swing vote, "tipped his hand": the Second Amendment protects a "general right to bear arms . . . without reference to the militia either way."[49]

With this wave, the tides had turned. Evoking the imagery of the classic film *Rocky*—a movie Adam Winkler's father Irwin co-produced in 1976[50]—Winkler described Gura's ebullient post-argument reaction to his now near-certain victory: "Gura lifted both arms straight up in the air with fists clenched. . . . [T]he young, inexperienced lawyer was Rocky Balboa, standing triumphant at the top of the steps."[51] The stuff of Hollywood magic, indeed.

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41. WINKLER, *supra* note 3, at 7.

42. *Id.* at 88.

43. Seegars v. Ashcroft, 297 F. Supp. 2d 201, 203–04, 242 (D.D.C. 2004) (finding that the plaintiffs lacked standing to bring four of their five claims), *aff'd in part, rev'd in part sub nom.* Seegars v. Gonzales, 396 F.3d 1248, 1250 (D.C. Cir. 2005) (finding that no plaintiff had standing on any of the claims).

44. Parker v. District of Columbia, 478 F.3d 370, 401 (D.C. Cir. 2007).

45. WINKLER, *supra* note 3, at 61–62.

46. *Id.* at 129.

47. *Id.* at 151.

48. *Id.* at 175.

49. *Id.* at 157.

50. DANIEL EAGAN, AMERICA'S FILM LEGACY: THE AUTHORITATIVE GUIDE TO THE LANDMARK MOVIES IN THE NATIONAL FILM REGISTRY 732 (2010).

51. WINKLER, *supra* note 3, at 178.

After Dellinger finished his argument, Solicitor General Paul Clement, arguing on behalf of the United States, approached the lectern. Gura, like many opposed to D.C.'s laws, was initially excited that President Bush's Solicitor General sought to intervene in the case; that is, until Clement briefed the unpopular—though not unpredictable—position that the Second Amendment protects an individual right to keep and bear arms, though the case should be remanded, and the law should be reconsidered under a form of deferential intermediate scrutiny.[52] During arguments, Clement largely adhered to the position taken in his briefs.[53]

In the final scene, it was Gura's turn to take center stage. Gura had never argued in the Supreme Court, let alone in one of the biggest constitutional law cases of the Roberts Court.[54] He immediately targeted Clement's position—so quickly that Justice Scalia coaxed him to "[t]alk a little slower."[55] With that, Gura settled into his argument and rebutted Clement's intermediate position, articulating that if the Second Amendment does protect an individual right to keep and bear arms, a complete ban on the most popular method of self-defense could not be constitutional.[56] Despite some tough questioning from the liberal Justices, "[w]hen Chief Justice John Roberts announced that Gura's time was up, the libertarian lawyer returned to his seat knowing that he had won on the big question of whether or not the Second Amendment guaranteed an individual right to have guns for personal self-defense."[57] After Dellinger supplied a few minutes of rebuttal, Chief Justice Roberts cut him off. "Thank you, Mr. Dellinger. The case is submitted."[58]

The dénouement of this drama descended on decision day: June 26, 2008. In a landmark 5–4 opinion, the Supreme Court held that the Second Amendment protects an individual "right of law-abiding, responsible citizens to use arms in defense of hearth and home."[59] The opinion was grounded in Justice Scalia's signature jurisprudence, originalism, and focused on how the Second Amendment and the right to keep and bear arms were understood at the time of its ratification in 1791.[60] According to Clark Neily of the victorious libertarian troika, "Justice Scalia's majority decision is everything

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52. Brief for the United States as Amicus Curiae at 10–19, 23–24, 27–32, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290); WINKLER, *supra* note 3, at 221.

53. WINKLER, *supra* note 3, at 221.

54. *Id.* at 6.

55. *Id.* at 227.

56. *Id.*

57. *Id.* at 261.

58. *Id.* at 262.

59. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

60. *See id.* at 576–77 (prefacing the Court's textual analysis of the Second Amendment by noting that "[i]n interpreting this text, we are guided by the principle that [t]he Constitution was written to be understood by the voters," and thus, it should be interpreted through the linguistic lens of "ordinary citizens in the founding generation" (second alteration in original) (citations omitted) (internal quotation marks omitted)).

a Second Amendment supporter could realistically have hoped for."[61] Though *Heller* serves as the beginning of a new Second Amendment jurisprudence, our nation has a long history of gun control and gun rights coexisting without the Court's intervention.

IV. "Gun Grabbers" and "Gun Nuts"

In every conflict, there are adversaries; in *Gunfight* they are the "gun grabbers" and the "gun nuts."[62] Winkler ascribes membership of the former to the Brady Center to Prevent Gun Violence, and of the latter to the National Rifle Association; the former aim to ban the private possession of all handguns, while the latter instinctively oppose any law that limits the right to keep and bear arms.[63] While these labels are intentionally pejorative—and rather overinclusive, as many members in both of these groups are more mainstream than fringe—Winkler deftly sketches how both of these movements are largely products of the last four decades. Each has moved towards extreme positions, much to the detriment of the middle ground in the gun rights and gun control debate.

A. The Gun Lobby

When the National Rifle Association was founded in 1871, "it wasn't to lobby against gun control," but rather primarily focused on promoting "target-shooting competitions."[64] As late as the 1920s and 1930s, leaders of the NRA wrote and even lobbied for handgun control legislation such as the Uniform Firearms Act. This proposed model legislation required people to obtain a license in order to carry a concealed weapon; such a license could only be issued "to a 'suitable person' with a 'proper reason for carrying' a firearm."[65] Gun dealers were required to be licensed by the state and to maintain records of all sales. A waiting period prior to sales was imposed.[66] Finally, sales were prohibited "to those convicted of crimes of violence, drug addicts, drunkards, and minors."[67]

Winkler reminds us that "[t]he NRA wasn't a blind supporter of any and all gun control, but the leaders of the organization were willing to compromise with lawmakers to enhance public safety."[68] Further, the NRA had not yet adopted the Second Amendment as its battle cry. In fact, any mention of the "Second Amendment was glaringly absent" from the *American Rifleman*,

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61. Neily, *supra* note 2, at 147.
62. WINKLER, *supra* note 3, at 15, 45.
63. *Id.* at 35.
64. *Id.* at 63–64.
65. *Id.* at 208 (citing Charles V. Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767 (1926)).
66. *Id.* at 209.
67. *Id.*
68. *Id.* at 64–65.

the NRA's primary publication until the 1960s.[69] As late as 1975, the *NRA Fact Book on Firearms Control* noted that the Second Amendment was "of limited practical utility" as a means to challenge any gun laws.[70]

However, the NRA was hardly in favor of all gun laws. As early as 1911, the president of the NRA wrote that laws that "seem to make it impossible for a criminal to get a pistol" also "make it very difficult for an honest man and a good citizen to obtain them . . . [and] have the effect of arming the bad man and disarming the good one to the injury of the community."[71] Even in the 1930s, the NRA opposed more draconian gun control laws, such as the Sullivan Act, arguing that they limited "the ability of a law-abiding citizen to defend himself in his own home."[72]

The mission and future of the NRA changed in November 1976. Two competing factions within the organization—one that sought to focus on target shooting and hunting, and the other that wanted to take a strong position against encroaching gun control legislation—clashed on what became known as the "Weekend Massacre."[73] The former faction ousted the hard-liners from leadership positions, though this victory was pyrrhic and short-lived.[74] Through guerilla parliamentary tactics coordinated with walkie-talkies at the NRA's annual meeting on May 21, 1977, the extremists assumed power and removed from leadership those moderates who desired that the NRA focus on hunting and target shooting.[75]

"[N]ow committed to a more rigid approach to gun control, [the NRA] became one of the most powerful forces in American politics."[76] Under this new leadership, the NRA's Institute for Legislative Action—its main lobbying arm—received increased funding and moved to the forefront of the organization's mission.[77] Today, under the leadership of NRA Executive Vice President Wayne LaPierre, Winkler asserts that the NRA views "every gun law . . . [as] a certain step down the slippery slope to . . . 'eliminate private firearm ownership completely and forever.'"[78] The Second Amendment is the NRA's battle cry with only the second clause of the text—"the right of the people to keep and bear Arms, shall not be infringed"—

69. *Id.* at 65.

70. *Id.*

71. OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 29 (1998).

72. WINKLER, *supra* note 3, at 211.

73. *Id.* at 66–67.

74. *Id.*

75. *Id.* at 67.

76. *Id.*

77. *See id.* at 66–67 (explaining that the new leadership "moved to revise the bylaws to . . . increase funding of the [Institute for Legislative Affairs]" and reversed the old leadership's policy of underfunding and restricting the powers of the Institute for Legislative Affairs).

78. *Id.* at 68.

emblazoned on the wall at their headquarters.[79] Enemy number one of the gun nuts are the gun grabbers.

B. The Anti-gun Lobby

In a somewhat ironic twist of fate, the genesis of the modern-day gun control movement began with the D.C. handgun ban—the very law that met its demise in *Heller* four decades later. Following a wave of gun violence and murders, one of the first major laws the District of Columbia enacted after Congress established home rule for the federal enclave was the 1976 ban on the possession and sale of handguns in the city.[80] It is only fitting that this ban was the very law the libertarian lawyers targeted in *District of Columbia v. Heller*.

Eliminating violence was only a secondary goal of this movement—the primary goal was the elimination of private ownership of firearms. Winkler observes that supporters of the D.C. handgun ban knew it "was not going to reduce crime or diminish gun violence" but "believed that such a symbolic law could send a message that it was time to get rid of the guns once and for all."[81] "Marion Barry, a supporter of the ban [and future mayor of the District of Columbia], made a frank acknowledgment. 'What we are doing today will not take one gun out of the hands of one criminal.'"[82] Nelson "Pete" Shields III, a founder of Handgun Control, Inc.—the progenitor of the Brady Center to Prevent Gun Violence—openly advocated for the elimination of all handguns: "'We're going to have to take this one step at a time. . . . Our ultimate goal—total control of all guns—is going to take time.' The 'final problem,' he insisted, 'is to make the possession of all handguns and all handgun ammunition' for ordinary civilians 'totally illegal.'"[83] John Hechinger, a sponsor of the D.C. handgun ban and a board member of Handgun Control, Inc., put it simply: "We have to do away with the guns."[84]

The modern-day extreme gun control movement gained steam on March 30, 1981, when John Hinckley's .22 caliber bullets struck President Ronald Reagan and his press secretary, James Brady.[85] Tragically, Brady was left permanently paralyzed.[86] Handgun Control, Inc. was later renamed the Brady Center to Prevent Gun Violence after James Brady.[87] The Brady Center brought numerous lawsuits in the 1990s alleging that guns were

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79. *Id.* (emphasis omitted).
80. *Id.* at 16–17.
81. *Id.* at 31.
82. *Id.* at 18.
83. *Id.* at 35 (omission in original).
84. *Id.* at 15–16, 19.
85. *Id.* at 69.
86. *Id.*
87. *Id.*

"defective," and it sought to hold the manufacturers liable for the injuries that resulted from the firearms.[88] The goal of these suits was not to show the guns were defective—a gun's lethality is a feature, not a flaw—but to "make the sale of guns to civilians so costly that no business would want to do it."[89]

The group's signature proposal was the Brady Handgun Violence Prevention Act, commonly known as the Brady Bill, "which would require a gun purchaser to wait several days before receiving a purchased gun."[90] The Brady Bill was met with strong opposition from the NRA, which warned that imposing waiting periods would lead us "on the inevitable path to complete disarmament of civilians."[91] Enacted in 1993 over strong NRA opposition, this bill received support from across the ideological spectrum, including by Presidents Reagan, Nixon, and Ford.[92] The bill imposed a five-day waiting period for handgun purchases, and—adopting an NRA proposal—required state officials to conduct instant computerized background checks through the National Instant Criminal Background Check System (NICS).[93] Ironically, the NRA challenged this requirement in *Printz v. United States*,[94] where the Supreme Court held that state officials could not be forced to conduct background checks—this was a violation of the Tenth Amendment's anti-commandeering principle rather than a violation of the Second Amendment.[95]

Despite NRA protestations that the Brady Bill wouldn't work—as criminals do not buy firearms from legal sources—"more than 1.5 million illegal gun purchases were rejected because of background checks in the decade or so after the law was enacted."[96] Without "grabbing," the Brady Center, through its signature legislation, has prevented criminals from easily obtaining firearms. However, Winkler reminds us that the ultimate aim of "disarmament is an unrealistic goal."[97] The fact that "[g]uns are permanent in America" is "perhaps the most important" fact that the "D.C. gun ban supporters failed to grasp."[98]

V. Guns and American History

Taking a step back from the present-day culture war over guns, Winkler deftly tracks the ebb and flow between gun rights and gun control as a reflex

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88. *Id.* at 35.
89. *Id.*
90. *Id.* at 69.
91. *Id.* at 70.
92. *Id.* at 71.
93. *Id.*
94. 521 U.S. 898 (1997).
95. *Id.* at 933; WINKLER, *supra* note 3, at 72
96. *Id.*
97. *Id.* at 19.
98. *Id.* at 22.

to five pivotal eras in our Republic: Revolution, Reconstruction, the Frontier, Prohibition, and the Civil Rights Era. These historical epochs provide a rich backdrop to explore how both gun rights and gun control reacted to racism, xenophobia, and lawlessness in America. In many respects, where we are today is a product of where we were. "What's past is prologue."[99] For the gun nuts, the fear of disarmament—as witnessed during the Revolutionary Era, Reconstruction, and the Civil Rights Era—animates concerns about a slippery slope toward the government taking away guns from unpopular groups. For the gun grabbers, the fear of widespread carnage—as witnessed during the (allegedly) Wild West and Prohibition—animates concerns about the dangers of insufficient gun control laws. Recreating these past skirmishes provides clarity from the fog of war on the Supreme Court's new battlefield.

A. Guns of Our Fathers

Even if the Second Amendment protects an individual right—and it is not clear that Winkler accepts this argument, as his brief in *Heller* only assumes this point arguendo[100]—*Gunfight* shows that the Founding-era generation imposed laws restricting the use of firearms "that few modern-day gun rights advocates would ever accept."[101] Many states imposed "safe storage" laws that required flammable gunpowder to be stored on the top floor of buildings.[102] Boston even passed a law effectively banning the possession of any combustible gunpowder—and thereby loaded firearm—indoors.[103] All "free men between the ages of eighteen and forty-five [were mandated] to outfit themselves with a musket, rifle, or other firearm suitable for military service" and muster at "public gatherings held several times a year."[104] At the musters, these guns were inspected and accounted for through the "rolls—an early version of gun registration."[105] In short, "[t]he right to bear arms in the colonial era was not a libertarian license to do whatever a person wanted with a gun," as "when public safety demanded that gun owners do something, the government was recognized to have the authority to make them do it."[106] The Founding-era generation "might not have termed it 'gun control,' but the founders understood that gun rights had to be balanced with public safety needs."[107]

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99. WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1.

100. Brief of Law Professors Erwin Chemerinsky & Adam Winkler, as Amici Curiae in Support of Petitioner at 12, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

101. WINKLER, *supra* note 3, at 114.

102. *Id.* at 116–17.

103. *Id.* at 117.

104. *Id.* at 113.

105. *Id.*

106. *Id.* at 115.

107. *Id.* at 114.

It is worth noting that none of the laws Winkler cites had the goal of reducing violence from individual ownership of firearms. Placing limitations on combustible gunpowder to reduce the risk of fire in the powder kegs that were colonial towns seems entirely divorced from the goals of the modern-day gun control movement. Guns today are safer and less likely to lead to a town burning down. In any event, Winkler's historical arguments are fatal to the absolutists who contend that no limitation on the right to keep and bear arms can be countenanced by our Constitution as implemented by the Founding-era generation.

B. Reconstruction, Guns, and Civil Rights

Gunfight tells the story of how the right to keep and bear arms played an integral role in the period before and after the ratification of the Fourteenth Amendment. Some of the earliest, most oppressive gun control laws emerged in the South and were aimed at "restricting gun ownership for blacks."[108] Prior to the Civil War, many of the leading abolitionists, including Lysander Spooner, recognized the importance of arming blacks, and they "argued that blacks had a natural right to use guns to defend themselves from southern outrages" and "that slavery must end, even if it meant taking up arms to stop it."[109] Following the Civil War, the situation worsened as white resentment grew toward the freedmen who were no longer under their control. As a result, the Ku Klux Klan formed and spread throughout the South. Winkler retells, in graphic, gory detail, the tragic stories of the Klansmen's carnage—often aided by state authorities and local militias—as they would ride through the night, breaking down the doors of freedmen who had guns, taking their arms, and then lynching them.[110]

The Radical Republicans in Congress, recognizing the criticality of ensuring that freedmen were armed in order to resist the KKK, passed two important pieces of legislation to protect this right. First, the Freedmen's Bureau Act of July 1866 "declared that the freedmen were entitled to the 'full and equal benefit of all laws and proceedings concerning personal liberty, [personal] security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*.'"[111] Later that year, "Congress passed the nation's first Civil Rights Act, which defined the freedmen as citizens of the United States and made it a federal offense to deprive them of their rights on the basis of race."[112] Senator James Nye stated, "'As citizens of the United States,' the freedmen 'have an equal right

108. *Id.* at 132.

109. *Id.* at 138.

110. *See, e.g.*, *id.* at 134–35, 137–39, 142–44 (describing how the Ku Klux Klan broke into freedman Jim Williams's house, demanded his arms, and lynched him in March 1871).

111. *Id.* at 140 (emphasis added) (quoting Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176).

112. *Id.*

to protection, and to keep and bear arms for self-defense.'"[113] President Johnson vetoed both laws—part of the impetus for his impeachment—but the support in Congress was so strong that both vetoes were overridden.[114]

Realizing that the Bill of Rights was not enforceable against the states[115] and recognizing the fleeting and ephemeral nature of statutes—which could be repealed by a future Congress more sympathetic to the cause of the South—the Radical Republicans in Congress aimed to entrench the fundamental rights of American citizenship—including the right to keep and bear arms—with a constitutional amendment.[116] Leading the charge on what would become the Fourteenth Amendment was Ohio Representative John Bingham.[117] Bingham aimed to correct what he "saw as the Constitution's greatest mistake"—"[f]rom now on, the states couldn't trespass on the fundamental rights of individuals listed in the Bill of Rights."[118] These fundamental rights, known as "privileges or immunities," were protected by the Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the *privileges or immunities* of citizens of the United States."[119]

What constituted a privilege or immunity was, and remains, a question open to debate,[120] though many of the ratifiers of the Amendment concurred that the right to keep and bear arms was such a right. Bingham argued that "'the privileges and immunities of citizens of the United States' were 'chiefly defined in the first eight amendments to the Constitution.'"[121] Senator Jacob Howard, the chief sponsor of the Amendment in the Senate, stated that privileges and immunities included "the personal rights guaranteed and secured by the first eight Amendments of the Constitution; such as the freedom of speech and of the press," "the right to be exempt from unreasonable searches and seizures," and "the right to keep and bear arms."[122]

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113. *Id.*

114. *Id.*

115. *See* Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 249–51 (1833) (holding that the Fifth Amendment is "not applicable to the legislation of the states").

116. WINKLER, *supra* note 3, at 140–42.

117. *Id.* at 141.

118. *Id.*

119. U.S. CONST. amend. XIV, § 1 (emphasis added).

120. *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3083–84 (2010) (Thomas, J., concurring) (finding that the right to keep and bear arms is a privilege under the Privileges or Immunities Clause). For further reading on the Privileges or Immunities Clause as it relates to the right to keep and bear arms, see Alan Gura, Ilya Shapiro & Josh Blackman, *The Tell-Tale Privileges or Immunities Clause*, 2009–2010 CATO SUP. CT. REV. 163 (2010). For a detailed account of *McDonald v. City of Chicago*, see generally Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1, 17 (2010).

121. WINKLER, *supra* note 3, at 141.

122. *Id.* at 142.

While the right to keep and bear arms in 1791 was closely tied—though not exclusively limited—to protecting state militias from federal tyranny, the right in 1868 was "defined . . . primarily in terms of individual self-defense" of freedmen from the KKK and the oppressive Black Codes.[123] Though, the Privileges or Immunities Clause's service as a bulwark of this fundamental right was short-lived following what became known as the Colfax Massacre.

Opposing a local election in Grant Parish, Louisiana, in 1873 that "was marked by widespread fraud and intimidation of black voters," a group of armed black men "occupied the courthouse and dug a large trench around the building."[124] On Easter Sunday, over "300 whites armed with rifles arrived and ordered the blacks to turn over their guns and evacuate the courthouse."[125] When they refused, "a battle ensued."[126] The white men brought out a cannon, raided the building, and set it afire, resulting in the death of 150 blacks.[127]

A federal prosecution was brought against the white men for violation of "the freedmen's civil rights, including their 'right to keep and bear arms for a lawful purpose.'"[128] Bill Cruikshank, one of the defendants, was convicted of conspiracy and appealed to the Supreme Court, arguing that the federal government lacked the power to prosecute him.[129]

In *United States v. Cruikshank*,[130] the Supreme Court invalidated the conviction. In tension with what Bingham and others had said about the Fourteenth Amendment, the Court held that the Second Amendment only applied to Congress.[131] Effectively affirming *Barron v. Baltimore*,[132] the Court reasoned that the Fourteenth Amendment did not change the relationship between the states and the Bill of Rights.[133] Because Congress did not infringe on the rights of the blacks—Cruikshank did (though he was aided and abetted by state officials)—there could be no prosecution.[134] This opinion had a devastating effect on the power of the federal government to enforce civil rights and placed in peril the ability of freedmen to arm themselves for self-defense.[135] As one historian noted, "*Cruikshank* paralyzed the federal government's attempt to protect black citizens by punishing violators of their Civil Rights and, in effect, shaped the

123. *Id.*
124. *Id.* at 143–44.
125. *Id.* at 144.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. 92 U.S. 542 (1876).
131. *Id.* at 553; WINKLER, *supra* note 3, at 144–45.
132. Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
133. *Cruikshank*, 92 U.S. at 552–55; WINKLER, *supra* note 3, at 144.
134. *Cruikshank*, 92 U.S. at 554–55; WINKLER, *supra* note 3, at 145.
135. WINKLER, *supra* note 3, at 145.

Constitution to the advantage of the Ku Klux Klan."[136] The specter of guns, race, and racism would return to haunt American culture a century later during the civil rights movement.

C. *The Mild, Not-So-Wild West*

The Old West was more mild than wild. The legendary shootout with Wyatt Earp and Doc Holliday at the O.K. Corral in Tombstone, Arizona—dubbed the "wickedest place in the West"[137]—was perhaps the exception, rather than the rule. "Like many myths, however, the lessons often taken from the Shootout at the O.K. Corral are profoundly misleading."[138] Life on the frontier was certainly dangerous, but the risk of being gunned down on Fremont Street is more legend than fact. In notorious Dodge City, Kansas, for example, between 1877 and 1886 there were only fifteen murders—in most years, there were one or zero homicides.[139] "It turns out there really wasn't much need to get out of Dodge."[140] In Tombstone's most violent year, 1881, only five people were killed.[141] In Deadwood, South Dakota's most violent year, only four people were killed.[142] Our "popular mythology of gun-toting cowboys having a shootout over a poker game gone awry [is] more a product of marketing than anything else."[143]

Contrary to Justice Kennedy's statement at oral arguments in *District of Columbia v. Heller*, the right to keep and bear arms during this period did not reflect the "concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that."[144] Citing the research of Robert Dykstra, Winkler shows that people on the frontier certainly had guns, but the towns in which they lived imposed strict limitations on those guns.[145] In many towns, carrying firearms was banned—a photograph from Dodge City in 1879 showed a sign notifying everyone that "The Carrying of Firearms [is] Strictly Prohibited."[146] When visitors arrived in a frontier town, they were required to temporarily turn over their guns to the sheriff until their departure—much like one would hand over a jacket to a coat check in exchange for a token. "On Main Street at high noon, holsters carried no guns."[147] However,

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136. *Id.* (quoting Leonard W. Levy, United States v. Cruikshank, *in* 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 527 (Leonard W. Levy et al. eds., 1986)).

137. *Id.* at 157.

138. *Id.* at 160.

139. *Id.* at 163.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 164.

144. *Id.* at 157.

145. *Id.* at 165 (citing ROBERT DYKSTRA, CATTLE TOWNS 112–22 (1968)).

146. *Id.* (emphasis omitted).

147. *Id.* at 166.

Winkler adduces no proof of how prevalent these laws were, and whether they were enforced effectively, if at all. The shootout at the O.K. Corral—even if it is an outlier—serves as proof that the gun control laws out west were not particularly effective. Rather than citing to gun laws, more compelling proof would be citations to convictions for violations of these laws.

D. Gunners and Bootleggers

Perhaps more than any other provision in the Constitution, the Eighteenth Amendment—banning the sale of alcohol—transformed the dynamic between state and federal enforcement of criminal laws. Prior to the 1930s, the enforcement of criminal laws was generally the province of the states.[148] However, the interstate nature of bootlegging offered challenges to this traditional model. Armed with automatic machine guns such as the infamous "Tommy gun," bootleggers wreaked havoc on big cities, causing untold bloodshed and suffering as they lubricated the streets with intoxicating liquors.[149] The "most famous machine-gun incident of all time" occurred on Valentine's Day in 1929 when Al Capone's gang viciously gunned down members of a rival gang.[150] "In ten seconds, Capone's men fired over seventy rounds and two shotgun blasts."[151] The bootleggers bought off the local police departments, so no one was ever prosecuted for the crime. Even those police departments that were not on the take lacked the firepower or jurisdiction to keep up with the well-armed mobsters, whose criminal enterprises stretched across state lines.[152]

"These types of criminals were a national problem, and it was going to require the national government to combat them."[153] As part of his New Deal, President Roosevelt found that the rash wave of crime was no longer only a local issue—it was a national one: "The consequences of lax law enforcement and crime-breeding conditions in one part of the country may be felt in cities and villages and farms all across the continent."[154] Homer Cummings, Roosevelt's Attorney General, proclaimed, "We are engaged in a war . . . with the organized forces of crime."[155] In response, Cummings added two hundred "G-men" agents to the nascent Bureau of Investigation and armed them, some with submachine guns, to fight the new breed of interstate criminals like John Dillinger and Bonnie and Clyde.[156]

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148. *Id.* at 187–88.

149. *Id.* at 191–92.

150. *Id.* at 191 (quoting JOHN ELLIS, SOCIAL HISTORY OF THE MACHINE GUN 154 (1975) (internal quotation marks omitted)).

151. *Id.* at 192.

152. *Id.* at 193.

153. *Id.* at 196.

154. *Id.* at 198.

155. *Id.* at 199.

156. *Id.* at 200.

Against the backdrop of nationwide crime sprees and corrupt police forces, federal gun control legislation soon followed. The National Firearms Act of 1934 imposed a tax of $200 ($2,000 in 2010 dollars) on the sale of machine guns and short-barreled shotguns, and required owners of such weapons to register them and submit fingerprints to the federal government.[157] Granted, no one expected mobsters to pay the tax, register the firearms, and submit fingerprints—that was the point.[158] Now, anyone caught with an unregistered machine gun could be prosecuted in a federal court and sentenced to a federal prison. No need for witnesses to testify against the mob. No need to rely on corrupt local police departments. "The government wouldn't have to prove that the person had killed anyone, only that he hadn't paid his taxes or properly registered his weapon."[159] Similarly, Al Capone was sent to Alcatraz not for his ruthless murders—but for his failure to pay income tax.[160]

In *United States v. Miller*,[161] the Supreme Court upheld the constitutionality of the enforcement of the 1934 Act.[162] As interpreted by the Ninth Circuit, *Miller* stands for the principle that "the right to keep and bear arms is meant solely to protect the right of the states to keep and maintain armed militia . . . guarantee[ing] a collective rather than an individual right."[163] *Miller* stood as the Court's only pronouncement on laws affecting the Second Amendment until *Heller*. The subsequent 1938 Federal Firearms Act barred felons from receiving firearms, and required gun dealers to be licensed and to keep records.[164] These laws set the stage for future federalization of gun control policy.

E. The Armed Civil Rights Era

During the civil rights era, opponents—both inside and outside the government—used unlawful violent force to suppress the movement. In response, many of the advocates of the era, unconfident in relying on the state to protect them, turned to guns as a means of self-defense. After his house was bombed, Martin Luther King Jr. "applied for a permit to carry a concealed firearm" in Montgomery, Alabama; the discretionary permit was denied by the local police chief.[165] Subsequently, King's home became an "arsenal" as "armed supporters took turns guarding" the house.[166]

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157. *Id.* at 203.
158. *Id.*
159. *Id.*
160. *Id.* at 203–04.
161. 307 U.S. 174 (1939).
162. *Id.* at 183.
163. Hickman v. Block, 81 F.3d 98, 101–02 (9th Cir. 1996) (internal quotation marks omitted).
164. WINKLER, *supra* note 3, at 204.
165. *Id.* at 235.
166. *Id.*

In the more militant wings of the civil rights movement, "[g]uns became part of the official uniform of the Black Panthers," as the group openly carried assault rifles throughout California in a show of force.[167] Unsurprisingly, many, including Governor Ronald Reagan, were concerned by the Black Panthers, who exploited a loophole in the law that permitted them to openly carry rifles, even in the California state capitol.[168] As Winkler notes, "If it hadn't been for the Black Panthers, a militant group of Marxist black nationalists committed to 'Black Power,' there might never have been a modern gun rights movement."[169]

The assassinations and the militant Black Panthers, set against the backdrop of the Warren Court's criminal procedural revolution, set the stage for a sea change in firearm policy, nudging the nation to get tough on crime.[170] "On July 28, 1967, less than three months after the Panthers' visit to Sacramento," Governor Reagan signed into law one of the strictest gun control laws—the Mulford Act—which banned the carrying of loaded firearms.[171] Later that year, there were "eight major riots and thirty-three other serious incidents of civil unrest," many of which were filled with gunfire and bloodshed.[172] The desire for gun control was heightened after the assassinations of Robert Kennedy and Martin Luther King Jr. within two months of each other; "[t]he political will to enact gun control shifted literally overnight."[173]

The day after Kennedy's assassination, Congress passed the landmark legislation of that movement: the Omnibus Crime Control and Safe Streets Act.[174] A few months later, its companion, the Gun Control Act of 1968—the first major piece of gun control legislation since the 1930s—was enacted.[175] Together, the acts banned the interstate shipping of firearms to anyone who was not a federally licensed dealer or collector; banned the sale of firearms to "prohibited persons," including "felons, the mentally ill, substance abusers, and minors"; and expanded the registration regime enacted by the Federal Firearms Act of 1938.[176]

The leadership of the NRA in 1968 initially supported the Gun Control Act. However, this support led to the ultimate schism of thought "that would

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167. *Id.*

168. *Id.* at 245.

169. *Id.* at 231.

170. *Id.* at 222.

171. *Id.* at 245.

172. *Id.* at 249–50.

173. *Id.* at 251. For further discussion of the implications of rushed legislative reactions to unexpected events, see http://joshblackman.com/blog/2011/03/08/assessing-governmental-responses-to-black-swans/, and NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE (2007).

174. WINKLER, *supra* note 3, at 251.

175. *Id.*

176. *Id.*

split the gun group wide open over the next decade."[177] The "gun hard-liners" worried that the "NRA leadership [was] focused too much on the sporting uses of guns and not enough on personal self-defense and the Second Amendment."[178] Buoyed by the "rising crime rates, easy access to drugs, and the breakdown of the inner city, the [hard-liners argued that the] NRA should be fighting to secure Americans the ability to defend themselves against criminals."[179] In short, the NRA "needed to spend less time and energy on paper targets and ducks and more time blasting away at gun control legislation."[180] By the mid-1970s, leadership in the NRA started to call for the repeal of the Gun Control Act.[181] Woodson D. Scott, the new president of the NRA, called the Act a "legislative monstrosity saddled upon the people in a period of emotionalism."[182] Opposition to the Act led the NRA to set up their leviathan lobbying arm, the Institute for Legislative Action,[183] which in large part brings us to the present-day culture war between the nuts and the grabbers.

VI. Back to the Future of the Second Amendment

Heller set forth an uneasy temporal relationship between the original understanding of the Second Amendment—that is, how the right would have been understood at the time of its ratification in 1791—and the role that over two centuries of change should play in considering gun control laws. The role that these histories play remains an important question in gun cases going forward. The story that *Gunfight* tells to a large extent answers this question, though it falls short of solidifying the link between the once and future Second Amendment.

A. Guidepost Originalism

To what end should we consider the history of the Second Amendment? *Heller* and *Gunfight* seem to consider three separate approaches. (Of course, these three approaches do not represent the entirety of originalist thought.) First, history can be used to show the original public understanding—or what has been deemed the "semantic content"[184]—of the Second Amendment.

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177. *Id.* at 254.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 256.

182. *Id.*

183. *See id.* ("Congressman John Dingell fatefully advised the NRA to set up a full-time professional lobbying arm to fight off regulation and roll back the laws of the 1960s.").

184. Lawrence B. Solum, *Semantic Originalism* 2 (Ill. Pub. Law and Legal Theory Research Papers Series, No. 07-24, 2008), *available at* http://ssrn.com/abstract=1120244.

Generally speaking, how would the term "the right to keep and bear arms" have been understood in 1791?[185]

Second, the history of early gun laws can be used as evidence of what the Framers of the Second Amendment were comfortable with. That is, examples of the founding generation placing limitations on the right to keep and bear arms suggest that this is how the Second Amendment was meant to operate. Or, opposition to such laws indicates that those laws were not compatible with the Second Amendment. In other words, if it was good enough for James Madison, it is good enough for us! I call this approach "retrospective originalism."

This method must be distinguished from the original-expected-application blend of originalism, which looks to how the Framers would expect the Constitution to be applied to modern issues[186]—such as how the Fourth Amendment would apply to a device that can measure heat signatures inside a home.[187] Retrospective originalism, in contrast, uses the practices of the Founding Era as evidence of how the provisions were intended to operate back then. For example, Winkler cites to many of the laws passed in the Colonial Era aimed at promoting gun safety as evidence that the Framers were comfortable with strict gun control laws.[188] These ordinances—many of which were cited in Justice Breyer's dissent in *Heller*[189]—are illustrations that "gun possession . . . balanced with gun safety laws was [an idea] that the founders endorsed."[190]

Third, historical practices of limitations on the right to keep and bear arms are not relied on so much to show how the founding generation viewed the Second Amendment, but rather to establish certain enduring practices. Indeed, this history need not be limited to 1791, but rather stretches throughout the American tradition. Justice Scalia's opinion in *Heller*, to the disapproval of Justice Stevens, looked to the post-enactment history of the Second Amendment following its ratification, in the antebellum period, and

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185. *See* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 940 (2009) (launching an exploration of the original public meaning of the Second Amendment).

