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 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

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vendors’ system of space allocation is superior, enjoying a number of efficiencies. By contrast, the City’s formal system suffers from a number of costs. It seems more intent on protecting storefront merchants from legitimate competition than on benefiting the community as a whole.

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 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 on a typical day only a half-dozen of them bothered to show up on the sidewalk. 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, which 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? Why, despite efforts to stamp it out, 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. How that land is allocated, however, is dramatically different. In MacArthur Park, a system of allocating space among the legal sidewalk vendors 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 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.\(^1\) 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.\(^2\) Their work has been overlapped by scholarship on informal order generally, especially in the areas of game theory and social norms.\(^3\)

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 a government. Shawn Kantor and Thomas Merrill, among others, have studied instances where a government has adopted formal rules for the allocation of commons resources, not only to explain their adoption in descriptive terms, but also to assess their merit.\(^4\) Still other commentators have attempted to shed light on the transitions between informal systems and formal ones.\(^5\) For all this work, though, we

\(^1\) See James M. Acheson, The Lobster Gangs of Maine (1988) (explaining how Maine lobstermen 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); 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 over-use, that is, “a tragedy of the commons”).

\(^2\) See Gary D. Libecap, The Conditions for Successful Collective Action, 6 J. Theoretical Pol. 563 (1994) (examining difficulties in organizing to control exploitation of oil fields and fisheries); Ostrom, supra note 1, at 144–178, 211 (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).


\(^5\) See, e.g., Terry L. Anderson & Peter J. Hill, The Not So Wild, Wild West (2004) (in the American West property rights that evolved from the bottom up were more likely to conserve resources and promote investment than property rights that were dictated by central authorities); Terry L. Anderson & Peter J. Hill, The Evolution of Property Rights: A Study of the American West, in 18 J. L. & Econ. 163 (1975) [Hereinafter Anderson & Hill, American West] (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. Papers & Proc. 347 (1967) (property rights regimes
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 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 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 similar users, nearly all of whom share the same cultural background—Spanish-speaking, Central-American immigrants. By holding these variables constant, 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. 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, and cities in the United States with large Latin American immigrant populations, such as New York City, New York and Los Angeles, California. 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. From Boise, Idaho to Jacksonville, Florida, and
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from Phoenix, Arizona to Port Huron, Michigan, 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 objective of this paper is to inform policy-making on the management of a variety of other increasingly strained commons resources. 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 commons resources may be better resolved. By controlling for a host of independent variables, this paper provides a rare opportunity to explain the emergence of, 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. The informal system adopted by the illegal vendors is based on the principal of first possession. This principal has two aspects. One aspect refers to the right of every vendor to use a space that that vendor occupies first on any given day. That right expires at the end of the day, or even sooner, if when the vendor leaves the space. 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

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Phoenix; St. Louis; San Diego; San Francisco; and Seattle); Kettles, supra note 7, at 12–14 (Los Angeles).
12 See Brad Hem, Boise Vendors Want Spot Back at 6th & Main, THE IDAHO STATESMAN, Aug. 13, 2005, at 1 (city installed metal markers on sidewalk in an effort to disperse vendors and ease congestion).
11 See Christopher F. Aguilar, Bill on Street-Side Seafood Sales Generates Opposition, FLORIDA TIMES-UNION, Apr. 27, 2005, at L-10 (city bill to bar some sidewalk vending).
10 See Ginger D. Richardson & Monica Alonzo-Dunsmoor, Fine-Tuning the Art Walk; Leaders Hope to Control Issues Without Killing the Fun, THE ARIZONA REPUBLIC, Aug. 5, 2005, at 1A (city considering regulating informal monthly downtown street festival that includes sidewalk vendors); Richardson, supra note 9 (city considering increasing regulation of vending near sports arena).
13 See Our View, TIMES HERALD (Port Huron, Michigan), Feb. 18, 2004 Op-Ed, at 7A (city planners and private landowners discussing opening part of street to sidewalk vendors).
14 In an earlier paper, Regulating Vending in the Sidewalk Commons, supra note 7, 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, and in the appendix to this paper as well.
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 inquiry of property scholarship that considers how order may be achieved informally without intervention by the state. 15 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 vendors are best explained by Robert Sugden’s theory of spontaneous order. 16

Part IV assesses the relative merit of the two allocative systems: the one adopted informally by illegal vendors, and the one adopted formally by the City, which is 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, 17 distribution, 18 and

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15 See, e.g., ELLICKSON, supra note 3 (examining informal resolution of trespass disputes through social norms); OSTROM, supra note 1; 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); POSNER, supra note 3 (examining informal order through social norms in a variety of contexts); Ann Carlson, Recycling Norms, 89 Cal. 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) (stating that norms will be stronger in smaller groups, especially when close-knit). See also AXELROD, supra note 3, at 3–12. Cf. Garnett, supra note 3; Harcourt, supra note 3, at 291 (critically examining the empirical evidence and social influence explanation supporting New York City’s experiment with order-maintenance policing).


17 See Demsetz, supra note 5. Demsetz’s theory of wealth maximization continues to command the attention of property scholars today. See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 41–48 (5th ed. 2002) (article excerpt in casebook); JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 49–53 (1998) (same); Anderson & Hill, American West, supra note 5, at 163; Richard O. Zerbe & 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 & 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).

18 See Merrill, supra note 4, at 291–93; KANTOR, supra note 4; 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); Epstein, supra note 4; 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).
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The illegal vendors’ informal allocative system enjoys a number of efficiencies, and is best explained by the theory of wealth maximization. In contrast, the formal system adopted by the City suffers from a number of costs. Rather than being aimed at maximizing the value of the sidewalk for vending, the formal system was aimed at protecting powerful interest groups, especially storefront merchants. The City’s formal system is best explained by a theory of 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.

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 the United States, the practice of sidewalk vending is common in Los Angeles, California, particularly in the neighborhood surrounding the City’s MacArthur Park. There, vendors typically place a blanket or piece of cardboard on the sidewalk, on which they display their wares. Alternatively, vendors may sell their 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. Such a situation begs the question of how such scarce spots are 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 on page 57). There, one system for allocating vending space was formally adopted by the city. Outside the park’s legal vending district, a second system for allocating vending space exists. 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 on page 57). There, the vending space allocation system was adopted by the illegal vendors on an informal basis. The two systems are dramatically different.

