

**When Civil Society Uses an Iron Fist:
The Role of Private Associations in Social Control**

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Abstract

Alexis de Tocqueville and Robert Putnam are but two of the many admirers of the countless private associations that lie at the core of civil society. This article seeks to advance understanding of the law-like activities of these associations. Residential community associations and sports leagues, for example, make rules and levy fines on members who violate them. The New York Diamond Dealers Club and the Writers Guild of America, like many other associations, have established internal arbitral panels for the resolution of member disputes. Courts are highly likely to defer to the outcomes of these arbitrations. The article's central positive thesis, hedged with qualifications, is that a private association tends to engage in social control when it is the most cost-effective institution for addressing the issue at hand. This thesis is used to illuminate some otherwise puzzling associational practices, such as the efforts of the National Football League and other professional sports leagues to control players' domestic violence off the field of play. (JEL: K00, L31, Z20)

This article, based on an address delivered at the 2016 annual meeting of the American Law and Economics Association (ALEA), deals with—of all subjects—organizations such as ALEA. Associations constitute part of what is commonly known as civil society. To commentators such as Alexis de Tocqueville and Robert Putnam, individuals' participation in associational activities is likely to bolster their skills at self-governance and enhance levels of generalized trust. I focus on a narrower issue, largely untheorized: the roles that associations play in controlling the behavior of individuals. The ultimate object of the legal system is behavioral control. When a state permits associations to use carrots and sticks, there usually is less for the legal system to do. Associations have been more involved in behavioral control than many commentators have recognized. To better understand law, it would be useful to have a theoretical framework for understanding the social controls of associations, as well as those of other individuals and institutions whose actions may complement the legal system.

An incident known to perhaps a billion fans of the world's most popular sport provides a springboard. During a match of the 2014 World Cup in Brazil, striker Luis Suárez, a star of the Uruguayan national soccer team, intentionally bit the shoulder of Giorgio Chiellini, a reputable defender on the Italian national team. Suárez's bite failed to break Chiellini's skin. But Suárez had bitten before on the field of play, and sufficiently flagrantly to have earned, from some soccer fans, the nickname "cannibal."

Intentionally biting an opponent during an athletic contest is an antisocial act that the institutions of a well-ordered society would discourage. But which institution or institutions? In this case, three candidates come quickly to mind. A legally-trained observer might think first of the legal system. Suárez's bite possibly could have led to his prosecution for a crime under the law of Brazil, and perhaps also to a successful claim by Chiellini for damages based on a theory of intentional tort. In the aftermath of Suárez's bite, however, neither Brazilian prosecutors nor Chiellini commenced a legal action.

A second possible response would have been tit-for-tat self-help. In *Order Without Law* (1991), I stressed the commonality, in many contexts, of diffuse private enforcement of informal social norms. If Suárez's bite were to have triggered self-help

sanctions, in subsequent soccer games his opponents might have taken measured steps to rough him up on the field of play—even, at the extreme, to have bitten him back. Responses of this sort are hardly unknown in professional sports. In baseball, a brush-back pitch by one team commonly triggers a tit-for-tat response from the opposing side. But during the two years that have elapsed since Suárez’s bite, there is no evidence that his soccer opponents have retaliated against him.

In this instance, a private association instead assumed responsibility for disciplining Suárez’s bite. The association was, as many know, the Fédération Internationale de Football Association (FIFA), a membership association headquartered in Zurich and organized as a charity under Swiss law. FIFA organizes World Cup events on behalf of its 209 member associations, most of which correspond to nation-states. FIFA employs a variety of agents, some of whom could have responded to Suárez’s bite both during and after the match. For starters, FIFA appoints the referee and other officials who supervise a World Cup match. Had the referee of the Uruguay-Italy contest witnessed Suárez’s bite, he might have issued a red card, the severest in-game penalty available under FIFA’s rules. The issuance of a red card typically would have resulted in Suárez’s immediate ouster from the match, reduced by one the number of players on the Uruguayan side, and also disqualified Suárez from participating in his team’s next World Cup game. Immediately after the bite, Chiellini bared his slightly inflamed shoulder, an attempt to lobby the game’s officials to issue a red card. But none of the four officials had witnessed the biting.² The referee of the match had seen both Chiellini and Suárez fall to the turf, however, and awarded Italy token relief—a free kick from the defensive end.

Following the match, FIFA pursued sterner options. Two days after the biting incident, FIFA’s Disciplinary Committee ruled that Suárez, among other sanctions, would be banned from FIFA-supervised soccer matches for four months, and also from playing on the Uruguayan national team during its nine ensuing matches. These penalties foreclosed Suárez’s involvement in Uruguay’s remaining games in the 2014 World Cup.

² Court of Arbitration for Sport, *Luis Suárez, FC Barcelona & Uruguayan Football Association v. FIFA*, CAS 2014/A/3665/3666/3667, at 2. Available at http://www.tas-cas.org/fileadmin/user_upload/award_3665-3666-3667__FINAL__internet.pdf (accessed April 21, 2016).

The Disciplinary Committee also levied on Suárez a fine of 100,000 Swiss francs.³ Suárez and the affected teams appealed these FIFA penalties, first to FIFA's internal Appeal Committee. The Appeal Committee affirmed all the penalties two weeks later, ten days after the Uruguayan team, playing without Suárez, had been eliminated in the round of sixteen. A second appeal, explicitly authorized by FIFA rules, was taken to the Court of Arbitration for Sport (CAS).⁴ CAS is an arbitral group, not the court of a nation-state. Less than two months after the date of the bite, CAS upheld all of the FIFA sanctions.⁵ The appellants' attorneys did not subsequently pursue relief in any government's court of law. Suárez's bite thus eventually led to his being hit with an iron fist, but one wielded not by a state, but by a private association.

In some social contexts, these sorts of associational responses are commonplace. Many sports associations, for example, retrospectively penalize athletes who violate their rules. Indeed, an athletic association ultimately may ban a major star—Lance Armstrong, Ben Johnson, Pete Rose—from a sport for life. A residential community association similarly may impose fines for rule violations⁶ and, in rare instances, even evict an owner

³ See source cited supra note 2, at 3-4. Page 4 blanks out the identity of payee of the fine, possibly FIFA itself.

⁴ Shavell (1995) advances a model of alternative dispute resolution in which an atomized individual contracts into ADR. FIFA's standard contracts, by contrast, compel a soccer player in one of its leagues to make use of ADR. The possibility that an association would have such a policy is anticipated in Landes and Posner (1979, p. 238).

⁵ See source cited supra note 2. The Court for Arbitration of Sport came into existence in 1984 through the efforts of the International Olympic Committee. It is an arm of neither a nation-state nor the United Nations. See History of the CAS, available at <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (accessed April 21, 2016). But CAS is organized under Swiss law, which authorizes a Swiss court to review its decisions. The Swiss court has tended to defer to CAS's substantive decisions, but been willing to more actively review the fairness of its arbitral procedures (Mitten, 2009). The courts of other nations typically have declined to overturn a CAS ruling on any ground (*id.*). The courts of Germany, however, may soon abandon this deferential stance (see *infra* note 32).

