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The Untold History of Transparency: Mercantile Agencies, the Law, and the Lawyers (1851–1916)

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This paper discusses the origins of rating in the second half of the nineteenth century. We review and criticize existing narratives, which—echoing a story told by lawyers favorable to (or employed by) the agencies—have alleged that a cultural shift in normative views, evidenced in an evolution of court decisions, provided legal protection (against libel) to agencies, and permitted the development of printed credit reports. Such a view is inconsistent with

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evidence from actual judicial decisions and from our exploration of archival material. Looking at both litigated and settled cases, we show that the rise of mercantile agencies in the late nineteenth century was the product of a farsighted corporate strategy applied ruthlessly to a legal system that was still very reluctant to permit the agencies to “commoditize” credit.

For the historian of ratings, the recent outrage over the role of rating agencies in the Sub-Prime crisis of 2008 is only the latest in a long series of controversies that have taken place in US media since the nineteenth century. In a letter to the *New York Times* from 1851 (the year this newspaper was founded) one correspondent lamented the inaccuracy of ratings and averred that he would never rely on them. He also questioned the morality and probity of a trade whose bottom line he described as “evil speaking for the sake of gain.”¹ The permanence of these complaints underscores the surprising resilience of the agencies—despite recurrent criticism and attempts at reform. This is a puzzle: if the agencies have been dogged by complaints since their very inception, how is it that they grew to occupy the central position in the functioning of American capital markets that they occupy today? And what made possible the initial growth of this new form of business?

The relatively small literature devoted to the large subject of rating agencies has argued that the emergence of rating was made possible by the American legal system’s tolerance for “Mercantile Agencies”—the name given the nineteenth-century pioneers of the rating industry. American common law—it is argued—gave US judges the flexibility to depart from the legal standard set by Britain, which was adverse to the *public* circulation of commercial information.² US judges saw the

1. T. “Mercantile Agencies.” *New York Daily Times (1851–1857)*, Oct. 29, 1851. 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.” A letter to the *New York Times* in 1900 from Yan Yokel offers another example: “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 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 18, 1900.

2. British 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

necessity of the mercantile agencies' system and ruled so as to allow the agencies' continued existence. This occurred through a generous interpretation of what constituted "privileged communications" (communications that were protected from liability) using a loophole in libel law known as "Qualified Privilege." A "Qualified Privilege" defense argued that the agencies were "duty-bound" to issue credit reports: if they were duty-bound, then errors were admissible and it would fall upon the accuser to demonstrate that a factual error had been maliciously made.³

According to previous writers, US judges and juries progressively extended to the newcomer Mercantile Agencies the protection of Qualified Privilege.⁴ The latest illustration of this narrative is the work of Rowena Olegario. She argues that although "the idea of transparency took several decades to attain maturity and legitimacy..." nonetheless by "...the 1870s and 1880s, growing numbers of subscribers and increasingly favorable court decisions signaled an important shift in attitudes: the desire among creditors for more transparency had largely overcome their concerns about the strict accuracy of credit reports."⁵ The change in the court's view, she claims, was due to "the courts increasingly broadened... ..definition of privileged communication,"⁶ and she concludes that "favorable court decisions affirmed the legitimacy of the agencies' activities."⁷

This paper grew out of a discovery, in the archive of a leading mercantile agency (R.G. Dun), of a brief prepared around 1907 by R.G. Dun's lawyers for the case *Macintosh v. Dun*.⁸ *Macintosh* was an

impugn his skill or otherwise injure him in the way of his trade or employment." This is from William Blake Odgers and James Bromley Eames, *A Digest of the Law of Libel and Slander* (London: Stevens, 1905), 30 a standard UK textbook on libel and slander. This late opinion can be tracked back in history to earlier British sources.

3. Due to the difficulty of proving malicious intent, defendants were exceedingly likely to win the case.

4. The most significant contributions to the topic include: Atherton, "The Problem of Credit Rating in the Ante-Bellum South," *Journal of Southern History* 12, no. 4 (1946): 534–56; Wyatt-Brown, "God and Dun and Bradstreet, 1841–1851," *Business History Review* 40, no. 4 (1966): 432–50; James H. Madison, "The Evolution of Commercial Credit Reporting Agencies in Nineteenth-Century America," *The Business History Review* 48, no. 2 (1974): 164–86; Norris, *R.G. Dun & Co., 1841–1900: The Development of Credit Reporting in the Nineteenth Century* (Westport: Greenwood Press, 1978); Olegario, "Credit reporting agencies: A Historical perspective," in *Credit Reporting Systems and the International Economy*, ed. Margaret J. Miller (Cambridge: MIT Press, 2003), 115–60; Olegario, *A Culture of Credit: Embedding Trust and Transparency in American Business* (Cambridge: Harvard University Press, 2006).

5. Olegario, *Culture of Credit*, 2. See also Olegario, "Credit reporting agencies," 132.

6. Olegario, *Culture of Credit*, 170.

7. Olegario, *Culture of Credit*, 173.

8. Dun and Bradstreet Corporation Records, 23, 2–3, Baker Library.

international libel suit, initiated in Australia and being argued before the Privy Council in England. In preparation, Dun organized a careful review of US and Canadian cases relating to Qualified Privilege. Our surprise was that, in contradiction with what the conventional narrative argues, the Agency's own lawyers' assessments of the protection afforded by Qualified Privilege was that it was limited at best. In fact, the *Macintosh* brief showed that in many cases and for many of the products the agencies distributed, US Judges had not deemed rating an activity protected by Qualified Privilege. This appears to be inconsistent with Olegario's and others' view of a transformation in the court's mindset that would have been completed by the end of the nineteenth century.

The *Macintosh* brief is not the only piece of evidence. The story that this paper tells relies on a thus far unexplored compendium of disputes over libel between individuals and mercantile agencies held in the archive of Dun and Bradstreet. The archive holds ten boxes of legal records on the Mercantile Agency Dun covering roughly the period from 1870 to 1900. Amidst sundry other legal concerns, the 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. By looking at both settled and tried cases, recorded in the correspondence in the archive, we are able to construct a new narrative.

In the story we tell, nothing is left of the insistence in the prevailing view on the greater wisdom of US judges who helped the business of transparency to come out on top. Our narrative portrays the conspicuous efforts, by the mercantile agencies, to settle claims, corrupt opponents and lawyers, and thwart individual libel cases, while at the same time using a number of media and paid supporters to organize the narrative that we find in conventional accounts. On the basis of our archival evidence, we thus undertake to revisit the triumph of rating in late-nineteenth-century America. We show that mercantile rating expanded despite judicial opinion, and beyond the boundaries of nineteenth-century tort. We find that resistance to rating was much more deeply entrenched than conventionally admitted, as reflected in the fact that many courts viewed the business model of mercantile rating with skepticism.

