

# DEMSETZ UNDERGROUND: BUSKING REGULATION AND THE FORMATION OF PROPERTY RIGHTS

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*The Metropolitan Transit Authority regulates busking—playing music or performing for tips in a public place—differently depending on the subway station. Some stations are reserved for members of a program called Music Under New York (MUNY), while at the others, anyone willing to pay the standard fare to enter the station is allowed to busk. As it happens, the distribution of MUNY and non-MUNY stations within the subway system follows an economic pattern. MUNY covers the stations where we should expect busking to impose the highest externality costs. This economic pattern of coverage provides the substantive basis for this Note: Because MUNY's distribution is consistent with Harold Demsetz's foundational theory about the economic development of private property rights, MUNY provides a window into a question left open by Demsetz and contested in subsequent literature—the question of how private property develops. This Note analyzes MUNY to make two contributions to the growing body of literature describing how property rights develop. First, observing the role that changing First Amendment doctrine played in MUNY's formation, this Note argues that exogenous legal norms act as constraints on the mechanisms through which new property rights develop. Second, it argues that Demsetz's theory should take account of the inertia built into property systems and the external shocks that help overcome this stasis.*

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INTRODUCTION

Late in the afternoon, a young woman sets up with her guitar on the mezzanine of the Union Square subway station in New York City. As riders look on, she places a hat on the ground in front of her, does a perfunctory check of the strings, and, satisfied by what she hears, begins to play. She is busking—playing music or performing for tips in a public place—an activity that is permitted, with exceptions, in the New York City subway system.<sup>1</sup> One stop away, on the uptown platform for the 6 Train at Astor Place, a grizzled man plays his accordion, a case splayed at his feet, filled with loose change and a few crinkled dollar bills.

These two musicians, though both busking in the subway system, secured their respective locations under separate municipal permitting regimes. The Union Station guitarist, participating in a permitting system called Music Under New York (MUNY),<sup>2</sup> called a telephone number two weeks ago, booked a specific three-hour time slot, and

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<sup>1</sup> See N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(3) (2011), available at <http://www.mta.info/nyct/rules/rules.htm> (allowing “artistic performances, including the acceptance of donations” as a “permitted nontransit use[.]”).

<sup>2</sup> See *Arts For Transit, Music Under New York: Facts About the Program*, Metro. Transit Auth., <http://www.mta.info/mta/aft/muny/factsheet.html> (last visited Aug. 9, 2012) [hereinafter *MUNY Factsheet*] (describing the background and basics of the MUNY program).

arrived at the appointed time, permit in hand, to play her tunes.<sup>3</sup> The Astor Place accordionist began the day without any guarantee of being able to play at a specific station, instead traveling from platform to platform, until, as luck would have it, he found a suitable busking location unclaimed by a fellow musician.

This is the mixed legal regime of subway busking in New York City. The Metropolitan Transit Authority (MTA) regulates the time, place, and manner in which subway buskers must ply their trade. For example, buskers may perform on platforms or in mezzanines, but not inside train cars;<sup>4</sup> amplifiers are banned throughout the system.<sup>5</sup> But overlaid on these general rules are two separate regulatory systems: Some subway stations require a special permit issued by MUNY, while the remainder do not, with buskers allocating platform space informally among themselves.<sup>6</sup>

At MUNY-regulated stations, the identity of the busker matters. Only MUNY members are entitled to perform, and members can only play during their assigned time slot. Over 350 individual performers or ensembles participate in MUNY, ranging from opera singers to didjeridoo players.<sup>7</sup> Each year, MUNY solicits applications and invites sixty applicants for a five-minute audition in Grand Central Terminal,<sup>8</sup> with judges selecting MUNY members based on the “criteria of quality, variety, and appropriateness for the mass transit environment.”<sup>9</sup> Selected performers receive a MUNY banner and are entitled to perform in one of the thirty transit locations covered by the program.<sup>10</sup> To schedule a performance, MUNY members call a program

<sup>3</sup> See SUSIE J. TANENBAUM, *UNDERGROUND HARMONIES: MUSIC AND POLITICS IN THE SUBWAYS OF NEW YORK* 57 (1995) (describing how MUNY is administered); see also *infra* note 132 (noting continuity in how MUNY is administered).

<sup>4</sup> See N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(3) (2011) (prohibiting busking “(A) when on or within . . . a subway car . . . (B) within a distance of 25 feet of a station booth, or a fare media sales device including but not limited to a fare media vending machine . . .”).

<sup>5</sup> *Id.* (prohibiting the use of “amplification devices of any kind” on subway platforms).

<sup>6</sup> *MUNY Factsheet*, *supra* note 2.

<sup>7</sup> *Id.*

<sup>8</sup> See *Music Under New York: 2012 Audition Application*, METRO. TRANSIT AUTH., [http://www.mta.info/mta/aft/muny/muny\\_auditionform.pdf](http://www.mta.info/mta/aft/muny/muny_auditionform.pdf) (printable audition form) (last visited Aug. 9, 2012); Press Release, Metro. Transp. Auth., 25 Performers and Groups Win Entry Into MTA’s Music Under New York (May 31, 2012), <http://www.mta.info/mta/news/releases/?en=120531-HQ1> (announcing the results from the annual auditions in Grand Central Terminal); see also *infra* note 132 (citing to sources that describe current MUNY policies).

<sup>9</sup> *MUNY Factsheet*, *supra* note 2.

<sup>10</sup> *Id.*

administrator in advance to sign up for an available performance slot.<sup>11</sup>

At stations that are not regulated by MUNY, there is no top-down allocation system.<sup>12</sup> The basic organizing principle of this informal system is as old as property law itself—the rule of first possession.<sup>13</sup> A musician claims a platform or mezzanine simply by arriving first.<sup>14</sup> Other musicians arriving afterward—second-comers—tend to respect the first musician’s claim to the spot, abiding by what one subway guitarist called “the unspoken law.”<sup>15</sup> Most musicians will move to a different station, or set up at the same location but outside the radius of ambient sound.<sup>16</sup> One organization dedicated to busker advocacy has even published a code of ethics that makes explicit the informal norms that regulate how musicians allocate public space.<sup>17</sup>

As it happens, the distribution of MUNY and non-MUNY stations within the subway system follows an economic pattern: MUNY covers stations where busking likely involves significant externalities.<sup>18</sup> This economic pattern of coverage, perhaps surprisingly, has significant implications for the theory of how property rights develop. Because MUNY’s distribution of permitting is consistent with Harold Demsetz’s foundational theory about the economic development of private property rights,<sup>19</sup> MUNY provides a window into a question

<sup>11</sup> Deepti Hajeli, *Performers Play for MTA Music Under New York Gives Subways Special Sound*, SOUTH FLORIDA SUN-SENTINEL, June 24, 2007 at A7.

<sup>12</sup> See Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. S515, S517–18 (2002) (distinguishing between property rights allocated through top-down systems versus those divided up using bottom-up systems).

<sup>13</sup> See *Pierson v. Post*, 3 Cai. 175, 177 (N.Y. Sup. Ct. 1805) (drawing on “ancient writers” to determine the scope of the rule of first possession as to the famous fox).

<sup>14</sup> See Randy Kennedy, *It Can Be a Long Climb to the Top, Even When You’re Down Here*, N.Y. TIMES, June 24, 2003, at B3 (describing how a keyboardist claims his usual location by “simply get[ting] there before anyone else”).

<sup>15</sup> TANENBAUM, *supra* note 3, at 63. As one musician put it, “[Y]ou have to respect the other musicians.” *Id.*

<sup>16</sup> See *id.* at 63 (quoting one musician as saying “[i]f they can’t hear, we sing on the same platform”).

<sup>17</sup> See *Street Artists Code of Ethics*, BUSKERSADVOCATES.ORG, <http://www.buskersadvocates.org/saacodeethics.html> (last visited Aug. 9, 2012) (“Artists should not set up within 50 feet of another artist(s) without first consulting with that artist(s).”).

<sup>18</sup> See *infra* Part II (arguing that externality costs roughly track ridership, and that MUNY covers the high-ridership stations). Externalities can be defined as costs unaccounted for by the primary actor—in this case the busker—and instead placed on others.

<sup>19</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). See *infra* notes 24–36 and accompanying text (describing Demsetz’s argument in detail). This Note treats MUNY permitting as a species of private property, based on the fact that the program allocates exclusive use of a resource to specific individuals, even if these use-rights are inalienable and of fleeting duration. See *infra* note 57 and accompanying text for further discussion.

that Demsetz left open and that has been contested in subsequent literature on the subject. Demsetz surmised that private property rights for a resource will develop when the externality costs for using that resource rise to a level high enough to justify the social costs of creating and enforcing new property rights.<sup>20</sup> While the broad outlines of this framework have become property-theory canon, the question of *how* private property rights develop remains subject to debate.

This Note analyzes the development of MUNY in order to make two contributions to a growing body of literature on the specific mechanisms of property-rights development. First, observing the role that changing First Amendment doctrine played in MUNY's formation,<sup>21</sup> this Note argues that exogenous legal norms—that is, non-property legal norms that have largely been ignored in Demsetz's framework—can constrain the mechanisms through which new property rights develop. Second, it argues that Demsetz's theory for how property rights shift should take account of the inertia built into property systems and the external shocks that help overcome this stasis.

To situate these claims, Part I describes the basic contours of Demsetz's economic theory of property rights, what Demsetz omitted, and how subsequent scholars have addressed his omissions. Part II demonstrates that the distribution of MUNY and non-MUNY stations roughly comports with Demsetz's efficiency thesis, and that, as such, the accessible history of MUNY may provide a window into the mechanics of how property regimes shift. Part III then delves into the history of MUNY to expand on Demsetz's efficiency thesis.

## I

### DEMSETZ'S THEORY AND CONTESTED QUESTIONS

Over forty years ago, Harold Demsetz published *Toward a Theory of Property Rights*, articulating an economic explanation for the emergence of private property rights and lauding the comparative efficiency gained from a private—as opposed to communal—property regime.<sup>22</sup> His short work, only thirteen pages, has become a foundational piece in property theory.<sup>23</sup> Part I.A of this Note describes

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<sup>20</sup> See *infra* notes 26–28 and accompanying text (describing Demsetz's core thesis).

<sup>21</sup> See *infra* notes 148–67 and accompanying text (discussing contemporaneous free-speech litigation).

<sup>22</sup> Demsetz, *supra* note 19, at 351.

<sup>23</sup> Demsetz's thesis was the exclusive topic for a symposium at Northwestern. Symposium, *The Evolution of Property Rights*, 31 J. LEGAL STUD. S331 (2002); see also Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1320 (1993) (referring to Demsetz's article as “seminal”); Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. S331, S331 (2002) (“The point of

Demsetz's core contribution to the economic theory of property rights. Part I.B describes one of the principal questions that Demsetz left open and that subsequent authors have struggled with: the question of how property rights actually form.