186. *See, e.g.*, Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 432–36 (2007) (arguing that while living constitutionalists generally object to the limiting influence of the "original expected application" of constitutional provisions, they normally do not oppose applying constitutional provisions according to their "original meanings").

187. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001) (concluding that a thermal-imaging device aimed at a home from a public street constituted a "search" and violated the "degree of privacy against government that existed when the Fourth Amendment was adopted"); *cf.* United States v. Jones, 132 S. Ct. 945, 958 (2012) (Alito, J., concurring in judgment) ("But it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case.").

188. *See supra* subpart V(A).

189. *See* District of Columbia v. Heller, 554 U.S. 570, 683–86 (2008) (Breyer, J., dissenting) (listing examples of substantial regulation of firearms in urban areas during colonial times that citizens thought compatible with the right to keep and bear arms).

190. WINKLER, *supra* note 3, at 117.

following the Civil War.[191] Or, to put it in the lexicon of the *Washington v. Glucksberg*[192] substantive due process framework, the Constitution protects "those fundamental rights and liberties which are, objectively, '*deeply rooted in this Nation's history and tradition*' . . . [and where there is] a 'careful description' of the asserted fundamental liberty interest."[193]

Through this approach, the Court looks to our "Nation's history, legal traditions, and practices [to] provide the crucial 'guideposts for responsible decisionmaking.'"[194] In short, we've been doing it so long that it must be right.[195]

I call this approach guidepost originalism. *Gunfight* demonstrates that our nation has a long tradition of regulating—and even banning—the use of firearms, from colonial days to the not-so-Wild West to the laws of the early twentieth century. The courts have looked to this history for guideposts for how the right has, and should, develop—despite the fact that the Second Amendment was effectively a dead letter during the period in which these laws emerged—even if this history was in tension with the original understanding of the Second Amendment.

In sum, semantic originalism looks to what people said or thought, retrospective originalism looks to what people did, and guidepost originalism looks to what people have done and are still doing. All three inquiries are historical in nature, but the focus and aim of each method varies significantly. *Gunfight* is a tour de force for guidepost originalism. By understanding the nature of a Second Amendment that is "deeply rooted in this Nation's history and tradition" through looking at the "history, legal traditions, and practices" evidenced over two centuries of balancing gun rights and gun controls—many of which constitute longstanding prohibitions—we can obtain *guideposts* on how to proceed. Yet, articulating why each approach should inform modern-day constitutional doctrine remains somewhat underexplored.

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191. *Heller*, 554 U.S. at 605 (2008) ("As we will show, virtually all interpreters of the Second Amendment in the century after its enactment interpreted the Amendment as we do.").

192. 521 U.S. 702 (1997).

193. *Id.* at 720–21 (emphasis added) (citations omitted).

194. *Id.* at 721 (citation omitted).

195. *See, e.g.*, Heller v. District of Columbia, No. 10-7036, 2011 WL 4551558, at *6 (D.C. Cir. Oct. 4, 2011). As the D.C. Circuit explains:

> [A] regulation that is "longstanding," which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right; concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment. A plaintiff may rebut this presumption by showing the regulation does have more than a de minimis effect upon his right. A requirement of newer vintage is not, however, presumed to be valid.

Id.

B. *What's Past Is Prologue*

Paradoxically, perhaps, in laying the groundwork for our *future* Second Amendment, the originalist Supreme Court turned to the *past.* Even while stating that the Court looked to the meaning of the right in 1791, Scalia's opinion in many respects "reflected a thoroughly modern understanding of gun rights."[196] In essence, Scalia's originalism—based on eighteenth-century political philosophy—was grounded in twentieth-century practicalities, and it only purported to elide everything in between.

The ban on machine guns, for example, was justified because they are not "in common use"—the reason why machine guns were not "in common use" was because the federal government had banned them since 1930.[197] Similarly, Scalia upheld certain "longstanding prohibitions"[198]—many of which were longstanding due to the Court's failure to recognize that the Second Amendment had any teeth for two centuries. "The scope of the Second Amendment's protections was not, in other words, defined by the original meaning of the Constitution . . . [but was] made within the confines of contemporary government regulation."[199] Perhaps the fact that these "longstanding prohibitions" are so "deeply rooted in this Nation's history and tradition"[200] informs their constitutionality. The Court's controversial pragmatic dicta—which I have assailed as unoriginalist[201]—sounds in guidepost originalism.

This temporal disconnect of the Second Amendment, which Winkler wittily refers to as "*Heller*'s Catch-22,"[202] remains the most enduring question going forward. Some lower courts considering Second Amendment challenges have looked to the history of the right.[203] Other courts have

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196. WINKLER, *supra* note 3, at 287; *see also* Nelson Lund, *The Second Amendment,* Heller, *and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1355 (2009) (noting that instead of a historical analysis, Scalia's conclusion in *Heller* focused on the arms that modern Americans prefer to keep for self-defense and the reasons that these preferences are sensible).

197. WINKLER, *supra* note 3, at 287 (quoting District of Columbia v. Heller, 554 U.S. 570, 624–25 (2008)).

198. *Heller*, 521 U.S. at 626–27.

199. WINKLER, *supra* note 3, at 288.

200. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

201. *See* Blackman, *supra* note 14, at 956 ("[T]he most significant portions of *Heller* for the lower courts are based on the same pragmatic—and not originalist—consideration of asserted social costs that may stem from gun ownership.")

202. Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1551 (2009).

203. *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 702 & n.11 (7th Cir. 2011) ("[T]his wider historical lens is required if we are to follow the Court's lead in resolving questions about the scope of the Second Amendment by consulting its original public meaning as both a starting point and an important constraint on the analysis."); *id.* at 702–03 ("Accordingly, if the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 or 1868—then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review."); United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011) ("[H]istorical meaning enjoys a privileged interpretative role in the Second Amendment context . . . .").

remarked that the history only provides limited,[204] if any,[205] use in fleshing out the contours of firearm jurisprudence. Winkler fails to fully connect this past with the future, short of making the largely anachronistic argument that "[a]s the history of the right to bear arms and gun control shows, there is a middle ground in which gun rights and laws providing for public safety from gun violence can coexist."[206] However, the Supreme Court, and not Winkler, is at fault for this shortfall.

Gunfight effectively and powerfully reminisces and pines for an earlier time of compromise and sensibleness—a veritable two-century-long golden era of gun control perhaps—where opponents and proponents of gun rights were able to work together in relative harmony in the legislative process to achieve common ends. Yet, it is not enough to simply say that things used to be better in the past—a time where the Second Amendment was effectively a dead letter, I might add—because for better or worse, we are in the midst of the culture war that Winkler so ably describes. For this reason, I am concerned that without solidifying the link between our shared traditions and today's developing Second Amendment landscape—to the extent that is even possible—these sensible and respectable arguments may not lead to a ceasefire in our constitutional *Gunfight* on the Supreme Court's new battlefield.

Conclusion

Gunfight was not written to make you an expert on the history of the Second Amendment or its evolving jurisprudence. It won't. *Gunfight* will not provide you with ammunition as to why all gun control laws are either unconstitutional or absolutely necessary. If you hold such an unwavering dogma, read elsewhere. Rather, by looking to the intervening two centuries between the ratification of the Second Amendment and *Heller*—where "the right to own a firearm has lived side by side with gun control"—*Gunfight* finds a "middle ground in which gun rights and laws providing for public safety from gun violence can coexist."[207] There is no "need to choose between two absolutes—between unfettered gun rights on the one hand and

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204. *See, e.g.*, United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) ("[The historical passages quoted] tell us that statutory prohibitions on the possession of weapons by some persons are proper—and, importantly for current purposes, that the *legislative role did not end in 1791*. That *some* categorical limits are proper is part of the original meaning, leaving to the people's elected representatives the filling in of details." (first emphasis added)).

205. Nordyke v. King, 664 F.3d 776, 786, 788 (9th Cir. 2011) (holding that heightened scrutiny of a firearm-regulating law is triggered only when the law substantially burdens the right to keep and to bear arms under the Second Amendment and concluding that the ban on gun shows did not substantially burden that right). The Ninth Circuit in *Nordyke v. King* did not even attempt to cite any historical sources to support its holding that a ban of gun shows on public property does not violate the Second Amendment.

206. WINKLER, *supra* note 3, at 295–96.

207. *Id.*

unfettered gun control on the other."[208] For this, advocates and zealots on both sides of the gun debate owe Winkler a debt, as he brings some much-needed sanity, reasonableness, and moderation to the Supreme Court's new battlefield.

208. *Id.* at 296.

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From the Streets to the Courts: Doing Grassroots Legal History of the Civil Rights Era

COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT. By Tomiko Brown-Nagin. New York, New York: Oxford University Press, 2010. 578 pages. $34.95.

Reviewed by Ariela J. Gross*

I. Introduction

In *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement*, Tomiko Brown-Nagin brings us the definitive legal history of the civil rights movement from the bottom up. This rich, dense narrative account of the day-to-day creation of civil rights law at the local level finally gives the "long" civil rights movement its legal history. Social and political historians have recovered the "long" local histories of the movement, re-centering our focus away from Congress and the Supreme Court and toward the grass roots, and shifting our attention backwards in time, away from the landmark cases and legislation of the 1960s, back toward the 1940s and 1950s.[1] Yet legal historians have remained remarkably attached to *Brown v. Board of Education*,[2] its roots, and its aftermath. For some it has been a beacon, for others a foil. Whether we are writing about what *Brown* should have said, or the effects *Brown* did or did not have, or the paths not taken when the National Association for the Advancement of Colored People (NAACP)

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1. *See, e.g.*, MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY (2003) (chronicling New York's civil rights movement); CIVIL RIGHTS HISTORY FROM THE GROUND UP: LOCAL STRUGGLES, A NATIONAL MOVEMENT (Emilye Crosby ed., 2011) (collecting original works on the history of the bottom-up civil rights movement); JOHN DITTMER, LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI (1994) (providing accounts of the grassroots civil rights movement in Mississippi); ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE (1984) (detailing the role of local community groups in the civil rights movement); CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE (1995) (describing the role local people played in the civil rights movement in Mississippi); THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2008) (exploring local citizens' efforts to advance the civil rights movement in the North).

2. 347 U.S. 483 (1954).

Legal Defense Fund (LDF) pursued the *Brown* litigation, we are entranced by the *Brown* case, by the United States Supreme Court, and by the national players who sought to influence the Court, notably Thurgood Marshall and the NAACP LDF.[3] In this work, Tomiko Brown-Nagin joins Risa Goluboff and Kenneth Mack and in heralding a new kind of constitutional history with regard to race and law, one that puts *Brown* in perspective as only one aspect of an ongoing engagement by African-American lawyers and activists with struggles for equality, representation, and resources.[4]

Brown-Nagin brings to light some important and neglected themes in this history. One major contribution of her book is to demonstrate the intense conflict within the "black community" over the direction of civil rights strategy and policy. Brown-Nagin uncovers disputes between the local Atlanta NAACP, led by lawyer A.T. Walden, and the national NAACP, led by Thurgood Marshall, in the 1940s and 1950s; between both Marshall and Walden on the one hand, as well as with student movement leaders in the 1960s; and between poor and working-class black parents and middle-class black officials during the 1970s.[5] When one looks to the local level, one can see division within the black community. As in the work of Kenneth Mack on black lawyers and of Dylan Penningroth on an earlier era of African-American history,[6] Brown-Nagin takes on what was once taboo in writing the history of a subordinated group: internal conflict. Even those who early on challenged the progressive orthodoxy that canonized *Brown*, such as Derrick Bell, presupposed a monolithic local black community whose interests were overridden by the national civil rights lawyers pushing integration at all

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3. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (investigating the history of the Supreme Court's rulings on race); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (rev. ed. 2004) (detailing the history of *Brown*); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994) (recounting the legal struggle, led by the NAACP and Thurgood Marshall, to secure civil rights for African Americans); WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001) (re-deciding *Brown v. Board of Education* using nine opinions each drafted by a different legal expert).

4. *See* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 6 (2007) (recovering the history of African-American claims to equality in the workplace and freedom from peonage unrelated to the battle against segregation in education); KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (forthcoming 2012) [hereinafter MACK, REPRESENTING THE RACE] (presenting a collective biography of African-American lawyers during the segregation era); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 352 (2005) (challenging the assumption that *Brown* is the endpoint of the civil rights movement while reconstructing the era before *Brown* and emphasizing the role of racial uplift in the civil rights movement).

5. *See infra* Part II.

6. *See* MACK, REPRESENTING THE RACE, *supra* note 4 (describing the tension faced by African-American lawyers during the segregation era between their racial and professional identities); DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH 123 (2003) (showing that court records indicate disputes existed among former slaves).

costs.[7] By contrast, Brown-Nagin shows a local community internally divided, not only by class but even within the middle and working classes. While middle-class professionals, especially teachers and principals, fit Bell's thesis that blacks were sold out by the national NAACP, a significant number of poor black families wanted integrated schools because they thought it was their best chance at a good education.

Brown-Nagin also shows the importance of class to African-American history. *Courage to Dissent*, read alongside Risa Goluboff's *Lost Promise of Civil Rights*—which illuminated the claims working-class African Americans made to the NAACP and the Justice Department in the 1930s and 1940s[8]—demonstrates the different economic and political interests at work in the "black community." Goluboff's book concludes that, most of the time, the interests of the poor majority, both white and black, were consistently ignored and underserved by those with political power.[9] *Courage to Dissent*, therefore, adds an important historical dimension to longstanding debates regarding the gulf in achievement and integration between middle-class blacks on the one hand and the "truly disadvantaged" black underclass on the other. While there are structural explanations for that divide,[10] Brown-Nagin shows that there were also political and legal choices that contributed to the disadvantage.[11] Yet Brown-Nagin seeks to do more than show the complexity of African-American strategies and motivations. By "looking to the bottom," as Mari Matsuda exhorted critical scholars of race to do a generation ago,[12] Brown-Nagin offers a counter-narrative of civil rights.

According to Brown-Nagin, grassroots history holds out the promise of an alternative narrative of constitutional history by focusing attention on local-black-community members as "agents of change—law shapers, law interpreters, and even law makers."[13] Brown-Nagin tells us that "[t]hese actors contested the constitutional conceptions of equality propounded by powerful judges and celebrated lawyers."[14] A.T. Walden and the local

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7. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 507 (1976) (describing the divergence between local blacks' interests and national lawyers' aims).

8. GOLUBOFF, *supra* note 4, at 6.

9. *Id.* at 9. Kenneth Mack also emphasizes class divisions in the conceptualization of "civil rights" among African-American lawyers. *See generally* MACK, REPRESENTING THE RACE, *supra* note 4.

10. *See, e.g.*, WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 56–58 (1987) (arguing that the disparity between middle-class and underclass blacks was exacerbated by the exodus of more economically stable families from the ghettos to suburbs and better urban neighborhoods).

11. *See infra* notes 118–19 and accompanying text.

12. Mari J. Matsuda, *Looking to The Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

13. TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 7 (2011).

14. *Id.* at 431.

NAACP leaders interpreted constitutional norms in line with "middle-class prerogatives"; student activists and movement lawyers demanded political and economic equality; and poor women in the decades after *Brown* claimed equality in education for their children, even if it meant busing them to the suburbs.[15] *Courage to Dissent* recovers a lost history of progressive and feminist lawyering attentive to political protest and class inequality and emphasizing a thicker notion of racial injustice than simply exclusion from public accommodations.

To some degree, Brown-Nagin's book follows a venerable legal–historical tradition of uncovering jurisprudential and legal–political paths not taken. For a generation now, legal and constitutional historians have recovered the alternative constitutional visions of social movements on the left, beginning with Willard Hurst's squatters,[16] taking inspiration from Hendrik Hartog's famous "Pigs and Positivism,"[17] and reaching a cottage industry in the 1990s with a rich history of the labor movement's claims on the Constitution in the works of William Forbath, Christopher Tomlins, and Robert Steinfeld.[18] Reva Siegel, the leading practitioner of this form of legal history, has illuminated the constitutional visions of social movements on both the left and the right: the feminist movement, the abortion-rights movement as well as the anti-abortion movement, and most recently, the grassroots history of gun rights.[19] Their work challenges the sometimes monolithic portrayal of "the people" in recent political-science-inflected legal scholarship on popular constitutionalism, which examines the Supreme

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15. *Id.* at 431–32.

16. *See* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 3–6 (1956) (discussing the legal and constitutional order built by the Pike River Claimants' Union).

17. *See generally* Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899 (breaking new ground in bottom-up legal history).

18. *See generally* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991) (describing the alternative constitutional vision of the Knights of Labor); ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350–1870 (1991) (discussing the clash between artisan republicanism and the new "free labor" ideology); CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993) (discussing the dominant and "subterranean" legal and constitutional understandings of free labor in the early nineteenth-century United States); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999) (comparing constitutional traditions from the Reconstruction Era).

19. *See* Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006) (discussing various social movements and how they affect the meaning of constitutional principles); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008) (uncovering the influence of the gun-rights movement's constitutional vision on the U.S. Supreme Court's Second Amendment jurisprudence); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073 (1994) (discussing the relationship between the nineteenth-century feminist movement's legal and constitutional vision and the jurisprudence of the late nineteenth century); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (using historical analysis to discuss the regulation of abortion).

Court's relationship to "public opinion."[20] Grassroots and social-movement constitutional historians, by contrast, uncover the many competing claims on the Constitution and visions of what the Constitution meant from very different political perspectives. Yet while this approach has been applied to many aspects of constitutional history, it has been surprisingly absent from civil rights history until this landmark work.

Brown-Nagin's book is in the tradition of legal and constitutional histories that focus on the alternative visions of social movements, but unlike many of these works, it is not a jeremiad for what might have been had alternative paths been followed. Instead, *Courage to Dissent* is considerably more sanguine, celebrating the good fight waged by ordinary people who, whether or not they actually won, had their day in court and exercised their "agency."[21] While I admire the optimism in this approach, I often find myself reaching somewhat more cynical conclusions about the successes of her forgotten heroes. In addition, Brown-Nagin hews closely to her sources, and resists drawing sweeping conclusions or fitting the evidence into a grand predetermined narrative, so that at times the alternative visions of her protagonists are not fully fleshed out, and the book falls short of drawing all of the conclusions it might have from the compelling evidence gathered here.

Yet if this is a flaw, it is one that to my mind magnifies rather than lessens the significance of the book. The refusal of an overarching thesis may be the inevitable result of a fine-grained social history of law, but in my view, the implications of stories Brown-Nagin has uncovered are far reaching, and the conclusions could be pushed even farther. Each part of this sweeping narrative, organized chronologically from the 1940s through the 1970s, challenges accepted versions of the relationship among law, politics, and social change, and in particular, of the complex negotiations and confrontations among different segments of the black community and the white community. I will highlight two of them here: one, the relationship between dissent among black activists and their white opponents; and two, the relationship between law and movement politics.

A crucial aspect of Brown-Nagin's local focus is to emphasize that the civil rights movement did not operate in a vacuum. One of her most powerful points is that blacks always acted in reaction to and in anticipation of the

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20. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (positing that the Supreme Court is responsive to public opinion); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (arguing that for most of American history, authority rested with "the people themselves"). For an insightful critique of this literature, see generally Justin Driver, *The Consensus Constitution*, 89 TEXAS L. REV. 755 (2011).

21. For an insightful discussion of "agency" in social history, see generally Walter Johnson, *On Agency*, 37 J. SOC. HIST. 113 (2003). For some of my own thoughts on "agency" in legal history, see Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 655–64 (2001).

actions of whites: "Above all else, white domination framed and constrained the paths toward equality that each of this story's actors took."[22] When Walden counseled patience or caution, it was in part because "he had to contend with intense white resistance."[23] National figures like Marshall did not face this resistance directly: "Walden practiced amid violent white racial hatred and the threat of racial terror on a daily basis for most of his professional life."[24] And in addition to the terror of white violence, the movement had to continually readjust its strategies to deal with the more subtle opposition they faced in Atlanta: elites who retreated into their all-white enclaves and working-class whites who learned the language of "freedom of choice," "freedom of association," and freedom from taxes to oppose African Americans' claims to full participation in public life.[25] The legal strategies of the civil rights movement dovetailed with, and counterpunched against, the legal strategies of these white opponents who did not form a monolithic "backlash" any more than civil rights activists were a monolithic "black community."[26]

Furthermore, both blacks and whites used law in a variety of ways, at different times, and "law" in Brown-Nagin's rendering had different and more expansive meanings than earlier civil rights historians have given it: not only landmark desegregation litigation[27] but also defending protestors from criminal prosecution;[28] "omnibus" lawsuits that challenged Jim Crow in numerous arenas at once;[29] and other forms of legal maneuvering that took its cues from movement activists themselves.[30] Whereas the debate in the past over the significance of *Brown* has at times posed political protest at one pole opposed to litigation at the other, Brown-Nagin shows that there were myriad forms of civil rights movement lawyering other than desegregation litigation, just as there were other forms of anti-movement activity besides massive resistance. In this way, Brown-Nagin's work shines a bright light on why it is that African Americans may have reason to have greater faith in legal-rights claims than critical legal scholars had understood.[31]

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22. BROWN-NAGIN, *supra* note 13, at 12.

23. *Id.* at 33.

24. *Id.* at 34.

25. *See infra* note 145 and accompanying text.

26. BROWN-NAGIN, *supra* note 13, at 359.

27. *See, e.g.*, Swann v. Charlotte-Mecklenberg Sch., 402 U.S. 1 (1971) (upholding the busing of students to promote integration); Brown v. Board of Educ., 347 U.S. 483 (1954) (declaring state laws segregating public schools unconstitutional).

28. *See infra* notes 97–98 and accompanying text.

29. *See infra* notes 84–86 and accompanying text.

30. *See infra* notes 88–89 and accompanying text.

31. *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 148–51 (1991) (comparing her own experience of "rights talk" to that of critical legal scholar Peter Gabel and arguing that people of color have benefited from rights talk as much as they have been limited by it).

Courage To Dissent is divided into three parts, each covering a great sweep of civil rights history. In Part II of this Review, I will consider each in turn, showing the way Brown-Nagin illuminates conflict and class, and emphasizing the reaction of local whites to the initiatives of the civil rights movement and the encroachment of African Americans on "white" spaces. In doing this, I draw on the work of Kevin Kruse and other historians of the conservative movement, as well as my own research on the grassroots legal history of race and conservatism. Part III of the Review turns specifically to the other side of the story—the grassroots movement to oppose civil rights—and suggests that these two sides of the story must go hand in hand to truly understand the civil rights era and rewrite the standard narrative of *Brown* and its aftermath.

II. *Courage to Dissent*

A. The 1940s and 1950s

Brown-Nagin devotes the first part of her book to the 1940s and 1950s. Rather than viewing this period as the run-up to and aftermath of *Brown*, she turns to three areas—housing, education, and public accommodations—to look at the way black leaders and activists pushed for change, integration, or otherwise. Her chief protagonist in this part is A.T. Walden, a "pragmatist" who sometimes pursued litigation but also worked together with leading white politicians and businessmen to effect other, less confrontational solutions.

For example, in the area of housing, the 1950s saw a major black migration to Atlanta, but only 10% of the city's land was allotted to African Americans.[32] Walden pursued biracial negotiation to gain more housing for blacks. The West Side Mutual Development Committee (WSMDC), put together by moderate Mayor William Hartsfield, consisted of Walden; a black builder; a black "realtist" (the term used for African Americans who sold real estate but were not allowed to win realtors' licenses); and three officials of the Southwest Citizens Association, a white anti-integrationist organization that was heir to the Klan and other more violent hate groups.[33] While the WSMDC was formed to "put out fires,"[34] it "played the pivotal role in determining the course of residential racial change in post-war Atlanta."[35] Its goal was to find "suitable" areas for black housing, while maintaining segregation.[36] The WSMDC employed informal means—surveying an area that was undergoing racial transition, cajoling whites and

32. BROWN-NAGIN, *supra* note 13, at 61.

33. KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM 78 (2005).

34. BROWN-NAGIN, *supra* note 13, at 65.

35. KRUSE, *supra* note 33, at 78.

36. BROWN-NAGIN, *supra* note 13, at 65.

blacks to maintain a racial boundary line, repurchasing black homes to keep a white area's "community integrity," etc.—but it did so with the full backing of the city government.[37] Furthermore, the WSMDC was the direct heir of white resistance groups in West Side neighborhoods who adopted many of the tactics of the Klan, as well as their membership, but cloaked them in greater respectability.[38] For example, the Mozley Park Home Owners' Protective Association raised money to repurchase homes from black "encroachers," then established a "voluntary boundary line for Negro expansion."[39] The threat of mob violence often lay just behind the offers to repurchase. In this climate, the WSMDC program of "organizing residents, repurchasing homes, and revitalizing the 'white market,'"[40] could look like pragmatic biracial cooperation or like the "Uncle Tomism" of which later activists accused Walden.[41] As Brown-Nagin concludes, Walden's accommodationist approach gained some housing for blacks but also increased the ghettoization that had terrible long-term consequences for African Americans in Atlanta.[42]

Litigation, however, proved equally dead-end. In the North, lawsuits that attempted to build on the gains of *Shelley v. Kraemer*,[43] which held in 1948 that racially restrictive real property covenants were unenforceable,[44] went nowhere. In Georgia, the national NAACP, with A.T. Walden's cooperation, brought a lawsuit against segregation in Savannah's public housing but lost in the trial court and eventually in the Fifth Circuit.[45] But the real story in residential segregation was twofold: white flight and "Negro removal," as critics termed the "urban renewal" plans of the 1950s and 1960s.[46] As Kevin Kruse chronicles, most whites in Atlanta voted with their feet, leaving the city and its public spaces to African Americans and moving to the suburbs.[47] Within the city, as various forms of roadblocks and barriers

37. KRUSE, *supra* note 33, at 78–79.

38. *See id.* at 77–78 (explaining how the Ku Klux Klan had evolved into more "respectable" organizations, such as the Southwest Citizens Association, whose top three officials would later compose half of the WSMDC).

39. *Id.* at 65–66.

40. *Id.* at 85.

41. *See id.* at 166–68 (recounting Walden's settlement negotiations with white leaders during the 1961 Atlanta sit-in movement and the vocal activists' response that Walden had "'sold out' the civil rights of other African Americans").

42. *Id.* at 81–82.

43. 334 U.S. 1 (1948).

44. *Id.* at 23.

45. Heyward v. Pub. Hous. Admin., 154 F. Supp. 589 (S.D. Ga. 1957), *aff'd sub nom.* Cohen v. Pub. Hous. Admin., 257 F.2d 73, 78 (5th Cir. 1958); BROWN-NAGIN, *supra* note 13, at 71.

46. BROWN-NAGIN, *supra* note 13, at 68.

47. KRUSE, *supra* note 33, at 5, 13.

failed to keep blacks out of neighborhoods, postwar redevelopment turned to slum clearance and relocation of blacks to segregated public housing.[48]

In education, a similar pattern took hold: first interracial diplomacy, and only later litigation, with limited success after six years in the courts.[49] The local NAACP began with a campaign for teacher-salary equalization, first appealing to the white teachers' union and the Board of Education and then bringing a lawsuit for pay equity in 1943–1944.[50] After having a limited victory overturned in the Fifth Circuit on procedural grounds,[51] Walden and the local NAACP then turned to school-funding-equalization litigation in 1950, just when the national NAACP was turning from equalization litigation to a direct attack on Jim Crow.[52] The threat of integration became a lever for equalization, and the Georgia General Assembly started pouring money into black education.[53] But *Aaron v. Cook*,[54] the school case, was taken off the state docket, pending the outcome of similar cases filed in other states that would be consolidated into *Brown v. Board of Education*.[55] And the local NAACP reacted to *Brown* with caution, not rushing to push for desegregation.[56]

As for the desegregation of public spaces and public transit, A.T. Walden and the black elite decided to begin with "realms that few blacks might have prioritized"—golf courses rather than swimming pools, parks, or playgrounds.[57] *Holmes v. City of Atlanta*[58] showed Walden's "continued commitment . . . to interracial diplomacy and the separate but equal principle."[59] Desegregation in Atlanta came to follow "a familiar pattern"[60]: First, local African Americans cautiously challenged the segregation of a particular realm.[61] Then, local officials waited for court orders.[62] Finally, they implemented a token desegregation of a public space, without violence but also without any great effort on the part of local blacks to push for actual

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48. RONALD H. BAYOR, RACE AND THE SHAPING OF TWENTIETH-CENTURY ATLANTA 69–71 (1996).

49. BROWN-NAGIN, *supra* note 13, at 88.

50. *Id.* at 88–90.

51. Davis v. Cook, 80 F. Supp. 443 (N.D. Ga. 1948), *rev'd* Cook v. Davis, 178 F.2d 595, 600–01 (5th Cir. 1949); BROWN-NAGIN, *supra* note 13, at 93.

52. BROWN-NAGIN, *supra* note 13, at 95.

53. *Id.* at 104.

54. Civ. No. 3923 (N.D. Ga. filed Sept. 19, 1950).

55. BROWN-NAGIN, *supra* note 13, at 105; *see* Thomas V. O'Brien, *The Dog that Didn't Bark:* Aaron v. Cook *and the NAACP Strategy in Georgia Before* Brown, 84 J. NEGRO HIST. 79, 87 n.9 (1999) (describing events in the five years leading up to the filing of *Aaron v. Cook*).

56. BROWN-NAGIN, *supra* note 13, at 106–07.

57. *Id.* at 115.

58. 350 U.S. 879 (1955) (per curiam).

59. BROWN-NAGIN, *supra* note 13, at 116.

60. KRUSE, *supra* note 33, at 106.

61. *Id.*

62. *Id.*

integration.[63] Even the more aggressive "Love, Law, and Liberation Movement," known as "Triple L," begun by the well-known local minister William Holmes Borders to test the *Gayle v. Browder*[64] holding striking down state segregation statutes on the bus lines, was remarkably limited: the ministers announced their protest ahead of time, were arrested in order to bring a test case, and did not try to ride the buses again.[65] After the favorable 1959 ruling in *Williams v. Georgia Public Service Commission*,[66] Borders warned his congregants not to "sit down by any white woman," "be drawn into any trap," or "irritat[e] anybody."[67] The Triple L and *Williams* litigation "channeled and controlled dissent."[68]

Whites simply fled the system. While upper-class whites could retreat to private all-white country clubs and transportation, working-class whites reacted with outrage to even the token desegregation of public spaces like streetcars, golf courses, public parks, and swimming pools: "First and foremost, they believed that these public spaces, which they considered their own, had been 'stolen' from them and 'given' to another race."[69] They reacted by voting down bond measures for public works projects and revolting against taxes in all forms.[70]

B. The 1960s

In the second part of the book, Brown-Nagin turns to the 1960s and the student movement's challenge to both Walden and Hartsfield's pragmatic biracial coalition on the one hand, and to the "legal liberal" litigation strategy of Marshall and the national NAACP on the other. Brown-Nagin "holds a magnifying glass to the sit-in movement in Atlanta during its first year and finds enormous and perhaps surprising complexity in African Americans' conceptions of equality and the law."[71] She writes against a literature that has portrayed the sit-in movement as wholly outside the law, forcing the hand of Congress and the President without regard to the Supreme Court.[72] Brown-Nagin's portrait is more complex. Although in 1960, student leaders saw the Supreme Court as having failed the African-American community, that very failure galvanized them to direct action to claim the rights *Brown*

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63. *Id.*

64. 352 U.S. 903 (1956) (per curiam).

65. BROWN-NAGIN, *supra* note 13, at 126–27; KRUSE, *supra* note 33, at 111–16.

66. [1959] 4 Race Rel. L. Rep. (Vand. Univ. Sch. Law) 166 (N.D. Ga. Jan. 21, 1959).

67. BROWN-NAGIN, *supra* note 13, at 128 (alteration in original).

68. *Id.* at 130.

69. KRUSE, *supra* note 33, at 125.

70. *Id.* at 125–27.

71. BROWN-NAGIN, *supra* note 13, at 134.

72. *But see* Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 777–79 (2010) (arguing that civil disobedience can be thought of not as an abandonment of law but as a type of constitutional claim, reflecting the highest faith in the existing legal order).

had announced.[73] Furthermore, the student activists displayed varied attitudes toward litigation, innovating new litigation strategies and a new style of "movement lawyering."

The opening salvo of the student movement was a full-page advertisement in Atlanta newspapers on March 9, 1960, with a declaration by the newly formed Committee on Appeal for Human Rights (COAHR), couched in the language of the Declaration of Independence and the Constitution, demanding the abolition of segregation and the elimination of racial disparities in education, health, voting, and many other areas of public life.[74] The COAHR, led by Lonnie King and Julian Bond, included the older generation of black leaders among its advisers, who thought they could contain it.[75] However, Walden and Hartsfield had lost that power.[76] When the student protestors pressed their demonstrations against white-owned restaurants and businesses, pragmatists urged the protestors to be prudent and work together with white businessmen.[77] As white resistance groups, including the KKK and "Georgians Unwilling to Surrender," led by Governor-Elect Lester Maddox, staged counter-demonstrations, Walden asked the students to cancel a rally in support of arrested demonstrators and instead attend a strategy meeting, pledging in return to support them "for the duration."[78] Walden considered the limited desegregation of downtown businesses "a high point of a lifetime of service in the cause of civil rights," whereas the students were disillusioned.[79] Brown-Nagin considers the campaign a success, "[d]espite [the students'] disillusionment," because they had "taken initial strides toward their conception of freedom—comprehensive desegregation, with attention to the interests of the working class—and had brought the rest of Atlanta along with them."[80]

The hero of this part of the book is Len Holt, who wrote to the Student Nonviolent Coordinating Committee (SNCC) executive secretary James Forman in 1962 proposing a new approach to civil rights lawyering, in which the lawyer would be an adjunct to the direct-action movement, providing ground support to the protestors and deferring to their decision making and methods.[81] SNCC protestors were refusing bail in 1960–1961, a tactic the NAACP and the NAACP LDF strenuously objected to because they thought

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73. BROWN-NAGIN, *supra* note 13, at 134–35.

74. *Id.* at 148; Comm. on Appeal for Human Rights, *An Appeal for Human Rights*, ATLANTA CONSTITUTION, Mar. 9, 1960, at 13.