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19 See Andrea G. McDowell, From Commons to Claims: Property Rights in the California Gold Rush, 14 YALE J. L. & HUMAN. 1 (2002) [hereinafter McDowell, From Commons] (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).
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 along those two blocks of Alvarado, I saw their numbers swell to forty or fifty. They occupied not only the corners where the two streets intersected, but the sidewalk in between as well. None of the vendors was blocking pedestrian traffic completely, as two pedestrians could still walk abreast up the sidewalk. Yet, 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 the 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 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
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MAP OF MACARTHUR PARK AREA, LOS ANGELES, CALIFORNIA

This map is based on the author's visual inspection of the area in July 2002 and March 2006; Rhonda Roumani, Hernandez Announces Launching of City's First Sidewalk Vending District, METROPOLITAN
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.21

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

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, six indicated that they had been a party to a dispute over vending space. (See the “Table of Vendor Responses to Disputes Over Space” on page 59.) Two of them reported that they successfully held their ground and continued to vend from the disputed space. Both of these vendors could be characterized as “full time” vendors. They came to vend most days of the week. Further, both had been selling from their spot for a very long time. One claimed to have been vending there for fifteen years; the other for twenty-one.24 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.25 One who had been vending for six months may have been on the verge of becoming established. He claimed that vendors are always fighting amongst each other for spots, “but he is respected.”26 However, when friction between him and another vendor does arise, he backs down and moves to another location.27

NEWS-ENTERPRISE, June 4, 1999, at 11 (boundaries of legal vending district); Interview with vendor, in L.A., Cal. (July 21, 2002) (east of Alvarado St., areas north of Wilshire and south of Wilshire fall within the territories of different street gangs); Interview with Officer Alexander Bautista, L.A. Police Dep’t, Rampart Patrol Div., in L.A., Cal. (July 24, 2002) (Crazy Riders and Mara Salvatrucha have territory on either side of Alvarado St. south of Seventh St.); Kathy Braidhill, Where The BoyZ Are, L. A. MAGAZINE, Jan. 1998, at 63 (map); Interview with gang member, in L.A., Cal. (July 21, 2002) (indicating territory of his gang runs from Wilshire north).

21 Interview with Tennis Shoe Seller, in L.A., Cal. (July 10, 2002).
22 Interview with Mamomes Lady, in L.A., Cal. (July 21, 2002).
23 Interview with Punk Couple, in L.A., Cal. (July 21, 2002).
24 Interview with Mamomes Lady, in L.A., Cal. (July 21, 2002); Interview with Pastry Pair, in L.A., Cal. (July 21, 2002); Interview with Punk Couple, in L.A., Cal. (July 21, 2002).
25 Interview with Silver Seller, in L.A., Cal. (July 21, 2002) (vending there for 3 months); Interview with Tennis Shoe Seller, in L.A., Cal. (July 10, 2002) (vending there for one week); Interview with Softspoken Belts, in L.A., Cal. (July 10, 2002) (vending there for six months); Interview with Student Girl, in L.A., Cal. (July 21, 2002) (vending there for three months).
26 Interview with Softspoken Belts, in L.A., Cal. (July 10, 2002).
27 Id.
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 a low ebb.\textsuperscript{28}

\textit{Table of Vendor Responses to Disputes Over Space}\textsuperscript{29}

<table>
<thead>
<tr>
<th>Vendor Interviewed</th>
<th>How long selling from that spot?</th>
<th>Amount of time spent vending?</th>
<th>Party to a dispute over vending space?</th>
<th>Response to dispute?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Herb Lady</td>
<td>3 days</td>
<td>Seasonal</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Mango Lady 1</td>
<td>Long time</td>
<td>Full time</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Student Girl</td>
<td>3 months</td>
<td>Part time</td>
<td>Yes</td>
<td>Moved on</td>
</tr>
<tr>
<td>Sunglass Guy</td>
<td>6-7 months</td>
<td>Full time</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Leader of 7</td>
<td>9 months</td>
<td>Full time</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Tennis Shoe Seller</td>
<td>1 week</td>
<td>Occasional</td>
<td>Yes</td>
<td>Moved on</td>
</tr>
<tr>
<td>Softspoken Belts</td>
<td>6 months</td>
<td>Full time</td>
<td>Yes</td>
<td>Moved on</td>
</tr>
<tr>
<td>Videotape Guy</td>
<td>2 months</td>
<td>Full time</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Mango Lady 2</td>
<td>12 years</td>
<td>Full time</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Mamomes Lady</td>
<td>21 years</td>
<td>Full time</td>
<td>Yes</td>
<td>Held ground</td>
</tr>
<tr>
<td>Pastry Pair</td>
<td>15 years</td>
<td>Full time</td>
<td>Yes</td>
<td>Held ground</td>
</tr>
<tr>
<td>Islamic Books</td>
<td>?</td>
<td>Part time</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Watch Woman</td>
<td>?</td>
<td>Part time</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Suitcase Jewelry</td>
<td>1 week</td>
<td>Part time</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Incense Guy</td>
<td>2 months</td>
<td>Occasional</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Umbrella Lady</td>
<td>7 months</td>
<td>Full time</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Smiling Cigarettes</td>
<td>4 years</td>
<td>Full time</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Huge Earrings</td>
<td>12 years</td>
<td>Full time</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Walkman Man</td>
<td>Little time</td>
<td>Part time</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Punk Couple</td>
<td>5-6 years</td>
<td>?</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Silver Seller</td>
<td>3 months</td>
<td>Part time</td>
<td>Yes</td>
<td>Moved on</td>
</tr>
</tbody>
</table>

\textsuperscript{28} Visual inspection of the sidewalk E. of Alvarado St., between Sixth St. and Seventh St. in L.A., Cal. (Mar. 13, 2006) (three illegal vendors).

\textsuperscript{29} This table is based on interviews conducted by the author and his assistant of vendors on the Strip on July 9, 10, and 21, 2002. Few vendors gave their names. They are identified on this table by names I invented. Each name distinguishes that vendor based on the product they sold or some other salient characteristic.
MacArthur Park had long suffered from a reputation for drug dealing, disorder, and danger.\textsuperscript{30} 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.\textsuperscript{31} Some had already returned to the Strip, thereby demonstrating the resiliency of vending and the continued strong demand for prime vending space.\textsuperscript{32}

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.\textsuperscript{33} Before opening the district in 1999, the City of Los Angeles contracted its management to a third party, who in turn hired a non-profit organization, the Institute for Urban Research and Development ("IURD").\textsuperscript{34} Between twelve and twenty vendors were selected to open the district.\textsuperscript{35} The IURD had a series of meetings with these vendors to determine the allocation of vending spaces.\textsuperscript{36} The vendors then tried to come up with a plan on their own.\textsuperscript{37} Some vending spots close to a bus stop were considered more desirable.\textsuperscript{38} In a series of meetings, the vendors agreed on an allocation of about 70 to 80 percent of the spots.\textsuperscript{39} 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. Management was concerned that if the IURD did not take matters into its own hands, the vendors would gravitate to spots that looked "good" and would resolve competing claims by giving spots to the vendors arriving first.\textsuperscript{40} This is, of course, the method of allocation followed by the illegal vendors across the street. Accordingly, the IURD imposed its own allocative system, electing