⁶ Section 3-102(a) of the Uniform Condominium Act provides in part: “[An] association may . . . (11) impose charges for late payments of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, by-laws, and rules and regulations of the association.”

for misconduct.⁷ But not all associations choose to assume responsibility for behavioral control. Consider ALEA itself. Suppose a law-and-economics scholar were to accuse another of plagiarism, and also that both the accuser and the accused had long been dues-paying members of ALEA. Suppose further that the accuser were then to petition the ALEA's officers to set up a committee to investigate the matter and issue written findings. I predict with some, but not total, confidence that ALEA's leaders would decline to involve the association in the matter.

To illuminate FIFA's actions in the Suárez case, and ALEA's hypothetical noninvolvement in a plagiarism case, law-and-economics scholars would benefit from having a positive theory of the involvement of private associations in behavioral control. My goal in this article is to stimulate interest in the development of such a theory. Parts III and IV put forward a simple utilitarian hypothesis, namely that an association tends to engage in social control when it is comparatively good at the task.

I. THE MULTIPLE SOURCES OF SOCIAL ORDER: MOVING BEYOND HOBBS

Analysts of the legal system tend to be *legal centralists*, a useful label of Oliver Williamson's (1983, p. 520). To a legal centralist, law is the primary institution of behavioral control. This perspective has a distinguished pedigree. It is manifested in Thomas Hobbes's well-known vision that, in the absence of a state, people would be endlessly engaged in "warre . . . of every man, against every man" (1651, 1991, p. 88). Oliver Wendell Holmes similarly assumed that state force would be the key instrument for deterring a "bad man" from misconduct (1897, pp. 460-61). And many of the founders of law-and-economics were legal centralists. For instance, in the text of their famous *Cathedral* article, Calabresi and Melamed wrote, "If Taney owns a cabbage patch and Marshall, who is bigger, wants a cabbage, he will get it unless the state intervenes" (1972, p. 1091).⁸

⁷ See, e.g., the *Pullman* case cited *infra* note 43.

⁸ Calabresi and Melamed did, however, drop a footnote that showed greater appreciation of the possibility of private ordering.

In numerous writings since the 1980s (e.g., 1998, pp. 539-541), I have asserted that legal centralism is deeply misleading. It ignores the potency of non-state constraints on behavior, in particular, the influence of informal social norms. In this intellectual campaign, I was joined by numerous allies, including law-and-economics scholars such as Lisa Bernstein (1992, 1996), Robert Cooter (1994, 1997), Richard McAdams (1996, 1997), and Eric Posner (1996, 2000).⁹ By roughly 2000, the members of our informal band perceived, perhaps too optimistically, that we had won over most of our colleagues in law-and-economics. We implicitly declared victory, and largely turned to other scholarly endeavors.

The burst of work on social norms in the 1985-2000 included valuable depictions of specific trade and sports associations (see especially Bernstein, 1992, 1996; West, 1997). Those authors, however, understandably declined to offer an overarching perspective on the role of private associations in maintaining social order.¹⁰ To gain leverage on the topic, I begin by invoking a concept from sociology—*social control*—and another from political science—*civil society*.

A. Social Control

Sociologists, long aware of the potential power of informal norms, seldom succumb to legal centralism. In the early twentieth century, some sociologists began employing the phrase *social control* to denote all sources of behavioral restraint (Janowitz, 1975, pp. 88-89). This phrase accurately states that the sources of control are plural, and that one of them is the diffuse enforcement of social norms. In the 1980s, sociologist Donald Black included the phrase *social control* in the title of several of

⁹ Our contributions of course built on those of others, perhaps most notably law-and-society stalwart Stewart MacAulay (1963).

¹⁰ Law reviews have published numerous articles on the authority of specific types of associations, such as bar associations and residential community associations, to control their members. See, e.g., Chafee (1930) (discussing judicial review of decisions of a private club or other association to expel a member). Early theoretical assessments of associations as a source of social control are sparse and cursory (e.g., Pound, 1944, pp. 1205-06).

books and articles (Black, 1983, 1984), helping to rejuvenate the concept.¹¹ In *Order Without Law* (1991), a book that described how residents of rural Shasta County, California resolved disputes arising from wayward cattle, I made use of this notion.

1. The Multiple Sources of Behavioral Control

Order Without Law (1991, p. 131) presented a basic taxonomy of the controllers that might deter a person from, for example, intentionally biting another. Table 1 offers a slightly modified version. The table identifies a variety of non-legal controls. The list starts with first-party constraints. Most of us, although apparently not Luis Suárez, have internalized, partly as a result of the teachings of parents, teachers, and others, a norm that biting is wrong. Those of us who are so constrained would punish ourselves, after inflicting a wrongful bite, with a cold prickle of guilt (Andreoni, 1995; Battigalli and Dufwenberg, 2007). An important second-party constraint is the expectation that someone who has been bitten would retaliate, probably immediately. Third-party constraints, by contrast, arise from sources beyond the biter and bitten. As mentioned, a central theme in *Order Without Law* was the importance of a particular set of third-party constraints, the diffuse private enforcement of social norms. Someone guilty of biting likely would become a target of negative gossip, ostracism, or worse. To a potential deviant who was the member of a closely knit group, the risks of these informal penalties, in many social contexts, would be more salient than the risk of legal sanctions. The legal system, the focus of legal centralists, is listed as the last form of third-party constraint.

[Table 1 about here.]

Tucked away in Figure 1, however, is entry 3b: the possibility that a non-state organization would engage in social control.¹² Because private organizations were not central to life in rural Shasta County, *Order Without Law* devoted little attention to

¹¹ Neither of the subject indexes of the two volumes in Black (1984) includes an entry for *associations*.

¹² How does a state differ from an association? A government invariably is linked to a particular territory, while an organization commonly is not. Within its territory, a general-purpose government, unlike an association, aspires to have ultimate control over privately inflicted violence (Weber, 1946, 129). Organizations and governments are created and terminated through different procedures. And the governance structure of an association commonly differs sharply from that of a representative democracy.

them.¹³ This article aims to give organizations their due, especially in contexts, such as sports leagues, where they are centrally important.

2. Controller-Selecting Rules

When a dispute arises, the parties to it are not entirely free to shop for a controller in the manner that a Tieboutian household is thought to shop for a municipality (Tiebout, 1956). *Order Without Law* asserted the importance of implicit or explicit controller-selecting rules (1991, pp. 240-64) that individuals apply to divvy out, in a specific context, social control responsibility to a particular controller or combination of controllers.¹⁴

Each of the controllers may be a source of a controller-selecting rule. Consider the various third-party controllers. The legal system can provide a controller-selecting law that favors, or disfavors, the involvement of state agents in a particular set of disputes. Legal rules of jurisdiction, for example, identify permitted subjects for a legal cause of action. Particularly intriguing, however, are legal rules that turn business away from the legal sector. *Kilgrow v. Kilgrow*,¹⁵ a decision famous in field of family law, provides an example.¹⁶ In *Kilgrow*, a husband and wife had long been living together with their only child, a seven-year old. The husband wanted the child to attend a religious school, but the mother, a public school. The husband initiated a legal action that asked the courts of Alabama to back his preference for a religious school. The trial court ruled in his favor, but the Supreme Court of Alabama reversed, holding that the state's courts lacked jurisdiction to decide a parental dispute of this nature. It ruled, in effect, that parties in an

¹³ But cf. Ellickson (1991, pp. 134, 248-249).

¹⁴ Controllers are hardly entirely independent, but rather are interconnected by means of feedback loops (id. at 131-132). In some instances, for example, the legal system may adopt a social custom as a legal rule, or, conversely, a legal innovation may affect social practice (McAdams, 2015). Most pertinently, the activities of membership associations are themselves shaped by law. See *infra* text accompanying notes 34-38.

