

# **Formal Versus Informal Allocation Of Land In A Commons: The Case Of The MacArthur Park Sidewalk Vendors**

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## **Abstract**

*Sidewalk vendors are becoming a more common presence in cities in Latin America and the United States. Vendor demand for the best sidewalk vending spots increasingly exceeds supply, making necessary a system to allocate space in what is essentially an open access commons. This paper presents an empirical study of two very different systems of allocation that have been adopted in the city of Los Angeles, California, a formal one imposed by the city on legal vendors when they were unable to come up with one on their own, and a second that was embraced by illegal vendors across the street on*

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*an informal basis. The fact that illegal vendors were able to adopt any system at all, while a handful of legal vendors were unable to when given the same opportunity, is not what would have been predicted by social norms scholarship. Nor can it be attributed to the activities of local street gangs. Instead the respective success and failure of these two groups of vendors are best explained by Robert Sugden's game theory of spontaneous order. Turning to their relative merit, the illegal vendors' system of space allocation is superior, enjoying as it does a number of efficiencies. By contrast, the city's formal system suffers from a number of costs. It seems intent less on benefiting the community as a whole than on protecting traditional storefront merchants from legitimate competition.*

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## I. Introduction

Why are many legal vending spots in Los Angeles empty while illegal vendors stand elbow to elbow across the street? When the city legalized vending in MacArthur Park, the aim was to lure there vendors who were already plying their trade illegally in the surrounding neighborhood. Legal vending there is now defunct. But even in its heyday the MacArthur Park legal vending district had the feel of a moribund petting zoo. Beautiful city-approved carts were stocked with state-sanctioned products and manned at officially designated locations. Each licensed vendor was one of more than thirty graduates of a special government-mandated vending training program, but only a half-dozen of them bothered to show up on the sidewalk on a typical day. Meanwhile, across the street, where vending is against the law, there was a buzz of activity, which continues today. The city enforces the law against illegal vending only sporadically. Soon after law enforcement leaves the scene, illegal vendors re-emerge like flowers after the spring thaw. Dozens of illegal vendors hawk their wares on busy sidewalks that have become a bazaar where anything that can be sold from a cardboard box, a blanket, or a suitcase is there for the asking. Why didn't more vendors go legal? Why did the legal district fail? Despite efforts to stamp it out, why does illegal vending continue to flourish?

The answer lies in part in property rights. The success of any vendor depends on finding a good spot from which to vend, and choice spots are highly coveted and scarce. The legal vendors in MacArthur Park and the illegal vendors across the street both sell from land that is traditionally open to the public at large—a commons. But how that land is allocated is dramatically different. In MacArthur Park, a system of allocating space among the legal sidewalk vendors who operate there was formally adopted by the city.

Across the street, a completely different system for allocating scarce sidewalk space was adopted by illegal vendors on an informal basis. It is the formality of one property system and the informality of the other that substantially explains the different outcomes in these two parts of a commons.

The significance of property rights in the management of commons resources has been the subject of a lively debate. Substantial work has been done in examining the ability of private individuals to allocate them informally, without the involvement of the state. Commentators such as Elinor Ostrom and James Acheson have identified a number of examples where private individuals have organized to allocate commons resources and avoid overuse, or a “tragedy of the commons,” in the language of Garrett Hardin’s oft-cited piece.<sup>2</sup> Ostrom and others have also reported on efforts at informal allocation of commons resources that have proven to be failures, and tried to identify the conditions for the emergence of informal systems that will succeed.<sup>3</sup> Their work has been overlapped by scholarship on informal order generally, especially in the areas of game theory and social norms.<sup>4</sup>

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<sup>2</sup> JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (1988) (explaining how Maine lobster men have organized themselves into gangs that “own” fishing territory communally and exclude non-gang members through self-help); ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 18-21, 61-65, 82-85 (1990) (describing how individuals have repeatedly found a way to cooperate and manage common pool resources as diverse as fisheries in Turkey, mountain meadows in Switzerland, and irrigated water in the Philippines). See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244-45 (1968), *reprinted in part in* ROBERT C. ELLICKSON ET AL., *PERSPECTIVES ON PROPERTY LAW* at 132 (arguing that designating a resource as an open access commons will lead to overuse, that is, “a tragedy of the commons”).

<sup>3</sup> Gary D. Libecap, *The Conditions For Successful Collective Action*, in *LOCAL COMMONS AND GLOBAL INTERDEPENDENCE* 170-80 (1995) (examining difficulties in organizing to control exploitation of oil field and fishery); ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 144-178, 211 (1990) (describing how individuals have been unable to cooperate to manage common pool resources such as fisheries in Turkey and groundwater in California, and listing factors that characterize successful informal regimes for common pool management).

<sup>4</sup> E.g., ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 3-12, (1984) (cooperation will emerge in a prisoners’ dilemma game in which players believe they are likely to encounter each other again); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (examining informal resolution of trespass disputes through social norms); ERIC A. POSNER, *LAW AND SOCIAL NORMS* 49-67 (2000) (examining informal order through social norms in a variety of contexts); Nicole Stelle Garnett,

Similar work has also been done on the formal side. A number of commentators have examined the rules allocating commons resources that have been formally adopted by government. Shawn Kantor and Thomas Merrill, among others, have studied instances where government has adopted formal rules for the allocation of common resources, not only to explain their adoption in descriptive terms, but also to assess their merit.<sup>5</sup> Still other commentators have attempted to shed light on the transitions between informal systems and formal ones.<sup>6</sup> For all this work, though, we are still left with an important question that has gone largely unanswered. For any single commons resource, is it better to manage it informally or formally? All but absent from the literature is a study that could well inform such a choice: a side by side, live action comparison of an informal system on the one hand and a formal system on the other.

This paper constitutes an attempt to fill this gap in the literature. The practice of sidewalk vending in the MacArthur Park neighborhood presents a unique opportunity in

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*Ordering (And Order In) The City*, 57 STAN. L. REV. 1 (2004) (arguing that in many urban communities, government efforts to promote order through land use regulation hinder efforts to eliminate social disorder through informal means); Bernard E. Harcourt, *Reflecting On The Subject: A Critique Of The Social Influence Conception Of Deterrence, The Broken Windows Theory, And Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) (critically examining the empirical evidence and social influence explanation supporting New York City's experiment with order-maintenance policing); Andrea McDowell, *Real Property, Spontaneous Order, and Norms in the Gold Mines*, 29 LAW & SOC. INQUIRY 771 (2004) (emergence of informal rules among miners during the California Gold Rush best explained by game theory).

<sup>5</sup> E.g., Thomas Merrill, *Explaining Market Mechanisms*, 2000 ILL. L. REV. 275, 291-293 (2000) (paucity of market-based incentives in environmental law best explained by hybrid theory of wealth maximization and distribution); SHAWN EVERETT KANTOR, POLITICS AND PROPERTY RIGHTS: THE CLOSING OF THE OPEN RANGE IN THE POST-BELLUM SOUTH (Chicago 1998) (distributional conflicts prevented the adoption of a liability regime for animal trespass that would have maximized societal wealth); Richard A. Epstein, *The Allocation Of The Commons: Parking On Public Roads*, 31 J. LEGAL STUD. S515 (2002) (government system of changing property rights in parking spaces is undermined by a political process that tends to be more responsive to the interests of particular interest groups).

<sup>6</sup> E.g., Terry L. Anderson and Peter J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. L. & ECON. 163 (1975) (evolution of rules of asset ownership in the American West were determined by changes in cost-benefit variables); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPER & PROC. 347 (1967) (property rights regimes evolve in response to changes in demand and technology, generally in the direction of more privatization); Henry E. Smith, *Exclusion Versus Governance: Two Strategies For Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002) (explaining replacement of private property with the open field system in England during the Middle Ages).

the study of property rights regimes. A single resource—the sidewalk—in a single place—a neighborhood in Los Angeles, California—has been divided in two parts, each of which is subject to two dramatically different property rights regimes within a stone’s throw of one another. Further, the resource in the two areas is being put to the same use—vending—at the same time and by users nearly all of whom share the same cultural background—Spanish-speaking Central-American immigrants. By holding these variables constant as it were, the comparison of these two property rights regimes is not only unique, but also robust.

The primary purpose of this paper is to explain the emergence and assess the merit of each of these two systems of allocating sidewalk vending space in a commons, the method formally adopted by the city of Los Angeles, and the one arrived at informally by illegal vendors next door. Allocating sidewalk space has become an increasingly important issue. In the United States this is due partly to communities’ embrace of “new urbanism” and the lively street life it espouses.<sup>7</sup> But even aside from these changed attitudes among city planners, pressures on sidewalk space have been increasing due to the pressures of private actors. Judging from the amount of media and legal attention devoted to it, sidewalk vending activity has increased in recent years. This occurrence has been most widely reported in Latin American countries, such as Mexico,<sup>8</sup> and cities in the United States with large Latin American immigrant populations, such as

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<sup>7</sup> Haya El Nasser, *'New Urbanism' Embraces Latinos*, USA TODAY, February 16, 2005, at 3A (arguing that “new urbanism” agenda is consistent with immigrant Latino tastes for compact neighborhoods, lively street life, and sidewalk vendors).

<sup>8</sup> Marla Dickerson, *Mexico Runs on Sidewalk Economy*, L.A. TIMES, Home Edition, May 9, 2005, Main, Part A, at 1 (informal economy, of which sidewalk vending is a part, was Mexico’s sole source of employment growth during 2000-2004); Gregg W. Kettles, *Regulating Vending in the Sidewalk Commons*, 77 TEMPLE L. REV. 1, 6-8 (2004) (discussing increased vending activity in developing countries).

New York City and Los Angeles, California.<sup>9</sup> But sidewalk vendors are also popping up in many less exotic places. No less than fifteen cities in the United States have legalized vending to some extent, charging vendors a license fee.<sup>10</sup> From Boise, Idaho<sup>11</sup> to Jacksonville, Florida,<sup>12</sup> and from Phoenix, Arizona<sup>13</sup> to Port Huron, Michigan,<sup>14</sup> communities all across the country are now struggling with how to deal with sidewalk vending. If vending should be legal at all, how should sidewalk space be allocated among vendors and other users? In other words, what property regime should be adopted for a common pool resource such as the sidewalk?

This study is about more than just sidewalk vending, though. A secondary object of this paper is inform policy making in the management of a variety of other commons resources that are increasingly strained. These include resources as diverse as fisheries, public lands, and the air we breathe. Understanding how and how well social order has been achieved on the public sidewalk—through two very different approaches—may shed light on how competing claims to these other scarce common pool resources may be

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<sup>9</sup> Rich Shapiro, *Crackdown Is Crisis For Street Vendors*, DAILY NEWS (New York), August 28, 2005, at 19 (discussing reaction to New York City's increase in fine structure for illegal vending); Gregg W. Kettles, *Regulating Vending in the Sidewalk Commons*, 77 TEMPLE L. REV. 1, 6-8 (2004) (discussing increased vending activity in the United States).

<sup>10</sup> Ginger D. Richardson, *Phoenix Considers Selling Sidewalk Space To Highest Bidders; Vendors' Turf Wars Concern City Officials*, THE ARIZONA REPUBLIC, March 3, 2004, Local, at 1B (Atlanta; Boston; Denver; Detroit; Kansas City, Missouri; Madison, Wisconsin; Milwaukee; Minneapolis; New York; Phoenix; St. Louis; San Diego; San Francisco; and Seattle); Gregg W. Kettles, *Regulating Vending in the Sidewalk Commons*, 77 TEMPLE L. REV. 1, 12-14 (2004) (Los Angeles).

<sup>11</sup> Brad Hem, *Boise Vendors Want Spot Back At 6th & Main*, THE IDAHO STATESMAN (Boise), August 13, 2005, Local, at 1 (city installed metal markers on sidewalk in an effort to disperse vendors and ease congestion).

<sup>12</sup> Christopher F. Aguilar, *Bill On Street-Side Seafood Sales Generates Opposition*, FLORIDA TIMES-UNION (Jacksonville), April 27, 2005, Shorelines, at L-10 (city bill to bar some sidewalk vending).

<sup>13</sup> Ginger D. Richardson and Monica Alonzo-Dunsmoor, *Fine-Tuning The Art Walk; Leaders Hope To Control Issues Without Killing The Fun*, THE ARIZONA REPUBLIC, August 5, 2005, at 1A (city considering regulating informal monthly downtown street festival that includes sidewalk vendors); Ginger D. Richardson, *Phoenix Considers Selling Sidewalk Space To Highest Bidders; Vendors' Turf Wars Concern City Officials*, THE ARIZONA REPUBLIC, March 3, 2004, Local, at 1B (city considering increasing regulation of vending near sports arena).

<sup>14</sup> *Our View*, TIMES HERALD (Port Huron, Michigan), Opinion, at 7A (city planners and private landowners discussing opening part of street to sidewalk vendors).

better resolved. By controlling for a host of independent variables, this paper provides a rare opportunity to explain the emergence and assess the relative merit of two systems for allocating rights to use commons resources, one formal and the other informal.

A word about the paper's organization is in order. Part II presents an empirical study of the two systems for allocating sidewalk space.<sup>15</sup> The informal system adopted by the illegal vendors is based on the principal of first possession. It has two aspects. One aspect refers to the right of every vendor to use a space that they occupy first on any given day. That right expires when the vendor leaves the space, and no later than the end of the day. The second aspect refers to the right enjoyed by a vendor to use a space that she has repeatedly occupied day after day for some period of time. Her right to that spot is durable. She is "established." If an established vendor arrives at her spot to find it occupied by an interloper, the interloper must move. The right to sell from a spot held by an established vendor is superior to that held by another vendor that occupied that same spot first on a particular day. In other words, a use right of short duration, that is, for the day, may evolve into a right of use that is durable. A different system was developed across the street in the legal vending district. After the legal vendors were unable to come up with a way to allocate sidewalk space on their own, the city imposed one for them. At first the city allocated spots by lottery. Later it reassigned them and positioned newcomers with putative goals of helping the vendors and beautifying the neighborhood.

Part III explains how the illegal vendors succeeded in developing an informal system for allocating sidewalk space while legal vendors failed when given the same chance. It situates this challenge of informally ordering sidewalk use within a broader

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<sup>15</sup> In an earlier paper, *Regulating Vending in the Sidewalk Commons*, 77 TEMPLE L. REV. 1 (2004), I argued that sidewalk vending should be much less restricted than it is today. That argument was based in part on a street level investigation of vending that I conducted. That same empirical research provides part of the foundation for this paper as well. My research methods are described in the appendix to that earlier paper.

inquiry of property scholarship that considers how order may be achieved informally without intervention by the state.<sup>16</sup> Property theories of social norms fail to explain either the emergence of informal order among illegal vendors or its absence among legal ones. Nor may sidewalk order be attributed to street gangs as a kind of private government. Instead, both the presence of an informal allocative system among illegal vendors and the absence of one among legal ones is best explained by Robert Sugden's theory of spontaneous order.<sup>17</sup>

Part IV assesses the relative merit of the two allocative systems: the one adopted informally by illegal vendors, and the formal system adopted by the city and imposed on the legal vendors operating in the MacArthur Park vending district. For yardsticks I draw on certain theories of property rights evolution, including wealth maximization,<sup>18</sup>

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<sup>16</sup> E.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (examining informal resolution of trespass disputes through social norms); ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990) (describing how individuals have repeatedly found a way to cooperate and manage common pool resources as diverse as fisheries in Turkey, mountain meadows in Switzerland, and groundwater in Southern California); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) (examining informal order in the cotton industry); ERIC A. POSNER, *LAW AND SOCIAL NORMS* 49-67 (2000) (examining informal order through social norms in a variety of contexts); Ann Carlson, *Recycling Norms*, 89 CALIF. L. REV. 1231 (2001) (arguing that social norms are unlikely to be able to resolve "large number, small-payoff" problems of collective action); Robert McAdams, *Norms*, 96 MICH. L. REV. 338 (1997) (norms will be stronger in smaller groups, especially when close-knit). See also ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 3-12, (1984) (cooperation will emerge in a prisoners' dilemma game in which players believe they are likely to encounter each other again). Cf. Nicole Stelle Garnett, *Ordering (And Order In) The City*, 57 STAN. L. REV. 1 (2004) (arguing that in many urban communities, government efforts to promote order through land use regulation hinder efforts to eliminate social disorder through informal means); Bernard E. Harcourt, *Reflecting On The Subject: A Critique Of The Social Influence Conception Of Deterrence, The Broken Windows Theory, And Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) (critically examining the empirical evidence and social influence explanation supporting New York City's experiment with order-maintenance policing).

