

Academic Brands

Distinction in Global Higher Education

EDITED BY

Mario Biagioli · Madhavi Sunder



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ACADEMIC BRANDS

The first comprehensive analysis of the emergence of academic brands, this book explores how the modern university is being transformed as it competes in an increasingly global economy of higher education where luxury is replacing access. More than just a sign of corporatization and privatization, academic brands provide a unique window on the university's concerns and struggles with conveying "excellence" and reputation in a competitive landscape organized by rankings, while also capitalizing on its brand to generate revenue when state support dwindles. This multidisciplinary volume addresses topics including the uniqueness of academic brands, their role in the global brand economy of distinction, and their vulnerability to problematic social and political associations. By focusing on brands, the volume analyzes the tensions between the university's traditional commitment to public interest values – education, basic research, and the production of knowledge – and its increasingly managerial culture framed by corporate, private values. This book is also Available as Open Access on Cambridge Core.

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DISTINCTION IN GLOBAL HIGHER EDUCATION

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Preface

The many conversations that were eventually channeled into the pages of this book started at the intersection of two fields or bodies of literature that had not been previously brought into sustained discourse. On one side stands the legal scholarship on trademark law's role in the global brand economy – possibly the epitome of late capitalism – and on the other side the research on the transformation of higher education in the direction of the so-called neoliberal university and its adoption of corporate managerial and marketing strategies. Our goal is to focus on academic brands both as an emergent phenomenon within the global horizon of branding and as a window on the predicament of contemporary higher education and the way the university tries to conceptualize and represent what it is and does, and what its “value” is. This is just a first iteration of that interdisciplinary experiment.

We have organized the discussion around three clusters. The first, “Are Academic Brands Distinctive?” teases out the specificities of academic branding scenarios. Do they constitute just another iteration of the brand economy or can we see different roles and dimensions in them that both reflect and can make us better understand how higher education is and is not a “service” or an “industry”? Are students consumers or producers of the academic brand? And how do academic brands connect with the discourse of excellence, rankings, and the push to represent education as a personalized experience made possible by matching the “right” student with the “right” university?

The second cluster looks at the “Local and Global Dimensions” of academic brands. Does distance make one know a university more as a brand than as an actual institution, thus conferring on it “auratic” status (which may, for instance, make franchise campuses like NYU Abu Dhabi or Yale-NUS and their degrees more attractive)? Is the university like any other corporation that can place its headquarters virtually anywhere in the world, or does its brand resemble a geographical indicator, which ties it to a specific place? And what role does the simultaneous locality and globality of the academic brand play in the acceptance and success of its online

education programs? Finally, how does the globalization of the student bodies of elite American universities, in particular as these colleges market themselves more and more to Asian students, converge with a growing clamor for luxury and status goods in Asia?

The third section, “Conflicted Interests, Haunting Associations,” focuses on the ethical challenges that adopting corporate-style brands create for the university, which has been traditionally associated with a nonprofit ethos. Our contributors then take a step further, analyzing very recent scenarios concerning the relationship between the brand of the university and that of its sponsors, and the crucial ethical, cultural, and political tensions that emerge from that intersection – tensions we may have not yet learned how to address.

Fitting for a study of how universities try to monetize their distinctiveness, this project also started with funding. A generous Mellon-Sawyer grant to UC Davis for a year-long seminar series allowed us to both start this book project and support its completion as an open access publication. It has been a thoroughly collaborative effort, involving Jamey Fisher and Molly MacCarthy at the UC Davis Humanities Institute, colleagues and staff at the UC Davis School of Law, the Center for Science and Innovation Studies, and the Science and Technology Studies Program. We also wish to thank Anne O’Connor, Nicole Kramer, Yoke Dellenback, Anthony Parenti, and especially Nina Bell who made sure that the trains would run on time – always.

This project would not have come into being without crucial generous conversations with Gaye Tuchman, Margaret Chon, Guido Guerzoni, John Marx, Kavita Philip, and Michael Szalay who helped us frame the topic and understand its ramifications. Our thick ledger of debts does not end there. The conference where these chapters were first presented and discussed greatly benefited from the interventions, contributions, and criticism by James Boyle, Anupam Chander, Vanessa Correa, Nicole Ferry, Julie Hage, Cynthia Holmes, Jennifer Jenkins, Tim Lenoir, Angus MacDonald, Libby Morse, Anne O’Connor, Kriss Ravetto, Brian Soucek, and Teresa Vilaros. The masterful closing remarks by Alberto Moreiras and George Marcus made us realize how far we still had to go to fully trace the implications of the project. We hope to have come close enough.

Finally, in the postproduction phase, we were lucky to add Beatrice Lewin-Dumin to our team. It is her editorial finesse that has crafted these chapters into that kind of object called “a book.”

Mario Biagioli and Madhavi Sunder

PART I

Are Academic Brands Distinctive?

Distinctive Excellence

The Unusual Roots and Global Reach of Academic Brands

Mario Biagioli*

The study of academic brands intersects trademark law with critical university studies around questions both empirical and conceptual, from rather mundane things like universities' trademark policies and lawsuits over T-shirts and hoodies carrying university insignia all the way to the complex cultural, political, and economic tensions that frame the conflicted identity of the modern university. Straddling the line between knowledge and business, public and private, or between its local ties to the state and its reach toward the global economy of higher education, the modern university seems to have found in brands a tool to construct a coherent and attractive image, if perhaps only skin deep, of itself, its role, and its "excellence."

WHEN AND WHY

The contours of these developments can best be traced through some general questions. How has the self-representation of universities, colleges, and polytechnics changed over time, and at what point do we see a shift in focus from individual insignia to comprehensive brand strategies managed by marketing and communication offices?¹ Is that transition reflected in a stylistic change of the marks from scholarly insignia to corporate logos, from ponderous seals and Latin mottos ("Fiat Lux," "Veritas," "Rerum Cognoscere Causas") to agile modern marks? Often consisting of just one single noun or acronym – Harvard, Michigan, UCLA,

* I wish to thank my colleagues at the UCLA School of Law for the thoughtful and detailed suggestions and criticism, which they probably will not think I have adequately answered here. Thanks to Beatrice Dumin, Kriss Ravetto, and Madhavi Sunder for their comments and support, and to Vinson Lin for his research assistance.

¹ The seal of the University of California, for instance, was designed by Tiffany & Co. in 1908, but that was an isolated commission rather than an element of a comprehensive brand strategy.

NYU, SciencesPo, LSE, etc. – modern university marks can fully convey their comprehensive brands without even mentioning the term “university.”²

Was the turn to branding driven by an attempt to strengthen the ties with students and parents as potential future donors, or was the university simply following the lead of its brand-conscious corporate partners? Either way, has the university’s turn to branding merely followed established trends or can we find something more specific to it, something inherently tied to the university and its history, like, for example, the US universities’ unique investment in sports (see [Chapter 8](#)) and the consequent engagement with the media, the world of merchandising, and audiences that have quickly grown beyond campus, embracing a national and even international public?³ Is it the nexus of sports and media that introduced a brand mentality into the university, perhaps together with that peculiar form of sports stats we now call academic rankings? And has something as mundane as Sky Sports’ decision to include US college games in their all-reaching broadcast network been instrumental in turning those academic brands into a global phenomenon?⁴

Or did it start at the other end of the geographical scale, in the local gift shop? Has the tradition of selling branded sweatshirts, umbrellas, coffee mugs, rings, and shot glasses functioned as a humble “brand incubator” where the university learned the importance of developing relations with alumni, students, and parents through souvenirs and wearable memorabilia that could also communicate the brand to other admirers in the making? Or was it just a way to generate some additional revenue, like the gift shops we have to traverse before we are allowed to exit an art museum? To put it differently, did universities start to aggressively enforce their trademarks to protect their merchandise revenue (see [Chapter 7](#)), or to control their

² Marks that consist of just a few letters seem to function more as visual logos than the mere linguistic acronyms of their longer descriptive marks like the “Massachusetts Institute of Technology” or “London School of Economics and Political Science.” Less signifies more. For instance, the minimalist “LSE” or “MIT” acronyms and logos convey much more than the teaching of economics in London or a polytechnic in Massachusetts – older referents that, in any case, are becoming both unfamiliar and irrelevant to younger audiences.

³ While the brand-building potential of sports is undisputed, how can we explain the relation between generally elevated or simply pretentious mottos like “Veritas” or “Under God’s Power She Flourishes” and the distinctly lowbrow (occasionally adolescent-sounding) names of universities’ sports teams and their mascots? How can the “Yale Bulldogs” go hand in hand with the university’s “Lux et Veritas” logo? Or how can UC Santa Cruz’s mascot “Sammy the Slug” be associated with the same research university that prominently features “Let There Be Light” in its seal? How can a mascot function as a successful sub-brand if its meaning is so radically removed from that of the main brand? (It would be a stretch, I believe, to call it product differentiation.) On the relationship between university, sports, and branding, see Mark Garrett Cooper and John Marx, *Media U: How the Need to Win Audiences Has Shaped Higher Education* (New York: Columbia University Press, 2018); Gaye Tuchman, *Wannabe U: Inside the Corporate University* (University of Chicago Press, 2011); Joshua Hunt, *The University of Nike: How Corporate Cash Bought American Higher Education* (New York: Melville House, 2018).

⁴ I owe this point to Guido Guerzoni. Grazie.

“identity” and defend their brand from dilution? And if there was a transition from the former goal to the latter, when did a counterfeit T-shirt morph into a threat to a university’s identity?

One could take a very different perspective, if only as a heuristic experiment. Could it be that prestigious academic institutions have not actually turned to branding but have instead exemplified luxury brands before that concept even existed – “Oxford,” “Yale,” or the “École Normale Supérieure” having always functioned as signs of social distinction and identity for students, alumni, and even the nation as a whole rather than as simple providers of educational services? Not unlike nineteenth-century corporate trademarks, older universities seem to identify their brand with vintage, which is unsurprising given that universities are among the oldest of corporations. Harvard, for instance, claims to be “the oldest corporation in the Western Hemisphere,”⁵ and a few other universities secured international name recognition several centuries before any of today’s brand-based businesses even existed. Could it be that the ability of brands to lend distinctiveness to their goods and services and provide “identity narratives” to their purchasers is something that the names of some universities have been doing since the late Middle Ages, thus prefiguring the very function of the modern brand?

EXPANDING MARKETS, PIVOTING ORIGINS, STRETCHING IDENTITIES

Like other corporations offering an expanding range of different products and services, modern universities have much to gain from developing distinctive brands.⁶ (Research in higher education, for instance, frequently models the university–alumni relationship in terms of “brand loyalty.”⁷) At the same time, the goal of university branding is not just to attract donors, high-achieving students, and corporate partnerships but also to give a sense of unity and identity to their

⁵ www.harvard.edu/about-harvard/harvards-leadership/president-and-fellows-harvard-corporation (last accessed February 10, 2021).

⁶ Robert M. Moore, *The Real U: Building Brands that Resonate with Students, Faculty, Staff, and Donors* (Washington: CASE, 2010).

⁷ James H. McAlexander and Harold F. Koenig, “University Experiences, the Student-College Relationship, and Alumni Support,” *Journal of Marketing for Higher Education* 10 (2001): 21–43; John M.T. Balmer and Mei-Na Liao, “Student Corporate Brand Identification: An Exploratory Case Study,” *Corporate Communications: An International Journal* 12 (2007), 356–75; Brandi A. Watkins and William J. Gonzenbach, “Assessing University Brand Personality through Logos: An Analysis of the Use of Academics and Athletics in University Branding,” *Journal of Marketing for Higher Education* 23 (2013): 15–33; M. Pinar, P. Trapp, T. Girard, and T.E. Boyt, “Utilizing the Brand Ecosystem Framework in Designing Branding Strategies for Higher Education,” *International Journal of Educational Management* 25 (2011): 724–39; A. Lowrie, “Branding Higher Education: Equivalence and Difference in Developing Identity,” *Journal of Business Research* 60 (2007): 990–99; C. Chapleo, “Do Universities Have ‘Successful’ Brands?” *International Journal of Educational Advancement* 6 (2005): 54–64.

increasingly diverse portfolio of goods and services that now extends well beyond their traditional pedagogical mission: for example, art museums, technology parks, sports and sports-related merchandising, technology licensing, executive education, hospitals, book publishing, extension courses, distance learning programs, and so on.

The geographical spread of the services offered by the modern university is as conspicuous as the increasing diversity of their nature. More than ever, the university is trying to reach beyond the traditional physical boundaries of its campus. As we see among luxury brands (see [Chapter 6](#)), the trend toward academic branding is visibly tied to globalization, in this case the conspicuous transformation of higher education into a global market in which universities compete for foreign students (who often pay higher fees), while also franchising their brands to satellite campuses and partnerships like NYU Abu Dhabi, Yale-NUS, MIT-Skoltech, and so on. (This is a trend that premier museum brands like the Guggenheim and the Louvre have also been pursuing, pointing to the emergence of a global market for “cultural brands,” not just academic ones.)⁸ Even when the ambitions are less than global, the mobilization of academic brands is still associated with the university’s attempt to reach beyond its physical campus. Examples are the development of online distance learning programs that crucially rely on the brand to offset possible doubts about their pedagogical value (see [Chapter 4](#)), or the use of brands like “Stanford” or “UCLA” with strong associations to top medical schools and hospitals to leverage a university’s entry into broader regional health care markets.⁹

What prestigious universities share with famous museums like the Louvre or the Guggenheim (but not with other corporations with equally distinctive brands and global recognition) is that, until recently, they have been physically unmovable, and for good reasons. Corporations can relocate both their headquarters and production facilities (the latter virtually anywhere in the world), but universities and museums have drawn most of their distinctiveness from their history in the places where they have grown,¹⁰ creating a resemblance between their brands and the “terroir” that

⁸ The franchising of the Guggenheim Museum also indicates a conscious attempt to create a “trade dress” effect by commissioning the design of all its foreign museum buildings to Frank Gehry, who has used his signature tri-dimensional effect produced by undulating titanium panels to create very different buildings that at the same time display an unmistakable brand-like family resemblance.

⁹ I thank Joel Braslow for this point.

¹⁰ Because the image and institutional culture of technology-focused institutions involve the future more than the past, their relatively short pedigree may even be seen as a sign of distinction. For the same reasons, the reputation of such universities is also less dependent on their location and “terroir.” Even though Stanford seems to be connected to a specific local innovative ecology, it is one that Stanford helped constitute. Whether Stanford made Silicon Valley or vice versa is a matter of debate while, by contrast, it is clear that Paris made the Louvre.

geographical indicators try to capture (see [Chapter 5](#)).¹¹ A trademark relates a good or service to an origin, but not literally so. It needs to connect the good to a source to guide the customer through his/her purchasing choices, but it would be irrelevant to that function of the trademark to disclose the precise identity or physical location of that origin: “We may safely take it for granted that not one in a thousand knowing of or desiring to purchase ‘Baker’s Cocoa’ or ‘Baker’s Chocolate’ know of Walter Baker & Co., Limited,” or of where Walter Baker & Co. may be located.¹²

But it is commonly known that the Louvre is based in Paris, the Uffizi in Florence, the Guggenheim in New York, Oxford in Oxford, and Cambridge in Cambridge. In several cases, they have been occupying the same buildings for centuries – buildings that prospective students or visitors could find pictured in print media and now online, imagining themselves visiting or studying there.¹³ Far from incidental, the locations of these institutions are intertwined with both the experience of their brand and the genealogy of its appeal. Universities and museums become distinctive through accumulation in one place: by bringing works of art from different places and periods to one museum building; many books and manuscripts in different languages and on different topics to one library; and many distinguished faculty and top-performing students to one campus. While most corporations can sell and ship their goods anywhere in the world, tourists and students have traveled to very specific places to enjoy the services of academic and museum brands – brands that could have hardly come into being outside of those locations and without their specific historical roots to them.¹⁴

“Enjoyment,” however, means something quite specific in this case. It does not refer primarily to purchasing a branded good to take it home or wear it, but rather to paying tuition or admission in order to spend time in a cultural institution, admire its collections, use its libraries, learn, do research, meet other people, etc. Though

¹¹ Among the substantial literature on the subject, see Dev Gangjee, *Relocating the Law of Geographical Indications* (Cambridge University Press, 2012).

¹² *Walter Baker & Co., Ltd. v. Slack*, 130 Fed. 514, 518 (C. C. A. 7th, 1904), discussed in Frank Schechter, “The Rational Basis for Trademark Protection,” *Harvard Law Review* 40 (1927): 813–33 (at 815).

¹³ It is also worth noticing that the connection between institutional identity and location is less relevant to the brand of museums of contemporary art, which are by definition newer institutions that can be successfully established in a variety of different locations, with shallower roots, if any, in the local cultural terroir. Comparable differences might also be seen between older broad-spectrum universities and more recent elite institutions that have specifically tied their image to high-tech. It would be difficult to imagine Oxford having grown a brand like the one it has in Oxford, England in, say, Pasadena, California. At the same time, one could imagine Caltech having developed its strong brand in other locations.

¹⁴ In the case of museums, their brand is obviously rooted in their direct genealogical connections to prestigious past sovereigns, relations that developed and are reflected in the museum’s present location – the Hermitage Museum being the czars’ former palace, the Uffizi in the former Medici Galleria, etc. To some extent, that can also be said of some of the oldest universities like Cambridge or Oxford and their relationship with past sovereigns, aristocrats, and the Church.

universities and museums may include gift shops, they do not function like shops. Nor can universities be easily treated as sites of so-called experiential purchasing, “the manufacturing of experiential consumer practices, that is, [the] consumption of non material objects.”¹⁵ Like going on a cruise, the college experience involves expenditures and emotions, but obtaining an academic degree requires work and the fulfillment of requirements that the student has modest control over. Academic curricula allow for choices but are not a buffet. Recent studies of brand identification in higher education suggest that in fact buffets are not the point. The main long-lasting source of alumni allegiance is “recalled academic experience,” not “recalled social experience.”¹⁶ Among those who feel connected to their alma mater, the memory of parties fades away faster than that of transformative educational experiences – experiences the student had to work for, not just pay for.

