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The Opaque Origins of the Business of Rating: Mercantile Agencies, the Law, and the Lawyers (1857-1916)

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THE OPAQUE ORIGINS OF THE BUSINESS OF RATING:

MERCANTILE AGENCIES, THE LAW, AND THE LAWYERS

(1857-1916)

Marc Flandreau & Gabriel Geisler Mesevage*

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Abstract

This paper discusses the origins of rating in the second half of the 19th century. We review and criticize existing business and cultural history narratives, which have, consistently with a story told by lawyers favorable to (or employed by) the agencies, emphasized an alleged cultural shift in normative views that would have provided legal protections permitting the development and spread of printed credit reports. Such a view is inconsistent with evidence from actual judicial decisions and from our exploration of archival material. Looking at both litigated and settled cases, we show that the successful expansion of the "commercial public sphere" in the late 19th century was made possible by the Mercantile Agencies' organization of a creditor-supported surveillance system that rewarded a vast network of local lawyers.

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The Subprime Crisis has reopened an important controversy on the role of Credit Rating Agencies in the modern polity. Reflecting a mounting popular outrage, the Financial Crisis Inquiry Report accused rating agencies Moody's and Standard and Poor's of having "abysmally failed in their central mission to provide quality ratings on securities for the benefit of investors."[1] Lawmakers devoted a substantial portion of the Dodd-Frank Act of 2010 to "improvements" to the regulation of Credit Rating Agencies. Lawsuits were initiated.[2] The backlash came from Down Under, in November 2012, when the Federal Court in Sidney slammed Standard and Poor's rating methodology and awarded a big verdict to plaintiffs.[3] Both the agencies and their critics are now monitoring whether such decisions are going to spread to the US.

But few people are aware that this Australian test of US grown ratings is in fact a replica of an episode that occurred one century ago and which involved the ancestors of credit rating, the so-called rating and credit reporting "Mercantile Agencies", an industry that sold opinions on corporate borrowers. At the time this episode took place, rating was a thriving US based business, tremendously profitable, and expanding internationally, just like the rating agencies today. In 1903, the Australian branch of R. G. Dun, a leading Mercantile Agency sold to Holdsworth, Macpherson & Co. two reports on New South Wales merchant

[1] Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, Submitted Pursuant to Public Law 111-21 January 2011, pp. 212.
[2] Frank Partnoy, "Wall Street Beware: Lawyers Are Coming", Financial Times, April 19, 2010.
[3] Leo Shanahan, "Councils win landmark case against Standard and Poor's, ABN Amro", *The Australian*, November 5, 2012.

Macintosh whose general purport was to picture him and his associates as persons with whom it "was not wise to do business". Macintosh lived "beyond his means, possessed habits and tastes which were likely to bring the firm into a state of insolvency"; business was "grossly mismanaged", "struggling with severe financial difficulties which would probably end in disaster".[4]

After discovering the content of the reports, Macintosh sued for libel, charging they were a bag of lies, half "repetition of alleged rumors" and half "defamatory statements." The point of law over which the legal battle was fought was that of deciding whether the communication between Dun and its customers Holdsworth, Macpherson & Co – the two reports Dun had sold – were "privileged" or not. Under Common Law, adverse reports on commercial credit were intrinsically libelous but "privilege" served as a carve-out from the law of libel and slander. It referred to situations in which "a party has a duty to discharge which requires that he should be allowed to speak freely."[5] If privileged, a communication exposed the one proffering it to reduced liability. The trial judge in New South Wales had returned a verdict favorable to the plaintiff but the defendant appealed and the High Court of Australia entered a judgment for the defendant. Upon appeal by the plaintiff, the matter came to the

[4] Macintosh vs. Dun (1908), A.C. 390-391.
[5] Cooley, as quoted in Joseph Errant, *Law Relating To Mercantile Agencies*, Philadelphia: T & J. W. Johnson & Co., 1889, pp. 8.

Privy Council in London, the highest jurisdiction for self-governing British colonies. This was in the Spring of 1908.[6]

As it turned out, Judges in London reversed the decision of the High Court in Australia. They found that communications from R. G. Dun to its customers were not privileged. The ground was the for-profit character of the agency. As Lord Macnaghten J. was quoted to have declared: "The occasion was privileged if the communication injurious to the plaintiffs' character was made in the general interest of society and from sense of duty; not so, if it was made from motives of self-interest by those who for the convenience of a class trade for profit in the characters of other persons, and who offer for sale information which, however cautiously and discreetly sought, may have been improperly obtained." Macnaghten continued: "However convenient it may be to a trader to know all the secrets of his neighbor's position, his 'standing,' his 'responsibility,' and whatever else may be comprehended under the expression 'et cetera,' yet, even so, accuracy of information may be bought too dearly—at least for the good of society in general."[7]

In the US, where lawyers for R. G. Dun directed the fire, the decision caused consternation. According to a preparatory brief the decision was bound to influence the Agency's ability to conduct business in the Dominion.[8] This is not

[6] Macintosh vs. Dun (1908), A.C. 390.
[7] Macintosh vs. Dun (1908), A.C. 390, p. 401.
[8] The lawyers write: "The clients [i.e. R. G. Dun and Co] believe that the service of the Agency may be peculiarly useful to the commerce of the British Empire and they purpose to make it so if they are not prevented by an adverse decision in the present case of Macintosh". In prefatory note to *A collection of cases in action for slander and libel brought against mercantile agencies…*, Dun & Bradstreet Corporation

the place to review either the reasons for the British decision (the Anglo-American commercial rivalry in the dominions may have been one) or the implications it had for Britain (where a locally grown for-profit business reports industry existed). Suffice to say that in the American world of Common Law, where quoting decisions on the other side of the Pond was not unusual, the Macnaghten ruling could not go unnoticed.

Sure enough, it was quoted at length in a case appealed before the Supreme Court of Idaho, where one Judge Ailshie returned a 1914 decision against a Mercantile Agency in Pacific Packing Co. v. Bradstreet (Bradstreet was the other leading mercantile rating firm at the time). The decision contained a stern admonition that reflected the language of the Privy Council's concern about commoditization of information: "The company," it lectured "that goes into the business of selling news or reports about others should assume the responsibility for its acts, and must be sure that it is peddling the truth."[9]

This prompted supporters of mercantile agencies to react. Judge Macnaghten's decision in Macintosh v. Dun was vehemently criticized by one Jeremiah Smith in a two-part article published in the *Columbia Law Review,* in which he admonished the Idaho judge.[10] Smith divided the world between competent, professional, modern men who saw the value of mercantile ratings and those

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Records. Baker Library Historical Collections. Harvard Business School [28 March 1907: handwritten date at the end of the note].

[9] Pacific Packing Co. v. Bradstreet (1914) 139 P.1007. For the citation to Macnaghten's ruling, see p. 4.

[10] Jeremiah Smith, "Conditional Privilege for Mercantile Agencies. Macintosh v. Dun. I", *Columbia Law Review*, Vol. 14, No. 3 (Mar., 1914), pp. 187-210 and "Conditional Privilege for Mercantile Agencies. Macintosh v. Dun. II", *Columbia Law Review*, Vol. 14, No. 4 (Apr., 1914), pp. 296-320.

overly sensitive to the encroachment on the private sphere – men of the past (the Judges in London), men backward (the Court in Idaho). According to Smith, the decision in Macintosh v. Dun evinced "unfamiliarity with the methods and practical necessities of modern business. The writer [of the decision] does not appear to realize fully either the nature or the importance of the information furnished by mercantile agencies. It is an attempt to establish a rule of law founded upon a mistake of fact as to the reasonable necessity of adopting certain modern business methods."[11]

About one century after the Macintosh v. Dun decision, concerns about the implications of rating – in Judge Ailshie's language an "open and safe way for the unscrupulous, the blackmailer or grafter, to ruin the business standing and credit of an individual or corporation at pleasure and without recourse" – still lingers. While the modern debate about rating agencies was started by accusations that the agencies' had failed to live up to their gatekeeping role (they failed to protect investors), cries of outrage increased when Standard and Poor's downgraded a number of developed countries' governments – including the US – demonstrating that the "libelous" nature of rating is by no means a fully settled matter – at least in public opinion and political discourse. Further, the recent decision by the Federal Court in Australia underscores that the legal status of the rating agency industry is in a situation of permanent flux: The ancient reference to Qualified Privilege (which the agencies claimed they had secured from courts)

[11] Smith (1914b), p. 310; Smith was obsessive with "modernity" and repeats in both articles "modern times", "modern tendency", "modern business".

bears similarity with modern rating agencies' lawyers for whom ratings are an opinion protected by free speech, although a closer look at the evidence suggests that the matter is way more blurry than they recognize.[12] Last, we note that the problem associated with the lucrative nature of rating provision (which had worried the Privy Council in London and Ailshie in Idaho) has once again entered debate in discussions of the so-called failure of the "issuer-pays model" according to which ratings lack quality because they are partially paid for by those who are rated.

The permanence of these debates underscores the surprising resilience of the public role of the agencies – despite recurrent criticism and attempts at reform, and in light of repeated errors in judgment. This is a puzzle that we feel is amenable to historical investigation: The agencies' right to pontificate on the credit of people and nations, and the inability of agency critics to drive their commentary from the public sphere, is a phenomenon whose roots lie in the 19th century establishment of Mercantile Agencies. At the heart of the Mercantile Agencies' ability to prosper, is a story of the successful expansion of the boundaries of what Jürgen Habermas called the "public sphere" at the expense

[12] For a statement and critique of the Agencies' pretense to first Amendment protection, see Partnoy, Frank, 2006, "How and Why Credit Rating Agencies Are Not Like Other Gatekeepers," in *Financial Gatekeepers: Can They Protect Investors?* (Yasuyuki Fuchita and Robert E. Litan, eds.) This opinion has received a partial endorsement in a subprime crisis related decision rendered by Federal Judge Browning in the district court of New Mexico: See Nate Raymond, "Judge Rejects Credit Rating Agencies' First Amendment Defense in Mortgage-Backed Securities Class Action", *The AM Litigation Daily*, November 23, 2011. A legal review and criticism of the matter may be found in Theresa Nagy, "Credit Rating Agencies and the First Amendment: Applying Constitutional Journalistic Protections to Subprime Mortgage Litigation", 2009, *Minnesota Law Review*, 94, pp. 140-67.

of the "private sphere".[13] The reasons for this feat have been variously assessed. The dominant narrative, illustrated by a long series of functionalist approaches in business and cultural history, holds that, conforming to the needs of economic progress and efficiency, the formerly private and confidential circulation of information about merchants among merchants became public and commercial.[14] In fact, several modern lawyers with whom we talked motivate their view that the recent decision by the Federal Court in Sidney regarding Standard and Poor's is unlikely to spread to the US by referring to cultural norms.[15]

This, however, is not the only view on rating. At the time when Mercantile Agencies developed there also existed a contemporary "underground" literature, which was about spying, repression and more generally the Agencies' infringement of individual privacy. These accounts have found their way into a smaller modern literature by social theorists and social historians such as Scott

[13] Habermas writes "By 'the public sphere' we mean first of all a realm of our social life in which something approaching public opinion can be formed. Access is guaranteed to all citizens." And he links the existence of the public sphere to citizens "…freedom to express and publish their opinions – about matters of general interest." For Habermas the existence of the public sphere is constituted by the existence of technologies of mass communication, such as the newspaper. In the early 19th century, the question as to whether ratings would be objects of public opinion and circulated as news, or objects for private consumption, was as yet uncertain. Quotes are from Jurgen Habermas, "The Public Sphere: An Encyclopedia Article (1964)" Sara Lennox and Frank Lennox (trans.), *New German Critique*, No. 3, 1974, pp. 49.