### A. *Demsetz's Efficiency Theory*

Demsetz began with the premise that property rights "are an instrument of society" that allow people to form expectations for dealing with one another.<sup>24</sup> An inevitable consequence of living among others is that one's use of resources has beneficial and harmful effects on others, and insofar as these external effects do not factor into one's decisionmaking about how to use the resource, they become externalities.<sup>25</sup> Demsetz posited that a "primary function of property rights" is to "achieve a greater internalization of externalities."<sup>26</sup> By his reckoning, private property rights to a given resource develop when the costs of a private property regime are justified by the benefits of internalizing the externalities associated with the open-access or communal use of the resource.<sup>27</sup> In other words, new property rights emerge when they are cost justified—when their benefits outweigh their costs.<sup>28</sup>

To illustrate his theory, Demsetz drew on Eleanor Leacock's anthropological study of the Montagnais, a Native American tribe from the Labrador Peninsula.<sup>29</sup> Prior to the advent of the fur trade with Europeans, the Montagnais did not have a system of private ownership for their land.<sup>30</sup> Hunters could kill what they needed from communal lands. With the introduction of the fur trade in the late seventeenth and early eighteenth centuries, the value of beaver pelts surged.<sup>31</sup> Rising prices incentivized more hunting, which led to the overexploitation of the beaver population and, with it, a spike in the

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departure for virtually all efforts to explain changes in property rights is Harold Demsetz's path-breaking article . . .").

<sup>24</sup> Demsetz, *supra* note 19, at 347. Put another way, "[i]n the world of Robinson Crusoe property rights play no role." *Id.*

<sup>25</sup> See *infra* note 64 and accompanying text (illustrating by way of example the distinction between external effects and externalities).

<sup>26</sup> Demsetz, *supra* note 19, at 348.

<sup>27</sup> See Demsetz, *supra* note 19, at 350 ("[P]roperty rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.").

<sup>28</sup> See Epstein, *supra* note 12, at S518 (describing complex allocation systems as "pay[ing] their way" when efficiency gains outweigh added administrative costs).

<sup>29</sup> See Demsetz, *supra* note 19, at 351 (citing Eleanor Leacock, *The Montagnais "Hunting Territory" and the Fur Trade* (pt. 2), 56 AM. ANTHROPOLOGIST ASS'N, no. 5, 1954).

<sup>30</sup> See Demsetz, *supra* note 19, at 352.

<sup>31</sup> *Id.*

magnitude of externalities that an individual hunter imposed on other hunters. This exogenous price shock changed the calculus of property rights in favor of private rights that would encourage the husbanding of scarce resources to prevent a “tragedy of the commons.”<sup>32</sup> Indeed, a clear correlation could be seen: Native Americans geographically closest to trading centers were the earliest to develop private hunting rights.<sup>33</sup> In response to surging fur prices, the Montagnais developed a “seasonal allotment system”—a system of quasi-private hunting rights, which Demsetz attributed to rising hunting externalities that made the social cost of doing nothing higher than the cost of enforcing private rights.<sup>34</sup> In other words, under Demsetz’s conception, the development of substantial negative externalities, which had been present but *de minimis* before the fur trade, spurred a change in the property system because the cost-benefit balance shifted. Now the net public gains of private property—encouraging husbanding and minimizing externalities—outweighed the costs of creating and enforcing private ownership rights.<sup>35</sup> Private property rights became worthwhile.

Demsetz did not provide much detail about *how* property rights change. The most he offered was that “the emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit-cost possibilities,” suggesting that new rights are created endogenously among the resource-users themselves, a form of spontaneous private ordering.<sup>36</sup>

### *B. Identifying the Mechanics of Property-Rights Formation*

While Demsetz’s thesis has been applied, critiqued, reevaluated, and analyzed from many angles,<sup>37</sup> a primary criticism—and the focus

<sup>32</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244–45 (1968) (coining the well-worn term). The “tragedy” is the inefficient use of a resource that occurs when resource users individually have incentive to use as much as possible, despite the fact that, in the aggregate, this results in overutilization of the resource. *Id.*

<sup>33</sup> Demsetz, *supra* note 19, at 352 (“The geographical or distributional evidence collected by Leacock indicates an unmistakable correlation between early centers of fur trade and the oldest and most complete development of the private hunting territory.”).

<sup>34</sup> *Id.* at 352–53.

<sup>35</sup> See *id.* at 351–52 (noting that before the fur trade, while externalities were “clearly present,” the external effects “were of such small significance that it did not pay for anyone to take them into account”).

<sup>36</sup> *Id.* at 350.

<sup>37</sup> Some writers have applied and tested Demsetz’s thesis in novel contexts. One writer applies the thesis to California surfers. See Daniel T. Kaffine, *Quality and the Commons: The Surf Gangs of California*, 52 *J. LAW & ECON.* 727 (2009) (investigating whether the quality of “surf breaks” led to stronger property rights enforced through “localism” or territorial protectionism of the resource—in this case the surf breaks—by locals against out-of-towners). Another took the approach to the case of Chicago street parking. See Epstein, *supra* note 12, at S516 (using Chicago parking to explore “Demsetz’s themes at

of this Note—has been that Demsetz’s thesis explains the “why” of private property, but not the “how.”<sup>38</sup> Demsetz was silent about the particular mechanisms that cause property rights to shift.<sup>39</sup> Or to borrow Richard Epstein’s description, “[t]he Demsetz account has the character of a parable or allegory that identifies the beginning and end points of a journey.”<sup>40</sup> In short, the question of *how* property systems evolve—the middle of the journey—remains open and subject to ongoing scholarly debate.<sup>41</sup>

Katrina Wyman, surveying the subsequent literature that addresses this open question, describes two basic camps: theorists who assume that property-rights creation is a bottom-up process, as Demsetz implicitly did,<sup>42</sup> and those who emphasize the role of the political process in top-down rights creation.<sup>43</sup>

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both a theoretical and a practical level”). Yet another scholar applied Demsetz’s thesis to Los Angeles street vendors. See Gregg W. Kettles, *Formal Versus Informal Allocation of Land in a Commons: The Case of the MacArthur Park Sidewalk Vendors*, 16 S. CAL. INTERDISC. L.J. 49, 78–85 (framing analysis in terms of Demsetz’s “wealth maximization theory of property”). A number of scholars have critiqued Demsetz for, among other things, underselling the upside to communal property rights regimes. See, e.g., Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

<sup>38</sup> Demsetz acknowledged as much in a later piece. See Harold Demsetz, *Frischmann’s View of “Toward a Theory of Property Rights,”* 4 REV. L. & ECON. 127, 129 (2008) (“I did avoid the different, difficult problem of how property right adjustments are actually made. I would still be working on the article were I to have undertaken this task.”).

<sup>39</sup> See JESSE DUKEMINIER ET AL., PROPERTY 55 (7th ed. 2010) (“Demsetz’s article has . . . [been] criticized . . . for only suggesting why, but not explaining how, property rights . . . formed in the first instance.”); Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 289 (1979) (noting that Demsetz did not address the mechanism for change); Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 121 (2005) (noting that Demsetz was silent “on the mechanism for change” and “elid[ed] an explanation of the process which gives rise to new property rights arrangements”). Indeed, Demsetz’s consistent use of the emergent property system as the subject of his sentences—private property *arises*, rights *develop*—is a syntactical “tell”: Demsetz constructed his sentences to avoid having to identify all the sticky questions associated with the “how.” E.g., Demsetz, *supra* note 19, at 350 (“[P]roperty rights develop to internalize externalities.”); *id.* at 354 (“[P]roperty rights arise when it becomes economic for those affected by externalities to internalize benefits and costs.”).

<sup>40</sup> Epstein, *supra* note 12, at S516.

<sup>41</sup> See Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 561 (2001) (“The evolutionary part of his celebrated contribution has been rightly criticized, and the problem remains a puzzle.”); Wyman, *supra* note 39, at 122 (“In the decades since the publication of Demsetz’s article, scholars have attempted to fill the void left by its silence on the mechanism for establishing private property.”).

<sup>42</sup> See Wyman, *supra* note 39, at 121 (noting that Demsetz implicitly assumed private ordering); see also Demsetz, *supra* note 19, at 350 (attributing changes in rights to “the desires of the interacting persons for adjustment to new benefit-cost possibilities”).

<sup>43</sup> See Wyman, *supra* note 39, at 145 (“Others emphasize the contributions of interest groups, and thereby recognize a political dimension to the evolution of property rights.”).

To explain how property rights shift, theorists in the bottom-up camp have drawn on game theory to describe how private ordering emerges in response to economic shocks.<sup>44</sup> These theorists point to a number of examples where resource-users create their own property rights.<sup>45</sup> To take one example, Daniel Kaffine describes how California surfers use “localism” to assert control over the most desirable surf breaks, congestible resources that risk losing their enjoyment value with too many surfers.<sup>46</sup>

Scholars in the second group observe that many property rights are created not by spontaneous ordering among resource-users, but by the directives of government entities.<sup>47</sup> Accordingly, this group argues that theoretical understandings should account for how political actors are influenced, especially by interest groups, during the process of property-rights formation.<sup>48</sup> For example, Wyman notes that, at the very least, accounting for political action means that we should focus not simply on rising externality costs, but also on the *distribution* of those costs: If externality costs are borne by a politically powerless demographic, then we may not expect a shift in the property regime, Demsetz’s predictions notwithstanding.<sup>49</sup>

To illustrate the point, imagine that the Montagnais in the late seventeenth century had our twenty-first century administrative state. Faced with the same exogenous price shock driven by the fur trade, we might imagine the Montagnais Hunting Commission, after notice and comment, promulgating a “seasonal allotment” rule that limited

<sup>44</sup> See Ellickson, *supra* note 23, at 1365 (citing “game-theoretic work” to speculate about the “bottom-up” creation of property rights among close-knit groups); Kettles, *supra* note 37, at 68–77 (using Robert Sugden’s game theory of spontaneous order to explain the bottom-up property rights of sidewalk vendors).

<sup>45</sup> E.g., Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 163–66 (1975) (describing the emergence of property rights in the American West based on resource “demand, factor endowments, and technology”). For a helpful collection of “examples of bottom-up accounts,” see Wyman, *supra* note 39, at 128 n.31.

<sup>46</sup> Kaffine, *supra* note 37, at 729; see also *infra* notes 170–74 and accompanying text (discussing Kaffine’s study in more detail).

<sup>47</sup> See Wyman, *supra* note 39, at 137 (“[T]he standard story about prices [increasing demand for private property] seems naive once it is recognized that private property typically is formed through political—rather than market—ordering.”).

<sup>48</sup> See Epstein, *supra* note 12, at S516 (referring to the “public choice dynamic”); Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. LEGAL STUD. S421, S425–33 (2002) (describing “interest-group” explanation as an alternative to the “transaction-cost” explanation for shifting property rights).

<sup>49</sup> Wyman, *supra* note 39, at 123–24 (“Since the political process does not require unanimity to proceed, it is important, in determining the probability of change, to analyze the expected distribution of the benefits and costs of private property among the influential interest groups who are likely to be consulted.”).

the number of beavers each hunter could kill.<sup>50</sup> Trying to explain the mechanism that drove this change, we might conclude that rising fur prices increased the externality costs of hunting, creating demand for private hunting rights. But such an explanation would require an extra step that would account for the *political* dimension of agency action. This analysis would require us to consider what factors motivated—and which groups influenced—the commission members as they decided to create the private hunting rights.