At the same time, the recent transformation of those local institutions imbued in local sociocultural charisma into internationally recognized brands through the globalization of higher education (or, in the case of museums, the emergence of mass tourism) has also created the conditions of possibility for them to branch out from their original locations. I argue, however, that universities could not have franchised prior to becoming academic brands because an earlier geographical spread would have preempted the development of the very brand that eventually enabled their franchising. The university changes constantly through generational flows of students, faculty, administrators, curricula, and programs, and yet it is perceived to remain “one” by staying physically put, by growing around its first buildings, which always remain (if still standing) part of the campus. Unlike other corporate trademarks, therefore, a university’s mark always points to a real physical point of origin, even when that location is not explicitly featured in the mark. There would be no academic brand without an original campus. (That might also explain why it is difficult to imagine a successful university mark becoming generic and losing its ability to function as a trademark.)¹⁷

Unsurprisingly, mobility means something quite specific in the case of the university. NYU’s expansion to Abu Dhabi, for instance, exemplifies a form of movement that is conceptually closer to grafting than to franchising. Unlike restaurant chains (or corporate headquarters) that can be located virtually anywhere

¹⁵ Eva Illouz, “Emotions, Imagination and Consumption: A New Research Agenda,” *Journal of Consumer Culture* 9 (2009): 377–413 (at 386–87).

¹⁶ Adrian Palmer, Nicole Koenig-Lewis, and Yousra Asaad, “Brand Identification in Higher Education: A Conditional Process Analysis,” *Journal of Business Research* 69 (2016): 3033–40 (esp. 3037–38).

¹⁷ Could you imagine a scenario where a famous university brand – e.g., Cambridge, Princeton, or Berkeley – would become a generic designator for higher education itself, the way Kleenex, Thermos, or Aspirin have come to be used as the name for an entire class of products rather than a specific member of that class? If you cannot, I believe it is because academic brands, no matter how famous they become, never refer to more than one specific university in its location, or to its possible satellites, which are satellites, not franchises.

because they are specific to nowhere, in the case of prestigious universities and museums the “original plant” stays back in Paris, New York, or Cambridge, while the “brand cuttings” are spliced onto other newer institutional stocks, in other locations, where more people may enjoy their fruits. All that a restaurant chain’s brand can convey is the consistency of its menus and ambience, but university and museum satellites deliver a little bit of the real thing – for example, some courses taught by faculty from the original campus, or some artwork from the original collection. It’s a chain, but it’s original. What spreads is not just the brand as a sign different from other signs but also some unique things and persons – something “auratic” – that come from the brand’s place of origin. (A satellite Louvre museum featuring only photographic reproductions of artwork on display in Paris would not work, in the same way that a satellite campus of a major university would not be attractive if all that the two shared was a course catalog.)¹⁸ The exhibits at the Louvre Abu Dhabi do not need to include the Mona Lisa, and Yale does not need to ship its Nobel Prize winners to Singapore, but something more than the brand as sign, something material and from the center – a “cutting” – needs to be grafted onto the new branches, or perhaps just sent to the satellite campus for a little while.¹⁹ A mere “university chain” – that is, a centerless chain identified only by its mark and perhaps by the trade dress of its buildings – would just look like another for-profit college populating nameless strip malls.

If I have stressed the specificity of academic brands it is because it does not seem to match entrenched views about the function of marks and its historical trajectory. In his seminal 1927 article, Frank Schechter argued that:

The signboard of an inn in stage-coach days, when the golden lion or the green cockatoo actually symbolized to the hungry and weary traveler a definite smiling host, a tasty meal from a particular cook, a favorite brew and a comfortable bed, was merely “the visible manifestation” of the good will or probability of custom of the house; but today the trademark is not merely the symbol of good will but often the most effective agent for the creation of good will, imprinting upon the public mind an anonymous and impersonal guaranty of satisfaction, creating a desire for further satisfactions. The mark actually *sells* the goods.²⁰

Schechter contrasted the premodern “Golden Lion” signboard with the function of modern trademarks, stressing the difference between marks that consumers took to

¹⁸ Even if the course syllabi are the same, it makes a crucial symbolic difference who teaches them. One can find all MIT syllabi and course materials online, but using them on your own or with a tutor, however competent, would not produce an “MIT education.”

¹⁹ Another figure for this transfer could be the relic – a material and unique testimonial that is made to circulate in time and space from the center of charisma. I am following Eva Illouz’s suggestion that, “The relic marks the irruption of the past inside the present through a unique and unreproducible object. Consumer goods are similar to relics in that they also open up inside the present a temporal breach: however what is opened up here is not the past but the future, through infinitely reproducible goods” (“Emotions, Imagination and Consumption,” 396).

²⁰ Schechter, “Rational Basis for Trademark Protection,” 818–19.

signify known specific services and goods provided in a specific place by specific individual providers, and marks that no longer signify the consumers' goodwill in specifically localized services. Modern trademarks become the means through which business can create such goodwill by signaling to customers that any inn in any location bearing that sign will provide them with the quality of services they are accustomed to, whether or not they have stopped there before. Scholars may describe or locate this transition differently, but few would disagree with Schechter that it has happened, and that it established the roots of what has eventually grown into the brand economy.²¹

Surprisingly, however, academic brands still function very much like the "Golden Lion" or "Green Cockatoo." They have become global brands of academic excellence, and yet they remain essentially tied to specific campuses and to the services that specific, known individuals like a university's distinguished faculty provide. Contrary to Schechter's otherwise remarkably accurate forecast of the future of trademarks, the "Green Cockatoo" (*sub specie* Oxford) has become a global brand, signifying *both* goodwill *and* its own value as a floating signifier of academic excellence.²² It has gone global by remaining essentially local and thus playing two signifying functions (or signifying two kinds of value) at the same time.

FROM *BILDUNG* TO EXCELLENCE

Academic branding goes hand in hand with broader neoliberal management and cultural trends like the erosion of the university's traditional (if inconsistently upheld) nonprofit stance, or the perception of education as a product with students as its consumers, but there may be more to it than that.²³ The recent expansion of the university's activities and services as well as its new global ambitions have created a broad identity crisis across academic institutions. Even those universities that proudly claim their status as public institutions feel compelled to frame their "publicness" as a distinctive brand element:

The University of California is located wherever a UC mind is at work. At any given moment, people in the UC community are exploring, creating and advancing our shared experience of life in California and beyond. These [brand] guidelines ensure

²¹ Deven R. Desai, "From Trademarks to Brands," *Florida Law Review* 64 (2012): 981–1044; Rochelle Cooper Dreyfuss, "Expressive Genericity: Trademarks as Language in the Pepsi Generation," *Notre Dame Law Review* 65 (1990): 397–424; Barton Beebe, "The Semiotic Account of Trademark Doctrine and Trademark Culture," in Graeme B. Dinwoodie and Mark D. Janis (eds.), *Trademark Law and Theory: A Handbook of Contemporary Research* (Cheltenham and Northampton, MA: Edward Elgar, 2009), 42–64 (esp. 58–64); Mark P. McKenna, "The Normative Foundations of Trademark Law," *Notre Dame Law Review* 82 (2013): 1840–1916 (esp. 1896–1916).

²² On brands as floating signifiers, see Beebe, "Semiotic Account," 60–63.

²³ Christopher Newfield, *Ivy and Industry: Business and the Making of the American University* (Durham, NC: Duke University Press, 2004).

we express these shared values with every communication. In short, this site helps us all “Speak UC.”²⁴

For better or for worse, brands have become the university’s idiom of self-representation and marketing, but probably also the medium through which the so-called university of excellence – private, public, elitist, or inclusive – has come to think about itself. Trademark scholars have shown that brands function as discursive tools that allow consumers to construct or project their identities as self-styled narratives tied to the purchase and display of specific branded goods and the claim to values deemed to be associated with them.²⁵ The university appears to engage in a comparable process of self-fashioning. As the head of the UC Marketing Communication Department puts it, the goal of an academic brand is “to create a coherent identity that would help us tell the UC story in an authentic, distinctive, memorable and thoughtful way.”²⁶ The relation between branding and narrating the university does not stop at the level of corporate strategy but trickles all the way down to mundane fund-raising practices, where the university reaches out to potential donors by presenting them with students’ poignant stories of personal challenges followed by sterling professional successes that were enabled (and, it is implied, could only have been enabled) by that very unique university.

In *The University in Ruins* (1997), Bill Readings argued that the emergence of the now-pervasive discourse of excellence signaled a radical shift in the nature and function of the university and its relationship to the state.²⁷ The university of excellence – the one we inhabit – is the successor to the nineteenth-century German research university that, functioning as the educational wing of the state, was meant to lead its students to *Bildung*. More than the development of professional skills, the Humboldtian university was meant to support a process of individual and cultural development aimed at attuning the students’ sense of self to a specific culture. It was part of a clear educational program framed by the nation-state’s view of what culture and nation should be and sought to mold its students to produce a certain kind of citizen and civil servant. Assumptions about culture and nation went hand in hand with assumptions about education, curriculum, the students’ social background, and the function of the university, enabling one to think of the “quality” of the university as an index of how well it performed this state-specific function.

²⁴ <http://brand.universityofcalifornia.edu/#!the-university-of-transformation> (last accessed December 13, 2021).

²⁵ Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (New Haven, CT: Yale University Press, 2012).

²⁶ “Meet Vanessa Correa, UC’s Creative Director,” *The California Aggie*, December 6, 2012, <https://theaggie.org/2012/12/06/meet-vanessa-correa-ucls-creative-director> (last accessed February 15, 2021).

²⁷ Bill Readings, *The University in Ruins* (Cambridge, MA: Harvard University Press, 1997), 21–43.

According to Readings, this framework came to an end in the late twentieth century with the distinct weakening of the relationship between the university and the state, which enabled or caused the university to become a more open and flexible system or, as some say, an entrepreneurial one. Even in those cases where the state still provides some financial support, there is no longer a unified notion of *Bildung* that the university is expected to deliver on behalf of the state. (Readings did not mention brands, but the current tendency among public universities to downplay the name of their state in their main mark (“Berkeley”) embed it into a logo-like acronym (“GaTech,” “ASU,” “UCLA”) or treat it more as a geographical indicator than a sociopolitical partnership (“Michigan,” “Cal”) seems to index a change in the connection between the state and the university.)

The university has also slowly opened up to students with more diverse cultural and ethnic backgrounds, new fields that extend well beyond the traditional liberal arts, and forms of professional training that were previously deemed non-academic. In the UK and Germany, for instance, the strong traditional distinction between universities and polytechnics or *Hochschulen* has been abolished. At the other end of the spectrum, artistic training, which used to be housed in academies, is now commonly offered by the university. The multiplication of new fields exemplified by adding “studies” after a seemingly endless range of different questions or materials – cultural studies, gender studies, media studies, innovation studies, border studies, etc. – is yet another illustration of this pedagogical shift from a unified *Bildung* toward an ever-expanding range of questions and constituencies.

Taken together, these transformations have led to the substitution of the concept of quality with that of excellence. We no longer have a unified notion of education and its goals that can comprehend the many fields we now see, each with their own specific goals and modes of evaluation.²⁸ The landscape of the university’s constituencies has also significantly expanded, further complicating the judgment of what counts as an appropriate curriculum.²⁹ The concept of excellence has emerged in response to this predicament in order to create the impression that something like a unified notion of quality can be found across its many different instantiations, including future ones, despite the patently different criteria used to assess such excellence. Being excellent means that you are “great” at doing what you do no matter what that is – a notion of quality so pliable as to be applicable to any and all of the university’s services, including parking.³⁰ Excellence acknowledges the utterly

²⁸ The same shift may also point to the roots of the requirements that our institutions (or, in the case of law schools, the American Bar Association) have introduced, requiring that we specify our courses’ “educational objectives” and “learning outcomes” – questions that would have sounded rather strange in nineteenth-century Germany, where they would have all received the same obvious answer: *Bildung*.

²⁹ Readings, *University in Ruins*, 24: “excellence is not a fixed standard of judgment but a qualifier whose meaning is fixed in relation to something else. An excellent boat is not excellent by the same *criteria* as an excellent plane.”

³⁰ Readings, *University in Ruins*, 24.

local notion of quality while simultaneously intimating that quality is equally present in all of its local manifestations – *una et multipla*. (Paradoxically, the same lack of fixed reference that makes excellence so pliable and effective can also bring it dangerously close to genericness. No matter what they do, all universities can now freely or shamelessly cast themselves as “institutions of excellence”).

Academic brands aim to transform the evanescence of academic excellence into an asset, filling the gap left behind by the disappearance of a unified idea and function of the university while capitalizing on the possibilities this opens up. The discourse of excellence has framed the university’s move to diversify its scope well beyond that of its institutional ancestors, and while we can no longer define what the university is or does, we can brand it and thus create the effect of unity in its absence. It is as if two virtualities, when superimposed, create the optical illusion of an actuality. Excellence projects a form of quality that can only function by having no unitary definition, while the academic brand projects itself as the unitary origin of that excellence. That “origin,” however, is virtual. It only exists as a trademark, a sign defined as: “any word, name, symbol, or device . . . used . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”³¹ The university may be confused about its mission, but it’s precisely this identity crisis that is turning it – whatever “it” may be – into an increasingly valuable brand.

BRANDING BY NUMBERS?

The relationship between the discourse of excellence and the turn to branding can be traced to today’s widespread reliance on metrics for evaluating academic work (see [Chapter 3](#)). This may seem paradoxical given that bureaucratic number-crunching looks hardly comparable to the graphic simplicity and immediacy of a logo, or the inherently qualitative storytelling that brands promote. The symbiosis of brands and metrics, however, is rooted in the complementarity of their differences and in the fact that metrics have come to be treated as the best way to manage the assessment of excellence. As a result, university rankings have become inextricably tied to brand-building.

For centuries, the peer evaluation of colleagues’ research has been one of the distinctive features of the academic world. Today’s supporters of metrics argue, however, that the parameters for the judgment of quality based on peer review are too opaque, prone to bias, and deploy different field-specific standards of evaluation. Instead of chasing after something as undefinable as quality, they have successfully proposed to focus on quantifiably salient features of the work, like assessing its post-publication impact as measured by the citations it receives. A citation is treated as a distinct event, not an opinion. Positive or critical, the citation happened. And being

³¹ § 45 (15 U.S.C. § 1127), emphasis mine.

reliably recorded in an article's footnotes and references, citations can be easily added up and elaborated to produce a variety of indexes. Quality has been turned into excellence, and in this case excellence has been made measurable by using "publication impact" as its proxy.³²

Excellence is inherently field-specific and thus potentially incommensurable across the spectrum of academic disciplines and genres. But if one can make excellence look measurable through proxies, then the university can have its cake and eat it too, holding on to the specificity and locality of excellence while also implying that excellence can be objectively assessed (and used to make sound decisions) across different disciplines, institutions, and contexts. Furthermore, if one agrees that excellence can be translated into numbers even in the most difficult of scenarios involving the notoriously elusive evaluation of research excellence, it follows that it's easy to assume all other forms of university excellence are also quantifiable, with even less difficulty, covering pretty much anything the university does or will do. Finally, unlike judgments of quality, assessments of impact can be scaled up, using aggregate metrics of the impact of the publications of individual scholars to measure the impact of departments, schools, and universities. *And then rank their relative "excellence."*

Metrics and brands are two complementary ways of capturing academic excellence and communicating it not only to the insiders of a given field, but especially to non-specialists. Brands reduce the customer's search costs and, likewise, metrics can be helpful to those who need to make decisions about a publication or a product whose production process or technical details they know little or nothing about, all the way down to students and parents trying to decide where their tuition money should go based on metrics-based university rankings. Being associated with numerical figures, metrics has the look of objectivity, while brands do not. Still, the main metric outcome of academic evaluation – rankings – is effective precisely because of the ubiquitous and endless public and private conversations and commentaries it constantly fuels. If metrics did indeed get things right, we would not need all the competing rankings we have, nor would they be discussed, questioned, or compared as actively and pervasively as they are – as numerical tea leaves.³³ In sum, from the academic consumer's point of view, metrics, rankings, and brands are part of the same conversations and decisions. Rankings are made of numbers, which makes them "look numerical," but are viewed, used, and discussed as qualities.

³² Mario Biagioli, "Quality to Impact, Text to Metadata: Evaluation and Publication in the Age of Metrics," *KNOW: A Journal on the Formation of Knowledge* 2 (2018): 249–75.

³³ The development of different global university ranking protocols is seen as an attempt to provide a fuller picture, fill gaps, and correct the biases of other ranking systems – a path to ever-improving precision and objectivity. But what if all the rankings we see were just evidence of a proliferation of many different, even possibly incommensurable metrics because they are, in fact, measuring differently construed objects?

The establishment and function of brands significantly overlap with those of reputation – the construction of a product's quality as knowable and reliable by connecting it to a reputable provider or origin. The same applies to academic rankings (especially those of *U.S. News & World Report*, assiduously followed by US universities).³⁴ While expressed in numbers, rankings like USNWR rely primarily on the qualitative reputation that universities and departments earn from key academic opinion leaders such as upper administrators from other institutions. (They do not measure reputation the way measuring tapes measure the length of wood planks, but rather simply bestow a quantitative look to qualitative judgments of distinction.) Both brands and rankings are about creating an effect of distinction in the eyes of the beholder – a distinction that is then stabilized by spreading its recognition to other people, often through networks of consumers, including the students themselves. Additionally, both academic rankings and brands are becoming increasingly effective and valuable as a result of the globalization of those markets. Students and their families rely on academic rankings and their branding effect to choose among hundreds of universities they have little or no direct knowledge of. At the same time, those same universities use metrics when trying to identify and hire top faculty talent from places that may be beyond the reach of traditional recruitment networks based on name recognition. A thousand citations, it would appear, speak louder than a letter of recommendation. Similarly, universities rely heavily on metrics during the student admissions process, carefully evaluating whether an applicant's "ranking" – their scores on the SAT, GRE, LSAT, etc. – will contribute to or diminish both the school's brand and its own ranking.

The global branding game, however, is not played on an even field. Up-and-coming universities that have not yet established a global reputation face an additional challenge as they try to become more distinctive: there are too many of them, and they may be geographically too far removed to be known by opinion leaders in countries "that matter." It is therefore interesting that some newer global ranking systems (especially those developed in Asia, like the *Academic Ranking of World Universities*, ARWU) do not privilege reputation by opinion leaders (like the USNWR does), but instead emphasize quantitative metrics (faculty productivity, journal impact factors, etc.).³⁵ This suggests that numerical ranking has become a way to build academic brands when and where emergent universities are still unknown to the "opinion leaders" of the Global North, either because they are still

³⁴ Ellen Hazelkorn, *Rankings and the Reshaping of Higher Education* (London: Palgrave Macmillan, 2015); Barbara Kehm, "Global University Rankings: Impacts and Applications," in Mario Biagioli and Alexandra Lippman (eds.), *Gaming the Metrics: Misconduct and Manipulation in Academic Research*, (Cambridge, MA: MIT Press, 2020), 93–100.