<sup>17</sup> Sugden's theory has enjoyed renewed attention recently. Andrea McDowell has argued that the theory of spontaneous order provides a more satisfying explanation than norms for the emergence of a property system in mines during the California gold rush. Andrea McDowell, *Real Property, Spontaneous Order, and Norms in the Gold Mines*, 29 LAW & SOC. INQUIRY 771 (2004). Cf. Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL'Y REV. 1, 7 (2004) (arguing that private legal systems typically do not form spontaneously, but evolve from existing networks that originally facilitated low-enforcement-cost norms).

<sup>18</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPER & PROC. 347 (1967). Demsetz' theory of wealth maximization continues to command the attention of property scholars today. See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 41-48 (5<sup>th</sup> ed. Aspen Law and Business 2002)

distribution,<sup>19</sup> and ideology.<sup>20</sup> The illegal vendors' informal allocative system enjoys a number of efficiencies, and is best explained by the theory of wealth maximization. By contrast, the formal system adopted by the city suffered from a number of costs. It was really aimed not so much at maximizing the value of the sidewalk for vending as it was in protecting powerful interest groups, especially traditional storefront merchants. The city's formal system is best explained by a theory distribution. It was inferior to the informal system of sidewalk space allocation enjoyed by the illegal vendors. Section V concludes by drawing implications of this study for other resources and suggesting avenues for further study.

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(article excerpt in casebook); JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 49-53 (Foundation Press 1998) (same); Terry L. Anderson and Peter J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. L. & ECON. 163 (1975) (rules of asset ownership in the American West were determined by cost-benefit variables); Richard O. Zerbe and C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 J. ECON. HIST. 114 (2001) (the property rights regime in mines that emerged during the California Gold Rush "supports earlier rational choice interpretations that property arrangements settling the American Western frontier were based on the marginal costs and benefits of defining and enforcing property rights"); Terry L. Anderson and Peter J. Hill, *Cowboys and Contracts*, 31 J. LEGAL STUD. S489 (2002) (smaller, more homogeneous groups are more likely to adopt wealth maximizing property rules than centralized political processes).

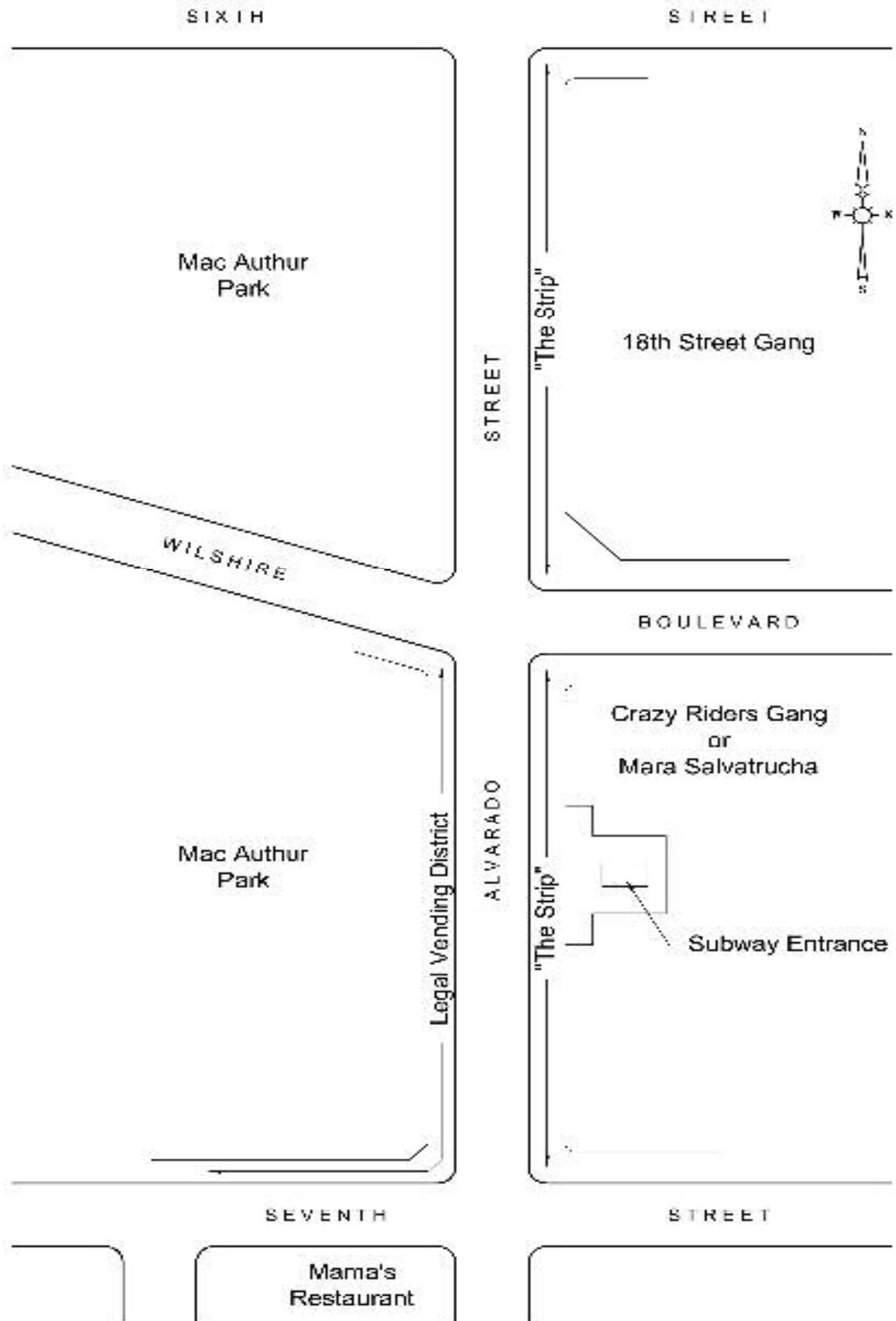
<sup>19</sup> Thomas Merrill, *Explaining Market Mechanisms*, 2000 ILL. L. REV. 275, 291-293 (2000) (paucity of market-based incentives in environmental law best explained by hybrid theory of wealth maximization and distribution); SHAWN EVERETT KANTOR, POLITICS AND PROPERTY RIGHTS: THE CLOSING OF THE OPEN RANGE IN THE POST-BELLUM SOUTH (Chicago 1998) (distributional conflicts prevented the adoption of a liability regime for animal trespass that would have maximized societal wealth); Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. S359 (2002) (pointing out the significant distributional benefits that flowed to those who reorganized the property rights regime in Europe and its colonies between 1500 and 1900); Richard A. Epstein, *The Allocation Of The Commons: Parking On Public Roads*, 31 J. LEGAL STUD. S515 (2002) (government system of changing property rights in parking spaces is undermined by a political process that tends to be more responsive to the interests of particular interest groups); Saul Levmore, *Two Stories About The Evolution of Property Rights*, 31 J. LEGAL STUD. S421 (2002) (movements between private property and common property equally well explained by theories of wealth maximization and distribution).

<sup>20</sup> Andrea G. McDowell, *From Commons to Claims: Property Rights in the California Gold Rush*, 14 YALE J. L. & HUMAN. 1 (2002) (miners in Gold Rush California developed restrictions on claim holder rights that did not maximize the production of wealth for society as a whole, but rather reflected new norms of egalitarianism and anti-capitalism).

## II. The Two Systems For Allocation Of Sidewalk Vending Space

In large cities in the United States and around the world, it is not uncommon to see people selling things from the sidewalk. In this country, the practice of sidewalk vending is common in Los Angeles, California, particularly in the neighborhood surrounding the city's MacArthur Park. There a typical vendor will place a blanket or piece of cardboard on the sidewalk, and display their wares on top. Alternatively, she might sell her goods out of a box or suitcase. Sidewalk vendors offer just about everything. They sell shampoo, batteries, bracelets, watches, sliced fruit, cigarettes, books, videotapes, and clothing, to name a few. Some vending spots are more lucrative than others. Choice spots are scarce and highly coveted. How are they allocated?

For about five years the MacArthur Park neighborhood had not one, but rather two systems for allocating vending space. Vending is legal only in the park itself, on sidewalks that lie on the west side of Alvarado Street and the north side of Seventh Street. (See map next page.) There one system for allocating vending space was formally adopted by the city. A second system for allocating vending space exists outside the park's legal vending district. Across the street, the sidewalks on the east side of Alvarado Street in between Sixth Street and Seventh Street, which I will refer to as "the Strip," have hosted perhaps the greatest concentration of vendors in the neighborhood. (See map next page.) The vending space allocation system there was adopted by the illegal vendors on an informal basis. The two systems are dramatically different.



## A. Illegal Vendors Informally Allocate Space Under A Two-Tiered System Of First Possession

There can be no doubt that an allocative system is necessary, at least on the Strip, because of the heavy demand for vending space. During weekday afternoons, I saw as many as twenty vendors selling there. The corners were consistently occupied, with other vendors setting up in between. On the weekends, I saw their numbers along those two blocks of Alvarado swell to forty or fifty. They occupied not only the corners where two streets intersected, but the sidewalk in between as well. None of the vendors was blocking all pedestrian traffic. Two pedestrians could still walk abreast up the sidewalk. But the area in between this open path and the curb was filled with vendors, packed elbow to elbow.

The Strip, which runs along Alvarado Street for two blocks, is intersected by three streets: Sixth Street, Seventh Street, and Wilshire Boulevard. All of these streets carry heavy automobile and pedestrian traffic. In addition, a subway station entrance is situated on the Strip between Seventh and Wilshire. By selling at the corners where these two streets intersect Alvarado, a vendor may significantly increase her visibility to potential customers. It stands to reason that, compared to other places on the block, the corners are more profitable. This is likely part of the reason why, even on weekday afternoons when pedestrian traffic was relatively light, these corners were consistently occupied.

Given the intensity of use of the sidewalk by these vendors, one might expect that allocation of scarce sidewalk vending space would involve the state. This could take place either directly, such as through state-run auctions or rationing, or indirectly, such as

through the enforcement of property rights traded in a market. It turns out that the state is not at all involved in vending space allocation on the Strip. The city of Los Angeles has made sidewalk vending a crime. Outside of a small area in MacArthur Park *on the other side* of Alvarado Street where vending is legal, sidewalk vending is a misdemeanor. Having criminalized the conduct, it is not surprising then that the city has taken no steps to allocate prime spaces among illegal vendors.

A system for allocating spaces was adopted by the illegal vendors informally. Their system is based on the principle of first possession. It has two aspects. In its first aspect, a vendor may set up and sell from any place on the sidewalk that is vacant when they arrive. If a second vendor shows up later hoping to sell from the space occupied by the first, the second has no right to compel the first to leave. The first to occupy the space that day has the right to sell from it. This right of use lasts only for the day. Vendors do not camp in their spots overnight. They leave in the evening, and take their unsold goods and other belongings with them. The next day vendors start with a clean slate. As one vendor put it, if he gets there late and the area where he usually sits is occupied, he goes somewhere else.<sup>21</sup>

The vendors' system of space allocation has a second aspect as well. It allows long-term vendors to get durable rights to vending places. When a vendor has been selling from a place on the sidewalk on a regular basis for several months, they become "established." They no longer need to arrive at that spot at any particular hour on a given day. If the established vendor arrives late and finds her spot occupied by another vendor, the other vendor will surrender the spot to the established vendor and move on. One established vendor explained that she does not have problems with other vendors. They

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<sup>21</sup> Interview with tennis shoe vendor on the sidewalk east of Alvarado Street, between Wilshire Boulevard and the Metro entrance, in Los Angeles, California (July 10, 2002).

do not “mess around” with her because they “respect her.” This has been her spot for “many years.”<sup>22</sup> Another established vendor confirmed that new vendors have “problems” with their spots and have to move from one place to another.<sup>23</sup>

How much time does a vendor have to spend on the sidewalk to become “established” and get a durable right to use a space on the sidewalk? There appears to be no bright line rule. Of the twenty-one vendors we interviewed on the Strip, seven indicated that they had been a party to a dispute over vending space. Three of them reported that they successfully held their ground and continued to vend from the disputed space. All three of these could be characterized as “full time” vendors. That is, they came to vend most days of the week. One claimed to have been vending in that place “for years,” a second for five to six years, and the third for fifteen years.<sup>24</sup> Four vendors admitted to backing down from a dispute over space. None of them had been vending on the Strip for more than six months.<sup>25</sup> One who had been vending for six months may have been on the verge of becoming established. He claimed that vendors are always

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<sup>22</sup> Interview with mamomes vendor on the sidewalk at the north-east corner of Alvarado Street and Seventh Avenue, in Los Angeles, California (July 21, 2002).

<sup>23</sup> Interview with necklace vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002).

<sup>24</sup> Interview with mamomes vendor on the sidewalk at the north-east corner of Alvarado Street and Seventh Avenue, in Los Angeles, California (July 21, 2002); Interview with pastry vendor on the sidewalk at the north-east corner of Alvarado Street and Seventh Avenue, in Los Angeles, California (July 21, 2002); Interview with necklace vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002).

<sup>25</sup> Interview with silver ring vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002) (vending there for 3 months); Interview with tennis shoe vendor on the sidewalk east of Alvarado Street, between Wilshire Boulevard and the Metro entrance, in Los Angeles, California (July 10, 2002) (vending there for one week); Interview with belt and watch vendor on the sidewalk east of Alvarado Street, between Wilshire Boulevard and the Metro entrance, in Los Angeles, California (July 10, 2002) (vending there for 6 months); Interview with vendor of shampoo, batteries, lighters, and cigarettes on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002) (vending there for 3 months).

fighting amongst each other for spots, “but he is respected.” But when friction between him and another vendor does arise, he backs down and moves to another location.<sup>26</sup>

From time to time the city takes active steps to clear the area of illegal vendors. When I returned to the Strip some years after I collected the main body of data for this study, I saw that vending activity was at low ebb.<sup>27</sup> MacArthur Park had long suffered from a reputation for drug dealing, disorder, and danger.<sup>28</sup> In a well-intentioned effort to make the park attractive to the law-abiding, the city mistook informal order for disorder and swept the area of illegal vendors shortly before my arrival.<sup>29</sup> Some had already returned to the Strip, thereby demonstrating the resiliency of vending and the continued strong demand for prime vending space.<sup>30</sup>

#### B. Following A Failed Attempt At Informal Allocation, Spaces In The Legal Vending District Were Formally Allocated By The State According To A Series Of Competing Principles

This informal system of space allocation among illegal vendors on the Strip stands in sharp contrast to the formal system adopted in the legal vending district across the street.<sup>31</sup> Before opening the district in 1999, the city of Los Angeles contracted its

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<sup>26</sup> Interview with belt and watch vendor on the sidewalk east of Alvarado Street, between Wilshire Boulevard and the Metro entrance, in Los Angeles, California (July 10, 2002).