\textsuperscript{31} Id.
\textsuperscript{32} Visual inspection of the sidewalk E. of Alvarado St., between Sixth St. and Seventh St. in L.A., Cal. (Mar. 13, 2006) (three illegal vendors).
\textsuperscript{33} The district is situated in Los Angeles’ MacArthur Park. Vendors are limited to certain sidewalks bordering the park, on the N. side of Seventh St. between Alvarado St. and Park View St., and on the W. side of Alvarado St. between Wilshire Blvd. and Seventh St. See Roumani, supra note 20, at 11.
\textsuperscript{34} Roumani, supra note 20, at 11; Interview with Sandra “Mama” Romero Plasencia, Program Dir., Inst. for Urban Research & Dev., in L.A., Cal. (July 23, 2002).
\textsuperscript{35} Roumani, supra note 20, at 11; Interview with Sandra “Mama” Romero Plasencia, Program Dir., Inst. for Urban Research & Dev., in L.A., Cal. (July 23, 2002).
\textsuperscript{36} Interview with Sandra “Mama” Romero Plasencia, Program Dir., Inst. for Urban Research & Dev., in L.A., Cal. (July 23, 2002).
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Interview with Joseph Colletti, Executive Dir., Inst. for Urban Research & Dev., in L.A., Cal. (July 16, 2002).
\textsuperscript{40} Interview with Sandra “Mama” Romero Plasencia, Program Dir., Inst. for Urban Research & Dev., in L.A., Cal. (July 23, 2002).
first to assign vending spots by lottery.\footnote{Interview with Joseph Colletti, Executive Dir., Inst. for Urban Research & Dev., in L.A., Cal. (July 16, 2002).} It does not appear that the vendors traded any of the resulting assignments.\footnote{Id.} Later, as additional vendors were added to the district, the IURD directed their placement and reallocated previously assigned spaces.\footnote{Id.} In these assignments, the IURD sought not only to help the legal vendors but also to beautify the neighborhood.\footnote{Id.} These two goals were not necessarily mutually reinforcing, as can be seen by comparing 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.\footnote{Id.} 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 likewise sells tamales.\footnote{Id.} In contrast, other merchandise vendors selling similar products were deliberately dispersed by the IURD.\footnote{Id.} Some legal vendors refused to sell every day, leaving gaps on the sidewalk.\footnote{Id.} The IURD considered this unsightly, and directed the vendors to leave their assigned spots and “close ranks” on those days.\footnote{Id.} Certain vendors objected.\footnote{Id.} The IURD believed the vendors were “superstitious” about staying in their spots, but ultimately gave in to the vendors and did not enforce its policy of requiring vendors to close ranks when one of their neighbors is absent.\footnote{Id.}

It was as if the IURD threw a party and nobody came. The IURD had assigned spots for thirty-three vending carts.\footnote{Interview with Sandra “Mama” Romero Plasencia, Program Dir., Inst. for Urban Research & Dev., in L.A., Cal. (July 23, 2002) (the program has thirty-one or thirty-two carts).} But on typical weekday afternoons when the district was still operating, I saw no more than ten legal vendors.\footnote{Visual inspection of MacArthur Park at Alvarado St. and Seventh St. (Wed., July 10, 2002) (five legal carts); Visual inspection of MacArthur Park at Alvarado St. and Seventh St. (Wed., July 24, 2002) (ten legal carts).} Likewise, on a weekend, the most I saw was thirteen.\footnote{Visual inspection of MacArthur Park at Alvarado St. and Seventh St. (Sun., July 21, 2002).} Most of the assigned legal spots sat vacant. Pedestrian traffic was light. Business was slow. This scene contrasts sharply with the bustling activity I saw across the street on the Strip. There 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? As explained in the next section, the respective success and failure of these two groups is best explained by Sugden’s game theory of spontaneous order.

III. THE SUCCESS OF ILLEGAL VENDORS IN ADOPTING AN INFORMAL SYSTEM OF ALLOCATING VENDING 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.55 A second has focused on the game theory of spontaneous order.56 Still other commentators on sidewalk life claim that street gangs coordinate the actions of private individuals by acting as a kind of private government.57 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.58 Norms are enforced not by the state, but rather by private individuals through the imposition of social sanctions and withholding of social benefits.59

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.60 Some have emphasized the importance of socialization through immediate sanctions and benefits, which are delivered through internal or external means.61 Internal enforcement occurs when an individual feels shame or pride depending on how close they have come to conforming to the norm.62 External

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55 E.g., Ellickson, supra note 3 (case study of norms in Shasta County, Cal.).
59 Id.
60 See McDowell, supra note 3, at 803–07.
61 See McDowell, supra note 3, at 803–07.
enforcement is administered by third parties who have the power to withhold esteem from nonconforming individuals.63

Regardless of whether enforcement is internal or external, it is immediate.64 According to this view of social norms then, individuals respond to short-term incentives.65 Other norms theorists have explained norm conformity by emphasizing the importance of social benefits an individual hopes to enjoy in the more distant future.66 This “social capital” view of social norms contends that individuals respond to long-term incentives.67

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.68 One prominent proponent of the internal enforcement theory of norms is Robert Cooter.69 He argues that “internalized” norms are norms that people follow through self-enforcement, which takes shape in feelings of pride and guilt.70 The extent to which a person has internalized a norm is measured by the amount he is willing to pay to conform to it.71 This internal demand for norm compliance is determined not only by an individual’s taste for the norm, but may also increase as the number of people who conform to the norm increases.72 Additionally, an internal demand may be positively affected if the law reinforces compliance with it.73

The theory of internalized norms has little explanatory power for behavior among vendors on the sidewalk. It neither explains the success of illegal vendors in cooperating to allocate space on the sidewalk nor explains the failure of 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 vendors to stand their ground, and others to back down when challenged.74 Those who backed down never expressed to us any feelings of shame at having tested the rule, or pride at having backed

63 See Ellickson, Law and Economics, supra note 62, at 540; McDowell, supra note 3, at 805; ELLICKSON, supra note 3 (providing a case study of Shasta County, Cal., demonstrating the mechanism of external enforcement).
64 See McDowell, supra note 3, at 805.
65 McDowell, supra note 3, at 805.
66 McDowell, supra note 3, at 805.
67 McDowell, supra note 3, at 805.
68 See generally Robert Cooter, Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms, 86 Va. L. Rev. 1577 (2000); See also McDowell, supra note 3, at 805 (summarizing the theory).
69 Id.
70 Id.
71 Id.
72 Id.
73 Id.
74 Interviews with Student Girl, Tennis Shoe Seller, Softspoken Belts, Mamones Lady, Pastry Pair, and Silver Seller, in L.A., Cal. (July 9, 10, & 21, 2002).
The closest any of the “losers” ever came to characterizing space conflicts in moral terms was when one referred to a “winner” as “crazy.”

Similar attitudes are held by the “winners” of vending space disputes. None of the “winners” talked about the “pride” they felt in retaining their spots. Although this may have been exactly how they felt, it is is hard to prove convincingly. This lack of proof 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. 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 inadequate 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, 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. 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, however, 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 generally works against everyone in the community except extreme deviants. This is because rural residents value their reputation, given that, being small in number and relatively rooted, they often deal with each other on a number of fronts and expect to continue to do so well into the future. In contrast, deviants, as they tend to be those who expect to leave the community soon, do not value their reputation as much.