75. BROWN-NAGIN, *supra* note 13, at 148.

76. *Id.* at 130.

77. *See id.* at 166–71 (detailing the brokering of an agreement between activists and white businessmen and the tensions it caused between the elder generation of activists and students).

78. *Id.* at 163–66.

79. *Id.* at 172.

80. *Id.* at 173.

81. *Id.* at 175.

it threatened the legal battle against segregation.[82] The NAACP expected to exercise more control over SNCC in return for its financial contributions, and it resented SNCC's collaboration with the National Lawyers Guild, which NAACP leaders saw as communist.[83] Len Holt's innovation in the fight against Jim Crow was the "omnibus integration" suit.[84] As Holt explained, "Instead of just seeking to integrate a library[, for example,] it attacks racial discrimination in the cemetery, swimming pool, public hospital, dog pound, parks, auditoriums, buses, public housing and you-name-it . . . and it does all this attacking simultaneously, at one time."[85] Even if the suit failed on the merits, it "could loosen the mental chains of racism and generate public concern about injustice."[86] In Atlanta, Holt attained some success with the combination of an omnibus suit and direct action, which "persuaded Mayor Allen to push for implementation of the court order."[87]

According to Brown-Nagin, what made movement lawyering like Holt's so successful is that he worked together with activists, even following their lead. With lawyers like Holt, "court-based social change strategies" could be effective, and some lawyers and activists moved fluidly between lawyering and politics.[88] As Brown-Nagin observes, "[Holt's] work challenges the idea that civil rights litigation undermined political activism. . . . This principle can be generalized. A host of factors determined whether or to what extent law and litigation, whether undertaken by Holt or NAACP-affiliated lawyers, aided or demobilized the struggle for racial justice."[89] Yet Brown-Nagin's conclusion is, at the end, a somewhat limited one. The only generalization she draws is that law and social movements "interacted dynamically" and that movement lawyering gave activists another tool to work with, one that could at times provide synergy for direct action.[90] Even losses might have benefits to the community in terms of their organizing potential.

Direct action in Atlanta came to a head in 1963–1964, with the SNCC and COAHR campaign against privately owned restaurants, hotels, and retailers, at the same time that Bull Connor turned the dogs on demonstrators in Birmingham, Alabama. The wave of demonstrations across the South, including in Atlanta, directly inspired landmark legislation—the Civil Rights Act of 1964—and led inexorably to Supreme Court litigation when reactionary firebrands Lester Maddox and Moreton Rolleston Jr., owners of the Pickrick Restaurant and the Heart of Atlanta Motel, respectively, resisted the

82. *Id.* at 179.
83. *Id.* at 182–83.
84. *Id.* at 192.
85. *Id.* (alterations in original).
86. *Id.* at 193.
87. *Id.* at 198.
88. *Id.* at 209.
89. *Id.*
90. *Id.* at 210.

new Act. Rolleston filed a legal challenge to the constitutionality of the Civil Rights Act "exactly two hours and ten minutes after" its passage, while Maddox was sued after refusing to comply with the Act at his restaurant.[91] This was an explosive time, and there were a variety of white and black responses—in Atlanta and in the nation—to the quickening pace of racial change. While some whites, like Maddox, hardened their resistance and drew a line in the sand, others, like Mayor Ivan Allen, flew to Washington to testify in favor of the Civil Rights Act.[92] The student activists saw Allen's actions as too little, too late, while A.T. Walden praised Allen's "leadership"—though not the bill itself.[93] A plethora of black activist groups came together in the Atlanta Summit Leadership Conference (ASLC) on October 19, 1963, to approve negotiation to break the stalemate over the desegregation of hotels and restaurants,[94] but it was a new wave of protests, pickets, and boycotts, combined with the decision in *Heart of Atlanta*,[95] that finally forced change.[96] At the same time, much of the energy of movement lawyers went into defending arrested student protestors in court as they faced hostile local trial judges.[97] Those trials did a great deal to galvanize black opposition and energize the movement.[98]

This part is the heart of Brown-Nagin's argument that citizens can shape the law, as she believes the students "catalyzed social, political, and constitutional change" even though it was extraordinarily difficult to accomplish their intended end—the desegregation of Atlanta.[99] Despite her positive view of the movement's successes, her evidence could support a more pessimistic conclusion. While massive resistance may have been routed toward and indeed helped trigger national action, far more effective forces lined up against the movement: the so-called white moderates, who backed limited desegregation as a tactic to hinder protest and forestall true integration.[100] Moderates used "appeals to social custom, property rights, and an inviolate state action doctrine long embraced by the courts," as well as a solid working relationship with Walden and other black pragmatists.[101] However, despite their efforts to speak for a broader base of Atlantans, poor blacks did not end up with much of a voice in the movement. The Atlanta Project, SNCC's organizing venture among poor blacks for "economic justice," ran out of

91. *Id.* at 243–44.

92. *Id.* at 224–25.

93. *Id.* at 226.

94. *Id.* at 228–29.

95. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

96. BROWN-NAGIN, *supra* note 13, at 229–31, 244–45.

97. *See, e.g.*, *id.* at 235–36 (detailing the work of attorney Donald Hollowell, known as Georgia's "Mr. Civil Rights," in defense of activists in a hostile judge's courtroom).

98. *Id.* at 234–42.

99. *Id.* at 247.

100. *Id.* at 248.

101. *Id.*

steam quickly, and the new antipoverty programs evolved with little input from actual poor Atlantans.[102] Julian Bond, elected to the Georgia State Legislature by a poor black constituency, had to fight in court to be seated; when he finally made it to the legislature, there was little he could do.[103] Rent strikes against slum lords and legal battles to make the eviction process fairer for poor Atlantans achieved only limited success.[104] Much energy was dissipated fighting the court battles of Bond and fellow SNCC leader Stokely Carmichael.[105] In the end, this narrative does not conclude with features entirely different from those of many more familiar tales of the late 1960s: diffusion of energy, exhaustion, and frustration.

C. The 1970s

The final third of *Courage to Dissent* takes us into the 1970s, the era of the long, drawn-out school-desegregation litigation grinding through the courts. So many whites had fled the Atlanta school system that it was now 80% black, leading Lonnie King to observe, "You've got to have some white kids to integrate with."[106] The Atlanta school-desegregation case, *Calhoun v. Latimer*,[107] "represented one of LDF's highest profile assaults on resistance to *Brown*,"[108] and ended in one of its most crushing failures.[109] The case began in 1958, under the direction of Constance Baker Motley, the NAACP LDF lawyer and critic of Walden's compromises.[110] While Atlanta's schools were nominally desegregated in 1961, "the racial integrity of most schools in Atlanta and all schools outside of the city remained unblemished."[111] Over the course of the 1960s, the LDF pushed for a "unitary" school district,[112] while the local community, fearful of a "one-way stream" from black to white schools,[113] registered complaints about racial inequality in schools but failed to support an all-out push for integration.[114] The LDF, hurt by its lack of community connection and without extralegal leverage, made no headway.

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102. *Id.* at 266–69, 297–304.

103. *Id.* at 256–62, 290–99.

104. *Id.* at 269–72.

105. *Id.* at 280–97.

106. *New Deal in Atlanta*, NEWSWEEK, July 30, 1973, at 42, 42.

107. 377 U.S. 263 (1964) (per curiam).

108. BROWN-NAGIN, *supra* note 13, at 308.

109. *Id.* at 330–31.

110. *Id.* at 309–10.

111. *Id.* at 325.

112. *See id.* at 369–70 (discussing the LDF's "plan for a unitary system that would bus fewer than 10 percent of the city's students").

113. *Id.* at 346.

114. *See id.* at 321 (observing that at public hearings, "[m]any blacks refused to endorse school desegregation" and expressed "concern about teacher equality and employment opportunities for black teachers after desegregation," with some making the case for "equal but separate schools"); *see also id.* at 345–46 ("Even as the LDF slogged it out in court for a massive pupil desegregation plan, Atlanta's civil rights mainstream endorsed freedom-of-choice").

Just as the LDF won a major legal victory in the *United States v. Jefferson County Board of Education*[115] case, Constance Baker Motley was appointed to the federal bench.[116] The miserable denouement of the *Calhoun* litigation was the "Atlanta Compromise," a deal brokered between the local branch of the NAACP, led by Lonnie King, and the white administration, trading student integration for a specified number of spots for black educators in the administration of the school system.[117] While black middle-class professionals, especially teachers and principals, preferred this outcome, poor blacks dissented: they wanted better schools for their kids, and they were willing to bus them to those schools.[118] As one critic of the compromise complained, "All these black kids are being sold out for jobs."[119]

In 1971, the United States Supreme Court decided *Swann v. Charlotte-Mecklenburg Board of Education*,[120] which was as close as the Court ever got to endorsing busing; it allowed broad judicial discretion and robust remedies to redress school board discrimination.[121] However, a Northern District of Georgia court "declared *Swann* remedies unworkable in Atlanta."[122] In Brown-Nagin's words, "The 'annual agony of Atlanta' should end, the judges explained, for three interrelated reasons: the city's lack of buses, uncontrollable white flight, and black opposition to busing."[123] Their analysis of white flight "traced the racial make-up of the city and its public schools to the Calhoun litigation itself."[124] In other words, school desegregation had caused white flight, and therefore, school desegregation must cease. As the lawyers of the LDF and Lonnie King descended into internecine battle in 1972, ending with the dramatic ouster of the LDF from its own case, local parents were the losers.[125]

As settlement negotiations dragged on, the ACLU filed a lawsuit, *Armour v. Nix*,[126] arguing that residential segregation in Atlanta was a product of deliberate choices by public officials and, therefore, that the only solution to school desegregation must be a "metropolitan" solution, busing

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115. 372 F.2d 836 (5th Cir. 1966).

116. BROWN-NAGIN, *supra* note 13, at 344.

117. *Id.* at 359.

118. *Id.*; *see also* BAYOR, *supra* note 48, at 247–51 (outlining the specifics, as well as the divisive effect, of the Atlanta Compromise).

119. *New Deal in Atlanta*, *supra* note 106, at 42.

120. 402 U.S. 1 (1971).

121. *See id.* at 15 ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

122. BROWN-NAGIN, *supra* note 13, at 366 (citing Calhoun v. Cook, 332 F. Supp. 804, 805–08 (N.D. Ga. 1971) (per curiam)).

123. *Id.* at 367.

124. *Id.* (emphasis omitted).

125. *Id.* at 376–77.

126. Civ. No. 16708, 1979 U.S. Dist. LEXIS 9609 (N.D. Ga. Sept. 24, 1979).

students between black Atlanta and the white suburbs.[127] The hero of Brown-Nagin's final part is Ethel Mae Mathews, spokesperson for the *Armour* plaintiffs and a civic and social organization leader in her own right, who worked together with feminist white lawyer Margie Pitt Hames to fight the *Calhoun* settlement.[128] Mathews and the welfare mothers she represented saw themselves as at times equally at odds with middle-class black professsionals as they were with whites.[129] At the public hearings on the Compromise, "long-festering rifts in the black community" were revealed: "differences over the value of desegregation, the meaning of equality, the salience of class in the black experience, and the priority of working-class interests in the struggle for racial justice."[130]

Despite all the attacks on the Compromise, the Fifth Circuit finally bowed out and let it stand in October 1975.[131] Its defenders argued that local autonomy and administrative control of the system was a concrete victory, compared to the hollow prize of integrating black students with the few remaining whites in Atlanta.[132] To its opponents, the compromise sold out the interests of the mass of black families in a backroom negotiation among cronies.[133] Brown-Nagin concludes that "the compromise advanced the priorities and worldviews of the negotiators and the black middle class, but it did not necessarily advance the interests of the large swath of black Atlantans whom the local NAACP leader claimed to represent."[134] Brown-Nagin also examines the courtroom strategies employed by Margie Hames, a lawyer who came to the fight against racial discrimination because of her outrage at the way black women were treated in the South.[135] She was willing to open up messy questions about the way black leaders had worked against the interests of poor blacks in upholding segregated housing as well as schools by acquiescing in the construction of the "Atlanta wall," a concrete barrier on Peyton and Harlan Roads physically marking the racial divide on the west side and functioning to keep rental units out of middle-class home-owning neighborhoods.[136] In the end, faced with the impossible Supreme Court precedent of *Milliken v. Bradley*,[137] *Armour* went down to defeat.[138]

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127. BROWN-NAGIN, *supra* note 13, at 373.

128. *Id.* at 385–86, 411–13.

129. *Id.* at 386.

130. *Id.* at 387–88.

131. Calhoun v. Cook, 522 F.2d 717, 720 (5th Cir. 1975); BROWN-NAGIN, *supra* note 13, at 400–01.

132. BROWN-NAGIN, *supra* note 13, at 403–04.

133. *Id.* at 406.

134. *Id.*

135. *Id.* at 411–12.

136. *Id.* at 418–19.

137. 418 U.S. 717 (1974).

138. Armour v. Nix, 446 U.S. 930, 930 (1980); BROWN-NAGIN, *supra* note 13, at 426.

Yet Brown-Nagin sees a positive side to the *Armour* story in the courtroom assertion of rights by poor women like Ethel Mae Mathews:

> Mathews's verbal jousts with men who first denied her rights and then tried to deny her humanity, she believed, were acts of civic participation rarely seen from the dispossessed. Mathews and her peers were also able to confront power brokers on behalf of those on society's bottom rungs. In so doing, the plaintiffs, many of whom were involved in welfare rights and other forms of political and social activism prior to *Armour*, demonstrated how legal and social movements can fortify one another, regardless of whether plaintiffs achieve victory in court.[139]

Ultimately, Brown-Nagin concludes, the conflicting visions of the Constitution of the pragmatists, the student protestors, and the poor women claiming educational equality were not a drain on the movement for civil rights but rather an energizing and often improving factor.[140] While litigation was not always successful, neither were lawyers a drain on the movement.[141] Instead, the Constitution remained an inspiration to ordinary people, and litigation could be an important tactic when combined with direct action.[142]

If we interpret *law* to mean only Supreme Court cases, then we may see local political protest as at odds with a law-based approach to civil rights. But if, instead, we expand our understanding of law to encompass other forms of legal activity, then we will see how engaged with law local political actors truly were. And when we look to the microhistory of interactions between movement activists, their allies, their opponents, and those in between, we may discover a more complicated story of whose interests were privileged and whose sold out at different moments in history. Accommodationism looks more pragmatic in the local political landscape at certain times, while at other times, local leaders' prioritizing the aims of black professionals means that the interests of poor people were better represented by national organization lawyers—and by themselves.

III. Conflict at the Grass Roots on the Left and Right

The story Brown-Nagin tells of the civil rights movement at the grass roots, deeply divided by dissenting approaches, also describes the opposition to integration. In Atlanta, puffed by city leaders as "the city too busy to hate,"[143] white residents resisted integration of their neighborhoods, schools, and public institutions not only through violence but also, and increasingly,

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139. BROWN-NAGIN, *supra* note 13, at 428–29.
140. *Id.* at 432–33.
141. *Id.* at 433–34.
142. *Id.* at 434.
143. *Id.* at 213, 230, 247; *New Deal in Atlanta*, *supra* note 106, at 42.

nonviolently and legally.[144] Conservatives learned to couch their opposition in terms of individual freedom of choice, including the freedom to choose religious schools, and they merged the issues of religious-school tax exemptions with opposition to taxation for the provision of public goods (such as parks and swimming pools) that were once whites-only.[145] These grassroots movements for school vouchers and against taxes became important parts of the rise of the New Right from the 1960s through the 1990s.[146] Over time, they found common ground with the same white, moderate coalition that had worked together with black pragmatists to substitute token desegregation for full integration.[147] Yet their voices have been lost in the dominant narratives about the history of race, law, and politics in the United States, which has centered on the Supreme Court on the one hand and national electoral politics on the other.

The dominant, liberal, *Brown*-centered narrative of constitutional history depicts an upward arc from *Brown* to the Civil Rights Act of 1964 and the Voting Rights Act of 1965, legislative victories buttressed by the Warren Court's protection of individual rights and freedoms.[148] Peaking in the mid-1970s, however, the tide began to turn as the increasingly conservative Burger Court refused to move beyond formal equality, and to paraphrase Justice Blackmun, to take account of race in order to get beyond racism.[149] In the standard story about race and the Constitution, the Supreme Court moved from progressive race consciousness to race neutrality, or "color blindness," as it moved to the right.[150] Color blindness itself started as a

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144. *See* Kevin M. Kruse, *The Fight for "Freedom of Association": Segregationist Rights and Resistance in Atlanta*, *in* MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 99, 103 (Clive Webb ed., 2005) (describing the state board of education's sympathetic acceptance of a white father's argument that his daughter's freedom-of-association rights should allow her to transfer to an all-white school).

145. *See* Joseph Crespino, *Civil Rights and the Religious Right*, *in* RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S, at 90, 90–95, 99–100 (Bruce J. Schulman & Julian E. Zelizer eds., 2008) [hereinafter RIGHTWARD BOUND] (describing conservatives' large-scale opposition to the IRS removing the tax-exempt status of racially discriminatory private schools); James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 579 (2007) (stating that Southern states used freedom-of-choice plans to avoid complying with desegregation rulings); Kermit L. Hall, *Justice Brennan and Cultural History:* New York Times v. Sullivan *and Its Times*, 27 CAL. W. L. REV. 339, 347 (1991) (noting that rather than desegregate, segregationist Montgomery officials chose to sell the city's parks).

146. *See* Forman, *supra* note 145, at 579 (linking the segregationists' ulterior support of vouchers in the 1960s and 1970s with the religious constituency that supports vouchers in order to send their children to private schools that embrace their spirituality).

147. *See id.* (reasoning that the constituencies in favor of vouchers advance the ways vouchers can promote racial justice in order to bolster support for vouchers more generally).

148. BROWN-NAGIN, *supra* note 13, at 9.

149. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part) ("In order to get beyond racism, we must first take account of race.").

150. *See* Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 764 (1996) (asserting decisions

liberal position in the 1940s and 1950s but became co-opted by conservatives, who made the idea of redress for past harms illegitimate and countenanced only "diversity" as a justification for race-conscious programs.[151] By the 1990s, "color-blind conservatism" had become the reigning ideology of the U.S. Supreme Court, whose majority opinions in successive cases regarding affirmative action in education and employment extolled race neutrality as the dominant value in equality jurisprudence.[152] A generation of critical-race theorists has traced the rise of this ideology in legal doctrine.[153] Yet legal scholars have not explored its links to the grassroots politics of conservatism in local battles over schools, taxes, and public spaces, and social and political historians tend to slight law in their histories.

The story of color-blind constitutionalism on the Supreme Court is matched by a top-down political history in which the civil rights movement had broad national support when it demonstrated nonviolently against violent, white, and massive resistance in the South.[154] But as African Americans radicalized, turned to Black Power, opposed the Vietnam War, and rioted in the cities, the movement lost white support and dissipated its energy.[155] The white Southern reaction to the civil rights movement has been so well chronicled as to become a truism in the standard narrative of the twentieth century.[156]

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from the conservative-dominated Rehnquist Court represented "striking departures" from the Court's prior decisions and "enormous setback[s] to minority efforts to achieve equal opportunity").

151. *See* Christopher W. Schmidt, Brown *and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 236 (2008) ("Interpretations of *Brown* as embodying colorblind constitutionalism . . . inaugurated a new era of colorblind constitutionalism in which it would become the favored interpretation of conservatives. But this new era had its roots in a deep commitment among liberal Americans at the time of *Brown* to the idea of a colorblind society.").

152. Matthew D. Lassiter, *The Suburban Origins of "Color-Blind" Conservatism: Middle-Class Consciousness in the Charlotte Busing Crisis*, 30 J. URB. HIST. 549 (2004); *see also* ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 60–61 (2010) (describing decisions dating back to the 1990s that represent a conservative viewpoint and a shift in constitutional jurisprudence).

153. *See generally, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (providing an overview of the history of color-blind constitutionalism and arguing that its use by the Court actually subordinates African Americans in modern society).

154. *See* BROWN-NAGIN, *supra* note 13, at 214 (describing how "images of young marchers pitted against fire hoses, snarling dogs, and club-wielding police officers" created a favorable environment for the passage of the Civil Rights Act of 1964).

155. *Id.* at 277.

156. *See generally* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (1969) (providing a historical survey of massive resistance); DAVID CHALMERS, BACKFIRE: HOW THE KU KLUX KLAN HELPED THE CIVIL RIGHTS MOVEMENT (2003) (chronicling the reappearance and downfall of the Ku Klux Klan as it tried to intimidate the nascent civil rights movement through violence, which ultimately strengthened the movement's resolve); MASSIVE RESISTANCE, *supra* note 144 (discussing the diverse origins and ideology of Southern whites engaging in massive resistance).

Yet the story of white backlash is a remarkably regionalized—even segregated—history of "massive resistance" in the South.[157] According to this story, which places racism in the South (and the Northern working class), a Southern backlash to the civil rights movement fueled the electoral shift from a solid white South for the Democratic to the Republican Party.[158] This led to the "Southernization" of American politics, as race became a reliable "wedge issue" for Republicans to pry white working-class voters away from the Democratic Party.[159] The move from civil rights to color blindness, especially as associated with New Right political figures like Norman Podhoretz and Nathan Glazer, epitomized the end of 1960s liberalism, the marginalization of the radical left and Black Power, and a national mood of "racial exhaustion."[160]

However, as a new generation of historians of racial politics in the South as well as in the urban North have shown, the South is not, and has never been, "another country."[161] The politics of nonviolent—and legal—backlash against African Americans moving into white neighborhoods and

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157. MASSIVE RESISTANCE, *supra* note 144; *see* REG MURPHY & HAL GULLIVER, THE SOUTHERN STRATEGY 2–12 (1971) (discussing the segregated nature of Southern politics in the 1960s and summarizing tumultuous political contests as white Southern voters began to support Republican candidates).

158. *See* THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 43 (paperback ed. 1992) (describing the shift to the Republican party of white Southern voters as a response to the strengthening of ties between the Democratic party and black voters).

159. *See* JOHN EGERTON, THE AMERICANIZATION OF DIXIE: THE SOUTHERNIZATION OF AMERICA 128–30 (1974) (contending that Nixon's "handling of racial issues" was a key component of his success in capturing the majority of white voters in the South, including those who had formerly aligned with the Democratic party).

160. *See, e.g.*, DAN T. CARTER, FROM GEORGE WALLACE TO NEWT GINGRICH: RACE IN THE CONSERVATIVE COUNTERREVOLUTION, 1963–1994, at 28–40 (1996) [hereinafter CARTER, FROM WALLACE TO GINGRICH] (tracing the cause of this shift to economic factors as the 1950s boom ended and more pressure came to bear on the working class, putting economic concerns over racial ones for many poor whites); DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS 347–50 (2d ed. 2000) (same); EDSALL & EDSALL, *supra* note 158, at 47–98 (identifying forces that began to fracture the civil rights coalition during the 1960s, including the inability to prevent riots, which ultimately led many Americans to shift to a more conservative outlook and ultimately paved the way for Richard Nixon's 1968 presidential victory). For an account of the development of neoconservatism after the 1970s, see Carl T. Bogus, *Rescuing Burke*, 72 MO. L. REV. 387, 461–62 (2007). For a brilliant discussion of "racial exhaustion"—a tendency to feel that racial injustice had sufficient remedies, leading to reluctance to discuss further racial remedies—see generally Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917 (2009).

161. *See* JOSEPH CRESPINO, IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION 4–5 (2007) (noting important connections between conservative white Southerners and conservative white Americans, and the common causes they shared with other conservative constituencies); *see also* Matthew D. Lassiter, *De Jure/De Facto Segregation: The Long Shadow of a National Myth*, *in* THE MYTH OF SOUTHERN EXCEPTIONALISM 25, 44 (Matthew D. Lassiter & Joseph Crespino eds., 2010) (denying that the reputation of America as a whole can be separated from the reputation of the Jim Crow South).

public spaces was a national phenomenon, tied centrally to the rise of the New Right and the conservative legal movement.[162]

Moreover, conservatives in law and in politics successfully drew on historical narratives about race that told reassuring stories about the path from slavery to freedom. Color-blind constitutionalism has a history in postwar America.[163] Conservatives appropriated this once liberal ideology not only through legal-opinion writing but drawing on the narratives generated by grassroots movements of opposition to integration, especially in housing and schools.[164] These narratives about freedom of choice, meritocratic individualism, and religious freedom took on a life of their own, beyond their origins in battles over racial integration—but they remain grounded to race, in their effects as well as their inspiration. Furthermore, these political movements were linked to popular cultural invocations of collective memory about the past, especially the slave past. Romanticism about Confederate symbols, narratives of progress from slavery to freedom, and celebrations of the 1787 Constitution provide the emotional substratum of conservative arguments against civil rights initiatives.[165]

New bottom-up legal and political histories of civil rights, desegregation, and racial politics have taught us that the history of race in

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162. *See* Joseph Crespino, *Mississippi as Metaphor: Civil Rights, the South, and the Nation in the Historical Imagination*, *in* THE MYTH OF SOUTHERN EXCEPTIONALISM, *supra* note 161, at 99, 110 (describing Northern white homeowner's resistance to integrations of their neighborhoods); Kevin M. Kruse, *Beyond the Southern Cross: The National Origins of the Religious Right*, *in* THE MYTH OF SOUTHERN EXCEPTIONALISM, *supra* note 161, at 286, 286 (noting that the Religious Right was a national, not Southern, phenomenon); Nancy MacLean, *Neo-Confederacy vs. The New Deal: The Regional Utopia of the Modern American Right*, *in* THE MYTH OF SOUTHERN EXCEPTIONALISM, *supra* note 161, at 308, 311–12, 322–23 (explaining that the resistance of whites to black advances was a national phenomenon, that neo-Confederatism allowed Northerners to support the rollback of civil rights, and that both the Federalist Society and the promotion of original-intention interpretation of the Constitution were products of this movement); Jeanne Theoharis, *Hidden in Plain Sight: The Civil Rights Movement Outside the South*, *in* THE MYTH OF SOUTHERN EXCEPTIONALISM, *supra* note 161, at 49, 51 (explaining that Northern white residents also attempted to block job, school, and housing opportunities from being made available to African Americans); *see also* CARTER, FROM WALLACE TO GINGRICH, *supra* note 160, at 41–42 (revealing that in the North, George Wallace's 1968 presidential campaign received the most votes where blacks and whites were in close proximity, "whether in their neighborhoods or in their schools"); Thomas J. Sugrue & John D. Skrentny, *The White Ethnic Strategy*, *in* RIGHTWARD BOUND, *supra* note 145, at 171, 174–75, 192 (revealing that whites reacted to demands for open housing and calls for educational desegregation by asserting their own group identities and that this "ethnic revival" led to many Northerners joining the Republican Party in the 1970s); Thomas J. Sugrue, *Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945–1969*, 91 J. AM. HIST. 145, 147 (2004) (stating that affirmative action led to Northern whites embracing the New Right).

163. For a beginning to this story, see generally Lassiter, *supra* note 161, and Sugrue, *supra* note 162.

164. *See generally* Lassiter, *supra* note 152 (detailing the conservative grassroots movement developed in Charlotte in opposition to integration by busing).

165. *See generally* Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283 (2008) (expounding on the history of slavery put forth by conservatives that presents a romanticized notion of the period).

America is not just a Southern story. Just as Jim Crow existed in the North and West as well as South, there was both violent backlash and legal, nonviolent resistance to desegregation and the civil rights movement in cities across the North and West. The phenomenon was not one of "Southernization" because the South was never "another country."[166] And as Brown-Nagin has shown, the civil rights movement itself, including lawyers, contained more diversity about means and ends regarding integration and institutions than has previously been acknowledged.

Today, the withdrawal of white Americans from public school systems, the segregated pattern of most of our major urban areas, *and* the continued de facto segregation of public life, appear to be natural patterns of class stratification, yet they came about as the result of active choices. Formal color-blind conservatism did not legally ratify changes that happened naturally, socially, or through individual actions; on the contrary, grassroots conservatives consciously pursued legal strategies to fight integration from the ground up as well as the top down.

One of *Brown*'s chief effects may have been, as Michael Klarman suggests, the massive resistance that spurred Northerners to intervene to implement civil rights initiatives,[167] but it had other effects at the grass roots. On the one hand, *Brown* made it possible for student activists for civil rights to push for changes that simply were not available before. And a generation of black activists turned to the courts in a variety of ways to make demands on the legal and political system. On the other hand, *Brown* also unleashed a white reaction of legal, nonviolent resistance, including white flight, school vouchers, and tax revolts, both North and South.[168] In this, Atlanta was emblematic and not unusual.

In Atlanta, the revolt against taxes began in the 1950s, not the 1970s, where many historians have traditionally placed it. Whites who believed their public spaces and institutions had been stolen by black usurpers, and mistakenly believed they paid all the taxes, rebelled against bond measures. "SHALL YOU CONTINUE TO PAY FOR THEIR PLEASURE?" blared one anti-tax message.[169] Record turnout in a local election brought down Mayor Hartsfield's proposed Piedmont Park cultural center in a swirl of rumors that it would become a haven for integration.[170] The first schools to which whites fled impending integration were indeed "segregation academies," paid for by tuition grants from the state government, but very

166. *See supra* notes 161–62 and accompanying text.

167. KLARMAN, *supra* note 3, at 421–24.

168. Of course, *Brown* may have only accelerated processes already underway since the end of World War II. *See* JASON MORGAN WARD, DEFENDING WHITE DEMOCRACY: THE MAKING OF A SEGREGATIONIST MOVEMENT AND THE REMAKING OF RACIAL POLITICS, 1936–1965, at 4 (2011) ("The roots of this opposition movement lay not only in the shallow soil and emotionally volatile politics of school desegregation. They pushed more deeply into the two preceding decades.").

169. KRUSE, *supra* note 33, at 125–28.

170. *Id.* at 128–30.

quickly—as Atlanta nominally desegregated its schools and the state legislature abandoned segregation statutes, allowing the "local option" plan to proceed—the real trend was toward religious schools whose populations swelled in the 1950s and 1960s.[171] Families learned to request transfers from desegregating schools "to maintain freedom of association."[172] Class divisions among blacks were matched by class divisions among whites, especially between those who could escape into private enclaves and those who had relied on public goods for their social lives.

The rise of a conservative movement organized to preserve white prerogatives, but increasingly voiced in color-blind and individualistic terms as a right to free choice and free association, took place not only in Atlanta and other Southern spots but as far afield as Los Angeles, California, during the same era. In 1954, when the U.S. Supreme Court decided *Brown v. Board of Education*, Los Angeles was already well on its way to having one of the most segregated school systems in the United States.[173] By the mid-1960s, when civil rights activists began to push integration of the schools—including busing children between districts—to the top of the political agenda, nearly half of Los Angeles Unified School District schools were classified as more than 50% minority ("black" or "Mexican").[174]

Jim Crow lived outside the South, as did a vibrant civil rights movement—and an active movement of reaction and opposition to integration of African Americans and Mexican Americans into public institutions and neighborhood spaces. The conservative activists who organized in reaction to desegregation claimed rights for white people, but they did so

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171. *Id.* at 169–72; *see also* Joseph Crespino, *supra* note 145, at 90–98 (describing the national debate over federal tax benefits for private schools in the South, a debate that would continue well beyond the 1960s).

172. KRUSE, *supra* note 33, at 161.

173. Despite the landmark Ninth Circuit decision in *Westminster School District v. Mendez*, 161 F.2d 774, 780–81 (9th Cir. 1947), declaring that Mexican Americans could not be relegated to separate schools according to the California school segregation statute, Los Angeles and Orange County school districts used annexation and secession to gerrymander whites and "Mexicans" into separate school systems. For example, in the area that was litigated in the *Mendez* case, an all-Anglo section of the El Modena school district transferred into the all-white Tustin School District in the fall of 1947, and six years later, a number of school districts in Orange County were unified, diluting Mexican-American political power. Ariela J. Gross, *"The Caucasian Cloak": Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337, 384 (2007).

174. Paul Egly, Crawford v. Los Angeles Unified School District; *An Unfulfilled Plea for Racial Equality*, 31 UNIV. LA VERNE L. REV. 257, 267 fig.2 (2010); *see also* Crawford v. Board of Educ. of the City of L.A., 551 P.2d 28, 31–32 (Cal. 1976) ("[T]he statistical evidence before the trial court reveals that in 1968 a substantial proportion of the district's schools had student populations of either 90 percent or more minority students or 90 percent or more white students."); U.S. COMM'N ON CIVIL RIGHTS, A GENERATION DEPRIVED: LOS ANGELES SCHOOL DESEGREGATION 4–8 (1977) (summarizing further demographic studies, including the factual finding by the trial judge in *Crawford* that most of the district's schools were either 90% white or 90% minority students, as well as a 1971 U.S. Department of Health, Welfare, and Education enrollment survey finding that 86.6% of black pupils in the area attended schools that were more than 80% black).

in terms that were rarely explicitly racial. In Los Angeles, the leading organization opposing the Congress of Racial Equality and NAACP's integration campaign was known as the Taxpayers' Rebellion of California, formed in mid-1963.[175] The Taxpayers' Rebellion demanded tax cuts by equating government spending with integration, special privileges for minorities, and welfare programs that would support blacks at whites' expense.[176] As Camille Walsh has argued, whites in the North as well as the South claimed the right to education in battles over segregation in terms of their taxpayer status; both whites and African Americans framed their legal claims as "taxpaying citizens."[177]

At the very same time taxpayers were rebelling in Los Angeles, a major campaign was underway to fight fair-housing legislation. The proponents of Proposition 14, placed on the ballot in 1963, sought to overturn the Rumford Fair Housing Act, and succeeded in doing so, with the argument that the Rumford "Forced Housing Act" took away property owners' "freedom of choice."[178] The "free-choicers" argued that residential segregation was a matter of individual choices, just as they did in Atlanta.[179] Yet the "national myth" of "de facto" segregation in the North and West being something entirely different from de jure segregation in the South remains strong in our historical tradition.[180]

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175. BECKY M. NICOLAIDES, MY BLUE HEAVEN: LIFE AND POLITICS IN THE WORKING-CLASS SUBURBS OF LOS ANGELES, 1920–1965, at 302–03 (2002).

176. *Id.*

177. Camille Walsh, "We Are Tax Paying Citizens": Race and the Right to Education 1, 5 (Nov. 2011) (unpublished manuscript) (on file with author).