<sup>27</sup> Visual inspection of the sidewalk east of Alvarado Street, between Sixth Street and Seventh Street in Los Angeles, California (March 13, 2006) (three illegal vendors).

<sup>28</sup> Interview with Sandra “Mama” Romero Plasencia, Program Director, Institute for Urban Research and Development, in Los Angeles, California (March 14, 2006).

<sup>29</sup> *Id.*

<sup>30</sup> Visual inspection of the sidewalk east of Alvarado Street, between Sixth Street and Seventh Street in Los Angeles, California (March 13, 2006) (three illegal vendors).

<sup>31</sup> The district is situated in Los Angeles’ MacArthur Park. Vendors are limited to certain sidewalks bordering the park, on the north side of Seventh Street between Alvarado Street and Park View Street, and on the west side of Alvarado Street between Wilshire Boulevard and Seventh Street. Rhonda Roumani,

management to a third party, who in turn hired a non-profit organization, the Institute for Urban Research and Development (“IURD”).<sup>32</sup> Between 12 and 20 vendors were selected to open the district.<sup>33</sup> The IURD had a series of meetings with these vendors to determine the allocation of vending spaces.<sup>34</sup> The vendors tried to come up with a plan on their own. Some vending spots close to a bus stop were considered more desirable.<sup>35</sup> In a series of meetings, the vendors agreed on an allocation of about 70 to 80 percent of the spots.<sup>36</sup> But after as many as ten meetings, no agreement could be reached among the vendors as to how to allocate the remainder.

Management at the IURD felt compelled to intervene. It worried that if the IURD did not take matters into its own hands, the vendors would have gravitated to spots that looked “good” and resolved competing claims to a spot by giving it to the vendor happened to get there first.<sup>37</sup> This is, of course, the method of allocation followed by the illegal vendors across the street.

The IURD imposed its own allocative system, electing first to assign vending spots by lottery.<sup>38</sup> It does not appear that the vendors traded any of the resulting

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*Hernandez Announces Launching of City’s First Sidewalk Vending District*, METROPOLITAN NEWS-ENTERPRISE/CAPITAL NEWS SERVICE, June 4, 1999, at 11.

<sup>32</sup> Rhonda Roumani, *Hernandez Announces Launching of City’s First Sidewalk Vending District*, METROPOLITAN NEWS-ENTERPRISE, June 4, 1999, at 11; Interview with Sandra “Mama” Romero Plasencia, Program Director, Institute for Urban Research and Development, in Los Angeles, California (July 23, 2002).

<sup>33</sup> Rhonda Roumani, *Hernandez Announces Launching of City’s First Sidewalk Vending District*, METROPOLITAN NEWS-ENTERPRISE, June 4, 1999, at 11; Interview with Sandra “Mama” Romero Plasencia, Program Director, Institute for Urban Research and Development, in Los Angeles, California (July 23, 2002).

<sup>34</sup> Interview with Sandra “Mama” Romero Plasencia, Program Director, Institute for Urban Research and Development, in Los Angeles, California (July 23, 2002).

<sup>35</sup> Interview with Sandra “Mama” Romero Plasencia, Program Director, Institute for Urban Research and Development, in Los Angeles, California (July 23, 2002).

<sup>36</sup> Interview with Joseph Colletti, Executive Director, The Institute for Urban Research and Development, in Los Angeles, California (July 16, 2002).

<sup>37</sup> Interview with Sandra “Mama” Romero Plasencia, Program Director, Institute for Urban Research and Development, in Los Angeles, California (July 23, 2002).

<sup>38</sup> Interview with Joseph Colletti, Executive Director, The Institute for Urban Research and Development, in Los Angeles, California (July 16, 2002).

assignments. Later, as additional vendors were added to the district, the IURD directed their placement and reallocated previously assigned spaces. In these assignments, the IURD sought not only to help the legal vendors but also to beautify the neighborhood. These two goals were not necessarily mutually reinforcing. Compare the experience of tamale vendors with others. Tamales are sold by a number of vendors, each with a slight variation in style, according to the country of origin. The IURD directed the tamale vendors to set up in a row across the street from a Mama's Restaurant, which is operated by the IURD and sells the same things. By contrast, other merchandise vendors selling similar products were deliberately dispersed by the IURD.<sup>39</sup> Some legal vendors refused to sell every day, leaving gaps on the sidewalk. The IURD considered this unsightly, and directed the vendors to leave their assigned spots and "close ranks" on those days. Certain vendors objected. The IURD believed the vendors were "superstitious" about staying in their spots, but gave in anyway. The IURD's policy of requiring vendors to close ranks when one of their neighbors is absent was not enforced.<sup>40</sup>

It was nearly as if the IURD threw a party and nobody came. The IURD had assigned spots for 33 vending carts.<sup>41</sup> But on typical weekday afternoons when the district was still operating, I saw no more than ten legal vendors.<sup>42</sup> On a weekend, the most I saw was thirteen.<sup>43</sup> Most of the assigned legal spots sat vacant. Pedestrian traffic was light. Business was slow. This scene contrasts sharply with the bustling activity I

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Interview with Joseph Colletti, Executive Director, Institute for Urban Research and Development, in Los Angeles, California (July 16, 2002). *Cf.* Interview with Sandra "Mama" Romero Plasencia, Program Director, Institute for Urban Research and Development, in Los Angeles, California (July 23, 2002) (the program has 31 or 32 carts).

<sup>42</sup> Visual inspection of MacArthur Park at Alvarado Street and Seventh Street (Wednesday, July 10, 2002) (five legal carts); Visual inspection of MacArthur Park at Alvarado Street and Seventh Street (Wednesday, July 24, 2002) (ten legal carts).

<sup>43</sup> Visual inspection of MacArthur Park at Alvarado Street and Seventh Street (Sunday, July 21, 2002).

saw across the street. There, on the Strip, illegal vendors stood elbow to elbow. All of the available vending spaces running a block and a half north from Seventh Street were taken. Pedestrian traffic was substantial. Business appeared to be brisk.

Why were the illegal vendors able to arrive at a method of allocating prime vending spaces on the sidewalk without the assistance of the state? Why were the legal vendors unable to do the same? Is there a single theory that can explain both facts?

III. The Success Of Illegal Vendors In Adopting An Informal System Of Allocating Renting Space, And The Failure Of Legal Vendors To Do The Same, Are Better Explained By Sugden's Game Theory Of Spontaneous Order, Than By Theories Of Social Norms Or Street Gang Governance

A number of scholars have attempted to explain how individuals coordinate their activities outside of the law. One group has focused on the role of social norms. A second has focused on the game theory of spontaneous order. Still other commentators on sidewalk life claim that street gangs coordinate the actions of private individuals by acting as a kind of private government. Both the social norms and gang government approaches are attractive. I think they do not, however, adequately explain either the success of the illegal vendors in informally allocating sidewalk space or the failure of legal vendors to do the same. The game theory of spontaneous order offers an explanation that is much more complete.

## A. Social Norms

Social norms are extra-legal rules governing individual behavior. Norms are enforced not by the state, but rather by private individuals through the imposition of social sanctions and withholding of social benefits.<sup>44</sup>

Social norm commentators disagree amongst themselves as to the relative importance of certain types of sanctions and benefits in motivating individuals to behave in conformity with a norm.<sup>45</sup> Some have emphasized the importance of socialization through immediate sanctions and benefits, which are delivered through internal or external means.<sup>46</sup> Internal enforcement occurs when an individual feels shame or pride depending on how close they have come to conforming to the norm.<sup>47</sup> External enforcement is administered by others who have the power to withhold esteem from nonconforming individuals.<sup>48</sup>

Regardless whether enforcement is internal or external, it is immediate. According to this view of social norms then, individuals respond to short term incentives. Other norms theorists have explained norm conformity by emphasizing the importance of social benefits an individual hopes to enjoy in the more distant future. This “social capital” view of social norms contends that individuals respond to long-term incentives.<sup>49</sup>

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<sup>44</sup> Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L & ECON. REV. 1, 3 (2001).

<sup>45</sup> Andrea McDowell, *Real Property, Spontaneous Order, and Norms in the Gold Mines*, 29 LAW & SOC. INQUIRY 771, 803-807 (2004) (summarizing the literature).

<sup>46</sup> Andrea McDowell, *Real Property, Spontaneous Order, and Norms in the Gold Mines*, 29 LAW & SOC. INQUIRY 771, 803 (2004).

<sup>47</sup> Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. Legal Stud. 537, 539 (1998); Andrea McDowell, *Real Property, Spontaneous Order, and Norms in the Gold Mines*, 29 LAW & SOC. INQUIRY 771, 805 (2004).

<sup>48</sup> Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. Legal Stud. 537, 539 (1998); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991); Andrea McDowell, *Real Property, Spontaneous Order, and Norms in the Gold Mines*, 29 LAW & SOC. INQUIRY 771, 805 (2004).

<sup>49</sup> Andrea McDowell, *Real Property, Spontaneous Order, and Norms in the Gold Mines*, 29 LAW & SOC. INQUIRY 771, 803 (2004).

## 1. Norms Enforced By Short Term Incentives

The short term incentives theory of norms argues that individuals conform out of a desire to enjoy immediate gains and avoid immediate losses that result from enforcement that is either internal or external. One prominent proponent of the internal enforcement theory of norms is Robert Cooter. He argues that “internalized” norms are norms that people follow through self-enforcement, which takes shape in feelings of pride and guilt. The extent to which a person has internalized a norm is measured by the amount he is willing to pay to conform to it. This internal demand for norm compliance is determined not only by an individual’s taste for the norm. Demand by one individual may also increase as the number of other people who also conform to the norm increases or if the law reinforces compliance with it.<sup>50</sup>

The theory of internalized norms has little explanatory power for behavior among vendors on the sidewalk. It does not explain either the success of the illegal vendors in cooperating to allocate space on the sidewalk or the failure of the legal vendors across the street to do the same. As to illegal vendors, there is little evidence that feelings of shame or pride were what motivated some individual vendors to stand their ground, and others to back down. Those who backed down never expressed to us any feelings of shame at having tested the rule, or pride at having backed down. The closest any of the “losers” ever came characterizing space conflicts in moral terms was when one called a winner “crazy.”

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<sup>50</sup> Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 Va. L. Rev. 1577 (2000); Andrea McDowell, *Real Property, Spontaneous Order, and Norms in the Gold Mines*, 29 LAW & SOC. INQUIRY 771, 805 (2004). (summarizing the theory)

Similar attitudes are held by the winners of vending space disputes. None talked about any “pride” she felt in holding on to their spot. That may of course be exactly how they felt. But this is hard to prove convincingly, and illustrates a problem with the theory of internalized norms. Because the theory rests not so much on what people *do* but rather on how they *feel*, it is difficult to verify it.<sup>51</sup> Even if the theory of internal enforcement was able to explain how illegal vendors were able to coalesce around a rule for allocating sidewalk space, how could it also explain the failure of the legal vendors across the street to do the same? For these reasons the theory of internalized norms seems unable to explain the presence or absence of order regarding allocation of vending space on the sidewalk.

The theory of norms that focuses on short-term enforcement by external agents likewise seems to come up short when applied to the sidewalk. According to this theory, the community enforces social norms through informal sanctions, such as self-help, especially negative truthful gossip and force, and ostracism. In *Order Without Law*, Robert Ellickson illustrated the external enforcement of norms with an empirical study of how ranchers in Shasta County, California resolve trespass disputes.<sup>52</sup> There a norm of reciprocal restraint exists that calls upon ranchers to swallow minor costs of trespass incidents and keep a mental accounting of them. If accounts become seriously out of balance, though, the “creditor” is allowed to engage in self-help retaliation against the offender. Most commonly this takes the form of truthful negative gossip. But if that does not work, the creditor may resort to tougher self-help sanctions, such as the use of force. Negative gossip works against everyone in the community except extreme

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<sup>51</sup> Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L & ECON. REV. 1, 3 n.6 (2001) (arguing that “patterns of external sanctions are the best evidence of the existence of a norm”).

<sup>52</sup> ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

deviants. This is because rural residents, being small in number and relatively rooted, deal with each other on a number of fronts and expect to do so long into the future. They value their reputation. Deviants tend to be those who expect to leave the community soon.

This external enforcement theory of norms would likely not predict what happened on the sidewalk in Los Angeles. With respect to the illegal vendors, the external enforcement theory would be pessimistic about the ability of the illegal vendors to allocate space on the sidewalk by virtue of social norms. The theory rests on the existence of a community like Shasta County, which is close-knit and continuing. This is not so clearly the case among vendors on the Strip. Granted, there are some indications that established vendors know and lookout for each other. One outside observer characterized them as a “union.” But the vendors include a number who are new and expect not to stay long. The costs of entering the sidewalk as a vendor are relatively low, as are the costs of moving a new sidewalk vending business to another part of town. The neighborhood around the Strip is also especially transient, being the region’s doorstep for new immigrants from Latin America.<sup>53</sup> Because of this, a vendor who refused to abide by a norm for space allocation would have less to fear from negative gossip or ostracism.

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<sup>53</sup> Beverly Beyette, Vendors vs. the Law - Unlicensed Street Merchants: Able Entrepreneurs or Nuisances?, L.A. Times, Home Edition, June 27, 1990, at E1 (characterizing this part of the city as "the heart of the Central American immigrant community"). The zip code in which the park is situated is home to around 57,000 people, of which nearly 70% are Latino or Hispanic. 2000 U.S. Census (showing that zip code 90057, the area around MacArthur Park, has population of 56,997, of which 39,311 are Hispanic or Latino), available at [http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-context=qt&-zip=90057&-r\\_name=DEC\\_2000\\_PL\\_U\\_QTPL&street=alvarado%20st.%20at%20sixth%20st.&-ds\\_name=DEC\\_2000\\_PL\\_U&-city=Los%20Angeles&-CHECK\\_SEARCH\\_RESULTS=N&-tree\\_id=400&-all\\_geo\\_types=N&geo\\_id=14000US06037208400&-geo\\_id=14000US06037208500&-geo\\_id=14000US06037208610&-geo\\_id=14000US06037208620&-geo\\_id=14000US06037208710&-geo\\_id=14000US06037208720&-geo\\_id=14000US06037208800&-geo\\_id=000US06037208902&-geo\\_id=14000US06037208903&-geo\\_id=14000US06037208904&-geo\\_id=14000US06037209401&-geo\\_id=14000US06037209402&-geo\\_id=14000US06037209403&-search\\_results000US06&-format=&-fully\\_or\\_partially=N&-\\_lang=en&-states=California](http://factfinder.census.gov/servlet/QTTable?_bm=y&-context=qt&-zip=90057&-r_name=DEC_2000_PL_U_QTPL&street=alvarado%20st.%20at%20sixth%20st.&-ds_name=DEC_2000_PL_U&-city=Los%20Angeles&-CHECK_SEARCH_RESULTS=N&-tree_id=400&-all_geo_types=N&geo_id=14000US06037208400&-geo_id=14000US06037208500&-geo_id=14000US06037208610&-geo_id=14000US06037208620&-geo_id=14000US06037208710&-geo_id=14000US06037208720&-geo_id=14000US06037208800&-geo_id=000US06037208902&-geo_id=14000US06037208903&-geo_id=14000US06037208904&-geo_id=14000US06037209401&-geo_id=14000US06037209402&-geo_id=14000US06037209403&-search_results000US06&-format=&-fully_or_partially=N&-_lang=en&-states=California) (last visited April 8, 2004).