[14] Lewis E. Atherton, "The Problem of Credit Rating in the Ante-Bellum South," *Journal of Southern History*, 12, 1946; Bertram Wyatt-Brown, "God and Dun and Bradstreet, 1841-1851," *Business History Review*, Vol. 40, No. 4, 1966; James H. Madison, "The Evolution of Commercial Credit Reporting Agencies in Nineteenth-Century America" *The Business History Review*, Vol. 48, No. 2, 1974., James D. Norris *R.G. Dun & Co., 1841-1900: The Development of Credit Reporting in the Nineteenth Century*, Greenwood Press, 1978; Rowena Olegario, "Credit reporting agencies: A Historical perspective", in Miller, (ed.) *Credit reporting systems and the international economy*, 2003, pp. 115-60, Cambridge, Mass.: MIT Press; Rowena, Olegario, *A Culture of Credit: Embedding Trust and Transparency in American Business*, Cambridge: Harvard University Press, 2006.

[15] Ross Buckley, an Australia based lawyer declared to us "The US law is pretty well unique in affording some First Amendment privileges to ratings, and certainly most Aussies think doing so is bizarre." (email correspondence with Ross Buckley, December 5, 2012).

Sandage or Josh Lauer, who focus on the agencies' role in the objectification and textualization of credit identity, and view the agencies emergence in terms of classification for the purpose of surveillance.[16] Indeed, the study of rating is fertile ground for social theorists, who see legitimate parallels between the agencies' systems of collecting, controlling and codifying social characteristics and theories of social discipline. According to Scott Sandage, Lewis Tappan (the founder of the first Mercantile Agency later known as R. G. Dun and Co) "did in the marketplace what others did in asylums and prisons. He imposed discipline via surveillance: techniques and systems to monitor and classify people."[17]

In this paper, we provide a historian's perspective on the origins of rating. At issue is to probe the narrative that rating developed as an enlightened industry that underscored the pro-transparency tendencies of the US economy in its search for efficiency. Alternatively, was rating instead some kind of conspiracy that subjected individuals to the scrutiny of an all-powerful Commercial Inquisition, as some contend? The new story that this paper seeks to articulate emerged from the discovery of a compendium of disputes over libel between individuals and mercantile agencies in the archive of Dun and Bradstreet. The archive holds 10 boxes of legal records on the Mercantile Agency Dun covering roughly the period from 1870 to 1900. Amidst sundry other legal concerns, the

[16] See in particular the book by Scott A. Sandage, *Born Losers: A History of Failure in America*, Harvard University Press: Cambridge, 2005, pp. 100; Josh Lauer, "From Rumor to Written Record: Credit Reporting and the Invention of Financial Identity in Nineteenth-Century America" *Technology & Culture*, 49 (2008), 304-305.

[17] Sandage Ibid. pp. 100. Unsurprisingly, Tappans were nephews of Benjamin Franklin – that American Benthamite.

core content of these boxes is correspondence between Dun's partners, its general counsel Samuel Wagner Esq., and various regional lawyers, pertaining to a series of libel disputes in which the company was engaged. This source provides an opportunity to revisit existing legal material because, unlike what has been made in previous narratives, we are not limited by the use of published court reports whose significance is undermined by a selection bias.[18]

Armed with this new tool, we undertake to revisit the triumph of rating in late 19th century America. We paint a picture of the development of rating that is at odds with the cultural demand story of business historians. We start with the pronouncements from this literature and construct our case gradually, showing that mercantile rating and the public commercial sphere expanded *despite* the law, *against* the minds of judges, and *beyond* the boundaries of 19th century tort. We find that the cultural resistance to rating was much more deeply entrenched than conventionally admitted, as reflected by the fact that even federal courts (often seen as having sided with big businesses and supported the construction of a "national" market) dealt with mercantile rating as apothecaries deal with poison. In the end, our exploration of the correspondence of Dun's lawyers brings to the fore a thus-far unwritten story: the ability of mercantile agencies to publically pronounce on the credit of merchants – without fear of legal liability – was not won in the courts but in the creation of a powerful network. And this

[18] The selection bias stems from the fact that parties to a dispute choose whether to settle or continue to litigate. As a result, the published record of court cases reflect the strategies of the litigants – a point we will return to below.

victory relied not on the legal subtleties of "privilege" but on the agencies' ability to strike a tacit alliance with a myriad of lawyers who, as interested warders of this commercial Panopticon, helped the agencies triumph in their legal disputes.

Credit Angst

Contemporaries often referred to Mercantile Agencies as the Mercantile Agency "System" – for a system it was, a system of credit control. This system originated in business-to-business credit relations as they prevailed in the American market for "dry-goods" around the late 1830s and early 1840s when Mercantile Agencies were created.[19] In New York, wholesalers of dry-goods lived from distributing their wares throughout the country, with the help of local distributors who worked on credit from that wholesaler. Instead of cash payment for the wares, a "discount" price was made for a time payment enabling the local distributors to use the proceeds from their sales to reimburse the wholesaler. The discount included an interest rate component and covered the wholesaler for the risk.

The issue for wholesalers' success was to get the risk right. For this, wholesalers relied on their own salesmen or on "dry-goods jobbers". The employees, or jobbers, reported to their employer, or principal, on the credit standing of local borrowers, and it is on this information that the decision to sell, and at what price, was taken. Decisions had to be made on the spot without

[19] See Peter Temin, *The Jacksonian Economy*. New York: W.W. Norton & Company, 1969, p. 31 ff.

convenient communication. The agents' world was a confused one, ruled, according to one of its best connoisseurs Peter Earling, by the problem of determining "whom to trust".[20] The local shop could deceive the wholesaler's agent, the agent could deceive his employer, or the agent and the local shop could conspire against the creditor. Letters of recommendation were asked and produced but could be manipulated. The author of an 1861 essay writes: "I remember [an individual] bringing a dozen or more letters, some of which contained the highest commendation. The writer of one of these letters sent a private note, through the mail, warning one of the persons addressed against the bearer of his own commendatory letter".[21]

Difficulties were compounded by weaknesses in creditors' protection, legal heterogeneity across states and differential treatments of in-state and out-of-state creditors. Contemporary observers remarked that debtors lacked remedies against creditors. French traveler Tocqueville touring the US in the early 1830s discovered a "strange indulgence that is shown to bankrupts" throughout the American Union. "In this respect" he continued "the Americans differ, not only from the nations of Europe, but from the commercial nations of our time".[22] In 1847, one American Merchant stated: "all modern nations have, we believe, without exception, laws on [the collection of debts by creditors] of more or less

[20] Peter R. Earling, *Whom to trust, A practical treatise on Mercantile Credits*, Chicago, New York, Rand, McNally & Co, 1890. This successful book had several editions, p. 298.
[21] [Anonymous], "A dry goods jobber in 1861", *The Atlantic Monthly*, 200-212, p. 209.
[22] Quoted in Edward Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America*, University of North Carolina Press, 2001, p. 13.

rigor, but none less than our own State".[23] The contemporary press made futile efforts to keep traders abreast with the latest information on the law of debtor and creditor in different states.[24] Some years later, Earling stated: "Laws for the collection of debts were on the statute books, and in some States were quite severe, but as regards any benefit for the creditor they were practically dead letter… To collect by process of law from a trader in the Territorial governments of the then Wild West, was, of course, impractical from a business standpoint, if not impossible."[25]

Balleisen has discussed an important attempt at setting federal guidelines. National bankruptcy rules might have helped, but repeated attempts to introduce uniform rules failed, and in practice intervention at the federal level ended up creating further disruption. He focuses on a short-lived National Bankruptcy law adopted in 1841 and repealed in 1843 whose main effect was to enable thousands of debtors to walk away from their debts.[26] The National Bankruptcy Act of 1841 in fact provides the context for the creation of the first Mercantile Agency by Lewis Tappan, launched literally a few days before the Act was adopted by Congress. At that juncture, creditors (Tappan's customers) feared a "Jubilee": in the Book of Leviticus, the universal pardon of debts.[27]

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[23] "Laws for the collection of debts", Hunts' Merchants Magazine, 1847, p. 440

[24] See among many other examples the articles published in Hunts' Merchants' Magazine. For instance, Vol. 16, 1847, "Law of debtor and creditor in Louisiana" and "Law of debtor and creditor in Alabama".

[25] Peter R. Earling, *Whom to trust, A practical treatise on Mercantile Credits*, Chicago, New York, Rand, McNally & Co, 1890.

[26] Although that law was repealed in 1843, another attempt would fail in the 1870s, and it would not be until 1898 that an exceptionally lenient national bankruptcy law would be adopted.

[27] Balleisen, *Navigating failure; Bankruptcy and Commercial Society in Antebellum America*, Chapel Hill,

The Mercantile Agency did not address all these problems but provided a partial fix. It provided a surveillance system for borrowers: The Agency helped control both the agents and the debtors by providing an "independent" source of information. It also helped track defaulters across state boundaries – "purify" the mercantile air was the preferred metaphor.[28] Mercantile Agencies worked by collecting, processing and eventually formatting in grades opinions regarding the "capital" and "character" of individual entities and in so doing they cultivated a relation with local lawyers. In each little city each agency of some standing had at least one "correspondent" who was in charge of reporting on local merchants. A hub in New York centralized information and correspondence with this network of attorneys. The reports would then be sold to "subscribers" who would contribute a flat fee in proportion to their operating income. An important aspect of the ecological link between Agencies and lawyers was the complementarity between reporting work and collection work.[29] The reporting attorneys were men well versed in the art and mysteries of bankruptcy and liquidation. When a problem occurred (in the form of a credit

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2001; The "nation of bankrupts" theme has received substantial historical exploration and validation; Sandage *Born Losers*; Peter Coleman, *Debtors and creditors in America: Insolvency, Imprisonment for Debt and Bankruptcy, 1607-1900*, Madison 1974. To explain this situation David Skeel (*Debt's Dominion: A History of Bankruptcy Law in America*, Princeton, 2001) refers to coordination problems across constituencies, courts that sided with the "people" and an East-West divide which led debtor states (West) to erect walls against creditors (East); A related discussion by economists is found in Ian Domowitz and Elie Tamer, "Two Hundred Years of Bankruptcy: A Tale of Legislation and Economic Fluctuations", Working Paper 97-25, Institute for Policy research, Northwestern University, July 1997.

[28] A perfect example is Earling, *Whom to trust*, p. 298: "Since the mercantile agency system is the direct outgrowth and is so inseparably connected with and dependent for its support on our credit system, and since, also, it has come to be recognized as an indispensable adjunct to present conditions and methods of doing business, it may not be amiss to give a brief outline of its origins, growth and present status".

[29] This has been emphasized before e.g. Norris, *R.G. Dun & Co. 1841-1900: The Development of Credit Reporting in the Nineteenth Century*, London: Greenwood Press, 1978.

incident – say when the debtor missed a payment) the network was used to mobilize local technologies in order to coerce the debtor. The link between lawyers and the Agencies we call ecological, because the expectation by lawyers that they would receive valuable collection work led them to tender their reports freely – a big saving for the Agencies but also a reflection of the existence of a common interest between lawyers and Agencies.[30]

Minter v. Bradstreet, a libel case, reveals much about the local politics of watching.[31] In 1890 the plaintiffs, a successful Sedalia, Missouri, merchant house who had "at different times employed a lawyer by the name of William Parmerlee who was an active, energetic young man, and whom they desired to assist" saw fit "for reasons satisfactory to themselves", to employ another attorney. An infuriated Parmerlee "proposed to get even with the Minter Bros., and that he would cause their ruin, or as he expressed it once, that, in a business sense, he would have them under the ground inside of 90 days." In front of another member of the Sedalia bar Parmerlee bragged that Minter Bros. could not afford to act that way towards "us, as attorneys" and, "God damn them" he would send Minter Bros. "under the ground in 90 days, and you will see it". On another occasion he predicted a "big old failure, and we will have some claims for collection."[32]

[30] In the late 19th century, one Mercantile Agency advertised in newspapers its performing credit reports and "Commercial Law and Collection" Publicity by Commercial Agency Tappan, McKillop and Co., American Lawyer, p. 360 (1895)
[31] Minter et al. v. Bradstreet Co, 174 Mo. 444, 73 S.W. 668.
[32] Ibid.