³⁵ The *U.S. World & News Reports* rankings do include some quantitative elements, but they concern undergraduate programs – like incoming students' test scores, expenditure per student, etc. – not research output. Ben Wildavsky, *The Great Brain Race: How Global Universities Are Reshaping the World* (Princeton University Press, 2010), 100–40.

emerging or because they are too far away and outside of the cognoscenti sphere, or both. Metrics and rankings function as branding by numbers – converting numbers into reputation for those institutions that do not yet have prominent reputations. They can also work the other way around, converting the reputation that known academic brands have in the eyes of opinion leaders into numbers that are then translated into rankings.

For instance, a university that is ranked between 400th and 500th globally has only an miniscule chance of developing a valuable brand anytime soon, or even of having its name known and recognized outside of its region. However, if that same university manages to have its faculty achieve a strong publication output in relatively reputable journals, it will quickly start to move up in rankings like the ARWU that focus on quantitative performance indicators, not qualitative reputation. Eventually it may be able to break into the top 200, and then perhaps even the top 100, at which point it may develop some name recognition precisely by having its name seen by the millions of people from around the world who pore over those rankings, assiduously comparing them to see who is moving up and who is heading down. (But very few people read the entire ranking list, so universities outside the top 100 are probably not likely to have their name seen by many, thus condemning their emergent brand to dwell in the shadows a while longer.) And if, hypothetically, an up-and-coming university was lucky enough to make it to the top twenty (which is exceedingly difficult, given the first-entrant advantages of older institutions), its brand would become strong and distinctive enough to endure just based on the reputation it would have gained through the very rankings that brought it to the attention of academic leaders in the first place, and whose opinions will feed both the brands and the future rankings of top universities.

I propose we think of these rankings – the ranked lists of university names on a screen or page – as global billboards. Not only are these rankings accessed and assessed nonstop by millions of people, but, while inherently and directly derived from metric evaluations of the “excellence” of hundreds of universities, they are experienced as visual objects, as ranked “logo walls.”³⁶ More than a gateway to branding (which I have argued they also are), global rankings may be the petri dish in which academic brands grow, the screen on which a university’s name will be seen and recognized in relation to others that precede and follow it on the list. Metrics and brands are therefore two technologies of distinctions that are seamlessly spliced together, even sharing the same medium: the ranked list – a list that while looking “objective,” functions in fact as material for conversations and interpretations, even disputes, among its users. In the same way that consumers of luxury goods will disagree in their evaluation (that is, the ranking) of this year’s Fendi, Chanel, or Hermès collections, so too will the students (and their parents) who are

³⁶ By 2010, just the ARWU alone was already receiving 2,000 viewings per day, despite being a newcomer in the rankings market (Wildavsky, *Great Brain Race*, 112).

considering which Ivy League university is “the best.” Rather than destabilizing the brands, however, these conversations and disagreements over whether the ranking of a certain university is correct (or correct in certain rankings and wrong in others) are in fact constituting and reinforcing them by teasing out the things that make a particular university “so special” and different from others.³⁷

BRANDING – AND ROTTING – FROM WITHIN

One distinctive feature of academic brands is that they tarnish from within, that is, they can be damaged by some of the same associations that made them distinctive to begin with. An example of this is the controversy, studied by Janet Halley, surrounding Harvard Law School’s seal, the design of which was borrowed from the family crest of an eighteenth-century slave owner from a slave-trading family and early key donor – Isaac Royall, Jr. – whose 1781 bequest went to fund Harvard’s first Chair in Law, thus seeding the establishment of the law school itself (see [Chapter 9](#)). An association that had been seen as seminal to the school’s beginning (and then to the distinctiveness of its ancestry-fed brand) has now turned against it.

Notice that this is different than a corporation harming its reputation by producing defective goods like, say, Boeing damaging its brand by selling crash-prone 737 Max airplanes. Nor is the harm to the Harvard Law School brand comparable to the tarnishment that actors external to the Coca-Cola Company caused by manipulating its mark “Enjoy Coca-Cola” into “Enjoy Cocaine.”³⁸ It also differs from the Proud Boys’ recent use of Fred Perry polo shirts or yellow kilts by Verillas – an LGBT-owned brand. While these brands were dismayed to see their products become part of the Proud Boys’ unofficial uniform, they had no cause of action against them given that the shirts and kilts were lawfully purchased, and the brand itself had not been manipulated.³⁹ All they could do was pull those items off their racks to prevent further purchases. As with the Royall scandal at the Harvard Law School (HLS), this controversy did not follow from recent actions by the brand owners or because of any substandard quality of the goods and services involved, but resulted from the radically new (and politically opposite) associations that the consumers – the Proud Boys and HLS students, respectively – attached to or rediscovered in the brands well after their original establishment.

³⁷ These numbers are meant as measures, but to the reader they function like symbols; not “1” as a numeral but “Number one!”; not “#59” but “Best University in Russia,” and so on. They look like factual measures of performance – mathematical signs – but function like visual symbols, that is, evidence of brand recognition. The higher your university appears on the billboard, the more distinctive it is. More than a table of performance measurements, a ranked list of university names could be thought of as a space of comparative advertisement.

³⁸ *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183 (EDNY 1972).

³⁹ Elizabeth Segran, “Why the Far Right Proud Boys Co-opted these Polo Shirts,” *Fast Company*, October 7, 2020; “LGBT-Owned Kilt Maker Denounces Kilt-Clad Proud Boys,” *BBC News*, December 15, 2020.

A crucial difference, however, is that Fred Perry and Verillas could end those associations by stopping the sale of these goods: “We decided we really didn’t want their money,” says the owner of Verillas.⁴⁰ But Royall is not an unwanted customer the Harvard Law School can disassociate itself from by simply pulling a product off its shelves. He did not buy anything from them but, over two centuries ago, provided a gift that helped to build a school that in 1936, in a gesture of retroactive gratitude (or in an attempt to construct its own heraldic prestige), decided to reinforce the relationship with Royall by adopting his family crest as its logo.⁴¹ As loudly and thoroughly as HLS may now repudiate or reduce the visibility of that association (see [Chapter 9](#)), it cannot be easily undone because it is literally constitutive of the brand. If trademarks like “Harvard Law School” function as signifiers of origin, then Royall’s gift and name constituted the origin of the origin or, so to speak, the goodwill behind the goodwill. Simply removing the Royall seal from all HLS buildings, merchandise, and stationery will not erase that origin.

Compared to conventional brands that grow from the inside – from the design and management of distinctive marks supported by goods and services of reliable quality – academic brands gain a significant portion of their distinctiveness from literally incorporating the names and distinctiveness of individual or corporate donors. (That strategy would be distinctly counterproductive for common corporate brands, unless carefully framed as an occasional “collaboration”). From endowed Chairs to named buildings, institutes, fellowships, conference centers, hospitals, museums, and sport facilities, the university is made more distinctive and prestigious not only by taking the donors’ money to pursue excellence and distinction, but by borrowing their distinction – their names – as well. Perhaps we could think of a campus as a surface on which different marks are inscribed, a scaled-up logo wall with the many names and marks of its individual and corporate donors functioning like the tesserae of a larger mosaic – the university brand.

But while it would be tempting to see this as an accumulation of endorsements – the way companies strengthen their brands by having their products endorsed by famous people – the university does not pay for these “endorsements” but is actually paid by and for receiving them. It may look like a strange quid pro quo where it is not clear who is advertising whom, but it works well precisely because of that. The donors seek to present the institution’s acceptance of their gift as having gained a

⁴⁰ “LGBT-Owned Kilt Maker Denounces Kilt-Clad Proud Boys.”

⁴¹ As Janet Halley shows in this volume, the Royall family coat of arms was both fake – the family had no title to it – and pirated, taken from an old aristocratic English family, the medieval Earls of Chester. In the 1830s, long after the sun of heraldry had set, Harvard sought to produce antique-looking emblems for its residential houses and schools as part of its tricentennial celebrations. In that context, HLS reappropriated the coat of arms that the Royalls had appropriated from the Earls of Chester in the eighteenth century. The Royalls do not appear to have objected to the HLS shield, nor does Prince Charles (the heir to the Earl of Chester title since the fourteenth-century merger of the earldom of Chester into the principality of Wales).

place on that peculiar logo wall we call a campus. At the same time, academic brands thrive on those donations not only economically but also semiotically, their distinctiveness feeding off the corporate or individual distinctiveness of the donors. Brands branding brands. What we find in the university, therefore, is not just one brand (or one that, like Supreme, enters into brand collaborations with other companies) but rather a full-fledged “kinship network of marks,” some big some small, all articulated on or around the main university brand.

The distinctiveness of the academic brand grows in part from the way these names signal a connection between the university and people and corporations that matter – distinctive actors that are believed to be discerning enough to recognize how good the university is, and rich enough to donate to it, thus establishing or reinforcing a “relationship.” The distinctiveness of the academic brand, therefore, is not exclusively rooted in the quality of the goods or services being provided by the university, but in the quality of the relationships that develop on or around them. Curiously, even if one does not recognize the name of the donor after whom something is named, the very fact that that thing has been gifted or endowed conveys the message that the university is important, or important enough.

The presence of donors’ marks, names, or brands conveys “brandedness,” that is, that the university is distinctive because of these other marks that are associated with it, even though one may not be able to recognize the specific names one is looking at on the façade of a building, attached to a university Chair, a fellowship, or to one of the several centers and institutes listed on a university’s website.⁴² (The analogy here is with jackets overloaded with multiple Western brands – many not just copied but plainly made up – that Indian youth in Chennai buy because of the stylishness they associate with the sheer quantity of logos displayed on these clothes, despite the fact that they can hardly recognize them.)⁴³ This points to a seemingly paradoxically constructive relationship between genericness and distinctiveness in academic brands (see Chapter 2). A donor’s name that is not recognizable by a viewer is by definition not distinctive, at least in the eyes of that viewer. It stands for, and can be replaced by, the name of any other unrecognizable donor. And yet, the bare presence of that name, however unrecognizable to many people, creates an effect of distinctiveness, like an unknown signature on a painting.⁴⁴

Kinship networks of marks are not always happy ones. In addition to the controversy at the Harvard Law School, Oxford’s struggle to hold on to its world-famous Rhodes Fellowship while acknowledging the white supremacist views and ardent imperialist commitments of its founder, Cecil John Rhodes, indicates that more

⁴² Constantine V. Nakassis, “Counterfeiting What? Aesthetics of Brandedness and Brand in Tamil Nadu, India,” *Anthropological Quarterly* 85 (2012): 701–22.

⁴³ Nakassis, “Counterfeiting What?” 702–03.

⁴⁴ A cynical mind might argue that it could be beneficial to universities to add fake donors’ names on buildings – just to create the impression that those building were endowed – and that other suitable donors might then want to follow suit.

university brands are suffering from the changing political connotations of formerly distinction-producing associations.⁴⁵ (Other universities are now establishing “naming committees” to review such scenarios, suggesting that they are becoming the new normal.⁴⁶) The debate on these issues has been primarily focused on the racist dimensions of these marks, which are the most offensive. That focus, however, has deflected attention from what these controversies can teach us about the specificity of academic brands, that is, the way their distinctiveness feeds on their associations with distinctive partners – past and present – and how the meaning of those associations is always in the eyes of the beholder.

Companies can sustain their brands by tweaking their look and by modifying their goods and services in response to customers’ appreciation or criticism of their quality, but universities – especially older ones – have fewer options. They may partially modify their curricula in response to critiques of the brand’s association with donors that have become unacceptable, and they may also end the relationship with those donors provided they are recent and/or peripheral enough to the brand.⁴⁷ But the Royall endowment is or has become too close to the genealogical roots of HLS to be simply excised. What can be reworked – partially and with difficulty – is not so much the product beyond the brand but the associations that make up the brand.

BRANDS BEFORE BRANDS?

The emergence of the brand economy has gone hand in hand with a trend toward the proprietization of marks. Originally trademark did not protect a property right in the mark but an exclusive right to use that mark in commerce in relation to specific goods and services.⁴⁸ The legal protection of trademarks was justified on the grounds

⁴⁵ Yale has renamed Calhoun College after Grace Murray Hopper, a woman mathematician, computer scientist, and Navy rear admiral (<https://news.yale.edu/2017/02/11/yale-change-cal-houn-college-s-name-honor-grace-murray-hopper-o>, last accessed December 13, 2021). It was originally named after John Calhoun, a prominent nineteenth-century alumnus who happened to be an outspoken white supremacist and supporter of slavery. Other universities, including Georgetown, Princeton, and the University of Texas at Austin, have been engaging in comparable renamings. In the wake of the scandal surrounding the opioid epidemic in the US, it is worth considering the future of Sackler museums at various universities, from Harvard to Beijing.

⁴⁶ Thomas Rosenbaum, “Letter to the Caltech Board of Trustees,” January 3, 2021, https://inclusive.caltech.edu/documents/18180/CNR_Cover.pdf (last accessed February 15, 2021). I wish to thank Dan Kevles for this reference.

⁴⁷ It is going to be instructive to see if and how US universities will rearrange their relationship with the Sackler family in the wake of the opioid crisis scandal. On Tufts’ ambiguous response, see Rick Seltzer, “Tufts Strikes Sackler Name From Campus,” *Inside Higher Ed*, December 6, 2019, www.insidehighered.com/news/2019/12/06/tufts-will-remove-sackler-name-medical-campus-drawing-rebuke-purdue-pharmas-owners (last accessed March 15, 2021).

⁴⁸ This was not limited to US law. Nineteenth-century British trademark law displayed the same assumption. Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911* (Cambridge University Press, 1999), 171–72.

that the relationship between a good and a mark conveys information about the good's origin, which helps to protect the consumer from fraud and to minimize his/her search costs while simultaneously incentivizing the producer to invest in the good's quality and reliability so as to maintain and grow the consumer's goodwill. However, with the rise of the brand, the protection of the relationship between goods and marks has been effectively rearticulated as the protection of the mark itself as a thing of value. At the same time, consumers come to seek brands in and of themselves, almost independently of their material embodiment. One no longer buys a T-shirt with a large Nike logo on it because one expects it to be of good quality due to the fact that it is made by or for Nike. Instead, consumers buy it because they appreciate the logo for what identity it enables them to construct and project by wearing it. As a prominent logos-centric fashion designer put it:

[A logo] is a symbol and, as symbols do, they attach people to each other, and the logo makes a statement, a transformative statement from person to person, letting them know that you have arrived. This is who I am. This is the statement I want to make. And the logos I have used are always associated with high-end brands, so the statement is like, "I qualify for this. Just look at me. Because I am."⁴⁹

No mention is made here of what piece of clothing the logo may be attached to – an absence that, far from accidental, points to the fact that clothes are simply the different media through which the logo is expressed rather than the goods whose origin the logo signifies.

Crucial developments in trademark law have accompanied this shift in the semiotics of the trademark and the emergence of brand economies. Since 1996, in the US, trademark infringement is no longer exclusively limited to a likelihood of consumer confusion – the consumer being swindled into buying a knockoff – but has been expanded to include the dilution of marks even in the absence of consumer confusion.⁵⁰ Even when the consumer is fully aware that s/he is buying a knockoff (and is not therefore the victim of fraud), the law now assumes that the mark itself is semiotically harmed by these knockoffs, its ability to signify distinctiveness being weakened by their circulation. It is as if the mark itself, not the consumer, becomes the victim.

To sociologists, anthropologists, and cultural studies practitioners, however, what is striking about the transition from older trademark regimes to the brand economy is the dramatic change in the role and agency of the consumer. At some level, all consumers are now influencers. Consumers buy, display, and talk about branded goods not because they take the brand to signify the quality and reliability of those

⁴⁹ "Harlem Designer Dapper Dan Talks with Vestoj Editor Anja Cronberg about Collaborating with Gucci," https://soundcloud.com/gucci_podcast, at 4:19.

⁵⁰ That trend was also associated with an expansion of types of consumer confusion, e.g., initial interest confusion, post-sale confusion, sponsorship confusion. Barton Beebe, "Intellectual Property Law and the Sumptuary Code," *Harvard Law Review* 123 (2010): 809–89 (at 851–55).

goods, but because the brand provides them with the means for self-fashioning and identity-making.⁵¹ This does not need to be a passive, uncreative process like, say, a customer decking themselves out in Gucci from head to toe, thus virtually becoming a walking billboard. Consumers' engagements with brands they purchase can enable all sorts of innovative bricolages, personalizations, and narratives which articulate the brand's meaning and associations in different ways, some of which may, in fact, be advantageous and welcome to the brand owner. (The analogy with fan productions is quite evident.⁵²)

Also clear is that those who expand the brand in different directions may straddle the line between consumers and appropriators. A fitting example is Gucci's recent appropriation of Dapper Dan's previous appropriations of Gucci's designs from the late 1980s, which eventually contributed to the shutting down of his Harlem boutique.⁵³ A "special relation" – and a Gucci collection that "homages" the former pirate – has since grown between them,⁵⁴ showing that a brand articulation that is considered unwelcome and damaging in a certain market and cultural environment may turn rather valuable when conditions change.⁵⁵ (The Harvard Law School case provides an example of the same kind of change but in the opposite direction, where one vintage brand is subsequently recast as unacceptable by a different generation of consumers/students who, as a result, try to change it.)

But no matter whether the brand is expanded, redirected, or criticized, or whether these interventions are rejected or prosecuted at some point in time and adopted or even celebrated at others, the fact remains that they are all the work of consumers or fans of various types, animated by different goals and subject positions. The law does not recognize their complex agency and, with few exceptions, their contribution goes unremunerated even when adopted by the original brand owners and integrated into the brand's further expansion.⁵⁶ (Dapper Dan is a rare exception, not the rule.)

This is particularly clear in the case of university brands. According to the Harvard Trademark Program: "Harvard University is one of the most widely known and respected trademarks of any kind. The commercial fruits of this fortunate reputation are largely attributable to the contributions of many generations of faculty, students

⁵¹ Thomas D. Drescher, "The Transformation and Evolution of Trademarks: From Signals to Symbols to Myth," *Trademark Reporter* 82 (1992): 301–40 (at 339).

⁵² Rebecca Tushnet, "Payment in Credit: Copyright Law and Subcultural Creativity," *Law and Contemporary Problems* 70 (2007): 135–74.

⁵³ Kelefa Sanneh, "Harlem Chic," *New Yorker*, March 18, 2013, www.newyorker.com/magazine/2013/03/25/harlem-chic (last accessed December 13, 2021). Yomi Adegoke, "I Came up a Black Staircase": How Dapper Dan Went from Fashion Industry Pariah to Gucci God," *Guardian*, January 14, 2021, www.theguardian.com/society/2021/jan/14/i-came-up-a-black-staircase-how-dapper-dan-went-from-fashion-industry-pariah-to-gucci-god (last accessed December 13, 2021).