Beyond providing a new perspective on rating, which we hope will be useful to future researchers, this paper also raises three important additional issues that speak to business and legal history beyond the subject of rating. First, we make a substantive contribution that informs a strand in American business and legal history,

as exemplified by the work of legal historian Charles McCurdy who argued that big business was supported by the Federal Courts. McCurdy has studied the techniques used by big business to shape the contours of the law.⁹ According to McCurdy, one critical aspect of the role of Federal Courts was to remove a number of protectionist tools from the hands of state legislatures. 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.”¹⁰ Our findings show that this view of the Federal Courts does not apply to that specific commodity—credit. We show in particular that mercantile agencies did not receive the protection of the Interstate Commerce Clause (despite their deliberate attempt to do so), and that the Federal Courts’ defense of the agencies was circumscribed.

We also make a methodological contribution. Our use of archival records to examine the agencies’ lawsuits highlights a well-known problem with published legal decisions. The existing literature on mercantile agencies has dealt with tried cases. But legal scholars have long documented that the strategic behavior of litigants—particularly strategic considerations of whether to litigate or settle a dispute—causes the published record of court cases to be a skewed sample of the population of disputes.¹¹ Litigation is an iceberg: beneath the surface of the water lies the great bulk of legal disputes, which are settled or abandoned based upon strategic considerations about the cost of trial and the likelihood of success. By exploring both the published record of legal decisions and the record of legal disputes encountered by Dun—most of which never went to trial—we are able to present a more accurate picture of the effect of the law on this particular American business.

Last, our story of how and why the Agencies “came out ahead” can be taken as a contribution to a broad body of legal research that has

9. Charles McCurdy, “American Law and the Marketing Structure of the Large Corporation, 1875–1890,” *Journal of Economic History* 38, no. 3 (1978): 631–49. For instance, he discusses how the sewing machine company of I. M. Singer & Co managed to 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 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.” McCurdy, “Marketing structure,” 641–2.

10. McCurdy, “Marketing structure,” 648.

11. The classic paper in this literature is Priest and Klein, “The Selection of Disputes for Litigation,” *The Journal of Legal Studies* 13 (1984): 1–55.

explored Galanter's thesis of why the court system favors the "haves." Galanter famously distinguished between "Repeat Players" and "One-Shotters."¹² 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. We will see that an important aspect of the success of the mercantile agencies had to do with their being "Repeat Players" in the spirit of Galanter, but also that given the mercantile agencies' prior litigation experience, economies of scale, etc., there were places other than the courts where the battle for the commercialization of credit opinion could be fought and won. We are not aware of business history papers that have underscored the relevance of this body of literature to the study of mercantile agencies.¹³

A System of Monitoring or an Inquisition? Mercantile Agencies and Their Critics

Contemporaries often referred to Mercantile Agencies as the Mercantile Agency "System"—for 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.¹⁴ 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.

12. Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change," *Law & Society Review* 9, no. 1 (1974): 98.

13. Galanter's thesis has frequently been assessed using regression techniques—all of which are biased by selection effects if parties to a dispute choose to settle out of court when the impact of the law (the Judge's decision) can be largely anticipated. Exploring the matter with the help of one "Repeat Player's" archive is obviously a solution to this conundrum. For examples of the "traditional" strategy see, e.g., Songer, Sheehan, and 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* 33 (1999): 811–32; Wheeler, Cartwright, Kagan, and Friedman, "Do the 'Haves' Come out Ahead? Winning and Losing in State Supreme Courts, 1870–1970," *Law & Society Review* 21, (1987): 403–46; Farole Jr., "Reexamining Litigant Success in State Supreme Courts," *Law & Society Review*, 33, (1999): 1043–58; Songer and Sheehan, "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals," *American Journal of Political Science* 36, (1992): 235–58.

14. Temin, *The Jacksonian Economy* (New York: W.W. Norton, 1969), 31 ff.

The issue for a 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 convenient communication. The agents' world was ruled, according to one of its best connoisseurs Peter Earling, by the problem of determining "whom to trust."¹⁵ 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 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."¹⁶

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 United States 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."¹⁷ 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 rigor, but none less than our own State."¹⁸ The contemporary press made futile efforts to keep traders abreast of the latest information on the law of debtor and creditor in different states.¹⁹ 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

15. Earling, *Whom to Trust, A Practical Treatise on Mercantile Credits* (Chicago: Rand, McNally, 1890), 298. This successful book had several editions.

16. [Anonymous], "A dry goods jobber in 1861", *The Atlantic Monthly*, February, 1861, 209.

17. Quoted in Edward Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (Chapel Hill: University of North Carolina Press, 2001), 13.

18. "Laws for the collection of debts," *Hunts' Merchants Magazine*, 1847, 440.

19. 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."

a trader in the Territorial governments of the then Wild West, was, of course, impractical from a business standpoint, if not impossible.”²⁰

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.²¹ 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.²²

Tappan’s Mercantile Agency (later known as Douglas and still later as R.G. Dun) and its main competitor, Bradstreet (created in 1849), did not address all these problems but gave a partial fix. They 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.²³ 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

20. Earling, *Whom to Trust*, 298.

21. 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.

22. Balleisen, *Navigating failure*. The “nation of bankrupts” theme has received substantial historical exploration and validation. See for instance, Sandage, *Born Losers: a History of Failure in America* (Cambridge, MA: Harvard University Press, 2006). Peter Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt and Bankruptcy, 1607–1900*, (Madison: State Historical Society of Wisconsin, 1974). To explain this situation David Skeel, in *Debt’s Dominion: A History of Bankruptcy Law in America* (Princeton, NJ: Princeton University Press, 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.

23. A perfect example is Earling, *Whom to Trust*, 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.”

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.²⁴ 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 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 (as rightly emphasized by all previous scholars) the expectation by lawyers that they would receive valuable collection work led local lawyers to tender their reports freely—a big saving for the Agencies but also a reflection of the existence of a common interest between the two parties, which we shall emphasize again later.²⁵

Inevitably, this system empowered the local lawyers, and could be subject to abuse. *Minter v. Bradstreet*, a libel case, provides illustration.²⁶ 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.”²⁷

Minter’s bad 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.

24. This has been emphasized before, e.g., in Norris, *R.G. Dun & Co.*

25. In the late nineteenth 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*, 1895, 360.

26. *Minter et al. v. Bradstreet Co.*, 174 Mo. 444, 73 S.W. 668.

27. *Ibid.*; 9–11.

to Bradstreet. When Minter's creditors began wiring him about his "facts" and calling off their loans, he went to meet with Guy Cope the representative of Bradstreet's rival Dun in Sedalia. Minter became convinced that the rumors originated with Parmerlee. He then went to New York by way of Chicago, trying to stop the hemorrhage of adverse reports. Minter 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 the 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.

Practices such as those of the lawyer Parmerlee prompted the emergence of an "underground" literature devoted to critiquing the Mercantile Agencies. Within this literature, the activities of the Agencies were presented as spying, repression, corruption, and more generally, the infringement of individual privacy. These accounts have found their way into a smaller modern literature by social theorists and cultural historians such as Scott Sandage or Josh Lauer. These authors focus on the agencies' role as systems of surveillance that employed credit classification as a modality of operation.²⁸ According to Scott Sandage, Lewis Tappan "did in the marketplace what others did in asylums and prisons. He imposed discipline via surveillance: techniques and systems to monitor and classify people."²⁹

Articles and books were devoted to the abuses allegedly committed by the agencies. Two "tell-all" exposes denounced their "exploitive system." The first was published in 1876 by one Thomas Francis Meagher. The book showed the incoherence of ratings by different firms, reporting large discrepancies between capital data across agencies.³⁰ 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.³¹

28. See in particular the book by Sandage, *Born Losers*, 100; Josh Lauer, "From Rumor to Written Record: Credit Reporting and the Invention of Financial Identity in Nineteenth-Century America," *Technology & Culture* 49 (2008): 304–5.