Minter's lack of luck was that, as the court report stated, "this same Parmerlee was the person whom [Bradstreet] had employed at Sedalia to procure information concerning the merchants there": this was the strategy Parmerlee intended to use to "get even" with Minter Bros. and he began sending adverse reports about Minter Bros to Bradstreet. Charles Minter, upon having some creditors wiring about his "facts", while others were calling off their loans, went to meet with Guy Cope the representative of Bradstreet's rival Dun in Sedalia and became convinced that the rumors came from Parmerlee. He then went to New York by way of Chicago, trying to stop the hemorrhage of adverse news. He had interviews with Bradstreet managers to whom he produced complete financial statements of his firm. But the rumors were slow to die and kept cropping up. The next thirteen years were a frustrating hunt of Bradstreet through US courts, ending in February 1903. While Minter Bros.'s diligent and dedicated efforts eventually secured a verdict for them, the case underscores the role of Mercantile Agencies' lawyers-correspondents as powerful local mercantile "notabilities" who "owned" other people's credit: as Minter Bros learnt, it was not prudent to pick a quarrel with them.

The Functionalist Narrative

Supporters of the functionalist narrative in business history hold that Mercantile Agencies succeeded because they were needed. Moreover, they argue that economic necessity gave legitimacy. A key feature of their story is that the

growth of credit reporting agencies was abetted by the reasonable stance eventually taken by the American legal system, in allowing the business to prosper. On the one hand, common law would have given US judges flexibility and enabled them to depart from the standard set initially by Britain and which was adverse to the *public* circulation of commercial information.[33] On the other, US judges saw the necessity of the mercantile system and ruled so as to allow the agencies' continued existence. It is argued that the accommodation of rating by US law occurred through a generous interpretation of what constituted privileged communications, or more technically "Qualified Privilege." As we saw, "Qualified Privilege" was something akin to saying that the agencies were "duty-bound" to report – and in this interpretation they were, for growth's sake. If a rating producing firm could convince judges that a communication was privileged, the burden of proof would fall upon the accuser to demonstrate that a factual error had been maliciously made. Due to the difficulty of proving malicious intent, defendants were exceedingly likely to win the case. According to previous writers, US judges and juries would have progressively extended to the newcomer Mercantile Agencies the protections of Qualified Privilege.

This view is widespread and its most recent statement is in Rowena Olegario's work on the development of mercantile rating where she argues that gradually,

[33] Common Law initially held that "any printed or written words are libelous which impeach the credit of any merchant or trader by imputing to him bankruptcy, insolvency, or even embarrassment, either past, present, or future, or which impute to him fraud or dishonesty or any mean or dishonorable conduct in his business, or which impugn his skill or otherwise injure him in the way of his trade or employment." This is from Odgers and Eames (1905) pp. 30 a standard UK textbook on libel and slander. This late opinion can be tracked back in history in earlier British sources.

over the post-Civil War era, "court decisions helped to legitimize the agencies' activities" through incrementally more generous application of Qualified Privilege.[34] Coming to this view is natural. It is indeed what a long tradition of legal scholarship has argued since the work of Joseph W. Errant, a Chicago lawyer. At the time when his *Law relating to mercantile agencies* was published, Errant was the Secretary of the newly created Sunset Club, which had been organized in March 1889 with the stated purpose of providing "good fellowship and tolerant discussion among business and professional men of all classes."[35] Errant's essay provides readers with a guided tour of the subtleties of Qualified Privilege and claims that the growth of mercantile rating received favorable reception and treatment. When they met with the Agencies, he says, US courts acknowledged "that these establishments were new forces in the community", "necessary servants of the commercial world", and "they felt themselves called upon to assign to them their proper sphere". They recognized that "through the needs of trade and commerce and the rapid growth of the business of the Mercantile Agencies some conditions had arisen which demanded recognition. The Agencies were allowed the means of carrying on their work."[36] In support of

[34] Olegario (2003), p. 132, and Olegario (2006), "The continuing quest for legitimacy", p. 164-73.
[35] He was the author of a small pamphlet *Justice For the Friendless and the Poor: An Address Before the Illinois State Bar Association*, January 11; Before the Society for Ethical Culture, of Chicago, January 29, 1888. Errant's essay crops up in Jerold S. Auerbach's *Unequal Justice: Lawyers and Social Change in Modern America*, Oxford University Press 1977. See the material provided by the University of Illinois at Chicago on the Sunset Club Collection. Questions related to free speech was a major discussion topic of the first meetings of the Club 1889-1891, See W.W. Catlin, Echoes of the sunset club, (Chicago : Howard, Bartels and Co), 1891.
[36] J. W. Errant, *The law relating to mercantile agencies* (Philadelphia: Johnson and Co), 1889. The book is said to be "the Johnson prize essay of the Union College of Law for the year 1886". This is obviously an update, given the post 1886 quotations. See, p. 5, 6 and 39.

his analysis, Errant quoted opinions such as Judge Van Syckel in King v. Patterson in 1887 that "business interests are so ramified at this day that large enterprises cannot be successfully conducted without a comprehensive survey of the whole field of industry […] Business methods have changed; […] It is the pride of the common law that it is sufficiently broad and elastic to adapt itself to the exigencies of the times, and to adjust itself to the new and ever-varying conditions that may arise in the progress of the age."[37]

Errant may be said to have set the tune for much subsequent writing. A quarter of a century later a carbon copy wording would be found in Jeremiah Smith's two articles in the *Columbia Law Review* where he enthused the by-now conventional hymn to American judges' practical spirit and concluded with three cheers for rating and the Common Law.[38] Likewise, his views inspired later historians' work such as Roy A. Foulke's biography of Dun and Bradstreet published 1941 (by then Dun and Bradstreet had merged and some years later they would become a subsidiary of Moody's). Faithful to the lawyers' tradition Foulke explained how, thanks to the indefatigable work of the agencies' lawyers such as the "venerable New York city attorney" Charles O'Connor and his "most lucid explanations of the essential need of centralized credit reporting organizations as a stimulant to trade" the courts after "several intermediate

[37] King v Patterson, 49 N.J.L. 417, 9 A. 705.
[38] Smith (1914a), p. 202, Smith (1914b), p. 310; and p. 315 quoting Cockburn C.J. "Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live".

steps", finally recognized that the doctrine of privileged communication should be applied."[39] Foulke dealt with the precise timing and chronology of this alleged transformation somewhat off-handedly, but judging by the cases surveyed the reader is led to conclude that the matter was settled quite early (he gives no cases beyond 1882).[40]

How Victors Write History

One problem with this tradition is that it is strenuously what the Mercantile Agencies were arguing. Indeed, the scholar uninitiated in the intricacies of libel law who finds herself navigating the uncharted seas of legal decisions on mercantile agencies is greeted by a welcoming line of amicable lighthouses, adroitly arranged by the Agencies, their friends and hired guns to guide her towards the "qualified privilege" harbor. On her way, she is helped with the directions of luminaries, such as the high-profile Charles O'Connor, at one point a candidate for President who shines and shows the way. If she looks for books to inform her, she is immediately tended a convenient corpus of relevant legal decisions together with pleas, etc. and cannot feel but gratitude to the Mercantile Agencies whose name appear as "publisher" on the useful volume.[41] Should she

[39] Foulke, Sinews, p. 294-5.

[40] This narrative was the starting point of subsequent characterizations by business historians such as Madison and Olegario. Concluding his essay on the triumphs of rating, Madison argued: "The two leading agencies survived … with little difficulty the long years of legal suits" (p. 185 in James H. Madison, "The Evolution of Commercial Credit Reporting Agencies in Nineteenth-Century America", The Business History Review, Vol. 48, No. 2 (Summer, 1974), pp. 164-186).

[41] Classic examples, usually quoted as evidence supporting the flexible common law thesis include the article published in *Hunt's Merchant's Magazine* quoted in text as Dun, Barlow and Co, 1873, *Reports of*

want to read about opinions in the contemporary press, she will find them included in the same volume: that is how she discovers the classic *Hunt's Merchants' Magazine* article of January 1851 where the author states his intention to "remove" the prejudice that existed among merchants against Mercantile Agencies. As the true salesman does, the author claims that at first, he had shared the "prejudice" existing "in some quarters" against the agencies but, "after having taken pains to inform" himself, he had learned that the prejudice was, as prejudices go, "founded in ignorance".[42] Who would want to end up in the company of the ignorant agency critics?

Dun's archive reveals the efforts of the agencies to ensure that the right kind of law would be printed. For instance, in 1888, Dun wrote to R.G. Dun's chief counsel Wagner, asking him "Inasmuch as the case is so very important, do you not think we had better reprint the judgment? If you will prepare it for the printer we will print it together with the Boston judgment at once. The New Jersey judgment, the Boston case, and this Todd case ought to be preserved in the shape of a volume."[43] Dun was constantly chiding local attorneys to ensure that favorable judgments were reprinted in legal journals, and Dun's Wagner often sent transcripts of favorable judgments to rural lawyers to be deployed in courts that might not yet have heard the new opinion.[44] (This propagandizing extends

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the four leading cases against the Mercantile Agency for slander and libel.

[42] "The Mercantile Agency", *Hunt's Merchants' Magazine*, p. 46 (Volume 24, pp. 46-53).

[43] R.G. Dunn to Samuel Wagner, Esq. June 21st 1888, "Joseph A. Todd vs. R.G. Dun & Co." Box 3, f. 14, Dun and Bradstreet Corporate Records, Baker Library.

[44] See e.g. a letter from Wagner to Rice which reads "I forwarded to you a few days since a copy of some published cases, turning down the leaves at places where references may perhaps be of some use to you.

far into subsequent history: In 1941, Foulke's book was published by Dun and Bradstreet. It wore on its cover the beautifully indentured seal of the merged firm showing the Man From the East, locked hands, eye to eye, with the Man From the West: "Man's Confidence in Man").

A theme that is omnipresent in the legal correspondence of Dun is the importance of cultivating a good published record before the courts. The examples are legion but a few quotations give the flavor of Dun's concerns, which led them to litigate selectively so as to organize the proper story. This led them to either push forward or hold back with an eye to narrative strategies. For instance, in the 1892 case Bleher v. Dun, the Kentucky regional manager Rolph noted the lack of precedent in the Kentucky courts, and wrote to Dun headquarters urging that a favorable record be established: "Mr. Eastin tells me that as we have never had a decision in the Kentucky Courts and as the case we have now is a very good one for us, that it will be as well to let the case be decided in Court, and in this I agree because I do not believe we could get a better case as far as we are concerned then we have in this and the issue now presented had better be met."[45] The same sentiment but with opposite implications is expressed in the matter of Maier & Berkele vs. R.G. Dun & Co: "I

There are a good many later decisions upon the point of privileged communications to which I shall be glad to send you the references if you care to have them." 4th April 1885 in "John Zucca vs. R.G. Dun & Co." Box 5, f. 7, Dun and Bradstreet Corporate Records, Baker Library. See also Letter of Wagner, 5th June 1886, "I am able to send you enclosed a portion of the draft of the recent case decided in the Circuit Court of the United States in Baltimore… In case you should have occasion to use the unreported cases of the Agency, you can get the material for the Krantz case by writing to Messrs. Douglass & Minton…" in "James M. Elliott vs. R.G. Dun & Co." Box 4, f. 2, Dun and Bradstreet Corporate Records, Baker Library.