⁵⁴ Sanneh, "Harlem Chic."

⁵⁵ Adegoke, "I Came up a Black Staircase."

⁵⁶ www.gucci.com/us/en/stories/advertising-campaign/article/pre-fall-2018-dapper-dan-collection-shoppable (last accessed December 13, 2021).

and staff, and therefore should be allocated for the benefit of the University as a whole.”⁵⁷ Notice, however, that while faculty and staff are paid for their contributions, students pay tuition to the university, if less so today than in the past. And while generations of students are acknowledged to have contributed to the “fortunate reputation” of the Harvard brand, the “commercial fruits” of the brand they have helped build go to “the University as a whole,” which, despite its expansive characterization, does not in fact include them in any legally meaningful fashion.

While there are obvious identity-making dynamics involved in the consumption and the reworking or hybridization of brands by consumers, some have seen the emergence of the brand economy as a sign of a fundamental shift in the ways value is produced under capitalism. Adam Arvidsson has argued that while Marx identified manufacturing as the site of value production (thus treating consumption as passive), the brand economy, while obviously capitalistic in logic, has shifted the site of value creation from production to consumption.⁵⁸ It is the consumers who create the value of the brand not only by purchasing and consuming but by engaging and transforming it – a view that is effectively endorsed by business research pointing to the co-construction of brands.⁵⁹ As in the so-called platform economy, consumers work, and their work and engagement can be tracked, extracted, and monetized by the brand owner. These trends grew visible in the 1990s, but what has gone unnoticed is that academic marks may have anticipated them by several decades.

A trip back to the gift shop suggests that the names of universities have always shared in the brand function. Students, prospective students, parents, and tourists who purchased branded umbrellas, coffee mugs, T-shirts, calendars, and other merchandise did not do so because marks like “Yale” made them think these were particularly well-made umbrellas, mugs, or color-fast shirts made of top-quality cotton. What motivated their purchases was a desire to get something with the “Yale” logo on it – something they could wear or use, showing to themselves and others that they had a relationship (actual, future, or just confabulated) with that school.⁶⁰ In sum, the merchandise purchased at a distinguished university’s gift shop were the medium that carried the brand and made it publicly visible – a brand the

⁵⁷ “Policy on the Use of Harvard Names and Insignias,” Harvard Trademark Program, <https://trademark.harvard.edu/policy-on-use-of-harvard-names-and-insignias> (last accessed December 13, 2021).

⁵⁸ Adam Arvidsson, *Brands: Meaning and Value in Media Culture* (New York: Routledge, 2006), 17–40.

⁵⁹ Adrian Payne, Kaj Storbacka, Pennie Frow, and Simon Knox, “Co-Creating Brands: Diagnosing and Designing the Relationship Experience,” *Journal of Business Research* 62 (2009): 379–89.

⁶⁰ This function of university merchandise is essentially different from souvenirs or postcards purchased to show that one has been to a famous site. In the former scenario, the merchandise serves as a means of identification, used to display a relationship, while the latter involves merchandise purchased during a visit to a place with which the tourist has no relationship beyond claiming to have been there, taken pictures, or enjoyed a meal.

purchaser claimed a relationship to – rather than goods whose quality was signaled by the mark.

And while students have treated university-trademarked goods as brands *avant la lettre*, their role has also gone beyond that of ambassadors or embodied advertisements of the brand. As reflected in the quote from the Harvard Trademark Program, generations of students have contributed to the Harvard brand (and, by extension, to the brand of all universities of excellence) in the same way that consumers now contribute to the articulation of the brands they purchase. Starting in the 1970s, the MIT catalog prominently featured images of students – happy, thoughtful, badly dressed, poring over instruments in labs, standing in front of blackboards covered with formulae, or relaxing on the lawn.⁶¹ By contrast, there were no such photos – and indeed no illustrations of any kind – in the printed information about the programs and courses of traditional Italian universities that I perused at the time; they contained only descriptions of curricula and lists of courses. Still operating within a version of the Humboldtian model described by Readings, the Italian university was of the state and by the state. The students were state subjects, not partners.

In hindsight, that MIT catalog exemplified an emergent trend that has since become pervasive in the US and globally: the conspicuous presence of students in virtually any kind of public representation of the university. One could say that this reflects nothing more than an advertising strategy aimed at prospective students and their parents – providing appealing pictures of happy, smart, tuition-paying students. (Even fake universities and diploma mills now hire actors to play the role of students in their fraudulent advertisements, confirming that a university can only be visually conveyed by images of students, not just pictures of buildings or descriptions of curricula.⁶²)

I suggest, however, that such representations are evidence of something more important and specific: the university's mobilization of students not just to advertise but to constitute its brand. Students do not function as customers but as usually paying partners who build their own "special" university experience as they work toward their degrees – a very special experience that is enabled, and in turn supports, a very special university and the brand that captures that uniqueness. The fact that the university seems to have adopted the logic of the brand even prior to the development of the brand economy is not evidence of our administrators' uncanny

⁶¹ <https://dome.mit.edu/handle/1721.3/115808> (last accessed 2/28/2021).

⁶² "The professors and bubbly students in promotional videos are actors, according to former employees, and some of the stand-ins feature repeatedly in ads for different schools." Declan Walsh, "Fake Diplomas, Real Cash: Pakistani Company Axact Reaps Millions," *New York Times*, May 17, 2015, www.nytimes.com/2015/05/18/world/asia/fake-diplomas-real-cash-pakistani-company-axact-reaps-millions-columbiana-barkley.html (last accessed February 15, 2021). For examples of student promotional videos: www.dailymotion.com/video/x2hfczy; <https://vimeo.com/118498304>; <https://vimeo.com/118496718>; <https://vimeo.com/118496228>.

ability to forecast the future of capitalistic modes of consumption. It points, instead, to the fact that while the university can be said to “provide” an education, the nature of education is such that the university cannot provide it as a paid service like, say, a haircut.

An education is framed and supported by the university and its faculty and staff, but it has to be produced by the student – unless that university is a diploma mill. At the same time, the students (or some other entity on their behalf) have to pay to work toward their education.⁶³ Education is a strange non-good that has to be produced by the student. This is also what makes each education – and thus each university experience – different. Unlike two cars, two pens, or two computers, two educations cannot be alike, even if two students have taken exactly the same courses, with the same professors, in the same academic terms. This is because educations are not produced on an assembly line but by individual students who are bound to work differently and choose different paths.

In other words, the logic of education is structurally analogous to that of the brand in the sense that both rely on the engagement and contribution of the consumer to achieve the self-fashioning or construct the identity that they seek – to tweak the brand to make it theirs or, with a lot more work, to become a different person, an educated one – by way of a specific path through the university and its programs.⁶⁴ In turn, the collective effect of all these very individual educational and experiential paths is the further development of the university brand.

Academic or not, the brand thrives on the fit between itself and those who buy and develop a relation with it – a mutually reinforcing process of identification that may also involve exclusionary practices.⁶⁵ (As we saw, Verillas was not happy to see its brand associated with the Proud Boys.) The university relies on some filtering techniques (such as the use of so-called performance indicators) to avoid admitting students they do not see as likely to contribute to the brand. But as any parent of college students has learned, universities also try very hard to deploy more positive forms of matching, emphasizing what “type” of student the university “looks for” or what students would be best suited to “become themselves” at that university.

⁶³ Even when an undergraduate student receives a fellowship in addition to free tuition and board, that funding is not represented as a salary to produce a certain work but as a fellowship to enable them to pursue an education. They may receive money, but are not employees and, as a result, their contribution to the university brand is a voluntary one.

⁶⁴ “Alumni find value in reflecting on mountains they have climbed and the travails endured during their education. Although possibly counterintuitive, our research might suggest that efforts to make the educational experience simpler or easier could be counterproductive for building some facets of subsequent alumni relationships.” McAlexander and Koenig, “University Experiences,” 38.

⁶⁵ For instance, think of the Abercrombie & Fitch controversy following its CEO’s remarks: “That’s why we hire good-looking people in our stores . . . Because good-looking people attract other good-looking people, and we want to market to cool, good-looking people. We don’t market to anyone other than that.” Matthew Wilson, “The rise and fall – and rise again – of Abercrombie & Fitch,” *Business Insider*, March 26, 2020.

Neither the university nor the student needs to be really distinctive, and it does not matter whether the match is made in heaven or just made up. The effect of distinctiveness comes from the intersection of the university looking for “its kind of student” (which, however, could be quite undistinctive) and the student whose university, while perhaps also undistinctive, becomes “MyUniversity” once s/he enrolls. The hybrid produced by crossing two generics is distinctiveness in the form of what Celia Lury calls a “personalized generic” (see [Chapter 2](#)).

CONCLUSION

Universities today build their brands through a variety of forms of “excellence,” which are not always tied to the valorization of their vintage. Stanford, for instance, has been remarkably successful at anchoring its brand not in tradition and pedigree but in innovation, “disruption,” and the celebration of entrepreneurial values over traditional academic ones. Those obvious differences in brand style notwithstanding, I argue that what makes the university so receptive to brand culture and economy is that, in some constitutive sense, it was always already one, well before its recent adoption of corporate managerial culture. The nature of that thing called education has framed the interaction between the university and its students as a form of brand-building, the students making the university what it is, and vice versa. Very different brands can be built on that platform. Even the story Stanford tells about itself – its brand – hinges on the entrepreneurial achievements of some of its early alumni (like William Hewlett and David Packard), which are retold to cast the university as always having supported and continuing to support a uniquely entrepreneurial culture.⁶⁶ It was that culture, we are told, that enabled it to seed and support Silicon Valley, whose uniqueness now mirrors that of the university.⁶⁷

⁶⁶ David Packard, *The HP Way: How Bill Hewlett and I Built Our Company* (New York: Harper, 1995).

⁶⁷ Annalee Saxenian, *Regional Advantage: Culture and Competition in Silicon Valley and Route 128* (Cambridge, MA: Harvard University Press, 1996), 20–27.

One of a Kind Like You

The University as a Personalized Generic

Celia Lury

What helps create a truly meaningful brand? A flawlessly articulated purpose? A killer logo? A leadership team that really understands the value of brand? Complete internal alignment? Oftentimes, the interplay of many different brand elements work together to create cohesive and lasting meaning. But one element that is gaining value in the world of branding is personalization.

Right now, personalization is “in” with brands. Mass consumption and mass production are becoming things of the past. These days, brands that matter and resonate with people are the ones that feel like they’re authentically made and designed *just for you*. It’s the age of personalization.¹

Who knew there were so many hidden depths to “he,” “she,” “it,” “they” and other pronouns? Interesting, right? Pronouns are multi-taskers, working busily to point us in different directions, freeing us from the catastrophe of repeated nouns.²

INTRODUCTION

The term MyUniversity is in relatively common use in the UK: many universities use it, or a variant, to describe the portal they require students and their staff to use in order to access information about their studies. Swansea University uses the name MyUni, with a heart replacing the dot above the “i,” and a webpage describing MyUni as “The Home of Current Students,” with the banner headings *Your University*, *Support and Wellbeing*, *MyUniHub*, and *Student news*. Kingston University has a My University log-in for students; my own institution has

¹ Tracy Lloyd, “Personalization Can Drive Meaning for Brands,” *Emotive Brand* (blog), September 19, 2018, www.emotivebrand.com/personalization-can-drive-meaning-for-brands.

² *Your Dictionary*, “Types of Pronouns,” <https://grammar.yourdictionary.com/parts-of-speech/pronouns/types-of-pronouns.html>.

MyWarwick. Exeter University has MyExeter, Leicester University has a MyUoL app, while Bristol University has a My Students log-in for members of staff. Glasgow University has MyGlasgow Staff and MyGlasgow Students alongside MyGlasgow News, and at the time of the pandemic (as I write) it added Glasgow Anywhere, implying that “your” Glasgow can be found anywhere.³ Edinburgh University has MyEd, which is described as “the University of Edinburgh’s web portal. It is a gateway to web-based services within and beyond the University and offers a personalised set of content with single sign on to key University services such as Learn and Office365.”⁴ This phenomenon is not confined to the UK: Groningen University has a portal named My University while the University of Minnesota Twin Cities has a portal named MyU, which it describes as “the University’s enterprise portal. The University community uses MyU to access a variety of personalized services and information.”⁵ There is also a Chinese computer game called My University 我的大学, which simulates university life, allowing the player to try out the effects of a series of decisions, including course choice.⁶

The joining of words (MyUniversity), the combination of upper and lower case letters (MyUniversity), the use of abbreviations (MyU and MyUni), and graphic symbols (such as the heart) are characteristic of both Internet language (McCulloch 2019) and brand names and logos (Holt 2004; Lury 2004; Arvidsson 2005). But the ubiquity of MyUniversity undercuts any claim to distinctiveness – a characteristic frequently described as essential for brands – while “my” (the first person possessive personal pronoun) appears to promise a more individualized experience than is typical of branding. If MyUniversity is not a brand, what is it? How can MyUniversity be both ubiquitous and “just for you”? The proposal this chapter makes is that MyUniversity is best understood as an example of personalization: that is, MyUniversity is a *personalized generic*.

What might this mean? The adjective “generic” is described in the *Online Etymology Dictionary* as originating in the 1670s, and its meaning is given as:

“belonging to a large group of objects,” formed in English from Latin *gener-*, stem of *genus* “race, kind” (from PIE root *gene- “give birth, beget,” with derivatives referring to procreation and familial and tribal groups) + *-ic*. Hence “of a general kind, not special.” In reference to manufactured products, “not special; not brand-name; in plain, cheap packaging,” is from 1953 of drugs; of groceries, etc., from 1977.⁷

In relation to this definition of generic, it might seem that a personalized generic is an oxymoron. But in what follows here, it will be suggested that while MyUniversity

³ www.gla.ac.uk/myglasgow/staff; www.gla.ac.uk/myglasgow/students; www.gla.ac.uk/myglasgow/news; www.gla.ac.uk/myglasgow/anywhere.

⁴ www.ed.ac.uk/information-services/computing/comms-and-collab/myed-portal.

⁵ <https://twin-cities.umn.edu>.

⁶ https://store.steampowered.com/app/1070950/My_University.

⁷ www.etymonline.com/search?q=generic.

is a response to “the proliferation and policing of similarity” (Hayden 2013: 615), “‘parity situations’ – the saturation of markets with sameness and similarity” (Hayden 2013: 617), and the prospect of an “increasingly generic future” (Greene 2014: 1) – and as such might appear to be an instance of unbranding (Greene 2014) – this reading alone risks misunderstanding the opportunities and dilemmas offered by personalization to universities seeking to generate value and difference.

SO, WHAT IS PERSONALIZATION?

While it might be a bit much to describe the current era as the age of personalization (a lot else is going on after all), personalization is an increasingly widespread phenomenon in the UK, the US, and elsewhere. Personalizing practices permeate everyday life – we are invited to participate in personalized medical, health, and care services, receive personalized customer experiences, and find our way with maps that are continuously updated with information about our movements. We are individuated in the rankings of Airbnb and Uber, and can travel on trains and planes at personalized prices. We pose for selfies, share personal data in networks with friends and strangers, and create multiple personae in social media (Vargha 2009; Turow 2011; Prainsack 2017; Prey 2017; Moor and Lury 2018). Indeed, Kris Cohen suggests that we are witnessing the emergence of a personalization industry, by which he means “the automation and financialization of personalization at industrial scales and speeds, although with decidedly postindustrial organizations of labor” (2019: 168).

In a study of recommendation algorithms, which we take to be a paradigmatic instance of contemporary forms of personalization,⁸ Sophie Day and I (Lury and Day 2019⁹) propose that personalization is a form of atypical individuation. To do this, we draw on a Simondonian understanding of individuation in which the individual does not pre-exist the process of individuation, and the individual is not confined to natural persons; so, for example, a technology, a cancer, or a university may be individuated (Simondon 2017). We identify three noteworthy characteristics of personalization as a mode of individuation, captured in the familiar address: “people like you like things like this.” First, the address can be reversed, that is, in

⁸ Kris Cohen says, “We find recommender systems in search engines, in dating sites, in shopping, in social media feeds like Facebook’s, in streaming music services, and, increasingly, at every point of networked interaction. In fact, unless one tries to turn off these personalization engines, which isn’t always possible, it’s now often harder to find a nonpersonalized environment online” (2019: 173). In contrast, Clause 18 of the People’s Republic of China’s first E-commerce Law (issued August 31, 2018, effective January 1, 2019) asserts: “When e-commerce operators provide search results of goods/services to consumers based on their consumption interests and habits, options not targeting their personal characteristics should also be provided so as to protect consumers’ legitimate rights and interests” (www.lawinfochina.com/display.aspx?id=eoc468f6d44d5b50bdfb&lib=law; Han Wen, personal communication, March 2020).

⁹ See <https://peoplelikeyou.ac.uk>.

practices of personalization, not only do “people like you like things like this,” but “things like this like people like you,” too. Second, the implementation of each form of address is interlinked with the other in recursively organized pathways¹⁰ – a sequence of relations of “liking” and “likeness” – to specify a “you.”¹¹ The sequencing may take the form of the spatiotemporal relations of gift and commodity exchange, including those of generation, but also, significantly, operates in the rerouting of social reproduction through the epistemic infrastructure and associated political and economic milieus that support datafication (Mayer-Schönberger and Cukier, 2013; Kitchin 2014). The nature and organization of this sequencing – of relations of liking and likeness – qualifies the “you.” Third, the “you” that is specified is simultaneously singular and plural, an individual and a collective,¹² that is, personalization organizes the relations between the individual and the collective as a kind of distributed (dispersed and stratified) reproduction (Murphy 2017). In doing so, it promises a new mode of togetherness: as Kris Cohen suggests, “[Personalization’s] slogan could be the political is personal” (2019: 189).

MYUNIVERSITY: “ONE OF A KIND” AND “A KIND OF ONE”

MyUniversity displays all three characteristics which Day and I identify in our account of personalization. To start with the obvious: the use of an address in the form of “Students like you like universities like this” is commonplace. In their promotional practices, universities routinely deploy well-established forms of recommendation, including those forms associated with personification, in the literary sense of using personal qualities or a person to signify a thing or an abstraction. But rather than using imagined persons or celebrities as figures of personification, as is common in commercial advertising and branding, universities are typically personified – in the prospectus, advertising, and on the website, for example – by images of “ordinary,” anonymous individuals who, the viewer is invited to assume, are already students: students who are “like” them. The implication of this form of address – if we continue to pursue the similarity with other forms of personalization – is that if you are “like” these individuals, have a resemblance to them, are similar in some

¹⁰ Recursion is understood here not just to mean repetition, but an action “relating to or involving a programme or routine of which a part requires the application of the whole, so that its explicit interpretation requires in general many successive executions” (*Oxford Languages Online Dictionary*). It thus involves a form of repetition in which the relation between the part and the whole is continually made anew.