29. Sandage, *Born Losers*, 100.

30. 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), 123–43.

31. 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, *Commercial Agency*, 157.

Meagher also accused the Inquisition of subverting Democracy and corrupting individuals. He recounts one instance in 1874 when a proposal was considered by the Pennsylvania legislature to increase the liability of Mercantile Agencies.³² According to Meagher, 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).³³ After this episode, the agencies began collecting intelligence on forthcoming legislative policy.³⁴

The other notable anti-Agency pamphlet was written in 1896 by William Yates Chinn.³⁵ Despite differences in style (Chinn was writing in the “Populist 90’s” and draws his images from the predilections of his time) there are many parallels. Like Meagher, Chinn described the mercantile agencies as “credit spies,” “put in motion for spying upon the private conduct and pecuniary standing of the people,”³⁶ a “self-appointed bureaucracy whose secret work is first of all in its

32. 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, *Commercial Agency*, 82.

33. Meagher, *Commercial Agency*, 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 (pp. 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 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.” Wiman, *Chances of Success: Episodes and Observations in the Life of a Busy Man* (New York: Stanley Bradley, 1895), 257.

34. Meagher, *Commercial Agency*, 85 reproduces a Dun company memorandum from Jan. 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 Mar. 1, 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 Mar. 1, 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, November 22, 1897, “L.C. Wahl vs. R.G. Dun & Co.” Box 6, f. 16, Dun and Bradstreet Corporate Records, Baker Library.

35. William Yates Chinn, *The Mercantile Agencies Against Commerce* (Chicago: C.H. Kerr, 1896).

36 Chinn, *Mercantile Agencies*, 181–3.

own interest.”³⁷ Just like Meagher, Chinn pronounced the agencies to be “against commerce” and the country at large. Like Meagher, he disputed the agencies’ having either mandate or competence.³⁸ Like Meagher, Chinn felt Mercantile Agencies were ready to use all means available (lobbying, bribery, and their influence on lawyers) to produce favorable law.³⁹ 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.”⁴⁰

In the business history literature, arguments by Agencies’ critics have been disparaged. Meagher has been judged on the basis of a company-wide memo produced by Dun, claiming that he was a disgruntled (and dishonest) former employee.⁴¹ Norris is skeptical of the memo, but Madison dismisses Meagher, writing that the Mercantile Agencies triumphed over the “muckraking attacks of Meagher and others.”⁴² Chinn has been handled in a gentler way.⁴³ But if historians worry about

37 Chinn, *Mercantile Agencies*, 62, 122.

38. Chinn, *Mercantile Agencies*, 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.”

39. Chinn, *Mercantile Agencies*, 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.”

40. Chinn, *Mercantile Agencies*, 63. Bruce Carruthers and Barry Cohen use records from R.G. Dun & Co, to 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, “Calculability and Trust: Credit Rating in Nineteenth Century America,” Working Paper, Northwestern University, Sep. 2010. 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.

41. The memo reads in part “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 Norris, *R.G. Dun & Co.*, 126–27.

42. See Madison, “The Evolution of Commercial Credit,” 164–86. Olegario’s characterization of Meagher as a disgruntled employee stems from the internal company memo cited in Norris, *R.G. Dun & Co.*, 126–27.

43. 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,” in particular referencing Earling’s study and noting that Earling was also critical of the quality of the agencies’ reporters. While we would concur that Chinn’s prose can be both rambling and bizarre, we feel that the comparison to Earling under-appreciates Chinn’s argument about systemic problems with the agencies, and his contention that their ‘tricks’ were not problems in implementation but central to how the system functioned. See Olegario, *Culture of Credit*, 169–70.

Meagher being a former Dun employee, they should worry about Chinn as well, because he was one too. Both critics were former insiders. The archives of the Dun Corporation show William Yates Chinn to have been a former manager of Dun's Austin, Texas, office in the late 1880s.⁴⁴ Chinn's name and somewhat swollen prose appear in correspondence concerning a libel case in 1889 involving a Mr. Achilles and at this time rather than arguing that the mercantile agencies were "against commerce" (as the title of his book would have it) he emphasized the company's "motto that we both protect and promote trade."⁴⁵

How Victors Write History: Narrative Politics of Mercantile Agencies

As indicated earlier, the conventional story holds that courts recognized the importance of the social function of the agencies, and consequently drew on the flexibility of common law in order to allow them to operate. The principal elements in this narrative were established very early on. Milestones included the classic article of January 1851 in *Hunt's Merchants' Magazine*—an influential journal in the mercantile community. The anonymous author stated his intention to "remove" the prejudice that existed among merchants against Mercantile Agencies. He argued that people objecting to the agencies were prejudiced people and that this prejudice was "founded in ignorance."⁴⁶

A few years later, Charles O'Connor, an influential lawyer and former US Attorney for the Southern District of New York, argued in 1857 that the mercantile agency system should be compared with innovations such as the telegraph, recent advances in chemistry, or the "leviathan steamship," whose novelty called for new legal solutions. In one particularly enthusiastic moment he exclaimed: "American ingenuity is equal to every emergency, and the invention, if it may be so called, of these mercantile agencies, was the result of that ingenuity."⁴⁷

44. His book has an introduction by a Texas lawyer, Dudley G. Wooten.

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

46. "The Mercantile Agency," *Hunt's Merchants' Magazine*, 24, Jan. 1851, 46.

47. Charles O'Connor, "Argument in the case of Ormsby against Douglass, in the superior court of New York, 1858," in *Legal Masterpieces. Specimens of Argumentation and Exposition by Eminent Lawyers*, ed. Veeder V. V., Vol. II, (Chicago: Callaghan and Company 1912), 874–85. See also Anon., *Reports of the four leading cases against the Mercantile Agency for slander and libel* (Chicago: Dun, Barlow and Co. 1873).

Joseph W. Errant, a Chicago lawyer, who published in 1889 an essay that read as a guided tour of the subtleties of Qualified Privilege and the benefits of Mercantile Agencies, developed the argument by claiming that at the time of his writing the growth of mercantile rating had already begun to receive favorable reception and treatment by the courts.⁴⁸ When they met with the Agencies, he says, US courts were forced to acknowledge “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.”⁴⁹ 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.”⁵⁰ In support of 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.”⁵¹

Errant created the template for much of the subsequent “pro-agency” writing. One can see the influence of Errant in Jeremiah Smith’s two articles in the *Columbia Law Review* published in 1914 (which contained the by-now conventional hymn to American judges’ practical spirit and concluded with three cheers for rating and the Common Law).⁵² And we recognize it in the work of historian 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,

48. Errant, *The Law Relating to Mercantile Agencies* (Philadelphia: Johnson, 1889). For instance, Olegario relies on Errant in assessing the history of court decisions, see Olegario, *Culture of Credit*, 228, footnote 130.