They could just move their business to another part of the city for a fresh start. So the external enforcement theory of social norms does not appear to explain the existence of order on the Strip.

The external enforcement theory does not fare any better with respect to space allocation in the legal vending district. Where the theory would predict success, there was failure. That district was opened with no more than 20 vendors. Each of these vendors had completed a rigorous six week training program. So they had invested a lot in the prospect of vending in the district. Moreover, their investment could not easily be applied elsewhere. While the law contemplated the opening of other legal vending districts, after several disappointments this was at the time the only one that had been created. When the district was organized and before a method of allocating spaces on the sidewalk was devised, each vendor had reason to believe that they would be sharing the district with these nineteen other vendors for some time. They would all store their carts in the same place, and would be vending within a block of one another. In other words, the legal vending district was set up as a limited access commons that was open to only 20 individuals that had no where else to go in the city to pursue their trade legally.

Notwithstanding these seemingly fertile conditions for the creation of norms governing space allocation on the sidewalk, none arose among the legal vendors. Most cooperated, but a few held out. This prevented the vendors from reaching an agreement. The IURD stepped in with its own system.<sup>54</sup> So in a circumstance where one might have expected the emergence of norms to solve a problem with the allocation of scarce resources, it didn't happen. The city felt compelled to impose a system from above.

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<sup>54</sup> Interview with Joseph Colletti, Executive Director, The Institute for Urban Research and Development, in Los Angeles, California (July 16, 2002).

## 2. Norms Enforced By Long-Term Incentives

One of the primary proponents of the social capital theory of social norms is Eric Posner. He argues that a social norm is the product of a signaling game in which people engage in behavioral regularities. In doing so, people incur a short term cost. They do this in order to show that they have low discount rates, that is, they value future trades a lot. This makes them appear to be desirable partners in cooperative endeavors, since cheaters are too present-oriented to sacrifice something in the short term for a gain in the future. The cooperator incurs this short term cost for the sake of a long term gain from cooperation.

Of course, only behavioral regularities that are costly and observable can accomplish this. Posner recounts the practice of gift-giving in the world of business. Business people incur a short-term cost of buying flowers for an employee on executive assistant's day or taking a client out to a ball game not because there is an immediate return to the bottom line. Rather, they do this because its obvious costliness demonstrates a commitment to the long term cooperative relationship.<sup>55</sup> The message an individual tries to send by conforming to these costly behavioral regularities is, "I won't stab you in the back at the first opportunity. I'm in this for the long haul." Under Posner's theory, adherence to costly norms that would otherwise appear irrational, are actually quite rational, since in the absence of perfect information, signaling is the only way to tell trustworthy people apart from swindlers.

Posner's theory does not explain the rules followed by illegal vendors for allocating space on the sidewalk. First, the identities of the parties on the sidewalk are

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<sup>55</sup> ERIC A. POSNER, LAW AND SOCIAL NORMS 23 (2000).

not limited. It is wide-open. The costs of becoming a vendor are quite low. Some vendors we spoke to confessed to having been there only a few days or weeks. Because of the high turn-over among many of the vendors, there is less reason for any vendor to invest in developing a reputation as a cooperator. There is little prospect for future gain from interaction with other vendors.

Of course, there is some concern for reputation, primarily among established vendors. A few of the vendors mentioned that they were “respected.” But “respect” tends to be correlated with being on the sidewalk for a long time. These respected vendors never pointed to costs they incurred in the short-term to get that respect. Rather, it was by showing up to the same spot on a regular basis for some period of time that brought them respect. Did that involve a cost? Yes, but it was followed by an immediate benefit derived from selling to non-vendor strangers in the market place. One does not get respect from yielding a spot to someone with a prior claim. A vendor gets respect from working the same spot for a long time. These are the same people that are holding on to their spots. In other words they are not sacrificing in the short term for the hope of some long-term gain from cooperation. They are maximizing their short-term interests.

Posner’s theory does not well explain the rule of first possession as it applies to established vendors. It does no better when applied to new vendors. Two new vendors may covet the same spot. Posner’s theory would suggest that one vendor or the other would back down to demonstrate a long-term commitment to some relationship. This is belied by the practice on the street. The character of the other person is irrelevant in resolving a dispute over space. Those who admitted they backed down never suggested that they did so in order to get respect. Nor is there any evidence these vendors ever received any future cooperation by doing so. Instead, the vendor backed down either

because she believed she had not been on the sidewalk long enough or because the other person was “crazy.”

Those who held onto spaces and those who backed down never spoke in terms of good versus bad. Winners said they were respected, but this was due to time on the sidewalk.

## B. Sugden’s Game Theory Of Spontaneous Order

Robert Sugden’s theory of spontaneous order offers an alternative explanation for sidewalk order. He argues that order can arise among people spontaneously without the help of the state or some other coordinating authority. Sugden’s theory has lately enjoyed more prominence in the law reviews. Andrea McDowell recently argued that, compared to social norms, spontaneous order offers a better explanation for the emergence of order among miners during the California Gold Rush. Similarly, Sugden’s theory provides a more complete explanation for order on the sidewalk. The theory of spontaneous order well explains both emergence of a system for allocating vending space among illegal vendors, and the inability of the vendors in the legal district to come up with one.

Sugden poses the question “whether, in the absence of any formal system of law, self-enforcing rules of property could evolve out of interactions of individuals concerned only with their own interests.”<sup>56</sup> One might answer this by referring to Thomas Hobbes’ Leviathan. Hobbes argued that men in a “state of nature,” that is without government, “a common power to keep them all in awe,” will find themselves in a permanent state of

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<sup>56</sup> ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, COOPERATION, AND WELFARE* 55 (Basil Blackwell 1986).

war.<sup>57</sup> War will arise from the fact that inevitably “two men [will] desire the same thing, which nevertheless they cannot both enjoy,” and they will “become enemies.”<sup>58</sup> Further, each man will perceive that even “the weakest has strength enough to kill the strongest.”<sup>59</sup> Rather than back down or cooperate, each is induced to get what he wants and keep what he already has by fighting for it to the death. Men live in “continual fear, and [endure the] danger of violent death; and the life of man [is] solitary, poor, nasty, brutish, and short.”<sup>60</sup>

Sugden concedes that Hobbes’ idea of the state of nature can be a useful model for important areas of modern human life, such as where two people each want some thing that only one of them can have.<sup>61</sup> But Sugden argues that Hobbes’ conclusion is entirely too pessimistic because it ignores the possibility that there might arise conventions by which disputes over resources may be quickly and peacefully resolved.<sup>62</sup> Sugden proves this in a series of steps, in the first of which he presents a game of hawk-dove. Two players compete for possession of a resource. Each of the players is capable of harming the other, so each has something to lose if there is a fight. A player may chose between two alternative strategies: (1) playing “hawk,” being aggressive and trying to win possession of the entirety of the resource, or (2) playing “dove,” backing down if their opponent shows any willingness to fight.<sup>63</sup> If there is no way to distinguish the players—if the game is “symmetrical”—an equilibrium will be reached in which each player alternatively adopts “hawk” and “dove” in a certain percentage of encounters. Significantly, the two players will sometimes both pick “hawk,” resulting in a fight. This

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<sup>57</sup> *Id.* at 56, quoting THOMAS HOBBS, LEVIATHAN Ch. 13 (1651).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 55.

<sup>60</sup> *Id.* at 56.

<sup>61</sup> *Id.* at 57.

<sup>62</sup> *Id.* at 56.

<sup>63</sup> *Id.* at 59.

worst possible outcome is what Hobbes feared would occur between men in the state of nature.<sup>64</sup>

Sugden recognizes that the game of hawk-dove is limited as a model of real world resource conflicts because it is a one-shot game. In the real world disputes over a resource can persist for a lengthy period of time, and the game is played over many rounds. Players suffer each round that fighting endures, but each player also has the opportunity to shift strategies – giving up hawk to become dove and concede defeat. Because the fighting may last for some time before a player gives up, Sugden calls this multi-round variant of the hawk-dove game the “war of attrition.”<sup>65</sup> Again, unless there is some way to distinguish the players, two players will persist in playing hawk for several rounds until “the value of the resource is completely dissipated in fighting.” This is Hobbes’ view of the state of nature.

Sugden argues that both of these games come out differently if they are “asymmetrical.” In other words, the Hobbesian state of nature may be avoided if there is some way for the players to distinguish one another—other than merely identifying the other as an opponent—at the outset of the game. The resource that is the subject of dispute may already be more closely associated with one of the two claimants. If that is so, then a convention will arise that assigns the object to that claimant. One kind of association is possession. In a dispute over a resource, assume that one party is already in possession – the “possessor”—and the other party—the “challenger”—seeks to dislodge them. This very prominent, if superficial, asymmetry reflects a deeper asymmetry, for two reasons. First, a party in possession is likely, on average, to value the resource more than someone else. Why else would they take the trouble of carrying it around? Second,

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<sup>64</sup> *Id.* at 61.

<sup>65</sup> *Id.* at 62.

possession confers an advantage in a fight over that resource. A party is more likely to win a fight over a resource if they are not the challenger, but rather the possessor.<sup>66</sup>

Possession not only reflects real asymmetries, it is also prominent because of a natural human tendency to seek out relations between objects.<sup>67</sup> The prominence of the asymmetry of possessor and challenger is likely to lead to a convention favoring possessors. Over time possessors will learn to play “hawk” and hold on to those resources in their possession and challengers will learn to play “dove” and back down.<sup>68</sup>

If the roles of possessor and challenger were always clear, the game would end after one round—even if they had the opportunity to play multiple rounds. That is, the result would be the same whether the parties were artificially restricted to playing a simple, one-shot game of hawk-dove, or whether they were allowed to play a multi-round hawk-dove game—the war of attrition. Sugden acknowledges, though, that in the real world the roles of possessor and challenger are not clear. Perhaps an individual dropped an object on the ground, and a second person picked it up. Who is the possessor? Players “sometimes make mistakes in assigning their roles.”<sup>69</sup> Players will assume a role but not be completely confident that they have chosen correctly. Whatever role is chosen initially, there are a number of possible levels of “confidence” in that role. If two disputants to a resource have both assumed the role of “possessor,” and hawk-like seek to fight to keep the resource, they will “surrender in order of confidence.”<sup>70</sup> If the players are skillful in assigning their roles, in most cases one player will be fairly confident that they are the possessor and the other fairly confident that they are the challenger. “Such

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<sup>66</sup> *Id.* at 90.

<sup>67</sup> *Id.* at 93.

<sup>68</sup> *Id.* at 91.

<sup>69</sup> *Id.* at 75.

<sup>70</sup> *Id.* at 78.

contests will be settled quickly; there will be a brief fight, and then one player will back down.”<sup>71</sup> Competing claims to a resource will be resolved without appealing to a higher authority.

C. Sugden’s Theory Offers A More Complete Explanation For The Existence Of A System For Allocating Space Among Illegal Vendors

Relative to the norms theories discussed above, Sugden’s theory of spontaneous order provides a more complete explanation for the fact that illegal vendors arrived at a method of allocating prime vending space on the sidewalk without government intervention. Sugden’s theory would predict that disputes over possession of a given piece of valuable vending space on the sidewalk would be resolved by a convention, especially a convention that favored possessors over challengers. This prediction is borne out on the sidewalk. The vendors follow a rule of first possession. A vendor will lay out their wares on parts of the sidewalk that are not already occupied by someone else. Suppose a second vendor hoped to sell from that same spot. Upon discovering it was already occupied, the latecomer would understand that they had no right to that spot, and move on.<sup>72</sup>

According to Sugden’s theory, this system of allocating vending space to the first possessor would also be self-enforcing. There would be no need to appeal to a higher authority to resolve disputes. This prediction likewise conforms to the facts. Vending from the sidewalk is illegal. The city has no role in allocating rights to a patch of

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<sup>71</sup> *Id.*

<sup>72</sup> Interview with tennis shoe vendor on the sidewalk east of Alvarado Street, between Wilshire Boulevard and the Metro entrance, in Los Angeles, California (July 10, 2002).

sidewalk among competing illegal vendors or enforcing claims. The vendors have not organized to enforce the rule of first possession. None of the twenty-one vendors we spoke with ever indicated that vendors collectively determined space allocation. There is no “vendors’ enforcement committee” that patrols the sidewalk to ensure that first possessors retain possession against challengers. No posses are formed. No dues are collected to support a space sheriff. No arbitration panel is established to handle disputes. Instead, the system is followed by illegal vendors on an individual or bilateral (possessor/challenger) basis.

Sugden’s theory would further predict that where disputants were uncertain as to their roles, the party least confident that they were in fact the “possessor” would surrender first. This squares with what happens on the sidewalk. Unlike shopkeepers, sidewalk vendors are unable to lock-up their spots when they leave for the evening. The sidewalk is open to all. When vendors depart the sidewalk at the end of the day they take all of their belongings with them. Like the proverbial slate being wiped clean, the sidewalk is freed from possession by sidewalk vendors. The next day vendors start over again. Whoever gets to a spot first that day gets to retain possession against a challenger, even if the challenger occupied that same spot the day before.<sup>73</sup>

But what happens if application of the rule of first possession is unclear in a given situation? Suppose a vendor manages to get to the same spot first day after day for several months. She might come to believe that this spot is hers, and not just for the day. The vendor might claim that she has acquired some more durable right to that piece of sidewalk. In the language of the street, she is “established.” Her claim would be based not on the fact that she was first *that* day, but rather because she had been there first for a

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<sup>73</sup> Interview with tennis shoe vendor on the sidewalk east of Alvarado Street, between Wilshire Boulevard and the Metro entrance, in Los Angeles, California (July 10, 2002).

period stretching over *several* days. If one day she showed up at “her” site only to find it occupied by a newcomer, what would the established vendor do? In the language of Sugden’s theory, both the newcomer and the established vendor might believe themselves to be the possessor. A fight, not necessarily physical, would ensue. The vendor who was less “confident” in her role as “possessor” would eventually back down and move on.

Is there any way to predict which of the two vendors claiming to be the rightful “possessor” is less confident and thus likely to back down first? Sugden’s theory offers some help. Awarding property to the possessor is a convention in part because of the tendency for those in possession of an object to value it more than others, and thus be more willing to fight to retain it.<sup>74</sup> In other words, possession is good, *objective* evidence of willingness to fight. Taking possession of a vending spot first on any particular day is evidence that that vendor puts some value in that spot and would be willing to fight to retain it. But if an established vendor has been selling from the same spot on a regular basis for years, they must place a very high value on that spot. Why else would they have gone to the trouble of being first each day for such a long period of time? Being established is objective evidence that a vendor highly values a spot and thus is highly motivated to fight to retain it. So the new vendor is likely to be relatively less confident in her role as the “possessor,” and after some amount of fighting back down and move on.