¹⁵ 107 So.2d 885 (Ala 1958).

¹⁶ Another example is the judicial deference of courts to the decisions of arbitral panels of the Writers Guild of America (described at text following note 44).

intact marriage had the ultimate say, through whatever decision-making process they might choose to use, to decide a question of this sort.

Kilgrow illustrates a *legal* controller-selecting rule, in this instance, a rule against the extension of legal jurisdiction. But many controller-selecting rules are social norms, not laws. In Shasta County, norms forbade cattlemen from taking a cattle trespass dispute into the legal system, but did allow them to file a lawsuit after a vehicle had collided with one of their animals on a public highway (1991, pp. 94-102, 240). David Fagundes's delightful study of the governance of nicknames used by "roller derby girls" unearthed an analogous pattern. Although a roller derby skater could conceivably invoke trademark law to remedy another's infringement of her skating pseudonym, skaters' norms instead funneled inter-skater disputes to the self-appointed managers of a private roster of skating nicknames. When resolving disputes among themselves, Fagundes states that the derby skaters "have a particularly strong aversion to law and lawyers" (2012, p. 1138). But when a skater had a dispute with an outsider, such as a moviemaker who had appropriated a roller-derby nickname, skaters' norms permitted the skater to invoke trademark law (2012, pp. 1129-31).

An association can formally adopt a controller-selecting rule to govern its future involvements in disputes. FIFA's rules of discipline, for example, channel disputes over player misconduct on the field of play to its own agents. And controller-selecting norms support this outcome. After Suárez's bite, there was broad agreement among soccer fans that FIFA, and not either the state of Brazil or the players themselves, had rightly assumed central responsibility for responding to the incident.¹⁷ But consider again the case of a hypothetical grievant who had sought to embroil ALEA in a plagiarism dispute. If ALEA's leaders were to decline to involve the association, they would have established a precedent that a plagiarism victim had to seek relief from another controller, for example, the norms of the academic gossip mill. My simple positive theory supposes that ALEA's leaders indeed would refuse to consider the matter on the ground that ALEA would be a relatively inferior institution for dealing with plagiarism.

¹⁷ See *infra* text preceding note 52.

B. Civil Society

Just as the sociologists' notion of social control has some utility, so does *civil society*, another conception mostly used by social scientists other than economists.¹⁸ Variations on this vague, but evocative, notion date back to the ancient Greeks (Setianto, 2007).

1. The Merits and Demerits of Private Associations

In *Democracy in America* (1835, 2000, pp. 489-92), Alexis de Tocqueville memorably asserted that the Americans were unusually inclined to join associations, and conjectured that these involvements served to strengthen democratic tendencies.¹⁹ In two much-discussed books, Robert Putnam (1993, 2000) revived what Schofer and Longhofer (2011, p. 541) call the "neo-Tocquevillian tradition." Putnam asserts that individuals' involvements in associations not only provide training in participatory democracy (2000, pp. 338-340) but also augment social capital, that is, levels of generalized trust and reciprocity (2000, pp. 18-22).²⁰

Political scientists traditionally have offered sunny assessments of the aggregate effects of membership associations on the social fabric. The list of supporters is diverse, and includes Gabriel Almond and Sidney Verba (1963, pp. 307-322), Edward Banfield (1958), and Theda Skocpol (2003, detecting and lamenting a trend toward professionalized management of associations). Recent empirical studies generally affirm that associational involvements tend to generate societal benefits (Mazzone, 2002, pp. 701-711; Paxton, 2007; but cf. Fiorina, 1999). The hostility of totalitarian tyrants to membership associations is a backhanded compliment to these organizations. The Stalinists who strove to Sovietize the nations of Eastern Europe after World War II

¹⁸ The Chicago-Kent Law Review (2000) and Indiana Law Journal (1997) have published symposia on civil society.

¹⁹ Curtis et al. (2001) investigated the social conditions conducive to the emergence of voluntary associations. Their data indicate that the United States remains a hotbed, but is rivaled by, among others, Canada and the Netherlands. In contemporary France, however, there does appear to be a relative paucity of voluntary associations (id. at pp. 791-92). If France's dearth has persisted for centuries, de Tocqueville's impressions in *Democracy in America* may say less about the country he was visiting, and more about the country he was from.

²⁰ On trust, see generally Glaeser et al. (2000).

expressly articulated their hatred of the institutions of civil society (Applebaum 2012, pp. 150-153), and systematically strove to convert youth organizations, for example, into instruments of the state and communist party.

Even enthusiasts of associations, however, are careful to qualify their praise (see, e.g., Harvard Law Review, 1963, pp. 986-90). They recognize that an association that serves the interests of its members may disserve society overall. Standard illustrations are associations organized to inflict violence on nonmembers, such as the Ku Klux Klan and Al-Qaeda, and associations designed to exploit consumers, such as cartels and guilds.

2. Defining the Institutions of Civil Society

A legal centralist is prone to downplay the significance of various intermediary institutions that might deter the “warres” that Hobbes feared. The broadest definition of the scope of civil society would encompass all multi-person institutions that lie between the individual and the state, including, for example, kinship groups and business enterprises.²¹ For current purposes, however, it is sensible to focus only on a subset of these intermediary groups, namely *membership associations*.²² These non-profit associations are formally structured in a fashion that is likely to foster members’ skills at participatory self-governance, a feature that would particularly commend them to de Tocqueville and his admirers (e.g., Almond and Verba, 1965, pp. 310-322; Mazzone, 2002, pp. 697-701). Even the narrowest definition of the scope of civil society would include these organizations.²³

²¹ For-profit and non-profit business enterprises that market goods and services to outsiders plainly are important centers of non-state power. These enterprises commonly take steps to control the behavior of their employees, customers, and others. Many business enterprises, for example, promulgate codes of ethics for their employees (Kouchaki et al., 2015). Zhou (1993) provides an empirical study of the evolution, over the course of a century, of the internal rules of Stanford University, a hierarchically governed non-profit enterprise.

²² This phrase is not commonly used. Hansmann (1981, p. 582), perhaps inspired by the existence of a New York “Membership Corporation Act” (id. at p. 533 note 98), refers to a “membership organization.” Hansmann places less emphasis than I do, however, on the necessity for both participatory governance and consumption of an association’s goods and services by members, as opposed to outsiders.

²³ Mazzone (2002, pp. 689-91, 744-48) offers a general typology of associations.

II. MEMBERSHIP ASSOCIATIONS

ALEA, FIFA,²⁴ and a condominium association exemplify a membership association. These organizations share three attributes:

- (1) a formal organizational structure, typically that of a non-profit or cooperative corporation;
- (2) a practice of providing the services the association produces to its own members, as opposed to the selling or giving of those services to outsiders; and
- (3) a system of governance that permits widespread member participation.²⁵

Institutions that meet these strict definitional requirements promise to generate the social benefits that de Tocqueville and Putnam particularly prized. The presence of a formal non-profit or co-operative organizational structure helps assure that members are trained to follow regularized procedures. When members both produce and consume association services, the intensity of their associational involvements is likely to be

Commentators on civil society commonly fold membership associations into a more capacious analytic category. There is a significant literature, for example, on *non-profit organizations*. Several of the leading contributors, who include practitioners of law-and-economics, have offered taxonomies of these entities (Hansmann, 1980, p. 842; Salamon and Anheier, 1997 pp. 29-50; Weisbrod, 1988, pp. 9-14). A non-profit governed by a self-perpetuating board of directors, however, would not satisfy my definition of a membership association because it would be unlikely to promote neo-Tocquevillian skills of participatory self-governance. For example, many nonprofit advocacy organizations (Walker et al., 2011), foundations, universities, and religious institutions are hierarchically governed.