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75 Interviews with Student Girl, Tennis Shoe Seller, Soft Spoken Belts, and Silver Seller, in L.A., Cal. (July 9, 10, & 21, 2002).
76 Interview with Tennis Shoe Seller, in L.A., Cal. (July 10, 2002).
77 Interviews with Mamones Lady and Pastry Pair., in L.A., Cal. (July 21, 2002).
78 Id.
79 See Ellickson, Social Norms, supra note 58, at 3 n.6 (arguing that “patterns of external sanctions are the best evidence of the existence of a norm”).
80 See ELLICKSON, supra note 3.
81 ELLICKSON, supra note 3.
82 ELLICKSON, supra note 3.
83 ELLICKSON, supra note 3.
84 ELLICKSON, supra note 3.
85 ELLICKSON, supra note 3.
86 ELLICKSON, supra note 3.
87 ELLICKSON, supra note 3.
This external enforcement theory of norms would likely fail to predict what happened on the sidewalk in Los Angeles. With respect to illegal vendors, the external enforcement theory would be pessimistic about their ability to allocate space on the sidewalk through 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 city inspector complained that illegal vendors unite against law enforcement agents. On the other hand, the vendors do include a number of people who are new and who do not expect 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. In contrast to storefront businesses, sidewalk vendors need not put down a security deposit, pay significant rent, or maintain utility service for their operations. The sidewalk and sunlight are free. Relocating a sidewalk vending business involves no more than picking up your goods and display blanket and moving on. The neighborhood around the Strip is also especially transient, being the region’s doorstep for new immigrants from Latin America. For these reasons, vendors who refuse to abide by a norm for space allocation would have little to fear from negative gossip or ostracism, as they can just move their businesses to another part of the City for a fresh start. Thus, 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. The district was opened with no more than twenty vendors. Each vendor completed a rigorous six week training program, investing significant time 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, no other vending district has been created.

[89] Visual Inspection of the sidewalk E. of Alvarado St., between Sixth St. and Seventh St. in L.A., Cal. (July 9, 10, & 21, 2002).
[90] Beverly Beyette, Vendors vs. the Law - Unlicensed Street Merchants: Able Entrepreneurs or Nuisances?, L.A. TIMES, 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, available at http://factfinder.census.gov/servlet/QTTable?_bm=y&-context=q&-zip=90057&r_name=DEC_2000_PL_U QTPL&street=alvarado%20st.%20at%20sixth%20st.&-ds_name=EC_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=14000US06037208600&geo_id=14000US06037208700&geo_id=14000US06037208800&geo_id=14000US06037208900&-geo_id=14000US06037209040&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) (showing that zip code 90057, the area around MacArthur Park, has population of 56,997, of which 39,311 are Hispanic or Latino).
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.\(^92\) In other words, the legal vending district was set up as a limited access commons that was open to only twenty 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.\(^93\) This prevented the vendors from reaching an agreement.\(^94\) The IURD stepped in with its own system.\(^95\) 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.

2. **Norms Enforced By Long-Term Incentives**

One of the primary proponents of the social capital theory of social norms is Eric Posner.\(^96\) He argues that a social norm is the product of a signaling game in which people engage in behavioral regularities.\(^97\) In doing so, people incur a short-term cost.\(^98\) They do this in order to show that they have low discount rates, that is, they value future trades a lot.\(^99\) 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.\(^100\) The cooperator incurs this short-term cost for the sake of a long-term gain from cooperation.\(^101\)

Of course, only behavioral regularities that are costly and observable can accomplish this.\(^102\) Posner recounts the practice of gift-giving in the world of business.\(^103\) 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.\(^104\) Rather, they do this because its obvious costliness demonstrates a commitment to the long-term cooperative relationship.\(^105\) The message an

\(^92\) Interview with Joseph Colletti, Executive Dir., Inst. for Urban Research & Dev., in L.A., Cal. (July 16, 2002).
\(^93\) Id.
\(^94\) Id.
\(^95\) Id.

\(^96\) POSNER, supra note 3.
\(^97\) POSNER, supra note 3, at 5.
\(^98\) POSNER, supra note 3, at 5.
\(^99\) POSNER, supra note 3, at 5.
\(^100\) POSNER, supra note 3, at 5.
\(^101\) POSNER, supra note 3, at 21, 24.
\(^102\) POSNER, supra note 3, at 23.
\(^103\) POSNER, supra note 3, at 23.
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 not limited. It is a wide-open market. 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 turnover 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 the short-term costs they incurred 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, as showing up prevented them from doing something else. But it was followed by an immediate benefit derived from selling to non-vendor strangers in the marketplace. 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 trying to hold 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 they did so in order to get respect. Nor is there any evidence from the interviews these vendors ever received any future cooperation by doing

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106 POSNER, supra note 3, at 20-21.
107 Visual inspection of the sidewalk E. of Alvarado St., between Sixth St. and Seventh St. in L.A., Cal. and interviews with vendors there (July 9, 10, & 21, 2002).
108 See Table of Vendor Responses to Disputes Over Space, supra note 29.
109 Interviews with Softspoken Belts and Mamones Lady, in L.A., Cal. (July 10 & 21, 2002).
110 Id.
111 Id.
112 Interviews with Student Girl, Tennis Shoe Seller, Softspoken Belts, and Silver Seller, in L.A., Cal. (July 9, 10, & 21, 2002).
so.\textsuperscript{113} Instead, a vendor backed down either because she believed she had not been on the sidewalk long enough or because the other person was “crazy.”\textsuperscript{114}

Those who held onto spaces and those who backed down never spoke in terms of good versus bad.\textsuperscript{115} One winner claimed she was respected, but this was due to time on the sidewalk.\textsuperscript{116}

\section*{B. Sugden’s Game Theory of Spontaneous Order}

Sugden’s theory of spontaneous order offers an alternative explanation for sidewalk order.\textsuperscript{117} He argues that order can arise among people spontaneously without the help of the state or some other coordinating authority.\textsuperscript{118} Sugden’s theory has lately won more attention in the law reviews. For example, 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.\textsuperscript{119} 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.”\textsuperscript{120} One might answer this by referring to Thomas Hobbes’ \textit{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 war.\textsuperscript{121} 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.”\textsuperscript{122} Further, each man will perceive that even “the weakest has strength enough to kill the strongest.”\textsuperscript{123} 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.\textsuperscript{124} Men live in “continual fear, and [endure the] danger of violent death; and the life of man [is] solitary, poor, nasty, brutish, and short.”

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

\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Interviews with Mamones Lady and Pastry Pair, in L.A., Cal. (July 21, 2002).
\textsuperscript{116} Interview with Mamones Lady, in L.A., Cal. (July 21, 2002).
\textsuperscript{117} ROBERT SUGDEN, THE ECONOMICS OF RIGHTS, COOPERATION, AND WELFARE 91 (1986).
\textsuperscript{118} Id.
\textsuperscript{119} McDowell, supra note 3.
\textsuperscript{120} SUGDEN, supra note 117, at 55.
\textsuperscript{121} SUGDEN, supra note 117, at 56, quoting THOMAS HOBBES, LEVIATHAN Ch. 13 (1651).
\textsuperscript{122} SUGDEN, supra note 117, at 56.
\textsuperscript{123} SUGDEN, supra note 117, at 55.
\textsuperscript{124} SUGDEN, supra note 117, at 56.
people each want some thing that only one of them can have.\textsuperscript{125} 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.\textsuperscript{126} Sugden proves this in a series of steps, in the first of which he presents a game of hawk-dove.\textsuperscript{127} 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.\textsuperscript{128} 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.\textsuperscript{129} 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.\textsuperscript{130} Significantly, the two players will sometimes both pick “hawk,” resulting in a fight.\textsuperscript{131} This worst possible outcome is what Hobbes feared would occur between men in the state of nature.\textsuperscript{132}

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.\textsuperscript{133} In the real world disputes over a resource can persist for a lengthy period of time, and the game is played over many rounds.\textsuperscript{134} 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.\textsuperscript{135} 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.”\textsuperscript{136} 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.”\textsuperscript{137} This is Hobbes’ view of the state of nature.