¹¹ Cohen says, “What both generates and organizes the data that drives the personalization industry is often distilled into two things that are distinct but interrelated: preferences and likeness” (2019: 173).

¹² Cohen says, “Personalization purports to be about the individual, to be about nothing but the individual. It promises, in fact, to augment the individuality of the individual. But, at the same time, personalization necessitates a conversation about a particular form of grouping” (2019: 167).

way or other to them, you will also “like” – that is, prefer – the university (to other universities). And if the preference is reciprocated (that is, if a student’s application is accepted), “you” as an individual come to be part of a collective – “(y)our” university becomes MyUniversity.

The reverse form of address – “Universities like this like students like you” – is not only what drives recruitment and acceptance procedures, but now also extends to what happens once students arrive. It, too, is implemented through a form of personification, but in the anthropological rather than literary sense of this concept. In his understanding of personification, Chris Gregory (1982), for example, builds on the established thesis that an objectification process predominates in a commodity economy, while a personification process predominates in a gift economy: that is, both things and people assume the social form of objects in a commodity economy while in a gift economy they assume the social form of persons. In other words, commodity exchanges objectify social relations between people, and in such exchanges persons appear in or as a quantitative relation – for example, a fee – between objects exchanged (successful completion of assessment for a university degree). Gift exchanges personify social relations and the gift appears as a qualitative relation – for example, as teaching and learning – between persons (students and academic staff). In such relations, Gregory argues, persons are placed in a state of reciprocal dependence as part of an exchange order. He says: “the distinction between value and rank epitomizes the difference between commodity exchange relations and gift exchange relations. The former emphasizes quantity, objects, and equivalence; the latter emphasizes quality, subjects, and superiority” (1982: 50–51). While the operation of circuits of both commodity and gift exchange have long characterized British and North American higher education, sometimes but not always as part of a brand identity, personification is being supplemented in new ways by the rise of the personalization industry. More specifically, it is enhanced by the ways in which the use of the portals described above – often introduced by universities to enable them to communicate with students in a more personal way – is exploited in practices of “customer relationship management,” the history of which as described by Zsuzsanna Vargha (2019) is one of the most important back-stories to the emergence of personalization.

By looking at industry literature archives, and conducting interviews with business practitioners, Vargha (2019) identifies three overlapping trends – in marketing theory, enterprise technology firms, and accounting methods – contributing to the emergence of personalization. In the 1980s, she says, a new paradigm of relationship marketing emerged as a critique of transactional marketing. Emphasis was placed on the long-term value of customer retention and satisfaction rather than on sales transactions. The same period saw the development of a suite of new products by information systems providers. This facilitated the scaling up of integrated customer information and tracking in the mid-1990s, and fed the growth of customer data analytics that characterized the latter part of the decade. Third, there was an

innovation in management accounting called activity-based costing – in which the focus is not on product profitability but customer profitability, that is, the rating of customers in terms of the profitability of their personal profiles. These three trends, Vargha says, combined in customer relationship management (CRM), that is, a suite of techniques for the management of relations with potential as well as current actual customers, typically using data analysis about the history of customers' purchasing to drive sales growth, and often emphasizing customer retention.

CRM builds on established forms of market segmentation (Arvidsson 2005), which are integral to the growth of branding. However, what distinguishes CRM, as Vargha explains, is the assumption that it makes sense to differentiate individual customers based on their current or expected profitability, and then to maintain and build “personal” relationships with what are called profitable customers.¹³ This has long been the work of the alumni or development offices in universities, even if the language of profit was not employed. However, CRM enables such “personal” relationships to be integrated into university provision at a more fundamental level, and not only with the wealthy or influential. Significantly, CRM is a step beyond traditional forms of market segmentation, which typically divides the market in relation to what are seen as the pre-existing (sociodemographic, lifestyle, or psychological) characteristics of natural persons. To identify individual customers, CRM software builds customer profiles and recommendations, and tracks interactions with those individuals through the collection and analysis of “personal” data.¹⁴ What is new is not only the ability to identify all students (and academics) individually and (re) aggregate them into categories of various kinds (typically in relation to a variety of performance metrics), but that these categories emerge from the analysis of aggregated personal data (not a prespecified individual). In this analysis, “Students like you” are brought into relation with “Universities like this,” and their (composite) qualities (such as, for example, the likelihood of completing a degree) emerge in that relation.

While there is little doubt that universities are becoming increasingly datafied (Williamson et al. 2020), it is hard to know exactly how widespread the use of CRM is in UK universities. However, it seems likely that most have some kind of system in place: there is a national network for CRM managers in higher education (HE) institutions,¹⁵ and the company Tribal Dynamics claims to have worked with 80 percent of the UK higher education sector,¹⁶ while another – Pythagoras – describes itself as having worked with 30 percent of UK universities. On their

¹³ Vargha (2017) has described the labour involved in the implementation of CRM in the finance industry.

¹⁴ For example, some recent approaches to health care seek to segment patients in terms of cost (identifying the least expensive, the most expensive, and so on); some such initiatives in the US combine the provision of health care with insurance (<https://hbr.org/2020/01/managing-the-most-expensive-patients>).

¹⁵ <https://crmnetworkhce.org>.

¹⁶ www.tribalgroupp.com/software-and-services/tribal-dynamics.

website they say: “Built on Microsoft Dynamics 365, Evolve HE maximizes existing investment in Microsoft technology. Our solution establishes a CRM foundation that enables universities to achieve a step change in their adoption and deployment of student relationship management solutions.”¹⁷ Pythagoras provides a variety of services, including “replacing and consolidating legacy solutions” to provide “a single view of each student,” managing “end-to-end student recruitment and marketing activities through cross-channel campaigns,” and maximizing “domestic and international student conversion through dedicated online accounts and student portals.” Their “add-on modules” include Recruitment, Events and Marketing; Application Management; Applications Portal; On Course; Alumni, Fundraising and Sponsorship; and Research and Enterprise (see de Juan-Jordán et al. 2018 for a survey of the uses of CRM in higher education). All these services allow for the possibility that the personal data of students may be constantly recalibrated in relation to a variety of university aims and external demands, placing students in a constantly changing state of dependence with each other, as well as with academics.¹⁸ In this regard, the personification practices of CRM function as a mechanism, not of exchange value but, as Gregory puts it, of exchange order.¹⁹

In such practices, there is a shift in how the (two-way) relation between individual and class or kind is established. On the one hand, the student is identified – personally – as “one of a kind.” But this “one” is not an individual, unitary and independent; instead, this “one” is “one of a kind,” reciprocally dependent on other “ones” in an exchange order. And the ordering of the “one” student’s (or academic’s) reciprocal dependence on others can be reconstituted at discrete intervals, with each recorded interaction (via the portals mentioned above) along multiple pathways of personalization. Indeed, the optimization of a university in relation to multiple (internally and externally generated) demands may have consequences for students before they are accepted as well as after they leave the university, potentially putting each “one of a kind” student in multiple timelines. As Adrian Mackenzie describes, “while individuals were once collected, grouped, ranked, and trained in populations characterized by disparate attributes (socio-economic variables, educational background and qualifications, nationality, and so on), today we might say that they are distributed across populations of different kinds that intersect through them. Individuals become more like populations or crowds” (2016: 116).

¹⁷ Webpage no longer available. Accessed February 2021. The company has since been acquired by EY in 2021 and is part of the EY – Microsoft Alliance.

¹⁸ I have not discussed here the use of personalized or predictive learning analytics, as their use is still relatively limited, but their adoption is currently being discussed at a variety of levels and clearly has the potential to expand the capacities of MyUniversity considerably.

¹⁹ The extent to which students are aware of such orderings is not clear, and current regulations relating to the use of personal data do little to support such awareness.

On the other hand, in the implementation of these analytics, the (generic) university is itself reconfigured.²⁰ No longer a kind comprised of independent or individual ones, MyUniversity is a “kind of one,” the constantly shape-shifting outcome of the recursive implementation of what Mackenzie calls distributive numbers or joint probability distributions. And the reconciliation of priorities in MyUniversity is inevitably complex: “The particles, maps, images and populations figure in a baroque sensibility as curves that fold between outside and inside, creating partitions, relative interiorities and exteriorities” (Mackenzie 2016: 131). For example, the timelines mentioned above work backwards and forwards: they may inform whether an applicant’s “liking” or preference for a university is reciprocated (and how that reciprocity is expressed – in terms of the conditions of the offer that is made, access to accommodation, a scholarship or not, and so on), a reciprocity which may, in fact, depend on the anticipation of the applicant’s likely future once they leave the university.²¹ And how the MyUniversity of students maps onto or is co-ordinated with the MyUniversity of academics is complex, as “measures of student performance, sentiment, engagement, and satisfaction are also treated as proxy measures of the performance of staff, courses, schools, and institutions as a whole” (Williamson et al. 2020: 354). The reconciliation of “(y)our” with “my” is hard to achieve. Nevertheless, however the priorities are reconciled (or kept in tense suspension), in the practices of personalization, MyUniversity is constantly individuated as the interrelationship of “one of a kind” with “a kind of one,” as articulated so precisely in the UC Davis pennant illustrated below (Figure 2.1).²²

²⁰ Williamson et al. say, “the contemporary university is reassembling into a new set of forms and functions as it adapts to a plethora of social, political, economic, and technological forces” (2020: 356).

²¹ So, for example, it can feed backwards, as it were, into recruitment practices (Bamberger et al. 2020), with the methods described above sometimes supplemented by platforms such as GeckoEngage, a “Higher Education chatbot and event management solution” (<https://geckoengage.com>). The services this company provides to clients such as the University of Cambridge, Goldsmiths, San Francisco State University, and the University of Toronto (according to their website) include communicating with potential applicants as members of groups as well as students “one-to-one, across multiple channels, with our chatbot enabled conversational marketing platform.” Conversation is recognized by Vargha (2017) as a key element of CRM.

²² This account emphasizes the significance of practices of personalization, and CRM in particular, but it needs to be acknowledged that, as Nigel Thrift makes clear, there is a variety of value systems in operation in any university and “Each value system has its own forms of specification, evaluation (including calculation), and means of acting out good and bad will.” He further observes that “in universities these modes of existence and their respective means of justification are brought into contact on a daily basis rather more starkly than in many other arenas. They have to pass through representatives of other modes of existence in order to endure. Indeed, nowadays, each mode of existence depends on the other to survive to a much greater degree than ever before. The idea that one academic mode of existence can ride roughshod over the others is a fantasy. Indeed, very often, they are in resonance. Certainly, they are in constant negotiation” (2016: 404).



FIGURE 2.1 One of a kind like you (photo of UC Davis pennant by Celia Lury).

To add one further observation: the personalization processes described here are dependent on a process of computer-assisted data collection made possible by platformization (Gillespie 2010; Helmond 2015; Poell et al. 2019). In the case of Pythagoras the platform is Microsoft Dynamics 365, a Microsoft Power

Platform.²³ For some critics, what is important about platforms is their programmability: “Definitionally, a ‘platform’ is a system that can be reprogrammed and therefore customized by outside developers – users – and in that way, adapted to countless needs and niches that the platform’s original developers could not have possibly contemplated, much less had time to accommodate” (Andreesson 2007). What is perhaps significant for an understanding of the politics of MyUniversity as a personalized generic, however, is the general definition of platformization as “the process of constructing a somewhat lifted-out or well-bounded domain as a relational intersection for different groups” (Mackenzie 2018: 6). Indeed, the term platform is sometimes used to describe the rise of multisided markets (Langley and Leyshon 2017). Platformization is thus important to acknowledge here not only because of the significance of datafication for the emergence of MyUniversity, but because platforms have made possible “lower cost, more dynamic, and more competitive alternatives to governmental or quasi-governmental monopoly infrastructures, in exchange for a transfer of wealth and responsibility to private enterprises” (Plantin et al. 2018: 306).²⁴ In other words, platformization has enabled the intervention of new actors in higher education, including a variety of entities concerned with online learning,²⁵ permitting old and new actors to acquire new and varying capacities, transforming the ways in which the heterogeneous values of education are created, distributed, accumulated, and extracted in the conjoining of “one of a kind” with “a kind of a one.”²⁶

WHOSE UNIVERSITY IS MYUNIVERSITY?

In the account above, I have described the emergence of MyUniversity as the outcome of a process of personalization, supported by processes of personification and platformization. But the underlying context for the emergence of personalization in higher education is important for the argument that MyUniversity is a personalized generic: that is, the saturation of an increasingly marketized sector

²³ The current market leader in CRM is Salesforce: www.salesforce.com/products/what-is-salesforce/#.

²⁴ Williamson et al. note, “In parallel with political desires to subject HE to further datafication, a ‘global HE industry’ has emerged of ‘data solutions’ service providers and platform companies offering HE products, which have sought to open up and exploit new markets in HE data” (2020: 355).

²⁵ I do not discuss online learning here, but how it is folded in to MyUniversity is clearly going to be of considerable significance. MyLO is the name given to the main online learning environment at the University of Tasmania.

²⁶ Poell et al. note that platformization is not only about data infrastructures but also about markets and governance. The definition of platforms they provide is: “(re-)programmable digital infrastructures that facilitate and shape personalised interactions among end-users and complementors, organised through the systematic collection, algorithmic processing, monetisation, and circulation of data” (2019).

with “sameness.” The most visible indicator of this in the UK was the abolition of the binary distinction between polytechnics and universities in 1992,²⁷ a growth in size of the sector further enabled by the increasing globalization of education.²⁸ Nigel Thrift observes:

Whereas there were about 250,000 students in 1965 [in the UK], now there are near to two and a half million. This expansion has been mainly in domestically based students, but a significant additional element has been international students flocking from many parts of the world. Since these students pay more, they have become a crucial element in the makeup of the economy of most universities.

(2016: 401)

The major role played by what are now called the post-1992 universities in the expansion of student numbers – including widening participation²⁹ at least to some degree – and then the decision by the sector as a whole to charge the same maximum fee allowed by the government in 2012,³⁰ have only complicated the ways in which sameness has become the basis of the search for distinction.³¹ The increasingly intense regulatory environment (including most recently the establishment in the UK of a national Office for Students as the “single market regulator”) is explicitly designed to enhance choice for students and increase competition between

²⁷ A polytechnic was a tertiary higher education institution in England and Wales offering higher diplomas, undergraduate degrees, and postgraduate education that was governed and administered at the national level by the Council for National Academic Awards. They tended to be focused on professional vocational degrees. After the passage of the Further and Higher Education Act 1992 they became independent universities which meant they could award their own degrees, and many extended the range and number of degrees they offered.

²⁸ Cohen says, “personalization is one kind of solution to the problem of market oversaturation” (2019: 174).

²⁹ In the UK context, widening participation refers to the component of government education policy that aims to increase the proportion of people from underrepresented groups entering higher education.

³⁰ The Teaching and Higher Education Act 1998 introduced tuition fees in all the countries of the United Kingdom. Following devolution in 1999, the newly devolved governments in Scotland and Wales came forward with their own acts on tuition fees. In England, tuition fee caps rose with the Higher Education Act 2004. Under the Act, universities in England could begin to charge *variable fees* of up to £3,000 a year for students enrolling in courses during the academic year 2006–07 or later. This was introduced in Northern Ireland in 2006–07 and in Wales in 2007–08. Following the Browne Review of 2010, the cap was raised to £9,000 a year. In 2012, a judicial review against these raised fees failed, and the new fee system came into effect that September. It was reported that the government had expected universities to compete with each other in terms of price, and was frustrated that they did not do so.

³¹ These moves increase both supply and demand; that is, they are moves from “scarcity” to “abundance” on both sides of “People like you like universities like this” and “Universities like this like people like you.” Personalization can be seen as an attempt to use sameness and similarity to bring saturated supply and saturated demand into relations of (artificial) scarcity with each other.

providers.³² The pressures on all academics to conduct “world class research” and the intensity of audit culture in UK higher education are both an additional cause and consequence. As Thrift observes of such expansion and the growing realization of the significance of higher education to the economy, “Universities come to be understood as intellectual property” (2016: 402). Whose property and how the distribution of the value of that property is mapped onto those who create it is what is at stake in the emergence of MyUniversity as a personalized generic.³³

To address these questions, I draw upon Cori Hayden’s assertion that “the generic” is “a rapidly expanding and differentiating category” (2013: 605). In her discussion of “parity situations,” that is, situations of substantive likeness, and “commercial landscapes saturated by sameness” (2013: 604), Hayden says of the generic that “this space of presumed indistinction is actually coming to hold within it and generate surprising potential for heterogeneity and stratification” (2013: 605). Indeed, in her discussion of the pharmaceutical industry she identifies a variety of generic kinds – newly invented “kinds of similar,” including super-generics, bio-similars, and me-too products. In all such cases, she says, similarity is constitutive rather than (merely) derivative;³⁴ importantly, *how* it is constitutive varies from one (kind of) generic to another. To specify MyUniversity in terms of its own form of constitutive similarity, and consider whether the emergence of MyUniversity is an instance of genericide – the fate that meets a brand or trademark when it becomes so dominant that it becomes synonymous with its entire kind – I draw on both Hayden’s and Jeremy Greene’s account of the history of generic medicines.

Greene suggests that “there were no firms known specifically as generic drug manufacturers or anything clearly called a generic drug until the late twentieth century” (2014: 10). However, he also points out that generic names for medicines can be traced back to at least the late nineteenth century: for example, Upjohn’s morphine, Squibb’s morphine, or Smith, Kline and French’s morphine (2014: 10). The history of generic names for universities is much longer, but the parallel is obvious: Harvard University, Durham University, and the University of the West of England, among others. Greene also describes the struggles involved in the attempt to establish the use of a single, universal generic name for drugs by the World Health

³² Policy instruments to enhance competition include fewer entrance barriers for providers; the requirement that all UK universities provide comparable information to inform choice (so, for example, the Longitudinal Educational Outcomes dataset, which shows the median earnings of graduates from specific degree courses, is already used to help prospective students choose where and what to study, via the national Discover Uni website); and a gradual liberalisation of student number controls (although this is delayed as I write in response to COVID-19).