Voluntary association is another common umbrella term (e.g., Berger and Neuhaus, 1977, pp. 34-40; Paxton, 2007). *Voluntary*, however, can be misleading. When a membership association has monopoly power, a member's decision to join or remain is not entirely voluntary. See *infra* text preceding note 49.

In economics, the literature on *club goods* (e.g., Cornes and Sandler, 1996) may be pertinent to the analysis of associations.

²⁴ FIFA's history of corruption tarnishes its value as an exemplar of democratic governance.

²⁵ Of the many definitions of the entities at the heart of civil society, Schofer and Longhofer's (2011, p. 542) may be closest to mine.

enhanced.²⁶ And the requirement of a participatory system of governance directly promotes training in democratic skills.

Neo-Tocquevillians especially glorify free-standing membership associations formed at the grass roots. Although these exist in large number, many local membership associations are propagated by, and federated beneath, an umbrella organization, perhaps national or international in scope (Skocpol et al., 2000; see also Schofer and Longhofer, 2011). Kiwanis Clubs and Girl Scout troops, for example, are local byproducts of international movements. And FIFA serves as an umbrella for national soccer associations.

The strictness of the definition of a membership association hardly denies the possible social value of an intermediary institution that fails to meet all three definitional requirements. For example, a hierarchically-governed private foundation, religious organization, or university might be a locus of private power that would usefully counterbalance the power of the state. But a hierarchically-governed institution would not invariably serve as a training ground for democracy, the essence of the neo-Tocquevillian vision.

A. The Many Forms of Membership Associations

Membership associations are ubiquitous, even under the strict definition presented.²⁷ ALEA is a classic example of a professional association, a type that abounds in the United States.²⁸ According to one tally, U.S. journalists, for example, sustain over 80 distinct associations, many of them highly specialized, such as the Association of

²⁶ Hansmann (1996, pp. 120-182) analyzes producer and consumer cooperatives. When those restrictive adjectives would be apt, neither of these types of entities would meet the definition put forward.

²⁷ Curtis et al. (2001, p. 788) provide cross-national data, drawn from World Values Surveys, on respondents' involvements in "voluntary organizations and activities" of 16 specified types. Putnam (2000, pp. 48-64) traces Americans' associational involvements, and famously asserts that they declined during the last third of the twentieth century.

²⁸ Except in a formally organized intentional community, such as a kibbutz, a member's involvement in association activities typically is part-time.

Food Journalists.²⁹ An entity of this sort typically aims to provide services that would deepen members' social ties, thus fostering their chances of professional advancement. These services may include convening an annual meeting, publishing a journal or newsletter, and maintaining a website or other forum for sharing information.³⁰ Like other membership associations, a professional association also commonly engages in public relations efforts designed to enhance the status of members. These efforts may include awards of prizes and other honorifics. A professional association may also attempt to influence legal rules affecting its members' welfare, for example, by lobbying or sponsoring litigation.³¹ And, not uncommonly, it may seek to suppress competition in order to enhance members' economic leverage.

Employers or employees in a common line of work similarly may form a trade association. When a major impetus for formation is the suppression of competition, as is commonly the case with a formally organized cartel or labor union, the association is likely to be heavily engaged in political activity. But employers' and workers' associations may also provide other services to members, such as social events, insurance options, and arbitral services.

Those who share commitments to a particular cause or activity, such as promoting environmental protection, boosting a particular alma mater, or singing chorales, may similarly see reason to band together in a membership association. A religious association that is member-controlled, such as a Congregationalist church, would satisfy the strict

²⁹ The source is the website of the American Journalism Review, http://ajrarchive.org/news_wire_services.asp?mediatype=11 (accessed March 3, 2016). Some of the associations listed in fact may be moribund.

³⁰ An intriguing side issue is the motivation of a member to devote time to association affairs. In many associations, the financial compensation of an activist member is minimal. Nonetheless, service as an association officer might be a significant source of third-party esteem, which might be valued for its own sake (McAdams, 1997) or because it would open up future exchange opportunities (Posner, 2000). An association volunteer also might gain first-party rewards from having faithfully served fellow members (Benkler, 2011; Kahan, 2003; Strahilevitz, 2003).

³¹ On the activities of the professional associations of attorneys, physicians, and accountants, see Buhai (2012).

definition of a membership association. And so would a political party governed in participatory fashion.

Some membership associations concentrate on managing the delivery of goods and services to a particular territory accessible to its members, and perhaps to them alone. Examples include organizations such as “friends of the park,” residential community associations, and country clubs.

And then there are leagues to govern sports and games. Competitors commonly see the value of establishing an association, such as FIFA, that would have authority to both promulgate rules of play and coordinate the timing and location of competitions. Because of significant barriers to entry by rivals, sport and game federations tend to be natural monopolies (Grow, 2015, pp. 598-603).³²

The membership associations mentioned in the last two paragraphs are particularly likely to actively engage in social control. An association that governs a particular space can be expected to adopt regulations designed to avert misuse of that common area. To regularize competition in a sport or game, contestants typically ask the governing association to promulgate a rulebook and provide referees.

A voluntary membership association usually finances its activities mainly by means of dues and user fees. An association is likely to terminate the membership of a person in arrears, thereby denying that person access to association services. In a truly voluntary association, member exit is easy, and the threat of exit constrains the decisions of the association’s leaders. But, in some associations, membership is less than entirely voluntary.³³

B. Associations and the Legal System

Even skeptics of legal centralism agree that associations would be unlikely to flourish in the absence of a stable and functional legal system (Ellickson, 1991, pp. 174-

³² A German appellate court has held that the International Skating Federation had monopoly power over competitive skaters, and that the Federation’s imposition of a mandatory arbitration clause therefore violated German Competition Law (Wilske and Krapfl, 2015). The decision is on appeal.

³³ See *infra* text preceding note 49.

176). It has conventionally been anticipated that the continuing expansion of the state would crowd out the nonprofit sector. Schofer and Longhofer (2011), however, have marshaled persuasive evidence that enhanced state activism tends to spawn some sorts of associational activity, such as lobbying and applying for government grants.

A legal system directly influences, in at least two ways, the operations of the membership associations under its jurisdiction. First, the law of organizations provides a limited menu of forms from which the founders of an association typically must choose (see, e.g., Hansmann, 1996, p. 16). By selecting a conventional form, the founders can reduce the transaction costs of formation, and also better forecast how governments will treat their entity for tax, subsidy, and other legal purposes. Second, and more significantly, lawmakers commonly retain broad authority to regulate a membership association's rulemaking and adjudicatory activities.³⁴ The leaders of a membership association can both abuse an insider, such as a Luis Suárez, and also damage an outsider, such as an applicant for membership who has been rejected on racial grounds. Using a wide variety of legal theories, judges have been willing to entertain, and sustain, some insiders' and outsiders' legal challenges to associations' policies (Harvard Law Review, 1963; Tushnet, 2000).