[45] W.T. Rolph to head office in Bleher v. Dun, Jan 22nd 1892, Box 8, f. 8, Dun and Bradstreet Corporation Records.

feel somewhat concerned about the state of litigated cases against the agency in Georgia" wrote Samuel Wagner, "The temper of the Courts there is very unfavorable…."[46] The agency's concern intensified as the case headed to the appeals courts. "The matter is of grave importance," wrote Dun's lawyer "not so much because of the amount involved as because, if an appeal is taken, the decision of the Appellate Court will be reported in the regular series of the Circuit Court of Appeals Reports as well as the Federal Reporter. If the decision is averse to the defendants, the precedent will lend to many attacks upon the defendant in the Federal Courts throughout the country."[47]

Beyond the Appalachians

But there also existed another narrative and this one expressed concerns about the agencies' quality and doubts about their morality. Contemporary newspapers reflected widespread discontentment with the agencies' slanderous business and unchecked profits: was it the case that the Agencies' "evil speaking for the sake of gain is justifiable?" as one reader of the New York Times asked in 1851.[48] The anti-agency sentiment manifested itself in two 'tell-all' exposes of

[46] Samuel Wagner 18th November 1896 to Messrs R.G. Dun & Co. New York, "Maier & Berkele vs. R.G. Dun & Co." Box 11, f. 3, Dun and Bradstreet Corporation Records, Baker Library.
[47] Walter R. Brown Esq, to R.G. Dun and Co., December 30th, 1896, , "Maier & Berkele vs. R.G. Dun & Co." Box 11, f. 3, Dun and Bradstreet Corporation Records, Baker Library.
[48] October 29, 1851, letter to the Editor of the New York Times. The writer added that he had "been repeatedly solicited to patronize these Agencies, but [had] declined, as well from conscientious motives, as a conviction of the worthlessness of these reports" Writing to the New York Times in 1900, a Yan Yorkel commented: "The Recent failures of W. L. Strong & Co. of New York City and C. H. & F. H. Stott of Stottville, Columbia County, N.Y., to my mind point to a very serious business moral, to wit, the ratings of business concerns quoted by the various mercantile agencies. The ratings for both of the above-mentioned concerns, by one of the best recognized mercantile agencies in this city… were A plus A1, which means a

agency (mis)conduct -- the corpus of an "underground" literature on Mercantile Agencies. The first was published in 1876 by one Thomas Francis Meagher and "exposed" the mercantile agencies' "exploitive system". The book showed the incoherence of ratings by different firms. There were large discrepancies between capital data across agencies.[49] Another criticism was leveled at the inquisitive nature the business of rating. Like the writer of the *New York Times* letter of 1851 who dubbed the Agencies "a self-constituted band of spies", Meagher repeatedly compared mercantile agencies with the Spanish Inquisition.[50]

Meagher also accused the Inquisition of subverting Democracy by lobbying legislatures. He recounts one instance in 1874 when a proposal was considered by the Pennsylvania legislature to increase the liability of Mercantile Agencies.[51] Meagher claims the Agencies circulated a petition and induced businesses they rated to sign that petition "on the promises of *special* recognition from the Agency" (meaning they would be rewarded through higher ratings).[52] After this

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capital from $750,000 to $1,000,000 and the highest credit. The facts, as chronicled today, are that neither of the concerns has a dollar… …There are numerous cases, which would go to show the utter worthlessness of the so-called ratings of mercantile agencies." Yan Yokel, "Value of Mercantile Ratings" *New York Times*, November 18th, 1900.

[49] Thomas Francis Meagher, *The Commercial Agency "System" of the United States and Canada Exposed: Is the Secret Inquisition a Curse or a Benefit?* New York, 1876, p. 123-43.

[50] A search reveals he used the word "Inquisition" seven times. This was a widespread metaphor. See, for instance the article in the *Toronto Mail* quoted by Meagher, p. 157.

[51] The law would have provided that "any commercial agency who shall knowingly, heedlessly or willfully exaggerate or misrepresent by writing, printing or otherwise, in book form or otherwise, the credit, financial responsibility, or business condition of any banker, merchant... shall be guilty of a misdemeanor." (Meagher p. 82).

[52] Meagher pp. 83; As evidence, Meagher claims that in 1874 "the contingent or expense accounts of the Agencies show a marked rise in these spring months" reflecting bribes, expenditures on newspapers, etc., and that this was not an isolated case (1876, p.83). We failed to identify this dramatic increase in one available overhead expenses ledger V. 24, Cash Book, 1872-1875, Dun & Bradstreet Corporation Records. However, the episode was sufficiently colorful to be worthy of a description in Erastus Wiman's (Dun's one-time partner's) memoirs wherein he recounts the lobbying campaign against the Pennsylvania

episode, the agencies began collecting intelligence on forthcoming legislative policy.[53]

The other notable anti-Agency pamphlet was written in 1896 by William Yates Chinn.[54] Beyond the difference in literary style and the time lag (he was writing in the "Populist 90's" and draws his images from the predilections of his time) there are many parallels. Chinn uses the Spanish Inquisition metaphor. Mercantile agencies are "credit spies", a "self-appointed bureaucracy whose secret work is first of all in its own interest".[55] "Are we a nation of swindlers and sharpers, or are the agencies against commerce? … A private organization, or public one as for that, put in motion for spying upon the private conduct and pecuniary standing of the people… is a perversion and abuse of the civilized rights of society".[56] Just like Meagher, Chinn (who found the "elasticity" of Common Law to be just "another handle for the sophist"[57]) pronounced the agencies to be "against commerce" and the country at large. Like Meagher, he

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legislature writing: "Occasion arose which made it advisable to concentrate the sentiment of the mercantile community upon the State Senate of Pennsylvania, in opposition to some adverse legislation threatened against the Mercantile Agency." Erastus Wiman, *Chances of Success: Episodes and Observations in the Life of a Busy Man*, New York: Stanley Bradley Publishing Co., 1895, pp. 257.

[53] Meagher, (pp. 85), reproduces a Dun company memorandum from January 1875: "We particularly wish to impress upon you the necessity of constantly perusing the official reports of your State Legislature, in order to discover if any bills or resolutions are introduced etc." In our research we came across evidence suggesting that Meagher's claims should not be taken lightly: In a letter to Wagner from Dun on March 1st 1895, Dun complains that "The Bill in Minnesota, of which we suppose Mr. Corcoran has sent you a copy, would effectually bar Agency business in that State if passed." (Dun to Wagner March 1st 1895, Box 12, f. 3, Dun and Bradstreet Corporate Records, Baker Library). More overtly, Wagner writes to the Dun partner Douglass in 1897, inquiring "Have you a list of the States whose legislatures will meet this year, and if so, will you kindly send me a copy of it? I want to see, some time in advance, where any efforts at bad legislation may be possible." (Wagner to Douglass, 22nd November 1897, "L.C. Wahl vs. R.G. Dun & Co." Box 6, f. 16, Dun and Bradstreet Corporate Records, Baker Library.)

[54] William Yates Chinn, 1896, *The mercantile agencies against commerce*, Chicago: C.H. Kerr.

[55] Chinn, 1896, p. 62, 122.

[56] Chinn, 1896 181-3.

[57] Chinn, 1896, p. 109

disputed the agencies' having either mandate or competence.[58] Like Meagher, Chinn felt Mercantile Agencies were ready to use all means available (lobbying, bribery, and the influence of courts) to produce favorable of law.[59] And like Meagher, he found that the agencies sold inconsistent grades: one entity was reported "worth a fortune and tip-top character by one mercantile agency" while "another marks him down below zero".[60] No wonder grades and reports lacked merit: they were produced by "cock-sure youngsters" coming down to a given place "once a year to spend a day or two in reporting the business men in this town who may number some hundred and fifty".[61]

In the business history literature, arguments by Agencies' critics have been disparaged. Meagher's allegations have been judged on the basis of a company-wide memo produced by Dun claiming that the whistle-blower was a disgruntled (and dishonest) former employee.[62] Although Norris presents the

[58] Chinn, p. 167: "Who gave the mercantile agencies the authority to break men down in character and in their credit responsibility?… Often adverse reports are told of men, which have no foundation in fact."
[59] Chinn writes (1896, p. 100): "For fifty years the mercantile agencies have been striving to build up a law unto themselves, and in proportion as they have secured judicial expression, employing for its direction the shrewdest talent that money can procure, they become more and more arrogant"
[60] Chinn (1896), p.63. Limited empirical evidence suggests that there was at least an element of truth in these criticisms. The recent work of Carruthers and Cohen (2010) using records from R.G. Dun & Co, provide a modern assessment of the ability of mercantile rating to predict future defaults. Their study examines whether ratings for 1875-1877 have a predictive power for failure rates during the subsequent period (1877-1884). The authors find that "published ratings worked only some of the time" and that ratings were "unreliable and variably useful predictors of failure" Carruthers and Cohen (2010, pp. 1). Note that their study does not attempt to determine whether mercantile agencies' ratings had a positive marginal effect on forecasts, over the cost of the rating.
[61] Chinn 1896, p. 228. He continues: "You see his youth, and judging from his actions one would not suppose he was a maker of people's reputation". In the end, "the unsuspecting 'lamb' might lie down together after resolving which is the more trustworthy for a business man to speculate on, the mercantile agency reports or the stock gambling quotations" (p. 61).
[62] The memo reads "Thomas Francis Meagher alias Chas. F. Maynard, is, as his real name implies, the son of Irish parents." 'An attack on the Agency' cited in James D. Norris, *R.G. Dun & Co. 1841-1900: The Development of Credit-Reporting in the Nineteenth Century*, Greenwood Press: Westport, 1978, pp. 126-127.

internal company document in a somewhat critical light, subsequent historians have been less careful. Madison writes that Mercantile Agencies triumphed over the "muckraking attacks of Meagher and others".[63] Chinn has been handled in a gentler way,[64] but if historians worry about Meagher being a former Dun employee, they should worry about Chinn just as well. For the archives of the Dun Corporation show one William Yates Chinn to have been the former manager of Dun's Austin, Texas, office in the late 1880s.[65] Chinn's name crops up in corporate correspondence concerning a libel case in 1889 involving a Mr. Achilles and one can recognize Chinn's somewhat swollen writing style, then employed by the Agency: "Accepting our motto that we both protect and promote trade, in this case I have the consciousness that instead of libelous injury accruing to any one by reason of the reports that went from this office on Achilles, a plot was defeated, and the trade was protected to the extent of thousands of dollars."[66] Going by the conflict of interest yardstick, we are left with nothing.

Qualified Privilege Qualified

[63] See James H. Madison, "The Evolution of Commercial Credit Reporting Agencies in Nineteenth-Century America", The Business History Review, Vol. 48, No. 2 (Summer, 1974), pp. 164-186. Olegario's characterization of Meagher as a disgruntled employee stems from the internal company memo cited in Norris (1978 pp. 126-127).

[64] For instance Olegario argues that Chinn's "rambling and bizarre" book, although "meant to convey the inadequacies of the system" in the end provided a description that "in fact did not differ materially from those found in later textbooks on the subject"; We have no idea what those "textbooks" are.