49. Errant, *The Law*, 5 and 6. 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.

50. *Ibid*; 39.

51. *King v Patterson*, 49 N.J.L. 417, 9 A. 705.

52. Jeremiah Smith, “Conditional Privilege for Mercantile Agencies. Macintosh v. Dun. I”, *Columbia Law Review*, 14 (Mar., 1914): 202 and Jeremiah Smith, “Conditional Privilege for Mercantile Agencies. Macintosh v. Dun. II”, *Columbia Law Review*, 14 (Apr., 1914): 310, 315 quoting Cockburn, “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.”

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 steps," finally "recognized that the doctrine of privileged communication should be applied."⁵³ This narrative was to become the starting point of subsequent characterizations of the law's approach to the mercantile agencies by business historians such as Madison or, more recently, Olegario.⁵⁴

One problem with this tradition is that it is strenuously what the Mercantile Agencies were arguing. The article in *Hunt's Merchant Magazine* had evidently been written by someone who was partial to the agencies; O'Connor had been an agency lawyer. At the time when his *Law Relating to Mercantile Agencies* was published, Errant was becoming Secretary of the newly created Sunset Club, which aimed at providing "good fellowship and tolerant discussion among business and professional men of all classes" and his idea of good fellowship included manipulation of the record, since the eloquent opinion of Van Syckel was really a minority opinion.⁵⁵ The two articles by Smith in 1914 explicitly professed their concern with arguing against recent Court decisions that had been hostile to the mercantile agencies. One may wonder whether the articles had been hired. Finally, Foulke's book was published by Dun and Bradstreet and even wore on its cover the indentured seal of the merged firms showing the Man From the East, locked hands, eye to eye, with the Man From the West, subtitled: "Man's Confidence in Man."

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?"

53. Roy A. Foulke, *The Sinews of American Commerce* (New York, 1941), 294–5. 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).

54. See introduction for relevant quotes from 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" Madison, "The Evolution of Commercial Credit," 185.

55. He was the author of a small pamphlet *Justice For the Friendless and the Poor: An Address Before the Illinois State Bar Association, Jan. 11; Before the Society for Ethical Culture, of Chicago, January 29, 1888* (Chicago: unknown publisher 1888). Errant's essay crops up in Jerold S. Auerbach's *Unequal Justice: Lawyers and Social Change in Modern America*, (Oxford: 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. William W. Catlin, *Echoes of the Sunset Club*, (Chicago: Howard, Bartels, 1891).

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.”⁵⁶ 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 opinion.⁵⁷

A theme that is omnipresent in the legal correspondence of Dun is the importance of cultivating a good published record before the courts and this led them to litigate selectively, so as to organize the proper story. The examples are legion. 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 than we have in this and the issue now presented had better be met.”⁵⁸ In the matter of *Maier & Berkele v. R.G. Dun & Co*, Counsel Samuel Wagner reported being concerned with a defeat, “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.”⁵⁹ It is understandable,

56. Dun to Wagner, Esq. June 21, 1888, “Joseph A. Todd vs. R.G. Dun & Co.” Box 3, f. 14, Dun and Bradstreet Corporate Records, Baker Library.

57. 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. 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.” April 4, 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, June 5, 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.

58. W.T. Rolph to head office in *Bleher v. Dun*, Jan 22, 1892, Box 8, f. 8, Dun and Bradstreet Corporation Records.

59. Samuel Wagner to Messrs R.G. Dun & Co. New York, November 18, 1896, “Maier & Berkele vs. R.G. Dun & Co.” Box 11, f. 3, Dun and Bradstreet Corporation Records, Baker Library; Walter R. Brown Esq, to R.G. Dun and Co., December 30, 1896, “Maier & Berkele vs. R.G. Dun & Co.” Box 11, f. 3, Dun and Bradstreet Corporation Records, Baker Library.

albeit ironic, that while the agencies sought to prosper on the disclosure of information regarding other firms and came out strongly in public statements on the side of transparency, they were striving to distort the signals sent by courts through the suppression or amplification of legal opinions.

Qualified Privilege Qualified: What Was Protected and When?

The previous discussion underscores the limitations of proceeding with the “ostensible” history of rating and trying to read motives in pronouncements. This leaves us with no alternative other than to go back to the primary sources to try and construct a less partisan and better-informed judgment. Consequently, in this section, we revisit the question of Qualified Privilege from scratch. As we have indicated, our first suspicion that the existing narrative might be flawed came from reading the R.G. Dun lawyers’ brief prepared for the case *Macintosh v. Dun*.⁶⁰ The memo emphasized the fact that in order to discuss the protections of Qualified Privilege it was useful, in fact indispensable, to sort the agencies’ output into different “products,” because courts dealt with different products in different ways (an issue that is absent from previous discussion).⁶¹

Indeed, a subscription to Dun or Bradstreet included three products. First, subscribers could have the right to make a certain number of inquiries and would receive in return that many reports, in handwritten, typed, or oral form, all confidentially made to the customer; second, the subscriber could receive the latest edition of the Reference Book (of which several editions—typically four—existed). These Reference Books had been started in the late 1850s and contained a list of individuals, with summary information of individual “capital” and “credit.” The last product was the so-called Notification Sheets (NSs), 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.”⁶²

60. Dun and Bradstreet Corporation Records, pp. 2–3 v. 23, Dun and Bradstreet Corporate Records, Baker Library.

61. See for instance the discussion in Olegario *Culture of credit*, 170–73.

62. Dun and Bradstreet Archive, *The Mercantile Agency Notification Sheet*, 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.”

As Dun's lawyers conceded, only for the first class of product "where the publication was made to a subscriber upon his special request," and was communicated confidentially, had the judges "held the publication privileged."⁶³ This was the case for *Ormsby v. Douglas*, a case that involved a confidential report. For the other rating products, 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 an NS had the courts found the communication privileged. In other words, according to the Agency's lawyers, a substantial part of the Mercantile Agency's "package" could not be considered as protected, even as late as 1907.

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). Discussing qualified privilege, Cooley stated in 1878 "but the reports of a mercantile agency to its customers are not privileged"⁶⁴ and later clarified—or qualified: "but the reports of a mercantile agency published and distributed to its customers are not privileged," by which was meant that the volumes and NSs were *not* privileged.⁶⁵ For Cooley, the criterion used to discriminate amongst communications was the nature of the support—and its public or confidential nature. It was the very act of circulating a printed credit opinion that removed the privilege: one might be bound to communicate in confidence about someone else's credit, but that did not justify the splashing out of credit reports. 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 Reference Books and NSs) were not privileged. Prying by passersby, third parties, in other words "the community," was *not* allowed.

The published record of court cases for libel involving the Mercantile Agencies can be established, and it confirms our previous conclusions. Using the American Law Reports and other secondary sources, we

63. Dun and Bradstreet Corporation Records, 23, 4; Dun and Bradstreet Corporate Records, Baker Library.

64. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Little, Brown, 1878), 533.

65. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Little, Brown, 1883), 527. The same language can be found in the 1890 edition (Cooley, *A treatise*, (1890): 524). Likewise Cooley, *A Treatise on the Law of Torts* (Chicago: Callaghan and Cy., 1888), 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."

have been able to identify twenty-eight libel cases against mercantile agencies spanning the period from 1851 to 1916 (the last decision in the period is 1914). For those court transcripts that described the origin of the libel claim we sorted the cases according to the incriminated support (confidential inquiry or CI, reference volume or RV, or NS) and assessed the extent to which the judge found that the product was privileged (because the cases also raised other dimensions, there were several cases for which the judge's opinion on privilege was not stated). This gave us a total of eighteen cases.⁶⁶ As expected the record for RV and NSs is unequivocal. In every reported case, communications were deemed unprivileged.⁶⁷ The evidence for Confidential Inquiries is more mixed. We could identify eleven cases involving CIs. For the vast majority of the cases we have (nine out of eleven) the general principle—that a CI distributed exclusively to subscribers having a special interest in the report is privileged—was upheld.⁶⁸

These facts that we have retrieved from a systematic examination of cases also matches what Agency insiders believed. We have stated that the agency critic Chinn was a former employee of the agencies. This gives greater significance to his quoting of Judge Cooley's *Torts and Constitutional Limitations* in a manner that suggests familiarity with the treatise.⁶⁹ Agency insiders knew that a substantial part of their output was not privileged at all. Indeed, writing in 1885, Dun's general counsel expressed forcefully his concern about the liability of printed credit ratings:

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

66. Of the twenty-eight cases, using Westlaw, we were able to access court transcripts for twenty-six (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 twenty-six disputes, nineteen had been first tried in a lower court, and our transcript of the dispute came from an appeal decision.

67. There are six cases on NSs in which the protections of qualified privilege 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.

68. Recall that 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. We have already discussed *Minter v. Bradstreet* where Minter won by demonstrating Parmerlee's malicious behavior. Another case was *Mower-Hobart Co. v. R.G. Dun & Co.* In both cases, the judges found against the defendant, and as a result, while privilege was recognized in nine out of eleven cases the agencies only won seven of these. *Minter v. Bradstreet* 174 Mo. 444, 73 S.W. 668; *Mower-Hobart Co. v. R.G. Dun & Co.* 131 F. 812.

69. Chinn, *Mercantile Agencies*, 134, 135 and in many other places in the book.

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 whose names are mentioned in it, whereby they have interest in knowing all about them.⁷⁰

Judicial hostility towards published reports helps to pin down the “legal” boundary of legitimate credit reporting. Confidentiality in the issuing of commercial reports was what made these reports eligible for legal protection. By contrast, public rating—a necessary feature of the annual volumes and updates (since subscribers who bought the volumes would read not only about the credit of firms or individuals that mattered for them, but about many other credits and individuals as well)—did not benefit from this protection. This confirms that the Common Law was drawing a rather clear line between privacy and publicity in commercial matters.

With the Damocles Sword of the law of libel hung above both RVs and NSs, agencies ought to have limited the amount of information printed that was dangerous for them. In practice, this may have taken the shape of not reporting negative opinions. There is evidence of this: for instance, until the early 1880s, Dun’s “General Credit Categories” came as “Very High,” “High,” “Good,” and “Fair.” Evidently, a lot of businesses were left out and so was associated litigation risk. In the 1880s, this ranking was adjusted in a modestly more aggressive way, and became “High,” “Good,” “Fair,” and “Limited.” This last category however represented a small fraction of the total. To take a random example, in the city of Columbus, Ohio, Dun’s RV for July 1886 has roughly 140 entities whose name start with letter C, of which we find 10 percent High, 53 percent Good, 19 percent Fair, 12 percent Limited, and 6 percent without an indication of credit grade. Thus, for close to 90 percent of the entities rated, the grade given was hardly an insult and one is under the impression that the agencies were taking a calculated risk, more than exploiting a new franchise, allegedly given by courts. Indeed, those firms with the mention “limited credit” had a minuscule capital stock (all were in the lowest capital brackets and most in the very bottom one, below 500 USD), so that the “negative” connotation was tautological and thus hardly actionable.⁷¹

70. Letter of Wagner to Rice, April 4, 1885 in “John Zucca vs. R.G. Dun & Co.” Box 5, f. 7, Dun and Bradstreet Corporate Records, Baker Library.

71. Computations made by authors from *The Mercantile Agency Reference Book*, vol. 73, (New York: R. G. Dun, July 1886). An example of earlier editions with different categories is for instance *The Mercantile Agency Reference Book*, vol. 48, (New York: R. G. Dun, Mar. 1880). It would be fascinating to study the historical expansion of the negative outlook, as it is evidently related to the agencies’ ability to manage their liability and an indicator of their legal risk perceptions.

Likewise our efforts to see how litigants who had complained about inaccurate CI reports were rated during the litigation led us to realize that in many cases they were just not rated in the RVs. The same logic was observed for the NSs: when mercantile agencies wanted to alert their customers that there were adverse reports about some firm or individual they just printed: “Call at office.” Eventually, the phrase “call at office” came to be viewed as synonymous with “bad.” Yet it did not constitute per se sufficient ground for libel.⁷² In other words, despite all that has been said about transparency and the commoditization of credit by mercantile agencies, it remains that their culture and modus operandi remained grounded in secrecy.

Where Protected? The Geography of Privilege

Thus far, we have treated court decisions as if they were all generated from the same “judicial machine.” This heuristic fiction must now be abandoned. Contemporaries reported being under the impression that different courts had different attitudes towards mercantile agencies. In the matter of *Maier & Berkele v. R.G. Dun & Co*, Samuel Wagner wrote: “I feel somewhat concerned about the state of litigated cases against the agency in Georgia... ..The temper of the Courts there is very unfavorable....”⁷³ This reflected the impression, found in both the papers of R.G Dun and pro-agency treatises such as Errant’s that Western and Southern States were more hostile than Eastern ones. The confident look between the Western Man and the Eastern Man displayed on Dun and Bradstreet’s seal concealed substantial mistrust — mistrust which was expressed in sociocultural ways. 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 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.”⁷⁴

There is indeed evidence supporting such a divide. Of the only two cases where the claim to privilege for a CI was rejected (and the agencies lost as a result), neither had been tried in the East. In *Johnson*

72. See *Erber & Stickler v. R.G. Dun & Co.*, Apr. 1882, 4 McCrary 160, 12 F. 526

73. Wagner to Messrs R.G. Dun & Co. New York, November 18, 1896, “Maier & Berkele vs. R.G. Dun & Co.” Box 11, f. 3, Dun and Bradstreet Corporation Records, Baker Library.

74. Rolph to Mess. R.G. Dun & Co. April 23, 1892, Box 8, f. 8, Dun and Bradstreet Corporation Records.

v. *Bradstreet* in 1886, the Georgia Supreme Court argued 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.⁷⁵ Likewise, negating the notion of a general trend towards greater protection from liability, *Pacific Packing Co. v. Bradstreet* was tried in Idaho on the basis of a confidential inquiry. For this late ruling (1914), the judge Ailshie's opinion was that: "The company, 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."⁷⁶

The cases where plaintiffs succeeded in proving malice provide additional evidence. As stated, despite the broad legal protection that CIs enjoyed the agencies remained culpable if they could be shown to have been negligent.⁷⁷ Judges and juries therefore retained some leeway in finding negligence. It is interesting on this count to note that the two cases where plaintiffs succeeded in proving malice were in Missouri and Georgia. 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 protection was extended to CIs early on.⁷⁸ The existence of a geographic schism was indeed brought out in the opinion in *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...."⁷⁹ Therefore the prima facie evidence is that 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-labeled merchant.