Nonetheless, it would be overly simple to regard the state as invariably supreme to its membership associations. The state's menu of organizational forms commonly provides many alternative choices to the founders of an association. More importantly, although statutes and common law decisions do regulate some practices of, among others, labor unions, religious groups, and residential community associations, both judges and legislators commonly are inclined to give associations wide berth. Judicial deference is reflected, for example, in the usual requirement that a complainant exhaust the association's internal remedies before coming to court (Harvard Law Review, 1963, pp. 1069-80). Judges also repeatedly proclaim their disinclination to second-guess the

³⁴ On the many legal bases for exercise of judicial review, see Harvard Law Review (1963, pp. 998-1006).

substantive soundness of an adjudicatory decision rendered by the board of a condominium association,³⁵ or the arbitral panel of a trade group or sports league.³⁶

In several respects, the U.S. Constitution also is neo-Tocquevillian. In many instances, the action of an association would not constitute “state action” under the Equal Protection Clause, thus freeing the association from certain constitutional constraints.³⁷ And, in some instances, an association could even invoke a constitutional right of freedom of association to preclude state interference in association affairs.³⁸ While a membership association indeed is potentially subject to law, it tends to be, as a neo-Tocquevillian would wish, more a nexus of semi-autonomous authority than an agent of the state.

III. A DEMSETZIAN HYPOTHESIS ABOUT THE INCLINATIONS OF ASSOCIATION LEADERS TO ENGAGE IN SOCIAL CONTROL

To stimulate development of a positive theory of the interplay among the various potential controllers, I put forward a simple hypothesis. Many practitioners of law-and-economics may find it congenial. The hypothesis asserts that controller-selecting rules make associations responsible for engaging in social control when they are relatively good at it, as FIFA was in the Suárez case, but free associations of responsibility for controlling behavior when they would be relatively bad at it, as the ultra-talented leaders of ALEA would be in a plagiarism case.

This hypothesis reflects Harold Demsetz’s optimistic view about the evolution of property rights institutions (1967). According to Demsetz, if an exogenous shock were to

³⁵ Many courts apply a species of the deferential business-judgment rule to a condominium board’s adjudicatory decisions (Pollack, 2013, pp. 847-52). See, e.g., *Pullman*, cited *infra* note 43.

³⁶ Bernstein (1992, p. 125); Fisk (2011, p. 245); Mitten (2009); *infra* note 53.

³⁷ For discussions of state action doctrine, see the majority and dissenting opinions in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001).

³⁸ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that application of a New Jersey antidiscrimination law would violate association members’ rights of expressive association); see generally Brody (2002); Mazzone (2002).

change the cost-benefit conditions that the members of a group faced, they would tend to adapt to the shock by altering their institutions in cost-effective fashion. As an example, he famously described a change, during the early colonization of North America, in the land tenure practices of a tribe of Labradorean Indians. After the development of the trans-Atlantic fur trade had greatly increased the value of pelts, tribe members shifted from communal ownership of land to household ownership of land, a system better suited to preventing overhunting.

Many lawyer-economists implicitly or explicitly share Demsetz's optimism that institutions tend to evolve in cost-effective fashion. A prominent example is Richard Posner's Whiggish theory that the deep structure of common law doctrine is promotion of economic efficiency (2014, pp. 297-301). Because there can be insuperable barriers to successful collective action, however, many observers, including Posner himself, tone down their optimism in some contexts. A milder version of the Demsetzian thesis posits only that if the members of a society were to face a choice of two institutional options, one that would make them wealthier by Kaldor-Hicks criteria and one that would make them poorer, they would be somewhat more likely to opt for the former.³⁹

Essentially Demsetzian is Ronald Coase's account (1974) of the supply of the earliest British lighthouses. So too is much of Elinor Ostrom's work on the commons (1990), and Henry Hansmann's theory (1996, pp. 20-23) that the patrons of an enterprise would tend to choose an organizational form that would minimize their total transactions costs. Much of my own scholarship reflects a mild form of Demsetzian optimism. I have attributed the near ubiquity of private ownership of dwellings and arable lands, for example, to the relative efficiency of those arrangements (1993, pp. 1331-1332). And in *Order Without Law*, I hypothesized that members of a closely knit group would tend to spontaneously generate norms that would be Kaldor-Hicks efficient for group members (although perhaps less advantageous for outsiders) (1991, p. 167).⁴⁰ Others with

³⁹ As Demsetz himself has written (2008, p. 128), “[My 1967 article] was an exercise in positive economics, but it does rest on the presumption that people, and specifically Native Americans, positively value efficiency.”

⁴⁰ I have taken a stab at articulating a theory of institutional change that assigns central roles to specific individuals (2001, pp. 15-17). The theory supposes that the key participants are

generally optimistic views about the efficiency of social norms include James Coleman (1990, pp. 249-258) and Robert Cooter (1994, pp. 224-226).⁴¹ Most directly on point are analyses of the institutional effectiveness of associations. Rogers (2006) finds that the presence of a residential community association tends to enhance the market value of housing units. Similarly supportive are Lisa Bernstein's positive evaluation of the New York Diamond Dealers Club (1992), Catherine Fisk's of the Writers Guild of America (2011, p. 278), and Mark West's of the Japan Sumo Association (1997).

In some contexts, of course, unalloyed Demsetzian optimism about the contributions of an association to Kaldor-Hicks efficiency would be naïve. First, individuals pursue values other than efficiency. In some contexts, association rule-makers therefore might give greater weight to, for example, distributive justice. Second, the benefits of an institutional arrangement to the members of an association might be exceeded by its costs to outsiders.⁴² Third, as Mancur Olson (1965) and many others have stressed, impediments may stymie adoption of an institutional improvement. The litanies of potential barriers are the stuff of law-and-economics. Among them are the transaction costs that limit the capacity of members of a collectivity to escape from a suboptimal equilibrium, and cognitive biases such as loss aversion that deepen path dependence. In his notable contribution to the theory of the evolution of institutions, Gary Libecap (1989, pp. 19-28) stresses a particular transaction-cost impediment: the risk that a politically powerful interest group would block a change that would be utilitarian overall, but disadvantageous to its own members. And lawyer-economists should be aware that historians are instinctively wary of "functionalism," their term for Demsetzian optimism. With these cautionary notes, the next Part nonetheless proceeds to muster evidence

the norm entrepreneurs who propose new norms or institutional forms, and the opinion leaders who then help mobilize member support for one or another of the entrepreneurs' proposed innovations. These actors are primarily motivated by the prospect of attaining first-party self-satisfaction and third-party esteem.

⁴¹ Richard McAdams (1997, pp. 409-424) and Eric Posner (1996) have proffered thoughtful reasons, mostly deduced, for greater pessimism about the content of norms.

⁴² See *supra* text preceding note 21.

supporting the hypothesis that utilitarian considerations underlie the roles that associations both play, and fail to play, in the overall system of social control.

IV. EVIDENCE SUPPORTING THE EFFICIENCY OF ASSOCIATIONS' SOCIAL CONTROLS

The disciplinary endeavors of membership associations vary widely. This Part describes four different depths of associational involvement, and offers a Demsetzian interpretation of each of these variations. The four are: a *strong* association, that is, one that both promulgates and enforces rules of conduct that might give rise to adjudicatory disputes for the association itself to resolve; a *semi-weak* association that formally adopts general standards of conduct such as a code of ethics, but provides no formal institutions to enforce those general standards; a *weak* association that declines to engage in social control other than that necessary to conduct its ministerial functions; and *no* association in a context where such an entity might possibly have been formed.