With this refinement, Sugden’s theory appears to fit real world practices of sidewalk vending fairly well. This is especially so with respect to the durable rights to a spot enjoyed by “established” vendors. The illegal vendors we spoke with had worked the sidewalk on the Strip for a variety of periods, ranging from as little as a few days to as

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<sup>74</sup> ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, COOPERATION, AND WELFARE* 90 (Basil Blackwell 1986).

long as fifteen years. Three of them claimed to have prevailed in a dispute with another vendor over rights to sell from a particular place on the sidewalk. Each of the three “hawks” had her own spot.<sup>75</sup> Each hawk was a full time vendor, selling from her spot most days of the week. Most importantly for Sugden’s theory, these hawks had been selling from their respective spots for “years.”<sup>76</sup> By contrast, four of the vendors we spoke with admitted to having backed down in a dispute over vending space. None of them had been working the Strip for more than six months. So when it comes to predicting that long-term, “established” vendors would prevail in disputes over vending spaces they had regularly possessed for at least a year, Sugden’s theory appears dead on.

It is clear that new challengers lose against possessors who are long-term, established vendors. How do new challengers fare against short-term, new vendors in possession? Four new vendors told us that they did have possession of a spot only to back down when challenged. If the challengers were long-term, established vendors simply asserting their superior rights of first possession over the spot, then Sugden’s theory would be confirmed. But I thought it would be impractical to interview both the “hawk” and “dove” to any dispute (all of which occurred before I got to the sidewalk), and I did not attempt it. So it is possible that these successful hawk/challengers were themselves new vendors with no better claim to the spot than the new vendors they had

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<sup>75</sup> Interview with mamomes vendor on the sidewalk at the north-east corner of Alvarado Street and Seventh Avenue, in Los Angeles, California (July 21, 2002); Interview with pastry vendor on the sidewalk at the north-east corner of Alvarado Street and Seventh Avenue, in Los Angeles, California (July 21, 2002); Interview with necklace vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002).

<sup>76</sup> Interview with mamomes vendor on the sidewalk at the north-east corner of Alvarado Street and Seventh Avenue, in Los Angeles, California (July 21, 2002); Interview with pastry vendor on the sidewalk at the north-east corner of Alvarado Street and Seventh Avenue, in Los Angeles, California (July 21, 2002); Interview with necklace vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002).

succeeded in displacing. Is there any evidence to suggest the existence of rule of first possession that protected not just established vendors, but new vendors too?

Sugden's prediction that new vendors in possession would prevail against new challengers is supported by other facts. Newer vendors repeatedly said that the rule was "first come, first served." Whoever occupied a patch of sidewalk first on any particular day had a right (with respect to other vendors) to sell from that spot for the rest of the day.<sup>77</sup> Two separate new vendors stated specifically that they would yield to the vendor who arrived first that day. If on a given day they arrived at their spot and found that it was already taken, they simply moved on.<sup>78</sup> One experienced vendor asserted that disputes between vendors are rare.<sup>79</sup> Of the twenty-one illegal vendors we spoke with, two-thirds claimed never to have been involved in a dispute over a vending location.

When new vendors surrendered a spot in possession to a challenger, it remains possible that the challenger was not an established vendor but rather another new vendor

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<sup>77</sup> Interview with billfold and hat vendor on the sidewalk on the east side of Alvarado Street, between Wilshire Boulevard and the Metro entrance, in Los Angeles, California (July 10, 2002); Interview with videocassette vendor on the sidewalk on the east side of Alvarado Street, half-way between Sixth Street and Wilshire Boulevard, in Los Angeles, California (July 10, 2002); Interview with tennis shoe vendor on the sidewalk east of Alvarado Street, between Wilshire Boulevard and the Metro entrance, in Los Angeles, California (July 10, 2002); Interview with watch and videocassette vendor, on the sidewalk east of Alvarado Street, between Wilshire Boulevard and the Metro entrance, in Los Angeles, California (July 10, 2002); Interview with jewelry vendor, on the sidewalk east of Alvarado Street, between Wilshire Boulevard and the Metro entrance, in Los Angeles, California (July 10, 2002); Interview with incense vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002); Interview with vendor of batteries, cigarettes, and toys on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002); Interview with cigarette vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002); Interview with necklace and coyote skin vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002); Interview with videocassette and portable radio vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002); Interview with necklace vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002); Interview with ring vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002).

<sup>78</sup> Interview with tennis shoe vendor on the sidewalk east of Alvarado Street, between Wilshire Boulevard and the Metro entrance, in Los Angeles, California (July 10, 2002); Interview with necklace and coyote skin vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002)

<sup>79</sup> Interview with sunglasses vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 9, 2002).

with no superior claim. But these kinds of disputes are rare in any event. Even if new vendors were the ones doing the challenging, they are so few in number that they may be viewed as deviants and exceptions to the rule of first possession.

D. The Existence Of An Informal System For Allocating Sidewalk Space  
Among Illegal Vendors Is Not Explained By The Presence Of Street Gangs

The Strip and the surrounding neighborhood are home to active street gangs. Rather than Sugden's theory, might not the presence of these street gangs be the best explanation for the existence of a system of allocating vending space on the sidewalk? Might not gangs constitute a kind of private government that can impose order on the sidewalk from above? While this gang government view has some adherents, I think it is not well supported by the evidence.

Los Angeles is home to more than 1300 street gangs, whose members number more than 150,000.<sup>80</sup> The city's gangs have been known to charge sidewalk vendors "rent" for the privilege to vend.<sup>81</sup> In one neighborhood, not MacArthur Park, gang members went so far as to use orange spray paint to designate makeshift sidewalk stalls so they could more readily "identify their targets."<sup>82</sup> Four street gangs vie for territory in the MacArthur Park neighborhood.<sup>83</sup> The subject of my empirical research – the Strip –

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<sup>80</sup> Kathy Braidhill, *Where The BoyZ Are*, LOS ANGELES MAGAZINE, January 1998, at p. 63 (map)

<sup>81</sup> Interview with Officer Alexander Bautista, Los Angeles Police Department, Rampart Patrol Division, in Los Angeles, California (July 24, 2002); Cf. Kathy Braidhill, *Where The BoyZ Are*, LOS ANGELES MAGAZINE, January 1998, at 65 (downtown Los Angeles street gang "collect[s] a 'tax' for allowing the women [prostitutes] to work 'their' street corners").

<sup>82</sup> Marc Lacey, *Extortion Patrols Hit Streets On Foot, Bikes*, L.A. TIMES, Home Edition, December 28, 1992, Metro, Part B, at 1.

<sup>83</sup> Interview with Officer Alexander Bautista, Los Angeles Police Department, Rampart Patrol Division, in Los Angeles, California (July 24, 2002); Kathy Braidhill, *Where The BoyZ Are*, LOS ANGELES MAGAZINE, January 1998, at 64 (map).

is divided between two gangs. According to a gang member who approached us, Alvarado Street running north from Wilshire Boulevard is controlled by one gang,<sup>84</sup> apparently the “18<sup>th</sup> Street Gang.”<sup>85</sup> Alvarado Street running south from Wilshire Boulevard is controlled by a different gang, likely the “Crazy Riders,” or possibly the “Mara Salvatrucha.”<sup>86</sup> (See map.)

There is evidence that the vendors operating in the southern half of the Strip are charged rent by the gang whose territory encompasses it. A police officer assigned to the area was aware that gangs had done this four years before my study was conducted, but believed the practice had largely been discontinued in the face of heavier police presence in the park and surrounding neighborhood. But the vendors had a different perspective. Two different vendors shared with us their understanding that members of the street gang that assumed control of Alvarado Street south of Wilshire Boulevard charged illegal vendors \$10 or \$20 per week “rent.”<sup>87</sup> Legal vendors in the MacArthur Park district also

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<sup>84</sup> Interview with gang member on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002). The gang member approached my assistant and asked her why we were interviewing sidewalk vendors. Upon learning of our purpose, he gave us “permission” to continue in his gang’s territory. *Id.*

<sup>85</sup> Interview with Officer Alexander Bautista, Los Angeles Police Department, Rampart Patrol Division, in Los Angeles, California (July 24, 2002); Kathy Braidhill, *Where The BoyZ Are*, LOS ANGELES MAGAZINE, January 1998, at 64 (map).

<sup>86</sup> Interview with vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002) (street gang south of Wilshire charges Alvarado Street vendors rent, but gang north of Wilshire does not); Interview with vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002) (street gang south of Wilshire charges Alvarado Street vendors rent). See Interview with Officer Alexander Bautista, Los Angeles Police Department, Rampart Patrol Division, in Los Angeles, California (July 24, 2002) (Crazy Riders and Mara Salvatrucha vie for territory south-west of the park); Kathy Braidhill, *Where The BoyZ Are*, LOS ANGELES MAGAZINE, January 1998, at 64 (map) (Crazy Riders and Mara Salvatrucha have territory on either side of Alvarado Street south of Seventh Street).

<sup>87</sup> Interview with vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002) (the “pandilleros” south of Wilshire charge vendors \$10 to \$20 per week); Interview with vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002) (the “cholos” south of Wilshire charge vendors \$20 per week).

sold from the sidewalk south of Wilshire (on the other side of Alvarado Street), and they likewise complained that gang members demanded rent from them, too.<sup>88</sup>

Charging rent is one thing, but assigning vendors to particular spaces is quite another. The evidence of a street gang-directed formal system for allocating space on the sidewalk is equivocal. Claims that gangs charge vendors for the use of particular spots were made to me by two individuals.<sup>89</sup> One, a city employee involved in the enforcement of the prohibition on sidewalk vending, based his claim on the fact that he repeatedly saw individual vendors selling from the same place on the sidewalk day after day. In other words, it appeared that he, much like Thomas Hobbes, assumed that in a state of nature order could be imposed only from above. Because it was not being provided by the city, the order on the sidewalk must have been provided by the only other potential sovereign, a local street gang.<sup>90</sup> The other person who alleged that gangs charge vendors for the use of particular spots is an administrator with the IURD, which runs the legal vending district in the park. She claimed that in exchange for rent, street gangs protected a vendor's right to use their space with bodyguards and lookouts. But she stopped short of asserting that gangs are the one assigning spots to begin with.<sup>91</sup> In other words, even if the street gangs charged vendors rent and enforced the rights of individual vendors to use of their space, it does not follow that gangs were responsible for assigning spaces in the first instance. These tasks are distinct.

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<sup>88</sup> Interview with Joseph Colletti, Executive Director, The Institute for Urban Research and Development, in Los Angeles, California (July 16, 2002). The legal vendors refused, citing the fact that they had already paid the city for a license to vend there. *Id.*

<sup>89</sup> Interview with Samuel Portillo, Senior Building Mechanical Inspector, Pro-Active Code Enforcement ("PACE"), City of Los Angeles Department of Building and Safety, in Los Angeles, California (July 24, 2002); Interview with Sandra "Mama" Romero Plasencia, Program Director, Institute for Urban Research and Development, in Los Angeles, California (July 23, 2002).

<sup>90</sup> Interview with Samuel Portillo, Senior Building Mechanical Inspector, Pro-Active Code Enforcement ("PACE"), City of Los Angeles Department of Building and Safety, in Los Angeles, California (July 24, 2002).

<sup>91</sup> Interview with Sandra "Mama" Romero Plasencia, Program Director, Institute for Urban Research and Development, in Los Angeles, California (July 23, 2002).

The theory that gangs assigned spaces to vendors is further undercut by evidence that the territory embraced by the Strip was at that time divided between two rival gangs, only one of which charged vendors rent. The Strip north of Wilshire fell within the territory of the 18<sup>th</sup> Street Gang, which by all street level accounts did not charge rent. Lacking a revenue stream from vending per se, it is unlikely that members of the 18<sup>th</sup> Street Gang would go to the trouble of assigning spaces to the vendors. The rule of first possession described by vendors in the area where rent was charged did not appear to be significantly different from the rule of first possession in the area that was rent-free. In both areas there were vendors who claimed the rule on the street was “first come, first served.” In both there were disputes that arose between “established” vendors who played hawk, and new vendors who played dove. Whatever impact the rent-collecting gang south of Wilshire had on vending there, it seems unlikely that it made a difference in the way in which vendors allocated spaces.

E. Sugden’s Theory Also Sheds Light On Why The Legal Vendors Were Unable To Devise A Way To Allocate Vending Space In The Legal Zone

Across the street from the Strip, the city of Los Angeles established a legal vending district on sidewalks bordering MacArthur Park. In dramatic contrast to their illegal counterparts, who devised an informal approach to space allocation, the legal vendors there were unable to come up with anything on their own. Even after ten meetings, the less than twenty legal vendors could not agree on a means of allocating vending space in the MacArthur Park vending district. Instead space was allocated by the IURD, acting on behalf of the city, and imposed formally. Sugden’s theory explains why

order arose spontaneously among illegal vendors on the Strip. Does it also explain why this did not come to pass among legal vendors across the street?

Sugden argues that disputes over property are resolved according to conventions that exploit existing associations between claimants and objects. Conventions favor possession. One problem with the legal vending district arose out of the fact that there was no vendor “in possession” before the district opened. Prior to opening day none of the legal vendors were selling from sidewalks in the park. There were no prior associations between vendors and spots that could form the basis for legal space assignments. Each vendor was new to the district. In Sugden’s language, the game appeared symmetrical. Some spots were more valuable than others, but there was no way similarly to distinguish among competing claimants.

The IURD feared that if left on their own, the legal vendors would eventually adopt a rule of first possession. It is not clear why the IURD thought this was such a bad thing. The district was being opened all at once. Perhaps the IURD imagined that the “opening day” feature of the district combined with a first possession rule would lead to a stampede reminiscent of the Oklahoma Land Rush of 1889. Whatever the reason, the rule of first possession was not considered by the IURD to be a desirable rule. Because there was no other way to distinguish among competing vendor-claimants, no informal system developed.

#### IV. The Informal Method Of Allocating Space Among Illegal Vendors' Is Superior To The Formal Method Used By Legal Vendors

It remains to be determined whether either the formal or informal system for allocating sidewalk space among vendors is preferable. One way to measure this is to test certain prominent theories of property rights evolution against each system. These theories include wealth maximization, associated with Harold Demsetz, and the competing theories of distribution and ideology.

In this section I argue that the system of sidewalk space allocation adopted spontaneously by the illegal vendors is better explained by Demsetz's theory of wealth maximization than by competing theories of distribution or ideology. Specifically, I contend that increases in demand for sidewalk space lead to privatization of rights to use the sidewalk. This privatization took place in order to facilitate the internalization of beneficial effects that flow from the activities of individual vendors. The development of these private rights is socially desirable because it minimizes the sum of allocative and administrative costs. Stated another way, the increase in value of the sidewalk brought about by the system for space allocation outweighs the administrative costs of this sidewalk property regime.

The informal system for allocating space on the sidewalk that was adopted by the illegal vendors contrasts sharply with the formal system adopted by the city with respect to legal vending, which for several years was administered in the legal vending district across the street. Far from being wealth maximizing, the city's approach is better explained by a theory of distribution. This difference is consistent with a hypothesis

advanced by Terry Anderson and Peter Hill, that homogenous groups are more likely to adopt wealth maximizing rules than more centralized political processes.<sup>92</sup>

#### A. The Illegal Vendors' Informal System Conforms To A Wealth Maximization Theory Of Property

In his classic piece, *Toward a Theory of Property Rights*, Harold Demsetz argued that property rights are created in order to facilitate the “the internalization of harmful and beneficial effects” on actors. Demsetz claimed that property rights regimes evolve in response to changes in demand and technology, generally in the direction of more privatization. He contended that this was by and large a good thing for society as a whole, since property rules would be adopted only if the cost of administering them were exceeded by the allocative benefits they carried with them.<sup>93</sup> The informal system for allocating scarce sidewalk space conforms well to this wealth maximization theory of property.