³³ For a related argument, deploying the concept of assemblage, rather than generic, see Bacevic (2019).

³⁴ Alternatively, one might argue that the value of MyUniversity is that it *is* a derivative, if the sense of derivative is that of the (financial) instrument whose value is established between parties to a contract in relation to an underlying asset. In the case of MyUniversity, the underlying asset is the intellectual property (IP) of the university (often “IP without IP” as will be discussed below).

Organization and the American Medical Association in the 1940s and 1950s, as well as the ways in which the anonymity of generic drugs was presented both as a risk (“Drugs Anonymous”) and “a value (of consumer empowerment) to be optimized” (2014: 64). But here the parallel with universities breaks down: MyUniversity may be ubiquitous but it is not Universities Anonymous. Neither, however, is the prefix to MyUniversity a proper name: it is, instead, “my.” And, so it will be argued here, it is the exercise of the personal possessive pronoun in the practices described above, rather than a name, that enables similarity to be constitutive of the value(s) of MyUniversity as a *personalized* generic.³⁵

Used on its own, “my” is what in linguistics is called a shifter: its meaning is dependent on who uses it. As shifters, personal pronouns are deictic signs that have the capacity to “multitask,” to “work busily to point us in different directions,” appearing to free us from “the catastrophe of repeated nouns.”³⁶ This liberation from a singular identity acquires a new potency in the redistribution of education through a transformed epistemic infrastructure. As I have argued elsewhere (Lury 2021), the role of linguistic shifters, including personal pronouns, has been significantly expanded with the changes in the activity of indexing associated with contemporary informational infrastructures.³⁷ And in the datafied university, the abductive agency of the personal pronoun acquires new significance, enabling the conjoining of “one of a kind” with “a kind of one” in a constantly changing, multidirectional moving ratio. And in this respect, the use of a variety of pronouns in the names and phrases associated with a whole range of products and services outside as well as inside education is suggestive, indicating some of the various ways in which personalized generics can be configured, and their diverse implications for the distribution of agency, accountability, and (intellectual and other) property. Alongside MyUniversity there are MySpace, MyGov, MyApp, MyInsurance, “I am train,” and “We are MyProtein. We are ForeverFit.” The vitamin products “WellMan” and “WellWoman” now have a competitor in “BetterYou,” while Cohen suggests that in the context of a discussion of search engines, “anything” should be considered “the symbolic pronoun of twenty-first-century commodity culture’s democratic claim” (2017: 112).³⁸ But how the abductive agency of pronouns

³⁵ Brian Massumi describes a singular generic as the likeness of an object to itself; each singular encounter with an object “teem[s] with a belonging to others of its kind (the object of semblance)” (2011: 187). For Massumi, the concept is a way of considering an object as an event, an iteration in an event series.

³⁶ *Your Dictionary*, “Types of Pronouns,” <https://grammar.yourdictionary.com/parts-of-speech/pronouns/types-of-pronouns.html>.

³⁷ Similarly, Amoore and Piotukh observe: “so-called unstructured data demands new forms of indexing that allow for analysis to be deterritorialized (conducted across jurisdictions, or via distributed or cloud computing, for example) and to be conducted across diverse data forms – images, video, text in chat rooms, audio files and so on” (2015: 345).

³⁸ In these and other uses it appears that personal pronouns afford the potential for what Rochelle Dreyfuss calls the expressive genericity of some words. She distinguishes expressive capacities from signaling capacities, and links expressiveness to the openness in meaning of some words

is put to work – and who might benefit from that work – in the platforms of personalized generics is a complex matter: as Jonathan Flatley suggests, the questions, “Can one simply decide to [be] like something? How might one exert agency in one’s likes?” (2010: 72) seem to be the ones that matter.

Hayden proposes that one of the merits of the “exuberant proliferation” of kinds of generics is that they make it possible for ownership claims to be established through non-legal as well as legal means. She stresses the importance of idioms of sameness and what she calls vernacular reconfigurations, but also suggests that “generic kinds might now, counterintuitively, be considered an instance of what Mario Biagioli has called ‘intellectual property without intellectual property’” (2013: 606). Certainly, the use of personal pronouns appears to allow for the possibility of “IP without IP,” but non-legal claims to ownership of the intellectual property of the university are multiple, often layered together with legal claims, and are by no means easy to adjudicate (Dreyfuss 2010). In current uses, for example, personal pronouns are not only often “passive voice constructions” (Cohen 2019: 167), typified by indirect forms of address, but are frequently linked with proper, sometimes proprietary, names in a kind of *mise-en-abyme*. In such uses, the pronoun is subordinated to a name that can be repeated, branded, and may be owned as a trademark. This is the case with many of the examples of MyUniversity given at the beginning (although none, as far as I am aware, is registered as a trademark).³⁹

Sometimes the pronoun is not personal but impersonal, as in the case of itslearning, a virtual learning environment for education which describes itself as “The learning platform designed for teaching,” a phrase that neatly sums up the role of the platform in conjoining “People (teachers) like you” with “Things like this (content, curricula, resources).”⁴⁰ Sometimes the platform pronoun/suffix comes second to the proper name (Harvard.X, MITx, BerkeleyX, ANUx, ImperialX, HKUSTx), even as it implies ownership of the generic activity of “education,” as in ed.X®:

related to “their history, derivation, and identification with users.” She continues: “These peripheral meanings are often highly individualized to the speaker, the listener, and possibly to the method by which they interact or perceive one another. When such words are used, they become infused with the listener’s own associations, and their message is incorporated into the listener’s own frame of reference” (1990: 413).

³⁹ Sometimes a pronoun does not even need to be subordinated to be owned: “We” was acquired as a trademark by the company now known as the We Company, previously WeWork. A day after the company name officially changed, the company filed a trademark for the phrases: “Elevating the World’s Consciousness,” “Creator,” and “We Are One.”

⁴⁰ The company was first established as “itsolutions” (<https://itslearning.com/us/about-us/our-story>). According to its website, some of its most popular features are “Reporting Analytics (track everything and easily apply data to specific priorities and practices),” “Personalised Instruction (facilitate student voice and choice and help individual students towards mastery),” and “Integrate with Everything (connect us with your favorite tools and providers).”

the trusted platform for education and learning. Founded by Harvard and MIT, edX is home to more than 20 million learners, the majority of top-ranked universities in the world and industry-leading companies. As a global nonprofit, edX is transforming traditional education, removing the barriers of cost, location and access. Fulfilling the demand for people to learn on their own terms, edX is reimagining the possibilities of education, providing the highest-quality, stackable learning experiences including the groundbreaking MicroMasters® programs.⁴¹

Sometimes, the proper or “personal” name of individuals is explicitly identified as a problem; so, for example, the ORCID platform (Open Researcher and Contributor ID) is described as a response to name ambiguity in scholarly research.⁴² The solution this platform provides is a sixteen-digit alphanumeric identity, similar to that created for content-related entities on digital networks by digital object identifiers (DOIs). It is the platform – not the state or the law – that assures the propriety of this “name” and enables it to be recognized as an owner of intellectual property; it is also what encourages an understanding of the value of content (that is, knowledge) in terms of its ability to incite platform relations.

And while the proliferation of generic kinds may invite multiple configurations of abductive agency, many kinds are subject to regulation of a variety of sorts, including being tested in measures of sameness and similarity. Both Hayden and Greene note that pharmaceutical generics have been subject to a range of equivalence tests, including tests of chemical equivalence and bioequivalence. So too the distinctiveness of the personalized generic MyUniversity depends, at least to a certain degree, on tests of equivalence – or sameness and similarity – to other (My)universities.⁴³ Traditionally, a significant guarantee of teaching quality in the UK was provided by the reports of external examiners of degree programs, but even though that role has been made (a little) more transparent,⁴⁴ it is still a process internal to the sector and

⁴¹ <https://www.edx.org/about-us>.

⁴² https://web.archive.org/web/20100202055935/http://orcid.securesites.net/media/pdf/ORCID_Announcement.pdf. A report about ORCID in *Nature* starts, “In 2011, Y. Wang was the world’s most prolific author of scientific publications, with 3,926 to their name – a rate of more than 10 per day. Never heard of them? That’s because they are a mixture of many different Y. Wangs, each indistinguishable in the scholarly record” (Butler 2012). Hayden notes that the consulting firm Thomson CompuMark “advertises its naming services by alerting its prospective corporate customers to the challenges of a market saturated by similarity: ‘With literally millions of pharmaceutical trademarks in use around the world, including marks not officially registered, finding a distinctive name or mark can be challenging’” (2013: 617). In this regard, I can’t fail to mention the approval by the FDA for “10 generic drugmakers . . . to start making generic versions of [the brand name drug] Singulair,” leading to headlines such as “Generic Singulair Approved.” (<https://www.webmd.com/asthma/news/20120803/generic-singulair-approved>).

⁴³ In this regard, we might consider the rise of personalised generics in terms of a reformulation of Nike’s “Just Do It” as “Just Be Like.”

⁴⁴ In language similar to that adopted by other universities, Durham University advises external examiners that they “should feel free to make any comments they wish, including observations on teaching, module/programme structure and content, and degree schemes as well as

the comparative referent of quality is typically only loosely specified.⁴⁵ In a parity situation, it has come to be supplemented by external evaluations according to criteria linked to national policy, including most recently in England the Teaching Excellence and Student Outcome Framework (TEF), which assigns bronze, silver, and gold awards to universities and colleges. The Research Excellence Framework (REF) is a peer-review process of research evaluation, in which “Units of Assessment” are assessed in relation to the rigour, originality, and significance of their members’ “output,” the impact of their research, and the quality of the research environment. Both these processes of evaluation provide absolute results, that is, results in relation to fixed criteria defined by the national regulatory framework, so the score achieved by one institution or unit should not affect that of another. However, these measures of similarity or sameness – along with many others – have increasingly come to be tied to rankings, enabling them to act as a mark of relative distinction within a sector characterized by sameness.

In the now considerable literature on rankings in academia and elsewhere (Espeland and Sauder 2007; Guyer 2010; Musselin 2010; Gerlitz and Lury 2014; Esposito and Stark 2019), it has been pointed out that it’s unusual for a single ranking to be accepted as the ultimate arbiter in any given arena; so, for example, there are numerous education rankings that order universities in relation to a wide range of academic and non-academic concerns, as well as competing rankings calculated in relation to ostensibly the same object. Importantly, however, such rankings are variously described as reactive (Espeland and Sauder 2007), performative (Esposito and Stark 2019), or participative (Gerlitz and Lury 2014).⁴⁶ In these analyses, contemporary ratings do not perform as observations of an independent world but acquire effectivity in a world in which observers include the observed, who have little choice but to take into account – and act on – the observations of others.

And to the extent that universities do act on rankings, the distinction of the personalized generic emerges in relations of similitude as described by Foucault, that is, in “small differences among small differences,” differences in (recursive)

assessment procedures. As the reports of external examiners are discussed widely within the University, we should be most grateful if external examiners would ensure that individual staff members or students are not referred to by name in their reports. Reports will normally be available for discussion widely within the University (including with student representatives via staff-student consultative committees), and may also be requested by certain external bodies, including the Quality Assurance Agency. An additional separate and confidential report may be sent to the Vice-Chancellor if the examiner considers this to be appropriate.” Durham University External Examiners Report Form, 2019–2020.

⁴⁵ Durham University asks external examiners: “Are the standards of the programme consistent with those required by the university qualification descriptors and so with the QAA Framework for Higher Education Qualifications?” And, “Were the academic standards of student work comparable with similar programmes with which you are familiar?” Durham University External Examiners Report Form, 2019–2020.

⁴⁶ And are widely recognized to have led to gaming and forms of misconduct (Biagioli and Lippman 2020).

series that “obey no single hierarchy” and “are able to move in one direction as easily as another” (1982: 44). In this regard, a MyUniversity that is guided by rankings alone might be said to be undergoing a form of genericide, a slow death of forced self-classification, “up-dating to remain the same” (Chun 2017) for fear of falling down the gap between “the merely similar and the properly equivalent” (Hayden 2013: 619).⁴⁷ Even if a university has room for maneuver (with elite institutions having more room than others), having refused the market lure of “the same, but cheaper” – the claim of the Mexican pharmaceutical chain Farmacias Similares studied by Hayden – a MyUniversity has little choice, in the UK at least, but to embrace the never-ending one-upmanship of “the same, but better (or worse).”⁴⁸ Indeed, as competitors to universities emerge as part of a process of platformization and privatization, they may well become “like a(nother) university, but not quite.”

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⁴⁷ As Esposito and Stark say, “users of rankings look at who’s up and who’s down, not at what . . . is” (2019: 5).

⁴⁸ Hayden reports on the existence of Biobetters, a name reportedly coined by the major Indian pharmaceutical company Dr. Reddy’s. Biobetters, she notes, are sometimes distinguished from generics: they “are not copies and will never be generics. Biobetters are new molecular entities that are related to existing biologics by target or action, but they are deliberately altered to improve disposition, safety, efficacy, or manufacturing attributes” (2013: 628).

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The Public Higher Education Brand

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Higher education institutions (HEIs) misunderstand branding in at least two ways. First, branding is supposed to enable market differentiation, yet higher education in the US seems to converge on one standard model: a school with high-test-scoring and high-grade-point-average students. Second, critics of branding in higher education argue that the nature of branding turns higher education into a commodity. The irony is that branding is supposed to avoid the problems of being a commodity by allowing an institution to move beyond price and economic levers and offer people something a competitor cannot copy.¹ This chapter argues that branding should be understood as a tool or “mechanism” that can (re)configure production,² and when properly understood, this tool can help higher education institutions focus their efforts on their respective missions, and allow them to co-create value with society.³ This chapter seeks to apply *the logic* of branding to the realities of higher education today,⁴ thereby opening a way, especially for public institutions and educational systems, to define their purpose and break free of the problems posed by rankings and similar quantification endeavors.

Despite a range of higher education institutions, higher education reduces to one model.⁵ A large problem is that even if one wants to copy the current, aspirational model, how this rich environment is created and works is unclear. Is it the students,

¹ Cf. Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1425, 1443.

² CELIA LURY, BRANDS: THE LOGOS OF THE GLOBAL ECONOMY 27 (2004): “The brand is thus a mechanism – or medium – for the co-construction of supply and demand. . . it is an abstract machine for the reconfiguration of production.”

³ BOYER, SCHOLARSHIP RECONSIDERED 65 (2016), concluding there is “the need to clarify campus missions and relate the work of the academy more directly to realities of contemporary life.”

⁴ See LURY, *supra* note 2.

⁵ Cf. BOYER, *supra* note 3 at 99–100: “Too many campuses are inclined to seek status by imitating what they perceive to be more prestigious institutions.”

the professors, the location, or some combination that creates the desired offering? Are some institutions simply selecting students of such high caliber that “success” is measured by building power networks?⁶ Are other institutions offering rigorous training that molds raw human capital into something more? Does each potential student need the same education? Where do schools that focus on training practitioners or vocational schools fit? What should such schools offer? The difficulty in knowing what education does for a student has fostered the idea that society needs higher education accountability. The College Scorecard is an example of an accountability system that tries to quantify “education” in the hope that it can be analyzed in economic terms.⁷ Like other rankings, accountability systems drive higher education institutions to chase numbers and compete with other institutions on the same metrics, even when those metrics may not fit an institution’s mission or capabilities. In short, higher education is becoming – if it is not already – the same offering across all institutions. But sameness is exactly what branding is supposed to defeat.⁸

A different misunderstanding of branding is that branding of its nature leads to a quantified, market-based orientation to education and the claim that branding should not be used by higher education at all.⁹ To be clear, reputational competition among higher education institutions, and faculty, has been part of higher education’s history.¹⁰ Nonetheless, education is a relational good – a good “produced in sympathetic, empathetic, trusting, and high regard relationships . . . [that are part of] social capital.”¹¹ Like relational goods in general, a key part of education’s “value depends on [its] connection to people and relationships between people and the social environment in which they are exchanged.”¹² But, for a range of reasons, market-driven ideology has become an additional and powerful way in which higher education institutions compete.¹³ Market-driven ideology – bolstered

⁶ Put differently, as the former dean of Harvard College put it, “universities have forgotten their larger educational role for students.” HARRY R. LEWIS, *EXCELLENCE WITHOUT A SOUL: DOES LIBERAL EDUCATION HAVE A FUTURE?* 171 (Kindle ed. 2007).

⁷ JERRY Z. MULLER, *THE TYRANNY OF METRICS* 111–12 (2018), explaining that the College Scorecard reduces “college education [to] purely economic terms.”

⁸ Cf. Desai & Waller, *supra* note 1.

⁹ See e.g., Arild Wæraas & Marianne N. Solbakk, *Defining the Essence of a University: Lessons from Higher Education Branding*, 57 *HIGHER EDUCATION* 449, 453 (2009): “branding may have a potential for challenging the institutional integrity of universities”; Giuseppe Delmestri, Achim Oberg & Gili S. Drori, *The Unbearable Lightness of University Branding: Cross-National Patterns*, 45 *INTERNATIONAL STUDIES OF MANAGEMENT & ORGANIZATION* 121, 122 (2015): “Are universities like all other institutions?”; Frank Furedi, *Introduction to the Marketisation of Higher Education and the Student as Consumer*, in *THE MARKETISATION OF HIGHER EDUCATION AND THE STUDENT AS CONSUMER* 6 (Mike Molesworth, Richard Scullion & Elizabeth Nixon eds., 2010).

¹⁰ See Furedi, *supra* note 9, at 15–22.

¹¹ Jeffrey R. Oliver & Lindon J. Robison, *Rationalizing Inconsistent Definitions of Commodification: A Social Exchange Perspective* 8 *MODERN ECONOMY* 11, 1314 (2017).

¹² *Id.*

¹³ See Furedi, *supra* note 10.

by various attempts to quantify education – challenges the way education is offered and feeds turning education into a commodity.¹⁴ As a review of the meaning of the word commodification puts it, the shift is to “exchanges through which something ‘human’ or ‘inalienable’ becomes valued for its commodity exchange value in a market.”¹⁵ Thus critics say that lessons from higher education branding “may have a potential for challenging the institutional integrity of universities.”¹⁶ Critics also assert that a cross-national move to branding in education creates an “unbearable lightness of university branding,” and begs the question, “Are universities like all other institutions?”¹⁷ These views *assume* that branding leads to commodification and the reduction of education to a market-exchanged “economic good, a raw material, an article of commerce, a mass produced and undifferentiated product, or a good that is widely available and has a low profit margin.”¹⁸ Although every higher education institution behaving the same and striving to meet metrics set by dubious ranking systems is a path to commodification that cedes power to outsiders,¹⁹ branding does not force such an outcome. Indeed, branding is supposed to aid in defeating such a result.