There are two final points that are important to recognize. First, these two theories about how property rights are created—the bottom-up view and the top-down view—are not inconsistent with one another. Bottom-up systems of allocation can and do coexist with state-created property regimes. Epstein discussed curb rights (rights to parking places on public streets) in Chicago as just such an example; busking rights in the subway is another.<sup>51</sup> Second, informal bottom-up property rights interact with formal top-down property rights.<sup>52</sup> As Epstein points out, “bottom-up rules are, in general, subject to displacement by clear state commands.”<sup>53</sup> Indeed, on some level, bottom-up and top-down systems are substitutes: Insofar as the state does not create private property rights where such rights are cost-justified, we should expect to see resource-users endogenously create their own.<sup>54</sup> Conversely, where informal bottom-up rights fail to develop, perhaps because the group of resource-users is too large and heterogeneous,<sup>55</sup> then we might expect government to step in.<sup>56</sup>

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<sup>50</sup> See *supra* note 34 and accompanying text (discussing the “seasonal allotment system”).

<sup>51</sup> Epstein, *supra* note 12. Just as metered or permit-only parking can be found alongside open-access parking, MUNY permitting coexists with open-access busking—a point illustrated by the opening juxtaposition of the Union Square guitarist and the Astor Place accordionist. See *supra* notes 1–17 and accompanying text (describing mixed legal regime of busking regulation).

<sup>52</sup> See Epstein, *supra* note 12 at S533 (discussing the “interaction between top-down and bottom-up systems of controls” with respect to “curb rights”).

<sup>53</sup> *Id.*

<sup>54</sup> Maine lobstermen are one example. High lobster prices created a tragedy of the commons, leading to overexploitation of the lobster population. In the absence of government action, groups of lobstermen formed gangs that owned lobstering territory, creating new bottom-up rights where before the waters were open access. See generally JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (1988) (providing a detailed anthropological account of the customs of Maine lobstermen, including the prevalence of “lobster gangs” that enforce informal property norms).

<sup>55</sup> Cf. Wyman, *supra* note 39, at 146–51 (describing how the presence of political-rights creation undermines the conventional wisdom that heterogeneity provides an obstacle to rights creation).

<sup>56</sup> See Wyman, *supra* note 39, at 144–49 (discussing how the nature of political institutions calls for a reevaluation of the prevailing view that the larger and more heterogeneous the group of resource-users, the less likely that property rights will form).

### C. *How MUNY Fits In*

In sum, Demsetz articulated an economic theory of when property rights evolve, positing that private property emerges to internalize externalities. Absent from his account was a clear presentation of the mechanism for this change. Many scholars have addressed this “how” question, falling into two camps: those describing the mechanism as emerging endogenously from the group of resource-users and those emphasizing the role of political institutions. But numerous questions remain about how, precisely, these mechanisms function.

MUNY, as Parts II and III of this Note argue, provides a window into these questions. Recall that MUNY allocates to specific artists the busking rights to a specific space at a specific time. For the three hours covered by the permit, only one musician (or ensemble) has the right to perform. This exclusive individual right to busk is a form of private property.<sup>57</sup> In all non-MUNY stations, busking rights are open access, with the general norm of first-come, first-served governing the informal allocation.<sup>58</sup> This mixed regulatory system, while not unusual,<sup>59</sup> provides an opportunity to further develop Demsetz’s theory. Why are some subway stations, but not others, suited for a private property regime? Can we draw lessons from the distribution of MUNY-permitted stations, as Demsetz did from the geographically patterned development of private hunting rights on the Labrador Peninsula?<sup>60</sup> If so, then busking in New York City subways has one very important advantage over beaver hunting in the Labrador

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<sup>57</sup> Admittedly, the term private property is fraught with debate. See Michael A. Heller, *The Dynamic Analytics of Property Law*, 2 THEORETICAL INQ. L. 79, 83 (2001) (“Private property is a complicated idea to pin down precisely; its boundaries fray at the edges.”); Jeremy Waldron, *What Is Private Property?*, 5 OXFORD J. LEGAL STUD. 313, 315–16 (1985) (discussing three reasons for the indeterminacy of private property). But drawing on Demsetz’s focus on the right to exclude as being the sine qua non of private property, MUNY creates private property by vesting the exclusive right to use the subway space in a specific individual or ensemble, albeit for a limited time period. See Demsetz, *supra* note 19, at 354 (“Private ownership implies that the community recognizes the right of the owner to exclude others from exercising the owner’s private rights.”); see also Rose, *supra* note 37, at 711 (“The right to exclude others has often been cited as the most important characteristic of private property.”).

<sup>58</sup> Open access, precisely as it sounds, describes a property system in which the resource is open to all: There is universal privilege of use. See Ellickson, *supra* note 23, at 1322 (“An open-access land regime is one in which privileges of entry are universal.” (emphasis omitted)).

<sup>59</sup> See Ellickson, *supra* note 23, at 1387–88 (noting that “[h]uman groups opportunistically mix public and private ownership together,” and describing as an example medieval open fields that were “marble cake[s] of group and individual property rights”); Epstein, *supra* note 12, at S535–56 (using the example of the different modes of parking regulation in Chicago).

<sup>60</sup> See *supra* notes 29–36 and accompanying text (discussing Demsetz’s example).

Peninsula: The transition occurred not hundreds of years ago, but in the last thirty years. Its recentness gives us a better opportunity to evaluate the *how* behind the formation of private property rights.

## II

### AN ECONOMIC ANALYSIS OF BUSKING

This Part seeks to establish that the hybrid system of busking regulation in the New York City subway system comports with Demsetz's notion that private property emerges if and when internalizing externalities is cost-justified. To do so, Parts II.A and II.B delve into the economics of busking to establish that the magnitude of externalities in a subway station roughly correlates with the number of riders who use that station. That is, busking in high-volume stations, brimming with the hustle and bustle of millions of riders, has higher externality costs than busking in less-travelled stations. Part II.A identifies the externalities of busking. Part II.B explains why high-volume subway stations are likely to have higher busking externalities, and shows that MUNY permitting covers high-volume stations, precisely as we would expect under Demsetz's theory. In other words, ridership helps explain the distribution of MUNY permitting the way proximity to the fur trade helped account for the geographic pattern of private hunting rights in the Labrador Peninsula.<sup>61</sup>

It is important at the outset to emphasize that the goal of this Part is modest. It does not assert that ridership is a perfect correlate with externality costs, nor that MUNY stations are precisely those for which the relative benefits of a permitting system outweigh its costs.<sup>62</sup> Rather, the limited objective is simply to convince the reader that ridership is a rough proxy for the magnitude of busking externalities and that, as such, there is a sufficiently Demsetzian logic to the current distribution of stations covered by MUNY permitting to justify taking a closer look at how the MUNY system of allocating property rights developed.

#### A. *The Varying Externality Costs of Busking*

To analyze how externalities vary from station to station, a critical starting point is to distinguish externalities from internalized external

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<sup>61</sup> *See id.*

<sup>62</sup> It readily concedes both of these points. Ridership is indeed an imperfect proxy for externality costs, and the distribution of MUNY stations is almost certainly both over- and under-inclusive if measured against Demsetz's understanding that such property systems emerge when the externality costs exceed the costs of enforcement.

effects. An example illustrates the difference between the two:<sup>63</sup> Assume that my neighbor offers me \$100 not to play music in the mornings, and I decline her offer because I derive more than \$100 benefit from listening to music over breakfast. The annoyance cost to my neighbor is no longer an externality because her offer is an opportunity cost that I consider in deciding whether to play music. My decision to play or not play, depending on the personal value I derive from the music, will be Kaldor-Hicks efficient.<sup>64</sup> Had my neighbor not offered money, then her annoyance would be an externality, because my decision to play music would not take account of the costs to her.

Distinguishing externalities from internalized effects is an important initial step because Demsetz's thesis concerns the internalization of externalities, and insofar as external effects are already internalized, they lose their explanatory power within his framework.<sup>65</sup> As a theoretical matter, this distinction makes sense: If all the external effects were internalized, then by definition everyone's decision about how to use a resource would be socially optimal, rendering any regulation, including regulation in the form of property law, unnecessary and counter-productive from a pure-efficiency perspective.

### 1. *Internalized External Effects of Busking*

Busking provides a monetary benefit to buskers, and this remuneration represents an internalized portion of the positive external effects of their playing. What is the scope of that benefit? As in other lines of work, earning potential varies by talent and geography, but unlike other sectors, reliable salary data are not collected for buskers. Various anecdotes in newspapers and books put the tax-free hourly earning potential from tips at \$20–30 per hour, with top earners

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<sup>63</sup> This illustration draws on a helpful example that Jesse Dukeminier and his co-authors included in their casebook. *DUKEMINIER ET AL.*, *supra* note 39, at 49.

<sup>64</sup> *See id.* (“An externality is not simply an effect of one person's activity on another person; rather, it is an effect that the first person is not forced to take into account.”). Kaldor-Hicks efficiency describes a distribution of entitlements that corresponds to the hypothesized distribution of entitlements in a world of zero transaction costs—namely, that entitlements are held by those who value them most. Lawrence B. Solum, *Legal Theory Lexicon: Efficiency, Pareto, and Kaldor-Hicks*, LEGAL THEORY BLOG (Aug. 7, 2011), <http://lsolum.typepad.com/legaltheory/2011/08/legal-theory-lexicon-efficiency-pareto-and-kaldor-hicks.html>; *see also* ALAN V. DEARDORFF, *TERMS OF TRADE: GLOSSARY OF INTERNATIONAL ECONOMICS* 154 (2006) (describing the “Kaldor-Hicks criterion” as when “the gainers should be able to compensate the losers and still be better off”). The example above is Kaldor-Hicks efficient because, valuing the entitlement to play music at over \$100, I could compensate my neighbor and still be better off.

<sup>65</sup> *See* Demsetz, *supra* note 19, at 348 (“One condition is necessary to make costs and benefits externalities. The cost of a transaction in the rights between the parties (internalization) must exceed the gains from internalization.”).

pulling in over \$100 per day in venues like Grand Central Terminal.<sup>66</sup> The pecuniary benefits to buskers are not limited to tips alone. Buskers can earn money by selling CDs or from private gigs that they secure as a consequence of their exposure while busking.<sup>67</sup> Moreover, tips, sales revenue, and private gigs tell only part of the story, since musicians derive nonmonetary benefits from busking as well.<sup>68</sup>

While buskers internalize some of the external benefit to subway riders, tipping is an incomplete mechanism of internalization. First, music to the extent that it provides a benefit, is a classic public good.<sup>69</sup> A busker cannot exclude non-tipping passengers from enjoying her

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<sup>66</sup> See TANENBAUM, *supra* note 3, at 65 (reporting earnings from \$20 to more than \$50 per day and noting increased earnings at Grand Central Terminal); see also Robert Blau, *New York Program Tries To Elevate Subway Musicianship into Institution*, CHI. TRIB., Feb. 2, 1986, at K8 (reporting that a jazz trio makes \$30–40 apiece on “a good day”); *Chicago Considers Permitting Artists’ Performances in Street*, N.Y. TIMES, Apr. 15, 1983, at A17 (reporting earnings of \$50–70 per day for a violinist); Will Crutchfield, *Woodwinds: Notes from Underground*, N.Y. TIMES, Nov. 5, 1985, at B1 (reporting that two buskers split \$30 for a two-hour stint); William E. Geist, *How Do You Get To the Subways? Practice, Practice*, N.Y. TIMES, May 27, 1987, at B1 (reporting earnings of \$20 apiece in an hour at some stations, “which is what some clubs pay us for doing three sets”); Edward Lewine, *Tooting Your Own Horn*, N.Y. TIMES, June 15, 1997, at CY10 (reporting that some musicians “clear \$100 a day”); Jesse McKinley, *Sampling the Music Beneath as It Prepares To Rise Above*, N.Y. TIMES, June 20, 2002, at B9 (reporting that one guitarist earns \$60–100 for three hours in Grand Central, while one violinist earns \$60 for six hours at West 14th Street); Andy Newman, *It Was Subterranean Tryout Blues for Some*, N.Y. TIMES, May 22, 2001, at B3 (reporting that “several performers said they could double their take from \$70 or so a shift to more than \$150”); Jeffrey A. Tannenbaum, *Street Musicians Learn How Deaf Bureaucrats Can Be*, WALL ST. J., May 15, 1989, at B2 (reporting that “incompetents are lucky to eke out \$20 or \$30 a day”); Neal Thompson, *Deck the Halls in N.Y. Subways*, CHRISTIAN SCI. MONITOR, Dec. 23, 1996, at 3 (reporting that earnings between Thanksgiving and New Year’s can be \$100 a day).