As a preliminary matter, it should be noted that even a weak formally-organized association, such as ALEA, necessarily makes and enforces some rules to govern member access to association services. For example, ALEA requires attendees at its annual conference to pay a combination of fees and dues, imposes a deadline for the submission of conference papers, and promulgates a schedule of conference sessions. Enforcements of these sorts of rules generally are ministerial in the sense that they do not entail much exercise of individual judgment. Scholars interested in the workings of the overarching system of social control tend to be more interested in less-mechanical processes of rulemaking and adjudication. Although the line between a strong and weak association is hardly bright, the rules of a weak association tend to be more ministerial, and less adjudicatory, than those of a strong one.

A. Strong Associations

A strong association makes and enforces rules beyond those necessary to conduct ministerial functions. A condominium association, for example, may enforce a member's duty not only to pay the monthly assessment, but also to adhere to general standards of

behavior, such as refraining from harassing other members.⁴³ Some membership associations even aspire to govern members' personal behavior in non-associational contexts. An example, developed below, is the set of rules that the National Football League enforces to discipline players who have committed off-field acts of domestic violence.

Lisa Bernstein has memorably described several strong commercial associations: the New York Diamond Dealers Club (1992); the National Grain and Feed Association (1996); and the cluster of associations involved in the cotton trade (2001). Each of these promulgates detailed rules, and funnels member disputes into its own internal arbitration system. Bernstein's evaluations of these institutions are generally Demsetzian. In her eyes, the various participants on balance gain from their associations' involvements in social control. Because Bernstein's studies are well-known, I feature three fresher examples of strong associations. The second two are sports leagues, namely FIFA and the NFL. But, before turning to sports, let's visit Hollywood.

1. The Writers Guild of America

The activities of the Writers Guild of America, vividly depicted by Catherine Fisk (2011), illustrate the advantages members may obtain from an association's engagements in social control. The WGA is a union of writers of movie and television scripts. The WGA's West Coast branch controls the gateways that lead to most major screenwriting jobs in Hollywood. In practice, dozens of writers may contribute to the production of a Hollywood script. A contributing writer aspires to garner screen credit, that is, identification on screen as having been one of the primary authors of the script. Receipt of screen credit tends to enhance future employment opportunities, and, under applicable contracts, may entitle a writer to receive residuals or bonus payments.

The WGA is deeply involved in the allocation of screen credit. Screen credit is a form of intellectual property, a source of contention in many examples discussed in this Part. In the eyes of screen writers, the award of screen credit is not a zero-sum game. Perhaps on account of the widely-accepted romantic notion that a piece of creative

⁴³ See, e.g., *40 West 67th Street v. Pullman*, 790 N.E.2d 1174 (N.Y. 2003) (holding that business judgment rule required court to defer to cooperative housing board's decision to evict a member for violating duty not to engage in "objectionable conduct").

writing is the product of a solitary genius (Boyle, 1996), writers believe that they would attain greater aggregate glory if only one, two, or at most three of them, as opposed to a multitude, were to receive screen credit. The WGA has published a manual of rules (2010) governing the allocation of screen credit and established an arbitration procedure to resolve disputes among union members. These arbitration panels, typically composed of three WGA members, process over 100 disputes per year.⁴⁴ Judicial review of these outcomes has been highly deferential (Fisk, 2011, p. 245).

Why have Hollywood screen writers bothered to set up this system, as opposed, say, to relying on the legal system to resolve disputes over writing credit? First, association governance gives them direct control over both the drafting of the governing rules and the staffing of adjudicatory boards. When members of an association envisage—as they commonly would—that they would have superior knowledge about the field to be governed, they would anticipate that self-governance through their own association likely would produce outcomes that would be superior, at least from their perspective, to those of the legal system.⁴⁵ In addition, an association’s agents typically would resolve disputes more expeditiously and more cheaply than the legal system would. Following Suárez’s bite in Brazil, FIFA’s Disciplinary Committee imposed its sanctions within two days, and the two ensuing arbitral appeals were resolved in a total of two months.⁴⁶ Legal proceedings are seldom so quick.⁴⁷

In some social contexts, the diffuse enforcement of informal norms would be more efficient than social control by an association. But the award of screen credit is not one of these contexts. A strong association, such as WGA, tends to involve itself in adjudication in a situation where fact-finding would be challenging and the rapid issuance

⁴⁴ In 2002, WGA panels arbitrated 67 of the 210 writing credits that were awarded for feature-length films, a subset of the Hollywood action (Friend, 2003, p. 160).

⁴⁵ An association’s members commonly reject the legal system out of hand, as opposed to expending resources to investigate what the governing law would provide (Ellickson, 2012, p. 249).

⁴⁶ See *supra* text accompanying notes 3-5.

⁴⁷ See also Ellickson (1989) on the gains that nineteenth-century whalers obtained from applying their own norms of capture in lieu of making use of the law of capture.

of an authoritative decision would be beneficial. A dispute over screen credit is such a situation. Comparison of disputants' preliminary scripts tends to be onerous work, and everyone involved in a particular production recognizes the value of a prompt determination of the writers' names to be screened.

Despite the popularity of the phrase *voluntary associations* with neo-Tocquevillians, the Writers Guild of America illustrates that membership in an association may not be entirely voluntary. Some associations have, as result of a combination of market conditions and legal rules, a degree of monopoly power.⁴⁸ In addition, a decision to join an association may be a tied product, that is, a necessary consequence of a prior decision. A decision to become a screenwriter in Hollywood, for example, virtually compels membership in WGA. Similarly, taking a job in a closed shop compels a worker to join a union, and choosing to practice law, in a majority of states, compels membership in the state bar association (Martin, 1989). The buyer of a unit in a condominium building also has no choice but to become a member of the building's condominium association. And, because FIFA controls the best soccer leagues, Luis Suárez's desire to play professional soccer in effect compelled him to submit himself to FIFA's purview. When an association possesses monopoly power, a member's exit options also are constrained. This can provide a rationale for legal protection of an insider from association abuse, particularly procedural abuse.⁴⁹

2. FIFA

Most sports leagues are heavily involved in making and enforcing rules. Referees' enforcement during the course of play generally is ministerial.⁵⁰ The repeated ministerial decisions of a league's referees, however, likely enhance the perceived legitimacy of the league's assumption of post-game adjudicatory authority.

⁴⁸ See also *supra* note 32 and accompanying text.

⁴⁹ See *supra* text at note 34.

⁵⁰ Even the application of ministerial rules, of course, can entail the use of discretion. See Berman (2011) (analyzing jurisprudence of referees' decisions).

The Suárez biting incident illustrates FIFA's application of its post-game system of social control.⁵¹ FIFA has formally adopted a Disciplinary Code (FIFA, 2011), and appoints a Disciplinary Committee that is responsible for post-game Code adjudications. The Code provides the Committee a wide range of sanctions, including a ban on entering a stadium, a fine payable to FIFA or another soccer association, the return of awards, and a lifetime ban on involvement in any FIFA-controlled soccer activity. In many instances, the Code authorizes a penalized party to appeal to FIFA's internal Appeal Committee, and ultimately to the non-governmental Court of Arbitration for Sport.