75. *Johnson v. The Bradstreet Co.*, 77 Ga. 172, 1886 WL 1483 (Ga.).

76. *Pacific Packing Co. v. Bradstreet* (1914) 139 pp.1007.

77. 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.

78. Privilege was firmly cemented earlier than Errant suggested, by the 1868 case *Ormsby v. Douglass*, 10 Tiffany 477, 37 N.Y. 477, pp. 2–3.

79. *Douglass v. Daisley*, 57 L.R.A. 475, 114 F. 628, pp. 2.

Another way to construe this spatial cleavage in legal protection would be to interpret it as a split between state and federal courts. This has relevance because, as indicated in the introduction, the work of legal historians of the American economy such as McCurdy suggests that in the late-nineteenth-century big business opportunistically used sympathetic federal courts by invoking the Interstate Commerce Clause. Illustrative of this tradition, Tony Freyer has argued that, early in the nineteenth century, federal courts acted as “forums of commercial order” and might have helped to create a national money market by trying to impose more homogeneous rules for their endorsement (although he recognizes that the extent to which they succeeded remained limited: there still remained substantial uncertainty as to which cases could be removed to federal courts and how such courts would act, a point forcefully underscored by quantitative research which has emphasized the utter lack of convergence in regional rates for bills even in the late nineteenth century).⁸⁰ Still, Freyer argues that in the second half of the nineteenth century, 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 grounds of “diversity of citizenship”) as enforcers of their property rights—a process that accelerated with the Interstate Commerce Act of 1887.⁸¹

Archival material suggests that Dun’s lawyer Wagner often sought to make his local correspondents aware of the possible benefits of having a case tried before a federal court, although the language he used suggests that the benefits were not unquestionable. In a letter Wagner wrote on April 4, 1885 to local Louisiana attorney Rice, he states: “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 Msrs. R.G. Dun & Co. would like to have your views on this point before deciding upon their instructions in that regard. Experience has shown

80. Tony Freyer, *Forums of Order: The Federal Courts and Business in American History* (Greenwich, 1979). For statistical counterpart evidence see Howard Bodenhorn and Hugh Rockoff, “Regional Interest Rates in Antebellum America,” in *Strategic Factors in American Economic History: A Volume to Honor Robert W. Fogel*, ed. Claudia Goldin (Chicago: University of Chicago Press, 1992).

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.

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.”⁸²

Looking at the evidence underscores to some extent 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 (four out of four) cases that were tried before circuit courts.⁸³ By contrast, of seven judgments in non-Federal courts, two rejected the doctrine of qualified privilege for CIs. They were the already mentioned cases tried in Georgia (*Johnson v. Bradstreet*, State Supreme Court) and Idaho (*Pacific Packing Co v. Bradstreet*, State Supreme Court). This divergence across jurisdictions was acknowledged by the judiciary. In *Mower-Hobart v. Dun*, a case tried in the Eleventh 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.⁸⁴ There is also scattered evidence that some plaintiffs were concerned that cases might be removed to federal courts. This is visible in the way some plaintiffs set their claims for damages as high as possible but just below the dollar amount constituting the minimum statutory threshold for enabling the defendant to remove the case to a Federal Court on the grounds of diversity of citizenship, an indication of plaintiff preferences for local courts.⁸⁵

It would be vastly exaggerated however to argue that Federal Courts provided blanket endorsement to the business of mercantile agencies. Again, it was only with respect to the degree of liability involved by a confidential response to a CI that Federal Courts and Eastern Courts were more generous. For the period under scrutiny, there is not a single case of a Federal or Eastern Court accepting the idea that RVs or NSs were privileged. Moreover, the McCurdy narrative about national manufacturers opportunistically using Federal Courts and the Interstate Commerce Clause *cannot* be applied to the

82. Wagner to Rice, April 4, 1885, Box 5, f. 7, Dun and Bradstreet Corporation Records.

83. 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 an NS.

84. *Mower-Hobart v. R.G. Dun and Co.* (1904) 131 F. 812, 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 Freyer, *Forums of Order*.

85. See, e.g., *Wahl v. 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).

manufacturers of commercial credit. This is revealed by the agencies' failed attempt to place themselves under the protection of the Interstate Commerce Clause. This arose when 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.⁸⁶ Possibly with the aim of provoking a lawsuit, Dun sent an agent named Morgan out to South Dakota, who never registered, and was fined.⁸⁷ Dun, through Morgan, then appealed the case up to the South Dakota Supreme Court in 1891. The challenge was that South Dakota's law was unconstitutional as it violated the Interstate Commerce Clause: in so doing, Chinn writes critically, the agencies were claiming "brotherhood" with "railroads, steamboats, telegraph."⁸⁸ Dun lost and the Court's unanimous opinion stated its disagreement with the plaintiff (Morgan) that agencies were "instruments of commerce and ... just as necessary to modern commerce as railroads and telegraphs, and without them the free interchange of commerce would be hindered and delayed." They had been "unable to agree with this contention," because "information or intelligence is not an article of commerce in any proper meaning of that word."⁸⁹

Dun then moved the case up to the US Supreme Court where it was decided in 1893. Mercantile Agencies felt Congress should regulate them. In a context of polarized economic relations between a creditor and industrial East and a debtor and agricultural West, mercantile agencies may have thought of federal institutions as arbiter and integrator, a counterpoise to the "protectionist" tendencies of states. They were to be disappointed however. Unlike what it had done for Singer and others, the US Supreme Court affirmed the State Court's judgment without issuing an opinion, in effect endorsing the South Dakota Supreme Court's view that information or intelligence is not an article of "commerce," unlike Singer's sewing machines:

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

86. The law also forced the agencies to register with the state and pay a 2 percent tax on profits.

87. For a summary of the case see *Reports of Cases Decided in the Supreme Court of the State of South Dakota*, 1891, "State vs. Morgan" p. 32–54, and *Supreme Court of South Dakota State v. Morgan*, 2 S.D. 32, 48 N.W. 314 (1891). For a critical discussion of agencies' behavior in the case, see Chinn, *Mercantile Agencies*, 193–4.

88. Chinn, *Mercantile Agencies*, 194.

89. "State vs. Morgan" in *Reports*, 52–53.

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.⁹⁰

The conclusion therefore is that mercantile agencies faced resistance much more widespread, entrenched, and resilient than former narratives suggest. The battlefield on the eve of the twentieth century was not nearly as advanced as previously argued. None of the Agencies' printed material was privileged and Confidential Inquiries were still at risk of the odd decision. The political economy of the fighting factions leads to a straightforward conjecture that the frontier between supporters and opponents cut along "classic" lines identified in US financial history: courts in creditor states were more willing to side with creditors; courts in debtor states recognized to some extent the agencies' right to operate but were leery of the risks that an unbridled business of credit reporting might entail for debtors. Federal courts for their part acknowledged the benefits of ratings, but were reluctant to take sides beyond the avoidance of a too localized approach.