[65] His book has an introduction by a Texas lawyer, Dudley G. Wooten.

[66] Letter from Wm, Y. Chinn, Manager, Austin Texas to Edward H. Gorse, Esq., Galveston Texas, January 9th 1889, Folder 2, Box 7, Dun and Bradstreet Corporation Records, Baker Library.

The previous discussion underscores the limitations of proceeding with the "ostensible" history of rating and trying to read motives in pronouncements. Indeed, the first impression that not all was well in existing narratives came from reading the R.G. Dun lawyers' brief prepared for Macintosh v. Dun. Unlike what the Agencies' public pronouncements proclaimed and what the dominant tradition in history had argued, the Agencies' own assessments of the degree of protection afforded by courts through Qualified Privilege was that it was limited at best.[67] In other words, by focusing on Qualified Privileged, Mercantile Agencies may not have confused the contemporary public but they surely lost subsequent historians working with second hand sources.

The revelation and surprise from the Macintosh v. Dun brief was that a more potent focus than whether Qualified Privilege was extended to the Agencies was to divide, as the brief did, agencies' output into three "products" and recognize that courts dealt with different products in different ways. A subscription to either Dun or Bradstreet included three products. First, subscribers would have the right to make a number of inquiries and would receive in return as many reports, handwritten, typed or oral, all confidentially made to the customer; second, the subscriber would receive the latest edition of the Reference Book (of which several editions – typically four – existed). These had been started in the late 1850s and contained a list of individuals, with summary information on their rating of "capital" and "credit"; and last were the so-called Notification Sheets,

[67] Dun and Bradstreet Corporation Records, pp. 2-3 v. 23, Dun and Bradstreet Corporate Records, Baker Library.

which completed the reference books by providing higher frequency updates. If the status of a given entity changed, the sheet would list its name with a mention such as "insolvent" or "call at office".[68] As Dun lawyers conceded, only for the first class of product "where the publication was made to a subscriber upon his special request" had the judges "held the publication privileged" (Ibid. pp. 4). For the rest, they found trial results to have been damning: neither in the one case they identified as involving a reference book (Bradstreet v. Gill) nor in any of the seven cases involving a notification sheet had the communication been held to be privileged. In other words, a substantial part of the Mercantile Agency's "package" could not be considered as protected, even as late as 1908.

Digging further, we found that the Agencies' insiders had always known this. For instance, writing in 1885 Dun's general counsel had expressed this fact forcefully noting: "The great danger in this Zucca Case seems to me to lie in the fact that the complaint is the publication of an alleged libel in the 'Notification Sheet', and not by means of a reply to a special inquiry. As yet there has been no decision that the Notification Sheet is a privileged communication, but, on the contrary, where there has been occasion to refer to it, the courts have not hesitated to say that it is not a privileged communication except where it is sent by the Agency to those having some special business relations with the persons

[68] Dun and Bradstreet Archive, The Mercantile Agency Notification Sheet, p. 1, July 20, 1878. Failure related issues include "assigned" (3), "bankruptcy" "in the hands of receiver" or "failed" (6) or "in sheriff's hands" (2). Liquidation includes "selling out at cost to retire", "dissolved" and "quit business". Lawsuit is mentioned as "suit" or "sued".

whose names are mentioned in it, whereby they have interest in knowing all about them."[69]

This perspective on privilege matches the findings of influential law treatises of the time, such as Judge Cooley's (by influential, we mean that they were often quoted in supporting decisions, or by contemporary lawyers such as Errant). Discussing qualified privilege, Cooley (1878, p. 533) stated in 1878 "but the reports of a mercantile agency to its customers are not privileged" and later clarified – or qualified – (Cooley 1883, p. 527): "But the reports of a mercantile agency published and distributed to its customers are not privileged", by which was meant that the volumes and notification sheets were not privileged.[70] Suggestively, Chinn's critical book quotes Judge Cooley's *Torts* and *Constitutional limitations*.[71] Since Chinn was a former Dun employee who had dealt with a libel case, his awareness of Cooley reinforces the impression that Mercantile Agencies' insiders knew very well that a substantial part of their output was not privileged at all.[72] For Cooley, the criterion used to discriminate amongst communications was the nature of the support – and its public or confidential nature. It was the

[69] Letter of Wagner to Rice, 4th April 1885 in "John Zucca vs. R.G. Dun & Co." Box 5, f. 7, Dun and Bradstreet Corporate Records, Baker Library.
[70] Cooley, Thomas McIntyre, 1878, A treatise on the constitutional limitations which rest upon the legislative power of the states of the American union, Little, Brown, and Company. Cooley, Thomas McIntyre, 1883, A treatise on the constitutional limitations which rest upon the legislative power of the states of the American union, Little, Brown, and Company. Same language in the 1890 edition (Cooley 1890, p. 524), Cooley, Thomas McIntyre, 1890, A treatise on the constitutional limitations, which rest upon the legislative power of the states of the American union. 6th ed., with large additions by Alexis C. Angell. Boston:…,Likewise, Cooley (1888, p. 255 Cooley, Thomas McIntyre, 1888, A treatise on the law of torts, Chicago, Callaghan and Cy.) states that if he who makes his business to furnish information on tradesmen etc. "sends such information to all who engage his services, without regard to their special interest in any particular case, his business is not privileged, and he must justify his reports by the truth".
[71] Chinn, 1896, p. 134, 135 and in many other places in the book.
[72] As Cooley was quoted in several decisions, his treatises were known to any participant in a libel case.

very act of publishing and circulating a credit opinion that removed the privilege. Because third parties, not directly interested in the credit of a person would nonetheless, as subscribers, read about that person, qualified privilege would not apply. Importantly therefore, a large part of the products sold by Mercantile Agencies (and arguably a very valuable part, given the success met by the Volumes and Notification Sheets) were not privileged.

The judicial hostility towards published reports raises an important point that helps to pin down the "legal" boundary that existed between the public and private sphere. That the communications of Mercantile Agencies were not privileged unless made confidentially to a customer in response to a specific inquiry by that customer means that the law sought to ring-fence individual credit against public scrutiny. This is seen from the fact that secrecy, confidentiality, in sum the protection of a high degree of privacy in the issuing of commercial reports was what made these reports eligible for protection by the doctrine of qualified privilege. Publicity by contrast, as illustrated by the annual volumes and updates, did not benefit from this protection: the agencies could turn the spotlight on any individual or corporation, but they were made liable for that. In other words, the Common Law was drawing a rather clear line between privacy and publicity in commercial matters. Surveillance was legitimate if kept within bounds. Individual creditors had a right to keep an eye on their investment and could peer into the business of their debtor. But passersby, third parties, in other words "the community", had none.

The Law of Mercantile Agencies Revisited

Had there been a case extending Qualified Privilege to Reference Volumes and Notification Sheets the Mercantile Agencies' lawyers would have found it. That Dun lawyers did not shows that there were none. Nonetheless, it is useful to delve further into the evidence and provide a more complete picture of the situation during the period under study, focusing on the US (as they were about to deal with London Judges, Dun lawyers mixed US and Dominion cases). To that end, we compiled the published record of the Mercantile Agencies on the basis of the American Law Reports and secondary sources. We identified 28 libel cases against rating agencies spanning the period from 1853 to 1914 (date of final decision). For those court transcripts that described the origin of the libel claim we could further identify the incriminated support (Confidential Inquiry or CI, Reference Volume or RV, Notification Sheet or NS) and assess whether the judge perceived the rating product that the Agency had used when it committed the libel to be privileged. This gave us a total of 18 cases.[73]

The record for the agencies' Reference Volumes and Notification Sheets is unequivocal. In every reported case, the communications of the mercantile agencies were deemed unprivileged. There are six cases on Notification Sheets

[73] Of the 28 cases, using Westlaw, we were able to access court transcripts for 26 (Two of the cases cited in the American Law Reports – Sherwood v. Gilbert (1870) 2 Albany LJ 323, and Commonwealth v. Stacey, 8 Phila. 617 (Pa. Quar. Sess. 1871) – did not have accessible trial reports, and as a result we could not determine the winner or loser of these two cases). Within the set of 26 disputes, 19 had been first tried in a lower court, and our transcript of the dispute came from an appeal decision.

in which the protections of QP were not extended, and one example of a case on the basis of a libel in a Reference Book. These also represented the minority of the reported cases – a finding that may reflect the fact that in similar cases the outcome was known and a settlement arrived at before. The evidence for Confidential Inquiries is more mixed (again, consistent with the Dun memo). We could identify 11 cases involving CIs. In the vast majority of them (9) the general principle – that a confidential inquiry distributed exclusively to subscribers having a special interest in the report is privileged – was upheld. However, despite their broad acceptance, it would *not* be true to say that CIs were universally acknowledged as privileged.[74] Unsurprisingly, our finding is consistent with (but a tad less optimistic than) the Macintosh v. Dun memo by Dun lawyers.

Of course, as we have already stated, privilege did not extend to cases where the plaintiff could prove malice and thus, unsurprisingly, CI cases that went to the higher courts included a significant fraction wherein malice was invoked (since the plaintiff would have felt he could show that the communication had been maliciously made). We have already discussed Minter v. Bradstreet where Minter won by exposing Parmerlee's unsavory behavior. Another case was Mower-Hobart Co. v. R.G. Dun & Co. In both cases, the judges found against the

[74] Furthering this interpretation of courts being parsimonious in their granting of privilege, in Douglass v. Daisley, the court held that if the agencies were negligent in exercising due care with the information they had been given then the protection of privilege would no longer be afforded: "Though the occasion is privileged, the privilege does not carry immunity to heedless and careless management in forwarding information." Douglass v. Daisley, 57 L.R.A. 475, 114 F. 628, pp. 5.

defendant, and as a result, while privilege was recognized in 9 out of 11 cases the agencies only won 7 of these.[75]

The two cases where the Agency's claim to privilege for a CI was rejected (and the agencies lost as a result) are worth examining. In Johnson v. Bradstreet in 1886, the Georgia Supreme Court argued unequivocally that qualified privilege could not extend to rating agency communications – including CIs. The Court dismissed the idea that a mercantile agency communication could be a public or private duty thus garnering the protections of qualified privilege.[76] Negating the notion of a trend towards greater protection from liability, Pacific Packing Co. v. Bradstreet – a case already mentioned – was tried in 1914 on the basis of a confidential inquiry, but again the judge's ruling was a broad indictment of the idea that Mercantile Agency communications of whatever sort were privileged (and since RV and NS never were, this meant CI).[77]

Thus the agencies' most protected product – the confidential report – faced large pockets of resistance in the American Judiciary. The cases where plaintiffs succeeded in proving malice were in Missouri and Georgia and the two cases lost on the basis of a CI were in Georgia and Idaho. This stands in contrast with New York State where the agencies faced their first severe litigation in the late 1840s and early 1850s and where indeed protection was extended to CIs early on.[78]

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[75] Minter v. Bradstreet 174 Mo. 444, 73 S.W. 668; Mower-Hobart Co. v. R.G. Dun & Co. 131 F. 812;
[76] Johnson v. The Bradstreet Co., 77 Ga. 172, 1886 WL 1483 (Ga.).
[77] Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 P. 1007.
[78] And being firmly cemented earlier than Errant suggested, by the 1868 case Ormsby v. Douglass, 10 Tiffany 477, 37 N.Y. 477, pp. 2-3. The existence of a geographic schism is brought out in the opinion in

Therefore CI afforded substantially greater legal protection in the Agencies' base of New York than in the South and West, where the courts were undoubtedly more sympathetic with the view of the beleaguered and oft-libeled merchant than the New York-based wholesale supplier.[79]

Protection of Federal Courts?