<sup>67</sup> Perhaps future income from private contracts is better conceptualized as an advertising benefit, but in any case the benefit is real. See Crutchfield, *supra* note 66, at B1 (noting the additional benefit of attracting private contract gigs); Geist, *supra* note 66, at B1 (discussing “side benefits” such as meeting producers and other gigs); Newman, *supra* note 66, at B3 (noting “more exposure . . . [for] more paying gigs aboveground”). The same goes for CD revenue. See Tannenbaum, *supra* note 66, at B2 (discussing how an electric harp player can sell thirty tapes at \$8.95 each in three hours on a “good day,” and how band leader Julian Avalos earns “\$100 or more in two or three hours, partly by selling prerecorded tapes”).

<sup>68</sup> See Francis X. Clines, *Style Divides Subway Rivals United in Need*, N.Y. TIMES, Aug. 8, 1993, at 37 (quoting a schoolteacher who took a leave of absence to busk in the subways as saying, “Music is my number one love . . .”); Jennifer Fermino, *Lots o’ Pluck!: Musicians Vie for Subway Spots*, N.Y. POST, May 17, 2012, at 27 (quoting a gospel singer as saying, “It’s about sharing the love you have inside . . . . It’s a passion thing.”).

<sup>69</sup> See Russell Hardin, *The Free Rider Problem*, reprinted in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2011 ed.), available at <http://plato.stanford.edu/archives/sum2011/entries/free-rider/> (describing how public goods, “once they are made available to one person, can be consumed by others at no additional marginal cost” and that “it is supposedly impossible to exclude anyone from the consumption of a public good”).

music while they wait for their train, creating a free-rider problem.<sup>70</sup> A concert in a private venue provides a helpful comparison: Given the right to exclude the nonpaying public, attendees must pay to enjoy the music, and thus the gross ticket sales from such a concert can be understood to approximate the external benefits attendees derive from the performance.<sup>71</sup> On a subway platform, however, tipping amounts to only a shadow of the external benefits because people pay much less frequently. As such, tipping only partially internalizes the benefit of the music to riders.

## 2. *Busking Externalities*

There are a number of potential axes along which to catalogue the different externalities—whether they are positive or negative, whom they affect, and the nature of the effect, to name a few. This section considers three basic categories: (a) enjoyment externalities, (b) crime and safety externalities, and (c) externalities to other buskers.

### a. *Enjoyment Externalities*

A portion of busking externalities take the form of riders' simple enjoyment—or not—of performances. Notice that if the external benefits of subway music are properly understood as a partial positive externality, then the external costs are an unmitigated negative externality. There is no reverse tipping, no monetary mechanism for a rider to register her unhappiness with the music, and rare is the case where a rider actually offers to pay a busker to stop.<sup>72</sup>

Certainly to some riders, the music is a nuisance.<sup>73</sup> A commuter may have particular musical preferences that do not jibe with the musician's songs. Because commuters have a diverse set of musical likes and dislikes, music that is good enough to earn sufficient tips to

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<sup>70</sup> Public goods tend to create free-rider problems, because once a public good is provided any individual can benefit from that good without contributing. *See id.* (noting that public goods “face the problem of freeriding that undercuts supply of the goods”).

<sup>71</sup> Even the ticketing mechanism does not fully internalize this benefit. By virtue of the decision to purchase the ticket, each attendee is, in effect, saying that she derives more value from attending than the face value of the ticket elsewhere. Even a performer in a private venue, then, does not internalize the consumer surplus.

<sup>72</sup> *But see* Blau, *supra* note 66, at K8 (describing a busker's tip box that read “PAY ME IF YOU WANT ME TO STOP”); Geist, *supra* note 66, at B1 (“There is often a man on board the F train who plays the saxophone so atrociously—almost cruelly, really—that riders pay the man . . . to stop.”).

<sup>73</sup> *See* Editorial, *Mostly Mozart, and Worse*, N.Y. TIMES, Sept. 2, 1988, at A26 (“However talented these musicians may be, there has to be a way for them to provide enjoyment for some riders at the right times and places, without imposing on those who seek peace and solitude even in a crowded subway.”).

keep the busker busking may nevertheless be bad to another subset of riders—and may be bad enough to this latter group that the music decreases social welfare. And yet the Kaldor-Hicks-suboptimal show goes on.<sup>74</sup> These harms, though likely trivial to each individual rider, may amount to a significant social cost in the aggregate. As noted by Robert Ellickson in the context of panhandling, the social cost of minor nuisances can add up quickly because of the sheer number of people affected and the accumulation of annoyance costs over time.<sup>75</sup>

While we lack sufficient data to determine whether enjoyment externalities of subway busking net out to be positive or negative, there are three reasons to think that the net externalities of busking are positive. First, what scanty data we have suggest that a large majority of riders enjoy the music.<sup>76</sup> Second, one would expect that buskers who fall below some minimum threshold of quality would not garner sufficient tips to continue playing.<sup>77</sup> Third, riders have self-help remedies that limit the externality costs imposed on them. In response to a disagreeable tune, for example, some commuters can put on headphones to drown out the offending cacophony or walk along the platform until they are outside of the range of ambient sound.<sup>78</sup> These self-help remedies, it should be noted, do not eliminate the negative externality. Instead, they essentially function as a ceiling by limiting the cost of that negative externality to either the cost of personally mitigating the nuisance or the cost of enduring the nuisance, whichever is lower.

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<sup>74</sup> See Solum, *supra* note 64 (discussing Kaldor-Hicks efficiency). In an imagined Kaldor-Hicks world, riders experiencing disutility from busking could collectively pay a bad busker for the entitlement of a music-free platform.

<sup>75</sup> Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 *YALE L.J.* 1165, 1177 (1996).

<sup>76</sup> See Wendy Feuer, Letter to the Editor, *Most Subway Riders Want More Music, Even in the Morning*, *N.Y. TIMES*, Sept. 30, 1988, at A34 (“Fully 70 percent of [survey] respondents said they enjoy music in the subway, many adding that it provides a respite from the harried pace of commuting and contributes to a sense of safety and well-being.”).

<sup>77</sup> See Tannenbaum, *supra* note 66, at B2 (“But ‘if people aren’t making money, they split, they don’t stay here,’ says subway guitarist Steven Witt. Those who survive are mostly abler musicians who can’t find enough work in clubs, private parties or restaurants.”).

<sup>78</sup> Of course, once riders are on their train, they are no longer able to move out of range, which perhaps explains why the MTA regulations ban busking on trains but allow it on platforms. *N.Y. COMP. CODES R. & REGS.* tit. 21, § 1050.6(c) (2011); see also Richard Levine, *Subway Musicians Told To Keep Distance*, *N.Y. TIMES*, Oct. 17, 1987, at 33 (noting that the MTA rules “were an attempt to balance the rights of riders and those who seek to solicit them, especially once they board trains” and quoting the MTA general counsel as saying, “In a train, people are more captive . . . . We are trying to make it so the public will not be harassed and annoyed.”).

## b. Crime and Safety Externalities

Musical enjoyment is not the end of the story: Other externalities, in particular those relating to safety, warrant attention.<sup>79</sup> For instance, popular performers may create congestion by attracting enough onlookers to impede pedestrian traffic,<sup>80</sup> causing delays, annoyance costs, and, in the extreme, safety risks.<sup>81</sup> Loud buskers may also make it difficult to hear MTA announcements, imposing informational costs on riders standing in the vicinity.<sup>82</sup>

Busking might also affect the crime rate, although, as with enjoyment externalities, it is unclear whether the net externalities are positive or negative. To indulge in oversimplification, there are two competing schools of thought. There is the “eyes on the street” theory, which holds that order is maintained not simply by policemen but also by passersby who help enforce informal norms.<sup>83</sup> And then there is the “broken windows” theory, arguing that minor manifestations of disorder—such as now-eponymous broken windows—encourage criminal acts.<sup>84</sup>

Jacobs’s core idea is that “*people* make city streets feel safe and vibrant.”<sup>85</sup> Buskers help constitute an informal network that maintains social order.<sup>86</sup> The presence of a busker can make a particular platform safer by adding another eye below the street. This theory is

<sup>79</sup> The universe of speculative external costs and benefits is large. For example, Susie Tanenbaum suggests, by way of an anecdote, that busking creates positive external effects by fostering better race relations. TANENBAUM, *supra* note 3, at 109. *But cf.* Ellickson, *Controlling Chronic Misconduct*, *supra* note 75 at 1181–82 (arguing that panhandling may worsen race relations by reinforcing negative stereotypes if panhandlers are disproportionately black).

<sup>80</sup> See *Music To Fight/Switch By*, N.Y. TIMES, Sept. 15, 1985, at E20 (describing how the very first MUNY concert “impeded rush-hour crowds surging to the shuttle”); *Subway Plans Challenged in Song and Spoof*, N.Y. TIMES, Apr. 14, 1989, at B3 (noting how the MTA hearings began with a videotape of “passages blocked by crowds around performances in stations at 34th Street, Times Square and Grand Central Terminal”).

<sup>81</sup> Although it is hard to quantify the actual safety risks, transit officials cited such risks as a concern. See James Brooke, *Subway Musician Challenges the Law*, N.Y. TIMES, July 13, 1986, at 27 (“Transit officials say musicians playing on crowded, narrow platforms can cause safety hazards.”).

<sup>82</sup> See *Subway Plans Challenged in Song and Spoof*, *supra* note 80, at B3 (noting the MTA’s claim that “loud music can make speaker announcements unintelligible”).

<sup>83</sup> JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 31–32 (1961); see also Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 26, 57 (2004) (describing how Jacobs’s insight counsels in favor of diverse zoning to encourage more pedestrianism).

<sup>84</sup> James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATL. MONTHLY, Mar. 1982, at 29, 31–32.

<sup>85</sup> Garnett, *supra* note 83, at 26; see also Ellickson, *supra* note 75, at 1196–99 (discussing informal networks of social control).