178. *See, e.g.*, COMM. FOR YES ON PROPOSITION #14, WHY "YES" ON PROPOSITION #14? (archived in Radical Right Collection, Box 4, Hoover Inst. Archives, Stanford Univ.) (urging that a *yes* vote "[w]ill abolish those provisions of the Rumford Forced Housing Act of 1963 which took from Californians their freedom of choice in selling or renting their residential property"); REG F. DUPUY, FORCED HOUSING VS. FREEDOM OF CHOICE (archived in Radical Right Collection, Box 38, Hoover Inst. Archives, Stanford Univ.) ("[Proposition 14] will outlaw forced housing. It will guarantee in plain and simple language, the right of any property owner to sell, rent or lease all or part of his property to any person he chooses. It restores the principle of Freedom of Choice."); WILLIAM STEUART MCBIRNIE, UNITED CMTY. CHURCH, WHY YOU SHOULD VOTE *YES* ON PROPOSITION 14 (archived in Radical Right Collection, Box 4, Hoover Inst. Archives, Stanford Univ.) ("Proposition 14 proposes to abolish those provisions of the Rumford Forced Housing Act which have taken away from California residential property owners their right to choose the person or persons to whom they may wish to sell or rent their property.").

179. *See, e.g.*, DUPUY, *supra* note 178 ("But doesn't Freedom of Choice involve discrimination? . . . No, discrimination means simply that a person makes a choice. Everybody discriminates in many things every day regarding food, shelter, T.V. programs and so on. In order to discriminate[,] [o]ne has to be *free to make a choice*, or free to prefer one thing to another.").

180. *See generally* Lassiter, *supra* note 161 (tracing the development of the de jure–de facto distinction from its origin as an NAACP strategy to appeal to the consciences of policy makers to the ultimate, unintended result of insulating many segregated Northern communities from liability).

IV. Conclusion

If it is true that the fiercest enemies the civil rights movement faced, in Atlanta as well as Los Angeles, Chicago, and New York, were not demagogues and massive resisters like Lester Maddox and Bull Connor but rather the ordinary people who moved to the suburbs, took their children out of the public school system, rebelled against paying taxes for "their" public services, and demanded the right to "freedom of choice," what does that tell us about the choices movement lawyers made? Does A.T. Walden appear especially prescient for working in coalition with white elites in Atlanta to keep whites in the city and to shore up black voting power while allowing segregation to remain in place? Or does Walden appear hopelessly shortsighted for not demanding more change during a window of opportunity and for allowing Jim Crow to harden into greater permanence through the highways that divided the city? Does Lonnie King reveal himself as the worst sort of villain for selling out the interests of black parents for the vain hope of black political power, or was he the true pragmatist?

Traditionally, legal scholars have asked whether social movements should or should not look to the courts, or frame their claims in legal and constitutional terms, and turn to the history of *Brown* to ask that question. Tomiko Brown-Nagin's magisterial work has already taken us a great distance from that tired debate by showing us that at the grass roots, activists and lawyers had much more complicated relationships with the courts and that there was not an either–or relation between community organizing and litigating. We might also ask: If color-blind conservatism came from below as well as from above, what does that tell us about the possibilities of organizing for racial justice at the grass roots? What kinds of strategies are necessary for social change if the alternative constitutional claims of the civil rights movement are met by equally deeply felt constitutional claims from the right? These are the questions we continue to struggle with today.

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Notes

Picking on the Little Guy? Asserting Trademark Rights Against Fans, Emulators, and Enthusiasts*

We live in a time of robust trademark[1] protection, but the fact that a trademark owner has a right does not mean the owner should always exercise that right. There are times when asserting a trademark right might do more harm than good to a trademark owner, without addressing any real threat to that owner. This Note aims to explore the actions of trademark owners against subsets of infringers referred to here as fans, emulators, and enthusiasts—groups that use the mark not to create a separate brand identity of their own but rather to show their support for or imitate the original brand owner. These groups include sports fans, youth and amateur sports teams that use official team names and logos, and enthusiasts that use trademarks in their domain names or to identify their group.

This presents a different situation than most trademark analyses, which usually focus on two separate businesses at odds with one another, each attempting to secure a share of its own product market. In the particular cases at issue here, the use is not competitive, and it usually has little risk of confusing consumers or diluting the original mark. In fact, in some cases such use may actually strengthen or reinforce the original mark, given the nature of the use.

While the law allows a trademark owner to enforce its rights in these situations, there are costs involved in such enforcement—costs to the trademark owner asserting its rights, costs to the allegedly infringing party, and costs to the community and society as a whole. While costs are inherent in any trademark-enforcement scenario, there is a problem if the costs are not offset by a corresponding benefit. For example, costs to an infringing party or to society are justifiable if the trademark owner derives a benefit to which

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1. For simplicity, the term *trademark* will be used throughout this Note to refer to marks used as source identifiers both for goods (trademarks) and for services (service marks). The distinction between the two does not affect the analysis because they are treated similarly under federal trademark law. *See* Lanham Act § 3, 15 U.S.C. § 1053 (2006) ("[S]ervice marks shall be registrable, in the same manner and with the same effect as are trademarks, and when registered they shall be entitled to the same protection provided in this chapter in the case of trademarks.").

it is entitled under the law—such is the nature of our trademark regime. However, if the trademark owner does not derive a benefit, or actually ends up worse off as a result, then such a situation is unacceptably inefficient. Trademark law itself obligates an owner, to a certain extent, to police its mark and ensure the integrity of its brand, but this obligation should be understood in such a way as to avoid unnecessary enforcement actions that result in inefficient outcomes.

This Note proceeds in four parts. Part I presents several examples of enforcement actions against fans, emulators, and enthusiasts for analysis. Part II explores the trademark owners' possible motivations for taking such actions, looking both at reasons expressed by spokespeople and reasons that may be lying beneath the surface. Part III analyzes the costs of enforcement actions in these cases to the parties involved, including the public. Part IV concludes.

I. Fans, Emulators, and Enthusiasts

There are several examples of enforcement actions taken against fans, emulators, and enthusiasts. Trademark owners take different approaches to these groups that use their marks. Some owners refuse to allow the use altogether, while others force groups to enter into licensing agreements if they wish to continue the use. Still other owners take no action at all and actually encourage the use. What follow are a few representative examples of the types of use that are the focus of this Note.

In 2010, a team of Philadelphia Phillies fans calling themselves the "Phlyin' Phanatics" entered their contraption in the Red Bull Flugtag Competition, a contest in which people build homemade flying machines and launch them into a body of water.[2] The team of fans had spent $3,000 and 400 hours building a machine modeled after the Phillie Phanatic, the mascot of the Phillies and a trademark of Major League Baseball (MLB).[3] MLB objected to the use, requiring them to remove a replica of the mascot's head from the craft and leaving a sour taste in the mouths of the dejected Phillies fans.[4]

MLB has a history of vigorously enforcing its trademarks. In the 1990s, it began cracking down on little league teams whose uniforms featured

2. Teresa Masterson, *MLB Decapitates Flugtag's Phlyin' Phanatic*, NBC PHILADELPHIA (Sept. 6, 2010), http://www.nbcphiladelphia.com/news/local/MLB-Decapitates-Flugtags-Phlyin-Phanatic-102163614.html.

3. *Id.*

4. *See* Dan Geringer, *Phlyin' Flugtag Team Just Can't Get a Head*, PHILA. DAILY NEWS (Sept. 3, 2010), http://articles.philly.com/2010-09-03/news/24972804_1_phillie-phanatic-shuttle-red-bull-s-flugtag (quoting members of the team who said they were "really disheartened" and who suggested that they should simply "cut the head off and call it, 'The Philly Mascot That Major League Baseball Decided to Kill'").

official logos but were not purchased through an authorized, licensed dealer.[5] This requirement to purchase from a licensed dealer appears to be the status quo,[6] but there have been some recent instances of enforcement actions taken against amateur teams. In 2008, a youth league in the Tinley Park area of Chicago was forced to stop using MLB team names because its uniforms were not purchased from licensed vendors, even though the teams apparently did not use official MLB logos.[7] This action even garnered the attention of comedian Stephen Colbert, warranting an appearance in a satirical segment on his show, *The Colbert Report*, along with plenty of tongue-in-cheek criticism of the youth league at the expense of the intended target—MLB.[8] MLB took similar action against the Cape Cod League, an amateur league that had served for years as a breeding ground for future MLB talent.[9] MLB demanded that they comply with the licensed-vendor requirement in order to use MLB team names, but in this case the threat was not a strictly legal one—instead, MLB threatened to withhold the annual $100,000 grant that it had provided to the league for years.[10] Six teams were affected by the demand: two changed their names in order to stay loyal to local vendors, and the other four kept their major league names and agreed to purchase through the licensed vendor.[11]

Recently, college football teams have also begun to make news for actions taken against high school teams that use official names and logos, but the actions taken turn out to be quite diverse. For example, the University of Florida refuses to allow any use of its "Gator" mark, licensed or not, arguing

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5. Bill Haltom, *Little League Ballplayers Need Major League Trademark Lawyers*, TENN. B.J., Mar./Apr. 1995, at 25, 25 (taking a critical view of MLB's requirement that youth teams use officially licensed vendors); Michele Himmelberg, *Little League Outfits Causing Quite a Stir*, DENV. POST, Apr. 23, 1994, at C5, *available at* Factiva, Doc. No. dnvr000020011029dq4n007k3 (reporting that the requirement to purchase through licensed vendors could cost these leagues thousands of dollars if they want to emulate the major league teams, a cost many cannot afford to bear).

6. *See* Bob Kimball, *MLB Wants Things Uniform When It Comes to Trademarks*, USATODAY.COM (June 3, 2008), http://www.usatoday.com/sports/baseball/2008-06-02-mlb-trademarks_N.htm (noting that approximately 4,000 leagues use official MLB uniforms in the United States).

7. *Id.*; Mike Masnick, *Stephen Colbert Takes on MLB's Attempt to Bully Little Leaguers with Trademarks*, TECHDIRT (May 30, 2008, 9:39 AM), http://www.techdirt.com/articles/20080529/2344361265.shtml.

8. *The Colbert Report: Episode 400* (*The Word: Brushback Pitch*) (Comedy Central television broadcast May 28, 2008), *available at* http://www.colbertnation.com/the-colbert-report-videos/168724/may-28-2008/the-word---brushback-pitch.

9. *See* Mark Murphy, *Wooden Bat League Faces Splintering Relationship: MLB Licensing Issue Causes Dilemma for Cape Cod Teams*, BOS. HERALD, May 31, 2009, *available at* http://www.bostonherald.com/sports/other_sports/general/view.bg?articleid=1175856 (noting that one out of five major league players had played in the amateur league at some point).

10. *Id.*

11. *Id.*

that licensing agreements are "extremely difficult to maintain and manage."[12] The University of Wisconsin takes a similar stance regarding use of its "Motion W" insignia.[13]

The University of Notre Dame has taken a mixed approach to high schools infringing its trademarked "Fighting Irish" name and leprechaun logo. When Notre Dame's football team returned from El Paso, Texas, after participating in the Sun Bowl in 2010, the University sent a letter to Cathedral High School—an El Paso Catholic school—demanding that it phase out its use of the famous leprechaun logo and the name "Fighting Irish."[14] The high school had been known as the Fighting Irish for over eighty-five years.[15] The University said that it does not actively seek out infringement, but it does stop it when it sees it.[16] The school had previously taken similar action against a high school in its home state of Indiana, a school that was founded by the same religious order as the one that founded Notre Dame.[17] In the case of Cathedral High School in El Paso, the school will ultimately be allowed to continue using the name "Irish," though it must drop "Fighting" from the name as well as use of the leprechaun logo.[18]

Other schools take a somewhat more lenient approach to high schools using their logos and names. Schools like Kansas State University allow licensing of their logos for a nominal fee, sometimes as low as one dollar for two years.[19] Western Michigan University actively seeks out infringement from time to time, but when it finds instances of infringement, the University offers the infringer the option of a two-year license for $100.[20]

In stark contrast to the approach taken by some colleges, the National Football League (NFL) reportedly allows youth teams and high schools to use official NFL team names and logos freely.[21] In fact, the NFL seems to

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12. Matt Porter, *Florida Gators Tell Palm Beach Gardens, Glades Day to Stop Using Their Logos*, PALM BEACH POST (Oct. 13, 2010), http://www.palmbeachpost.com/sports/florida-gators-tell-palm-beach-gardens-glades-day-969833.html.

13. *See* James Wagner, *Logos Inspire a Turf Battle*, WASH. POST, Oct. 22, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/21/AR2010102106519.html (observing that Wisconsin has forced over forty schools to stop using its logo).

14. Aaron Bracamontes, *Notre Dame Asks Cathedral High School to Drop Irish Logo, Nickname*, EL PASO TIMES (Mar. 5, 2011), http://www.elpasotimes.com/news/ci_17543105.

15. *Id.*

16. *Id.*

17. Rob Schneider, *Cathedral Won't Fight Notre Dame; High School Will Comply with Request to Stop Using the Leprechaun Logo*, INDIANAPOLIS STAR, Mar. 16, 2007, *available at* http://www.indystar.com/article/20070316/LOCAL/703160504/Cathedral-won-t-fight-Notre-Dame.

18. Bracamontes, *supra* note 14.

19. Wagner, *supra* note 13. One interesting restriction on the use of Kansas State's "Powercat" logo is that licensees are free to use almost any colors in their licensed logo, including Kansas State's own purple and silver, but they may not use red and blue, which just happens to be the color combination of Kansas State's rival, the University of Kansas. *Id.*

20. Larissa Chinwah, *Colleges to High Schools: Stop Using Our Logos*, DAILY HERALD (Nov. 30, 2010), http://www.dailyherald.com/article/20101130/news/712019831.

21. *Id.*

encourage the use.[22] Thus, many high schools borrow popular official NFL logos without having to worry about the threat of enforcement by the NFL.[23]

The case of enthusiasts is perhaps best illustrated by an incident between Ford Motor Company and therangerstation.com, a website for enthusiasts of Ford Ranger pickup trucks. In 2008, Ford sent a letter to the owner of the website demanding that he surrender the URL and pay Ford $5,000.[24] What ensued was an online firestorm regarding Ford's actions against the website.[25] While Ford's primary concern actually involved the alleged sale of counterfeit merchandise on the site and not use of the trademark "Ranger,"[26] the case is an important illustration of what can happen when a company pursues its trademark rights too aggressively against enthusiasts.[27]

II. Why Do Trademark Owners Assert Their Rights Against These Users?

One question that may not be completely obvious to ask is why trademark owners challenge these types of uses in the first place. Are these owners simply trademark bullies,[28] seeking to expand their own rights through abusive enforcement against small alleged infringers? This explanation alone seems incomplete here. Many of these allegedly infringing uses do not seem all that threatening to the original owners and may even be reinforcing and strengthening the brand among its followers. A member of a youth football team that calls itself the "Gators" might grow up with an affinity for the University of Florida and go on to become an actual Florida Gator one day. Likewise, a frequent contributor to the message boards on therangerstation.com is likely to continue buying Ford Rangers after sharing common experiences with the online community.

The focus in this part is not on what the law allows a trademark owner to protect, or even what it should allow, because those issues are largely irrelevant in this context. In all of the examples discussed above, the threat of litigation was sufficient to effect compliance by the junior user. These

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22. *See id.* (quoting the NFL's director of corporate communications as saying, "We support football on all levels and do not have an issue with high school and youth teams using NFL team logos"); Wagner, *supra* note 13 (crediting the same spokesman with remarking that the NFL considers it "inspirational for young players to play football under the same name as NFL teams").

23. Wagner, *supra* note 13.

24. Ron Ploof, *The Ranger Station Fire: How Ford Motor Company Used Social Media to Extinguish a PR Fire in Less than 24 Hours* 3 (2008), *available at* http://ronamok.com/ebooks/the_ranger_station_fire_final.pdf.

25. *Id.*

26. *See id.* at 8 (explaining that the demands for relinquishment of the URL and payment of $5,000 were intended as scare tactics meant to stop the sale of counterfeit decals on the site).

27. *See infra* Part III.

28. *See* Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 642 (defining "trademark bullying" as "enforcement of an unreasonable interpretation by a large corporation of its trademark rights against a small business or individual through the use of intimidation tactics").

users are not equipped to withstand the costs of litigation, and once threatened, they usually conform to the mark owner's demands by either discontinuing the use or entering into a licensing agreement. Thus, the focus in this part is instead on the trademark owners' internal motivations—that is, on what motivates owners to take the enforcement actions that they do.

When asked, many trademark owners assert that the main motivation behind zealous enforcement is preservation of their mark and the rights associated with it. However, there may be other motivations at play here as well, including a desire to capitalize on an opportunity for revenue and a genuine concern about the effects of actual confusion and dilution among consumers. The likely answer is a combination of these concerns, but while these incentives are often present in any trademark enforcement scenario, there is reason to think that they are less warranted in this specific context.

A. Ability to Capitalize

The easy (and perhaps cynical) answer to why trademark owners assert their rights in these situations is that they want to make more money. The ability to license the use of a mark is an opportunity for increased revenue—a potentially lucrative one, as evidenced by the vibrant sports merchandising market.[29] If the revenue from licensing to these users exceeds the costs of enforcement,[30] this could be a sufficient motivator.

MLB's requirement that youth teams buy official uniforms from a licensed vendor clearly results in some revenue, though it is unclear how much. For most of these owners, however, it seems unlikely that generation of revenue is a significant motivator for enforcement. As discussed above, many of them—such as the University of Florida and the University of Wisconsin—refuse to allow the use outright, foreclosing any possibility of licensing revenue from those users.[31] Others—such as Kansas State University and Western Michigan University—do charge nominal licensing fees, though they are so small that licensing income alone cannot be the reason for them to take the actions that they do.[32]

Additionally, one might expect that as licensing fees approach a level where they become profitable to the trademark owner, the users would become more likely to simply discontinue the use altogether. Youth sports

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29. *See* David Bennett, *Tilting Playing Field: Expanded Protection for Sports Trademarks*, SPORTS LITIG. ALERT (Nov. 20, 2009), http://www.hackneypublications.com/sla/archive/000951.php (reporting revenues from the licensing of logos and names of college teams of over $3 billion annually); Darren Rovell, *Publication: MLB Will Beat NFL in Licensing Revenue in '10*, CNBC.COM (June 14, 2010), http://www.cnbc.com/id/37692194/Publication_MLB_Will_Beat_NFL_In_Licensing_Revenue_In_10 (detailing the results of a report that revealed that the total retail sales of licensed merchandise based on sports teams, logos, and personalities totaled $17.5 billion worldwide in 2009).

30. *See* discussion *infra* Part III.

31. *See supra* notes 12–13.

32. *See supra* notes 19–20.

teams and car enthusiasts might decide it is not worth the extra cost of using the officially licensed name in order to identify with the brand. Thus, while the opportunity for revenue can surely be one factor in the decision of whether to enforce trademark rights, in at least some of these cases it cannot be the only reason.

B. Fear of Consumer Confusion and Dilution

Another possibility is that the trademark owners in these cases actually fear what the law is purportedly meant to protect against: consumer confusion and dilution.[33] Regardless of whether a likelihood of confusion or dilution exists in a strictly legal sense, trademark owners may have a genuine concern that their brand might be harmed in some way and might want to prevent that potential harm by asserting their rights through a cease-and-desist letter or actual litigation.

Confusion in the trademark context typically refers to confusion as to affiliation, connection, association, origin, sponsorship, or approval between the original mark owner and a subsequent user.[34] When a high school sports team uses a college team's logo or team name, the college may be concerned that third parties who encounter that youth team will think that the college is somehow affiliated with the high school, sponsored the high school, or at the very least, approved the use of the mark. If this is a serious concern, then the mark owner is justified in using the mechanisms of the law to stop the subsequent use.

However, actual confusion among the public is unlikely. The chance that the public will think that a team of teenagers playing high school football is associated with a college hundreds of miles away is arguably small. Most of the spectators are usually affiliated with the school and surrounding community and would know that the school has merely adopted a popular team name or logo. Further, the number of consumers exposed to that particular use is likely to be relatively small, therefore posing a minimal threat

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33. *See* Lanham Act § 32(1)(a), 15 U.S.C. § 1114(1)(a) (2006) (imposing liability upon anyone who without permission "use[s] in commerce any reproduction . . . of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion"); *id.* § 43(a), 15 U.S.C. § 1125(a) (making "[a]ny person who . . . uses in commerce any word, term, name, symbol, or device" liable to "any person who believes that he or she is or is likely to be damaged by such act" if that use "is likely to cause confusion . . . as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person"); *id.* § 43(c), 15 U.S.C. § 1125(c) ("[T]he owner of a famous mark . . . shall be entitled to an injunction against another person who . . . commences use of a mark . . . that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark . . . .").

34. *See id.* § 43(a)(1)(A), 15 U.S.C. § 1125(a)(1)(A) (imposing liability upon users who "cause confusion . . . as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person").

to the original mark owner.[35] Finally, the fact that some mark owners enter into licensing agreements belies any claim by them of concern about confusion. Owners that enter into these agreements are actually creating associations and affiliations that were not there previously, and the public is not likely to spot the difference between licensed and unlicensed uses. Thus, while trademark confusion may be a valid concern in some instances, the existence of licensing agreements suggests it is not the reason for trademark litigation in every case.

Fear of dilution is another potential threat that a trademark owner may wish to address by enforcing its rights. Dilution by blurring refers to an "association arising from the similarity between a mark or trade name and a famous mark *that impairs the distinctiveness of the famous mark*,"[36] and dilution by tarnishment refers to an association that "harms the reputation of the famous mark."[37] Considering that in many of these cases the contested marks are identical to the original marks, there may be a risk of dilution of the original (assuming the original would be considered a "famous mark").[38] Mark owners may fear that too many uses of the same mark might make the original less distinctive or that it may actually harm the reputation of the mark.[39]

In these particular cases, however, it seems that the result would not be dilution but, rather, the opposite. For example, in the case of youth teams using major league names, the use is obviously a reference to the original and not an attempt to create a separate brand identity. At the very least, the contested use likely does not diminish the original brand but rather highlights the original in the minds of those who come into contact with it. In these cases, it is plausible to think that the use might actually reinforce the original brand, leading those who support the youth team to support the original or to buy officially licensed merchandise of the original.[40] Similarly, when a Ford

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35. Although admittedly, with websites like YouTube and the proliferation of nationally televised high school games, there may be a valid counterargument to be made here regarding the exposure of the junior user's use of the mark to the general public.

36. Lanham Act § 43(c)(2)(B), 15 U.S.C. § 1125(c)(2)(B) (emphasis added).

37. *Id.* § 43(c)(2)(C), 15 U.S.C. § 1125 (c)(2)(C).

38. *See id.* § 43(c)(2)(B)(i), 15 U.S.C. § 1125(c)(2)(B)(i) (listing "degree of similarity between the mark or trade name and the famous mark" as one of the factors courts may consider in determining whether a mark is likely to cause dilution by blurring).

39. The tarnishment concern may have been what motivated MLB to prevent the Phlyin' Phanatics from launching their contraption; perhaps MLB felt that an amateur rendition of their valuable mark would not portray it in the best light. *See supra* notes 2–4 and accompanying text.

40. If the youth team tries to sell logoed merchandise that could pass as that of the original mark owner, that presents a different, and arguably valid, concern. *See* Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 412–13 (1916) ("The essence of the wrong [in trademark cases] consists in the sale of the goods of one manufacturer or vendor for those of another."), *superseded by statute*, Lanham Act, 15 U.S.C. §§ 1051–1141n, *as recognized in* Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189 (1985); Beacon Mut. Ins. Co. v. OneBeacon Ins. Grp., 376 F.3d 8, 10, 15 (1st Cir. 2004) (identifying loss of sales and diversion of sales as among the types of commercial injury relevant to a determination of infringement under the Lanham Act); Bos. Prof'l Hockey Ass'n v.

enthusiast website uses the original brand in its name, it is an obvious direct reference to the original mark holder and not the typical dilutive use that the Lanham Act (along with most businesses) seems to be concerned with.

While it is possible that the law might find that likelihood of confusion or dilution exists in these contexts, that does not necessarily mean that the trademark owners would sincerely have the same fear. While the risk of confusion and dilution is likely on the minds of trademark owners in these contexts, there is reason to think that this alone is not enough to motivate their actions. The fact that some of the owners enter into licensing arrangements that create associations and allow potentially dilutive uses suggests that there is still another motivator at play here.

C. Fear of Losing Protection

Conventional wisdom says that trademark owners are under an affirmative duty to "police" their marks and that failure to do so can have disastrous consequences, from a weakening of rights all the way up to loss of the mark.[41] At least publicly, many trademark owners in these cases adopt this view as well. Regarding its actions against the Cape Cod League, a spokesman for MLB's licensing division said, "There's a variety of reasons we have to do this . . . . It affects our relationships. If you don't enforce your trademark rights, then you run the risk of losing them."[42] A spokesman for Notre Dame spoke similarly regarding its actions against Cathedral High

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Dall. Cap & Emblem Mfg., Inc., 510 F.2d 1004, 1012–13 (5th Cir. 1975) (holding that the reprinting of a team's mark on embroidered emblems for sale constituted an infringing use of that mark, even while conceding that buyers might arguably not even be deceived or confused by the emblems); *see also* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:5 (4th ed. 2011) ("'Express passing off' is defined as the classic form of trademark infringement."). *But see* Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2153–55 (2004) (challenging the rationale behind the enforcement of merchandising rights through trademark law, contending that in merchandising cases "there is little in the way of trademark-related harm . . . , and the substantive policies favoring trademark protection are not strongly implicated"); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or* Fait Accompli*?*, 54 EMORY L.J. 461, 481–84 (2005) (arguing that where consumers are not "duped" into thinking that a product bearing a trademark was made or sponsored by the mark owner, a broad merchandising right might actually interfere with the goals of trademark law). Resolution of the debate over whether a merchandising right is consistent with the policies underlying trademark law is beyond the scope of this Note.

41. *See* Nitro Leisure Prods., L.L.C. v. Acushnet Co., 341 F.3d 1356, 1367 (Fed. Cir. 2003) (Newman, J., dissenting) ("Trademark law requires that the trademark owner police the quality of the goods to which the mark is applied, on pain of losing the mark entirely."); 6 MCCARTHY, *supra* note 40, § 31:38 (noting that the law imposes a duty on a trademark owner to police its rights against infringers); Michael S. Mireles, Jr., *Towards Recognizing and Reconciling the Multiplicity of Values and Interests in Trademark Law*, 44 IND. L. REV. 427, 473 (2011) ("Trademark owners who fail to police their marks take great risks with the value of their marks under trademark law."); Arnold B. Calmann & Jakob B. Halpern, *Ten Steps to Prevent Trademark Disaster*, N.J. LAW., June 2009, at 53, 56 (warning that if an owner does not police its rights effectively, equitable doctrines such as acquiescence or laches may attach, or the mark may lose significance as a source identifier and lose protection altogether).

42. Murphy, *supra* note 9.

School, saying, "To allow others to use our trademarks as their own could weaken the University's rights to its own marks to the point where its legitimate property interests could be at risk."[43] Even the media itself adopts this dire prediction for those owners who fail to police their marks sufficiently.[44]

However, many owners also try to at least convey the message that they take no pleasure in fulfilling this duty the law imposes on them. After the Tinley Park Bulldogs were forced to either drop the use of official MLB team names or buy from approved vendors, an MLB spokesman was quoted as saying, "We want nothing more than youth league players using the names of major league teams."[45] During another incident where MLB sent warning letters to a fan site that featured official Houston Astros uniforms, an MLB spokesman said, "'We like the sites, encourage the sites[,] . . . [b]ut our (trademark) people are very wary of misuse. They are very careful to protect our logos and trademarks.'"[46] In this way, it seems entities attempt to distance themselves from their actions, as if to say that the real culprits behind any harm caused by their enforcement actions against fans are the law itself and the "trademark people" and lawyers that force owners to comply with the unhappy obligations that the law imposes. While, in general, those who sleep on their trademark rights can run the risk of losing them, there is reason to think that the risk may be overstated in this subset of infringement cases. There are two aspects to this potential loss of rights that must be examined: (1) rights as to the infringing party or parties and (2) rights as to third parties in general.

1. Rights as to the Infringing Party.—When trademark owners speak of the obligation to assert their rights for fear of losing them, they may be speaking of the closely related equitable doctrines of laches and acquiescence.[47] The doctrines of laches and acquiescence are by no means exclusive to trademark law, but they do apply in a particular way in the trademark context. The application of laches and acquiescence has been

43. Bracamontes, *supra* note 14.

44. *See, e.g.*, Wagner, *supra* note 13 ("Under trademark law, logo holders such as universities have an obligation to police their marks. If not, they essentially lose the right to stop unauthorized uses."); Joshua Kaufman, *Fan Art: Friend Or Foe?*, MONDAQ (Oct. 16, 2011), http://www.mondaq.com/unitedstates/x/149444/Trademark/Fan+Art+Friend+or+Foe ("Trademark owners in the United States have a duty to 'police' their trademarks.").

45. Bob Kimball, *Using Big-League Team Names Could Cost Big; Licensing Fees Cause Some to Run Legally Afoul*, USA TODAY, June 3, 2008, at C3, *available at* Factiva, Doc. No. USAT000020080603e463005x.

46. Rod Beaton, *Fans' Internet Sites, MLB Clash Over Copyright*, USA TODAY, Aug. 21, 2002, at 6C.

47. *See* Mireles, *supra* note 41, at 469 ("Failure to police third party usage and other conduct may also result in the loss of trademark rights through either laches or some other equitable defense such as estoppel or perhaps even acquiescence.").

articulated as a sort of "implied license" to use a mark if the mark owner does not enforce its rights vigorously against a party.[48]

While the approach of courts is not always precise or consistent regarding the impact of a failure to sue infringers, in general, laches is an equitable defense that may be recognized when a long delay in taking action causes undue prejudice to a defendant.[49] Importantly, however, these are "personal" defenses that only involve the loss of rights as against a particular defendant as opposed to a loss of rights as against the world.[50]

The Second Circuit indicates that the defense of laches requires a defendant to prove that it has been prejudiced by the plaintiff's unreasonable delay in bringing suit and characterizes laches as essentially "passive consent."[51] The Fourth Circuit enumerates three questions to ask in considering a laches claim: "(1) whether the owner of the mark knew of the infringing use; (2) whether the owner's delay in challenging the infringement of the mark was inexcusable or unreasonable; and (3) whether the infringing user was unduly prejudiced by the owner's delay."[52] The court points out that the Lanham Act does not contain a limitations period, and thus, the doctrine of laches acts to remedy the inequity of a trademark owner allowing a competitor to build up its business only to later "lower the litigation boom."[53] Thus, the doctrine of laches requires that a claim for infringement existed at the time from which any delay is measured.[54]

Acquiescence is very similar to laches but requires something more.[55] In fact, the doctrines are so similar that the Sixth Circuit uses the terms interchangeably, noting that "acquiescence encompasses the elements of laches."[56] What differentiates acquiescence is that it is premised on the notion of "active consent"—that is, a finding of conduct on the part of the plaintiff amounting to "an assurance to the defendant, express or implied, that the plaintiff would not assert his trademark rights against the defendant."[57] As articulated by the Second Circuit, the elements of acquiescence are (1) that the trademark owner actively represented that it would not take action against the subsequent user; (2) that the delay between

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48. *Id.* at 469–70.

49. 4 MCCARTHY, *supra* note 40, § 17:17.

50. *Id.*

51. Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C., 314 F.3d 62, 67 (2d Cir. 2002) (internal quotation marks omitted).

52. What-A-Burger of Va., Inc. v. Whataburger, Inc. of Corpus Christi, Tex., 357 F.3d 441, 448–49 (4th Cir. 2004) (quoting Brittingham v. Jenkins, 914 F.2d 447, 456 (4th Cir. 1990)).

53. *Id.* at 449.

54. Kellogg Co. v. Exxon Corp., 209 F.3d 562, 569 (6th Cir. 2000).

55. *See id.* ("Although both laches and acquiescence require proof that the party seeking to enforce its trademark rights has unreasonably delayed pursuing litigation and, as a result, materially prejudiced the alleged infringer, acquiescence requires more.").

56. *Id.* at 569 n.2.

57. Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C., 314 F.3d 62, 67–68 (2d Cir. 2002) (internal quotation marks omitted).

the active representation and any subsequent assertion of a right against the user was not excusable; and (3) that the delay caused undue prejudice to the subsequent user.[58]

The doctrines of laches and acquiescence are not as threatening as they may appear at first glance, however. For one, while the doctrines can limit monetary relief for damages, they will generally not bar injunctive relief if the likelihood of confusion is great enough to outweigh the effect of the delay.[59] In the historic trademark case of *United Drug Co. v. Theodore Rectanus Co.*,[60] the Supreme Court articulated this principle.[61] That case established that a trademark right is not a property right, nor is it a right "in gross or at large"; rather, it is "a right appurtenant to a business or trade" that derives from use, not mere adoption.[62] While the issue in that case was the scope of geographic rights in a mark,[63] another corollary inference to take from the nature of a trademark right as articulated by the Court is that there is an interest in the trademark right that extends beyond the owner and the infringer: the public's interest in the mark as a source identifier. A trademark transcends mere property rights, and thus, even in the face of equitable doctrines like laches and acquiescence, the consumer's interest in the trademark may still warrant an injunction to prevent confusion even if the trademark owner himself is foreclosed from recovering a financial remedy. In most of the cases at issue in this Note, all the trademark owners seek is for the infringing use to cease or be licensed. If all that the owners seek to protect is the right to an injunction against the infringing use should they desire it in the future, refusing to enforce that right promptly would not necessarily destroy that right.

Of course, this is assuming the doctrines would even apply when the actual elements of the doctrines are examined. While there may be knowledge of, or even assent to, the infringing use on the part of the owner, it is not clear that the elements of inexcusable delay or undue prejudice would be met in most of these cases. What distinguishes these cases from the usual case of laches and acquiescence is perhaps best articulated in *Dwinell-Wright Co. v. White House Milk Co.*[64]—an opinion authored by Judge Learned Hand. He explained the rationale behind estopping an owner from asserting its rights after an unreasonable delay, saying, "[H]ow [such a plaintiff] can expect us to stifle a competition which with complete complaisance, and even with active encouragement, it has allowed for years

58. *Id.* at 67. Note that the second element listed here, delay, which is crucial to a finding of laches as well, suggests that even if a party has acquiesced, it will be able to revoke that consent if it does so before an unreasonable amount of time has passed.

59. *Id.* at 68; *Kellogg*, 209 F.3d at 568.

60. 248 U.S. 90 (1918).