In this chapter, **Part I** identifies the apparent convergence of metrics and brands in the context of higher education institutions, and argues that this convergence is based on a faulty view of both brands and higher education. Popular rankings such as *U.S. News & World Report* focus on metrics that measure one set of criteria/values that favor selection-effect schools over treatment-effect schools.²⁰ Schools, often public ones, that focus on serving first-generation students seek to have a treatment effect. That is, after attending the school, a student unlikely to attain success such as attending graduate or professional school or getting a prestigious job upon graduation is able to pursue such options. Treatment effects are not, however, measured by entering class selectivity. Put differently, schools vary greatly in their type, goals,

¹⁴ Although critiques of market-driven ideology may be part of a “general resistance to neo-liberalism,” the larger point is that one can critique whether market methods work well for the goals of education and the assumption that such methods are the “only” way to meet demands for expanding education. Richard Scullion, Mike Molesworth & Elizabeth Nixon, *Arguments, Responsibility and What Is to Be Done about Marketisation*, in *THE MARKETISATION OF HIGHER EDUCATION AND THE STUDENT AS CONSUMER* 227–36 (Mike Molesworth, Richard Scullion & Elizabeth Nixon eds., 2010).

¹⁵ See Oliver & Robison, *supra* note 11.

¹⁶ Wæraas & Solbakk, *supra* note 9, at 453.

¹⁷ See Delmestri, Oberg, & Drori, *supra* note 9; Furedi, *supra* note 9.

¹⁸ See Oliver & Robison, *supra* note 11.

¹⁹ See e.g., ERNEST L. BOYER, *SCHOLARSHIP RECONSIDERED: PRIORITIES OF THE PROFESSORIATE* 56 (1990), arguing “restrictive” views on what scholarship is lead to “campus priorities [that] are more imitative than distinctive.” For a succinct critique about the way HEI admissions, and by extension higher education institutions in general, are driven by the “junk science” of rankings, see Jason England, *The Mess that Is Elite College Admissions, Explained by a Former Dean*, Vox, May 8, 2019, www.vox.com/the-highlight/2019/5/1/18311548/college-admissions-secrets-myths (last visited Nov. 18, 2020).

²⁰ See *infra* Part I.A.

and missions. There are differences between private and public schools. There are also differences among private schools and among public schools. Yet playing the ranking game makes a school compete on sameness rather than on what makes it unique. In that sense schools fail to use branding as a tool to show what is different and special about the school.

Part II uses California's *A Master Plan for Higher Education in California, 1960–1975*²¹ (AMP) as a lens to examine the varied goals of education and adds a distinction – a differentiation and branding one – between private and public institutions. The laudable goal of the then president of the University of California and chief architect of AMP, Clark Kerr, for public higher education institutions – to balance the “competing demands of fostering excellence and guaranteeing educational access for all”²² – may not fit the private institutions with which many public institutions compete.²³ The twin goals may shatter when the desire, and unfortunate need, for advancement in the higher education ranking game takes hold.²⁴

Part III turns to how a better understanding of a given type of higher education institution may allow a given public higher education system to recapture control over its destiny.²⁵ It begins by explaining how pursuing co-creation of value as a branding practice enables a school to establish its brand in partnership with its stakeholders, and by extension to look beyond the metrics that miss a particular school's vision. Part III then uses the University of California (UC) system and its approach to first-generation students as an example of how co-creation of value works at specific schools and across the state's higher education system.

The chapter concludes by offering that the purpose of US higher education has changed throughout its history, and yet the question is stable: Who is served? Students, faculty, or society at large?²⁶ I argue that public higher education must answer this question with a resounding “yes” to all three stakeholders. To do so will require institutions to reassess their place in society continually and co-create value by listening to their stakeholders, experimenting with programs, communicating

²¹ Arthur G. Coons, Arthur D. Browne, H.A. Campion, G. Dumke, T. Holy, D. McHenry, and K. Sexton, *A MASTER PLAN FOR HIGHER EDUCATION IN CALIFORNIA, 1960–1975* (1960) [HEREINAFTER AMP].

²² Sean Kennedy, *Berkeley Is Collapsing In On Itself*, THE AMERICAN CONSERVATIVE, Jan. 12, 2018, www.theamericanconservative.com/articles/berkeley-is-collapsing-in-on-itself (last visited Nov. 18, 2020); accord Jeffrey Earl Warren, *UC, Where Are Your Native Sons and Daughters?*, SF GATE, July 14, 2011, www.sfgate.com/opinion/openforum/article/UC-where-are-your-native-sons-and-daughters-2354592.php (last visited Nov. 18, 2020).

²³ Cf. England, *supra* note 19: “Elite universities, no matter how high-minded, have corporate souls and bottom lines.”

²⁴ *Id.*: “professed ideals will take a back seat to whatever drives the market. If your competitors boast an SAT median of 1450 and 60 percent of their incoming class ranks in the top 10 percent of their high schools, you need to at least match that.”

²⁵ LURY, *supra* note 2.

²⁶ LEWIS, *supra* note 6, at 44.

results, and building the future at each level of public higher education on the system's terms rather than a news magazine's. This approach should allow education systems to show why they need funding and help higher education institutions avoid becoming commodities. It will allow institutions to build and evolve their brand just as any corporation does.

I. MARKETS, NUMBERS, AND MISSTEPS

Higher education institutions ought to resist the factors that feed the turn to the current commodity market mindset. Funding problems and a desire to show value intersect. They create a feedback loop where an obsession with numbers and quantifiable outcomes leads to commodification and a cycle that is difficult to break.²⁷ As funding goes down, and the cost paid directly by students goes up, the question of what one gets from education becomes acute. Yet rankings don't measure important differentiating things such as how well a school educates someone or whether the school serves underrepresented minorities or first-generation-to-college students well. This section presents the difference between schools that operate based on selecting students already set up for success versus schools that seek to train students so that after graduation the students have skills and knowledge that set them up for success. It then turns to how ranking systems create a trap for schools so that they chase external metrics rather than building programs that differentiate their institution from others.

A. *The Selection or Treatment Effect Problem*

An important question is whether a school is simply showing a selection effect or whether there is a treatment effect. Selection effects are driven by choosing someone who already has a trait or traits. A modeling agency selects beautiful people, it does not make people beautiful.²⁸ With a treatment-effect institution, such as the US Marine Corps, the *training* is what counts and those who make it through have a reputation for being "a formidable soldier."²⁹

Educational institutions differ on whether their outcomes are driven by selection or treatment effects. "Top-tier universities depend heavily on selection effects; [they] produce top graduates by accepting the best applicants."³⁰ Top-tier universities

²⁷ MULLER, *supra* note 7, at 1–6: "Rankings create incentives for universities to become more like what the rankings measure"; accord England, *supra* note 19.

²⁸ *Id.*

²⁹ Malcolm Gladwell, *Getting In: The Social Logic of Ivy League Institutions*, NEW YORKER, Oct. 10, 2005, 80–86.

³⁰ AnnaLee Saxenian, *Can Online Education Technology Improve Excellence and Access at Berkeley?* (2012), http://people.ischool.berkeley.edu/~anno/Papers/Online_Education_at_Berkeley.pdf; accord LEWIS, *supra* note 6, at 139: employers see admission to an elite school

operate “more like a modeling agency than like the Marine Corps.”³¹ Institutions such as Harvard, Stanford, Yale, and so on select students who are smart, hard working, etc., and often come from families where parents have an average of sixteen years of education.³² By choosing such students, these schools select people who would have done well by many measures, including income, even if they had attended a “moderately selective school” such as a state university.³³ These results do not, however, apply for racial and ethnic minorities and students whose parents “have relatively little education.”³⁴ As Alan Krueger said in 2005 – well before the recent college admissions bribery scandal – parents “fight to get their kids into the better school. But they are just assigning to the school a lot of what the student is bringing with him to the school.”³⁵ Even so, the difference appears not to be the education received at the school, but the access “to networks for minority students and for students from disadvantaged family backgrounds that are otherwise not available to them.”³⁶

In contrast, some schools pursue treatment effects as they strive to serve low-income students or students who are the first in their family to attend college. One example is UC Santa Barbara (UCSB). Its pioneering program, Promise Scholars, provides support to low-income students and first-generation students.³⁷ The program is expensive but helps students maintain little to no debt and provides counseling for academic and career success.³⁸ Members of the first 122 to graduate have entered PhD and MA programs at Harvard, Duke, USC, University of Pennsylvania, and Michigan State as well as been hired straight out of college into industry jobs.³⁹

Prospective students and society should know about and value treatment effects. Rankings, however, track selection-effect metrics much better than treatment effects, if rankings even track the latter at all. This problem pushes institutions into the rankings trap.

as a “strong indicator of quality” and grades as a reflection of consistent work rather than training.

³¹ Gladwell, *supra* note 29: “The extraordinary emphasis the Ivy League places on admissions policies, though, makes it seem more like a modeling agency than like the Marine Corps.”

³² Stacey B. Dale & Alan B. Krueger, *Estimating the Effects of College Characteristics over the Career Using Administrative Earnings Data*, 49 *J. OF HUMAN RESOURCES* 323 (2014); accord LEWIS, *supra* note 6, at 32, stating that Harvard graduates “may be ready for anything” not because of “skills or expertise” from attending Harvard but because “they are smart, self-confident, and Harvard water-marked.”

³³ See Dale & Krueger, *supra* note 32.

³⁴ See Dale & Krueger, *supra* note 32, at 326.

³⁵ Gladwell, *supra* note 29, quoting Alan Krueger.

³⁶ *Id.*

³⁷ Sanya Kamidi, *Promise Scholars Program Sees First Graduating Class*, DAILY NEXUS UC SANTA BARBARA, June 20, 2019, <http://dailynexus.com/2019-06-20/promise-scholars-program-sees-first-graduating-class> (last visited Nov.18, 2020).

³⁸ *Id.*

³⁹ *Id.*

B. *The Rankings Trap*

That some schools are selection-effect schools and others treatment-effect schools may seem benign, but when rankings enter the picture several problems arise. First, rankings favor selection-effect schools. Second, when one focuses on quantified metrics such as grade point average (GPA) and test scores, the pressure to accept a homogeneous, already set-up-for-success student body is high. Third, because rankings are not good at reflecting treatment effects, schools that strive to offer training and develop students who might otherwise not succeed look like inferior institutions, when in fact they may be a superior educational choice. Fourth, once a school embraces ranking, it is trapped. It is less able to show what it does differently from other schools. Instead, it will strive to compete in areas that other schools can copy and so cede its power to brand – its power to offer and communicate what is unique.

Selection-driven admissions seem to breed school rankings, or league tables as the British call them,⁴⁰ – a phrase that evokes sports and the way in which sports fans obsess over stars, trades of stars, and win-loss statistics and captures the problem with ranking. Looking at entering class SAT or ACT test performance and GPAs starts an arms race. Schools can no longer look at the breadth of a student's experience or calibrate for intrinsic biases in testing when admitting students.⁴¹ Instead, an entering class must have a high twenty-fifth, median, and seventy-fifth percentile standing (e.g., a class may have entering students with the top 25 percent having above a 1,580 SAT score out of 1,600 and 75 percent are above a 1,460 score) so that a school can maintain or improve its rank.⁴² Worry about rankings and median scores can push even a well-regarded, established, and highly ranked private higher education institution to reject precisely those students who would most benefit from admission.⁴³ And yet, the focus on entering class grades and scores simply tells a potential student that a school has selected in a certain way, not that the school will add to the student's knowledge and skills.

Other aspects of rankings aggravate the problem of selection versus treatment effects. Using dollars spent per student as part of a school's rank score⁴⁴ puts public

⁴⁰ Stella Jones-Devitt & Catherine Samiei, *From Accrington Stanley to Academia? The Use of League Tables and Student Surveys to Determine "Quality" in Higher Education*, in *THE MARKETISATION OF HIGHER EDUCATION AND THE STUDENT AS CONSUMER* 86–101 (Mike Molesworth, Richard Scullion & Elizabeth Nixon eds., 2010).

⁴¹ England, *supra* note 19, detailing committee rejection of candidate who "had two working-class parents without advanced degrees and grew up in an economically depressed region of western Massachusetts [and] had the grades and the extracurricular activities, but her scores were 70 points below our median."

⁴² *Id.*

⁴³ *Id.*

⁴⁴ U.S. News and World Report states that dollars per student accounts for 10 percent of overall rank and justifies this metric this way: "Generous per-student spending indicates a college can offer a wide variety of programs and services. U.S. News measures financial resources by using

institutions at a disadvantage and makes otherwise top-tier institutions look less attentive to students so they slip down the list.⁴⁵ Focusing on immediate job placement privileges schools that have smaller student populations and powerful alumni – the very same elite schools that thrive based on selection, not treatment effects. Adding a student's income upon graduation into rankings again favors schools that admit applicants already connected to privilege. In addition, the focus on job placement and income favors schools with large technology or business programs and disfavors schools that send students to graduate or professional schools. As such, a school cannot ignore maintaining, if not growing, technology and business programs at the cost of maintaining and developing programs that lead to deeper training in and engagement with, for example, medicine, public health, social services, law, and of course basic scientific research. Ironically, advances in basic scientific research are the lifeblood for exactly the technology and business jobs that are factored into rankings.⁴⁶

As opposed to selection metrics, treatment efforts and results are not well reflected in rankings. Recall the work at UCSB that strives to serve low-income and first-generation college students. Rankings fail to capture this subset population let alone the value of such services to students and society.⁴⁷ For example, rankings that rely on retention rates and job success will make an institution seeking to reach students who may have lower scores or GPAs rank lower and look like a poor performer, even though the very nature of its mission is to serve those students who are less likely to graduate, or graduate on an Ivy League timetable, and are more likely to have lower-paying jobs.⁴⁸

Although the metrics used in rankings can be seen as helping students know what a particular higher education institution offers, the focus ends up shifting to a

the average spending per student on instruction, research, student services and related educational expenditures in the 2018 and 2019 fiscal years.” U.S. News and World Report, *How U.S. News Calculated the 2021 Best Colleges Rankings*, at www.usnews.com/education/best-colleges/articles/how-us-news-calculated-the-rankings (last visited Dec. 17, 2020).

⁴⁵ See e.g., Valerie Strauss, *U.S. News Changed the Way It Ranks Colleges: It's Still Ridiculous*, WASHINGTON POST, Sept. 12, 2018, www.washingtonpost.com/education/2018/09/12/us-news-changed-way-it-ranks-colleges-its-still-ridiculous/?utm_term=.f737ec9ac9ac (last visited Dec. 13, 2021).

⁴⁶ See e.g., MARIANNA MAZZUCATO, *THE ENTREPRENEURIAL STATE: DEBUNKING THE PUBLIC PRIVATE MYTHS* (2014), arguing that many industries from pharmaceuticals to Silicon Valley giants such as Apple leverage publicly funded basic research rather than inventing and discovering on their own.

⁴⁷ Although perhaps the most notorious ranking, *U.S. News & World Report*, changed its methods in 2019 to include social mobility, the shift had little effect on the rankings at the top, and so the change has been seen as a “fig leaf” to hide the ranking’s metrics, which still favor wealthy schools and selection effects for admission. See Scott Jaschik, *The “U.S. News” Rankings’ (Faux?) Embrace of Social Mobility*, INSIDE HIGHER ED., Sept. 10, 2018, www.insidehighered.com/admissions/article/2018/09/10/us-news-says-it-has-shifted-rankings-focus-social-mobility-has-it (last visited Nov. 18, 2020).

⁴⁸ MULLER, *supra* note 7, at 106; Jaschik, *supra* note 47: “A measure that works for the Ivies may not reflect the experience” of schools that serve low-income or first-generation students.

consumer model.⁴⁹ The student is the consumer and wishes to know what will come of the price paid in dollars and hours spent in school. As an outsider, the student-consumer needs a way to assess quality. Rankings become the easy way to express quality. And yet, students, parents, and employers read league tables in ways that misunderstand the difference between higher education institutions that focus on educating a student – a treatment effect – and higher education institutions that rely on a student’s pre-admission training and luck to have been born into a family where the parents have attained at least a college degree – a selection effect. In that sense, rankings arguably force higher education institutions *of all types to play the same game*.⁵⁰

One dimension of ranking, academic reputation, exemplifies the way rankings can alter the focus and mission of an institution. Some rankings focus on publications and citations as metrics of global stature and the excellence of an institution’s faculty.⁵¹ That emphasis can lead to an explicit “shift” to improving publication and citation scores and away from educating students, as was the case in Russia.⁵² Citation obsession can lead to more absurd and unethical practices such as forming citation circles to improve the so-called impact factor of a journal and thus the claimed quality of a given author’s work.⁵³ Regardless of how citation counts are generated, having a highly cited professor has little to say about educating a student. Indeed, such professors’ focus is on their research and PhD students, not being in a classroom, so much so that reduced class loads, and thus less contact with non-doctoral students, is likely. All these tactics are ways to climb global ranking indices, not to educate students.⁵⁴

In short, rankings and specific metrics such as GPAs, endowment, job placement, and academic reputation ignore the different types of education and what they offer to different people. That is a mistake. There is a clear difference in the goals of a research university – a difference compounded by whether it is public or private – and the goals of a small college,⁵⁵ let alone the goals of a state college or junior/community college. Rankings, however, blur, or do not care about, these differences

⁴⁹ For a UK perspective on the problem of rankings, see Jones-Devitt & Samiei, *supra* note 40, positing a future in the year 2020 where “league tables” and consumer value metrics take over the way higher education institutions are run.

⁵⁰ See e.g. BOYER, *supra* note 19, at 10–02, noting the shift “to impose a single model of scholarship on the entire higher education enterprise.”

⁵¹ MULLER, *supra* note 7, at 75.

⁵² Nailya G. Bagautdinova, Yuliya N. Gorelova, & Oksana V. Polyakova, *University Management: From Successful Corporate Culture to Effective University Branding*, 26 *PROCEDIA ECONOMICS AND FINANCE* 764, 765 (2015).

⁵³ MULLER, *supra* note 7, at 75.

⁵⁴ Bagautdinova, Gorelova, & Polyakova, *supra* note 52; MULLER, *supra* note 7, at 101.