<sup>86</sup> *Cf.* TANENBAUM, *supra* note 3, at 120 (describing newsstands as outposts of safety on subway platforms).

in tension with the notion that the purported crime-prevention advantage of a busker's presence is highest in precisely those places where buskers are least likely to be found. Motivated by tips, buskers do not seek out deserted platforms. Despite this tension, a benefit may nevertheless exist during those intervals immediately after a train arrives, temporarily emptying even a busy platform. Perhaps a stronger conception of a positive busking externality is to consider its effect on riders' perceptions: Even though an individual busker does not actually make people safer as they wait for their train, it may make them feel safer, and the safer people feel, the more frequently they will use the subway, which increases the eyes on the subway platform, increasing rider safety.<sup>87</sup> Alternatively, busking may calm hostile spirits and forge a stronger sense of community among listeners, increasing the likelihood that passersby will actively enforce social norms.<sup>88</sup>

On the other hand, busking may increase the crime rate. By creating distractions on platforms and mezzanines, buskers may inadvertently create opportunities for pickpocketing and minor theft.<sup>89</sup> Less intuitively, busking itself may be a "broken window," a manifestation of disorder that signals attenuated social control, leading to more crime.<sup>90</sup> However, this argument assumes that people perceive busking as a form of misconduct. Though this argument may be defensible in the case of panhandling, which is banned in the subway system,<sup>91</sup> it does not withstand scrutiny when applied to buskers. Busking, after all, is permitted; it is not *misconduct* and thus should not send crime-permissive signals. It is an unbroken window. But given the disconnect between the regulations governing the subway system and people's perceptions of those rules, busking may nevertheless be perceived as a "broken window" based on background societal

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<sup>87</sup> See TANENBAUM, *supra* note 3, at 179–80 (quoting a police lieutenant as saying that "a confident riding public . . . becomes a strong police ally").

<sup>88</sup> See Geist, *supra* note 66, at B1 (quoting a drummer as saying that "music really does soothe people"); *Music To Fight/Switch By*, *supra* note 80, at E20 (noting "music's capacity to civilize"); Robin Toner, *The M.T.A. Presents: Music To Soothe the Subway Rider*, N.Y. TIMES, Sept. 13, 1985, at A1 (quoting a commuter as saying, "If they had a little more music, you'd feel more comfortable down here. Maybe people wouldn't be so mean.").

<sup>89</sup> See TANENBAUM, *supra* note 3, at 179 ("Some officers contended . . . that large audiences invite such 'crimes of opportunity' as pickpocketing and chain snatching."); Blau, *supra* note 66, at K8 (noting a transit policeman's comment that if crowds get too big, pickpocketing becomes a problem).

<sup>90</sup> Behavior can be a manifestation of social order. As Wilson and Kelling wrote, "The unchecked panhandler is, in effect, the first broken window." Wilson & Kelling, *supra* note 84, at 34.

<sup>91</sup> N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(b)(2) (2011) ("No person shall panhandle or beg upon any facility or conveyance.").

assumptions.<sup>92</sup> Alternatively, there may be actual misconduct, as in the case of a musician who uses an amp.<sup>93</sup>

c. Externalities to Other Buskers

Subway space is not a typical exhaustible resource, like beavers on the Labrador Peninsula.<sup>94</sup> With buskers inflicting little to no wear and tear on the platform space, the value of the resource to future buskers is unaffected by the present level of use.<sup>95</sup> Busking today has no effect on busking tomorrow; there are zero externalities imposed on future buskers. The only externalities, then, are the costs to contemporaneous buskers who want to play at the same location. There are two components to this cost. First, to the extent that the occupied space is more productive than the alternative, the second-comer loses the differential value. Second, there are search costs: Second-comers have to continue their search, instrument in tow, without any guarantee that the next location will be available, and all the while wasting precious moments that would otherwise be spent playing and earning tips.<sup>96</sup> If it were common practice for second-comers to offer current buskers money to vacate their location, then these externalities would

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<sup>92</sup> Even transit police are confused about what is and what is not permitted. *See* TANENBAUM, *supra* note 3, at 174–76 (describing officers’ assumptions that a permit is required even in non-MUNY stations). It is important to recognize the tautological nature of this external effect: If an activity, such as busking, is authorized and people understand it as such, there is no signal of attenuated control.

<sup>93</sup> *See* N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(c)(4) (2011) (banning the use of “amplification devices of any kind”).

<sup>94</sup> *See* Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 5–6 (describing exhaustible and “congestible” resources). Congestible goods “can bear some joint usage” before their congestion becomes “uncomfortable.” *Id.* at 5, 7.

<sup>95</sup> Compare this state of affairs with exhaustible beavers. As Demsetz points out, in a communal property system, a successful hunt imposes external costs on future hunters. Demsetz, *supra* note 19, at 351.

<sup>96</sup> *See* Natalia “Saw Lady” Paruz, *Music Under NY Audition—The Real Subway Idol*, SUBWAY MUSIC BLOG (May 15, 2007), <http://www.subwaymusicblog.com/music-under-new-york/music-under-ny-audition-the-real-subway-idol/> (“[A]s a freelancer I used to waste sometimes a whole hour on just trying to get a vacant spot. I would arrive at a spot and there would already be somebody there. I would go to another location, and again there would already be someone there, and so on.”); *cf.* WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 16–18 (2003) (discussing rent seeking in the context of sunken treasure and noting how in some cases “[t]he competition to realize [the] gain by acquiring the property right may gobble up all or most of the potential rent, transforming it into a deadweight social loss”).

be internalized.<sup>97</sup> But, with occasional exceptions, this does not appear to be the practice.<sup>98</sup>

### *B. Whether Busking Regulation Comports with Demsetz's Efficiency Thesis*

Having identified a range of externality costs associated with busking, the next step is to consider how the magnitude of these externalities varies by station and whether the stations covered by MUNY permits match those with high busking externalities. Building on the previous section, this section argues that high-volume subway stations, on balance, have higher busking externalities. Crosschecking station ridership with MUNY stations, it concludes that the results are as we should expect: High-traffic stations, with higher expected externalities, are precisely where busking rights have shifted from an open access regime to a species of private property under MUNY. This is consistent with Demsetz's basic thesis that such property rights will develop when it becomes cost-justified to internalize externalities.

#### *1. How Externalities Vary with the Ridership of the Stations*

This section considers how we should expect externalities to vary by station, using the categories outlined in Part II.A.2. It concludes that, in an open-access regime, busking externalities are likely higher at more crowded stations.

##### *a. Enjoyment Externalities*

At the most basic level, externalities almost always increase with the number of people affected by an action. While this observation borders on banal, it should not be overlooked. For example, identical quantities of pollutants emitted by identical factories may nevertheless impose different sized externalities, based on how many people live nearby. The same goes for busking: the more passengers in a station, the higher the aggregate externalities.<sup>99</sup>

At high-volume stations it is also less likely that there will be a "match" between the musical tastes of the crowd and a busker's music. At such stations, busking is likely to be a valuable endeavor without regard to the overall aggregation of preferences: With a high enough pedestrian volume, even a song that generates a miniscule tip-

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<sup>97</sup> See *supra* note 64 and accompanying text (distinguishing externalities from external effects and providing the example of morning music).

<sup>98</sup> But see Kennedy, *supra* note 14, at B3 (recounting an instance of one busker, a Michael Jackson impersonator, offering another busker \$20 for his location).

<sup>99</sup> Cf. Ellickson, *Controlling Chronic Misconduct*, *supra* note 75, at 1177 (discussing the aggregation of minor annoyances caused by panhandling).

ping rate will be worth playing. Busking at these locations will thus be worthwhile to a larger number of low-quality musicians, increasing the likelihood of subpar performances. This idea suggests that at high-volume stations enjoyment costs (full externalities) are more likely to displace enjoyment benefits (partial externalities),<sup>100</sup> leading to an overall increase in the magnitude of externalities. Conversely, at lower-volume stations, where a musician's take is correspondingly more dependent on increasing the percentage of tippers in an audience, it is more likely that the musician will cater to the perceived tastes of station-goers.<sup>101</sup>

Finally, external annoyance and dissatisfaction costs are likely higher at high-volume stations for two reasons. First, a crowded subway station increases the cost of self-help actions available to an annoyed rider. The hassle of maneuvering through a crowded platform to get away from, say, "noisome bucket drummers"<sup>102</sup> raises the ceiling on the negative externalities by increasing the disutility to a subset of riders. Second, the tip fertility, so to speak, of high-density platforms increases the likelihood that musicians will "set up" on each other.<sup>103</sup> When two buskers occupy nearby turf, the likely result is disharmony. Double occupancy decreases everyone's enjoyment, limiting the platform space to which riders who prefer silence can escape and further raising the ceiling on externality costs.

#### b. Crime and Safety Externalities

How crime and safety externalities vary by station is less clear. If buskers impede foot traffic and get in the way, causing either inefficient pedestrian flow or unsafe conditions, then one would expect this effect to be most pronounced in crowded stations. Similarly, insofar as busking inadvertently contributes to pickpocketing by creating distractions,<sup>104</sup> presumably this effect is strongest in high-volume stations, where there are more riders to be distracted. Yet, the purported crime-prevention advantage to having more eyes on the subway platform is likely to be less important in stations that have consistently high ridership. In sum, it is difficult to say whether the magnitude of crime and safety externalities as a whole is higher in

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<sup>100</sup> See *supra* notes 66–72 and accompanying text (discussing the partial internalization of the external benefits, but not the costs, of busking).

<sup>101</sup> See TANENBAUM, *supra* note 3, at 78–79 (describing an interview with Los Andinos buskers who played at the Roosevelt Avenue-Jackson Heights Mezzanine, in part because the Latino ridership at the station made for better money).

<sup>102</sup> Francis X. Clines, *Caught Up in the Underground Blues*, N.Y. TIMES, Nov. 5, 2004, at A30; see also *supra* note 78 and accompanying text (discussing self-help measures).

<sup>103</sup> TANENBAUM, *supra* note 3, at 63.

<sup>104</sup> See *supra* note 89 (discussing the pickpocketing concern).

crowded stations. And even if the magnitude of these externalities is lower in high-volume stations—a conclusion that would run counter to the premise of this Part—the differential is likely offset by the disparity in enjoyment externalities, discussed above, and externalities to other buskers, discussed below, both of which are likely greater in the high-volume stations.

c. Externalities to Other Buskers

The externalities imposed on fellow buskers increase with the ridership of the station. Assuming that a high volume of potential tip-pers makes a location more valuable to performers, this increased value triggers higher demand among buskers for the resource. As such, under an open-access system, more buskers will attempt to secure a platform in Times Square than in West 4th Street.<sup>105</sup> That means that a guitarist playing in Times Square imposes externalities, in the form of search costs and foregone tips, on a larger number of buskers than a guitarist playing in the West 4th Street station.