##### 1. The Illegal Vendors' System Enjoys A Number Of Allocative And Administrative Efficiencies

The general rule for allocating sidewalk space among illegal vendors is first come, first served. This rule is, of course, not unique to the sidewalk. It applies with

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<sup>92</sup> Terry L. Anderson and Peter J. Hill, *Cowboys and Contracts*, 31 J. LEGAL STUD. S489 (2002) (smaller, more homogeneous groups are more likely to adopt wealth maximizing property rules than centralized political processes).

<sup>93</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. Paper & Proc. 347, 347-350 (1967).

respect to a number of other resources, including wild animals<sup>94</sup> and parking spaces on public streets.<sup>95</sup> It also applied to oil and gas in the early days of their development in the United States,<sup>96</sup> and to mining claims during the California Gold Rush.<sup>97</sup> In their study of the California Gold Rush, Richard Zerbe and Leigh Anderson reported how the rule of first come, first served in allocating mining claims resulted in a number of local efficiencies.<sup>98</sup> The rule of first possession used by Los Angeles' illegal vendors today enjoys some of these same efficiencies, as well as some others.

The rule of first possession of vending spaces enjoys four allocative efficiencies.<sup>99</sup> First, it encourages the early discovery of valuable vending sites.<sup>100</sup> The vendor who arrives at an open space on the sidewalk before other vendors arrive that day will gain a right to sell from that spot for the rest of the day. If that vendor arrives at that same space first on a regular basis for several months, the vendor will gain durable right to sell from it. They will be freed from having to get there first on any particular day. By rewarding discoverers, vendors are encouraged quickly to seek out valuable vending locations.

Second, the rule of first possession likely puts a given piece of sidewalk space into the hands of the vendor who values it most. Richard Epstein observed a similar phenomenon among users of space by a swimming pool or at the beach. There those who

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<sup>94</sup> *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Supreme Court 1805).

<sup>95</sup> Richard A. Epstein, *The Allocation Of The Commons: Parking On Public Roads*, 31 J. LEGAL STUD. S515 (2002) (empirical study of informal rules for parking on public streets in Chicago, IL).

<sup>96</sup> *Hammonds v. Central Kentucky Natural Gas Co.*, 255 Ky. 685, 75 S.W.2d 204 (1934).

<sup>97</sup> Richard O. Zerbe and C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 J. Econ. Hist. 114, 133 (2001).

<sup>98</sup> *Id.* at 135.

<sup>99</sup> An economy for which the mix of goods and services cannot be altered to make consumers better off is known as "allocatively efficient." A private choice or government policy will be said to increase allocative efficiency if it gives its beneficiaries the equivalent of more dollars than it takes away from its victims. The allocative cost of an economic action is its opportunity cost, that is, the allocative value that the resources the action consumers would have generated in their actual alternative uses.

<sup>100</sup> *Cf.* Richard O. Zerbe and C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 J. Econ. Hist. 114, 135 (2001) ("The first-come procedure encourages further, and faster, discovery of gold, as it encourages the mining of gold before others arrive").

arrive first are allowed to claim a spot with a towel, and their space is “generally respected for the day.”<sup>101</sup> Epstein reasoned that this was a satisfactory way to allocate space in part because “it is likely that the earlier users on each particular day will, all things equal, make more intensive use of their place.”<sup>102</sup> The situation is similar among vendors on the sidewalk. Those who arrive at the sidewalk earlier in the day are more likely to make more intensive, or valuable, use of the property than latecomers.

The third allocative efficiency the vendors’ rule of first possession stems from the fact that it rewards the specialized knowledge earlier vendors gain from selling from a particular location.<sup>103</sup> Even over the course of a single day, a vendor may learn how to hawk their wares more effectively from a particular location. The vendor might find that potential customers tend to approach from one direction as opposed to another, or that certain products sell better when displayed adjacent to certain other products. For an established vendor the knowledge is likely to become even more refined and valuable. After selling from one spot for several months a vendor would probably learn what products sell best, at what prices, and at what times of the day or week.

The vendors’ rule of first possession results in a fourth allocative efficiency: business good will. In the familiar world of traditional storefront merchants, big box retailers, and fast food franchisees, it is well understood that a business is worth more than just its assets. A certain amount of its value rests on the firm’s reputation and relationship with its customers. The same is true for the business enterprises of sidewalk vendors. As a vendor becomes established, she will develop a reputation among potential

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<sup>101</sup> Richard A. Epstein, *The Allocation Of The Commons: Parking On Public Roads*, 31 J. Legal Stud. S515, S527 (2002).

<sup>102</sup> *Id.* at S528.

<sup>103</sup> *Cf.* Richard O. Zerbe and C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 J. Econ. Hist. 114, 135 (2001) (“The first-come procedure . . . recognizes that the earliest miners would develop special knowledge about particular claim sites”)

customers. Her reputation will be based on not only what she sells, but also *where* she sells. The customer will come to associate that vendor with her “spot.”<sup>104</sup> This reputation has value because it communicates information to potential customers, making it easier for them to find the vendor and engage in wealth generating trades. The longer a vendor successfully sells from one location, the more valuable this place-based reputation becomes.

This business good will is not completely portable. If an established vendor were to cease selling from her spot, and try from another location, some of her good will would be lost. She would be starting over. It would take some time for customers to associate her with a new spot. Nor is one vendor’s good will easily transferred to another. If an established vendor were to be displaced by a newcomer, some of the good will enjoyed by the established vendor would be lost. Even if the newcomer sold the same products, some customers might turn away, not wanting to do business with them. By enabling vendors to become “established” and obtain durable rights to spots, the vendors’ rule of first possession preserves business good will.

The rule for allocating sidewalk space based on first possession also enjoys three administrative efficiencies. First, it minimizes the costs that are incurred when the vendor that arrives first on a given day is forced to gather their things and find a new

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<sup>104</sup> Berestein, *For Vendors, the Wheels Turn Slowly*, L.A. TIMES, Home Edition, Jan. 15, 1995, City Times, at 12 (explaining that fruit vendor sells from same intersection every day); Beyette, *Vendors vs. the Law - Unlicensed Street Merchants: Able Entrepreneurs or Nuisances?*, L.A. TIMES, Home Edition, June 27, 1990, at E1 (stating that tamale vendors operate at “their spot,” and a vendor’s “makeshift stand was a fixture at Seventh and Alvarado”); *Family Album Deck: Daniel and Reynalda Cruz*, L.A. TIMES, Mar. 21, 1999, at 1 (explaining that licensed vendor in Santa Ana, California, has been selling fruit from the same corner for a decade); Julianne Malveaux, *Street Vendors’ Lament*, THE SAN FRANCISCO EXAMINER, June 4, 1995, at B2 (asserting that vendors are pressured by the free market to find and keep “the right spot to sell from,” making some vendors “as permanent (and as dependable) as large department stores”); Sebastian Rotella, *Peru’s Poor See Lessons in Standoff*, L.A. TIMES, Home Edition, Jan. 4, 1997, at 2 (explaining that vendor has operated from the same spot for ten years); Tracy Wilkinson, *Street Vendors’ Leader Arrested on Issue of Untaxed Cigarettes*, L.A. TIMES, Home Edition, Feb. 15, 1992, Metro, Part B, at 3 (describing how illegal vendor arrested by Los Angeles police while selling from her “traditional spot”).

spot.<sup>105</sup> These costs can be significant for some kinds of merchandise. We saw vendors of jewelry and compact discs spend several minutes carefully laying out their goods for display. If another vendor were to come along, these goods would have to be gathered up, moved, and carefully laid out somewhere else. With respect to disputes over vending space among unestablished, or “new,” vendors, the rule of first possession eliminates these costs entirely. The first vendor to occupy a spot on any given day has a right to remain there for the rest of the day. That first vendor need not relocate when another new vendor arrives later and covets the same spot. The result may be different, though, when a dispute over vending space arises between a new vendor and an established vendor. An established vendor may arrive at her spot one day only to find it occupied by a new vendor. The vendors’ rule of first possession gives priority to the established vendor, and the new vendor must relocate. The costs of relocation in this instance, though, seem outweighed by the allocative benefits. The established vendor has built up specialized knowledge and good will in that spot. This value would be lost if a new vendor were allowed to supplant the established one just by showing up on the sidewalk early one day. The costs of relocation are not completely eliminated by the vendors’ rule of first possession. But the costs that do remain seem justified.

The rule of first possession on the sidewalk bears a second administrative efficiency. It is a fairly simple rule to administer. New vendors facing off on the sidewalk know exactly where they stand. The one who arrived at the spot first gets to stay there for the rest of the day. It is a little more complicated if the dispute is between a new vendor and an established vendor who wants to displace them and sell from their

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<sup>105</sup> Cf. Richard O. Zerbe and C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 J. Econ. Hist. 114, 135 (2001) (“The first-come procedure . . . obviates the need for the earlier miners to resettle”).

usual spot. Some time will undoubtedly be spent by the claimants determining whether the party claiming to be established is telling the truth. There is of course a risk of error. The new vendor who backed down and relocated when confronted by an “established” vendor may have been duped.

Another reason why the first possession rule used by the vendors is administratively efficient is because it is self-enforcing. Vendors need not call upon a third party to enforce a rightful claim. Disputes are infrequent. Only a third of the twenty-one vendors we spoke with claimed to have been a party to a dispute over vending space. Those who claimed to have won these disputes said that they were “respected.” From this one might assume that the winners had made some appeal to other vendors on the sidewalk to come to their aid and enforce the rule of first possession. But none of the winners said this. Instead the winners seemed simply to have held their ground. When they speak of “respect,” it appears to refer more to a sense of entitlement to use the sidewalk. “Respect” means that an established vendor’s entitlement is recognized by the second party who makes a competing claim and then backs down. It also refers to self-respect, in the sense that an established vendor would be willing to stand up to an interloper to maintain their right to sell from their spot.

## 2. The Illegal Vendors’ Informal System Has Not Over-Propertized The Sidewalk

Demsetz’s theory that property rights evolve based on cost-benefit principles is affirmed not only by the fact that a property rights regime has emerged for allocating valuable space among illegal vendors on the sidewalk. His theory is also affirmed by the

fact that this regime is far simpler than the one that exists for many other highly valuable resources. In other words, the costs of the illegal vendors' informal system do not outweigh its benefits.

Demand for sidewalk vending spaces in Los Angeles increased over the 1980s and 1990s.<sup>106</sup> This made the sidewalk relatively more valuable. But a number of factors have limited the value of the sidewalk for purposes of vending. Many vendors are not established and have no desire to become established either.<sup>107</sup> Some are between jobs in the formal economy.<sup>108</sup> One vendor we spoke with said she was a student.<sup>109</sup> These temporary vendors are looking for some quick cash on the sidewalk, and are not interested in developing a more valuable long-term vending enterprise.

Even for those vendors who want to become, or already are, established, the value of the sidewalk is still quite limited. There exist a number of substitutes for vending from

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<sup>106</sup> See Leslie Berestein et al., *Wheeling and Dealing; Street Vendors Risk Citations and the Ire of Other Merchants as They Try to Eke Out a Living*, L.A. TIMES, Home Edition, Feb. 2, 1995, at J12 (stating that sidewalk vending "proliferated after a surge in Latin American immigration"); Penelope McMillan, *Street Vendors - In Between a Rock and a Hard Place*, L.A. TIMES, Home Edition, Dec. 23, 1988, Metro, 2, at 1 ("What we're seeing in the streets of Central Los Angeles is a dramatic increase in street vending."); James Rainey, *L.A. Looks For Palatable Solution to Street Vending*, L.A. TIMES, Home Edition, Dec. 9, 1993, at A1 ("The immigration boom and simultaneous contraction of the job market have resulted in a dramatic increase in street merchants.") Raymond L. Sanchez, *Street Vendors Pay High Price for Unlicensed Trade in L.A.*, L.A. TIMES, Home Edition, Oct. 26, 1987, Metro, 2, at 1 (stating that, in the MacArthur Park neighborhood, "police began enforcing the law against street sales about six months ago [in April 1987] after area business owners complained that "the problem with vendors was getting totally out of hand"). Between 1987 and 1992, the number of illegal sidewalk vendors in Los Angeles grew from 1000 to 4000. Raymond L. Sanchez, *Street Vendors Pay High Price for Unlicensed Trade in L.A.*, L.A. TIMES, Home Edition, Oct. 26, 1987, Metro, 2, at 1; *Plan to Legalize Street Vending Comes Under Fire*, L.A. TIMES, Home Edition, Jan. 14, 1992, Metro, Part B, at 2.

<sup>107</sup> Interviews with vendors on the east side of Alvarado Street between Wilshire Boulevard and Seventh Street, in Los Angeles, California (July 9, 10, and 21, 2002) (of 21 illegal vendors interviewed, 8 indicated that they had another occupation).

<sup>108</sup> Interview with tennis shoe vendor on the sidewalk east of Alvarado Street, between Wilshire Boulevard and the Metro entrance, in Los Angeles, California (July 10, 2002) (he started vending full time a week earlier because he lost his job); Interview with watch and video cassette vendor on the sidewalk east of Alvarado Street, between Wilshire Boulevard and the Metro entrance, in Los Angeles, California (July 21, 2002) (she's been vending for 3 months because she has no work); Interview with videocassette and portable radio vendor on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002) (he began selling 2 months earlier because he has no job).

<sup>109</sup> Interview with vendor of shampoo, batteries, lighters, and cigarettes on the sidewalk at the north-east corner of Alvarado Street and Wilshire Boulevard, in Los Angeles, California (July 21, 2002).

the sidewalk, including selling from indoor swap meets, flea markets, and traditional storefront shops. In comparison with these substitutes, vending from the sidewalk suffers from a number of disadvantages. Sidewalk vending is illegal. Government enforcement of the prohibition has been sporadic. Even when the police come, some vendors have been inclined to grab their belongings, run, and return another day.<sup>110</sup> But the risk of police enforcement of the prohibitions against sidewalk vending and public nuisances has discouraged even the most dedicated vendors from investing in fixed improvements.

All things being equal, an established vendor might want to sell from a permanent stall on the sidewalk. This would enable her and perhaps her customers to escape the weather. Even a modest permanent structure might give a vendor a secure place to display merchandise and store it overnight. Rather than having to lug unsold merchandise to and from the sidewalk each day, the vendor could simply lock it up on the sidewalk each night. And during the day, a vendor could afford to market more merchandise and over a larger area of the sidewalk, since in a secure set of display cases her goods would be less subject to theft. But the very feature that makes fixed improvements so attractive as a protection against theft makes them vulnerable to seizure by city authorities. A vendor can run away with her box of shampoo. She cannot take a fixed stall with her.

So sidewalk vendors are left with selling in the open air. Vulnerable to weather, vendors must limit the number and kinds of goods they hawk. These marketing choices are further limited by the higher risk of theft. This risk also compels each vendor to

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<sup>110</sup> Interview with vendor of sliced fruit on the sidewalk on the east side of Alvarado Street, half-way between Sixth Street and Wilshire Boulevard, in Los Angeles, California (July 10, 2002) (when the police come she runs away with her wheeled cart); Interview with videocassette vendor on the sidewalk on the east side of Alvarado Street, half-way between Sixth Street and Wilshire Boulevard, in Los Angeles, California (July 10, 2002) (when the police approach, he runs away).

collect her goods and remove them from the sidewalk at the end of every day. As a platform for selling goods then, the public sidewalk's value is limited.