Sugden argues that both of these games come out differently if they are “asymmetrical.”\textsuperscript{138} 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

\textsuperscript{125} SUGDEN, supra note 117, at 57.
\textsuperscript{126} SUGDEN, supra note 117, at 57.
\textsuperscript{127} SUGDEN, supra note 117, at 59.
\textsuperscript{128} SUGDEN, supra note 117, at 59.
\textsuperscript{129} SUGDEN, supra note 117, at 59.
\textsuperscript{130} SUGDEN, supra note 117, at 61.
\textsuperscript{131} SUGDEN, supra note 117, at 61.
\textsuperscript{132} SUGDEN, supra note 117, at 61.
\textsuperscript{133} SUGDEN, supra note 117, at 62.
\textsuperscript{134} SUGDEN, supra note 117, at 62.
\textsuperscript{135} SUGDEN, supra note 117, at 62.
\textsuperscript{136} SUGDEN, supra note 117, at 90.
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 slightly more likely, on average, to value the resource more than someone else. Why else would they take the trouble of carrying it around? Second, 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. Possession not only reflects real asymmetries, it is also prominent because of a natural human tendency to seek out relations between objects. 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.

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, however, 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 assessing their roles.” Players will assume a role but will 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.” If the players are skillful in assigning their roles, in most cases one player will be fairly confident that she is the possessor and the other fairly confident that she is the challenger. “Such contests will be settled quickly; there will be a brief fight, and then one player will back down.” Competing claims to a resource will be resolved without appealing to a higher authority.

139 SUGDEN, supra note 117, at 90.
140 SUGDEN, supra note 117, at 93.
141 SUGDEN, supra note 117, at 91.
142 SUGDEN, supra note 117, at 75.
143 SUGDEN, supra note 117, at 75.
144 SUGDEN, supra note 117, at 75.
145 SUGDEN, supra note 117, at 75.
146 SUGDEN, supra note 117, at 75.
147 SUGDEN, supra note 117, at 78.
148 SUGDEN, supra note 117, at 78.
149 SUGDEN, supra note 117, at 78.
150 SUGDEN, supra note 117, at 78.
151 SUGDEN, supra note 117, at 78.
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.\(^{152}\)

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 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 comports 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.\(^{153}\)

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 the

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152 Interview with Tennis Shoe Seller, in L.A., Cal. (July 10, 2002).
153 Id.
spot is hers, and not just for the day. The vendor might claim that she has acquired a more durable right to that piece of sidewalk. In the language of the street, she is “established.”154 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 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.155

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.156 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, then the vendor must place a very high value on that spot. Why else would she 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 true 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 long as fifteen years.157 Two of them claimed to have prevailed in a dispute with another vendor over rights to sell from a particular place on the sidewalk.158 Each of these two “hawks” had her own spot.159 Each hawk was a full time vendor, selling from her spot most days of the week.160 Most importantly for Sugden’s theory, these hawks had been selling from their respective

154 Interview with Mamomes Lady, in L.A. Cal. (July 21, 2002).
155 Sugden, supra note 56, at 78.
156 See Sugden, supra note 56, at 90.
157 See Table of Vendor Responses to Disputes Over Space, supra note 29.
158 Interviews with Mamomes Lady and Pastry Pair, in L.A., Cal. (July 21, 2002); Interview with Pastry Pair on the sidewalk at the Ne. corner of Alvarado St. and Seventh St., in L.A., Cal. (July 21, 2002).
159 Interview with Mamomes Lady, in L.A., Cal. (July 21, 2002); Interview with Pastry Pair on the sidewalk at the Ne. corner of Alvarado St. and Seventh St., in L.A., Cal. (July 21, 2002).
160 Interview with Mamomes Lady, in L.A., Cal. (July 21, 2002); Interview with Pastry Pair on the sidewalk at the Ne. corner of Alvarado St. and Seventh St., in L.A., Cal. (July 21, 2002).
spots for fifteen and twenty-one years, respectively.\textsuperscript{161} By contrast, four of the vendors we spoke with admitted to having backed down in a dispute over vending space.\textsuperscript{162} None of them had been working the Strip for more than six months.\textsuperscript{163} 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 to be extraordinarily accurate.

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.\textsuperscript{164} 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 it would be impractical to interview both the “hawk” and “dove” to any dispute.\textsuperscript{165} 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 succeeded in displacing. There is, however, some 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.”\textsuperscript{166} 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.\textsuperscript{167} 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.\textsuperscript{168} One experienced vendor asserted that disputes between vendors are rare.\textsuperscript{169} Of

\begin{thebibliography}{99}
\bibitem{161} Interview with Mamomes Lady, in L.A., Cal. (July 21, 2002); Interview with Pastry Pair, in L.A., Cal. (July 21, 2002).
\bibitem{162} Interviews with Student Girl, Tennis Shoe Seller, Softspoken Belts, and Silver Seller, in L.A., Cal. (July 9, 10, & 21, 2002).
\bibitem{163} Table of Vendor Responses to Disputes Over Space, supra note 29.
\bibitem{164} Interviews with Student Girl, Tennis Shoe Seller, Softspoken Belts, and Silver Seller, in L.A., Cal. (July 9, 10, & 21, 2002).
\bibitem{165} As such an interview would require the interviewer to be present at the time of dispute, which occur randomly, it was considered impractical with in the confines of this study.
\bibitem{166} Interview with Leader of 7, in L.A., Cal. (July 10, 2002); Interview with Videotape Guy, in L.A., Cal. (July 10, 2002); Interview with Tennis Shoe Seller, in L.A., Cal. (July 10, 2002); Interview with Watch Woman, in L.A., Cal. (July 10, 2002); Interview with Suitcase Jewelry, in L.A., Cal. (July 10, 2002); Interview with Incense Guy, in L.A., Cal. (July 21, 2002); Interview with Umbrella Lady, in L.A., Cal. (July 21, 2002); Interview with Smiling Cigarettes, in L.A., Cal. (July 21, 2002); Interview with Huge Earrings, on the sidewalk at the Ne. corner of Alvarado St. and Wilshire Blvd., in L.A., Cal. (July 21, 2002); Interview with Walkman Man, in L.A., Cal. (July 21, 2002); Interview with Punk Couple, in L.A., Cal. (July 21, 2002); Interview with Silver Seller, in L.A., Cal. (July 21, 2002).
\bibitem{167} Id.
\bibitem{168} Interview with Tennis Shoe Seller, in L.A., Cal. (July 10, 2002); Interview with Huge Earrings, in L.A., Cal. (July 21, 2002).
\bibitem{169} Interview with Sunglass Guy, in L.A., Cal. (July 9, 2002).
\end{thebibliography}
the twenty-one illegal vendors we spoke with, two-thirds claimed never to have been involved in a dispute over a vending location.170

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 with no superior claim. But these kinds of disputes are rare in any event. Even if new vendors were the ones 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, it is not well supported by the evidence.