According to the Demsetzian hypothesis, a strong association such as FIFA would be most likely to take exclusive jurisdiction in a context where affected members would anticipate that the association's rulemaking and adjudication would be more cost-effective than any alternative means of social control. After Suárez's World Cup bite, soccer fans and commentators around the world honored an informal controller-selecting norm that directed FIFA, and only FIFA, to respond to the matter. FIFA has unmatched expertise in the making of soccer rules, and is generally incentivized to reach a defensible adjudicatory outcome through appropriate procedures. There were virtually no protests from any quarter about FIFA's assumption of exclusive jurisdiction over the matter. To my knowledge, no one called for a Brazilian prosecutor to initiate a criminal action. Nor did anyone call for opposing players to rough up Suárez during subsequent matches. That alternative would have posed inherent risks. Had FIFA permitted Chiellini and other soccer players to retaliate against Suárez, physical injuries to players would have mounted. In addition, members of rival teams might have disagreed about whether the aggregate amounts of ensuing tit-for-tat self-help had been excessive or inadequate. And that disagreement might have triggered an unending feud (Ellickson, 1991, pp. 216-217, 220). In short, in this instance, virtually everyone recognized that FIFA was the cheapest controller available.

3. The National Football League's Efforts to Control Domestic Violence

Like other sports leagues, the NFL focuses most of its rulemaking and adjudicatory efforts on assuring that its games are properly played. In the much-

⁵¹ See *supra* text accompanying notes 2-5.

publicized “deflategate” incident of 2015, for example, the NFL sought to penalize after-the-fact a team and player that it determined had intentionally deflated game footballs.⁵² These sanctions are analogous to FIFA’s after the Suárez incident. Although arbitral panels have on occasion been willing to overturn NFL penalty determinations, judges have recognized the merits of league autonomy, and traditionally have been deferential (Kim and Parlow, 2009, pp. 579-83).⁵³

Far more intriguing are the NFL’s ongoing efforts to control players’ actions in non-game situations, specifically their acts of domestic violence. A 2014 incident involving player Ray Rice spurred the NFL into action (Withers, 2015, p. 374). While in a casino elevator, Rice punched unconscious his then fiancée, now wife. A video clip capturing the events was posted online and widely viewed. The NFL Commissioner first responded by suspending Rice for two games. When the Commissioner subsequently attempted to apply a newly adopted

⁵² In the AFC Championship game of January 2015, agents of the New England Patriots were accused of having intentionally deflated the game footballs. Four months later, the NFL announced that it was suspending Patriots quarterback Tom Brady without pay for four games of the upcoming 2015 regular season. The NFL also fined the Patriots \$1 million and stripped the team of various future draft picks. The penalized parties unsuccessfully appealed these decisions to an internal NFL arbitrator, a role that NFL Commissioner Roger Goddell himself assumed. In a federal lawsuit subsequently brought by the NFL Players Association, a District Judge overturned Brady’s penalties, in part for “inadequate notice to Brady of both his potential discipline (four-game suspension) and his alleged misconduct.” *National Football League Management Council v. National Football League Players Ass’n*, 125 F. Supp. 3d 449, 463 (S.D.N.Y. 2015). On April 25, 2016, a panel of the Second Circuit, citing *Garvey* infra note 53, reversed and reinstated the league’s penalties.

⁵³ U.S. decisional law strongly supports judicial deference to the outcomes of a sports league’s internal tribunals. When arbitrators appointed pursuant to a collective bargaining agreement have affirmed a penalty that a league has imposed, the Supreme Court has indicated that courts must be highly deferential to that arbitral outcome. *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001); see also *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 539 (7th Cir. 1978) (deferring to Commissioner’s determinations of what is “in the best interests of baseball”). But see *National Football League Players Association v. National Football League [Adrian Peterson]*, 88 F. Supp. 3d 1084 (D. Minn. 2015) (holding that arbitrator had wrongly applied a new NFL rule against domestic violence retrospectively to a player who would have lacked notice of what was prohibited). The judge who decided *Peterson* was influenced by the arbitrator’s decision against the NFL in the Ray Rice case, infra note 54.

NFL policy against domestic violence to Rice, an arbitrator ruled that procedural principles protected Rice from any stiffening of the initial penalty.⁵⁴

Why have the NFL, as well as other major North American professional sports leagues, decided to discipline players for acts of domestic violence? In this domain, the NFL has no special expertise in either rule-making or adjudication. If members of the public regarded the legal system and other controllers to be competent at controlling domestic violence, football executives plausibly might decide that they should not extend their writs to this extra-associational activity.

A conventional explanation for a league's concern about domestic violence is its desire to protect the image of the sport, especially in the eyes of fans and sponsors (Harvard Law Review, 1996, pp. 1051-52; Kim and Parlow, 2009, p. 583).⁵⁵ Some observers assert that the criminal justice system is biased in favor of star athletes (Kim and Parlow, 2009, p. 584; Withers, 2015, pp. 379-85). If true, that bias would provide a rationale for league activism against any sort of player-committed crime. But it would offer no explanation for why sport leagues have singled out crimes of domestic violence, as opposed, say, to tax evasion or drug dealing.⁵⁶

The Demsetzian hypothesis, however, does suggest an explanation. NFL may have acted to limit players' domestic violence because members of the public widely perceive that other potential controllers of domestic violence are relatively inept. Proponents of the league involvements emphasize, in particular, the legal system's shortcomings in controlling domestic violence (Harvard Law Review, 1996, pp. 1051-

⁵⁴ Barbara S. Jones, Hearing Officer, In the Matter of Ray Rice, November 28, 2014. Available at http://espn.go.com/pdf/2014/1128/141128_rice-summary.pdf (accessed April 20, 2016).

⁵⁵ The NFL's collective bargaining agreement with its Players Association forbids player "conduct detrimental to the integrity of, or public confidence in, the game of professional football." Collective Bargaining Agreement, Art. 46 § 1(a), signed on August 4, 2011 (cited in *National Football League Players Ass'n v. National Football League*, 88 F. Supp. 3d 1084, 1086 (D. Minn. 2015)).

⁵⁶ The NFL may be widening the scope of its concerns, however. In February 2016, an NFL executive released a memo that implied that the league would prevent a team from drafting a player convicted of not only a domestic violence or rape offense, but also a weapons offense (Jones, 2016).

1053). Fear of future retaliation by a batterer commonly deters a spouse or child from initiating a civil suit, or cooperating in a criminal prosecution (Withers, 2015, pp. 386-88). Criminal prosecutions, in particular, are likely to be underpursued. In one instance, an offender agreed to a large civil settlement with his victim on the condition that she not testify in a criminal case against him (Withers, 2015, pp. 384 n.48, 406).

Various other second- and third-party controllers similarly are unlikely to adequately deter domestic violence. Professional athletes typically are strong and fit, and readily able to overcome efforts at hand-to-hand self-defense. Because most domestic violence occurs in private, third-party gossip and other diffuse informal sanctions are unlikely to be sufficiently effectual. Given the weaknesses of these other instruments for controlling domestic violence, members of the public might regard a sports league, despite its own shortcomings in this context, as one of the least incompetent controllers. And, because a league typically possesses monopoly power, its sanctions can sting. By contrast, ALEA, which lacks meaningful monopoly power, would be a relatively impotent instrument for controlling domestic violence.