The limited nature of the sidewalk's value is especially apparent when one considers the advantages of selling from an indoor swap meet or any of the traditional store fronts that exist next to the sidewalk on the Strip and throughout the city. Those merchants are much better secured against the weather and theft, and the risk of the state removing a merchant's business is dramatically less. Even adjusting for differences in size, a store front business is more valuable than vending space on the sidewalk next to it.<sup>111</sup>

Demsetz argued that property rights are transformed in response to changes in technology and demand.<sup>112</sup> A corollary of this thesis might be that, all other things being equal, where one resource is more valuable than another, the more valuable resource will enjoy more property rights activity. Property rights activity must be cost justified. If a resource has relatively low value, it will not enjoy a great deal of property rights definition. A given resource will be the subject of only that level of property rights definition that is justified in light of the resource-related benefits that may be derived from it. Because the sidewalk has less value than the store fronts adjacent to it, Demsetz's cost benefit theory of property rights evolution would predict that there would be less property rights activity on the sidewalk. This theory is confirmed by the facts.

Stated generally, the core rights of property are the rights to use, exclude, and transfer. The rules relating to each of these rights is much more rich and elaborate with

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<sup>111</sup> See Gregg W. Kettles, *Regulating Vending in the Sidewalk Commons*, 77 TEMPLE L. REV. 1, 30-31 (2004) (elaborating argument).

<sup>112</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPER & PROC. 347, 350 (1967) ("the emergence of new private or state-owned property will be in response to changes in technology and relative prices").

respect to store front businesses than it is in the illegal vendors' regime for sidewalk vending space. Consider first the right of use. Through first possession, sidewalk vendors get the right to use their spaces to sell goods. There may be a restriction on selling products that do not directly compete with either an adjacent merchant or vendor.<sup>113</sup> But that is as elaborate as the vendors' property regime gets with respect to use. This regime is quite simple compared to the one that exists on property containing storefront businesses. There the law contemplates rights to use being divided temporally, such as between a landlord and a tenant. The law of property may also more precisely define the contours of a right to use. For example, a merchant's right to modify the appearance of a storefront may be limited by the common law doctrine of waste<sup>114</sup> or provisions in their lease.<sup>115</sup>

Similar differences exist between the sidewalk and traditional storefront shops with respect to the right to exclude. Under the property regime embraced by them, each illegal sidewalk vendor gets the right to exclude other vendors from selling from her spot. The right to exclude enjoyed by store front merchants and other landowners are defined in greater detail. For example, a merchant may be restricted in their ability to exclude a

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<sup>113</sup> Gregg W. Kettles, *Regulating Vending in the Sidewalk Commons*, 77 TEMPLE L. REV. 1, 28-29 (2004).

<sup>114</sup> A tenant's duty not to commit waste is breached if tenant makes "such a change as to affect a vital and substantial portion of the premises; as would change its characteristic appearance; the fundamental purpose of the relation; or the uses contemplated, or a change of such a nature, as would affect the very realty itself, extraordinary in scope and effect, or unusual in expenditure." *Pross v. Excelsior Cleaning and Dyeing Co.*, 110 Misc. 195, 201, N.Y.S. 176, 179-180 (Mun. Ct. 1919)

<sup>115</sup> *U.S. Fidelity & Guaranty Co. v. Let's Frame It, Inc.*, 759 P.2d 819 (Colo. App. 1988) (fire damage exception to tenant's covenant to repair held inapplicable to fire caused by tenant's negligence when other lease provisions required tenant to repair damage resulting from its negligence).

customer<sup>116</sup> or another party that holds a legally recognized interest in the property, such as a tenant in common or landlord.<sup>117</sup>

It is not clear whether illegal vendors have a right to transfer their interest in a spot. There were instances when one vending spot was being operated by more than one person. Perhaps this was a way to transfer a vending spot from one vendor to another: a vendor who planned to leave would bring in another vendor to work together for a time. Transfers of interests in storefront businesses are much more complicated. Among other things, a writing with certain language is generally required, and it is advisable to visit the recorder's office and perform a title search before buying.<sup>118</sup>

The system for allocating space among illegal sidewalk vendors appears to fit well with a number of the components of Demsetz's well-maximization theory of property. Property rights in the sidewalk did arise at about the time the demand for vending space increased to the point that conditions of scarcity existed with respect to the most valuable spots. The property rights evolved towards greater privatization, as first possession principles were applied so that exclusive usufructory rights were recognized in individual vendors. Finally, the property rights regime is cost-justified. The allocative efficiencies brought about by the vendors' system for allocating sidewalk space outweighs its administrative costs. The higher administrative costs that would be incurred in a property regime with more elaborate features are not justified in light of the limited value of the sidewalk for selling goods. As Demsetz's theory would predict, those added features have not been adopted by illegal vendors on the sidewalk.

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<sup>116</sup> *Uston v. Resorts International Hotel, Inc.*, 89 N.J. 163, 445 A.2d 370 (1982) (casino patron enjoys a common law right of reasonable access).

<sup>117</sup> *Spiller v. Mackreth*, 334 So.2d 859 (Ala. 1976) (cotenant in possession would be liable to cotenants out of possession for value of his use and occupation of the property if the cotenants actually sought to occupy the property but were excluded by the cotenant in possession).

<sup>118</sup> JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 611, 661 (5<sup>th</sup> ed. Aspen Law and Business 2002).

B. The Illegal Vendors' Method of Allocating Space Does Not Conform To Theories Of Property That Are Either Distributional or Ideological

Having demonstrated that the property rights regime adopted by illegal vendors is well-explained by all aspects of Demsetz's wealth maximization theory, it remains to be seen whether it is also consistent with another theory of property rights evolution. If it can be well-explained by another theory, then our confidence in Demsetz's wealth maximization theory might be diminished. Two competing theories of property rights evolution are particularly prominent in the legal academic literature: distribution and ideology. Both theories argue that a community may not adopt property regimes that maximize societal wealth. But neither theory fares well when applied to the sidewalk used by illegal vendors.

The theory of distribution rests on the interest group theory of politics.<sup>119</sup> It claims that different property rights regimes will favor different groups, and a community "will adopt those regimes whose distributional features are most favorable to the groups that can organize most effectively to influence the political process."<sup>120</sup> Thomas Merrill has used this theory to explain why market mechanisms, which promise to generate added wealth for society as a whole, are so little used in environmental law.<sup>121</sup> Well organized groups, such as labor and existing businesses, do not find free adoption of those mechanisms to be in their narrow self-interest.<sup>122</sup>

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<sup>119</sup> Thomas Merrill, *Explaining Market Mechanisms*, 2000 ILL. L. REV. 275, 280 (2000) (summarizing the theory).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 277.

<sup>122</sup> *Id.* at 291-293.

This perspective does not fit well with the allocation regime adopted by illegal sidewalk vendors. The theory of distribution assumes the existence of a political process in which groups compete for the selection of property rules.<sup>123</sup> The property rights regime on the sidewalk was not adopted by any state entity or quasi-political body. A local street gang may have a role in sidewalk vending. But the evidence suggests that its role is limited to enforcing the regime that was already in place rather than adopting the property rights regime in the first instance. Because there was no entity to be influenced in the adoption of the system for allocating sidewalk vending space, the distribution theory does not seem to be a good fit at first glance.

Even when examined more closely, the theory of distribution does not seem any more powerful in explaining what happened on the sidewalk. The distribution theory claims that a group's influence over a process to consider a change in a system of rights is determined by a number of factors, including (1) the cost of organizing the group; (2) the stakes each group member has in the proposed change; and (3) whether the interests of the group members are aligned or in conflict with respect to the proposed change.<sup>124</sup> Application of these factors to the sidewalk suggests that vendors would have little influence in a decision-making process to consider changing rights to vend on the sidewalk. Many who vend do so only temporarily. Constant change in group membership raises costs of organizing the group. Nor is there a great deal to fight over on an individual basis. Limitations imposed by the environment and city government limit the per capita stakes of sidewalk vending rights. Finally, vendors do not have identical interests in sidewalk rights. Temporary vendors would prefer a regime in which

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<sup>123</sup> *Id.* at 280 (2000) (“groups are assumed to compete in an effort to persuade regulators to adopt those instruments that distribute the greatest wealth to themselves”).

<sup>124</sup> Thomas Merrill, *Explaining Market Mechanisms*, 2000 ILL. L. REV. 275, 280 (2000).

rights to vend could be quickly obtained and lost, while established vendors might instead favor one where vending rights could be obtained and lost only slowly. The theory of distribution does not explain why vendors were able to adopt a regime for allocating space on the sidewalk.

The theory of ideology appears to fit no better. This theory argues that a community will adopt a property regime that reflects an aspiration, such as egalitarianism, that is widely held among community members.<sup>125</sup> The theory of ideology was used by Andrea McDowell to help explain the content of a system of rules adopted by miners during the California Gold Rush.<sup>126</sup> In some mining camps, there were limits on the size of claims and the number that could be held at the same time, as well as claim notice and work requirements.<sup>127</sup> These limitations were not wealth maximizing for society as a whole, but rather advanced the miners' own group interests in conformity with new ideologies of egalitarianism and anti-capitalism.<sup>128</sup>

There are some similarities in the facts of mining during the California Gold Rush and those of vending on sidewalk today. Vendors stake claims to sidewalk space. Their spaces appear to be limited in size, specifically to what they can physically occupy with their wares. While some vendors work for someone else, most are self employed, and all of them seem to have rights to use only the space they occupied and no other. There is a kind of work requirement, at least for some vendors. If a new vendor leaves the sidewalk, another may take their place. There is no evidence that a vendor can hold more than one spot at a time.

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<sup>125</sup> Andrea G. McDowell, *From Commons to Claims: Property Rights in the California Gold Rush*, 14 YALE J. L. & HUMAN. 1 (2002) (miners in Gold Rush California developed restrictions on claim holder rights that did not maximize the production of wealth for society as a whole, but rather reflected new norms of egalitarianism and anti-capitalism).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 33, 44-45 (2002).

<sup>128</sup> *Id.* at 58, 61 (2002).

But the similarities end there. Significant differences exist between mining claims during the California Gold Rush and sidewalk claims today. First, the stakes are dramatically different. Even the choicest spots for sidewalk vending are of fairly limited value. By contrast, mining claims for gold were potentially worth a fortune.<sup>129</sup> Second, the risks are likewise dissimilar. In part because even the best vending spots are not all that much more valuable than the poorest vending spots, the risks involved in sidewalk vending are fairly minimal. Mining during the Gold Rush was a different story. One might dig for days and come up empty handed, while another in the same amount of time would earn thousands of dollars.<sup>130</sup> The high potential payoffs and great risks in gold mining lead some to advocate a greater expansion of private property rights in mining claims. Specifically, they argued that restrictions on the number of claims that could be held by any one miner should be removed.<sup>131</sup> This raised the specter of concentrated power and monopoly. It was against this threat that miners reacted, as evidenced by arguments made by their representatives, their correspondence, and their codes that restricted claim rights.<sup>132</sup> Sidewalk vending is different. The low risks and low potential payoffs in sidewalk vending have deterred large scale capitalists from arguing for expanded property rights in the sidewalk. There is no danger of sidewalk monopoly, and thus no danger against which venders have been compelled to react.

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<sup>129</sup> *Id.* at 63.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 50.

<sup>132</sup> *Id.*

C. The City's Method of Allocating Space Is Better Explained By The  
Distribution Theory Of Property

The method of allocating space adopted by illegal sidewalk vendors differs greatly from that adopted by the city of Los Angeles for legal vending. Demsetz' wealth-maximization theory has some explanatory power for the city's approach, but it is limited. The city's approach is better explained by the distribution theory of property.

Demsetz's wealth-maximization theory of property has several parts. One of the weaker components of his theory is that as demand for a resource increases, "new property rights emerge in response to the desires of interacting persons for adjustment to new benefit-cost possibilities."<sup>133</sup> This aspect of Demsetz's thesis is confirmed by the city's foray into sidewalk vending. For many years the city of Los Angeles refused to recognize any kind of property right to vend from the sidewalk. To the contrary, the city made sidewalk vending a kind of anti-property. Those practicing it were guilty of a misdemeanor.<sup>134</sup> But this prohibition notwithstanding, demand for vending space on the sidewalk increased substantially during the 1980s and 1990s, as reflected by the dramatic increase in sidewalk vendors during that period.<sup>135</sup> The city responded to this increased

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<sup>133</sup> Dean Lueck, *The Extermination and Conservation of the American Bison*, 31 J. LEGAL STUD. S609, S649 (2002) (private property rights to live bison herds did not evolve, despite increasing market demand for bison). Cf. Henry E. Smith, *Exclusion Versus Governance: Two Strategies For Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002) (increasing demand does not necessarily lead to increased privatization in the first instance).

<sup>134</sup> Los Angeles, Cal., Mun. Code 42(b) (2004).

<sup>135</sup> See Leslie Berestein et al., *Wheeling and Dealing; Street Vendors Risk Citations and the Ire of Other Merchants as They Try to Eke Out a Living*, L.A. TIMES, Home Edition, Feb. 2, 1995, at J12 (stating that sidewalk vending "proliferated after a surge in Latin American immigration"); Penelope McMillan, *Street Vendors - In Between a Rock and a Hard Place*, L.A. TIMES, Home Edition, Dec. 23, 1988, Metro, 2, at 1 ("What we're seeing in the streets of Central Los Angeles is a dramatic increase in street vending."); James Rainey, *L.A. Looks For Palatable Solution to Street Vending*, L.A. TIMES, Home Edition, Dec. 9, 1993, at A1 ("The immigration boom and simultaneous contraction of the job market have resulted in a dramatic increase in street merchants.") Raymond L. Sanchez, *Street Vendors Pay High Price for Unlicensed Trade in L.A.*, L.A. TIMES, Home Edition, Oct. 26, 1987, Metro, 2, at 1 (stating that, in the MacArthur Park

demand by enacting an ordinance that created a mechanism by which legal vending districts could be established in the city and vendors be allowed to ply their trade on the sidewalk.<sup>136</sup> The city approved the establishment of two legal vending districts, including one in MacArthur Park.<sup>137</sup> The city contracted with a third party to manage the MacArthur Park district, who subcontracted the task to the Institute for Urban Research and Development (“IURD”).<sup>138</sup> The IURD assumed responsibility for allocating space among the legal vendors who were to sell from the district.<sup>139</sup> In doing so, the city and its agent, the IURD, created new property rights for qualifying vendors in the sidewalk.

This action by the city is consistent with Demsetz’s argument to the extent he claims that new property rights emerge for a resource when demand for it increases. But Demsetz’s argument also contains stronger components, including that the property rights that do emerge do so “in accordance with a criterion of social wealth maximization.”<sup>140</sup> As explained by Thomas Merrill, “if the social benefits of a property regime exceed the social costs of creating and enforcing such a regime, then society will recognize property rights over a resource. Conversely, if the social benefits of a property regime do not exceed the social costs of creating and enforcing such a regime, the society will not

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neighborhood, "police began enforcing the law against street sales about six months ago [in April 1987] after area business owners complained that "the problem with vendors was getting totally out of hand"). Between 1987 and 1992, the number of illegal sidewalk vendors in Los Angeles grew from 1000 to 4000. Raymond L. Sanchez, *Street Vendors Pay High Price for Unlicensed Trade in L.A.*, L.A. TIMES, Home Edition, Oct. 26, 1987, Metro, 2, at 1; *Plan to Legalize Street Vending Comes Under Fire*, L.A. TIMES, Home Edition, Jan. 14, 1992, Metro, Part B, at 2.