How the West Was Won: Resolving the Mystery of Mercantile Agencies

It is clear from the preceding analysis that most of the products sold by Mercantile Agencies were not "protected" when the United States entered World War I, that there was no trend towards greater protection and that cases such as the one decided by Judge Ailshie in Idaho in 1914 showed that legal hostility persisted. 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 short, the archives represent a haphazard collection of letters salvaged by the Baker library and pertaining to libel disputes across the time period in question.⁹¹

90. "State vs. Morgan," *Reports*, 34.

91. 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.

The archival holdings of letters relate to fifty-four distinct libel disputes across the period 1880–1900.⁹² In addition, during the period 1880–1900, Dun was a defendant in six more (published) cases (part of those discussed in the previous section) thus amounting to sixty distinct cases against Dun in total. If the collection of archival documents were indeed a random sample, simple statistical capture/recapture methods—used to estimate population abundance—would suggest that the actual number of cases would be closer to ninety-five libel cases in the twenty-year period.⁹³ It is difficult to characterize with confidence the process through which the “sample” of cases was constructed as “random.” There are reasons to believe that a number of cases were settled locally without reaching Wagner by simple applications of the “guidelines” that transpire from his letters. The settled cases also involved a number of corrupt arrangements for which, when they survived at all, there are indications of the need not to leave written traces. Last, cases litigated “all the way” were around for a longer time and produced more material than the others. All this suggests that simple inference from available numbers of cases in the settled and litigated group should lead us to underestimate the true number of total cases which must have been therefore significantly higher than implied by randomness (ninety-five cases).

These crude estimates, along with the potentially large awards that could be granted in principle, suggest 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 average profits of a Mercantile Agency were around \$40,000.⁹⁴ 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).⁹⁵ Frequently, correspondence in the archives reveals the plaintiffs’ original plea for damages. Using these reported figures for damage pleas, we conclude that the average libel suit against Dun was for

92. The total number of cases concerning libel in the archive was fifty-nine, however, five of those cases were in Canada and we excluded them from the analysis.

93. 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. George. A.F. Seber, “A Review of Estimating Animal Abundance” *Biometrics*, 42 (1986): 267–92. This technique has been extended to epidemiology where it is used to estimate populations affected by disease from incomplete lists of patients; Wittes and Sidel, “A generalization of the simple capture-recapture model with applications to epidemiological research” *Journal of Chronic Disease*, 21 (1968): 287–301.

94. Authors’ calculations from Norris, *Dun*, 47, Table 2.

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

\$22,400 (in 1890 USD). If Dun was litigating roughly five libel suits a year—as explained a very conservative estimate—that would imply 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 \$476,700.⁹⁶ Thus, annual libel claims for damages amounted to roughly greater than 20 percent of Dun’s annual profits and in fact, 20 percent of profits is likely a lower bound estimate, because if the public learnt that many cases were lost, then more litigation would have followed (as statements previously quoted suggested). Cases were initiated when plaintiffs believed they were likely to win and if more cases reached the court system it could have snowballed. 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 nineteenth century and early twentieth century.

Part of the techniques used to avoid litigation involved—as we have already emphasized—a more prudent attitude towards disclosure of a merchant credit situation than the agencies boasted. The CIs remained a key ingredient of the business model, and the RV and NSs, operated more like directories that encouraged applications for information. These techniques to limit the amount of litigation were supplemented by an aggressive approach toward dealing with lawsuits—an approach that the firm’s papers describe as “strangulation.” Sandage noted similarly aggressive legal practices employed by Tappan’s firm.⁹⁷ 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 Volumes reveals the technique: “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 possible step be taken, by technical defense, or otherwise, to ‘strangle’ the case without letting it get to a trial.”⁹⁸ Based on archival evidence the strangulation techniques the agencies relied upon in order to prevent successful libel cases can be grouped under five distinct headings: technical defenses, venue shopping, dragging out proceedings, intimidation tactics, and subverting the plaintiff’s counsel. We address these tactics sequentially, because they intervened in succession at various stages of the litigation.

Dun’s first line of defense against libel suits exploited the fact that the structure of the mercantile business was complicated, and that

96. Authors’ calculations from Box 18, f. 1–7, Dun and Bradstreet Corporation Records.

97. Sandage, *Born Losers*, in particular Chapter 6 “Misinformation and its Discontents.”

98. Letter by Wagner to Messrs. Wynne, McCart & Booty, March 24, 1892, Box 9, f. 2, Dun and Bradstreet Corporation Records.

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 v. 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.”⁹⁹ 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 suit was abandoned. This common technical dismissal of the case was abetted with pleas to jurisdiction, where Dun’s lawyers argued that the charges had been 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.¹⁰⁰ 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 could be counterbalanced by limitations in the right to appeal and, as we found, the risk of generating more publicity.¹⁰¹ If a case lacked merit, it was sometimes preferable to lose it in the depths of a state’s judicial system, than in the greater light of a federal court.¹⁰²

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

99. Letter from Lewis Hallam, Attn. to Samuel Wagner, Feb. 19, 1895, Box 12, f. 3, Dun and Bradstreet Corporation Records.

100. 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.

101. In the already quoted letter from Wagner to Rice (April 4, 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.

102. Indeed, such cases, kept in the archive of lower state courts are still today, part of the harder to retrieve litigation record of mercantile agencies.

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 v. Dun*, in 1898 where Dun's local attorneys wrote to Wagner stating: "We believe this is in accordance with what both we and you regard as the best tactics in the case, to wit: to put off the trial as long as possible."¹⁰³ Chinn argues that in some cases such as in *State v. Morgan* when earlier decisions ought to have forced an agency to change its mode of operation, the "pendency" enabled "the mercantile agency in question to carry on its traffic in reporting the reputation, etc., of the citizens of that State."¹⁰⁴

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 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."¹⁰⁵ Reynolds agrees but, given

103. Caldwell & Caldwell to Samuel Wagner, May 24, 1898, Box 11, f. 8–12, Dun and Bradstreet Corporation Records.

104. Chinn, *Mercantile Agencies*, 194.

105. Wagner to Reynolds, Feb 20., 1886, Box 4, f. 13, Dun and Bradstreet Corporation Records.

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.”¹⁰⁶

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 v. 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....”¹⁰⁷ The usual effect of intimidating the plaintiffs’ witnesses was the dismissal of the suit, as the plaintiffs inability to prove either damages, or even the publication of the libel, caused the case to be thrown out.¹⁰⁸ In other cases, 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.¹⁰⁹

106. Reynolds to Wagner, Feb. 22, 1886, Box 4, f. 13, Dun and Bradstreet Corporation Records.

107. Jepson to Wagner, Oct. 19, 1885, Box 4, f. 7–11, Dun and Bradstreet Corporation Records.

108. 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*, 39).

109. Letter of Stuart, Smith, and Arkansas to Messrs R.G. Dun & Co. New York, Nov. 20, 1891, “S.E. Smith vs. R.G. Dun & Co.”, Box 8, f. 7, Dun and Bradstreet Corporate Records, Baker Library.