2. *MUNY Permitting Covers the Stations with the Highest Expected Busking Externalities*

Having reasoned that busking externalities roughly increase with the number of riders per station, the remaining question is whether MUNY stations are substantially higher volume than non-MUNY stations. On balance, they are. Of the approximately thirty MUNY stations in the subway system,<sup>106</sup> most are at or near the top when it comes to ridership. The busiest eight stations—as measured by annual ridership—all require MUNY permitting, as do thirteen out of the top eighteen.<sup>107</sup> While some of the MUNY stations do not seem to fit this pattern—such as the Willets Point stop on the 7 Train, which ranks 237th (out of 422) in annual ridership—explanations are not hard to find.<sup>108</sup> Willets Point, for example, is the station nearest to Mets

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<sup>105</sup> On an average weekday in 2011, 189,426 riders bustle through the Times Square station, compared with 37,873 commuters in the West 4th Street stop. *Average Weekday Subway Ridership*, MTA.INFO, [http://www.mta.info/nyct/facts/ridership/ridership\\_sub.htm](http://www.mta.info/nyct/facts/ridership/ridership_sub.htm) (last visited Aug. 9, 2012).

<sup>106</sup> See *MUNY Factsheet*, *supra* note 2.

<sup>107</sup> See *infra* Table 1 (compiled from the list of MUNY stations and 2009 MTA Statistics, available at *Average Weekday Subway Ridership*, *supra* note 105); see also *MUNY Factsheet*, *supra* note 2 (listing MUNY stations).

<sup>108</sup> *Id.* Conversely, MUNY does not cover the station with the ninth highest ridership, 86th Street-Lexington Avenue. See *infra* Table 1. This may have to do with the timing of ridership at this station. It is likely that busking garners higher tips in the evening than the morning, because riders are in more of a giving mood at day's end. See *Mostly Mozart, and Worse*, *supra* note 73, at A26 (“[R]ecently awakened people prefer to read or have a few moments to themselves . . .”). If we accept this contention, and combine it with the

Stadium and experiences peak flows during home games, making it prime busking turf.<sup>109</sup>

In sum, the distribution of MUNY permitting within the New York subway system comports with Demsetz's basic efficiency thesis that property rights develop to internalize externalities. Stations with fewer riders and thus lower expected busking externalities remain open access, while high-volume stations have shifted from open access to a species of private property under MUNY. Differential externality costs can be understood to have tipped the balance between the costs and benefits of privatized use.

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assumption that buskers earn most of their tips when their audience is captive while awaiting outgoing trains, we can speculate that stations that experience peak platform volume in the morning rush hour are not as valuable to buskers as the ridership figures at first suggest.

<sup>109</sup> See Mets/Willets Point Station, METS.COM, [http://mlb.mlb.com/nym/ballpark/transportation/index.jsp?content=willets\\_point](http://mlb.mlb.com/nym/ballpark/transportation/index.jsp?content=willets_point) (last visited Aug. 9, 2012).

TABLE 1: RIDERSHIP

<i>Station</i>	<i>Rank</i>	<i>Annual Total</i>	<i>Average Weekday</i>	<i>MUNY?</i>
Times Sq-42 St	1	58,099,313	181,224	Yes
Grand Central-42 St	2	42,002,971	144,904	Yes
34 St-Herald Sq	3	36,945,680	119,202	Yes
14 St-Union Sq	4	34,245,245	105,118	Yes
34 St-Penn Station (1, 2, 3)	5	27,196,195	88,520	Yes
34 St-Penn Station (A, C, E)	6	24,182,097	79,875	Yes
59 St-Columbus Circle	7	20,418,815	65,376	Yes
Lexington Av/59 St	8	18,924,005	61,403	Yes
86 St (4, 5, 6)	9	18,891,890	60,254	No
Fulton St/Broadway-Nassau St	10	18,845,513	65,635	Yes
Lexington Av-53 St/51 St	11	18,618,358	64,389	Yes
Flushing-Main St	12	18,287,069	57,753	No
74 St-Broadway/Jackson Hts-Roosevelt Av	13	16,049,407	48,426	Yes
47-50 Sts-Rockefeller Center	14	15,977,449	55,402	Yes
Canal St (J, M, N, Q, R, 6)	15	15,970,032	46,450	No
14 St/6 Av	16	15,220,076	47,932	No
Chambers St/WTC/Park Place	17	14,770,515	51,076	No
42 St-Bryant Pk/5 Av	18	13,502,111	46,431	Yes
West 4 St	19	12,297,799	37,304	No
Court St/Borough Hall	24	10,788,326	37,057	Yes
68 St-Hunter College	28	10,311,822	35,323	Yes
Atlantic Av/Pacific St	29	10,039,490	31,408	Yes
125 St (4, 5, 6)	35	8,710,718	27,704	Yes
161 St-Yankee Stadium	36	8,410,256	26,061	Yes
125 St (A, B, C, D)	41	7,872,649	24,404	Yes
28 St (6)	57	6,548,905	22,042	Yes
Astor Place (6)	73	5,522,077	17,376	Yes
53 St (R)	187	2,382,707	7,460	Yes
Grand Army Plaza	188	2,366,786	7,661	Yes
Mets-Willets Point	237	1,862,720	4,998	Yes

## III

## HOW MUNY DEVELOPED AND ITS IMPLICATIONS

Accepting the premise discussed in Part II—that the distribution of MUNY permitting accords with Demsetz’s efficiency thesis—the following account of MUNY’s creation suggests two observations that contribute to the growing scholarship describing and explaining the mechanisms of shifting property regimes. First, the First Amendment constrained how the MTA could allocate busking rights. Second, the

free speech challenges to the MTA's busking rules appear to have catalyzed the creation of MUNY. These observations illustrate two general principles about property law, previously overlooked, that should be incorporated into the Demsetz framework. First, exogenous (non-property) legal rules constrain how new property rights develop. Second, regulatory inertia—and the shocks that overcome it—determine the timing of when new, cost-justified property rights are created.

Part III.A describes the core facts of MUNY's development and how a series of free speech challenges played a role in the development of the MTA regulations. Part III.B builds on two facets of this account—the First Amendment as regulatory constraint, and contemporaneous free speech challenges as regulatory catalyst—to suggest two important additions to Demsetz's framework.

### A. *Creating MUNY*

This section describes the development of MUNY in two parts: first, a simple factual account that suggests that MTA officials created MUNY to “bring” music to the subways, and, second, a description of contemporaneous First Amendment challenges to the MTA's regulation of busking that suggests a different story and lays the foundation for the two observations about property law that follow.

#### 1. *The Simple Account*

For as long as there have been subways in New York City, there have been subway rules that ban or regulate underground music. In 1904, despite the legality and prevalence of street busking,<sup>110</sup> Rule 416 of the then-nascent Interborough Rapid Transit Company prohibited “[p]laying upon musical instruments and collecting or receiving compensation therefor, in this Company's trains.”<sup>111</sup> In fact, the proscription was in place before the subway system opened, based on prior experience with elevated transit lines.<sup>112</sup> While the City's policy on

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<sup>110</sup> See TANENBAUM, *supra* note 3, at 40 (citing to local ordinances authorizing “organ grinders and street musicians”).

<sup>111</sup> INTERBOROUGH RAPID TRANSIT, RULES AND REGULATIONS FOR THE GOVERNMENT OF THE OPERATING OFFICERS AND EMPLOYÉES OF THE INTERBOROUGH RAPID TRANSIT COMPANY SUBWAY DIVISION 76 (1904).

<sup>112</sup> TANENBAUM, *supra* note 3, at 40.

street busking vacillated,<sup>113</sup> the regulations beneath the streets consistently banned the practice for much of the twentieth century.<sup>114</sup>

Despite this complete ban, spanning the better part of a century, it was clear by the mid-1980s that the formal prohibition against busking did not ensure compliance from musicians, particularly when many transit officers turned a blind eye to illegal performances.<sup>115</sup> Buskers regularly broke MTA rules, accepting the occasional summons as the cost of doing business.<sup>116</sup> Against this backdrop, the MTA created MUNY in 1985.<sup>117</sup> MUNY modeled itself after another initiative, Music Under Boston, that MTA Chairman Robert Kiley had instituted in his prior role as head of Boston's mass transit system.<sup>118</sup> In initial press accounts, the MTA emphasized the artistic benefit that MUNY would bestow on riders, declaring that stations would become "makeshift concert halls" providing music to soothe the "savage beast[]" lurking inside every commuter.<sup>119</sup> The *New York Times* reported that the first-ever MUNY performance, featuring a brass quintet and held at Grand Central Station, had the "audience in a dither."<sup>120</sup>

In its infancy, MUNY differed in significant respects from how it is currently administered.<sup>121</sup> First, the program initially covered only eight subway stations, with far fewer scheduled blocks available for performances.<sup>122</sup> Second, there were no auditions; according to MTA officials, musicians were chosen on the "basis of their résumés and recommendations."<sup>123</sup> At the start, the practice appears to have been that MTA employees invited buskers already in the system to submit

<sup>113</sup> See *id.* at 42–46 (recounting how Mayor LaGuardia effectively banned street busking by requiring licenses that the city would not grant, while Mayor Lindsay removed the licensing requirement).

<sup>114</sup> See *id.* at 43 ("By 1938 the rule book of the city Board of Transportation prohibited musical entertainment under the heading 'Peddling and Begging.'"); see also Bernard Weinraub, 39 "Don'ts" Listed in Subways' Code, N.Y. TIMES, Feb. 17, 1967, at 36 ("[T]he message is simple: Entertaining passengers . . . is banned." (internal quotation omitted)).

<sup>115</sup> See, e.g., Blau, *supra* note 66, at K8 (describing an officer ignoring an illegal performance).

<sup>116</sup> See TANENBAUM, *supra* note 3, at 150 (noting that by the 1970s, musicians played with "more regularity," inevitably receiving summonses). In 1984, the MTA reported issuing 671 summonses. Toner, *supra* note 88, at A1.

<sup>117</sup> TANENBAUM, *supra* note 3, at 130.

<sup>118</sup> *Id.* at 126–30; see also Toner, *supra* note 88, at A1.

<sup>119</sup> Toner, *supra* note 88, at A1.

<sup>120</sup> *Music To Fight/Switch By*, *supra* note 80, at E20.

<sup>121</sup> See *supra* notes 6–11 and accompanying text (describing the current administration of MUNY).

<sup>122</sup> The inaugural eight stations were Grand Central, Times Square, Penn Station, Whitehall St, 125th-Lex, 161 Yankee Stadium, Roosevelt Av, and Atlantic Av, and each had only three two-hour performance slots every weekday. Toner, *supra* note 88, at B5.

<sup>123</sup> *Id.* at B5.

an application.<sup>124</sup> In less than a month, the MUNY membership rolls jumped from around 20 to 140 musicians,<sup>125</sup> causing MUNY to stop accepting applications for fear that there were too few performance slots.<sup>126</sup> In the absence of auditions, some criticized the program for lacking quality control, complaining that there were “more than . . . a few duds” in the program.<sup>127</sup>

Beginning as a pilot program, MUNY had three and a half months of MTA funding. After that, MTA officials hoped that MUNY would be successful enough to attract corporate sponsors to fund and administer the program on a permanent basis, and possibly expand the program to other stations.<sup>128</sup> But in January 1986, MUNY had to be suspended when no corporate sponsors were found, and the pilot funding lapsed.<sup>129</sup> For most of 1986, the New York subway system returned to its status quo of a nominal prohibition of busking, honored mostly in the breach.