Los Angeles is home to more than 1300 street gangs, whose members number more than 150,000.171 The City’s gangs have been known to charge sidewalk vendors “rent” for the privilege to vend.172 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.”173 Four street gangs vie for territory in the MacArthur Park neighborhood.174 The subject of my empirical research – the Strip – 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,175 apparently the “18th Street Gang.”176 Alvarado Street running south from Wilshire Boulevard is controlled by a different gang, likely the “Crazy Riders,” or possibly the “Mara Salvatrucha.”177

170 See Table of Vendor Responses to Disputes Over Space, supra note 29.
171 Braidhill, supra note 20, at 63 (map).
172 Interview with Officer Alexander Bautista, Rampart Patrol Div., L.A. Police Dep’t, in L.A., Cal. (July 24, 2002); Cf. Braidhill, supra note 20, at 65 (noting that downtown Los Angeles street gangs “collect a ‘tax’ for allowing the women [prostitutes] to work their street corners”).
174 Interview with Officer Alexander Bautista, L.A. Police Dep’t, Rampart Patrol Div., in L.A., Cal. (July 24, 2002); Braidhill, supra note 20, at 64.
175 Braidhill, supra note 20, at 64. Interview with gang member, in L.A., Cal. (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.
176 Interview with Officer Alexander Bautista, L.A. Police Dep’t, Rampart Patrol Div., in L.A., Cal. (July 24, 2002); Braidhill, supra note 20, at 64.
177 For a clear depiction of gang territory see the map, supra Part II.A. Interview with vendor, in L.A., Cal. (July 21, 2002) (street gang South of Wilshire charges Alvarado St. vendors rent, but gang North of Wilshire does not); See Interview with Officer Alexander Bautista, L.A. Police Dep’t, Rampart Patrol Div., in L.A., Cal. (July 24, 2002) (Crazy Riders and Mara Salvatrucha vie for territory S.W. of the
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 years before my study was conducted, however the officer 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 ten or twenty dollars per week “rent.” Legal vendors in the MacArthur Park district also sold from the sidewalk south of Wilshire (on the other side of Alvarado Street), and they complained that gang members demanded rent from them too.

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. 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. It appeared that he, much like Hobbes, assumed that in a state of nature order could be imposed only from above. In other words, because it was not being provided by the City, order on the sidewalk must have been provided by the only other potential sovereign, a local street gang. The other person who alleged that gangs charge vendors for the use of particular spots is an administrator with the IURD, the agency 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. In other words, even if the street gangs charged vendors rent and enforced the rights of individual

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179 Interview with vendor, in L.A., Cal. (July 21, 2002) (the “pandilleros” South of Wilshire charge vendors ten or twenty dollars per week); Interview with vendor, in L.A., Cal. (July 21, 2002) (the “cholos” South of Wilshire charge vendors twenty dollars per week).
180 Interview with Joseph Colletti, Executive Dir., Inst. for Urban Research & Dev., in L.A., Cal. (July 16, 2002). The legal vendors refused, citing the fact that they had already paid the city for a license to vend there.
184 Id.
185 Id.
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.

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 18th Street Gang, which no vendor claimed charged rent. Lacking a revenue stream from vending per se, it is unlikely that members of the 18th 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 areas, there were also disputes that arose between 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

186 Interviews with vendors on the Strip, in L.A., Cal. (July 9, 10, & 21, 2002).
188 Compare interviews with Tennis Shoe Seller, Softspoken Belts, Mamones Lady, and Pastry Pair, in L.A., Cal. (S. of Wilshire) with interviews with Student Girl, Silver Seller, and Punk Couple, in L.A., Cal. (N. of Wilshire).
189 Interview with Joseph Colletti, Executive Dir., Inst. for Urban Research & Dev., in L.A., Cal. (July 16, 2002).
190 Id.
192 Id.
The Case of the MacArthur Park Sidewalk Vendors

The 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 was 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. Perhaps because the district was opened all at once, 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 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.

This section argues 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, it contends 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.

193 Interview with Joseph Colletti, Executive Dir., Inst. for Urban Research & Dev., in L.A., Cal. (July 16, 2002).
194 Id.
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.  

A. THE ILLEGAL VENDORS’ INFORMAL SYSTEM CONFORMS TO A WEALTH MAXIMIZATION THEORY OF PROPERTY

In his classic piece, Toward a Theory of Property Rights, 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. 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 respect to a number of other resources, including wild animals and parking spaces on public streets. It also applied to oil and gas in the early days of their development in the United States and to mining claims during the California Gold Rush. 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. The rule of first possession used by Los Angeles’ illegal vendors today enjoys some of these same efficiencies, as well as some others.

195 Anderson & Hill, Cowboys & Contracts, supra note 17, at 5489 (smaller, more homogeneous groups are more likely to adopt wealth maximizing property rules than centralized political processes).
196 Demsetz, supra note 5, at 347–350.
197 Demsetz, supra note 5, at 347–350.
198 Demsetz, supra note 5, at 347–350.
199 Supra note 176.
200 Pierson v. Post, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805).
201 Epstein, supra note 4, at 515 (empirical study of informal rules for parking on public streets in Chicago, Ill.).
202 Hammonds v. Cent. Ky. Natural Gas, 75 S.W.2d 204 (Ky. 1934).
203 Zerbe & Anderson, supra note 17, at 133.
204 Zerbe & Anderson, supra note 17, at 135.
The rule of first possession of vending spaces enjoys four allocative efficiencies. First, it encourages the early discovery of valuable vending sites. 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 arrive first are allowed to claim a spot with a towel, and their space is "generally respected for the day." 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." 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 of 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. 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 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.”213 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 arriving first on a given day is forced to gather their things and find a new spot.214 For some kinds of merchandise these costs can be significant. We saw vendors of jewelry and compact discs spend several minutes carefully laying out their goods for display.215 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 un-established, 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

213 Leslie Berestein, For Vendors, the Wheels Turn Slowly, L.A. TIMES, 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, 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: Daniel and Reynalda Cruz, L.A. TIMES, Mar. 21, 1999, at 1 (explaining that licensed vendor in Santa Ana, Cal. has been selling fruit from the same corner for a decade); Julianne Malveaux, Street Vendors’ Lament, 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, Jan. 4, 1997, at A2 (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, Feb. 15, 1992, Metro, Part B, at 3 (describing how illegal vendor arrested by Los Angeles police while selling from her “traditional spot”).