61. *Id.* at 102.

62. *Id.* at 97.

63. *Id.* at 94–95, 97–98.

64. 132 F.2d 822 (2d Cir. 1943).

to grow like the mustard tree; why we should destroy a huge business built up with its connivance and consent: this we find it impossible to understand."[65] This characterization makes sense in the context of a business, competing or not, that is expending efforts and capital to expand and grow. Millions of dollars may have been spent by the time a delaying owner decides to assert rights against the alleged infringer.[66] That is not the case in the examples discussed in Part I. Fans, emulators, and enthusiasts are typically not businesses that seek to grow and expand as a normal business would, and thus it is unlikely that a delay in bringing suit will cause them to incur substantial expenses building up a brand only to lose it all in an eventual lawsuit. Given the relatively minimal effect that a delay would have on these users as compared with the usual commercial infringer, it is unlikely that the element of undue prejudice would even be satisfied in many of those cases.

There are also other doctrines that would act to protect a trademark owner in these cases against losing protection through laches or acquiescence. Consider the situation where the owners claim that they actually want the users to utilize the mark but are forced to enforce the mark or lose protection. If it is truly the case that they support the use, then what might they be afraid of? Why are they afraid of losing protection against a use that they purport not to oppose on its face? Assuming their desire to allow the use is sincere, then what they may fear is a future use or an expansion of the existing use that begins to affect the owner's interests in a way it did not before. For example, a high school might realize that it can sell logoed merchandise to fans of the original owner at a lower cost because it does not pay licensing fees. Under the pretext that it is selling its own merchandise, this activity harms the original owner's interest. Likewise, a youth or amateur sports league could expand and gain national prominence, becoming a legitimate enterprise and posing a real risk of confusion or dilution of the original mark.

This might be a valid concern except for the fact that trademark law makes an exception for these types of cases. Inherent in the doctrine of acquiescence is the principle that "[w]hile a plaintiff may acquiesce in some uses of the mark and in any resulting likelihood of consumer confusion, that acquiescence does not extend to a use that has not yet materialized and is not foreseeable."[67] Thus, use in a different way or in a different geographic area

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65. *Id.* at 825–26.

66. *See, e.g.*, Kellogg Co. v. Exxon Corp., 209 F.3d 562, 565 (6th Cir. 2000) (noting the expense Exxon had incurred over the years promoting its "Whimsical Tiger" mark before Kellogg brought an action for infringement of its "Tony the Tiger" mark).

67. Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C., 314 F.3d 62, 69 (2d Cir. 2002).

may be outside of the original scope of consent, express or implied, that may have otherwise foreclosed enforcement against the original infringing use.[68]

When Kellogg filed suit against Exxon for the use of Exxon's "Whimsical Tiger" symbol as infringing on its own "Tony the Tiger" mark, thirty-one years had passed from the time Kellogg was placed on notice of the use by virtue of Exxon's federal registration, which Kellogg did not oppose.[69] The district court in the case granted summary judgment to Exxon, finding that this delay constituted acquiescence on the part of Kellogg and that Kellogg was therefore foreclosed from exercising its trademark rights against Exxon.[70] However, Exxon's initial registration was for use on petroleum products, while Kellogg's mark was for breakfast cereals.[71] As the Sixth Circuit noted on appeal, "the two marks peaceably co-existed, each catering to its own market."[72] At issue in the case now, however, was Exxon's use of the mark on its line of convenience stores in connection with the sale of food and beverage products.[73] The Sixth Circuit reversed the district court's summary judgment in favor of Exxon, holding as a matter of law that Kellogg's acquiescence to the use of the mark for petroleum products did not extend to acquiescence to use of the cartoon tiger to sell non-petroleum products.[74] Similarly, acquiescence to the use of a college team's logo or team name for a high school or youth team would not automatically extend to use on merchandise or other commercial activities.

The related doctrine of progressive encroachment is also effective in protecting a delaying or acquiescing trademark owner's rights. Essentially, the doctrine allows an owner sufficient leeway to wait to take action until the likelihood of confusion becomes significant enough to warrant it.[75] As the Second Circuit says, "[t]he primary rationale is that a plaintiff should not be obligated to sue until its right to protection has ripened."[76] According to the court, the important question is whether the defendant "redirected its business so that it more squarely competed with plaintiff and thereby increased the likelihood of public confusion of the marks."[77] Essentially, a plaintiff is allowed to show that even if it could have brought suit earlier but

68. *Id.*

69. *Kellogg*, 209 F.3d at 573.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 574. A question of fact still existed as to whether Kellogg had acquiesced to such use at a later time, but the original acquiescence thirty years earlier to the use of the cartoon tiger on petroleum products was not enough. *Id.*

75. Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C., 314 F.3d 62, 70 (2d Cir. 2002).

76. *Id.*

77. *Id.*

did not, certain factors now exist that have justified it doing so.[78] This means that if use by a fan, emulator, or enthusiast becomes a threat to the original owner where it was not one before, that owner could assert progressive encroachment as "an offensive countermeasure to the affirmative defenses of laches and acquiescence" to excuse the delay.[79]

Based on the foregoing analysis, it seems that trademark owners have little to fear regarding their rights against infringers. The doctrine of progressive encroachment and the narrow scope of acquiescence afford considerable protection for a trademark owner, allowing it to tolerate uses to which it has no objection and from which it may actually be benefitting. Further, even a successful laches or acquiescence defense would still not bar a remedy of injunction completely, which is all these owners seek in most cases.

2. *Rights as to Third Parties in General.*—A more serious consequence than loss of rights against a particular infringer is loss of rights against third parties. Some doctrines, such as genericide and abandonment, can result in a complete loss of rights in a mark, though for reasons to be discussed, that result is highly unlikely in these cases. However, one general result that may affect one's rights in a mark is a loss of mark *strength*, and this might be a somewhat more realistic concern.

The Lanham Act provides for cancellation of a registered mark at any time if it "becomes the generic name for the goods or services . . . for which it is registered, . . . or has been abandoned."[80] Further, it provides that a mark is deemed to be "abandoned" if either (1) its use has been discontinued with intent not to resume use, or (2) the owner causes, including through acts of omission, the mark to become the generic name for the goods or services.[81] The first definition for abandonment is not at issue here because in none of these cases has the original use been discontinued with an intent not to use the mark. The second definition, which involves the mark becoming the generic name for the goods and services, is commonly referred to as "genericide."[82]

A word or mark is generic if it "refers . . . to the genus of which the particular product is a species"[83]—that is, a generic mark is one that refers to

78. *Kellogg*, 209 F.3d at 571.

79. *Id.*

80. Lanham Act § 14, 15 U.S.C. § 1064(3) (2006).

81. *Id.* § 45, 15 U.S.C. § 1127.

82. Deven R. Desai & Sandra L. Rierson, *Confronting the Genericism Conundrum*, 28 CARDOZO L. REV. 1789, 1790 (2007) ("Genericide . . . refers to the process by which a mark that was once highly valuable and unquestionably protectable loses all trademark status and value."); *id.* at 1791 ("[U]nder the doctrine of genericide, mark holders are required to 'police' their marks, and failure to do so may lead to a court finding that the source-identifying function of the mark no longer exists.").

83. Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976).

a class of goods rather than a specific source of goods. For example, use of the mark "Apple" would be generic for a brand of apples but is not so for a brand of computers. At common law and under the Lanham Act, a generic mark has never been protectable.[84] In determining whether a previously protectable mark has become generic (that is, whether genericide has occurred), courts usually look to both the use of the mark by consumers and the policing efforts of mark owners against third parties.[85] Famous examples of once-protectable marks that were lost through genericide include "Murphy Bed,"[86] "Escalator,"[87] "Aspirin,"[88] and "Thermos."[89]

While failure to police a mark can result in genericide, that is highly unlikely in the cases at issue. The use of the trademarks here is not the same as the public adopting a brand name to refer to a class, as it might be with use of the word "Kleenex" to refer to facial tissue or "Xerox" to refer to photocopies. Regardless of how many youth teams use the name "Dodgers," such use is not likely to make the word synonymous with "baseball" or "baseball team." There is little risk of the mark losing significance altogether with this type of use, and in all of these cases the original owner has not discontinued use. Thus, there is no risk of the owners in these cases losing their trademark rights completely as against the world.

However, widespread use of a mark may affect the strength of the mark. In his treatise on trademarks, J. Thomas McCarthy opines that the greatest significance of a failure to sue goes to the strength of the mark rather than abandonment or genericity.[90] In this case, the mark still has significance as a source identifier but is weakened through similar use by competitors.[91] However, he calls the relationship here a "tenuous" one.[92] He also notes that failure to sue could undercut an argument of irreparable injury, which is necessary to obtain a preliminary injunction.[93]

Strength of the mark is one of the factors commonly considered in deciding whether a likelihood of confusion exists.[94] Accordingly, it is

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84. *Id.*

85. Mireles, *supra* note 41, at 459.

86. Murphy Door Bed Co. v. Interior Sleep Sys., Inc., 874 F.2d 95, 104 (2d Cir. 1989).

87. Haughton Elevator Co. v. Seeberger, 85 U.S.P.Q. 80, 81 (Comm'r Pat. 1950).

88. Bayer Co. v. United Drug Co., 272 F. 505, 512 (S.D.N.Y. 1921).

89. King–Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577, 581 (2d Cir. 1963).

90. *See* 4 MCCARTHY, *supra* note 40, § 17:17.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See* Sara Lee Corp. v. Kayser–Roth Corp., 81 F.3d 455, 467 (4th Cir. 1996) (calling strength or distinctiveness of a mark "the first and paramount factor" in the likelihood-of-confusion analysis (internal quotation marks omitted)); AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348–50 (9th Cir. 1979) (listing mark strength as one of eight factors for consideration in determining whether a likelihood of confusion exists), *abrogated in part on other grounds by* Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003); Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961) (same).

possible that in an action against a third party, a court may look to the use of the mark by fans, emulators, or enthusiasts and conclude that the mark is relatively weak and therefore entitled to a more narrow scope of protection. Similarly, one of the elements for determining likelihood of dilution by blurring is "[t]he extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark."[95] Thus, it is possible that other uses of the mark by these groups could harm a dilution claim by the owner against a third party.

However, such a result would require a court to follow the factors for confusion and dilution blindly, without regard for the difference between use of the mark by these groups and use by a competitor or another business. This kind of blind adherence to the factors is unlikely, as it would warrant a similar inference of weakness for marks that are the subject of licensing agreements or product-line expansions—an approach that courts have not generally taken.[96]

Does this analysis regarding loss of protection suggest that these trademark owners are simply naive and misinformed regarding their rights under trademark law? Not likely. These entities presumably utilize attorneys and professionals who are knowledgeable of their rights under the law. This could mean one of two things. It could mean that even though owners may be aware that the risk that they will lose substantial rights for failure to enforce them is small, they still feel the safest way to ensure full protection of the mark is to stop any other use altogether. After all, Exxon did win summary judgment on the issue of acquiescence at the trial-court level in *Kellogg*, even where Exxon's use of the mark had expanded to other goods beyond the initial acquiescence by Kellogg.[97] Kellogg was ultimately successful in its appeal on that issue, but it does illustrate the uncertainty and risk inherent in acquiescing to a particular use. The best way for a trademark owner to avoid any uncertainty regarding interpretation of its possible acquiescence is for the owner to never acquiesce in the use to begin with.

The second possibility is that there is more to a trademark owner's motivation than the fear of losing protection or rights. For example, any third-party use of a mark that an owner allows is a use that a potential challenger to that mark might present before a court and force that owner to confront, raising the potential costs of litigation for that owner. Thus, it may benefit the owner to control the mark for control's sake. Again, the surest way to ensure that potential uses of the mark do not harm the owner's

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95. Lanham Act § 43, 15 U.S.C. § 1125(c)(2)(B)(iii) (2006).

96. *See* Sara Stadler Nelson, *The Wages of Ubiquity in Trademark Law*, 88 IOWA L. REV. 731, 734–36 (2003) (noting that courts generally consider the use of a mark by an owner on a diversity of products to constitute evidence that the mark is famous and entitled to protection under dilution law but ultimately arguing that such usage actually destroys the "uniqueness" of a mark and should therefore preclude a remedy for dilution of that mark).

97. Kellogg Co. v. Exxon Corp., 209 F.3d 562, 573 (6th Cir. 2000).

interests (whether through blurring, tarnishment, consumer confusion, or some other effect) is to foreclose any other unauthorized use at all. The law currently allows the mark owner to do this through mechanisms such as cease-and-desist letters or even litigation, and this Note does not seek to change that. However, such a decision by a trademark owner should take into account the costs associated with it. Similarly, the law should account for these costs to provide appropriate incentives for the trademark owner to exercise its rights and to prevent inefficient enforcement of those rights.[98]

III. Costs of Enforcement Against Fans, Emulators, and Enthusiasts

There are several costs associated with enforcing a trademark. The most obvious are the costs of enforcement to the trademark owner: litigation, monitoring, sending cease-and-desist letters, and simply retaining personnel to deal with trademark issues. There are also obvious costs to the infringer, who must discontinue the use, find its own brand, and rebrand anything that has the offending logo. When a right is exercised efficiently, these costs are ones the system should have no problem forcing infringers to bear. Finally, there are costs to the public of litigation and of losing a source identifier that they may have been using to identify a particular product or service. These too are justified costs if overall consumer confusion is reduced by enforcement. However, in many of these cases the costs may not be justified by any appreciable benefit to the owner or otherwise. As we have seen, zealous enforcement may not earn a trademark owner substantially more protection for its mark in these cases than if the owner simply allowed the use, and any financial benefits do not appear to be significant.

A. Costs to the Trademark Owner

Aside from the normal costs of enforcement, actions taken against fans, emulators, and enthusiasts entail special costs to the trademark owner. One such cost is the potential benefit and goodwill that may have been derived from allowing the use. As the NFL observes, allowing use of their team trademarks could be a "great opportunity to inspire kids to one day play in the NFL and wear the real helmet."[99] Allowing the use might even encourage kids and fans at those schools to purchase officially licensed merchandise with the logo, eventually leading them to support the original team.[100] This

98. For example, courts should recognize the character of an allowed use of a mark by a fan, emulator, or enthusiast and consequently take care that such use is not leveraged unfairly by a challenger to impose unwarranted litigation costs on the mark owner.

99. *See* Porter, *supra* note 12 (quoting NFL spokesman Brian McCarthy).

100. *See* Richard Chacon, *Seventh Annual Harvard Latino Law, Business, and Public Policy Conference: Investing in Our Future*, 8 HARV. LATINO L. REV. 93, 96 (2005) (calling Cathedral High School in El Paso a "feeder school" for Notre Dame and noting the connection students at Cathedral felt with the university); Marissa Monroy, *Cathedral High School's Ties to Notre Dame*, KVIA EL PASO (Dec. 17, 2010), http://www.kvia.com/news/26178083/detail.html (remarking on the number of Cathedral graduates that end up at Notre Dame and on the traditions that the high

opportunity may be something the mark owners are willing to forgo, but if they only do so because they fear they have to in order to preserve their marks, then this is a wasted opportunity.

There is also a risk of backlash against the owner among fans who feel that the actions are unwarranted. In response to the demand that they remove the Phillie Phanatic head from their Flugtag, the Phlyin' Phanatics Flugtag team was understandably dejected, having poured so much time and money into something that was meant to represent their support as Phillies fans. The pilot of the craft, Adam Denard, was quoted as saying, "I've been going to Phillies games since I was a toddler, and the Phillie Phanatic was always a favorite."[101] It is not clear that the incident would be enough to turn the group off of the Phillies forever—after all, fandom likely does not die that easily. However, when fans feel a connection to something and devote this amount of effort to it, it is probably little consolation to them that these enforcement actions are in accordance with trademark law.

The incident with the *Ranger Station* illustrates just how quickly this kind of backlash can take off, especially in the context of widespread Internet use. When the website received the letter from Ford demanding that it turn over the URL and pay $5,000, the news first broke on the forums of the website itself under a thread entitled "TRS is being attacked by the Ford Motor Company."[102] What ensued was something of a firestorm, spreading to other fan websites with members and Ford fans expressing outrage at Ford's actions.[103] The furor was abated by quick action on the part of Scott Monty, head of social media at Ford.[104] Monty checked with Ford's legal department and confirmed that the actual concern was sale of counterfeit decals on the *Ranger Station*—the website demand was used as a scare

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school shares with the university in a report made before Notre Dame's visit to El Paso and subsequent demand); Porter, *supra* note 12 (suggesting that students at Palm Beach Gardens High School, which used the Florida Gator logo without authorization, routinely buy officially licensed merchandise just to wear items with the famous Gator head to school).

101. Geringer, *supra* note 4.

102. Ploof, *supra* note 24, at 3.

103. *See, e.g.*, Wade Meredith, *PR Disaster: Ford Suing the Only People Who Actually Still Care About Ford Cars*, 360ANGLES (Dec. 10, 2008), http://voltagecreative.com/articles/pr-disaster-ford-suing-people-who-about-ford-cars (giving a synopsis of the public relations battle along with updates as it progressed and eventually suggesting changing the title of the post to "PR Disaster Averted . . . by Brand-Management Jedi Scott Monty" after his response to the situation (alteration in original)); Peloton25, Comment to *TheRangerStation.com in Legal Trouble with Ford . . .*, FOCALJET (Dec. 10, 2008, 1:32 AM), http://forums.focaljet.com/team-pit-stop/596094-therangerstation-com-legal-trouble-ford.html ("I know the legal arguments for both sides on issues like this, but it just seems like common sense should prevail for companies to keep them from going after their own enthusiast base."); Thameth, Comment to *TheRangerStation.com in Legal Trouble with Ford . . .*, FOCALJET (Dec. 10, 2008, 2:34 AM), http://forums.focaljet.com/team-pit-stop/596094-therangerstation-com-legal-trouble-ford.html ("So sad that Ford is letting its legal team do this. At this time they should be embracing their fan base and building it up to make it larger. . . . [R]ight now is the WORST possible time to be shooting down your fans.").

104. *See* Ploof, *supra* note 24, at 4–10 (detailing Monty's response via social media to the negative online publicity).

tactic.[105] Monty acted quickly to resolve the situation and spread word of its resolution through social media.[106] After all was said and done, Ford had contained the crisis less than twenty-four hours after it had begun.[107]

Word spreads quickly online, and one can imagine the damage that may have been done among the brand's most devoted enthusiasts had the situation not been resolved so skillfully. With the growth of the Internet, this poses a real danger to trademark owners who pursue their rights too vigorously. Rumblings like those that occurred with the *Ranger Station* surface on some of the news stories surrounding the examples highlighted in this Note.[108] In fact, some commentators argue that the public should strive to become informed about possible trademark "bullying" so lawmakers might shape trademark law in a way that makes it work for the people.[109] The power of the Internet to provide that information should inform trademark owners' decisions and make them think twice before acting.[110]

B. Costs to the Public

Enforcement in these actions also brings with it costs to the general public. One such cost is the loss to the community of a team that they have grown to support and with which they identify. For example, loss of a logo, name, or mascot not only hurts a community because of the history built up around support for the local high school team, but it also takes time and money for a school to rebrand the team and to rebuild the school spirit and pride behind the team. The public is an interested party in the trademark system, and loss of a mark to the public is not without cost.

There is also an even more significant interest involved that may implicate important speech concerns, and this might best be described as a sort of identification interest. Take the example of the Phlyin' Phanatics

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105. *Id.* at 8.

106. *Id.* at 8–10.

107. *Id.* at 10.

108. *See, e.g.*, Cathedral Alum, Comment to *Notre Dame Forcing Cathedral High to Drop 'Fighting,' Change Mascot*, KVIA.COM (Mar. 3, 2011), http://www.kvia.com/news/27073606/detail.html ("Notre Dame is now the home of the Fighting Bullies."); Kimball, *supra* note 6 (quoting a website commentator in response to MLB's actions against the Tinley Park Bulldogs as asking, "What the heck are they doing trying to collect on middle class families? Weak, MLB, totally weak, dude"); Nolongeranotredamefan, Comment to *Notre Dame Forcing Cathedral High to Drop 'Fighting,' Change Mascot*, KVIA.COM (Mar. 3, 2011), http://www.kvia.com/news/27073606/detail.html ("Notre Dame is only doing [this] because they were here in El Paso . . . . Don't take something from these kids that won't harm you.").

109. *See* DAVID BOLLIER, BRAND NAME BULLIES: THE QUEST TO OWN AND CONTROL CULTURE 7 (2005) ("As copyright and trademark holders extend their powers in unprecedented ways, it is important for us to learn these little-known stories. . . . A largely unresponsive body of law can be forced to the bar of public judgment and common sense and, as warranted, be held up to ridicule.").

110. For an analysis of how the Internet can be used effectively to combat trademark bullies through "shaming," along with some legal-reform proposals to facilitate the use of such tactics, see generally Grinvald, *supra* note 28.

Flugtag Team. Their interest in building a contraption based on the Phillie Phanatic is not based solely on the fact that the character is an interesting one. It is based on the fact that they feel a sort of identification with the mascot and the team—as fans, they feel entitled to use the mascot to express their support for what they see as "their" team.[111] Many youth teams similarly want to identify with major league teams and players when they seek to don official team uniforms to play youth ball.[112] Ford Ranger enthusiasts also undoubtedly feel a certain entitlement to use the mark given their allegiance to the brand and their wishes to identify themselves as Ford devotees.

This is another way that use of a mark serves a purpose that transcends the original source-identifying function of trademarks.[113] The use of the marks in these cases is reflective of the original mark and should be analyzed differently because of the expressive use involved. As Judge Kozinski notes, once enforcement moves beyond the confusion rationale, trademark law risks losing its "built-in first amendment compass."[114] This is not to say that enforcement in these cases violates the Constitution. Rather, the law must be sensitive to the price we pay when speech interests are implicated in a trademark-enforcement scenario. Surely, speech is stifled any time a trademark is enforced because it necessarily means that the infringer is not allowed to communicate the mark, but this is usually acceptable because enforcement often serves some beneficial purpose, whether it be preventing consumer confusion, protecting investment in a mark, or lowering consumer search costs.[115] However, if the benefit derived from the action is small or nonexistent, or if the enforcement actually acts to the detriment of all parties involved, impingement on speech interests like those at issue here becomes a much more serious problem. Trademark law has already created a situation

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111. *See* Geringer, *supra* note 4 (quoting the pilot of the machine, Adam Denard, as saying, "This is my city, Major League Baseball! My Phillies! My Phillie Phanatic!").

112. *See* Kimball, *supra* note 6 (relating the dismay of one Tony Baldwin of insidetheballpark.com regarding the actions MLB took against the Tinley Park youth league, who said, "I can't believe that MLB is coming down on these teams, especially since these little baseball players look up to these (major league) teams and enjoy putting on a Yankees jersey before playing their game"); Masnick, *supra* note 7 (suggesting that MLB should be doing everything it can to build up its fans and that one way to do that is to let kids identify with the teams and players by using major league team names).

113. *See* Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 962 & n.9 (1993) (speaking of marks acquiring characteristics that are "different from—and sometimes inconsistent with—their traditional role as identifiers of source," such as when consumers wear clothing with a trademarked symbol emblazoned on the front).

114. *Id.* at 973.

115. The merit or value of any of these purposes is assumed for the sake of argument, while acknowledging that there are valid arguments on all sides about what the proper purpose of trademark law is or should be. That is the subject for another paper, but presumably we can agree that if the design of trademark law is such that enforcement in a given scenario creates a valid benefit, it could justify at least some impact on speech interests.

where much of our cultural capital is not in the public domain.[116] Elements of our cultural heritage have become "private properties that we parody, proliferate, or politicize at our peril,"[117] and in these cases we can also add *identify with* to that list of actions that are taken at the risk of infringing another's property right.

Finally, another cost of trademark enforcement in these cases that affects the public interest is the cost to the trademark system itself. A legal system that sanctions, and even incentivizes, trademark bullying through overzealous enforcement of marks against small infringers might harm the integrity of the trademark system as a whole if it goes too far.[118] When the public begins to see trademark law as a vehicle that serves only corporate interests, it harms the legitimacy of the law.

IV. Conclusion

There are a myriad of reasons why trademark owners might choose to enforce their rights against fans, emulators, and enthusiasts. However, such enforcement actions may yield no benefit in the aggregate and may actually be causing significant harm. In order to prevent inefficient enforcement actions, the focus must be not on the law itself, but rather on the incentives that the law provides (or does not provide) to the trademark owner. The reason for this is simple: A change in the law to protect these allegedly infringing groups would be largely ineffective. The fact of the matter is that these users are in such a position that even if the law is on their side, litigation would be so prohibitively expensive that they would usually face two choices: (1) comply with the cease-and-desist letter, or (2) fight the case and win, but to their financial ruin. The solution, then, is to ensure that the law at the very least does not encourage vigorous enforcement in situations where it benefits no one and results in a net loss to all parties involved.

There are two ways that this may be addressed so that trademark law at least does not encourage inefficient enforcement of a mark.[119] The first is to ensure that the doctrines of acquiescence and laches do not attach unless there is a risk of significant harm to the original owner's interests. As we have seen, this is largely already the case given the doctrines of ripeness and progressive encroachment. Ensuring that the law allows for recognition of the special nature of the uses in these cases will help prevent inefficient

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116. Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEXAS L. REV. 1853, 1866 (1991) ("[T]he cultural resources available to us (and within us) are increasingly the properties of others.").

117. *Id.* at 1868.

118. *See* BOLLIER, *supra* note 109, at 237 (lauding the value of stimulating the public to question the moral legitimacy of laws that permit enforcement abuses through mechanisms like cease-and-desist letters).

119. Inefficient enforcement may always be a possibility because of other motivations of the trademark owner, but at the very least, such inefficient enforcement should not be encouraged by trademark law itself.

enforcement of rights against nonthreatening uses. The second way involves the confusion and dilution analyses. Courts applying the law should recognize that these types of uses should factor differently in the analysis, both in assessing the strength of the mark for confusion and dilution purposes, and in determining whether substantially exclusive use of the mark exists for the dilution inquiry. Since these cases are litigated so infrequently, it is hard to say whether courts would be inclined to do this anyway, but making sure that this is considered is essential to moving toward the proper balance.

For the trademark owner, the foregoing analysis illustrates that choosing whether to stop use by a fan, emulator, or enthusiast is not just a legal decision but also an important business decision, and a mark owner must be cognizant of all of these factors and take them into account before blindly asserting rights against any and all users. In these cases in particular, special attention must be paid given how little owners might stand to gain from enforcing rights against these groups and how much they could lose with an incorrect decision. To the extent that the law can encourage wise, efficient decision making on the part of a mark owner in these situations, it has the potential to result in situations that are beneficial to all involved: the mark owner, the subsequent user, the public, and trademark law itself.

—David E. Armendariz

* * *

Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law*

Qualified immunity creates several obstacles for plaintiffs seeking to recover damages for civil rights violations under Section 1983 of Title 42 of the United States Code.[1] Consider this hypothetical: while walking downtown, Jane Doe stops to watch a peace protest. As she stands on the sidewalk, police officers arrive to break up the crowd. Jane does not try to intervene, but before she can walk away, Officer Smith sprays her in the face with pepper spray. Jane suffers severe physical injuries and decides to seek compensation by filing a Section 1983 claim against Officer Smith, asserting a violation of her Fourth Amendment right to be free from excessive force. In response, Officer Smith moves for summary judgment and dismissal of the action, claiming he is entitled to qualified immunity because he mistook Jane for a protestor and did not believe pepper spray constituted excessive force. To overcome the officer's motion, Jane must not only prove Officer Smith's conduct violated her Fourth Amendment right but also that this right was "clearly established" at the time the violation occurred.[2]

Suppose the court agrees that Officer Smith's conduct rose to the level of excessive force. Jane would likely still lose her claim because the law surrounding the use of pepper spray remains ambiguous, and she would be unable to identify a precedent to meet the clearly-established-law requirement. Under these circumstances, a court will be inclined to grant qualified immunity because it was not clearly established at the time of the incident that Officer Smith's conduct constituted a violation of Jane's Fourth Amendment right.

This simplified hypothetical demonstrates the power of the clearly-established-law requirement: public officials can be shielded from liability even if their actions violated a constitutional right.[3] Courts justify this result

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1. 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

2. Pearson v. Callahan, 555 U.S. 223, 231–32 (2009).

3. *See, e.g.*, Mattos v. Agarano, 661 F.3d 433, 448 (9th Cir. 2011) ("[W]e conclude that, although [the plaintiff] has alleged an excessive force claim, the law was not sufficiently clear at the time of the incident to render the alleged violation clearly established. Accordingly, the defendant officers are entitled to the defense of qualified immunity against [the plaintiff's] § 1983 excessive force claim."); Karen M. Blum, *Qualified Immunity: Further Developments in the Post-*Pearson *Era*, 27 TOURO L. REV. 243, 255–58 (2011) (providing a non-exhaustive list of cases where courts

as balancing the interests of plaintiffs and public-official defendants in Section 1983 litigation,[4] and as ensuring that defendants were clearly on notice that their conduct violated a constitutional right.[5] However, what if Jane Doe wore a clearly identifiable uniform from a restaurant and stood at the restaurant's back door, smoking a cigarette, at the time she was injured by the pepper spray? What if she only had one leg, immediately threw her hands in the air when she saw the officer, and said, "Please don't hurt me, I was just passing by and I am not involved at all"? Pepper spraying under these circumstances seems much harder to justify as an honest mistake by the officer. However, a court might still be inclined to grant qualified immunity if Jane could not identify a closely analogous case.

This Note discusses the question of whether Section 1983 plaintiffs can prove a constitutional right was clearly established at the time of a violation by focusing on the idea of an "obvious case." Defeating a qualified immunity claim and demonstrating that a right was clearly established depends on how generally a court defines the right at issue and on what sources of law are considered to be relevant. Specifically defining a constitutional right will render more cases, statutes, or policies irrelevant to providing the requisite notice and result in granting qualified immunity to more defendants. The Fifth Circuit, for example, adopted a relatively restrictive approach to sources of clearly established law and requires plaintiffs to define a constitutional right with a high level of specificity. Other federal circuits are more willing to accept that in certain instances the existence of a right may present such an obvious case that a public official was on notice even if precedents do not directly address the applicable facts. This Note recommends courts include the concept of an obvious case in the adjudication of Section 1983 claims to more fairly balance the interests of plaintiffs and public-official defendants while maintaining recourse to qualified immunity when a right may be ambiguous or less clearly established.

Part I of this Note discusses the general background of the clearly-established-law requirement, including the evolution of how courts have defined the rights at issue and the sources courts consider to prove clearly established law. Part II addresses the idea of an obvious case, as initially

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held that a defendant violated a plaintiff's constitutional right but granted qualified immunity based on the clearly-established-law requirement).

4. *See, e.g.*, *Pearson*, 555 U.S. at 231 ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."); Anderson v. Creighton, 483 U.S. 635, 638 (1987) ("[D]amages may offer the only realistic avenue for vindication of constitutional guarantees. On the other hand, permitting damages suits against government officials can entail substantial social costs . . . . Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity . . . ." (citations omitted) (internal quotation marks omitted)).

5. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 739–40 (2002) ("[T]he defendant was entitled to 'fair warning' that his conduct deprived his victim of a constitutional right . . . .").

developed in *Hope v. Pelzer*,[6] and the Fifth Circuit's reluctance to incorporate obviousness into the clearly-established-law analysis. Using *Nelson v. Correctional Medical Services*[7] as a case study, Part II argues that courts should recognize the concept of an obvious case and highlights how the Fifth Circuit's approach is unable to properly accommodate the consideration of obvious violations in Section 1983 litigation. Part III analyzes *Ashcroft v. al-Kidd*[8] and its implications for Supreme Court recognition of the obvious-case concept. Part IV contends courts should continue to utilize obviousness as a factor in analyzing clearly established law and identifies areas for future discussion regarding the development of a standard for proving an obvious violation of constitutional rights in Section 1983 claims.

I. Background: The Clearly-Established-Law Requirement

Section 1983 allows for a private right of action against public officials who violate constitutional rights under the color of state law.[9] Accordingly, it serves to compensate victims and deter harmful conduct.[10] Early cases interpreting Section 1983, however, also reflected "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[11] The doctrine of qualified immunity developed to balance these interests, and as such, it protects certain defendants from Section 1983 claims to facilitate the conduct of public activities and institutions.

The Supreme Court's initial formulation of the qualified immunity doctrine contained both subjective and objective elements. In *Wood v. Strickland*,[12] the Court stated a public official could be shielded from a Section 1983 claim if the official was "acting sincerely and with a belief that he is doing right," but the Court went on to clarify that "an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice."[13] The *Wood* Court reasoned this test would "impose[] neither an unfair burden upon

6. 536 U.S. 730 (2002).

7. 583 F.3d 522 (8th Cir. 2009) (en banc).

8. 131 S. Ct. 2074 (2011).

9. 42 U.S.C. § 1983 (2006).

10. *See* Robertson v. Wegmann, 436 U.S. 584, 590–91 (1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law.").

11. Butz v. Economou, 438 U.S. 478, 506 (1978); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982) ("Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.").

12. 420 U.S. 308 (1975).

13. *Id.* at 321.

[public officials] requiring a high degree of intelligence and judgment for the proper fulfillment of [their] duties, nor an unwarranted burden in light of the value which civil rights have in our legal system."[14]

However, responding to a significant increase in the volume of civil rights litigation[15] as well as concerns about too many Section 1983 claims going to trial and burdening public officials,[16] the Court replaced the hybrid test with a purely objective test. Under the objective approach, public officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[17] This requires plaintiffs to prove (1) there was a violation of a constitutional right, and (2) the right was clearly established at the time the violation occurred.[18]

A. Defining the Right at Issue: The Supreme Court's Problematic Approach

Implementing the Supreme Court's objective test for qualified immunity proved difficult because district and circuit courts were unsure about how broadly to define the constitutional right at issue. A broadly defined right, such as freedom from an unreasonable search, would tend to defeat immunity claims because public officials would be presumed to have notice of such rights in a larger number of cases. A specifically defined right, such as freedom from random drug searches in shopping malls, would afford a larger number of defendants with qualified immunity because the more precise definition would apply to a much narrower range of conduct. As Justice Scalia, writing for the majority, noted in *Anderson v. Creighton*,[19] "[T]he right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right."[20]

This reasoning reflected the concern that qualified immunity might become meaningless if any right could be clearly established so long as it was defined with a high level of generality. Thus, in *Anderson*, the Court

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14. *Id.* at 322.