What could a plaintiff do when he discovered that he faced a coalition that 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 had 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."¹¹⁰

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 v. 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."¹¹¹ In other words, while the plaintiff 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."¹¹² A common tactic was for Dun to offer to pay the lawyers costs by way of settling the case, as in *Potter v. Dun*, where Wagner suggests "Possibly we could give a small sum

110. Letter of Hutton, Manager, Little Rock Arkansas to Samuel Wagner Esq., Mar. 25, 1892, "S.E. Smith vs. R.G. Dun & Co.," Box 8, f. 7, Dun and Bradstreet Corporate Records, Baker Library.

111. Letters of July, 23 and 25, 1892, Box 9, f. 3, Dun & Bradstreet Corporation Records, Baker Library.

112. Letter to Wagner Mar. 6, 1889, "James M. Peyton vs. R.G. Dun & Co." Box 5, f. 14, Dun and Bradstreet Corporation Records, Baker Library.

to the plaintiffs' attorney by way of costs, if you think it would be advisable to do so."¹¹³ Since the plaintiff's lawyer was usually defending a credit poor individual against a cash rich company, he could be sensitive to securing some income for his efforts, especially because the complementary role of mercantile agencies as both providers of information and agents for bankruptcy collection implied that Dun and Bradstreet jointly controlled an enormous business of litigation.

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*, (1892) 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. Once it was discovered Bradstreet's lawyers were in opposition, Dun's partner Erastus Wiman 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...."¹¹⁴

The evidence of collusion between Dun and Bradstreet's counsels (who from the language used were socializing and sharing information) brings to the fore the disproportion between the agencies (a concentrated interest) and their local opponents (a diffuse one). Of course we are not arguing that every single lawyer was part of the system but rather that the agencies were able to muster enormous legal firepower compared to their opponents: for anyone who takes seriously existing theories of collective action, the mercantile agencies' natural ability to coordinate (because they already owned a network) is suggestive. Only a few individuals (inside the rating agencies) knew what was really happening and the only thing that the agencies needed to do in order to keep the matter hidden (as they did) was to reward their counsels handsomely. Potential litigants not only needed to pay the costs of accessing the right kind of expertise: such expertise was not available—except inside the agencies themselves. This may explain why, when efforts were made to oppose them, they took the shape of attempts at regulation at the State level (as in the case of the South Dakota statutes).

113. Wagner to F. H. Neary, Esq., Mar. 22, 1895, *Potter v. Dun*, Box 11, f. 6, Dun and Bradstreet Corporation Records.

114. Letter of Samuel Wagner to [local counsel] Francis Minton, July 15, 1892, *T. Kane & Co. v. R.G. Dun & Co.*, 1892–1896, Box 8 f. 13, Dun and Bradstreet Corporation Records, Baker Library.

These tricks and tactics were sufficient for Dun to regularly draw libel cases to a satisfactory conclusion, either through dismissal on technicalities, or through drawing out the case for so long that the plaintiffs gave up, and we have reason to believe that Bradstreet did the same. Where the plaintiffs proved more tenacious than usual, the ferocity of the Agencies' defense, and their tendency toward underhanded tactics, gave them a strong bargaining position from which to arrive at satisfactory settlements. At the end of the day the balance-sheet of Dun's litigation reads as follows: of the forty-three 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 four cases reached the courts. There were two NS 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 two cases out of forty-three that were won on "merits" by the agencies. The other thirty-nine cases were dealt with as follows: Dun succeeded in getting fourteen of them dismissed on technicalities, thirteen of them were dropped by the plaintiff (typically after lengthy appeals), and twelve 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.¹¹⁵ The archival records reveal only two court-mandated payments by Dun, both in Canada.¹¹⁶

Conclusion

There is evidently merit in the conventional statement that the Agencies expanded because they enjoyed some favor. This paper has identified a number of such "supporters." They formed a credit nexus that supported the rise of Agencies. As we stated, given the deficiencies of the bankruptcy law, no creditor in his right mind could ignore the value of the confidential information, if no alternative existed. We also found that individual merchants could be discouraged (if needed through underhanded means) from siding with the debtors in libel cases. Finally, the business of credit reporting, with its

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

116. \$500 judgment reported in a Western Union telegram to Erastus Wiman, Mar. 29 1889 in Box 5, f. 17, "Cossette vs. R.G. & Co." Dun and Bradstreet Corporation Records.

complementarity with failure, permitted the agencies to enlist a vast network of lawyers directly interested in the success of the endeavor. In sum, the ecology of the Mercantile Agency “system” enlisted a myriad of local supporters. It put in motion rich and complex micropolitical economies, which were instrumental to its expansion.

But the court system was not part of the pro-agencies coalition. The view that mercantile agencies prospered in the United States because they secured social acceptance in courts is incorrect. Our consideration of the evidence finds no support for the assertion that “favorable court decisions and the industry’s strong growth indicate that by the 1870s an important shift had occurred: the desire for transparency had by then trumped concerns about accuracy.”¹¹⁷ In fact, the common law drew a sharp line between what was private confidential communications and reports and what was public printed material. Courts privileged private communications (the handwritten, typed, or oral reports), not so the volumes and NSs and after an early period—when even the confidential reports were suspect—consistently adhered to this interpretation across the nineteenth century and beyond. But the volumes and notifications sheets were valuable products, because they advertised the existence of more detailed information that the agencies owned and disclosed confidentially.

The agencies persevered in selling their products regardless of legal protection, which was not there, and regardless of the US Supreme Court, which refused to treat mercantile reports as just another commodity. Of course, in so doing, the agencies made themselves vulnerable to a tremendous amount of litigation. Commercial libel remained an enduring topic in late-nineteenth-century America. Beneath the dozens of cases that reached the higher courts and the law reports, there were, we found, those cases (hundreds?) that were settled or killed one way or another. And then there were the thousands of 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 skilled in crushing lawsuits.

As we found, a constant objective and concern of the Agencies was the sequestering of information that would have been detrimental to them. Had the general public learnt about the legal limits of rating, there would have been much more litigation. And thus the conflicting interpretations of privilege that appear depending on whether one looks at sources from “inside” or “outside” of the Agencies: inside the mercantile firms, the limits of qualified privilege were fully known and articulated. For outsiders, a nice narrative was organized that sought to inculcate the idea that going against the mercantile agencies

117. Olegario, *Culture of Credit*, 173.

was going against the telegraph, the railway, and the steamboat. This suppression of information was part of the response mercantile agencies found to adapt to a legal environment that remained hostile to them.

The legacy of the extended legal and extra-legal campaign the mercantile agencies launched in the second half of the nineteenth century is visible today in modern rating agencies' construction of ratings as an exercise of free speech and the expression of an opinion. Emphatically, this arrangement was *not* the reasoned preference of nineteenth century judicial opinion. Finding its origin there, as has been implied by previous work, is an incorrect reading of history. What the agencies put forward was a certain ideology of transparency, which they tried to render consistent by suppressing much information. We note that it is not a small irony that this ideology had such deceptive origins and that its sustainability hinged on information suppression.

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