<sup>136</sup> L.A., Cal., Mun. Code 42(m)(1), (m)(2)(B), (m)(6) (1999); Kara Glover, *L.A. Gets a Sidewalk Vending Law, After Four Years of Consideration*, LOS ANGELES BUSINESS J., Dec. 27, 1993, at 11; James Rainey, *L.A. Looks For Palatable Solution to Street Vending*, L.A. TIMES, Home Edition, Dec. 9, 1993, at A1;

<sup>137</sup> Rhonda Roumani, *Hernandez Announces Launching of City's First Sidewalk Vending District*, Metropolitan News Enterprise (Los Angeles), June 4, 1999, at 11.

<sup>138</sup> Interview with Joseph Colletti, Executive Director, Institute for Urban Research and Development, in Los Angeles, California (July 16, 2002).

<sup>139</sup> *Id.*

<sup>140</sup> Thomas Merrill, *Explaining Market Mechanisms*, 2000 ILL. L. REV. 275, 278 (2000).

recognize property rights over the resource.”<sup>141</sup> In other words, whatever property rights regime is created will be cost justified. The allocative benefits brought about by the new rights regime will outweigh its costs. The new property rights will be efficient.

The city of Los Angeles’ property regime for legal sidewalk vending does not fit nearly as well with this stronger, “efficiency” component of Demsetz’s thesis. As to whether the city’s approach maximized wealth, the evidence is equivocal. Los Angeles’ ordinance did not create any districts where vending would be legal, instead it created an intensely bureaucratic process by which such districts could be created.<sup>142</sup> A district had to be approved by twenty percent of the property owners in the area.<sup>143</sup> Individual property owners had the right to veto vending from the sidewalk immediately adjacent to their property.<sup>144</sup> This approach may have been taken out of a concern that legal vending risked imposing negative spill-over effects on neighboring property owners. Some thought that vendors might attract crime, contribute to undue congestion on the sidewalk, and generally compete unfairly with traditional storefront merchants.<sup>145</sup> These risks would have to be addressed to the satisfaction of the expected victims—neighboring property owners—before a district could be created.

But the facts surrounding the creation of legal vending districts are more consistent with a distribution theory of property. I have argued elsewhere that many of the negative spill-over effects of vending are exaggerated or do not exist at all.<sup>146</sup> The

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<sup>141</sup> *Id.* at 278-279.

<sup>142</sup> See Tim May, *Caught in Catch-22 Business: The City’s First Group Of Trainees Remains Subject To Fines Until Legal Selling Districts Are Established*, L.A. TIMES, Valley Edition, March 31, 1995, at 1 (“vendors . . . face a lengthy, bureaucratic approval process before they can be established as legitimate merchants”).

<sup>143</sup> Los Angeles, Cal., Mun. Code 42(m)(2)(B) (1999).

<sup>144</sup> Los Angeles, Cal., Mun. Code 42(m)(12)(E) (1999).

<sup>145</sup> Gregg W. Kettles, *Regulating Vending in the Sidewalk Commons*, 77 TEMPLE L. REV. 1, 27-32, 35-38 (2004).

<sup>146</sup> *Id.*

real objection to vending stemmed from a desire on the part of traditional store-front merchants to suppress legitimate competition from sidewalk vendors. Merchants feared not only increased competition from legalized vending, but also decreased relative prestige. For this reason storefront merchants opposed legalizing vending, and fought to shape the ordinance to ensure that the only districts approved would be those that were certain to generate positive spill-over effects, if they endured at all.<sup>147</sup>

The merchants got what they wanted. The ordinance did not make vending legal city wide, but rather created a process by which legal vending “districts” could be established.<sup>148</sup> The ordinance limited the number of districts to eight.<sup>149</sup> Though vending proponents advocated for the establishment of as many districts,<sup>150</sup> only two were created. One started with six carts and went downhill from there.<sup>151</sup> It limped along for

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<sup>147</sup> *Id.* at 27-42.

<sup>148</sup> L.A., Cal., Mun. Code 42(m)(1) (1999); Kara Glover, *L.A. Gets a Sidewalk Vending Law, After Four Years of Consideration*, LOS ANGELES BUSINESS J., Dec. 27, 1993, at 11.

<sup>149</sup> *Id.*

<sup>150</sup> See Leslie Berestein, *For Vendors, the Wheels Turn Slowly*, L.A. TIMES, Home Edition, Jan. 15, 1995, City Times, at 12 (explaining that vendors gathered signatures for proposed district at intersection of Western Avenue and Santa Monica Boulevard in Los Angeles); Henry Chu, *Alarcon Rejects Bid for Sidewalk Vending Zone; Pacoima: Councilman Says Request from Vendors for District Along Van Nuys Boulevard Fails to Generate Enough Support*, L.A. TIMES, Valley Edition, Apr. 21, 1995, at B6 (stating that vendor organizations seek approval of vending districts in Pacoima, Pico/Union, and MacArthur Park areas of Los Angeles); Stephen Gregory, *Agreement Nears in Vendors' Dispute*, L.A. TIMES, Home Edition, June 18, 1995, City Times, at 6 (showing that group of vendors hoped to use petitions to establish legal vending district in Boyle Heights neighborhood of Los Angeles); Ken Hallinan, *Sidewalk to Prosperity? Vendors are Taking Their Place in MacArthur Park*, THE SAN DIEGO UNION-TRIBUNE, July 21, 1999, Business, at C1 (describing how organizers in San Pedro district of Los Angeles, California area hope to create legal sidewalk vending district); Michael Krikorian, *Street Sellers Push for Vending District in Boyle Heights*, L.A. TIMES, Home Edition, Aug. 23, 1996, at B5 (explaining that taco vendor in the Boyle Heights neighborhood of Los Angeles "expressed dismay that his councilman, Richard Alatorre, has not moved more quickly to help establish a vending district"); Tim May, *"Legal Vending Zone" Proposal Grows Stale*, L.A. TIMES, Valley Edition, Dec. 22, 1995, Valley Focus, at B3 (explaining that vendors in Pacoima neighborhood of Los Angeles organized to establish legal vending district); Lee Romney, *Group of Street Vendors Licensed in Test of Reform*, L.A. TIMES, Home Edition, May 7, 1999, at C1 (stating that vending districts were proposed); Louis Sahagun, *Council OK's Districts for Street Vendors*, L.A. TIMES, Home Edition, Jan. 15, 1992, at A1 (legal vending districts are targeted for Boyle Heights, MacArthur Park, downtown Los Angeles, the Pico-Union District, and parts of Hollywood) James Rainey, *Vendors Cheer as Legalization Wins Final OK*, L.A. TIMES, Record Edition, Jan. 5, 1994, at A1 (describing how groups plan to sponsor vending districts in Pico-Union, Westlake, Hollywood, Eastside, South-Central, Leimert Park, Watts, and the northeast San Fernando Valley).

<sup>151</sup> See Email from Joseph Colletti, Executive Director, Institute for Urban Research and Development (Apr. 27, 2004) (on file with author) (vending district in San Pedro area of Los Angeles started with six

two years before becoming completely inactive.<sup>152</sup> The second district, in the MacArthur Park neighborhood, was created not adjacent to any traditional storefront business, but rather in the park itself.<sup>153</sup> Merchants conditioned their approval of the district on a promise that no vendor would sell a product sold by any of the storefront businesses in the area.<sup>154</sup> The city ordinance requires vendors to sell from city-approved carts. The carts are expensive, but beautiful, and maybe that is the point.<sup>155</sup> By presenting a more attractive appearance to the park and not selling any competing goods, area storefront merchants must have believed that the legal vending district in MacArthur Park would attract more shoppers to the area. This would benefit the merchants. If the district failed (which it did, five years later), the merchants would not be any worse off than they were before the ordinance was passed.

So when it comes to choosing where to set up on the sidewalk, legal vendors' choices are severely restricted. At this macro level, the city's new property rights regime for sidewalk vending space seems better explained by a theory of distribution than by

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carts); Telephone Interview with Maggie Calderon, Sidewalk Vending Administrator, Los Angeles Community Development Department (Apr. 22, 2004) (the San Pedro legal vending district is now inactive).

<sup>152</sup> See Telephone Interview with Carolyn Brownell, Office Manager, San Pedro Peninsula Chamber of Commerce (Apr. 29, 2004) (the San Pedro legal vending district operated for two years).

<sup>153</sup> Rhonda Roumani, Hernandez Announces Launching of City's First Sidewalk Vending District, *Metropolitan News Enterprise* (Los Angeles), June 4, 1999, at 11.

<sup>154</sup> See Lee Romney, *Group of Street Vendors Licensed in Test of Reform*, L.A. TIMES, Home Edition, May 7, 1999, at C1 ("Organizers have carefully selected participating vendors and their wares to make sure that they do not compete with one another or surrounding merchants, nor duplicate the goods available at [downtown Los Angeles] Olvera Street's Mexican marketplace."); Rhonda Roumani, *Hernandez Announces Launching of City's First Sidewalk Vending District*, METROPOLITAN NEWS ENTERPRISE (Los Angeles), June 4, 1999, at 11 (explaining that district "limited what the vendors could sell, making sure that the wares sold complimented rather than competed with surrounding merchants ..."); *Sidewalk Vending Zone Set Up at MacArthur Park*, CITY NEWS SERVICE INC., June 3, 1999 at 1 ("Under city law, vendors must win the support of merchants and residents in areas where they want to peddle their goods and services."); Interview with Dina Serrano, a legal vendor in the MacArthur Park district, in Los Angeles, California (July 23, 2002) (stating that merchants in MacArthur Park area agreed to creation of vending district so long as there was no competition).

<sup>155</sup> Maki Becker, *Street Vendors Appear to be Sold on Budding Designers' Change of Cart; Students Develop Prototypes to Meet New Standards for MacArthur Park Peddlers*, L.A. TIMES, Home Edition, Nov. 10, 1995, at B4.

wealth-maximization. What about at the micro level? Was the regime for allocating individual spaces to vendors within the MacArthur Park legal vending district any different? Is it better explained by a theory of wealth maximization, or does it too fit better with the theory of distribution?

The legal vending district at MacArthur Park was managed by the IURD, which had assumed responsibility for allocating individual spaces to legal sidewalk vendors. When the district was about to open, between twelve and twenty legal vendors had completed the training program and were waiting to start selling from the sidewalk.<sup>156</sup> As detailed above, the vendors were unable to agree on a system for allocating space and the IURD assigned them first by lottery. As a way to assign a scarce vending space to the vendor that values it most, the lottery method seems inferior to the rule of first possession, whose efficiencies are described above. The IURD took a different approach when it later reassigned vending spaces. It was then concerned with benefiting the vendors, but also sought to beautify the neighborhood. It may not have been possible to do both well. Even this new approach appears to have fallen short of maximizing the value of sidewalk vending, as viewed from the street. Even on the busiest days of the week, near the district's peak health, less than half the legal vendors showed up to work. The presence of so much unused capacity in the legal vending district may be explained by a host of factors, including that the park is a poor place to vend. But one cannot help but wonder whether allowing the legal vendors to have settled on an allocative rule of first possession would have resulted in more complete use of the sidewalk there.

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<sup>156</sup> Rhonda Roumani, *Hernandez Announces Launching of City's First Sidewalk Vending District*, METROPOLITAN NEWS-ENTERPRISE, June 4, 1999, at 11; Interview with Sandra "Mama" Romero Plasencia, Program Director, Institute for Urban Research and Development, in Los Angeles, California (July 23, 2002).

It is an open question whether the property rights regime for legal vending resulted in any allocative efficiencies. Whatever allocative efficiencies have resulted, they appear to have been less than those enjoyed by the system adopted by the illegal vendors across the street. But allocative efficiencies are just one part of the equation. Administrative costs likewise figure into the concept of efficiency, and in this respect the evidence suggests that wealth may not be maximized by the legal vending regime's system of property rights. The legal vending ordinance was debated for years.<sup>157</sup> After it was enacted and a property rights system for sidewalk vending broadly outlined, the IURD was hired to fill in the details and manage the district. For the first year of its work the IURD was paid \$235,000.<sup>158</sup> Of course the IURD did a lot more than just allocate space on the sidewalk. But whatever it spent on space allocation issues is more than what has been spent by the illegal vendors across the street. When asked why the legal vending district closed, the IURD cited the high cost of managing it and the drying up of grant money from the city and state of California.<sup>159</sup> All told, the property rights regime for legal vending offers only equivocal support for the wealth maximization theory of property. At least in regards to property rights in a macro sense, the legal vending regulatory system is much more consistent with a property theory of distribution.

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<sup>157</sup> Louis Sahagun, *Council OK's Districts for Street Vendors*, L.A. TIMES, Home Edition, Jan. 15, 1992, at A1; Kara Glover, *L.A. Gets a Sidewalk Vending Law, After Four Years of Consideration*, LOS ANGELES BUSINESS J., Dec. 27, 1993, at 11; James Rainey, *Vendors Cheer as Legalization Wins Final OK*, L.A. TIMES, Record Edition, Jan. 5, 1994, at A1.

<sup>158</sup> Lee Romney, *Group of Street Vendors Licensed in Test of Reform*, L.A. TIMES, Home Edition, May 7, 1999, Business, Part C, at 1.

<sup>159</sup> Interview with Sandra "Mama" Romero Plasencia, Program Director, Institute for Urban Research and Development, in Los Angeles, California (March 14, 2006).

## V. Conclusion

In this paper I compare one formal and one informal system for allocating land in a commons in a specific context: sidewalk space for vending. I explain why each system for allocating scarce vending space on the sidewalks in Los Angeles arose, explain what the system entails, and judge its desirability. The “why” part of the inquiry provides an opportunity to test the power of various theories of collective action against real world facts. Against rival theories of social norms and street gang government, Robert Sugden’s game theory of spontaneous order appears best to explain the ability of illegal vendors to arrive at a method for resolving disputes over space. It also does a fair job of explaining why legal vendors in a city-run vending district across the street were unable quickly to settle on method for allocating space there.

The “what” part of the inquiry is also important. It provides an opportunity to test various theories of property rights evolution and determine which of the two methods of allocating land is more desirable. These theories include Harold Demsetz’s theory of wealth maximization, and theories of distribution and ideology. The substantial number of allocative and administrative efficiencies enjoyed by the first possession system adopted by illegal vendors offer substantial support for the theory of wealth maximization. The city’s approach to sidewalk vending is more equivocal. When it comes to allocating space within the legal vending district among vendors, there are signs that the value of the sidewalk was being maximized. But when one considers the administrative costs, the high levels of unused capacity in the district, and the fact that MacArthur Park is effectively the only place in the city where it is legal to vend, a different picture emerges. Rather than maximizing wealth for the entire community, at

the macro level the city's approach to allocating rights in the sidewalk seems more attuned to concerns of distribution.

This paper is optimistic. Self-interested strangers have coordinated their vending activities to maximize the value of the sidewalk. They have done this not just in the absence of government help, but in the face of government hostility. These illegal vendors developed wealth maximizing order not in the law's shadow, but rather in its absence. I hope municipalities and other governmental entities will take note when considering how to respond to sidewalk vending in their communities.

There are of course limits to this analysis, confined as it was to the sidewalk. One should not conclude from this study that formal government-imposed property rights regimes should be avoided generally. Not every dispute over a resource shares characteristics of hawk-dove games, where spontaneous order is likely to emerge. But where they do, it seems that government should tread lightly. A research agenda might be to look for other resources where hawk-dove conditions are present. Where spontaneous cooperation may not be achieved and social norms are not a viable tool, there is a role for government. But the rule systems it adopts do not have to conform to a theory of distribution; they might instead be wealth maximizing. This suggests further study on how the decision-making processes of the state can be set up so that all interests are represented, and wealth maximizing rules have a better chance of emerging. In the meantime, there's always the sidewalk.