15. *See* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 662 tbl.1 (1987) (documenting how nonprisoner civil rights filings rose from 296 in 1961 to 21,219 in 1984).

16. *See Harlow*, 457 U.S. at 815–16 (observing that "[t]he subjective element of the good-faith defense frequently has proved incompatible with [the Court's] admonition in *Butz* that insubstantial claims should not proceed to trial" and that "substantial costs attend the litigation of the subjective good faith of government officials").

17. *Id.* at 818.

18. Wilson v. Layne, 526 U.S. 603, 609 (1999) ("A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." (internal quotation marks omitted)).

19. 483 U.S. 635 (1987).

20. *Id.* at 639.

stated that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[21]

In adopting this requirement of specificity, the *Anderson* Court focused on protecting the interests of public-official defendants rather than plaintiffs.[22] The Court offered little discussion or guidance regarding how to avoid undermining Section 1983 plaintiffs' legitimate interests by defining rights too narrowly. Some circuits responded to the Court's decision by requiring plaintiffs to prove a constitutional right was clearly established with an impossibly high degree of specificity. Adopting perhaps the most stringent approach, the Eleventh Circuit insisted that only citing to cases with "materially similar" facts could defeat qualified immunity.[23]

Fifteen years after *Anderson*, the Supreme Court appeared to retreat from an overly specific definition of rights in Section 1983 cases in *Hope v. Pelzer*. In *Hope*, the plaintiff alleged prison officials violated his Eighth Amendment rights by handcuffing him to a hitching post for seven hours and denying him water and shelter from the sun.[24] The Eleventh Circuit, applying its materially-similar-case requirement, had found that although punishing the prisoner in this manner violated the Constitution, prison officials were entitled to qualified immunity because no prior case addressed the specific conduct at issue.[25] The Supreme Court reversed and rejected the materially similar standard, finding that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[26] *Hope* refocused the clearly-established-law requirement on "fair warning" and the idea of notice to public officials prevalent in earlier qualified immunity cases.[27] The Court held that "general statements of the law are not

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21. *Id.* at 640. Applying this standard, the *Anderson* Court vacated the Eighth Circuit's decision and redefined the Fourth Amendment right at issue from whether the "general right . . . to be free from warrantless searches . . . was clearly established" to "whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.* at 640–41, 646. The Court re-characterized the right to encompass the more specific issue of whether it was clearly established that the circumstances the public official confronted did or did not give rise to probable cause. *Id.* at 640–41.

22. *See id.* at 639–40 (centering the discussion of how specifically to define a right on the need to curtail plaintiffs from "convert[ing] the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights").

23. *See* Lassiter v. Ala. A&M Univ., Bd. of Trs., 28 F.3d 1146, 1150 (11th Cir. 1994) ("When considering whether the law applicable to certain facts is clearly established, . . . the facts need not be the same as the facts of the immediate case. But they do need to be materially similar." (quoting Adams v. St. Lucie Cnty. Sheriff's Dep't, 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmondson, J., dissenting), *approved en banc*, 998 F.2d 923 (11th Cir. 1993)), *abrogated by* Hope v. Pelzer, 536 U.S. 730 (2002)).

24. *Hope*, 536 U.S. at 734–35.

25. Hope v. Pelzer, 240 F.3d 975, 982 (11th Cir. 2001), *rev'd*, 536 U.S. 730.

26. *Hope*, 536 U.S. at 741.

27. In the foundational case for qualified immunity, the Court declared that "a police officer is not charged with predicting the future course of constitutional law" and recognized a "good faith" defense for officers who wrongly arrested a plaintiff pursuant to a law later deemed

inherently incapable of giving fair and clear warning" and that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question."[28] As a result, *Hope* indicated plaintiffs could overcome a qualified immunity claim when a public official's actions obviously violated a constitutional right, notwithstanding the absence of applicable precedent.

The *Anderson* and *Hope* decisions provided contradictory guidance on the determination of clearly established law. In *Anderson*, the Court required courts to protect the interests of defendants by specifically defining the right at issue. In *Hope*, the Court suggested a right could be defined generally as long as public officials could be construed to have had fair warning that their conduct violated a constitutional right.

In *Brosseau v. Haugen*,[29] the Supreme Court attempted to reconcile *Hope* with *Anderson* and its earlier decisions. The case involved a claim that a police officer used excessive force when she shot a suspect attempting to drive away from a purported crime scene.[30] The Ninth Circuit had reasoned the officer violated clearly established law by using deadly force when there was no probable cause that the suspect posed a threat of serious physical harm.[31] In reversing this decision, the Supreme Court admonished the Ninth Circuit for mistakenly finding fair warning of a constitutional violation "cast at a high level of generality."[32] The *Brosseau* decision suggested the appropriate level of specificity to define a clearly established right was more limited than the approach applied by the Ninth Circuit but more expansive than the Eleventh Circuit's restrictive approach.

B. Sources of Clearly Established Law: Localized Development

Once a court defines the right at issue, it must determine whether the right was clearly established at the time a public official acted in a Section 1983 claim. Historically, the Supreme Court failed to provide clear guidance concerning appropriate sources of clearly established law.[33] In

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unconstitutional. Pierson v. Ray, 386 U.S. 547, 557 (1967). Likewise, the *Wood* Court reasoned it was unfair to hold public officials liable "for every action which is found subsequently to have been violative of a student's constitutional rights." Wood v. Strickland, 420 U.S. 308, 319 (1975).

28. *Hope*, 536 U.S. at 741 (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).

29. 543 U.S. 194 (2004) (per curiam).

30. *Id.* at 194–97.

31. Haugen v. Brosseau, 351 F.3d 372, 382, 392 (9th Cir. 2003), *rev'd*, 543 U.S. 194 (2004).

32. *Brosseau*, 543 U.S at 199.

33. *See* Boyd v. Benton Cnty., 374 F.3d 773, 781 (9th Cir. 2004) ("The Supreme Court has provided little guidance as to where courts should look to determine whether a particular right was clearly established at the time of the injury."); David R. Cleveland, *Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. MIAMI L. REV. 45, 63 (2010) ("The Supreme Court has never spelled out what sources of law may clearly establish the law . . . ."); Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1036

Hope, the Court held that "[a]lthough earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding."[34] In *Wilson v. Layne*,[35] the Court suggested that plaintiffs could prove clearly established law by identifying a "consensus of cases of persuasive authority."[36] The Court has also indicated that plaintiffs could rely on nonbinding case law and regulations to prove a right was clearly established, but it has never provided a definitive rule.[37]

As a result, the federal circuit courts have developed different approaches to evaluating whether a right was clearly established. Most notably, the circuits split on the issue of whether courts may consider extra-circuit case law. The Second and Eleventh Circuits limit the analysis to case law from within each circuit.[38] The Eighth and Ninth Circuits are willing to consider all available decisional law.[39] The Fourth and Sixth Circuits only look to extra-circuit case law in limited circumstances[40] and as such are practically as restrictive as the Eleventh Circuit.[41] The Fifth Circuit

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(2005) (arguing that circuit courts cannot agree on what constitutes a proper source of clearly established law because "the Supreme Court has failed to articulate a single approach").

34. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

35. 526 U.S. 603 (1999).

36. *Id.* at 617.

37. *See Brosseau*, 543 U.S. at 199–201 (considering various circuit court opinions to determine if a right was clearly established); *Hope*, 536 U.S. at 741–42 (analyzing state prison regulations and a report from the Department of Justice); *Wilson*, 526 U.S. at 616–17 (considering police policy pamphlets and a Sixth Circuit decision in order to determine if a right was clearly established in the Fourth Circuit).

38. *See* Moore v. Vega, 371 F.3d 110, 114 (2d Cir. 2004) ("Only Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established." (citing Townes v. City of New York, 176 F.3d 138, 144 (2d Cir. 1999))); Thomas *ex rel.* Thomas v. Roberts, 323 F.3d 950, 955 (11th Cir. 2003) ("As we have stated, only Supreme Court cases, Eleventh Circuit caselaw, and Georgia Supreme Court caselaw can 'clearly establish' law in this circuit." (citing Hamilton v. Cannon, 80 F.3d 1525, 1532 n.1 (11th Cir. 1996))).

39. *See* Vaughn v. Ruoff, 253 F.3d 1124, 1129 (8th Cir. 2001) ("We subscribe to a broad view of the concept of clearly established law, and we look to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in this circuit." (citing Tlamka v. Serrell, 244 F.3d 628, 634 (8th Cir. 2001))); Boyd v. Benton Cnty., 374 F.3d 773, 781 (9th Cir. 2004) (instructing courts in the Ninth Circuit to look to "whatever decisional law is available . . . including decisions of state courts, other circuits, and district courts" (citing Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003)) (internal quotation marks omitted)).

40. *See* Owens *ex rel.* Owens v. Lott, 372 F.3d 267, 280 (4th Cir. 2004) ("When there are no such decisions from courts of controlling authority, we may look to 'a consensus of cases of persuasive authority' from other jurisdictions, if such exists." (quoting *Wilson*, 526 U.S. at 617)); Ohio Civil Serv. Emps. Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988) ("In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law.").

41. John C. Jeffries, Jr., *What's Wrong With Qualified Immunity?*, 62 FLA. L. REV. 851, 858 (2010) (noting the Sixth Circuit only "grudgingly" looks beyond its own precedents); Caryn J. Ackerman, Comment, *Fairness or Fiction: Striking a Balance Between the Goals of § 1983 and the Policy Concerns Motivating Qualified Immunity*, 85 OR. L. REV. 1027, 1036 (2006) ("The Fourth

nominally recognizes that courts may treat case law from other circuits as a source of clearly established law but only when extra-circuit case law provides "persuasive authority" of a clearly established right.[42] Consequently, while it has been grouped together with the Eighth and Ninth Circuits,[43] the Fifth Circuit's approach more closely resembles the restrictive practice in the Fourth and Sixth Circuits.

Circuit courts also divide on the issue of when, if ever, courts may consider policies and regulations as sources of clearly established law. Theoretically, these sources can put public-official defendants on notice that their actions would violate a constitutional right. For example, in *Hope*, the Supreme Court found that since prison officials violated Alabama Department of Corrections regulations, they should have been aware their conduct was unconstitutional.[44] Similarly, the Second and Eighth Circuits have looked to regulations as sources of clearly established law.[45] Nevertheless, regulations and policies are infrequently cited in Section 1983 litigation, as courts have been reluctant to interpret local guidelines, and even state statutes, in making qualified immunity determinations.[46] The Fifth

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and Sixth Circuits take approaches that are only slightly varied from (and slightly less narrow than) that of the Eleventh Circuit.").

42. *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002) (en banc) (per curiam), demonstrates the high threshold plaintiffs must meet to prove a persuasive consensus existed. In *McClendon*, the plaintiff alleged that a police officer violated his clearly established rights when the officer gave a gang member a pistol while knowing that the man had a history of drug violence and was going to confront the plaintiff. *Id.* at 320. The issue presented was whether this violated the Due Process Clause of the Fourteenth Amendment based on the state-created-danger theory of liability. *Id.* at 329. In determining whether the state-created-danger theory was clearly established at the time, the Fifth Circuit considered opinions from six other circuit courts recognizing it as a valid theory of liability. *Id.* at 330–31. While acknowledging these as potentially valid sources of clearly established law, the Fifth Circuit still granted qualified immunity and concluded that recognition by six different circuits did not provide a "consensus of cases of persuasive authority" because it still failed to "establish the contours of an individual's right." *Id.* at 329, 333; *see also* Williams v. Ballard, 466 F.3d 330, 333 (5th Cir. 2006) (per curiam) (granting qualified immunity because "even if consideration of these [three circuit court] cases made the number of cases sufficient, the lack of consistency among their rules makes 'the contours of the right' not 'sufficiently clear'" (quoting *McClendon*, 305 F.3d at 331)); Modica v. Taylor, 465 F.3d 174, 188 (5th Cir. 2006) ("[I]n the absence of a prior ruling by the Supreme Court, this court, or a consensus among our sister circuits, we cannot say that the law was clearly established . . . .").

43. *See, e.g.*, JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 43 (2d ed. 2007) (listing the Fifth Circuit with the Eighth and Ninth Circuits as among those that "agree that persuasive out-of-circuit authority can, under at least some circumstances, clearly establish a constitutional right"); Jeffries, *supra* note 41, at 859 ("The First, Fifth, Seventh, Eighth, and Tenth Circuits are similarly latitudinarian [like the Ninth].").

44. Hope v. Pelzer, 536 U.S. 730, 744 (2002).

45. *See, e.g.*, Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 433–34 (2d Cir. 2009) ("[W]e may examine statutory or administrative provisions in conjunction with prevailing circuit or Supreme Court law to determine whether an individual had fair warning that his or her behavior would violate the victim's constitutional rights."); Treats v. Morgan, 308 F.3d 868, 875 (8th Cir. 2002) ("Prison regulations governing the conduct of correctional officers are also relevant in determining whether an inmate's right was clearly established.").

46. *See, e.g.*, Cortes-Reyes v. Salas-Quintana, 608 F.3d 41, 51–53 (1st Cir. 2010) (choosing to grant qualified immunity based on the second step of the analysis, the clearly-established-law

Circuit indicated local and state policies and regulations are often ambiguous, and any arguable ambiguity leads to the conclusion that a right was not clearly established at the time a public official acted.[47]

II. The Problem with the Fifth Circuit: A Lack of Obvious Cases

The divergent approaches to defining the right at issue and determining whether a right is clearly established reflect the difficulty of balancing the interests of public officials and plaintiffs. Limiting the qualified immunity analysis to circuit precedent and excluding local policies or rules tends to favor defendants in Section 1983 cases. The Supreme Court, however, suggested that the qualified immunity determination should not be constrained when the existence of a right is "obvious" to a reviewing court. In *Brosseau*, the Court stated, "Of course, in an *obvious case*, [general] standards can 'clearly establish' the answer, even without a body of relevant case law."[48] While the *Brosseau* Court did not provide substantive guidance on identifying an obvious case, it concluded that handcuffing a prisoner to a hitching post for hours without food or water, as in *Hope*, represented an instance where an Eighth Amendment violation was obvious enough that a court should deny qualified immunity.[49] In contrast, the Court found that the shooting of a fleeing suspect in *Brosseau* presented an issue that was "far from the obvious one where [general tests] alone offer a basis for decision" and reversed the Ninth Circuit's denial of qualified immunity.[50] Accordingly, the Supreme Court introduced the idea that a plaintiff may be able to defeat a qualified immunity claim when it is obvious that a public official's action violates a constitutional right.

Since *Brosseau*, no majority opinion of the Supreme Court has further clarified the concept of an "obvious case" in Section 1983 litigation. Several subsequent references, however, imply the continued vitality of the doctrine. In *Safford Unified School District # 1 v. Redding*,[51] a case involving school officials strip-searching a female student after she was accused of bringing drugs to school, Justice Stevens, joined by Justice Ginsburg in dissent, argued, "This is, in essence, a case in which clearly established law meets clearly outrageous conduct. I have long believed that [it] does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is

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requirement, in order to avoid interpreting local law); Waeschle v. Dragovic, 576 F.3d 539, 551 (6th Cir. 2009) (certifying a question necessary to resolve the constitutional issue presented because "Michigan courts are better suited to answer the unsettled state-law aspect").

47. *See* Kinney v. Weaver, 367 F.3d 337, 370 (5th Cir. 2004) (en banc) (finding that police officials could not rely on certain state policies as sources of clearly established law because the policies had been challenged as violating free speech).

48. Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (per curiam) (emphasis added).

49. *Id.* (citing *Hope*, 536 U.S. at 738).

50. *Id.* at 199, 201.

51. 129 S. Ct. 2633 (2009).

an invasion of constitutional rights of some magnitude."[52] Likewise, dissenting from a denial of certiorari in another case, Justice Ginsburg, joined by Justice Sotomayor, contended that "[n]o 'specific authority' should have been needed" to show that denying admission to a presidential speech based on owning a bumper sticker violated the First Amendment.[53] Justice Ginsburg concluded that "solidly established law 'may apply with obvious clarity' even to conduct startling in its novelty."[54] While these post-*Brosseau* discussions do not define a coherent standard for an obvious case, they show that members of the Court believe the obvious-case concept should be an element of the qualified immunity analysis in Section 1983 cases.

A. Circuit Court Interpretations of Hope v. Pelzer

All circuits currently recognize the narrow holding of *Hope* that courts should not require plaintiffs to find a factually identical prior case in order to defeat a claim of qualified immunity.[55] However, the circuits do not consistently recognize that in an obvious case a right may be defined at a higher level of generality and that courts can consider a broader range of sources.

In perhaps the most direct and comprehensive response to *Hope*, the Eleventh Circuit implemented a three-step framework.[56] First, if a federal statute or constitutional provision applies with "obvious clarity," a public official may violate a clearly established right "even in the total absence of case law."[57] Second, if a general statute or constitutional provision does not apply, a court may then consider whether a constitutional principle embodied in prior precedent clearly establishes a right, even if the principle is not tied to particularized facts.[58] Finally, courts may still conduct the Eleventh Circuit's materially-similar-case analysis and evaluate whether a factually similar case clearly establishes the law.[59] Thus, the first step of the Eleventh Circuit analysis incorporates the idea of an obvious case, and the second step incorporates *Hope*'s more narrow holding that courts should not limit their analysis to cases with materially similar facts. The Eleventh Circuit has not

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52. *Id.* at 2644 (Stevens, J., concurring in part and dissenting in part) (alteration in original) (internal quotation marks omitted).

53. Weise v. Casper, 131 S. Ct. 7, 7 (2010) (Ginsburg, J., dissenting from denial of certiorari).

54. *Id.* (quoting Weise v. Casper, 593 F.3d 1163, 1177 (10th Cir. 2010) (Holloway, J., dissenting)).

55. *See, e.g.*, Atteberry v. Nocona Gen. Hosp., 430 F.3d 245, 256 (5th Cir. 2005) ("As this court has long held, the term clearly established does not necessarily refer to commanding precedent that is factually on all-fours with the case at bar, or that holds the very action in question unlawful." (internal quotation marks omitted)); Savard v. Rhode Island, 338 F.3d 23, 28 (1st Cir. 2003) ("[O]vercoming a qualified immunity defense does not require a plaintiff to show that either the particular conduct complained of or some materially indistinguishable conduct has previously been found unlawful.").

56. Vinyard v. Wilson, 311 F.3d 1340, 1350–52 (11th Cir. 2002).

57. *Id.* at 1350 (emphasis omitted).

58. *Id.* at 1351.

59. *Id.* at 1352.

expressly adopted the more expansive interpretation of *Hope* that courts should always consider nontraditional sources of law.[60] However, by emphasizing that a right may apply with obvious clarity even in the absence of case law, the Eleventh Circuit's approach allows for a more expansive survey of clearly established law in obvious cases.[61]

The Eighth and Ninth Circuits implemented the broadest interpretation of *Hope*, adopting a more expansive approach to sources of clearly established law and recognizing the existence of obvious cases.[62] The First, Third, Fourth, Sixth, Seventh, and Tenth Circuits also recognize that a right may be clearly established in certain obvious cases.[63] The D.C. Circuit has not expressly addressed the issue of an obvious case, but district courts within the D.C. Circuit have embraced the concept.[64] Similarly, at least one Second

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60. *See supra* note 38 and accompanying text.

61. For example, in *Vinyard*, the court considered whether a police officer violated the plaintiff's Fourth Amendment right when he assaulted her during a drive to jail. *Vinyard*, 311 F.3d at 1347–48. The court reasoned, "Although the 'obvious clarity' standard is often difficult to meet, we conclude that the law in 1998 was clearly established . . . ." *Id.* at 1355. The court went on to state that "no factually particularized, preexisting case law was necessary for it to be very obvious to every objectively reasonable officer" that the defendant violated the plaintiff's clearly established right to be free of the excessive use of force. *Id.*

62. *See* Morris v. Zefferi, 601 F.3d 805, 812 (8th Cir. 2010) ("The district court did not err in finding the unconstitutionality of [the defendant's] alleged conduct should have been obvious to [the defendant] based both on common sense and prior general case law."); Treats v. Morgan, 308 F.3d 868, 875 (8th Cir. 2002) ("Prison regulations governing the conduct of correctional officers are also relevant in determining whether an inmate's right was clearly established."); Mattos v. Agarano, 661 F.3d 433, 448 (9th Cir. 2011) (acknowledging the potential existence of an obvious case by asserting that "the violation was not so obvious that we can define clearly established law at a high level of generality" (internal quotation marks omitted)); Boyd v. Benton Cnty., 374 F.3d 773, 781 (9th Cir. 2004) (instructing courts in the Ninth Circuit to look to "whatever decisional law is available . . . including decisions of state courts, other circuits, and district courts" (internal quotation marks omitted)).

63. *See* Whitfield v. Meléndez-Rivera, 431 F.3d 1, 8 (1st Cir. 2005) ("[T]he [Supreme] Court has also acknowledged that, in the obvious case, the standards announced in those decisions alone are sufficient to clearly establish the answer." (internal quotation marks omitted) (citing Brosseau v. Haugen, 543 U.S. 194, 199 (2004))); Schneyder v. Smith, 653 F.3d 313, 330 (3d Cir. 2011) ("In extraordinary cases, a broad principle of law can clearly establish the rules governing a new set of circumstances if the wrongfulness of an official's action is so obvious . . . ."); Owens *ex rel.* Owens v. Lott, 372 F.3d 267, 279 (4th Cir. 2004) (noting that a right may be "specifically adjudicated or [be] manifestly apparent from broader applications of the constitutional premise in question"); Sample v. Bailey, 409 F.3d 689, 699 (6th Cir. 2005) ("[T]he [Supreme] Court recognized that in an obvious case, [general] standards can clearly establish the answer, even without a body of relevant case law." (third alteration in original) (internal quotation marks omitted) (citing *Brosseau*, 543 U.S. at 199)); Estate of Escobedo v. Bender, 600 F.3d 770, 780 (7th Cir. 2010) ("The [Plaintiff] can demonstrate that the right was clearly established by presenting a closely analogous case that establishes that the Defendants' conduct was unconstitutional or by presenting evidence that the Defendant's [sic] conduct was so patently violative of the constitutional right that reasonable officials would know without guidance from a court."); Weise v. Casper, 593 F.3d 1163, 1167 (10th Cir. 2010) ("[I]n qualified immunity cases, except in the most obvious cases, broad, general propositions of law are insufficient to suggest clearly established law.").

64. *See, e.g.*, Davis v. Billington, 775 F. Supp. 2d 23, 47–48 (D.D.C. 2011) (denying qualified immunity because the defendant was "aware of 'a general constitutional rule already identified in the decisional law'" (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002))); Navab-Safavi v. Broad.

Circuit district court denied qualified immunity in an "obvious" case.[65] Although the Second Circuit has yet to clearly embrace the obvious-case concept in Section 1983 claims, it did recognize that *Hope* allows for consideration of a more expansive approach to sources of clearly established law.[66]

B. The Fifth Circuit's Divergent Approach to Hope v. Pelzer

Compared to other circuits, the Fifth Circuit appears to misconstrue the concept of an obvious case and fails to allow for a reasonably expansive analysis of sources of clearly established law. While a relatively small number of generally unpublished appellate and district court decisions cited obviousness as a factor in a qualified immunity decision,[67] the Fifth Circuit has been uniquely reluctant to consider that in obvious circumstances a public official's conduct may not warrant a grant of qualified immunity.

This divergent approach arises in part from the adoption of a two-step qualified immunity analysis that differs from the test articulated by the Supreme Court. The Court's analysis proceeds as follows:

> First, a court must decide whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must

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Bd. of Governors, 650 F. Supp. 2d 40, 63–64 (D.D.C. 2009) (denying qualified immunity because "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question" (quoting *Hope*, 536 U.S. at 741)); Qutb v. Ramsey, 285 F. Supp. 2d 33, 50 (D.D.C. 2003) (recognizing in the Fourth Amendment context that "[qualified] immunity applies unless clearly established legal standards would have made it obvious to any reasonable officer that the level of force used was unlawful").

65. *See* Li v. Aponte, No. 05 Civ. 6237(NRB), 2008 WL 4308127, at *10 (S.D.N.Y. Sept. 16, 2008) ("[The defendant's] violation of the general standards articulated in *Graham* is sufficiently 'obvious' that [the plaintiff] need not show any more particularized precedent.").

66. Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 433–34 (2d Cir. 2010) (recognizing that the court "may examine statutory or administrative provisions in conjunction with prevailing circuit or Supreme Court law to determine whether an individual had fair warning that his or her behavior would violate the victim's constitutional rights" (citing *Hope*, 536 U.S. at 741–45)).

67. *See, e.g.*, Reyes v. Bridgwater, 362 F. App'x 403, 408 (5th Cir. 2010) ("Indeed, unless the violation is 'obvious,' there must be relevant case law that 'squarely governs' the situation . . . ." (quoting Brosseau v. Haugen, 543 U.S. at 201)); Graves v. Zachary, 277 F. App'x 344, 349 (5th Cir. 2008) ("[T]he violation of [the plaintiff's] constitutional rights would have been 'obvious . . . even without a body of relevant case law.' Under general precedents . . . , [the defendant] should have known that his use of force was excessive." (first omission in original) (quoting *Brosseau*, 543 U.S. at 199)); Mitchell v. Cervantes, No. 3:10-CV-0030-K-BH, 2010 WL 4628003, at *1, *6–7 (N.D. Tex. Oct. 12, 2010) (denying defendant's motion for summary judgment on qualified immunity grounds because "it was clearly established that prison officials could not maliciously and sadistically apply force to cause harm to a prisoner" and citing *Hope* for the proposition that a constitutional violation may be obvious); Strittmatter v. Briscoe, 504 F. Supp. 2d 169, 176 (E.D. Tex. 2007) ("While some violations are so obvious as to require no on-point precedent to give officials fair warning, the violation in this case is not that clear."). While the Fifth Circuit flirted with the idea of recognizing an obvious case in one other case, it did not clearly articulate the concept and applied the traditional approach to defining the right. Kinney v. Weaver, 367 F.3d 337, 350 (5th Cir. 2004) (en banc).

> decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right.[68]

In contrast, the Fifth Circuit has implemented a two-step analysis that essentially collapses the Supreme Court's process, including the clearly-established-law requirement, into the assessment of whether a constitutional violation occurred. The Fifth Circuit's approach has also introduced the objective-reasonableness inquiry, whereby courts consider whether a public official's conduct was "objectively reasonable," even if the law was clearly established at the time:

> This Court conducts a bifurcated analysis to assess the defense of qualified immunity. First, Plaintiffs must allege that Defendants violated their clearly established constitutional rights. Constitutional law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights. Second, if Plaintiffs have alleged such a violation, this Court must consider whether Defendants' actions were objectively reasonable under the circumstances. That is, this Court must decide whether reasonably competent officers would have known that their actions violated law which was clearly established at the time of the disputed action.[69]

In practice, the Fifth Circuit's analysis reduces the likelihood that qualified immunity can be defeated in obvious cases. In conducting the objective-reasonableness inquiry, the Fifth Circuit requires a finding that "[t]he defendant's acts are held to be objectively reasonable unless *all* reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff."[70]

Objective reasonableness could encompass the idea of an obvious case, such as in the Eleventh Circuit's definition of "obvious clarity."[71] The Eleventh Circuit's obvious-clarity standard, however, emerged as an alternative method for plaintiffs to prove the existence of clearly established

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68. Pearson v. Callahan, 555 U.S. 223, 232 (2009) (citations omitted).

69. Collins v. Ainsworth, 382 F.3d 529, 537 (5th Cir. 2004) (citations omitted) (internal quotation marks omitted).

70. Thompson v. Upshur Cnty., Tex., 245 F.3d 447, 457 (5th Cir. 2001). The Second Circuit expressly introduced this third step as well, which may explain why it too has been reluctant to recognize the existence of an obvious case. *See* Higazy v. Templeton, 505 F.3d 161, 169–70 (2d Cir. 2007) ("[E]ven where the law is clearly established and the scope of an official's permissible conduct is clearly defined, the qualified immunity defense also protects an official if it was objectively reasonable for him at the time of the challenged action to believe his acts were lawful." (internal quotation marks omitted)).

71. *See supra* notes 56–61 and accompanying text (discussing the Eleventh Circuit's interpretation of *Hope*).

law.[72] The Fifth Circuit developed its objective-reasonableness requirement as a further protection for defendants, increasing the likelihood defendants would receive qualified immunity.[73]

By implementing the second step of its qualified immunity test in this manner, the Fifth Circuit significantly reduced the possibility that a plaintiff could defeat qualified immunity in obvious cases.[74] One Fifth Circuit decision observed that the objective-reasonableness inquiry appears to be in tension with *Hope*:

> *Hope* pushes us toward a more general description of the constitutional right at issue both by describing a level of specificity lower than that we have used in the past, and by undermining the case law that originally established the more rigid standard and thereby eroding the foundations of our precedent on this point.[75]

No subsequent Fifth Circuit decisions followed or further developed this concern.[76] Furthermore, unlike the Eleventh Circuit's obvious-clarity inquiry, which explicitly allows plaintiffs to look beyond case law, the Fifth Circuit's objective-reasonableness inquiry does not expressly allow for a more expansive approach to sources of clearly established law. Thus, in contrast with other circuits, the current Fifth Circuit qualified immunity test

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72. *See supra* notes 56–61 and accompanying text (explaining the emergence of the obvious-clarity standard).

73. *See generally* Thomas E. O'Brien, Note, *The Paradox of Qualified Immunity: How a Mechanical Application of the Objective Legal Reasonableness Test Can Undermine the Goal of Qualified Immunity*, 82 TEXAS L. REV. 767 (2004) (arguing that the Fifth Circuit's application of "objective reasonableness" unnecessarily harms the interests of plaintiffs).

74. For example, in *Hernandez*, the Fifth Circuit considered whether the district court correctly denied qualified immunity to case workers who removed a child from his parents and placed him with a foster family despite multiple reports that the foster family had abused children in its care. Hernandez *ex rel.* Hernandez v. Tex. Dep't of Protective & Regulatory Servs., 380 F.3d 872, 876–78 (5th Cir. 2004). The Fifth Circuit first addressed the clearly-established-law issue and noted that neither party contested the district court's ruling that the child's "constitutional right to personal security and reasonably safe living conditions" was clearly established at the time. *Id.* at 880. However, the court still reversed, granting qualified immunity based solely on the objective-reasonableness inquiry and its determination that the defendants were not deliberately indifferent. *Id.* at 884–85. Thus, the Fifth Circuit treated the objective-reasonableness inquiry as an extra burden on the plaintiff, not as an alternative for proving clearly established law.

75. Hart v. Tex. Dep't of Criminal Justice, 106 F. App'x 244, 249–50 (5th Cir. 2004).

76. No appellate court opinions cite *Hart*, nor did any adopt its reasoning. Two district court opinions subsequently cited *Hart*, but one chose to rely on the old standard for clearly established law, essentially ignoring *Hart*'s argument about *Hope*. *See* White v. McMillin, No. 3:09cv120-DPJ-FKB, 2010 WL 2683033, at *7–8 & n.6 (S.D. Miss. July 2, 2010) (stating that prior case law "still offers guidance" and granting qualified immunity). While the other unpublished opinion echoed *Hart*'s reasoning, it was later reversed by the Fifth Circuit, which found there was no violation of a constitutional right. *See* Gordon v. Pettiford, No. 5:04cv224-DCB-JCS, 2007 WL 4375294, at *1 (S.D. Miss. Dec. 13, 2007) ("According to the Fifth Circuit, *Hope* requires a more general description of the constitutional right in question."), *rev'd*, 312 F. App'x 595 (5th Cir. 2009).

does not provide a vehicle for considering obviousness when assessing notice and clearly established law.[77]

C. *Case Study—An Obvious Case:* Nelson v. Correctional Medical Services

Nelson v. Correctional Medical Services highlights why clarifying the concept of an obvious case matters in Section 1983 claims. The Eighth Circuit majority opinion and the dissent differed with respect to what constitutes a source of clearly established law. The plaintiff, a pregnant woman shackled by a prison official during late labor, prevailed largely due to the court's willingness to consider the obviousness of the constitutional violation by relying on a broad set of factors, including prison regulations and medical opinions. Comparing the *Nelson* court's approach with how the Eleventh and Fifth Circuits would likely decide the case illustrates the problems with the Fifth Circuit's narrow interpretation of *Hope*.

Nelson presented the issue of whether a prison official violated a prisoner's Eighth Amendment right to be free from cruel and unusual punishment when she shackled the prisoner's legs while the prisoner was seven centimeters dilated and in the final stages of labor.[78] According to the court, when the defendant, a prison officer, took custody, Nelson's contractions occurred about every five minutes, and she was in such severe pain she could not walk.[79] The prison nurse told the officer to hurry to the hospital, yet the officer repeatedly took time to shackle the prisoner during the trip to the hospital from the prison, in a wheelchair at the hospital, and then to the bed in the maternity ward.[80] The officer re-shackled Nelson after cervical measurements and insisted the shackles remain while Nelson was nine centimeters dilated and while nurses helped her push the baby through the birth canal.[81] Experiencing acute pain, Nelson eventually needed to be taken to a delivery room, at which point the doctor ordered the permanent removal of the shackles.[82] Nelson produced evidence that "the shackling caused her extreme mental anguish and pain, permanent hip injury, torn stomach muscles, and an umbilical hernia requiring surgical repair."[83] As the court stated,

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77. Some Fifth Circuit courts consider the concept of an "obvious risk" in Eighth Amendment deliberate-indifference claims. *E.g.*, *Hernandez*, 380 F.3d at 881; Wilkerson v. Stalder, 639 F. Supp. 2d 654, 670 (M.D. La. 2007). However, in doing so, these courts transfer the idea of obviousness to the first step of the analysis (whether there was a violation of a constitutional right) and therefore do not give full effect to the concept of an obvious case by allowing for consideration of obviousness in the clearly-established-law determination.

78. Nelson v. Corr. Med. Servs., 583 F.3d 522, 526–27 (8th Cir. 2009) (en banc).

79. *Id.* at 525.

80. *Id.*

81. *Id.* at 526.