214 Cf. Zerbe & Anderson, supra note 17, at 135 (“The first-come procedure . . . obviates the need for the earlier miners to resettle.”).

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 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. One of those who claimed to have prevailed in a dispute 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 they seemed simply to have held their grounds. When one spoke 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 her right to sell from her spot.

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216 See Table of Vendor Responses to Disputes Over Space, supra note 29.
217 Table of Vendor Responses to Disputes Over Space, supra note 29.
218 Interview with Mamones Lady, in L.A., Cal. (July 21, 2002).
219 Interview with Mamones Lady and Pastry Pair, in L.A., Cal. (July 21, 2002).
220 Id.
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. This made the sidewalk relatively more valuable. A number of factors, however, have limited the value of the sidewalk for purposes of vending. Many vendors are not established, nor do they have any desire to become established. Some are between jobs in the formal economy. One vendor we spoke with said she was a student. 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 the sidewalk, including selling from indoor swap meets, flea markets, and 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


222 Interviews with vendors, in L.A., Cal. (July 9, 10, & 21, 2002) (of twenty-one illegal vendors interviewed, eight indicated that they had another occupation).

223 Interview with Tennis Shoe Seller, in L.A., Cal. (July 10, 2002) (he started vending full time a week earlier because he lost his job); Interview with Videotape Guy, in L.A., Cal. (July 21, 2002) (she’s been vending for three months because she has no work); Interview with Walkman Man, in L.A., Cal. (July 21, 2002) (he began selling two months earlier because he has no job).

224 Interview with Student Girl, in L.A., Cal. (July 21, 2002).


226 Kettles, supra note 7, at 19.
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 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, but she cannot take a fixed stall with her.

Thus, 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 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 storefronts 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 storefront business is more valuable than vending space on the sidewalk next to it.228

Demsetz argued that property rights are transformed in response to changes in technology and demand.229 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 storefronts adjacent to it, Demsetz’s cost-benefit theory of property rights evolution predicts that there would be less property rights activity on the sidewalk. This theory is confirmed by the facts.

227 Interview with Mango Lady 1, in L.A., Cal. (July 10, 2002) (when the police come she runs away with her wheeled cart); Interview with Videotape Guy, in L.A., Cal. (July 10, 2002) (when the police approach, he runs away).
228 See Kettles, supra note 7, at 30–31 (elaborating argument).
229 Demsetz, supra note 5, at 350 ("[T]he emergence of new private or state-owned property rights will be in response to changes in technology and relative prices.").
Stated generally, the core rights of property are the rights to use, exclude, and transfer. The rules relating to each of these rights are much more rich and elaborate with respect to storefront businesses than they are 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. But that is as elaborate as the vendors’ property regime gets with respect to use. This regime is quite simple compared to the regime 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 or provisions in their lease.

Similar differences exist between the sidewalk and the 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 on her spot. The right to exclude enjoyed by storefront merchants and other landowners, however, is defined in greater detail. For example, a merchant may be restricted in their ability to exclude a customer or another party that holds a legally recognized interest in the property, such as a tenant in common or landlord.

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.

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230 See Members of the Peanut Quota Holders Ass’n v. U.S., 421 F.3d 1323, 1330 (Fed. Cir., 2003) (property rights in a thing include “the rights to exclude, use, transfer, or dispose of the property”).
231 Kettles, supra note 7, at 28–29.
232 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 erection; or the uses contemplated, or a change of such a nature, as would affect the very reality itself; extraordinary in scope and effect, or unusual in expenditure.” Pross v. Excelsior Cleaning and Dyeing Co., 179 N.Y.S. 176, 179–180 (Mun. Ct., 1920).
233 See U.S. Fid. & Guar. Co. v. Let’s Frame It, Inc., 759, 823 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).
235 Spiller v. Mackereth, 334 So. 2d 859, 861–62 (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).
236 Interviews with Pastry Pair and Punk Couple, in L.A., Cal. (July 21, 2002).
237 JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 611, 661 (5th ed. 2002).
The system for allocating space among illegal sidewalk vendors appears to fit well with a number of the components of Demsetz’s wealth-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 the system’s 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.

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.238 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.239 The theory 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.”240 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.241 Well organized groups, such as labor and existing businesses, do not find free adoption of those mechanisms to be in their narrow self-interest.242

This perspective does not fit well with the allocation regime adopted by illegal sidewalk vendors. The theory of distribution assumes the existence

238 Merrill, supra note 4, at 280 (distribution); McDowell, From Commons, supra note 19 (ideology).
239 Merrill, supra note 4, at 280 (summarizing the theory).
240 Merrill, supra note 4, at 280.
241 Merrill, supra note 4, at 277.
242 Merrill, supra note 4, at 291–93.
of a political process in which groups compete for the selection of property rules. 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 the 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. 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 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. The theory of ideology was used by McDowell to help explain the content of a system of rules adopted by miners during the California Gold Rush. 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.251 If a miner failed to work his claim for some period of time without a good excuse, his claim was forfeit.252 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.253

There are some similarities in the facts of mining during the California Gold Rush and those of vending on sidewalk today. Vendors, like the miners, physically stake a claim to space. Both spaces appear to be limited in size, specifically to what they can physically occupy. While like the miners during the California Gold Rush 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. Further, as there was with miners, 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, which also comports with the conditions of the California Gold Rush.

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.254 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.255 The high potential payoffs and great risk of coming out empty handed 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.256 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.257 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 vendors have been compelled to react.

251 McDowell, *From Commons*, supra note 19, at 33, 44–45.
252 McDowell, *From Commons*, supra note 19, at 33, 44–45.
253 McDowell, *From Commons*, supra note 19, at 58, 61.
254 McDowell, *From Commons*, supra note 19, at 63.
255 McDowell, *From Commons*, supra note 19, at 63.
256 McDowell, *From Commons*, supra note 19, at 50.
257 McDowell, *From Commons*, supra note 19, at 50.
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’s 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.”258 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.259 Notwithstanding this prohibition, 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.260 The City responded to this increased demand by enacting an ordinance that created a mechanism by which legal vending districts could be established in the City and vendors would be allowed to ply their trade on the sidewalk.261 The City approved the establishment of two legal vending districts, including one in MacArthur Park.262 The City contracted with a third party to manage the MacArthur Park district, who subcontracted the task to the IURD.263 The IURD assumed responsibility for allocating space among the legal vendors

259 L.A. CAL. MUN. CODE 42(b) (2004).
262 Roumani, supra note 20.
263 Interview with Joseph Colletti, Executive Dir., Inst. for Urban Resear ch & Dev. in L.A., Cal. (July 16, 2002).
who were to sell from the district. 264 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 the idea that the property rights that do emerge do so “in accordance with a criterion of societal wealth maximization.” 265 As explained by Merrill:

[[If the social benefits of a property regime exceed the social costs of creating and enforcing such a regime, the 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 recognize property rights over the resource. 266

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’ proposed 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. 267 A district had to be approved by twenty percent of the businesses and twenty percent of residents in the area. 268 Individual property owners or tenants had the right to veto vending from the sidewalk immediately adjacent to their property. 269 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. 270 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

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264 Id.
265 Merrill, supra note 4, at 278.
266 Merrill, supra note 4, at 278–79.
267 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, Mar. 31, 1995, at 1 (“[V]endors . . . face a lengthy, bureaucratic approval process before they can be established as legitimate merchants.”).
270 Kettles, supra note 7, at 27–32, 35–38.
The 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 it is likely that they 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.