Our evidence of a contrast between East and West takes us to a possible refinement of the conventional view of an allegedly enlightened attitude of courts at large – a refinement which readers of an earlier draft of this paper encouraged us to consider seriously, before rejecting it if we had to. Namely, we now explore the possibility of an evolution, not of the American judiciary at large as conventionally argued, but of federal courts. Indeed, a lingering theme in American history is the role of federal courts in helping create a "national" market. In a context of polarized economic relations between a creditor and industrial East and a debtor and agricultural West, federal institutions are often portrayed as having played the role of an arbiter and integrator. Such a role emerged as a counterpoise to the "protectionist" tendencies of states.

Douglass v. Daisley: "In jurisdictions where such communications are treated as privileged, the privilege is a qualified one…. In other jurisdictions, like Georgia, Texas, Missouri, Wisconsin… the privilege is made to depend somewhat upon the question of due care in the matter of selection of agents, and in respect to the means and manner of communication… In New York and many other jurisdictions, if the requisite occasion and relations exist, such communications, speaking in general terms, are treated as privileged…" Douglass v. Daisley, 57 L.R.A. 475, 114 F. 628, pp. 2.

[79] For instance, in 1891 south Dakota passed a law forcing Mercantile Agencies operating in the state to make a deposit of $50,000 as a liability fund, and forcing them to register with the state and pay a 2% tax on profits, see The State v. Morgan (1891) 2 S.D. 32, 48 N.W. 314.

Illustrative of this tradition, Tony Freyer has argued that, early in the 19th century, federal courts made a conspicuous attempt at sustaining the negotiability of credit instruments (although he recognizes that the extent to which they succeeded remained limited as there still remained substantial uncertainty as to which cases could be removed to federal courts and how such courts would act).[80] Freyer also emphasized the polarization between sectional interests during the post-Bellum era: Eastern Capital invested in the South and West faced deep-seated prejudices in local populations and came naturally to look towards federal courts (to which they had access on the ground of diversity of citizenship) as enforcers of their property rights, a process that accelerated with the Interstate Commerce Act of 1887.[81]

Charles McCurdy has characterized the techniques used by big business to shape the contours of the law in a direction that permitted vertical integration.[82] For instance, he discusses how the sewing machine company of I. M. Singer & Cy managed to measu fight a measure adopted in 1880 by the Virginia legislature that imposed heavy duties on salesmen of out-of-state products unless certain conditions, which Singer could not fulfill, were met. This was a blow for Singer, which operated a large network of salesmen. The Virginia court of appeals had

[80] Tony Freyer, *Forums of Order: The Federal Courts and Business in American History*, Greenwich, Connecticut, 1979.
[81] Diversity of citizenship is one of the factors that will allow a federal district court to exercise its authority to hear a lawsuit. It extends to cases between citizens of different states (or aliens) and applies when the party on one side of a lawsuit is a citizen of one state and the party on the other side is a citizen of another state. The requisite jurisdictional amount must, in addition, be met. This amount was set by the Judiciary Act of 1789, to $500. It was raised to $2000 in 1887 and $3000 in 1911.
[82] McCurdy, "American Law and the Marketing Structure of the Large Corporation, 1875-1890," JEH, 38(3), 1978.

sustained the statute, but the Supreme Court voted unanimously to reverse the decision arguing that "It was against legislation of this discriminating kind that the framers of the Constitution intended to guard, when they vested in Congress the power to regulate commerce among the several States."[83] According to McCurdy, one critical aspect of the role of Federal Courts would have been the de-legitimization of protectionist state legislation. This gave an advantage to large "national" litigants endowed with "sufficient resources to finance scores of lawsuits in order both to secure initial favorable decisions and to combat the tendency of state governments to mobilize 'counterthrusts' against the Supreme Court's nationalistic doctrines".

Mercantile agencies with their large resources, national networks and determined approach to litigation appear to be ideal candidates for such a strategy. And indeed, their owners and managers did think of some strategy along similar lines. There is also no doubt that, as far as rhetoric is concerned, agencies had chosen their side in the conventional discursive opposition between people from the East ("modern" men seeking legitimate protection of their just rights – or "Caesars") and people from the West ("fellow-slaves" of the capital in the East – or "yokels"). In a case tried in Kentucky in the early 1890s, Dun's local manager wrote to the New York office, cautioning that "I see no chance of a verdict being returned adverse to us, unless from a "hay-seed" jury. If we can get one good business man on the jury, I am satisfied we will win the case, but

[83] McCurdy, "Marketing structure", p. 641-2.

with the average class of jurymen obtained in our Courts there is danger on the account of prejudice against corporations and monied institutions &c. same as they will class ours."[84]

It also appears that this perception sometimes led counsels to recommend removing cases to federal jurisdictions. Wagner states as much in a letter of 4th April 1885 to local Louisiana attorney Rice: "The first question which arises in my mind is whether or not it would be well to have the case removed to the Federal Court. This, of course, is very much a question of discretion and good judgment, depending upon the particular circumstances of the case, and Mssrs. R.G. Dun & Co. would like to have your views on this point before deciding upon their instructions in that regard. Experience has shown them that as a general rule, a broader and more generous consideration of questions of law, and a fairer treatment at the hands of a jury, are to be obtained in a Federal Court than in a local State Court." [85]

Looking at the evidence underscores the more receptive consideration that the agencies received in federal courts. As the data for pleaded cases shows, agencies had the privilege of Confidential Inquiries (CIs) acknowledged in all (4 out of 4) cases that were tried before circuit courts.[86] By contrast, the 2 out of 7 judgments that rejected the doctrine of qualified privilege for CIs (Johnson v. Bradstreet and

[84] W.T. Rolph to Mess. R.G. Dun & Co. 23rd April 1892, Box 8, f. 8, Dun and Bradstreet Corporation Records.
[85] Wagner to Rice, 4th April 1885, Box 5, f. 7, Dun and Bradstreet Corporation Records.
[86] There was also one case lost before a Federal Court where the privileged nature of CI was recognized but the support of the libel arose from a publication in a Notification Sheet.

Pacific Packing Co v. Bradstreet) originated in State (Supreme) courts. In other words, even the right of writing a confidential report was not fully secured in State courts. Such differences in ruling attitudes were also understood by contemporaries (besides the agencies' legal research). In Mower-Hobart v. Dun, a case tried in the 11th circuit court for the district of Georgia the judge acknowledged the precedent in the Georgian State Supreme Court, but suggested that he, in contrast, would be prepared to view CI as privileged.[87] There is scattered evidence that some plaintiffs were concerned that cases be removed to federal courts. This is visible in the way some occasionally set their claims for damages as high as possible but just below the dollar amount constituting the minimum statutory threshold for decision in a Federal Court, an indication of plaintiff preferences for local courts.[88]

Note, however, that this more favorable attitude only concerned confidential inquiries, but certainly not other types of products sold by the agencies, which were treated as we saw, in a uniformly hostile manner by federal and state jurisdictions. It would be a vast exaggeration, therefore, to argue that mercantile agencies experienced something like the protection that other big businesses received from federal courts. That the McCurdy story needs serious qualification when applied to mercantile agencies is seen by the agencies' failed attempt to

[87] Mower-Hobart v. R.G. Dun and Co. (1904) 131 F. 812, pp. 3. (ultimately, the circuit court did not rule on the question of privilege as the plaintiffs succeeded in proving malice). On the support Federal Courts brought to business, see Tony Freyer, *Forums of Order*.

[88] See e.g. Wahl vs. Dun, where the stipulated damages were for $1,999, at a time (1897) when the minimum amount for removing a case to federal courts was 2'000 (Box 6, f. 16, Dun and Bradstreet Corporation Records).

place themselves under the protection of the Interstate Commerce Clause. In 1890 South Dakota made a law stating, among other things, that mercantile agencies had to register with the state, and that they had to deposit $50'000 with the state treasurer. Dun sent an agent named Morgan out to South Dakota, who never registered, and was fined. Dun, through Morgan, then appealed the case up to the South Dakota Supreme Court, where he lost, and moved it up to the Supreme Court. The challenge was that South Dakota's law was unconstitutional as it violated the interstate commerce clause - Mercantile Agencies felt they should be regulated by Congress. However, unlike what it had done for Singer and others, the Supreme Court affirmed the South Dakota judgment without issuing an opinion, in effect endorsing South Dakota's Supreme Court's view that "Mercantile or commercial agencies are not such legitimate and useful instruments of commerce or commercial intercourse as to put them exclusively under the regulation of congress, and free from state control, and a legislative enactment providing for the organization of such companies, and the regulation of their business within the limits of the state, is not an interference with interstate commerce, and is not void because in violation of the commerce clause of section 8 of article 1 of the constitution of the United States."[89] A grade might have been "sold" but it was not as legitimate a commodity as a sewing machine.

The Mystery of Mercantile Agencies

[89] Supreme Court of South Dakota State v. Morgan, 48 N.W. 314 (1891)

It is clear from the preceding analysis that the "business" (i.e. the entirety of the products sold) of a Mercantile Agency was not "protected" when the United States entered WWI, that there was no trend towards greater protection and that cases such as the one decided by Ailshie in Idaho in 1914 showed that uncertainty was still around. At that date, the core of the production of commercial opinion was a fraught endeavor that invited lawsuits for any misrepresentation.

The material from the Dun and Bradstreet Corporation Records, which we have quoted occasionally thus far, provides a way to assess the extent of the problem. These folders are far from an exhaustive compilation of all of Dun's libel disputes during this time period and indeed, for each of these disputes, the level of information varies from simply a letter stating the existence of the suit (when there must have been much more material) to detailed information on the circumstances of the libel, the legal strategy employed by Dun, settlements, etc. In other words, we are dealing with a somewhat random selection of documents that were salvaged by the Baker library, and it would be most correct to view the selection of cases as a sample of the agencies' libel disputes across the time period in question.[90]

If the haphazard process through which the material reached the Agency's archive stands for randomness, then the archival holdings of letters pertaining to 54 distinct libel disputes is a random sample of the 1880-1900 population of US

[90] The authors wish to thank Laura Linard of the Baker library for her helpful explanation of the documents' history and the process by which the Baker library acquired the collection.

libel complaints.[91] Using the published and the unpublished samples of libel cases, we can estimate the amount of libel-related litigation Dun faced using methods drawn from population ecology.[92] We use this approach to estimate that during 1880-1900 Dun was sued an estimated 95 times in the US for libel. Given that a libel suit might take at least a year to resolve – but much longer if it went through appeals – it is fair to say that during any given year Dun was litigating at least 5 libel cases. Furthermore, we strongly suspect 95 to be an underestimate of the true number (and then there were the cases in Canada and Australia).

These figures, along with the potentially large awards that could be granted in principle, meant a substantial liability. The first verdict in Beardsley v. Tappan in 1851 had been $10'000 (or $294,000 in purchasing power adjusted 2010 US dollars) at a time when the capital of a Mercantile Agency was around $30'000.[93] In Minter v. Bradstreet (1903) the judge ruled that plaintiffs could sue for both punitive and compensatory damages up to $100,000 (or $2,560,000 in purchasing power adjusted 2010 US dollars).[94] Frequently, correspondence in the archives revealed the plaintiffs original plea for damages. Using these reported figures

[91] The total number of cases concerning libel in the archive was 59, however, 5 of those cases were in Canada and we excluded them from the analysis to make the archival sample comparable to the published sample.