MUNY resumed operations in 1987, thanks to a General Electric Foundation grant of \$75,000.<sup>130</sup> The MTA used the money to hire Symphony Space, a community arts organization, as a consultant to administer the program.<sup>131</sup> Under the direction of Bob Rogers at Symphony Space, MUNY changed a number of its pilot policies, and these changes have largely remained in place ever since.<sup>132</sup> First, MUNY significantly increased its number of locations, from eight to twenty<sup>133</sup> and then to twenty-four.<sup>134</sup> Symphony Space selected the specific stations for the MUNY expansion by observing buskers and

<sup>124</sup> See TANENBAUM, *supra* note 3, at 130 (recounting the experience of one busker who had an MTA employee drop a card in his guitar case).

<sup>125</sup> Compare Toner, *supra* note 88, at A1 (reporting membership of “more than 20 musicians”), with Crutchfield, *supra* note 66, at B1, B4 (reporting that membership increased to “about 140 . . . musicians”).

<sup>126</sup> Blau, *supra* note 66, at K8.

<sup>127</sup> *Id.*

<sup>128</sup> Toner, *supra* note 88, at A1. The total cost of the pilot program was \$19,000. Blau, *supra* note 66, at K8.

<sup>129</sup> TANENBAUM, *supra* note 3, at 130–31.

<sup>130</sup> TANENBAUM, *supra* note 3, at 130; Richard Sisk, *Subway Symphony! Sound of Music To Ring Under New York*, SEATTLE TIMES, June 7, 1987, at A15.

<sup>131</sup> Sisk, *supra* note 130, at A15.

<sup>132</sup> Compare TANENBAUM, *supra* note 3, at 130 (noting the introduction of the call-in system and MUNY banners in 1986), with Paruz, *supra* note 96 (noting similar call-in procedures in 2007), and Susie Tanenbaum, *Know Your Rights!: A Guide for Subway Musicians & Other Performers*, CITYLORE, <http://citylore.org/urban-culture/resources/street-performers/> (last visited Aug. 9, 2012) (describing how MUNY members can request locations twice a month and receive banners), and Fermino, *supra* note 68, at 27 (noting that participants still receive MUNY banners and scheduled performance slots).

<sup>133</sup> Geist, *supra* note 66, at B1.

<sup>134</sup> Andrew L. Yarrow, *Adventurous Performers in Unexpected Places*, N.Y. TIMES, Oct. 9, 1987, at C1.

talking to prior MUNY members about which locations were in high demand.<sup>135</sup> Second, Symphony Space developed a call-in scheduling system: MUNY members would call to schedule performance slots two weeks in advance.<sup>136</sup> Third, MUNY instituted auditions.<sup>137</sup> While instituting auditions elicited amused puzzlement,<sup>138</sup> the purpose was to increase performer quality at high-demand busking locations.<sup>139</sup> In May of 1987, Bob Rogers held the first audition at Symphony Space headquarters in the Upper West Side, and, in what would become an annual tradition, newspapers reported whimsically about the event.<sup>140</sup>

After the General Electric grant lapsed, the MTA decided to institutionalize MUNY, making it a permanent item on the MTA budget beginning in 1987.<sup>141</sup> Since then, the basic contours of the program have remained the same.<sup>142</sup>

## 2. *The Role of First Amendment Challenges*

By themselves, the events recounted above suggest a simple story: MTA officials thought that there was an undersupply of music in the subways and they created MUNY to address the problem. And indeed, this was the MTA's purported reason, declaring that MUNY would "bring" music to the subways.<sup>143</sup> Two facts undercut this reading. First, the background policy norm preceding MUNY's creation was an eighty-year ban on busking, suggesting that the MTA had

<sup>135</sup> TANENBAUM, *supra* note 3, at 130.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*; Geist, *supra* note 66, at B1.

<sup>138</sup> See Geist, *supra* note 66, at B1 ("‘Auditioning to play in the subways!’ laughed Alvin Slythe, waiting to audition his trio. ‘Ain’t New York something?’").

<sup>139</sup> See TANENBAUM, *supra* note 3, at 130 (describing the push to "professionalize" the program).

<sup>140</sup> Geist, *supra* note 66, at B1; see also, e.g., *Notes from the Underground*, N.Y. TIMES, June 16, 1996, at SM11 ("Among the appurtenances the aspirants brought were a dual-cassette karaoke center, bagpipes, trombones, a life-size female rag doll and a handkerchief. A few came with only their voices. Among the distractions they encountered were heat, renovations, poor acoustics, faulty amplifiers and judges."); Newman, *supra* note 66, at B3 ("Barbara Watson thought she could sing. But was her voice more powerful than a locomotive? Louder than a braking F train?"); Lynda Richardson, *Above the Roar of the Subway, Longing To Be Heard*, N.Y. TIMES, May 17, 2005, at B3 (quoting the director of the MTA's Art of Transit as saying, "‘We’re looking for magic,’ . . . ‘when there’s something magical about the performer, it sort of transports you, and it goes a very long way to making it a good ride.’").

<sup>141</sup> TANENBAUM, *supra* note 3, at 130–31.

<sup>142</sup> See *supra* note 132 and accompanying text (noting continuity in how MUNY is administered).

<sup>143</sup> See *supra* note 119 and accompanying text (describing MTA's public statements about MUNY). Susie Tanenbaum, for one, is skeptical of this explanation. By her account, MUNY "meant to displace, and thus, suppress freelance subway music." TANENBAUM, *supra* note 3, at 133.

long made the categorical judgment that music in the subways was socially inefficient. Second, illegal busking in the face of the ban was rampant, undermining the MTA's claim that MUNY was necessary to bring music to the subways.<sup>144</sup> Indeed, Wendy Feuer, who ran MUNY during its pilot phase, reported that when she first heard of the idea from MTA officials, she responded, "There are [already] street musicians in the subway; why are we doing this?"<sup>145</sup>

With reasons to doubt the MTA's proffered rationale, this section investigates an alternative reading: that MUNY represents, in part, the MTA's response to a sustained and increasingly successful assault by buskers asserting their First Amendment rights in court. To make the point, this Part briefly describes contemporaneous free-speech challenges to MTA rules on performances, before turning to the implications arising from the basic observation that evolving First Amendment doctrine played a role in the creation of MUNY.

By the mid-1980s, developments in First Amendment doctrine made the MTA's flat ban on artistic performances constitutionally suspect.<sup>146</sup> In early 1985, guitarist Roger Manning, represented by Arthur Eisenberg of the New York Civil Liberties Union (NYCLU), successfully challenged on First Amendment grounds a disorderly conduct summons that he received for busking in the Lexington Avenue station.<sup>147</sup> It had become clear that the total ban on performances was both ineffective and on shaky legal ground.

In the wake of the *Manning* case, transit police shifted tactics, issuing summonses to musicians for soliciting contributions while performing, not for the performances themselves.<sup>148</sup> Late in 1986, while MUNY was suspended for want of a corporate sponsor,<sup>149</sup> a second musician, guitarist Lloyd Carew-Reid, challenged a summons he received for soliciting contributions while busking.<sup>150</sup> He argued that

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<sup>144</sup> See *supra* note 115 and accompanying text (describing police turning "blind eye").

<sup>145</sup> TANENBAUM, *supra* note 3, at 129.

<sup>146</sup> For a discussion of the First Amendment constraints on busking regulation, see David Hébert, Note, *Carew-Reid v. Metropolitan Transportation Authority: Free Expression Sound and Fury*, 11 PACE L. REV. 643, 644–46 (1991), summarizing the Supreme Court's First Amendment jurisprudence.

<sup>147</sup> See TANENBAUM, *supra* note 3, at 150–51. The author was unable to locate the original case.

<sup>148</sup> See TANENBAUM, *supra* note 3, at 151 (describing enforcement efforts after the *Manning* decision).

<sup>149</sup> See *supra* notes 128–29 and accompanying text (describing suspension of program).

<sup>150</sup> TANENBAUM, *supra* note 3, at 151; *Carew-Reid v. Metro. Transp. Auth.*, No. 89 Civ. 7738, 1990 WL 3216, at \*1 (S.D.N.Y. Jan. 5, 1990).

the MTA rules violated his First Amendment rights.<sup>151</sup> Carew-Reid, like Manning, was represented in Manhattan Criminal Court by Eisenberg and the NYCLU, who made it clear that the NYCLU's goal was to "use the trial as a test case to establish the constitutional right of musicians to play in the New York subways."<sup>152</sup> The objective, he continued, was "to force the Metropolitan Transportation Authority to designate places and hours for subway musicians."<sup>153</sup> As a partial response, the MTA publicly invoked MUNY, suggesting MTA-sanctioned busking performances would return as soon as corporate funding was secured.<sup>154</sup> And return they did: MUNY resumed operations late in 1986. Nevertheless, Carew-Reid and Eisenberg continued pressing the First Amendment claim, contending that the permitting system violated Carew-Reid's First Amendment rights.<sup>155</sup> After settlement negotiations were unsuccessful, the MTA withdrew the charges against Carew-Reid in January of 1987, declaring that it was in the process of changing busking regulations.<sup>156</sup>

In November of 1987, the MTA made the promised rule change, adopting section 1050.6 as an experimental rule that removed the blanket ban on subway performances and allowed musicians to solicit donations.<sup>157</sup> In place of the flat ban, the experimental rules allowed anyone to perform so long as they kept a specified distance away from stairwells, escalators, and turnstiles,<sup>158</sup> and refrained from "play[ing] an instrument (electronic or otherwise) or us[ing] any amplification device which creates excessive noise."<sup>159</sup>

In 1989, however, the MTA partially reversed its permissive stance, proposing to reinstate a complete ban of expressive activity on subway platforms, while continuing to allow performances in mezzanines.<sup>160</sup> The public reacted negatively, and civil libertarians joined with buskers to protest the proposed rule at a series of public hear-

<sup>151</sup> Brooke, *supra* note 81, at 27. Carew-Reid would continue to challenge the MTA in court, again represented by Eisenberg. *See infra* notes 165–67 and accompanying text (describing Carew-Reid's challenge of the experimental rules).

<sup>152</sup> Brooke, *supra* note 81, at 27.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* Carew-Reid and a number of other musicians did not find this response satisfactory, calling MUNY the MTA's attempt to "bureaucratize music." *Id.*

<sup>155</sup> Levine, *supra* note 78, at 33, 34.

<sup>156</sup> *Id.*

<sup>157</sup> *See* Carew-Reid v. Metro. Transp. Auth., No. 89 Civ. 7738, 1990 WL 3216, at \*1 (S.D.N.Y. Jan. 5, 1990) (describing the experimental rules).

<sup>158</sup> Levine, *supra* note 78, at 33, 34.