82. *Id.*

83. *Id.*

> According to Nelson's orthopedist, the shackling injured and deformed her hips, preventing them from going "back into the place where they need to be." In the opinion of her neurosurgeon the injury to her hips may cause lifelong pain, and he therefore prescribed powerful pain medication for her. Nelson testified that as a result of her injuries she cannot engage in "ordinary activities" such as playing with her children or participating in athletics. She is unable to sleep or bear weight on her left side or to sit or stand for extended periods. Nelson has also been advised not to have any more children because of her injuries.[84]

At no point did the officer claim to be in danger or that Nelson posed a flight risk.[85]

To defeat the officer's assertion of qualified immunity, the plaintiff argued her right to be free from having her legs shackled during labor was clearly established, based on four pieces of evidence: (1) the general purposes and history of the Eighth Amendment embodied in prior Supreme Court case law; (2) a partially vacated D.C. district court opinion; (3) prison regulations; and (4) the testimony of the defendant.[86] The plaintiff was unable to rely on prior Eighth Circuit case law because the specific issue in question had not been previously addressed. As a result, the decision hinged on the extent to which the evidence cited by the plaintiff obviously put the defendant on notice that her actions would violate a clearly established Eighth Amendment right.

Rehearing the case en banc, the Eighth Circuit found the defendant violated clearly established law and denied the officer summary judgment based on qualified immunity.[87] The majority cited extensively to *Hope*—most notably for the proposition that "[t]he obvious cruelty inherent in this practice should have provided [the officer] with some notice that [her] alleged conduct violated [Nelson's] constitutional protection against cruel and unusual punishment."[88] The dissent (joined by five of the eleven judges) declined to acknowledge that *Hope* allowed for Section 1983 claims to proceed in obvious cases and contended, "The majority opinion falls far short of demonstrating Nelson sufficiently bore her burden to prove a reasonable prison guard would have understood the restraint of Nelson violated a clearly established constitutional right."[89] The close split between the judges, coupled with the majority's extensive reliance on *Hope*, suggests the court would have granted qualified immunity if the Supreme Court, in *Hope*, had not introduced the concept of an obvious case.

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84. *Id.*

85. *Id.* at 525.

86. *Id.* at 528–34.

87. *Id.* at 536.

88. *Id.* at 534 (first, third, and fourth alterations in original) (citing Hope v. Pelzer, 536 U.S. 730, 745 (2002)).

89. *Id.* at 537 (Riley, J., concurring in part and dissenting in part).

The majority opinion incorporates the concept of obviousness by allowing the plaintiff to demonstrate her right was clearly established based on a body of evidence that traditionally would be dismissed as inadequate to provide notice. The majority found, for example, that a partially vacated district court opinion from the D.C. Circuit provided fair warning to the defendant that her conduct violated clearly established law because the opinion previously decided the "precise issue under consideration."[90] Absent the concept of obviousness developed in *Hope*, it is likely that a vacated, extra-circuit decision would offer little support for the plaintiff in a qualified immunity analysis. As the dissent concluded, "one unchallenged portion of a vacated district court opinion from outside our circuit is not sufficient here to create a clearly established constitutional right."[91]

Similarly, the majority found that generally, rather than specifically, defined Eighth Amendment principles embodied in prior Supreme Court cases, namely *Hope v. Pelzer* and *Estelle v. Gamble*,[92] put the defendant on notice that her conduct was unconstitutional.[93] The majority reasoned that the official should have known restraining a prisoner under these circumstances would be unconstitutional because there was a "clear lack of an emergency situation" and "a risk of particular discomfort and humiliation."[94] The dissent, which declined to consider obviousness as a factor, argued that the Supreme Court cases were factually different and therefore that the general principles they articulated were inapplicable.[95]

Both the majority and dissent treated the prison regulations as valid and applicable sources of clearly established law but differed in their analysis of whether the regulations provided notice to the defendant. The majority determined the regulations further put the defendant on notice. By permitting restraints "*only* when circumstances require the protection of inmates, staff, or other individuals from potential harm or to deter the possibility of escape," the regulations notified the defendant that her conduct was illegal.[96] The dissent contended the regulations were too ambiguous to provide notice sufficient to defeat the grant of qualified immunity.[97]

Finally, the majority considered the defendant's testimony in which she conceded, "If you've got a very sickly old woman who's had three or four strokes, of course you don't want to put shackles on that inmate. That is just

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90. *Id.* at 532 (majority opinion).

91. *Id.* at 538 (Riley, J., concurring in part and dissenting in part).

92. 429 U.S. 97 (1976).

93. *See Nelson*, 583 F.3d at 532 ("The general responsibilities of state officers with regard to an inmate's medical needs were . . . clearly established . . . .").

94. *Id.* (quoting Hope v. Pelzer, 536 U.S. 730, 737–38 (2002)).

95. *Id.* at 539 (Riley, J., concurring in part and dissenting in part) ("Nelson was not being punished, was not made to suffer unnecessarily and wantonly, and was not deprived of basic necessities of life.").

96. *Id.* at 533 (majority opinion) (quoting Ark. Dep't of Corr. Admin. Reg. 403 § V (1992)).

97. *Id.* at 539 (Riley, J., concurring in part and dissenting in part).

common sense. I do the same thing with pregnant inmates."[98] The majority interpreted this as evidence that the defendant obviously and unreasonably decided to shackle the prisoner during late labor and birth.[99] The dissent viewed the officer's testimony as subjective evidence that should be ignored in determining what a "reasonable officer" would do under similar circumstances.[100]

Circuits, such as the Eleventh Circuit, that recognize that a right may be clearly established in obvious cases would be more likely to adopt the *Nelson* majority's reasoning and look at the totality of the evidence to conclude the law was clearly established at the time. In the Eleventh Circuit, assuming no precedent had previously decided the issue, the outcome would depend on whether the court found general constitutional provisions "so clear and . . . conduct so bad that case law is not needed to establish that the conduct cannot be lawful."[101] Based on this standard, which is derived from *Hope*, the Eleventh Circuit could also find the conduct in *Nelson* involved sufficiently obvious constitutional violations as to defeat a qualified immunity claim.[102] At the very least, the Eleventh Circuit standard would allow the plaintiff to present evidence and argue the defendant's conduct "obviously" violated clearly established law, even though she could not produce a substantial body of case law to support her claims.

In contrast, the Fifth Circuit's qualified immunity approach does not facilitate a discussion of obvious violations to establish that a reasonable public official had notice that an action would violate a constitutional right. To the extent a Fifth Circuit panel would consider obviousness in *Nelson*, it would do so in the context of determining whether the "risk was obvious," such that the conduct amounted to deliberate indifference.[103] In contrast, the *Nelson* majority, like the *Hope* Court, considered whether a combination of

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98. *Id.* at 534 (majority opinion).

99. *Id.*

100. *Id.* at 537 n.11 (Riley, J., concurring in part and dissenting in part) (emphasis omitted).

101. Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002).

102. This conclusion assumes the Eleventh Circuit would apply *Vinyard*'s three-step framework. *See supra* notes 56–61 and accompanying text. Not all Eleventh Circuit judges embraced *Vinyard*'s interpretation of *Hope*. *See* Richard B. Golden & Joseph L. Hubbard, Jr., *Section 1983 Qualified Immunity Defense:* Hope*'s Legacy, Neither Clear nor Established*, 29 AM. J. TRIAL ADVOC. 563, 589 (2006) (discussing the Eleventh Circuit's interpretation of *Hope* and how "[n]ot all judges on the Eleventh Circuit view *Hope* as creating a new category of notice"). But *Vinyard* has not been overturned or modified, and therefore it continues to provide controlling authority in the Eleventh Circuit.

103. *See supra* note 77 (discussing the limited application of *Hope* in Eighth Amendment claims). Moreover, this would likely not be helpful for Nelson. Given the Fifth Circuit's high burden to prove deliberate indifference, it probably would hold, as the Eighth Circuit panel did, that the officer did not act with deliberate indifference. Nelson v. Corr. Med. Servs., 533 F.3d 958, 963 (8th Cir. 2008), *vacated*, 583 F.3d 522 (8th Cir. 2009) (en banc); *see* Hernandez *ex rel.* Hernandez v. Tex. Dep't of Protective & Regulatory Servs., 380 F.3d 872, 882 (5th Cir. 2004) ("We begin by emphasizing that our court has interpreted the test of deliberate indifference as a significantly high burden for plaintiffs to overcome.").

nontraditional sources could make a violation so obvious that a Section 1983 claim should proceed. The Fifth Circuit requires plaintiffs to prove the defendant's conduct violated a clearly established right based only on binding precedent or a "persuasive consensus" of authority.[104] When conducting this analysis, the Fifth Circuit has demonstrated a propensity to analyze each piece of evidence individually rather than consider whether the totality of practice, including nonbinding cases or testimony, might prove an obvious violation and justify denial of qualified immunity. In *McClendon v. City of Columbia*,[105] for example, the Fifth Circuit found six other circuit court opinions addressing the issue in question inadequate to collectively establish a persuasive consensus and defeat a grant of qualified immunity.[106] This approach is similar to the analysis presented in the *Nelson* dissent and suggests the Fifth Circuit would likewise find the officer in *Nelson* entitled to qualified immunity.

Thus, because the Eighth and Eleventh Circuits accept that some degree of obviousness should be considered when analyzing the clearly-established-law requirement, the plaintiff in *Nelson* could prevail on her claim that shackling a prisoner's legs during the final stages of labor is a sufficiently obvious Eighth Amendment violation to overcome qualified immunity. In the Fifth Circuit, which does not allow for significant consideration of obvious violations of clearly established law, it is likely the court would bar the plaintiff from pursuing her claim.

III. Recent Developments: Does Obviousness Exist After *Ashcroft v. al-Kidd*?

Whether the Fifth Circuit recognizes obvious cases in the future depends in part on its interpretation of the recent Supreme Court case, *Ashcroft v. al-Kidd*. The Fifth Circuit suggested *al-Kidd* supports its restrictive approach to Section 1983 claims. In *Morgan v. Swanson*,[107] the court intimated that the concept of an obvious case may not "survive" *al-Kidd*, and by implication, that the Fifth Circuit's narrow interpretation of *Hope* was correct.[108]

In *al-Kidd*, the Supreme Court considered whether U.S. Attorney General John Ashcroft violated Abdullah al-Kidd's Fourth Amendment rights by detaining him under the federal material-witness statute.[109] Al-

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104. *See supra* note 42 and accompanying text (discussing the Fifth Circuit's approach to sources of clearly established law).

105. 305 F.3d 314 (5th Cir. 2002) (en banc) (per curiam).

106. *See supra* note 42 (analyzing *McClendon*).

107. 659 F.3d 359 (5th Cir. 2011) (en banc).

108. *See id.* at 373 ("[T]his case does not call on us to decide whether the Court's statements in *Hope* survive *al-Kidd*.... We leave for another day the question of whether and when a constitutional violation may be so 'obvious' that its illegality is clear from only a generalized statement of law.").

109. *al-Kidd*, 131 S. Ct. at 2079 (citing 18 U.S.C. § 3144).

Kidd, an American citizen with no outstanding charges against him, was apprehended to allegedly serve as a material witness in a visa-fraud trial.[110] Federal officials strip-searched al-Kidd several times, held him in a maximum-security facility for two weeks, and only allowed him to leave detention if he agreed to move to Nevada, live with his in-laws for a year, and limit his travel to four states.[111] Subsequently, al-Kidd lost the opportunity to study abroad, was separated from his wife, lost his job, and could not find steady employment.[112] The federal government never called al-Kidd as a witness in any criminal proceeding.[113]

The Ninth Circuit found the Attorney General's conduct violated the defendant's constitutional rights with sufficient clarity to defeat a grant of qualified immunity.[114] The Supreme Court reversed and unanimously granted the Attorney General qualified immunity because the law was not clearly established at the time of the violation.[115] While the *al-Kidd* Court did attempt to clarify the clearly-established-law analysis, the majority and concurring opinions did not, as the Fifth Circuit suggested, eliminate the concept of obvious cases. The majority, citing *Brosseau*, stated, "We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality."[116] The majority opinion also stated that "[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question *beyond debate*,"[117] and that in the absence of binding authority, courts must find a violation based on "a *robust* 'consensus of cases of persuasive authority.'"[118]

Applying these principles, the Court concluded that the evidence considered by the Ninth Circuit did not clearly establish the law at the time the defendant was detained.[119] The Ninth Circuit analysis had relied on a footnote from a Southern District of New York opinion, which explicitly warned the Attorney General that using the material-witness statute as a pretext to detain an individual would be unconstitutional.[120] Rejecting this reasoning and finding the footnote could not provide the defendant with sufficient notice of a clearly established right, Justice Scalia, writing for the Supreme Court, stated,

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110. al-Kidd v. Ashcroft, 580 F.3d 949, 952–53 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011).

111. *Id.* at 953.

112. *Id.* at 954.

113. *Id.*

114. *Id.* at 973.

115. *al-Kidd*, 131 S. Ct. at 2085; *see also id.* at 2085 (Kennedy, J., concurring) ("The Court's holding is limited to the arguments presented by the parties and leaves unresolved whether the Government's use of the Material Witness Statute in this case was unlawful.").

116. *Id.* at 2084 (majority opinion) (internal citation omitted).

117. *Id.* at 2083 (emphasis added).

118. *Id.* at 2084 (emphasis added) (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999)).

119. *Id.* at 2084–85.

120. al-Kidd v. Ashcroft, 580 F.3d 949, 972–73 (9th Cir. 2009) (citing United States v. Awadallah, 202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002)), *rev'd*, 131 S. Ct. 2074 (2011).

> We will indulge the assumption (though it does not seem to us realistic) that Justice Department lawyers bring to the Attorney General's personal attention all district judges' footnoted speculations that boldly "call him out by name." On that assumption, would it prove that for him (and for him only?) it became clearly established that pretextual use of the material-witness statute rendered the arrest unconstitutional? An extraordinary proposition. Even a district judge's *ipse dixit* of a holding is not "controlling authority" in any jurisdiction, much less in the entire United States; and his *ipse dixit* of a footnoted dictum falls far short of what is necessary absent controlling authority: a robust "consensus of cases of persuasive authority."[121]

Similarly, the Court dismissed the Ninth Circuit's reliance on the general purposes and history of the Fourth Amendment, reasoning, "Ashcroft must be forgiven for missing the parallel, which escapes us as well."[122]

Although *al-Kidd* requires the Ninth Circuit to rethink its approach to sources of clearly established law,[123] the decision falls short of eliminating the concept of obvious cases, as suggested by the Fifth Circuit. Given that the Ninth Circuit extensively quoted *Hope* in denying qualified immunity for the Attorney General, it is notable that the *al-Kidd* opinion never cited the case. While the Fifth Circuit suggested this omission means the Supreme Court may no longer recognize the concept of an obvious case,[124] the absence of citations to *Hope* is better explained by Justice Kennedy's concurrence, which emphasizes that the *al-Kidd* holding reflects the uniquely national role of the Attorney General[125] and national security concerns presented in the case.[126] Consistent with *Hope*, the concurrence also notes that the analysis of qualified immunity for officials performing a single function within one jurisdiction would be different from the analysis applicable to the Attorney General.[127]

Following *al-Kidd*, moreover, several circuit courts denied qualified immunity when a defendant's conduct constituted an obvious violation of

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121. *al-Kidd*, 131 S. Ct. at 2084 (quoting *Wilson*, 526 U.S. at 617).

122. *Id.*

123. *See* Mattos v. Agarano, 661 F.3d 433, 442 (9th Cir. 2011) (accepting the "beyond debate" language and declaring accordingly that "*Graham*'s general excessive force standard cannot always, alone, provide fair notice to every reasonable law enforcement officer that his or her conduct is unconstitutional").

124. *See supra* notes 107–08 and accompanying text.

125. *See al-Kidd*, 131 S. Ct. at 2086 (Kennedy, J., concurring) ("The fact that the Attorney General holds a high office in the Government must inform what law is clearly established for the purposes of this case.").

126. *See id.* at 2087 ("[N]ationwide security operations should not have to grind to a halt even when an appellate court finds those operations unconstitutional. The doctrine of qualified immunity does not so constrain national officeholders entrusted with urgent responsibilities.").

127. *Id.* at 2086 (Kennedy, J., concurring) ("They reasonably can anticipate when their conduct may give rise to liability for damages and so are expected to adjust their behavior in accordance with local precedent." (internal quotation marks omitted)).

clearly established law.[128] In *Schneyder v. Smith*,[129] the Third Circuit denied a prosecutor qualified immunity based on the "self-evident wrongfulness" of her conduct.[130] The issue in *Schneyder* was whether a prosecutor violated a plaintiff's clearly established Fourth Amendment right by detaining her for almost two months without notifying the judge and on the pretext that she would be a material witness in a future trial.[131] Holding that "[n]o reasonable prosecutor would think that she could indefinitely detain an innocent witness pending trial without obtaining reauthorization," the Third Circuit reasoned that "this is one of those exceedingly rare cases in which the existence of the plaintiff's constitutional right is so manifest that it is clearly established by broad rules and general principles."[132] By finding an obvious violation in a case similar to *al-Kidd*, *Schneyder* indicates *al-Kidd* should not be read to eliminate the consideration of obviousness in Section 1983 litigation.

IV. Conclusion

Historically, case law attempted to balance the need for vindicating civil rights violations through Section 1983 litigation with the need to protect public officials from unreasonable lawsuits that interfere with their duties and responsibilities. Often the interests of courts and public officials aligned, as the former adopted restrictive approaches favoring defendants, which led to early dismissal of litigation. But, as reflected by *Hope*, qualified immunity jurisprudence also developed out of concerns that existing standards steered courts to grant immunity even when public-official conduct was manifestly improper.

As this Note shows, the development of an obviousness factor for evaluating whether a defendant violated a clearly established constitutional right helps address this problem. Considering the obviousness of a violation refocuses the inquiry on notice and enables plaintiffs to establish the law by reference to more general rules, nonbinding case law, and regulations. While *al-Kidd* suggested these sources cannot provide notice to national actors, like the U.S. Attorney General, they can apply to more local actors, such as the prison officer in *Nelson* and the prosecutor in *Schneyder*.

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128. *E.g.*, Vance v. Rumsfeld, 653 F.3d 591, 611 (7th Cir. 2011), *vacated, reh'g granted*; Schneyder v. Smith, 653 F.3d 313, 331 (3d Cir. 2011). The Seventh Circuit may revisit the issue when it rehears *Vance* en banc. However, based on the briefing, the issue may not arise because *Vance* implicates other national security issues, which could dispose of the claims without reaching the clearly-established-law requirement. *See* Brief for Former Secretaries of Defense and Members of the Joint Chiefs of Staff as Amici Curiae Supporting Petitioner at 12–13, *Vance*, 653 F.3d 591 (Nos. 10-1687, 10-2442), 2011 WL 4542829, at *12 (arguing that potential liability for U.S. officials could compromise their decision-making abilities and thus harm national security).

129. 653 F.3d 313 (3d Cir. 2011).

130. *Id.* at 331.

131. *Id.* at 318.

132. *Id.* at 330–31.

Recent changes to the qualified immunity doctrine will likely stimulate further debate about the consideration of obviousness in Section 1983 claims. Ironically, *Morgan*'s suggestion that *Hope* can no longer stand for considering obviousness represents the most definitive recognition by the Fifth Circuit that an obvious case can exist.[133] In other circuits, adopting *al-Kidd*'s more restrictive approach to sources of clearly established law could compel courts to rely more on obviousness in order to hold defendants liable for outrageous conduct, even in the absence of binding case law.

Likewise, changes to the order of analysis in qualified immunity could prompt circuits to decide cases by relying on obviousness to conclude the right was clearly established at the time of the violation. In *Pearson v. Callahan*,[134] the Supreme Court made it discretionary for courts to bypass the constitutional issue in Section 1983 litigation and dismiss claims based on a lack of clearly established law.[135] This change raised concerns about whether courts would produce substantially less rights-defining litigation—a problem for future plaintiffs hoping to rely on case law to prove clearly established law.[136] While these concerns have yet to manifest,[137] the reasoning in Justice Kennedy's dissent in *Camreta v. Greene*,[138] which was supported by Justices Scalia and Thomas, suggests the Court might adopt a stricter approach that would prevent lower courts from considering the constitutional issue in cases dismissed for a lack of clearly established law.[139] Adopting this position could lead to substantially less rights-defining litigation and consequently compel courts to deny qualified immunity on the basis that the conduct at issue presented an obvious violation of a constitutional right.

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133. Judge Dennis specially concurred in order to debate Judge Benavides's assertions about *Hope*. *See* Morgan v. Swanson, 659 F.3d 359, 393 (5th Cir. 2011) (Dennis, J., concurring) ("I believe that certain official conduct may so obviously fall within the prohibition of a general or abstract rule of the Constitution that any reasonable official would have 'fair warning' that his actions are unconstitutional . . . .").

134. 555 U.S. 223, 231–32 (2009).

135. *Id.* at 236.

136. *See The Supreme Court—Leading Cases*, 123 HARV. L. REV. 153, 282 (2009) ("The provision of legal clarity is welcome and necessary . . . . Dismissing challenges early in litigation on the ground that a claimed right was not clearly established does little to help parties structure future conduct." (footnotes omitted)).

137. In fact, scholars have used empirical analysis to show that courts continue to address constitutional issues in appropriate cases. *See generally, e.g.*, Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667 (2009) (exploring the role of the qualified immunity doctrine on the promulgation of constitutional law holdings); Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623 (2011) (analyzing how circuit courts apply the qualified immunity analysis set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), after *Pearson*, 555 U.S. 223).

138. 131 S. Ct. 2020 (2011).

139. *See id.* at 2043 (Kennedy, J., dissenting) ("If today's decision proves to be more than an isolated anomaly, the Court might find it necessary to reconsider its special permission that the Courts of Appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect.").

If courts continue to recognize the existence of obvious cases, as this Note argues they should, they will need to develop a workable standard for what constitutes an obvious case. Difficulties that may arise in trying to define an obviousness standard should not prevent courts from recognizing the need for obviousness as a factor in the clearly-established-law analysis. As the Fifth Circuit approach to clearly established law demonstrates, failure to adequately allow for the consideration of obviousness can lead to the denial of qualified immunity even when a range of sources indicates the constitutional violation should have been apparent to any reasonable official. Given the importance of obviousness in cases where no clear precedent exists, courts should incorporate the concept into the clearly-established-law analysis.

—*Amelia A. Friedman*

Using Financial Incentives to Achieve the Normative Goals of the FMLA*

> *By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for* all *eligible employees, irrespective of gender, the Family and Medical Leave Act attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.*
>
> —Chief Justice William H. Rehnquist, Majority Opinion, *Nevada Department of Human Resources v. Hibbs*[1]

I. Introduction

Ten years after Congress passed the Family and Medical Leave Act (FMLA) of 1993,[2] the Supreme Court in *Nevada Department of Human Resources v. Hibbs* revisited one of the Act's primary aims: the production of a workforce that does not discriminate against women on the basis of presumed obligations to private-sphere responsibilities. To achieve this goal, the drafters of the FMLA sought to adjust the baseline of worker expectations to produce a norm that family leave is both socially acceptable and consistent with workplace standards. Unfortunately, as the *Hibbs* decision reflects, such gendered stereotyping and family-*un*friendly workplace norms persist in the American workforce. The Act has done little to change the gendered patterns of leave taking for family-care purposes, and social research indicates that entrenched gender-role norms perpetuate patterns in which men devote time to work while women take up responsibilities for family health and functioning. In light of the Court's recent reflections in *Hibbs*, as women still do take on the majority of family responsibilities, has the FMLA made enough progress toward reducing employers' incentives to

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* I want to thank my mother, Monica Sellers, whose incredible work as a mother and a professional showed me the importance and challenge of finding balance for working parents. I also want to thank Professor Joseph Fishkin for his guidance in developing this Note and the members of the *Texas Law Review* for their efforts in preparing it for publication.

1. 538 U.S. 721, 737 (2003).

2. Family and Medical Leave Act (FMLA) of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601–2654 (2006 & Supp. III 2010)).

discriminate based on stereotyped expectations of women's attendance, productivity, or commitment? To make the FMLA work as envisioned, we must first see some necessary change in the social underpinnings upon which it is built. The gender-neutral guarantees in the FMLA cannot manufacture equality. Instead, they will only reflect equality when applied to a society that is willing to embrace and encourage that equality. I argue in this Note that such social aims are not outside the reach of the law. To the contrary, the law must endeavor to remedy these underlying social problems, lest statutes like the FMLA become hollow promises.

When the FMLA went into effect, it became our nation's first federal family leave statute.[3] The Act entitles employees of qualifying employers[4] to take up to twelve weeks of unpaid leave per twelve-month period to care for a newborn or newly adopted child; to care for a spouse, child, or parent who is suffering from a serious medical condition; to receive treatment for the employee's own serious medical condition; or to respond to exigencies created by a family member's active military duty.[5]

The FMLA was enacted, at least in part, to produce antidiscriminatory effects and to reduce gender inequality in certain workplaces. Although its major shortcomings in achieving those goals quickly became apparent, nearly twenty years later the statutory scheme still stands without major amendment.[6] Meanwhile, the social problems it aimed to remedy are ever present. Of primary significance, women still take FMLA caretaking leave much more frequently than men do, and as a result, women continue to face stereotypes that hinder their professional advancement and keep men in superior and more stable positions in the workforce. The FMLA may in some cases even function to entrench these differences by recreating and validating social and market incentives for women to shoulder the burden of family responsibilities.

This Note first chronicles the history and effects of the FMLA. It then proposes measures to increase its effectiveness as a vehicle for social change and as a mechanism for reducing stereotyping and discrimination in employment. Part II details the social and legislative history that informed the Act's passage. This history is helpful in determining the proper goals and scope of the Act, as Congress's original priorities provide a good foundation

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3. CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE 4 (2010).

4. To fall under the purview of the FMLA, private employers must maintain fifty or more employees for twenty or more weeks of the calendar year. Family and Medical Leave Act (FMLA) of 1993 § 101(4), 29 U.S.C. § 2611(4)(A)(i) (2006). All public employers are bound by the FMLA without regard to the number of people they employ. *Id.* § 101(4)(A)(iii), 29 U.S.C. § 2611(4)(A)(iii).

5. *Id.* § 102(a)(1), 29 U.S.C. § 2612(a)(1) (2006 & Supp. III 2010).

6. Congress amended the FMLA in 2008 only to add provisions that extended leave to employees responding to exigencies created by a family member's active military duty. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 585(a), 122 Stat. 3, 128–31 (codified at 29 U.S.C. §§ 2611–2614 (Supp. III 2010)).

on which to develop a reform agenda. Part III analyzes the effects of the FMLA on workplace discrimination and gender equality, and reveals some particular areas of concern. Part IV investigates some of the measures that have been proposed to improve the FMLA, including attempts at legislative action and proposals from legal scholars and social scientists. Part V introduces several proposals to use tax incentives in conjunction with reform to the FMLA itself to produce the normative social change envisioned when the FMLA was enacted. Part VI concludes.

II. Historical Foundations of the FMLA

Beginning in the 1950s, women entered the workforce in increasing numbers.[7] They did so in a social, political, and economic context that positioned men—specifically, married men with supportive wives organizing their private obligations—as "ideal workers."[8] Although women were taking on additional responsibilities in the public sphere, the division of labor in the private sphere underwent few changes.[9] Until the feminist movement gained momentum in the 1970s and 1980s, women were typically subject to outright discrimination and disparate treatment.[10] Even as the social acceptability of outright disparate treatment diminished as a result of feminist gains, women continued to be disadvantaged by persistent stereotypes of women as caregivers, by real obligations to their families, and by employers' unwillingness to modify enduring and outmoded workplace norms.[11] Women's responsibilities for homemaking and family care were not distributed to their spouses, and the responsibilities produced unique tensions between work and family obligations.[12] Women required more time off from work than their male counterparts, causing women to suffer in terms of job security, tracking to less desirable positions and discrimination in hiring and advancement.[13] Although the feminist movement was able to achieve

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7. Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 115 (1998).

8. JOAN WILLIAMS, *UN*BENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 19–30 (2000) (taking stock of commonly held notions that employers are entitled "to demand an ideal worker with immunity from family work"); *see also* ALBISTON, *supra* note 3, at 5 ("With regard to gender, that [historical] model of work and social life had at its center the family wage ideal, which presumes that the most common and most desirable family configuration is the male breadwinner/stay-at-home housewife model.").

9. WILLIAMS, *supra* note 8, at 27.

10. ALBISTON, *supra* note 3, at 8.

11. *Id.* at 8–10.

12. *See* Young, *supra* note 7, at 115 (citing research that women who became employed reduced the amount of time spent weekly on housework but that their spouses' domestic workload did not increase, and explaining that society has expected women to choose between work and family obligations).

13. *See infra* note 48 and accompanying text.

significant gains using Title VII antidiscrimination suits,[14] family responsibilities continued to weigh unequally on female workers to the detriment of their professional achievement.

These disparities were met with strong critiques from legal thinkers and social scientists that recommended fairer leave policies reflecting the new division of labor between the public and private spheres. In response to these critiques, some states enacted family leave policies aimed at increasing gender equality and reducing discrimination against working parents—particularly women.[15] By 1993, thirty-four states offered family leave policies, although the scope of benefits varied widely across jurisdictions.[16] States chose to provide leave benefits for a variety of activities, including personal illness, family caretaking, childbirth or adoption, and even parent–teacher conferences.[17] Policies also showed wide variance in the duration allowed for leave and in the standards for eligibility.[18] Only Massachusetts, in formulating its family leave policy, considered or included wage-replacement programs.[19] Some employers also enacted family leave policies, although leave was often offered to women only.[20] These policies, viewed by many as paternalistic, were subject to attack under Title VII and were viewed as inconsistent with the equal-treatment underpinnings of antidiscrimination law.[21]

Congress first took up the issue of caretaking leave when it considered the Parental and Disability Leave Act (PDLA) of 1985.[22] The original draft

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14. *See* Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1357 (2008) (finding that FRD litigation under Title VII has proven useful for alleviating workplace discrimination, both for individual plaintiffs and employees as a whole, as the success of the lawsuits changes employer practices).

15. *See* STEVEN K. WISENSALE, FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA 117–18 (2001) (discussing states' responses to the "political momentum" for family-friendly policies). In 1985, the few existing policies were limited to pregnancy-related disability and paid little attention to caretaking responsibilities. *Id.* at 119. Intergenerational caretaking leave was not introduced in the states until Connecticut passed a law protecting family-care leave in 1987. *Id.* at 123. Between 1987 and 1990, ten states proposed legislation that confined leave benefits solely to women. *Id.* at 126.

16. *Id.* at 118.

17. *Id.* at 118–19.

18. *Id.*

19. *Id.* at 124–25.

20. *See* Young, *supra* note 7, at 116 (discussing a pre-FMLA survey, which revealed that 37% of employers responding to the survey offered parental leave to men, while 52% offered parental leave to women).

21. *See* Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work–Family Conflict*, 110 COLUM. L. REV. 1, 42–44 (2010) (arguing that in passing the FMLA, Congress was influenced by the belief that federal parental-leave laws had to be gender neutral to comply with Title VII and that the Supreme Court cemented this notion when it "upheld the FMLA as a valid exercise of Congress's Fourteenth Amendment Section 5 power to enforce the Equal Protection Clause").

22. THE FAMILY AND MEDICAL LEAVE ACT 4 (Michael J. Ossip et al. eds., 2006).

of the Act was spearheaded by a coalition of feminist activists who viewed gender-neutral policies embracing both sexes' right to leave as essential to securing significant long-term benefits without the threat of discriminatory application.[23] The PDLA, had it become law in 1985, would have provided at least eighteen weeks of unpaid leave for the birth, adoption, or serious illness of a child, and an additional twenty-six weeks of unpaid disability leave for nonoccupational medical reasons.[24] By combining family and medical leave to encompass situations applicable to nearly every worker, early proponents believed the bill would generate broader support and avoid the challenges associated with "special treatment."[25] The PDLA would have contained additional measures to prevent employers' retaliation against employees who had taken leave under the statute.[26] Over the next eight years, the PDLA was modified, amended, filibustered, vetoed, and renamed.[27]

By the time the FMLA became law in 1993, its protections were significantly circumscribed and its benefits were drastically reduced from its 1985 predecessor.[28] After the Act was vetoed for a second time by President Bush in 1992, it was reintroduced and President Clinton ultimately signed it into law the following year.[29] In a statement accompanying the 1993 Act, the House Report situated the FMLA among other minimum-labor-standard laws, such as "the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment."[30] The House used this analogy to note that the FMLA was to be a vehicle for societal change and to "take broad societal concerns out of the competitive process" of employers.[31] Congress made a judgment that employers could not or would not, if left to their own devices, self-regulate to produce equality or equal opportunity. Leaving these decisions to employers created a system that could not be fair to those also performing the essential social role of family caretaking.

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23. *See* RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 22 (1995) ("[Donna] Lenhoff [of the Women's Legal Defense Fund] argued [that] a law protecting maternity alone might not be the best policy. It might be protective, . . . but it would be the opposite of empowering. And in the long run, it could prove counterproductive for women.").

24. THE FAMILY AND MEDICAL LEAVE ACT, *supra* note 22, at 4.

25. ELVING, *supra* note 23, at 39.

26. THE FAMILY AND MEDICAL LEAVE ACT, *supra* note 22, at 5.

27. *Id.* at 6–16. For additional discussion of the legislative history, see Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 J. GENDER SOC. POL'Y & L. 459, 469–74 (2008).

28. *See generally* ELVING, *supra* note 23 (discussing the significant compromises that bill proponents made to achieve passage of the FMLA). The final manifestation of the FMLA resulted from a combination of state initiatives in Minnesota, Oregon, and Rhode Island. WISENSALE, *supra* note 15, at 124.

29. H.R. REP. NO. 103-8, pt. 1, at 21 (1993); THE FAMILY AND MEDICAL LEAVE ACT, *supra* note 22, at 3.

30. H.R. REP. NO. 103-8, pt. 1, at 21–22.

31. *Id.* at 22.

Although employers have a narrow, self-serving focus, Congress aimed to make decisions *for* employers that it believed would benefit society.

Those social aims are reflected in the text of the FMLA, which aims to minimize "employment discrimination on the basis of sex by ensuring generally that leave is available . . . for compelling family reasons, on a gender-neutral basis"[32] and "to promote the goal of equal employment opportunity for women and men."[33] Clearly, then, Congress sought some amount of social change as a result of the FMLA. The Act—produced in light of changing social values, altered workplace demographics, and feminist calls for action—should not be viewed as successful unless it achieves those objectives.