B. Semi-Weak Associations

A semi-weak membership association adopts rules, but makes little or no effort to enforce them. These rules may include a high-sounding code of ethics governing, in part, non-associational activities (see Gorlin (1999) for examples). Despite the association's own paucity of enforcement mechanisms, standards in a code of ethics nevertheless may have some bite (Moore, 1990). The association's members, for example, might look to it for guidance in how to identify miscreants, and then administer negative gossip or other informal sanctions on them.

The Modern Language Association (MLA) is a semi-weak membership association. The MLA posts on its website a statement of ethics that includes a condemnation of plagiarism (2015). Many MLA members teach introductory courses in essay writing, duties that likely sensitize them to the frequency of plagiaristic offenses. But the MLA website does not commit the association to adjudicating alleged instances of plagiarism.

From a Demsetzian perspective, the MLA likely has made the right call. The association, by adopting rules condemning plagiarism, has given its members a talking point to use when advising students, engaging in academic gossip, and lobbying the institutions that employ them to adopt and enforce anti-plagiarism policies. These sorts of informal efforts probably would be more cost-effective than the MLA's own active involvement in the adjudication of specific plagiarism disputes.

C. Weak Associations

A weak membership association promulgates no rules other than the ministerial rules necessary to coordinate its activities, such as the convening of its annual meeting. ALEA, which has not adopted a general code of ethics, is an example of a weak association. I have predicted that ALEA's leaders would choose not to involve the association in policing a member's possible extra-association misconduct, such as an act of plagiarism. Wise heads in the ALEA likely would eventually agree with the authors of a *Green Bag 2d* editorial, "Plagiarism is . . . the kind of wrongdoing best left to informal, private sanctions" (2007, 273).

Examinations of how other weak associations deal with thefts of intellectual property support this prediction. The Council of Fashion Designers of America holds gala events, supports educational programs, and has lobbied for Congressional bills designed to limit the pirating of fashion designs. But the Council has steered clear of helping to resolve disputes, common in the fashion industry, over the theft of designs (Raustiala and Sprigman, 2006). Although U.S. magicians have sustained a vibrant Society of American Magicians since 1902, the Society appears not to have involved itself in disputes between members arising out of the copying of tricks (Loshin, 2008). The practices of French chefs provide an example from abroad. French chefs have long relied on informal norms to control the copying of recipes, one of their major concerns (Fauchart and von Hippel, 2008). In 2011, French chefs formed a professional association, Le Collège Culinaire de France. This institution appears to be weak, however, because its website does not list controlling the copying of recipes as one of its functions.⁵⁷

⁵⁷ The College's website is <http://www.college-culinaire-de-france.fr/>.

Although a weak association does not directly engage in social control beyond ministerial matters, its social activities may strengthen members' social bonds, better enabling them to apply informal sanctions such as negative gossip. Thus the existence of ALEA, despite its weak structure, might help deter plagiarism among law-and-economics scholars.

A Demsetzian take on the predicted unwillingness of the ALEA to control plagiarism is straight-forward. It presumes that law-and-economics scholars recognize the availability of better alternative methods for dealing with plagiarism. The main alternative, to repeat, is negative gossip of the sort that journalists use to condemn journalists who have invented news stories. When this "court of public opinion" renders a negative judgment, the consequences to an academic's career can be devastating. In many plagiarism cases, an academic association's adjudicatory efforts would represent a waste of its scarce resources.

D. Failure to Form an Association

When members of a group are closely knit, they have good information about how they each of them have behaved, and anticipate having continuing relations through which they could administer informal punishments and rewards (Ellickson, 1991, pp. 177–82). Under these conditions, members may see little need to create a formally structured organization. During the nineteenth-century, the tightly knit high-seas whalers never saw fit to set up an association (1991, p. 192). A Demsetzian interpretation of this failure is that whalers regarded their informal system of social control to be adequate.

Oliar and Sprigman's discussion (2008) of U.S. stand-up comedians provides a more contemporary example. Comedians deplore the stealing of jokes. Although the National Association of Comedians maintains a website, that site has virtually no content other than a link to a site that promises information about the availability of health insurance.⁵⁸ Why haven't comedians followed the lead of the Writers Guild of American and used their Association to establish an adjudicatory system for cases of alleged joke-

⁵⁸ The website is <https://www.facebook.com/The-National-Association-Of-Comedians-LLC-246889963430/> (accessed April 24, 2015).

stealing? The Demsetzian interpretation is that comedians prefer to address that problem through other means, especially self-help. An aggrieved comedian can insert in a stand-up routine jokes about the sins of a particular joke thief.

But this Demsetzian interpretation may be overly rosy. Comedians possibly may have been done in by free-riders who thwarted them from creating a membership association that would have effectively controlled joke-stealing, in part by strengthening comedians' gossip networks. The history of business improvement districts (BIDs) serves as a caution. Until a mechanism for overcoming free-riding was established, downtown commercial areas of North American cities lacked effective neighborhood institutions. The enactment of enabling legislation authorized a supermajority of downtown landowners to force potential holdouts to pay dues to a BID devoted to providing district services that would attract shoppers. By 1999, a thousand BIDs had bloomed in the United States alone. These institutions generally receive positive reviews (see, e.g., Briffault, 1999). This history suggests that, for centuries, city dwellers had the benefit of too few of these sorts of associations. Perhaps high-seas whalers and comedians have suffered similarly.

V. CONCLUSION

The legal system is a source of important duties. As April 15 approaches, many U.S. citizens find it hard to suppress thoughts of their obligations to the Internal Revenue Service. But legal centralism is profoundly misleading. Consider the major duties that might weigh on the mind of a university professor. On a given day, the most salient of these duties might arise from a household norm obligating the professor to shop for the evening meal, a departmental norm supporting attendance at a faculty meeting, and a promise to a colleague to read the draft of a paper. None of the three duties mentioned is legally enforceable. But they are the stuff of life, or at least much of it.

I have discussed another source of non-legal obligation, the membership association. Members commonly have informal duties of loyalty to their associations. These are in evidence when a member of an alumni association agrees to serve on a fundraising committee, a member of a condominium association on its board of directors, and a member of ALEA on a panel charged with reviewing submitted papers. But a

membership association also may adopt formal rules, and a strong association, such as FIFA and the Writers Guild of America, sets up formal institutions for their enforcement.

My analysis generally supports de Tocqueville's sunny assessment of the effect of associations on the quality of social life. The central hypothesis, hedged with qualifications, is that a membership association is likely to control member behavior in a context where no other instrument of social control, such as informal norms or the legal system, would be as cost-effective. If so, FIFA's assumption of control over soccer offenses, and the NFL's efforts to control players' domestic violence, will tend to make the world richer, in a broad sense of that word. But leaders of an association must be attentive to what it does best. ALEA's leaders have implicitly understood that ALEA is better at fostering academic interchange and deepening social networks, than it would be at adjudicating plagiarism disputes and controlling domestic violence.

Sociologists and political scientists traditionally have been the leading investigators of the institutions of civil society. Law-and-economics scholars have the tools and brashness to invade the field. Godspeed.

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Table 1: Components of the System of Social Control

<i>CONTROLLER</i>	<i>RULES</i>	<i>SANCTION</i>
<i>1. First-Party Control</i>		
Actor	internalized norms, personal ethics	self-sanction
<i>2. Second-Party Control</i>		
Person Acted Upon	norms, contracts	personal self-help
<i>3. Third-Party Control</i>		
a. Diffuse Social Forces	norms	vicarious self-help
b. Organizations	organization rules	organization enforcement
c. Governments	law	state enforcement