[92] Ecologists frequently use capture/recapture methods to estimate population sizes, where the number of repeated members in two random samples is used to infer how large the population must be. G.A.F. Seber, "A Review of Estimating Animal Abundance" *Biometrics*, Vol. 42, No. 2, 1986, pp. 267-292. This technique has been extended to epidemiology where it is used to estimate populations affected by disease from incomplete lists of patients; J. Wittes and V.W. Sidel, "A generalization of the simple capture-recapture model with applications to epidemiological research" *Journal of Chronic Disease*, Vol. 21, 1968, pp. 287-301. Note that Dun was defendant in 6 of the "law making cases" during the time period 1880-1900 discussed in the previous section, and, taken in conjunction with the published record of libel cases against Dun, we have records of 60 distinct cases against Dun.

[93] See Norris, *Dun*.

[94] Although settlements were rarely as large as implied in Minter v Bradstreet (1903) 174 Mo. 444, 73 S.W. 668.

for damage pleas, we conclude that the average libel suit against Dun was for $22,400 (in 1890 USD). Dun faced annual litigation risks in the region of $100,000. Based upon figures computed from Dun's balance sheets, average annual net profits for the company between 1886 and 1890 were $476,700.[95] Thus, annual libel claims for damages amounted to roughly 25% of Dun's annual profits. This is a lower bound estimate, because if the public learnt that many cases were lost, then more litigation would have followed, and our estimate based on those cases that were coming up when plaintiffs could believe they were unlikely to win would largely underestimate true figures. The survival of mercantile rating would have been at stake. And yet the company continually avoided large settlements and expanded trouble-free and profitably throughout the late-19th and early 20th centuries.

How the West Was Won

In a nutshell, the solution to this "mystery of rating" was strangulation. A letter in Dun's archive from General Counsel Samuel Wagner regarding a libel suit brought by one J.H. McCaughey and involving the Reference Book reveals the secret to the agencies successful litigation strategy. Given the situation, Wagner writes, "if the Plaintiff is seriously pressing his case, I would strongly advise that every effort be made to avoid going to a trial … and that every

[95] Authors' calculations from Box 18, f. 1-7, Dun and Bradstreet Corporation Records.

possible step be taken, by technical defense, or otherwise, to 'strangle' the case without letting it get to a trial."[96]

The tricks that the agencies relied upon in order to prevent successful libel cases can be grouped under 4 distinct headings: technical defenses, venue shopping, dragging out proceedings, and intimidation tactics. To this we might append a fifth category of subverting the plaintiff's counsel. We address these tactics sequentially. Dun's first line of defense against libel suits was that the structure of the mercantile business was complicated, and that made it technically challenging for plaintiffs to charge the company correctly. The exact legislation varied in each state, but in many, it was not possible for plaintiffs to charge Dun directly on the basis of actions undertaken by his agents. For instance, in the Wisconsin case Ingraham & Stendahl vs. R.G. Dun & Co., the case was dismissed on the technicality that "There is no statute in Wisconsin allowing service on an agent of a non-resident person or partnership."[97] In short, when Dun was accused of libel *he* was accused of libel, but the summons had been delivered to the regional Dun office. This mix-up was sufficient for Dun's lawyers to have the case thrown out. Although the plaintiff's lawyers could have re-filed in this, as in so many other cases, the time and cost caused them to abandon their suit. This common technical dismissal of the case was abetted with pleas to jurisdiction, where Dun's lawyers argued that the charges had been

[96] Letter by Wagner to Messrs. Wynne, McCart & Booty, 24 March 1892, Box 9, f. 2, Dun and Bradstreet Corporation Records.
[97] Letter from Lewis Hallam, Attn. to Samuel Wagner, Feb. 19th 1895, Box 12, f. 3, Dun and Bradstreet Corporation Records.

brought in the wrong court, and even a dismissal on the technical grounds that Dun the corporation had been charged instead of Dun the partnership.[98] In this latter case, Dun's lawyers were able to successfully contend that Dun the corporation did not exist.

If the plaintiff succeeded in correctly formulating the charging documents, Dun would frequently choose to remove the case to another court. Indeed, the consideration of which jurisdiction was optimal was usually the first question considered by Wagner and by local counsel when a libel case presented itself and it seems that the marginal advantage of bringing the cases to a federal court which we identified earlier was understood by Dun's lawyers although the modest advantage thus conferred (as we found) could be counterbalanced by limitations in the right to appeal.[99]

The combination of venue shopping and technical appeals combined to produce Dun's most regularly effective weapon – postponing cases. Indeed, dragging the proceedings out as long as possible was an effective way to get suits to disappear, as fatigued plaintiffs dropped the suits to spare themselves the legal fees. This strategy was explicitly discussed by Dun's lawyers on multiple occasions, such as in Alexander Lumber vs. Dun, in 1898 where Dun's local attorneys wrote to Wagner stating: "We believe this is in accordance with

[98] See letter from D.F. Higgins to R.G. Dun & Co., April 11 1895, in "Patrick V. Scully vs. R.G. Dun & Co." Box 9, f. 10, Dun and Bradstreet Corporation Records.
[99] In the already quoted letter from Wagner to Rice (4th April 1885, Box 5, f. 7, Dun and Bradstreet Corporation Records) counsel warns about possible offsetting costs of removing the case from local courts: " […] but then, on the other hand, the limitation to the right of appeal in the Federal Courts may put [Dun] at a disadvantage", Wagner writes.

what both we and you regard as the best tactics in the case, to wit: to put off the trial as long as possible."[100]

Legal chicanery aside, another potent deterrent were the resources Dun could bring to bear on plaintiffs, witnesses and lawyers. These resources were used to cajole and intimidate, convincing lawyers to abandon clients, plaintiffs to abandon suits, and witnesses to refuse to testify. The most prevalent tactic was witness intimidation through the threat of retaliatory lawsuits. In order to sue for damages, a plaintiff needed to prove that the libel had been published to somebody – in short, they required witnesses who had seen the libelous material to testify. Normally, anyone who had seen the libel would by definition either need to be a subscriber, or need to have been shown the libel by a subscriber. Dun's legal strategy entailed entering a motion for a Bill of Particulars, by which the plaintiff would need to furnish a list of all the people whom they intended to prove the libel had been sent to. Dun would then take this list, and inform the subscribers listed that if they testified they would be in violation of their confidentiality agreement with Dun, and would be held liable for any damages Dun incurred as a consequence of the libel suit.

Wagner put the strategy succinctly in an 1886 letter, writing "I am strongly of the opinion that none of these firms should testify in favor of the Plaintiff, and my suggestion is that a letter should be written to each of them by Mssrs. R.G. Dun & Co., calling their attention to the fact that these communications were

[100] Caldwell & Caldwell to Samuel Wagner, May 24th 1898, Box 11, f. 8-12, Dun and Bradstreet Corporation Records.

entirely confidential under the terms of their contract of subscription to the Agency, and that they cannot disclose them without violating their agreement, and that, if libelous, any testimony on their part as to their publication would in fact be proving themselves to be the publishers of the libel, and therefore tend to criminate themselves."[101] Reynolds agrees but, given the rather suspect nature of witness intimidation suggested, he avers that it would be wiser to implement the strategy orally rather than in writing, as "a letter such as you suggest if produced at the trial might have a prejudicial effect on our case."[102]

In addition to these liability based witness intimidation strategies, the mercantile agencies used more direct tactics. For instance, in the important New Jersey case of Patterson vs. Dun, Dun's New Jersey branch manager wrote worriedly to Wagner, relating some information Dun's lawyer had uncovered while deposing Emma Patterson's witnesses. Dun's New Jersey counsel was informed by witnesses during the deposition that Patterson's key witness, "Lisberger of Lisberger & Wise… had been called on by somebody from R.G. Dun & Co. and by threats to take away the firm's rating and to ruin them, he had been intimidated and would not appear as a witness…."[103] The usual effect of intimidating the plaintiffs' witnesses was the dismissal of the suit, as the

[101] Wagner to Reynolds, 20th Feb. 1886, Box 4, f. 13, Dun and Bradstreet Corporation Records.
[102] Reynolds to Wagner, 22nd Feb. 1886, Box 4, f. 13, Dun and Bradstreet Corporation Records.
[103] H.E. Jepson to Wagner, 19 Oct. 1885, Box 4, f. 7-11, Dun and Bradstreet Corporation Records.

plaintiffs inability to prove either damages, or even the publication of the libel, caused the case to be thrown out.[104]

In addition to the intimidation applied to the witnesses, Dun could marshal pressure on the Plaintiffs themselves by rallying the large wholesale merchants to their side. Often this was done in a rather ostentatious manner, using the structure of court proceedings to reveal to small litigants how tightly they could be squeezed if they pursued their grievance. When a plaintiff sued for damages it was common to ask Dun to post a bond to cover the potential damages. For instance, in the 1891 suit in Arkansas brought by S.E. Smith who had been falsely reported as out of business, Smith obtained the right to request that Dun post a bond of $150. In rejoinder, Dun's office manager wrote to New York the following: "I have today had that bond signed by the following wholesale merchants: Henderson, Garrett & Co., Speer Hardware Co., W.J. Echols & Co., Frank Bollinger, Fellner Bros., George Sengel, John Schaap, and P.R. Davis & Son. I will also have it signed by Reynolds, Foster & Co. whom I understand virtually carry S.E. Smith, the complainant. I had all these prominent merchants put on this small bond to show that they are thoroughly in accord with us and in order that it might be of some weight in persuading Smith to withdraw the suit."[105] What could a plaintiff do when he discovered that he faced a coalition that

[104] Thus our evidence seems to vindicate on this account the accusations by Meagher and Chinn that the Agencies used the threat of downgrading to deter would be witnesses, (Meagher, *Mercantile Agencies*, p. 39).

[105] Letter of J.D. Stuart, Fort Smith, Arkansas to Messrs R.G. Dun & Co. New York, 20th November 1891, "S.E. Smith vs. R.G. Dun & Co.", Box 8, f. 7, Dun and Bradstreet Corporate Records, Baker Library.

included both his creditor and a powerful breaker of reputations? A second letter from Dun's Arkansas manager to their general counsel in New York reported the happy news that Smith has been induced to settle for a mere $100 to cover his lawyer's fees. "The way I got it settled so easily" triumphantly reports Dun's office manager "was by getting the influence of the prominent merchants in Fort Smith to interview the Smiths and prove convincing arguments that they had no case against R.G. Dun & Co."[106]

The privileged relation between lawyers and Mercantile Agencies closed the loop. Lawyers derived power, money and prestige from their link with the Agency, as Minter v. Bradstreet showed. With their "side" business of enforcing collection claims, Agencies generated a great deal of business for lawyers. In return, they expected from the lawyers a preferential treatment. For instance, in J. H. McCaughey vs. R. G. Dun & Co., Wagner wrote lamenting the Texas lawyers' Wynne, McCartney & Boody's $500 retainer. In reply, Dun advised: "We think it would serve a good purpose if you were to write to Fort Worth, suggesting a reduction in the fee demanded in the McCaughey case. It seems almost outrageous that we should have to pay so large a sum as $500 on such a case, when there is such a close relationship between the office and the lawyers. As a rule, this kind of business is attended to for us without compensation… Perhaps you will write them a quiet private letter."[107] In other words, while the plaintiff

[106] Letter of W.P. Hutton, Manager, Little Rock Arkansas to Samuel Wagner Esq., 25th March 1892, "S.E. Smith vs. R.G. Dun & Co.", Box 8, f. 7, Dun and Bradstreet Corporate Records, Baker Library.
[107] Letters of July 23rd and 25th 1892, Box 9, f. 3, Dun & Bradstreet Corporation Records, Baker Library.

would have to pay their lawyer, Dun could rely on the help of local lawyers at a friendly rate.