III. Observed Effects Post-passage

Immediately after the Act's passage, Congress was primarily concerned with the Act's effects on employers and employers' satisfaction with the law.[34] Meanwhile, social scientists and legal scholars began to document the failings of the Act. While heralded for its symbolic value,[35] most critics noted that the Act did little to change existing patterns of leave taking, with women still acting as primary caretakers and, while able to return to work, suffering certain stigmatic effects associated with leave taking and with gendered stereotypes of family responsibilities.[36]

As a primary observation, Professor Michael Selmi wrote that "the FMLA largely replicated leave that was already being offered."[37] At best, he suggested, the Act provided "some additional unpaid sick leave."[38] Just over five years after the passage of the Act, Professor Selmi pointed to data indicating that FMLA leave had been infrequently used, even when employees took time off for reasons that would have qualified for such leave.[39] Moreover, the majority of FMLA leave takers used the law to take additional personal-care time off, as opposed to using it for family-caretaking

32. Family and Medical Leave Act (FMLA) of 1993, § 2(b)(4), 29 U.S.C. § 2601(b)(4) (2006).

33. *Id.* § 2(b)(5), 29 U.S.C. § 2601(b)(5).

34. *See generally* 140 CONG. REC. H2360-01 (1994), 1994 WL 130158 (statement of Rep. Ford) (introducing into the *Congressional Record* a *New York Times* article that "surveyed many in the human resources field and concluded that the supporters of the [FMLA] were right and that the opponents were not").

35. *See, e.g.*, Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 410 (1999) ("Certainly, one can argue for the importance of having federal legislation as a means of advancing the issue or as a first step in trying to bring family leave into the workplace.").

36. *E.g.*, ALBISTON, *supra* note 3, at x–xi.

37. Selmi, *supra* note 35, at 397.

38. *Id.* at 407.

39. *Id.* at 408.

purposes.[40] Beyond these statistical observations, Professor Selmi argued that the FMLA is a poor vehicle for remedying gendered divisions in the labor market because it "does little more than recreate the preexisting market incentives that apply to questions of childrearing."[41] For example, women—who on average earn less than men—are still disproportionately incentivized to take leave because, when wage replacement is unavailable, the lower wage earner in a couple is the logical choice for leave taking.[42] Essentially, the FMLA's provisions have little effect in instituting social change.

In addition to leaving intact the market-based structures that produced gendered imbalances in leave taking, the FMLA has been criticized for its lack of impact on gendered stereotyping. Professor Deborah Anthony took aim at Congress's apparent naïveté in presuming that gender-neutral legislative action could make significant progess in changing social norms, writing that "changing the law merely masks . . . social stereotypes, assumptions, and expectations of women's caregiving roles and does not repair the problem."[43] At the heart of this analysis is the proposition that creating benefits in the public sphere is only effective if necessary change occurs in the private social structure.[44] Professor Catherine Albiston described the relationship between leave and social norms in writing about one female leave taker: "Her problems with leave arose in part because gendered assumptions about work and family gave meaning to her use of leave."[45] In this case, social norms about work and family dictate that women take on the role of primary caregiver, and given that the law gives both men and women a choice to take leave, the law does little to subvert existing social structures that inform those choices.

In the years after the passage of the FMLA, social science research has confirmed the continuing patterns of gendered leave taking. A 2005 study indicated that nearly 60% of individuals taking FMLA leave were women.[46] The division of responsibilities becomes starker when considering that nearly 60% of men who take leave do so to care for themselves, not for family members.[47] In contrast, "[w]omen are twice as likely as men to take leave to care for their children or parents, and four times as likely to take leave to care

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40. Deanna R. Gelak, *The Family and Medical Leave Act: A Case for Reform*, *in* TIME OFF TO REFLECT ON THE FAMILY AND MEDICAL LEAVE ACT 29, 30 (Mark G. Ellis & Daren Bakst eds., 2001); Selmi, *supra* note 35, at 408.

41. Selmi, *supra* note 35, at 397.

42. ALBISTON, *supra* note 3, at 10.

43. Anthony, *supra* note 27, at 473.

44. *See id.* ("A law that refuses to take gender into account is effective only if the private social structure does not *itself* perpetuate women's inequality . . . .").

45. ALBISTON, *supra* note 3, at 169.

46. *Roundtable Discussion: The Family and Medical Leave Act: A Dozen Years of Experience: Hearing Before S. Comm. on Health, Educ., Labor & Pensions*, 109th Cong. 8 (2005) (statement of Debra Ness, President, National Partnership for Women & Families).

47. *Id.* at 8.

for another relative's health."[48] Men and women both report that workplace norms discourage men from taking leave,[49] and indeed some employers report that it is never acceptable for men to take family leave.[50]

It appears that leave taking continues to be associated with lack of commitment to employment responsibilities; it has not become the norm, and those who take leave report feeling disadvantaged upon their return to work.[51] The traditional model of the "ideal worker" remains in place and continues to disadvantage women and men who seek both to work and to maintain a healthy family life.[52] Despite the existence of the FMLA and its protections, workers continue to experience real pressures to avoid family leave at all costs, and when such leave becomes necessary, social standards and stereotypes dictate that women, and not men, take leave.[53]

Hibbs reflects these enduring stereotypes; the case was about a male worker who faced challenges in securing family leave despite the FMLA guarantees.[54] The plaintiff in this case sought leave to care for his wife, who had been badly injured in an automobile accident.[55] In upholding Congress's extension of FMLA liability to public employers, the Court noted that "[b]ecause employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave," leading to discrimination that was "difficult to detect on a case-by-case basis."[56] However, more than ten years after the FMLA was enacted, *Hibbs* and other similar cases demonstrate that family leave remains a battleground for gender discrimination, and the growing number of suits by male employees seeking to secure family leave benefits reveals the resilience of the very discriminatory patterns the FMLA intended to address.[57]

IV. Survey of Proposed Changes

Changes to the FMLA have been proposed formally in Congress and informally through academic discourse and extralegal calls for action. Existing proposals run the gamut and have varying aims. However, because this Note focuses primarily on the issue of rectifying gender imbalances in

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48. Anthony, *supra* note 27, at 480.

49. ALBISTON, *supra* note 3, at 169.

50. Young, *supra* note 7, at 117.

51. *See* ALBISTON, *supra* note 3, at 167 ("[M]any women found that taking leave changed perceptions of them at work because it seemed to signal that they were no longer committed to their jobs.").

52. *See supra* note 8 and accompanying text.

53. *See id.* at 174 (discussing the norms that dictate that women prioritize motherhood and men prioritize work outside the home).

54. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 725 (2003).

55. *Id.*

56. *Id.* at 736.

57. For another prominent case brought by a male employee seeking full FMLA benefits, see generally *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001).

family leave taking, discussion in this part is limited to reforms that address this problem. Among the more salient proposals are calls for creating a system of paid leave, imposing mandatory leave for fathers, rethinking the gender neutrality of the FMLA, giving federal contract incentives to employers with gender-equal leave statistics, and creating tax incentives for FMLA promotion.

A. Paid Leave

A common refrain, dating back to the initial adoption of the FMLA, has been that providing paid leave will rectify many of the shortcomings of the Act and of family leave policy writ large.[58] Indeed, paid leave was part of the earliest discussions of a federal family leave act.[59] Providing paid leave would reduce economic incentives for lower-wage-earning women to take leave instead of higher-wage-earning men because the financial impact of the leave period would become less significant.[60] Couples would be afforded a much greater amount of financial flexibility, even if wage replacement did not cover the entire amount of the leave taker's salary.[61]

Of course, opposition to these proposals often springs from concern about how paid leave will be financed.[62] One suggestion is to create a payroll tax as opposed to requiring employers to fund extended family leaves.[63] Indeed, almost all pragmatic proponents of paid leave recognize that employer-funded FMLA leave is unlikely to be successful for a number of reasons, including employer resistance and social-policy concerns.[64]

Professor Suk argues that the legislative combination of family leave and personal sick leave has hobbled the potential efficacy of family leave legislation, particularly in terms of achieving a paid family leave statute. Although employers frequently oppose expansion of the Act, their primary concerns are the costs they would incur.[65] Notably, however, personal sick leave accounts for far more financial loss to employers than does family

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58. For an early scholarly proposal for paid leave, see generally Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can The United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 COMP. LAB. L.J. 373 (1996).

59. ELVING, *supra* note 23, at 27.

60. Young, *supra* note 7, at 154.

61. *See id.* ("Wage replacement should be at a level sufficient to remove the financial disincentives for leave-taking by men and by the working class.").

62. Indeed, Selmi describes offering paid leave as "politically impractical." Selmi, *supra* note 35, at 410.

63. Young, *supra* note 7, at 156.

64. *See, e.g.*, *id.* (discussing the tension between the idea that paid parental leave operates for the benefit of society in general—meaning that the burden should be shouldered broadly and not isolated to individual employers—and the potential for discriminatory effects if women are presumed to be more expensive to hire).

65. *See* Suk, *supra* note 21, at 19 ("It appears that employers' most serious complaint about FMLA arises in opposition to intermittent leave, most often to care for an employee's own illness, rather than to care for babies or other family members." (footnote omitted)).

leave.[66] The majority of FMLA leave is taken for personal illness, which increases employer cost due to its unpredictability and intermittence, whereas family leave is often anticipated and planned.[67] Employers also express concerns that the FMLA is used for fraudulent and unnecessary leave, and they advance these claims to oppose expansion of the statute's guarantees.[68] However, personal disability is a more fertile ground for fraud than the birth or adoption of a child, which is difficult to falsify.[69]

California is the only state that has introduced paid leave as a standard for FMLA-type workplace leave, although over half of the states have considered paid-leave legislation.[70] California adopted its policy in 2002 in response to a standing invitation from the Clinton Administration for states to use unemployment insurance to fund family-care leave.[71] California funds its program through its State Disability Insurance Program, which is financed entirely by employee contributions; employers are under no obligation to contribute to the fund.[72] The policy offers up to six weeks of paid leave to care for a newborn or newly adopted child, or to care for a seriously ill family member.[73] Qualifying leave takers receive as much as 55% of their salary for the six-week period at a cost of about $3 per month to the average worker paying into the system.[74]

The results of California's program indicate that paid leave alone may not be sufficient to produce even patterns of leave taking between genders and suggest that the norm remains that women are to take on primary-caretaker roles. However, while early results created fears that the law would have few effects on the gender balance of leave taking, recent studies are more promising in that respect. One year after the statute went into effect, statistics showed that 88% of program participants took leave to care for a newborn; more than 80% of those individuals were women.[75] Of the remaining 12% of participants who took family-care leave, 70% were women.[76] Recent research, however, shows that men in California are now taking paid family leave at higher rates than they were in 2005 and that more

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66. *Id.* at 19–20.

67. *Id.*

68. *Id.* at 21.

69. *Id.*

70. Steven K. Wisensale, *California's Paid Leave Law: A Model for Other States?*, *in* FAMILIES AND SOCIAL POLICY: NATIONAL AND INTERNATIONAL PERSPECTIVES 177, 183 (Linda Haas & Steven K. Wisensale eds., 2006).

71. *Id.* at 181–83.

72. *Id.* at 184.

73. *Id.* at 183.

74. *Id.* Payouts are subject to a weekly cap, adjusted annually according to California's average weekly wage. *Id.*

75. *Id.* at 188.

76. *Id.*

men are taking leave to bond with their children.[77] Employers report that men are also now taking longer family leaves than before the passage of the law.[78] Researchers have suggested that "[p]erhaps this is because of the availability of substantial wage replacement" or because "the fact that the benefits are part of a state-sponsored program . . . makes using it more legitimate in the eyes of men, and in the eyes of the employers they work for."[79] This "legitimacy" points to adjustments in norms about the propriety of leave taking and the appropriate member of the household to do so. Nevertheless, there have been no significant increases in men's participation in family-care (i.e., nonbonding) leave, and as of 2009, women still comprised three-quarters of bonding leave takers.[80] Although paid leave appears to have contributed to some norm changing, simply offering paid leave looks unlikely to resolve gender imbalances.

Paid-leave amendments and initiatives have appeared before Congress regularly in the years since the FMLA passed but have found no success. These measures include the Family Income to Respond to Significant Transitions Act[81] and the Federal Employees Paid Parental Leave Act of 2009.[82]

B. Mandatory Leave

A more radical proposition to reduce gendered associations with family care is to force men and women to take leave.[83] Mandatory leave would clearly reduce gender-based disparities in leave taking, but other benefits have also been suggested. These benefits include forcing employers to fully evaluate the costs and benefits of leave policies and providing men a meaningful opportunity to choose primary parenting.[84] If both sexes took family leave, employers' tendency to adopt stereotypes about the balance of caretaking responsibilities would be reduced, and it would be less sensible for employers to engage in statistical discrimination against women based on presumptions about leave taking.[85] Mandating leave could also help change

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77. EILEEN APPELBAUM & RUTH MILKMAN, LEAVES THAT PAY: EMPLOYER AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA 5 (2011), *available at* http://www.paidfamilyleave.org/pdf/leaves_that_pay.pdf.

78. *Id.* at 18.

79. *Id.* at 17.

80. *Id.* at 18 fig.3.

81. Family Income to Respond to Significant Transitions Act, H.R. 2339, 111th Cong. (2009).

82. Federal Employees Paid Parental Leave Act of 2009, S. 354, 111th Cong. (2009); Federal Employees Paid Parental Leave Act of 2009, H.R. 626, 111th Cong. (2009).

83. *E.g.*, Iman Syeda Ali, *Bringing Down the "Maternal Wall": Reforming the FMLA to Provide Equal Employment Opportunities for Caregivers*, 27 LAW & INEQ. 181, 205–06 (2009); Selmi, *supra* note 35, at 410–12.

84. Selmi, *supra* note 35, at 411.

85. *See* Ali, *supra* note 83, at 206 ("The absence of paid leave has . . . prevented the Act from changing social stereotypes regarding women and motherhood. Without mandating paid leave,

social patterning as men grow accustomed to sharing primary-caretaking roles and begin to seek them out in a context where work and family could more easily coincide.

These policies are in effect in several European countries and have been positively evaluated by some American scholars.[86] However, as is discussed in more detail in the following subpart, mandatory leave is often granted in conjunction with policies that do not assign leave benefits evenly between the genders and that are built on stereotypical, norm-perpetuating ideas of the balance of family responsibilities.

Given U.S. courts' reception of mandatory-leave policies in the past, it seems unlikely that these types of programs would find success from a pragmatic or constitutional standpoint. In *Cleveland Board of Education v. LaFleur*,[87] the Supreme Court invalidated on due process grounds an employer's policy mandating leave for pregnant employees.[88] Although the leave in question was unpaid, it is probable that the Court's constitutional concerns would have persisted even if the employer had compensated its pregnant employees during the time they were prohibited from working.[89] Although the employer-mandated leave in *LaFleur* only applied to women, it seems likely that due process concerns weighing against involuntary child-care leave would prevail regardless of the gender of the leave taker. From a pragmatic standpoint, employment interests would be almost certain to vehemently and persuasively oppose legislation *requiring* their workers to reduce their own productivity.

C. Rethinking Gender Neutrality

There has been significant debate over the effects of gender neutrality on the successes and failures of the FMLA. Some have suggested that for the FMLA to provide real social benefits in terms of reducing conflict between work and family, legislators should abandon gender-neutral provisions in favor of guarantees that take into consideration the gendered patterns of leave taking that exist in the workforce.[90] The gender neutrality of the FMLA developed from already-existing methods of securing leave for women and from the Title VII framework used to achieve those gains.[91] Early proponents of federal family leave also saw gender neutrality as a way to avoid scenarios in which benefits conferred to improve conditions for women are

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women are likely to continue bearing the brunt of the burden when it comes to taking [parental] leave . . . .").

86. *See infra* notes 93–103 and accompanying text.

87. 414 U.S. 632 (1974).

88. *Id.* at 651.

89. Suk, *supra* note 21, at 52.

90. *E.g.*, *id.* at 68.

91. *Id.* at 40–41.

later used to women's detriment.[92] In contrast, many European states address family leave issues by guaranteeing and even mandating parenting leave for women under different terms and with different qualities from the leave benefits allocated to men.[93] Professor Julie Suk argues that while most Americans view these policies as unacceptably paternalistic, nations using gendered family leave laws have achieved successes in women's professional achievement that have not—and cannot—be replicated under our gender-neutral approach.[94]

Professor Suk argues that less neutral policies will produce better results in terms of reducing stigmatization of leave taking and of women's ability to participate in the workforce while carrying out their family-caretaking responsibilities.[95] Suk looks to family leave policies in France and Sweden to suggest that their gender-conscious allocation of rights has produced normative effects in the workforce that are beyond the reach of the FMLA.[96] Both French and Swedish (albeit to a lesser extent for the latter) policies take for granted the assumption that women are primary caregivers to children and give far more generous benefits for maternity leave than paternity leave.[97] In fact, both nations have created some form of mandatory maternity leave.[98] France's policy features a strict guarantee that women returning from family leave be reinstated to the same position or to a different position that pays at least as well.[99]

However, even Suk acknowledges that European systems are imperfect, especially in terms of changing the distribution of leave taking between genders.[100] While apparently successful in moderating employers' incentives and ability to deny leave and in keeping women in the workforce, traditional norms are allowed to persist and individual choice—a cornerstone of American constitutional jurisprudence—is defeated.[101]

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92. ELVING, *supra* note 23, at 22–23.

93. *See* Suk, *supra* note 21, at 26–30 (discussing the special provisions of French law applicable to maternity leave and prenatal care).

94. *See id.* at 51 ("It is assumed in U.S. law that state paternalism is an affront to women's equality, but the European experience shows how some forms of paternalism can strengthen the ability of employees to exercise their rights, which can strengthen women's continued participation in the labor market.").

95. *See id.* at 53 (noting that mandatory maternity leave may actually save women from having to make a difficult choice to take maternity leave and may reduce workplace backlash stemming from the pursuit of family responsibilities).

96. *Id.* at 68–69.

97. *Id.* at 49–50.

98. *Id.* at 64.

99. *Id.* at 31.

100. *Id.* at 63–66.

101. *See id.* at 66–68 ("[P]roposals that would be unimaginable in the United States are possible in Europe, which underscores another distinctive American barrier to progress on work–family policy: The strong rejection of paternalism . . . . Paid or unpaid, mandatory rules that limit choice, particularly in family matters, are constitutionally problematic.").

Suk's argument is weakest in suggesting that abandoning gender neutrality is the only—or even the best—way to fix the normative hurdles affecting patterns of leave taking in the United States. Although she demonstrates a correlation between gendered policies in Europe and some results that American reformers would like to see take hold domestically, she comes far from establishing a causal relationship and is too quick to dismiss the shortcomings of these policies. Suk sees gender stereotyping as one of the root causes of European programs' success, but she fails to separate the effect of stereotyping from other differences in policies, such as the distinction between sick leave and family leave or the provision of paid family leave. Moreover, Suk minimizes the significance of gender inequalities that remain rooted in European societies despite women's increased success in maintaining employment following family caretaking leave.

In any case, the viability of developing national family leave policies that apply different standards and provide different benefits to men and women is highly questionable. American courts have interpreted Title VII to provide strict limits on gendered policies.[102] Mimicking European mandatory leave provisions would be even more difficult because due process concerns would be added to the list of legal challenges.[103]

D. Pecuniary Incentives

Professor Selmi has proposed offering business incentives to employers that demonstrate gender equality in leave taking.[104] He proposes a set-aside program for federal contracts, benefitting employers who meet some base number—he proposes 30%—of each gender taking advantage of family leave policies.[105] Selmi notes that this program would be acceptable under Title VII's gender-neutral standards because its requirements would treat men and women alike.[106]

In the context of a general discussion of tax policies that may advance feminist causes, Professor Anne Alstott introduced the idea of using tax incentives to improve the FMLA, although the scope of her consideration was limited to incentivizing employers to encourage use of FMLA-authorized leave.[107] Professor Alstott's proposal aimed to use tax incentives to address economic concerns that cause employers to skirt FMLA mandates generally, and she did not reach the issue of stigmatic leave-taking

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102. *See supra* notes 20–21 and accompanying text.

103. *Cf.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (1974) (invalidating an employer's mandatory leave policy on due process grounds).

104. Selmi, *supra* note 35, at 412.

105. *Id.*

106. *Id.*

107. Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2076–77 (1996).

patterns.[108] Specifically, she suggested that "tax incentives for family leave, part-time work, or flex-time could encourage [the use of] these arrangements while spreading their cost to the taxpaying public."[109] While these incentives suggest the potential effect of tax benefits on the FMLA's effectiveness, they offer only minimal hope with regard to challenging the stigmatic effects of leave taking because they continue to advance the gender-neutral framework that has thus far perpetuated gender imbalances in leave taking. In short, Alstott's proposal does not adjust the baseline norms that affect family leave.

V. New Proposals: Adjusting the Baseline Through Financial Incentives

The following proposals are aimed at adjusting the private-sphere norms that have prevented gender-neutral FMLA policies from affecting patterns of family leave taking. At their core, these proposals are geared to produce a system where family responsibilities and work duties are compatible and where women are not forced to shoulder a disproportionate and unwanted burden in striking a balance between public and private spheres. Because few would contend that family health is an unimportant social value and because caregiving is an essential component of family stability, these proposals reveal preferences that workers take leave when it is necessary and appropriate and that employers accommodate and validate these responsibilities. However, these proposals are deliberately formulated to be gender neutral so that they may survive Title VII challenges.

To the extent possible, I advocate incentives in the form of positive benefits rather than penalties. Especially in the context of social engineering, I argue that it is more productive to encourage behavior than to discourage behavior—to tell individuals and employers what they can do to improve their position rather than force action with threats of previously inapplicable penalties. The latter seems likely to foster resentment toward the policies themselves and toward the social goals that they are intended to promote.

These proposals, like most American legislation pertaining to family values and benefits, presuppose a heterosexual child-rearing couple.[110] This focus is especially practical in this case, since many of the normative changes that hinder workplace equality come from a gendered division of family responsibilities driven by stereotypes of men's roles in relation to women's roles. In most cases, these proposals are equally effective when taking into account homosexual partnerships, single-parent households, and other alternative family arrangements in that the proposals ultimately represent blanket encouragement of leave taking for family responsibilities. However, I have

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108. *Id.* at 2074–77.

109. *Id.* at 2076.

110. *See, e.g.*, Adrienne Jennings Lockie, *Multiple Families, Multiple Goals, Multiple Failures: The Need for "Limited Equalization" as a Theory of Child Support*, 32 HARV. J.L. & GENDER 109, 116–17 ("Current child support laws presuppose a heterosexual, typically married (but always cohabitating) family that permanently dissolves.").

tried to address effects on nontraditional child-rearing and caretaking situations where the predominant hetero-normative assumptions fail to account for the effects on same-sex partnerships and single parenting.

A. Paid Leave

Paid leave is an important first step in improving the FMLA. For every family, paying the bills is a bottom-line consideration. Providing workers with a meaningful choice to fulfill family responsibilities is inevitably tied to financial security. The past nineteen years under the FMLA have shown that the absence of a paid-leave requirement produces inequalities in leave taking—with respect to both class status and to gender—in light of historical discrimination and resulting patterns of wage earning. Foreign policies and California's Paid Family Leave legislation indicate that offering wage replacement increases the range of individuals who take leave and, to some degree, increases male participation in leave programs.[111] For any additional progress to take place, significant wage replacement must exist as a baseline standard. The availability of paid leave will benefit dual-parent households, who will have more flexibility to distribute caretaking responsibilities and will provide much-needed support for single parents who today risk losing their entire household income when taking family leave.

The obligation to fund this leave should not be left to employers, which already sacrifice profits when workers take FMLA leave. As many have suggested, employer-funded leave is unlikely to be adopted from a political and pragmatic standpoint. As Professor Suk identifies, the current relationship between caretaking leave and sick leave compounds the practical difficulties associated with moving toward paid leave, especially when costs come out of employers' profits.[112] Employer-funded leave also runs contrary to the social policy underlying paid leave, which seeks to assign independent value to family caretaking.

Instead, the wage-replacement system should be funded by worker contributions. As a general rule, funding for paid FMLA benefits should come out of payroll taxes. In addition to increasing employer support for paid leave, this arrangement may have positive normative effects. If workers, as a norm, pay taxes to fund family leave, they are more likely to seek to benefit from their contributions by taking leave when it is available and appropriate. As California's example has indicated, payroll-funded paid-leave programs can operate at minimal cost to workers yet provide significant social benefits.[113]

The federal program may benefit from following California's example with regard to the amount of compensation that employees receive while on

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111. *See supra* notes 70–74, 93–101 and accompanying text.

112. *See supra* notes 65–67 and accompanying text.

113. *See supra* note 74 and accompanying text.

leave. California's system pays workers up to 55% of their regular salary, with a cap that varies based on average income among state citizens.[114] Developing a national figure to cap compensation would be tricky; the federal government should instead take into account income in varying localities. This endeavor has proven to be successful in other forums such as compensation for federal employees, which takes into account the cost of living in various metropolitan areas.[115]

Although wage replacement makes FMLA leave feasible for larger numbers of the population in more gender-equal patterns, additional incentives are necessary to fuel the underlying normative change necessary to reduce statistical discrimination in workplaces. Some may be resistant to accepting the government's role in normative change, but I am not alone in suggesting that "government deserves to have, and in any case inevitably does have, a large role in norm management."[116] It seems clear that the purpose of the FMLA implicates a change in social norms, and efforts to improve the Act should properly consider this objective.

B. Tax Incentives

I propose to generate normative change through a system of tax incentives. These incentives would reward either employers or employees who engaged in gender-equal leave taking. Depending on levels of support, the policy may be directed at employers, rewarding those companies whose male and female employees take leave in proportional numbers, or it may involve an employee-directed benefit, providing tax breaks or credits to households in which both parents take leave. As Selmi suggested, pairing financial incentives with paid leave could provide real progress toward reconstructing common understandings of the work–family divide.[117] Taking into account Selmi's and Suk's accounts of employer disdain for the personal-medical provisions of the FMLA,[118] I would recommend that these incentives be applied only to family leave. This would help to achieve the narrow objectives of achieving equality in family caretaking while avoiding potential employer opposition to these proposals.

Professor Dorothea Kübler notes that there are two factors influencing norms that can be regulated by "norm entrepreneurs," which include government actors and other organizations interested in social change.[119] For normative change to occur, there must be an incentive that motivates indi-

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114. *See supra* note 74 and accompanying text.

115. *See* 5 U.S.C. § 5304 (2006) (establishing a locality-based comparability payment system for federal employees).

116. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 907 (1996).

117. *See supra* notes 104–06 and accompanying text.

118. *See supra* notes 65–69 and accompanying text.

119. Dorothea Kübler, *On the Regulation of Social Norms*, 17 J.L. ECON. & ORG. 449, 450 (2001).

viduals to follow a new norm, and there also must be positive reputational value in doing so.[120] Successful policies address both the motivational and reputational aspects of the norm—both the *motives* and the *meaning*.[121] I believe that the following proposals may be successful based on their potential to affect both aspects of norm making.

The tax incentives could be directed either at employers or employees, as both options involve benefits and drawbacks. Employer-directed tax incentives reflect Kübler's "motives and meaning" approach to "norm entrepreneurship," although they are perhaps more "meaning" oriented in that the reputational impacts of leave taking will be positive when employers have a reason to encourage individuals to take necessary leave. If employers take an interest in seeing gender-equal leave patterns, then negative attitudes and stigmatic effects of leave taking should be reduced. Indeed, one hopes that corporate human-resources departments would encourage individuals to take FMLA leave when their circumstances qualify them for such benefits. On the "motives" end, the hope is that existing desires among men to spend more time with family and children, complemented by women's desires to strike a meaningful balance between work and family[122]—which implicates partners' participation in family obligations—mean that the motivational requirements for norm changing are already in place. The simultaneous transition to a paid-leave mandate should also increase individual motivations to participate in norm shifting.

While the employer-directed approach makes its primary impact on the "meaning" end of norm changing, the employee-directed approach, by putting additional money in workers' pockets, does much more to address the individual motivational aspects. Reputational effects may still be present given that financial incentives may become known motivators for men to take leave. In corporate cultures that now stereotype men as breadwinners, financial incentives offer a transitional narrative that may help straddle the reputational line between two norms; under the proposed system, men can take care of their families *while* earning monetary benefits that reference the traditional breadwinner role. Nevertheless, employee-centered programs would undoubtedly face much greater challenges in reworking public workplace norms. Although the cost may be prohibitive, an ideal solution would be to conduct both employer- and employee-incentive programs for maximum effect on motive and meaning as norms undergo change. Should the initiative prove successful, such broad policies may become less

120. *Id.* at 452–53.

121. *Id.* at 472.

122. *See* WILLIAMS, *supra* note 8, at 246 (describing one woman's dilemma in balancing ideal-worker norms and her desire for a fulfilling career with the demands of her family responsibilities in light of her husband's own demanding job); *cf. id.* at 273 ("People now in their twenties, men as well as women, want to put limits on work time in order to leave time for family life.").

necessary, and the gender-neutral provisions of the FMLA alone may be able to work as originally intended.

1. Employer-Directed Tax Incentives: Baseline Compliance.—Employer-directed initiatives would provide tax breaks for companies that could demonstrate patterns of leave taking that meet certain gender-equality standards. Those standards could involve a baseline—for example, employers who can demonstrate that 25% or more of each gender has taken two or more weeks of FMLA leave would qualify for the tax breaks. This initiative is somewhat reminiscent of Selmi's federal-contracting proposal,[123] but it opens up the possible effects to a much broader range of workers. This rubric benefits from the establishment of minimum standards for family leave taking. Employers are therefore given an incentive to publicize and promote FMLA leave generally *as well as* to create workplace norms that encourage both sexes to attend to family responsibilities and to do so openly.

The primary concern would be that FMLA leave is still restricted to those who qualify under the statute. Employers, while able to encourage leave taking, would be unable to control the incidence of qualifying family illness, childbirth, or adoption among their workforce. Nevertheless, baseline standards could (and should) be tailored to reflect the average incidence of qualifying events triggering leave eligibility and could reasonably ensure that most workforces may meet those numbers. Additionally, employers with workforces whose personal obligations did not generate the numbers to qualify one year would still have an incentive to promote FMLA leave in subsequent years.

2. Employer-Directed Tax Incentives: Proportionality.—Alternately, standards in an employer-directed initiative could be based on proportionality in leave taking. For example, so long as the percentage of female employees taking FMLA leave is within five percentage points of men taking such leave, the employer would qualify for the tax breaks. This arrangement solves the problem in the baseline-contingent approach discussed above in that employers may be eligible for tax breaks even if their employees have few FMLA-qualifying obligations. Employers would only be responsible for encouraging leave equally between sexes, and not for generating FMLA use generally. However, the downside of this approach is the concern that it might reward employers who discourage leave generally or who grant leave sparingly based on these tax considerations. At worst, it may encourage employers to deny women FMLA leave in order to equalize leave statistics. Although wage replacement would certainly provide workers additional general incentives to aggressively pursue appropriate leave, the minimum-standards approach to employer incentives is preferable as a method of promoting family leave.

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123. *See supra* notes 104–06 and accompanying text.

3. Employer-Directed Tax Incentives: Sliding-Scale Benefits.—Both the bottom-line and proportionality-based approaches to employer-directed incentives have shortcomings, and an employer-directed tax-incentive program may be best enacted through some sort of sliding-scale benefit. If employers receive more tax benefits as more of their workforce takes leave in gender-equal patterns, it should make employers more willing to support all eligible leave takers and to be more conscious of the patterns they see developing. At the same time, the sliding scale removes the perverse incentives to have employees out on leave when they are not FMLA-eligible, or to discourage leave once a certain number of employees have qualified the company for the tax benefit.

This arrangement may also make sense to employers who view the tax incentives as a way to recoup the costs they incur when employees take leave to care for their families. When employers know that they can avoid larger financial sacrifices by fostering a truly gender-neutral and encouraging corporate culture with regard to family leave, it seems likely that these initiatives will achieve their intended success.

4. Employee-Directed Tax Incentives.—An alternative method of using tax incentives to create gender-equal patterns of leave taking would be to offer incentives to individuals instead of employers. This could be done through a tax benefit that becomes available if both members of a couple took FMLA leave in a calendar year. In heterosexual couples, this would encourage men to consider the balance of family labor in the household and may stimulate increased balancing of private-sphere responsibilities. In combination with paid leave, employee-directed tax incentives may encourage men to take paternity leave in situations where they may have otherwise left primary-care responsibilities to their children's mother. The benefit should also be designed to apply to single parents and homosexual couples in the interests of equal treatment, promoting the value and legitimacy of taking adequate care of family responsibilities and in a continued push toward making family leave the norm for all workers.

This policy may be criticized by employers as promoting unnecessary or excessive leave taking given its tendency to encourage the participation of two caretakers for one family member. However, since the FMLA was written to address the presence of both genders in the workplace and to create adaptability between the public and private spheres, the promotion of balanced family responsibilities is a reasonable way to facilitate continued participation of men *and* women in the workplace. Instead of having one family member shoulder constant primary-care responsibility, the burden could be shared between two members, ultimately reducing the impact on professional obligations and attrition from the workforce.

VI. Conclusion

The FMLA's attempt to reduce the career setbacks experienced by workers who take family leave has fallen short of its goals. Because one set of workers continues to take family leave less frequently than another, the conception of an ideal worker has not changed to accommodate family responsibilities that generate tension with workplace responsibilities in a dual-wage-earner society. As a result, negative career consequences continue to follow leave takers, the majority of whom continue to be women. While the FMLA made leave taking acceptable in a formal sense, it failed to adjust baseline norms that would make leave taking acceptable for all workers in a practical sense. This gap between formal guarantees and real-world effects is largely attributable to the consequences of mapping a gender-neutral policy onto a society that recognizes an enduring history of social norms that envision men as wage earners and women as caretakers of family and domestic responsibilities. Given these underlying prescriptive stereotypes, gender-neutral policies like the FMLA can do little to offset the effects of a gendered society.

Vindicating the normative aims of the FMLA requires action to adjust the underlying social norms that have fueled gender-differentiated patterns of leave taking. In this Note, I have proposed internal changes to the FMLA and policies external to the Act that I suggest will work together to shift pervasive norms affecting the acceptability of leave taking for family care. As a threshold matter, separating family leave from personal-medical leave will focus the issue on the specific social problem of family caretaking and will reduce resistance from employers concerned about FMLA abuse. Providing worker-funded paid leave will increase the feasibility of leave taking for single parents and for dual-earner households that will be more equipped to survive financially, even if the higher wage earner takes leave. Finally, a program of positive incentives for employers, employees, or both to take full advantage of family leave policies on a gender-equal basis will help reduce workers' concerns about the stigmatic effects of family leave.

—*Kristin M. Malone*

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