<sup>159</sup> N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6 (1987); *see also* Carew-Reid, 1990 WL 3216 at \*1 (describing the progression of the MTA rulemaking). Amplifiers that stayed below ninety decibels were allowed by permit only. *Id.*

<sup>160</sup> TANENBAUM, *supra* note 3, at 153.

ings, armed with constitutional arguments and satirical song.<sup>161</sup> In fact, there was disagreement within the MTA: Chairman Kiley opposed the rule, “not only because it would almost certainly be struck down by the courts as a violation of free speech, but also because the public would not stand for it.”<sup>162</sup> Perhaps because of internal agency disagreement, the public outcry succeeded in getting the MTA to reconsider, and, when the MTA formally revised the rule in October of 1989, the platform prohibition was removed.<sup>163</sup> In language that remains nearly identical today, the final rule allowed performances on platforms and mezzanines, but prohibited the use of amplifiers on platforms.<sup>164</sup>

Even though the final 1989 rules were more accommodating to buskers than the proposed amendments—and vastly more permissive than the prior ban—they nevertheless barely passed First Amendment scrutiny. Carew-Reid, again with the help of Eisenberg and the NYCLU, sued in district court to enjoin the new rules, including the ban on amplifiers, as violating the First Amendment.<sup>165</sup> Agreeing with Carew-Reid, the district court preliminarily enjoined the amplifier ban as unconstitutional.<sup>166</sup> The Second Circuit, however, reversed, and the rule survived.<sup>167</sup>

### B. *Two Additions to the Demsetz Framework*

The foregoing discussion suggests that the First Amendment played an important role in MUNY’s formation. In particular, there seem to be two plausible explanations. First, the *Manning* and *Carew-Reid* challenges, together with their press coverage, suggest, at the least, that MTA officials were cognizant of First Amendment constraints as they created MUNY. As such, it is likely that these perceived constitutional limitations inhibited MTA officials as they decided to exercise control over only parts of the subway system, for fear that if MUNY covered all stations, a court would treat the pro-

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<sup>161</sup> See TANENBAUM, *supra* note 3, at 154–61 (describing the public hearings in detail, including Eisenberg’s First Amendment arguments); *Subway Plans Challenged in Song and Spoof*, *supra* note 80, at B3 (describing satirical songs including one by Seaman Jack, “which ran ‘IRT, BMT, IND, it all spells the blues to me,’ and, like the subway, got grittier from there”).

<sup>162</sup> TANENBAUM, *supra* note 3, at 153.

<sup>163</sup> N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6 (1989); TANENBAUM, *supra* note 3, at 161.

<sup>164</sup> N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6 (2011); TANENBAUM, *supra* note 3, at 161–62.

<sup>165</sup> *Carew-Reid v. Metro. Transp. Auth.*, No. 89 Civ. 7738, 1990 WL 3216, at \*2 (S.D.N.Y. Jan. 5, 1990).

<sup>166</sup> *Id.*

<sup>167</sup> *Carew-Reid v. Metro. Transp. Auth.*, 903 F.2d 914, 914 (2d Cir. 1990).

gram as tantamount to a ban on non-MUNY expression. Second, by unsettling the status quo policy, these First Amendment challenges catalyzed MUNY's formation. Both of these explanations for how the First Amendment influenced the formation of MUNY have broader implications.

### 1. *Exogenous Legal Constraints*

That the First Amendment constrained the MTA with respect to how it could create private busking rights seems to be, at first glance, an obvious point with limited utility. When it comes to allocating expressive use rights to a resource, top-down government allocation is subject to First Amendment constraints. That is the nature of the First Amendment, after all. But this basic point informs the larger observation that exogenous legal norms affect when and how property rights develop. Here, "exogenous" is used to distinguish non-property legal norms from the property norms of Demsetz's model that shift in response to the changing economics of resource use. Put another way, while Demsetz hypothesizes that an increase in externality costs causes a change in property law, non-property legal norms limit the mechanism for this change.

This observation—that exogenous legal norms constrain how private use-rights develop—is true of both bottom-up property formation among resource-users and top-down property creation by the government. For example, borrowing from Epstein's analysis of the informal property rights to parking places on a public street after a snowfall,<sup>168</sup> we might say that the strength of laws prohibiting physical violence and vandalism constrain the formation of bottom-up private parking rights. The informal private-property norm—that whoever shoveled a parking place owns it—depends on the existence of a credible threat of property damage to a car that would violate the norm. Well-enforced criminal laws against such property damage limit the credibility of retaliation, constraining the potential of a bottom-up mechanism to create private property. The stronger the anti-violence legal norms and the more comprehensive their enforcement, the less likely it is that a bottom-up mechanism will succeed. Put another way, the allocative system in Chicago—that he who dug has "dibs"—functions because retributive acts against offending parkers are "widely tolerated."<sup>169</sup>

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<sup>168</sup> See Epstein, *supra* note 12, at S528–33 (describing the allocation of parking places during heavy snowfall).

<sup>169</sup> *Id.* at S528–29. Epstein quotes Mayor Richard M. Daley as saying "I tell people, if someone spends all that time digging their car out, do not drive in that spot. This is Chicago. Fair warning." *Id.* at S529.

The constraining effect of exogenous legal norms on bottom-up property formation also appears in California surfing.<sup>170</sup> Studying how California surfers allocate access to choice waves, Daniel Kaffine conducted an empirical study of eighty-six surf breaks in California, employing regressions to estimate the effect of the quality of the surf break on the strength of the informal property right.<sup>171</sup> Breaches of the property norm—when one surfer cuts the “informal line-up of surfers in the water taking turns catching waves”—often lead other surfers to sanction the usurper with “localism,” territorial aggression by locals against out-of-towners which “can take the form of broken surfboard fins, slashed tires and broken windows, or even physical violence.”<sup>172</sup> Kaffine included a variable for the distance between a surf break and a major city in his regression, and he found some evidence “that more remote locations . . . lead to more localism.”<sup>173</sup> Kaffine surmised that “[i]ntimidating non-locals on a deserted stretch of the Central Coast may go unnoticed, while similar behavior along a busy urban beach in Orange County would draw far more attention from local authorities.”<sup>174</sup> In other words, stronger enforcement of criminal laws—exogenous legal norms—constrain the bottom-up development of informal surfing rights.

Similarly, the constraining effect of exogenous legal rules can be seen in James Acheson’s description of how lobster fishermen in Maine informally allocate fishing rights.<sup>175</sup> Over the years, Maine lobstermen have organized themselves into “harbor gangs” that enforce informal ownership over coastal waters by exerting social pressure, cutting the lines on a transgressor’s trap, and even burning boats.<sup>176</sup> However, the scope of this informal “harbor gang” control has decreased with the increase in law enforcement efforts aimed at stopping trap cutting, the “primary means of defending . . . informal territories.”<sup>177</sup> Here, the enforcement of criminal laws inadvertently

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<sup>170</sup> See generally Kaffine, *supra* note 37 (analyzing the allocation of access to surf breaks among California surfers).

<sup>171</sup> *Id.* at 3–5.

<sup>172</sup> *Id.* at 5–6.

<sup>173</sup> *Id.* at 22.

<sup>174</sup> *Id.*

<sup>175</sup> See generally ACHESON, *supra* note 54.

<sup>176</sup> See *id.* at 48–49 (describing the harbor gangs).

<sup>177</sup> Pammela Quinn Saunders, *A Sea Change Off the Coast of Maine: Common Pool Resources as Cultural Property*, 60 EMORY L.J. 1323, 1333 (2011); see also JAMES M. ACHESON, CAPTURING THE COMMONS: DEVISING INSTITUTIONS TO MANAGE THE MAINE LOBSTER INDUSTRY 223 (2003) (“[F]ear of losing one’s license dissuaded many fishermen from indulging in a lot of trap cutting.”); James M. Acheson & Jennifer F. Brewer, *Changes in the Territorial System of the Maine Lobster Industry*, in THE COMMONS IN THE NEW

undermined established territorial property rights by deterring the very informal sanctions that held the property system together.

In sum, exogenous legal norms constrain both top-down and bottom-up mechanisms for the creation of new property rights and should be accounted for within Demsetz's framework. The First Amendment, an exogenous legal norm, limited the potential scope of MUNY. Similarly, criminal laws prohibiting private violence constrain bottom-up property rights formation by making localism and extra-legal enforcement less effective. Indeed, insofar as an exogenous legal norm constrains top-down property formation, we might expect that bottom-up property rights formation is more likely, and vice versa.

## 2. *Property Rights Inertia*

The MTA's ban on busking lasted eighty years.<sup>178</sup> Perhaps MTA officials regularly reaffirmed their categorical judgment that subway performances were socially inefficient. But one suspects that there was regulatory inertia: The rules remained what they had been, absent a compelling reason to change them. The looming court challenges provided MTA officials with a reason to reconsider their policies on busking, and, once officials did revisit prior policies, they decided to create a private permitting system at high-volume stations. The legal challenge to the busking ban did not lead merely to a revision of the rules, but also to the creation of private property rights, a step that regulatory inertia may have otherwise prevented.

Recognizing regulatory inertia suggests an important qualification to Demsetz's core thesis. A property regime will eventually shift if the externality costs outweigh the costs of instituting and enforcing a private property system, but we should not expect this shift to be triggered as soon as the scales tip past equipoise. Rather, there is likely to be a stickiness built into the mechanism, whether of the bottom-up or top-down variety.<sup>179</sup> Focusing on top-down mechanisms, if political agencies are to create new property rights, there needs to be some transmission of the fact of rising externality costs to agency officials. There are a number of potential channels: affected parties might contact the agency directly, or they might contact elected officials who in turn contact agency officials. Under this framework, agency officials will act either (a) when the differential between externality costs and the costs of instituting and enforcing new property rights is sufficiently

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MILLENNIUM 41 (2003) (describing the use of trap-cutting to dissuade encroachment by other lobstermen).

<sup>178</sup> See *supra* notes 110–14 and accompanying text (providing the history of the ban).

<sup>179</sup> See *supra* notes 42–50 and accompanying text (describing the scholarship on bottom-up and top-down property mechanisms).

high to generate enough baseline demand for new property rights to ensure that this message reaches agency officials, or (b) when there is some catalyst that focuses agency attention on the issue or helps galvanize affected parties to spur agency action.

### CONCLUSION

Reflecting on *Toward a Theory of Property Rights*, Demsetz described the puzzle of Native American hunting rights as the “literary hook,” which he used to frame his thesis about property rights.<sup>180</sup> Similarly, this Note uses subway busking regulation as its “hook” to develop two observations about the economic development of property rights. As an initial step, this Note establishes that the distribution of MUNY permits has a distinctly Demsetzian flavor to it: MUNY permits are required in stations that have high busking externality costs, but not in stations with lesser costs. Because the distribution of permitting comports with Demsetz’s basic efficiency thesis—private property rights developing to internalize high externalities—the Note scrutinizes the history of MUNY’s development to glean lessons about *how* property rights develop.

This history—in particular, the importance of contemporaneous free speech litigation—suggests two qualifications to the basic efficiency framework articulated by Demsetz. First, exogenous legal norms act as constraints on the mechanisms by which new property rights form. The universe of property regimes that the MTA could choose from was limited by the First Amendment. While the First Amendment limitations on the MTA serves as an example of an exogenous legal norm constraining top-down property formation, the observation holds for bottom-up property creation as well, a point briefly illustrated by reference to bottom-up rights formation among California surfers and Maine lobstermen. Second, Demsetz’s basic efficiency thesis should take account of the inertia of property regimes and the role of external shocks that help overcome this inertia. The MTA banned busking in the subways for the better part of a century. Free speech challenges unsettled this regulatory status quo, leading to the creation of MUNY. On this view, regulatory stasis and the external catalysts that help overcome this stasis are important factors that determine when and how property regimes shift.

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<sup>180</sup> Harold Demsetz, *Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership*, 31 J. LEGAL STUD. S653, S655 (2002).