Moreover, lawyers working with the plaintiff soon realized they were on the wrong side of success. On occasion, the Agencies could tempt lawyers opposing them to let cases dissipate. In summarizing the state of a New Orleans case, the former office manager noted "… the case is dormant, and I do not think it is likely to be called. Since the suit was brought the attorneys representing J.M. Peyton, who failed a few months ago and compromised his indebtedness, have become very friendly to me, and I have been of a good deal of service to them in one or two instances."[108] A common tactic was for Dun to offer to pay the lawyers costs by way of settling the case, as in Potter vs. Dun, where Wagner suggests "Possibly we could give a small sum to the plaintiffs' attorney by way of costs, if you think it would be advisable to do so."[109] Since the plaintiff's lawyers were usually defending a credit poor individual against a cash rich company, he could be sensitive to securing some income for his efforts. In certain cases, suborning of the plaintiff's lawyer could be facilitated by the fact that, in many small cities, there were not so many lawyers to choose from. In Kane v. Dun, Kane's lawyers were Bradstreet men and Dun reached out to its competitor Bradstreet to get them to influence their lawyers to drop the suit.[110]

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[108] Letter to Wagner March 6th 1889, "James M. Peyton vs. R.G. Dun & Co." Box 5, f. 14, Dun and Bradstreet Corporation Records, Baker Library.
[109] Wagner to F. H. Neary, Esq., 22nd March 1895, Potter vs. Dun, Box 11, f. 6, Dun and Bradstreet Corporation Records.
[110] Once it was discovered Bradstreet's lawyers were in opposition, Dun's partner Erastus Wiman

At the end of the day the balance-sheet of Dun's litigation reads as follows: Of the 43 US cases for which we have enough information to enable us to document the cause for the libel and the outcome there was very little pleading and even less winning on "merits" (by merits we mean arguing that the communication was indeed privileged). Only 4 cases reached the courts. There were two Notification Sheet cases and they were, predictably, lost. The two other cases were won and one of those was a CI – the type of case most protected by the law (we do not have information on the type of the other case). In other words, there was a maximum of 2 cases out of 43 that were won on "merits" by the agencies. The other 39 cases were dealt as follows: Dun succeeded in getting 14 of them dismissed on technicalities, 13 of them were dropped by the plaintiff (typically after lengthy appeals), and 12 were settled. The average size of the settlement was $250, although occasionally Dun resorted to more unorthodox settlement techniques such as hiring the plaintiff's daughter to work in their Texas office.[111] The archival records reveal only two court-mandated payments by Dun, both in Canada, with the largest one being for only $500.[112]

These tricks and tactics were sufficient for Dun to regularly draw libel cases to a satisfactory conclusion, either through dismissal on technicalities, or through

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consulted with Dun's general counsel Wagner as to the advisability of approaching Bradstreet to convince them to have their lawyers abandon the case. Wagner was enthusiastic about the strategy, writing: "By all means I think it would be advisable to have a chat with Mr. Bird [Bradstreet's General Counsel] about this matter, if it will be agreeable to you to do so. He is a very good fellow, and appreciates the fact that a decision against one Agency is a decision against both…."

[111] This was the settlement agreed to in "Harris vs. Dun", Box 7, f. 3, 1898, Dun and Bradstreet Corporation Records.

[112] $500 judgment reported in Western Union Telegram to Erastus Wiman, March 29th 1889 in Box 5, f. 17, "Cossette vs. R.G. & Co." Dun and Bradstreet Corporation Records.

drawing out the case for so long that the plaintiffs gave up. Where the plaintiffs proved more tenacious than usual, the ferocity of Dun's defense, and their tendency toward underhanded tactics, gave them a strong bargaining position from which to arrive at satisfactory settlements.

Conclusion

Against the "whiggish" narrative of an expansion of the commercial public sphere permitted by US judges' higher understanding of the needs of a modern economy this paper has discovered that common law really drew a sharp line between what was private confidential communications and reports and what was public printed material and consistently adhered to it. Courts privileged private communications (the handwritten, typed or oral reports), not so the volumes and notification sheets. But these last two were valuable products and had been a tremendous commercial success. Indeed they gave subscribers the means (or the illusion of the means) of controlling credit: when one met with a new relation, one could check him or her out in the Reference volume. One could update information with the sheets. In other words, it was the profit motive, not the emergence of a new cultural norm, which led the agencies to nibble at the secrecy of the private sphere and "expose" the credit of merchants. Doing so was a winning financial strategy.

Of course, in so doing, they made themselves vulnerable to a tremendous amount of litigation. Against the whiggish narrative we found that commercial

libel was a big and enduring topic in late 19th century America. Beneath the dozens of cases that reached the higher courts and the law reports, there were, we found, the hundreds of cases that were settled or killed one way or another. And then there were the thousands cases that never came to be, because individual litigants did not have access to the right legal resources in their encounters with two powerful firms that knew exactly how the game was played.

There are various ways in which our evidence could be construed. It can be construed as evidence of a Foucauldian "dispositive" of credit control where "no detail is unimportant… not so much for the meaning that it conceals within it as for the hold it provides for the power that wishes to seize it."[113] In this perspective, one would emphasize the extent to which the threat of being observed at any point in time had a "disciplinary" effect on the behavior of plaintiffs. Importantly, the coercive factor that supported this arrangement was the ability by Agencies to degrade a merchant's credit, and the helplessness of the merchant when he was confronted with such aggression.

Alternatively, our story of how and why the Agencies "came out ahead" speaks to a broad body of legal research that has explored Galanter's thesis of why the court system favors the 'haves'. Galanter distinguished between "Repeat Players" (such as the Agencies) and "One-Shotters" (such as the plaintiff in a

[113] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Penguin Books: London, 1977, pp. 140.

typical commercial libel case).[114] Repeat Players would come out ahead because they have prior litigation experience, enjoy economies of scale in litigation, have the ability to build a credible reputation across multiple negotiations, play the odds across multiple lawsuits, and so on. Our exploration of the Dun and Bradstreet Archive lends support to the Galanter conjecture.[115]

More fundamentally, our exploration revealed the importance of the credit nexus in supporting the rise of Agencies. As was seen, the Agencies expanded the commercial public sphere because they enjoyed the support of creditors (who could be discouraged from siding with the debtors in libel cases) and because they had a tight relationship with members of legal institutions (a point also mentioned by Galanter but which appears to have been fundamental in this specific case). The Agencies fed lawyers and lawyers reciprocated by protecting

[114] Marc Galanter, "Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change" *Law & Society Review*, Vol. 9, No. 1, 1974, pp. 98.

[115] Incidentally, a contribution of our historical exploration is to address a well-known methodological problem in attempts at testing Galanter's thesis. This is often done by collecting a sample of cases, usually within a given court, code litigants by type (usually government, business, or individual) and use regression techniques to assess the impact of litigant type on probability of success. Typically, these regression techniques find small but significant advantages accruing to RPs, with usually the largest advantage going to governmental litigants, closely followed by big businesses. These results are often intrinsically interesting, but they mask the true effect of the RP advantage. As Priest and Klein demonstrate, most disputes are settled out of court (George L. Priest and Benjamin Klein, "The Selection of Disputes for Litigation" *The Journal of Legal Studies*, Vol. 13, No. 1, 1984, pp. 1-55). Parties to a dispute choose to settle out of court when the impact of the law (the Judge's decision) can be largely anticipated, and thus trial decisions are rendered where there is the greatest ambiguity concerning the impact of a law so that results for cases that are pleaded all the way through tend to be randomly distributed. But exploring the matter with the help of one RP's archive is obviously a solution to this conundrum. For examples of the "traditional" strategy see e.g. Donald R. Songer, Reginald S. Sheehan, and Susan Brodie Haire, "Do the "Haves" Come out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988" *Law & Society Review*, Vol. 33, No. 4, 1999, pp. 811-832; Stanton Wheeler, Bliss Cartwright, Robert A. Kagan, Lawrence M. Friedman, "Do the "Haves" Come out Ahead? Winning and Losing in State Supreme Courts, 1870-1970" *Law & Society Review*, Vol. 21, No. 3, 1987, pp. 403-446; Donald J. Farole Jr., "Reexamining Litigant Success in State Supreme Courts" *Law & Society Review*, Vol. 33, No. 4, 1999, pp. 1043-1058; and Donald R. Songer and Reginald S. Sheehan, "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals" *American Journal of Political Science*, Vol. 36, No. 1, 1992, pp. 235-258.

the Agencies against libel. The ecology of the Mercantile Agency system enlisted a myriad of local lawyers who lived on it. In other words, mercantile rating put in motion rich and complex micro-political economies, which were instrumental to its success.

In the end, the conventional view that rating agencies prospered in the US because they secured social acceptance and recognition is exaggerated at best. Rather, the very logic of credit reporting, with its evident complementarity and spill-overs with failure, offered a nice hunting ground for well-endowed corporations which could enlist a vast network of lawyers who were directly interested in the success of the endeavor. The results of the extended legal and extra-legal campaign of the mercantile agencies endures – this campaign laid the ground for rating's later embeddedness in the public sphere as an exercise of free speech and the expression of an opinion. Emphatically, this arrangement was *not* the reasoned preference of 19th century judicial opinion. Rather, as we have demonstrated, it was the product of a farsighted corporate strategy applied ruthlessly to a legal system not equipped to adjudicate evenhandedly between intensely focused legal pressure and the broader public interest. The question of when and why rating became construed as legitimate remains open to future research. Meanwhile, we note that it is not a small irony that an activity that is so vociferous about the value of transparency had such opaque origins.

Appendix: Estimating the population of libel suits against Dun:

To estimate the number of libel cases involving Dun, we proceeded as follows.[116] Our first sample of libel cases published as court transcripts constitutes our first list L1. There remains a population of unlisted libel cases, U, such that U = N – L1, where N is the population of libel cases. Our second sample of libel cases reported in the archive constitutes our second list, L2, which contains *m* cases repeated from list 1, and *u* cases that are not repeated, where *u* = L2 - *m.* Assuming that the number of cases from L1 appearing in the sample L2 are equivalent to the number appearing in the population N, then *m*/L2 = L1/N, and N = L1*L2/*m.* In fact, Chapman (1951) suggests that for small sample sizes a more unbiased estimator of N can be obtained by using the formula:

$$N = [(L1 + 1) * (L2 + 1)/(m + 1)] - 1$$

Our sample of published cases, L1, contained 10 cases. However, only 6 of them fell within the time period 1880-1900. Our sample of archival cases, L2, contained 59 cases, however 5 of them stemmed from the Agency's activities in Canada, and consequently we excluded them to focus on the population of US cases. There were three cases repeated between the two samples. In consequence, our estimate of N was:

$$95.25 = [(6 + 1) * (54 + 1)/(3 + 1)] - 1$$

$$95.25 = 385/4 - 1$$

$$95.25 = 96.25 - 1$$

[116] The notation here follows G.A.F. Seber, "A Review of Estimating Animal Abundance" *Biometrics*, Vol. 42, No. 2, 1986, pp. 273.

If the probability of a case from L1 appearing on L2 is greater than the probability of any random case in the population N appearing on L2 than our estimate of N will be biased downwards. In ecology, this represents the problem of certain animals being more likely to be captured. In our instance, it is the problem of certain cases likely generating more paperwork, and thus that paperwork being more likely to survive into the archive. In fact, this is highly likely to be the case, as the cases that appear in our list of published court decisions were important cases on the question of privilege that generated a lot of interest within the firm. In consequence, we suspect that 95.25 is a lower bound on the number of libel cases the firm faced between 1880 and 1900.