The merchants got what they wanted. The ordinance did not make vending legal citywide, but rather created a process by which legal vending “districts” could be established. Though vending proponents advocated for the establishment of as many districts, only two were created. One started with six carts and went downhill from there. It limped along for two years before becoming completely inactive. The second district, in the MacArthur Park neighborhood, was created not adjacent to any traditional storefront business, but rather in the park itself. 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.\footnote{Roumani, supra note 20, at 11 (explaining that district “limited what the vendors could sell, making sure that the wares sold complimented rather than competed with surrounding merchants . . . .”); See Romney, supra note 276, 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 L.A.] Olvera Street’s Mexican marketplace.”); 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 L.A., Cal. (July 23, 2002) (stating that merchants in MacArthur Park area agreed to creation of vending district so long as there was no competition).} The City ordinance requires vendors to sell from City-approved carts. The carts are expensive, but beautiful, and perhaps that is the point.\footnote{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, Nov. 10, 1995, at B4.} By presenting a more attractive appearance to the park and not selling any competing goods, storefront merchants must have believed that the legal vending district in MacArthur Park would attract more shoppers to the area. This would, in turn, benefit the merchants. If the district failed, which it did five years later,\footnote{Interview with Sandra “Mama” Romero Plasencia, Program Dir., Inst. for Urban Research & Dev., in L.A., Cal. (Mar. 14, 2006).} the merchants would not be any worse off than they were before the ordinance was passed.

Therefore, 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 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.\footnote{Roumani, supra note 20, at 11; Interview with Sandra “Mama” Romero Plasencia, Program Dir., Inst. for Urban Research & Dev., in L.A., Cal. (July 23, 2002).} 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 later took a different approach when it reassigned vending spaces. It was then concerned with benefiting the vendors, but also with beautifying 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. However, one cannot help but wonder whether allowing the legal vendors to settle on an allocative rule of first possession would have resulted in more complete use of the sidewalk.

It is an open question whether the property rights regime for legal vending resulted in any allocative efficiencies. If any have resulted, they appear to have been less than those enjoyed by the system adopted by the illegal vendors across the street. However, allocative efficiencies are just one part of the equation. Administrative costs also 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. After it was enacted and a property rights system for sidewalk vending was 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. Of course the IURD did a lot more than simply allocate space on the sidewalk. It organized training for vendors, stored carts, and oversaw food preparation. 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 the State of California. 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.

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, Sugden’s game theory of spontaneous order appears best suited 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 to quickly settle on a method for allocating space there.

284 Sahagun, supra note 276, at A1; Glover, supra note 261, at 11; Rainey, supra note 276, at A1.
285 Romney, supra note 276, at C1.
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 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 is evidence 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.

VI. APPENDIX: RESEARCH METHODS

I chose Los Angeles, California as the focus of my study for many reasons. The City is home to many sidewalk vendors. This increased the likelihood that demand for certain prime vending spaces would exceed supply and make necessary some rule system to allocate them. Los Angeles turned out to be especially well suited for study because it contained not just one, but at least two “jurisdictions.” The City legalized vending in MacArthur Park, where sidewalk space was to be used by more than two
dozen vending carts. Across the street vending continued to be a crime, but was nonetheless home to at least two dozen illegal vendors.

Studying these Los Angeles vendors was also made more attractive by the record of observers who came before me. A number of newspapers, most notably the *Los Angeles Times*, have published articles about vendors in the MacArthur Park area—both legal and illegal. Los Angeles was also chosen in part for my own convenience. I worked in Los Angeles for six years. My knowledge of the City and personal contacts enabled me to perform on-site research at minimal cost.

Earlier published accounts of vending in Los Angeles provided a solid foundation, but only that. To understand the rules by which space was allocated on the sidewalk, I had to talk to the participants. My assistant and I conducted a total of thirty interviews. The interviews fell into three categories: (1) illegal vendors; (2) individuals connected with legal vending; and (3) employees of City government, including law enforcement officers.

Twenty-one of the interviews were of illegal vendors. This is a large sample within that two block area—more than a third of the total number of vendors we saw there at any one time. One weakness in the study is that the twenty one illegal vendors we interviewed were only part of the total number from which we sought information. Seven other illegal vendors were approached, but they refused to talk with us. Accordingly, cooperative people are over-represented in our interviews. In advance of the interviews I prepared a set of questions in English, which my assistant translated into Spanish. A copy of each follows this discussion, below. All but one of the interviews was conducted in Spanish. We attempted to ask each vendor all the prepared questions, and follow-up with unique questions that were suggested by their answers. We made notes of their answers during the interviews, and typed them up less than half a day later. I retain the notes and type-written records.

When designing the study, I appreciated that illegal vendors would have an interest in putting their trade in a positive light. To get a balanced picture of sidewalk vending, I interviewed others. Five interviews were given by individuals connected with Los Angeles' efforts to establish and manage legal vending districts in Los Angeles, including the active district at MacArthur Park. Four interviews were given by employees of the Los Angeles City government. Of these four, two were given by law enforcement officers. No standardized set of questions was used.

The interviews were further supplemented and balanced by my own observations of vending on the sidewalks of Los Angeles.
The Case of the MacArthur Park Sidewalk Vendors

VENDOR QUESTIONS

A. SPANISH

1. ¿Cómo decide donde vender?
   a. ¿Problemas con otros vendedores? ¿Que vendían? ¿Cómo lo resolvió? ¿El que primero llega? ¿O es “su” lugar?
   b. ¿Problemas con los de la tienda? ¿Que vendían? ¿Cómo lo resolvió?
   c. ¿Cuanto tiempo en este lugar? ¿Horas de trabajo?

2. ¿Porqué le gusta vender?
   a. ¿Cuanto tiempo que lo hace?
   b. ¿Dónde aprendió?
   c. ¿Gana + que otro trabajo? ¿Cuanto?

3. ¿Cómo vende?
   a. ¿Para sí mismo?
   b. ¿Familia?
   c. ¿Otro (no familiar)?

4. Encuentros con Policía:
   a. ¿Multa?
   b. ¿Se llevaron sus productos?
   c. ¿Dijeron que se vaya?
   d. ¿Porqué vino policía?
B. ENGLISH

1. How do you decide where to vend?
   a. Disputes w/other vendors? What selling? How resolved? First arrival that day? or “Your” spot?
   b. Disputes with merchants? What selling? How resolved?
   c. How long in this location? Hours of operation?

2. Why vend?
   a. How long doing this?
   b. Where learned how?
   c. Better income?

3. How vend?
   a. Work for self?
   b. Family?
   c. Non-family?

4. Encounters with police:
   a. Fined?
   b. Goods confiscated?
   c. Told to move on?
   d. Why did police come?