⁵⁵ MULLER, *supra* note 7, at 42, discussing the tensions between educating undergraduates and the high cost of research faculty who lack training to teach a broad undergraduate population; BOYER, *supra* note 19, at 99–108, examining varying types of higher education institutions and their missions.

and try to create a commodity-style comparison table. Put differently, rankings force higher education institutions to be assessed on GPAs, standardized test scores, academic citations, etc. – metrics that are nothing more than education’s version of marketing’s famous four Ps (product, price, place, and promotion) – characteristics or qualities that other HEIs can and do copy, instead of allowing them to focus on offering something unique.⁵⁶ Again, *that sameness is exactly what branding is supposed to defeat*,⁵⁷ rather than succumb to.

II. THE DIVERSITY OF EDUCATIONAL INSTITUTIONS AND GOALS: HOW PUBLIC EDUCATION IS DIFFERENT FROM PRIVATE EDUCATION

Educational institutions vary. There are research institutions and small colleges. There are private institutions and public ones. Elite private institutions – be they universities or small colleges – are self-contained and autonomous. They can have a singular goal as determined by their board. Public institutions, however, function as part of a given state’s overall higher education system. Their goals are set at the state level with the basic goal being to build an education system that serves the public. The beauty and difficulty of such systems is that they have many offerings within the system. For example, within public higher education there are research universities, state universities, and community colleges. And there are notable differences in each of those spheres. There are differences among public research institutions, among state universities, and among public community colleges. Thus, a public education system has different parts that provide different things to the public, but those parts taken together present a cohesive public education offering.

Branding raises questions for public education. One question is, “What is different about being part of a system?” In other words, is there a system-level brand? A related question is, “What differentiates institutions at a given level within a system?” Can a school at the research level distinguish itself from other schools at the same level? Does differentiation within a system level also differentiate a school from private schools? Before answering these questions, however, one has to have an understanding of the overall system and of the various offerings within that system. California’s approach to higher education provides an example of a system’s goals and the offerings within it.

The study, *A Master Plan for Higher Education in California, 1960–1975* (AMP),⁵⁸ provides a way to understand the differences among higher education institutions and what an overarching identity or brand for a system-wide higher educational offering might look like. The study was prepared for the Liaison Committee of the State Board

⁵⁶ LURY, *supra* note 2, at 24, 32–33; MARCEL DANESI, BRANDS 33 (2006).

⁵⁷ Cf. Desai and Waller, *supra* note 1.

⁵⁸ See *supra* note 21.

of Education and Regents of the University of California in 1960. AMP's main focus was on public higher education institutions. It formalized the state's existing,⁵⁹ "disorganized,"⁶⁰ three-tier system of public higher education institutions so that, "Each shall strive for *excellence in its sphere*."⁶¹ Rather than "uncoordinated and competing colleges and universities," each segment had its sphere of "excellence."⁶² AMP can thus be understood as a coherent, comprehensive education system for California.⁶³ The spheres show differing goals *that together* provide the dream: fostering excellence and guaranteeing educational access for all.⁶⁴

Under AMP, state research and doctoral education are the province of University of California campuses and admission is for "seniors in the top 12.5 percent of their public high school graduation class."⁶⁵ If someone is not in that top group, but is in the top 40 percent of high school graduates, the California State University (CSU, also called Cal State) system offers another type of four-year university offering.⁶⁶ Even if someone did not get into the UC or State level schools to start, a student could go to a junior college (today called a community college), and if they met a certain grade point average, transfer to finish a four-year degree. Junior colleges also took in non-traditional students.⁶⁷ In addition, AMP acknowledged and worked with "independent colleges and universities" as another part of the way California would be able to meet its education needs.⁶⁸ Although distinct, the segments are supposed to work together to provide educational, and so economic mobility.⁶⁹

⁵⁹ Saul Geiser & Richard C. Atkinson, *Beyond the Master Plan: The Case for Restructuring Baccalaureate Education in California*, 5 CALIFORNIA JOURNAL OF POLITICS AND POLICY 67, 70 (2013): "the Master Plan did not create California's tripartite system of public higher education; it largely preserved and codified the existing system."

⁶⁰ CALIFORNIA COMPETES, MOVING PAST THE MASTER PLAN: REPORT ON THE CALIFORNIA MASTER PLAN FOR HIGHER EDUCATION (Oct. 2017), https://californiacompetes.org/assets/general-files/Master-Plan-Report_-with-cover-for-hearing.pdf (last visited Nov. 20, 2020).

⁶¹ AMP, *supra* note 21, at 2.

⁶² Letter from UC President Atkinson to the Regents on the Master Plan, University of California, Office of the President, Sept. 15, 2003, at www.ucop.edu/acadinit/mastplan/mpregents091503.pdf (last visited Dec. 17, 2020).

⁶³ *Id.*

⁶⁴ Cf. BOYER, *supra* note 19, at 108, "calling for ... [a system of higher education institutions where each institution] takes pride in its own distinctive mission and seeks to complement rather than imitate the others."

⁶⁵ Teresa Watanabe & Nina Agrawal, *California Higher Education Hangs in the Balance as UC, Cal State Search for New Leaders*, LA TIMES, Nov. 30, 2019, www.latimes.com/california/story/2019-11-30/california-higher-education-hangs-in-the-balance-as-uc-cal-state-search-for-new-leaders (last visited Nov. 20, 2020); accord Office of the President to the Regents of the University of California: Discussion Item for [the] meeting of November 15, 2018, Preliminary Planning for a Multi-Year Framework (B2), <https://regents.universityofcalifornia.edu/regmeet/nov18/b2.pdf> (last visited Nov. 20, 2020).

⁶⁶ *Id.*

⁶⁷ Aaron Bady & Mike Konczal, *From Master Plan to No Plan: The Slow Death of Public Higher Education*, 59 DISSENT 10, 12 (2012).

⁶⁸ AMP, *supra* note 21.

⁶⁹ Bady & Konczal, *supra* note 67.

Despite the dream, AMP has faced continual challenges. Critiques of AMP point out that AMP falls short of its goals, because of California governors of the Reagan mindset changing commitments to those goals and to the system's overall structure; underfunding of the system primarily due to the passage of Proposition 13 in 1978 and its limitation on property taxation; the change from "comparatively quite low" fees to higher and higher ones to attend; the introduction of explicit tuition in 2009; and an unwillingness and/or inability to continue to fund the expansion of student seats needed at all tiers of the system.⁷⁰ A deeper criticism is that from its birth, AMP was in fact a product of the need to limit costs and build capacity for the future such that the admissions standards worked to *reduce and limit* admission to four-year programs.⁷¹ In other words, the balance of students seeking higher education was pushed to two-year programs at junior colleges.⁷² Yet AMP embraced two-year programs as part of the overall approach, and whether everyone should go to a four-year college is unclear.⁷³

Claiming that all should go to, or are ready for, a four-year college at eighteen recreates the ranking problem, because it assumes that one size of education fits all – a position this chapter challenges. Nonetheless, as of this writing, the ten UC campuses educate about 280,000 students while also being a "massive and top-ranked research enterprise, [with] five medical centers, three affiliated national laboratories and an overall budget of \$37.2 billion, bigger than those of more than 30 states" and being the main creator of PhDs in the state on top of its undergraduate and master's degrees.⁷⁴ The Cal State (CSU) system is "the largest and most diverse four-year university system in the nation, educating 482,000 students on 23 campuses who are drawn from the top 40% of California's annual high school graduates."⁷⁵ The system "is often referred to as the 'job engine' of California," given that it trains about half of California's teachers and more than half of its nurses in addition to providing education for other important career paths.⁷⁶ Thus despite the structural issues and questions around the balance of how many students go to four-year colleges, the system continues to try to serve the state by fostering excellence and striving to guarantee educational access for all.

In short, these critiques do not undermine the idea of an identity or brand for a public higher education system. Instead, they challenge whether a system lives up to

⁷⁰ *Id.*

⁷¹ See Geiser & Atkinson, *supra* note 59, at 68–71, noting California's rate of BA degrees per 1,000 between the ages of 18 and 24, which puts California 42nd out of the 50 states).

⁷² *Id.* at 68–69.

⁷³ MULLER, *supra* note 7, at 67–68, questioning "the belief that ever more people should go on to college, and that doing so increases not only their own life-time earnings but also creates national economic growth."

⁷⁴ Watanabe & Agrawal, *supra* note 65.

⁷⁵ *Id.*

⁷⁶ *Id.*

its claims and force institutions to focus and refine what they do. These tasks fit well with branding.

III. RECAPTURING THE PUBLIC HIGHER EDUCATION SYSTEM BRAND

It is time for public higher education systems to recapture what they do. It is time for public higher education systems to recapture their brand. Public higher education systems should re-embrace, and tell the public that they are, *systems*. Like a major corporation with a range or family of brands offered under one umbrella,⁷⁷ public higher education systems should offer, support, and celebrate a range of higher education institutions. California's AMP sets out a system with three types. Ernest Boyer's study of scholarship offers more types – research universities, doctorate-granting institutions, liberal arts colleges, community colleges, and the comprehensive college or university.⁷⁸ The point is that higher education systems can set out types of higher education institutions *so that each level can have a purpose to guide its mission*. In addition, within a level, a given institution can innovate and “take pride in its own distinctive mission and seek to complement rather than imitate the others.”⁷⁹ In this section, I explain what branding – and in particular the view of branding as co-creation of value – requires and what it can do for a public education system. I then explore how the UC system is an example of branding as co-creation of value.

A. Public Education and Co-Creating Value as a Brand

Brands and branding have evolved to embrace far more than the simple world where a brand was owned by an institution and used to communicate the brand owner's offering to consumers.⁸⁰ As I have developed elsewhere, we can think of corporate or entity-level brand activity and non-corporate or outside-the-entity brand activity. Both activities matter. The corporate, or internal, aspect of branding involves “forg [ing] not only a product symbol, but also a connection with consumers so that consumers look beyond price when they make a purchasing decision. It also enables corporations to sell multiple branded products and ancillary merchandise and to turn the brand into a product in its own right.”⁸¹ In corporate branding, the entity builds and offers the brand. But today there is more to brand relationships than simply using advertising to tell people to buy a good or service. The non-corporate,

⁷⁷ See Deven R. Desai, *From Trademarks to Brands*, 64 *FLORIDA L. REV.* 981, 1019–21 (2012), explaining how the family or house mark under trademark law supports having one core brand and then brand extensions.

⁷⁸ BOYER, *supra* note 19, at 103–06.

⁷⁹ BOYER, *supra* note 19, at 108.

⁸⁰ See generally, Desai, *supra* note 77.

⁸¹ *Id.* at 985.

or external, side of branding accounts for “consumers and communities as stakeholders in brands.”⁸² The way to connect these activities is through the idea of co-creating value. Co-creation of value embraces the idea that value is not created purely “from a product- and firm-centric view” but rather that it comes from “personalized consumer experiences.”⁸³ In this understanding, “Informed, networked, empowered, and active consumers are increasingly co-creating value with the firm. The interaction between the firm and the consumer is becoming the locus of value creation and value extraction.”⁸⁴ As such, a higher education institution must address both internal and external brand activity.

A higher education system must co-construct its future with its public. That requires understanding what its public needs. The system must also understand the nature of its students. Last, it must continually communicate with the public about needs, goals, methods, and outcomes. Put simply, the boldest step for any higher education system would be not to give in to the herd and imitate what current rankings try to assess. If a system wants to reject or move away from ranking metrics, it will have to show how and why that change is a good goal. And it will need to build its offering from within, which leads to another set of important stakeholders – the people working inside the institution.

Systems and specific institutions will need to co-create value within the institution. They must communicate with faculty about the possible shift from rote rankings chasing. Part of that shift might, and I argue should, include a broader understanding of scholarship. Embracing a range of scholarship – what Boyer calls a Mosaic of Talent – can begin to unlock the potential for higher education systems and specific schools.⁸⁵ That is, especially at a large higher education institution, not everyone needs to be doing the same thing. Of course, research is a key and major part of a research institution.⁸⁶ But if someone is past tenure and wants to focus on scholarship beyond publication including as a teacher, an institution should have room for and support that goal. It may be that an institution shifts teaching loads based on research plans. For example, one professor who is pursuing research may teach fewer courses, while another pursuing novel teaching techniques may teach fewer courses while developing new methods, and another person may explicitly focus on course delivery and feedback to students and so teach one or two more courses instead of research. As an institutional matter, all are able to focus on their desires as scholars, and all are well served as long as each aspect of their effort is respected.⁸⁷

⁸² *Id.* at 986.

⁸³ C.K. Prahalad & Venkat Ramaswamy, *Co-Creation Experiences: The Next Practice in Value Creation*, 18 *J. INTERACTIVE MARKETING* 5, 10–13 (2004).

⁸⁴ *Id.* at 5.

⁸⁵ BOYER, *supra* note 19, at 77.

⁸⁶ *Id.* at 103.

⁸⁷ *Id.*

Staying with the simpler California model as an example, the California higher education system would set out what each tier is and still give room for experimentation, innovation, and competition within each tier. The UC level would be clearer about what it means to be at a top research institution where professors engage in what Boyer calls discovery. But a given UC campus might focus on how its faculty are also scholars who integrate knowledge across disciplines, or apply knowledge by engaging with “consequential problems,” or develop teaching so that people can understand discovery.⁸⁸ The Cal States and community colleges (originally called junior colleges in AMP) would also focus on their realms, and yet again pursue differentiating and innovative offerings. Cal State and Cal Polytechnic campuses might celebrate teaching prowess in general. Still a given campus may have one or two programs that shine in agriculture, business, computer science, health professions, or other specific fields. Community colleges may focus on training and treatment effects in fields where a two-year program can accomplish much. Or they may focus on training and treatment to be ready to transfer to a UC or CSU. Success from either approach would perhaps let a campus, or the entire set of higher education institutions at a given level, be the US Marines of public education.

A look at how the UC system is facing its current challenge of educating a growing first-generation student population shows how these steps might work and how the same challenge can be met in different, innovative ways.

B. Co-Creation in Action: The UC System and First-Generation Students

The California system must address the changing nature of Californians entering college – many of whom are first-generation attendees. Despite different educational emphases and student populations, both the UC and Cal State systems have “far higher proportions of low-income and first-generation students than do similar universities in other states.”⁸⁹ Both face a similar challenge – “to close achievement gaps for low-income, first-generation and underrepresented minority students.”⁹⁰ As Lindsay Romasanta, director of Student Success Programs at UC San Diego, puts it, “the demographics of our students are changing, and it’s important we get ahead of the curve and give them the information that’s going to help them thrive.”⁹¹ Director Romasanta also captures a key point, not just for her campus but all the UC campuses: “Our perception has been, we’re a highly selective institution – our students will figure it out on their own.”⁹² That is, relying on selection effects alone,

⁸⁸ *Id.* at 67–76.

⁸⁹ Watanabe & Agrawal, *supra* note 65.

⁹⁰ *Id.*

⁹¹ *Assistance during First Years of Biology Major Leads to Higher Retention of First-Gen Students*, SCIENCE DAILY, Dec. 5, 2019, www.sciencedaily.com/releases/2019/12/191205155321.htm [hereinafter SCIENCE DAILY] (last visited Nov. 20, 2020).

⁹² *Id.*

instead of trying to have treatments effects, is not viable or proper for the UC, given the reality of its attendees' backgrounds. The different UC campuses address the issues in ways that fit a specific institution, but they do not act in isolation. There is coalition across the UC system that focuses on first-generation students. Yet the variety of approaches shows how a system can identify or set a goal and then allow campuses and faculties room to be creative and responsive to their student and campus needs.

For example, UC Merced is the newest of the University of California campuses and has distinguished itself by embracing first-generation students. In 2018, UC Merced's student body was 73 percent first-generation, the highest within the UC system and "double the national average."⁹³ In 2010, UC Merced started and maintained up to today a program, Fiat Lux, focused on first-generation students.⁹⁴ The program serves more than 100 first-year and more than 150 later-year students by providing money, space to live together as a cohort, structured learning environments, and dedicated counselors and student mentors.⁹⁵ Specific aspects of the program such as "numerous workshops aimed at what is called procedural knowledge, boning up on study skills and learning how to connect with professors and research opportunities . . . [and] Several . . . organized lunches with faculty members per semester" provide a foundation for success.⁹⁶ As evidence of the program's treatment effect, "Scholars graduate at a higher rate than students with comparable grade-point averages."⁹⁷

The focus on first-generation student success has spread across the UC system.⁹⁸ In addition to UC Santa Barbara's Promise Scholars Program, UCSB professors of biology have developed a BioMentors program that seeks to combat the problem that "Fewer than 40% of U.S. students entering into science, technology, engineering, and mathematics (STEM) majors complete their intended degree upon

⁹³ Kenneth Mashinchi, *UC Merced Professors Honored for Work with First-Generation Students*, UC MERCED NEWSROOM, Sept. 24, 2018, <https://news.ucmerced.edu/news/2018/uc-merced-professors-honored-work-first-generation-students> (last visited Nov. 20, 2020); see also Patricia Leigh Brown, *Creating a Safe Space for California Dreamers*, NY TIMES, Feb. 3, 2017, www.nytimes.com/2017/02/03/education/edlife/daca-undocumented-university-of-california-merced-fiat-lux-scholars.html (last visited Nov. 20, 2020): "About 70 percent of the student body are the first in their families to attend college."

⁹⁴ Fiat Lux Scholars Program (University of California, Merced), <https://fiatlux.ucmerced.edu/History> (last visited Nov. 20, 2020); accord Brown, *supra* note 93: "Fiat Lux Scholars [is] a special initiative for first-generation, low-income students."

⁹⁵ Fiat Lux Scholars Program, *supra* note 94; accord Brown, *supra* note 93.

⁹⁶ Brown, *supra* note 93.

⁹⁷ *Id.*

⁹⁸ Nicole Freeling, *Cracking the Code on First-Gen College Student Success*, UC Newsroom, July 31, 2018, www.universityofcalifornia.edu/news/cracking-code-first-gen-college-student-success, noting efforts and programs aimed at first-generation students at UC San Diego, UCLA, UC Merced, and UC Irvine; Mashinchi, *supra* note 93, reporting on events honoring programs and professors focused on first-generation students at UC Berkeley, Davis, Merced, San Francisco, Santa Barbara, and Santa Cruz.

graduation,”⁹⁹ and close to 50 percent of STEM majors leave such majors after their first year.¹⁰⁰ Some students leaving the major “came from high schools that didn’t prepare them for the rigor that [they] face in college,” which, when combined with “feeling out of place in a completely new environment and not knowing who to turn to for help,” leads to poor performance and a loss of “confidence in their abilities and to reconsider their major.”¹⁰¹ This outcome occurs despite the students being fully qualified and capable of doing the work.¹⁰²

The change in teaching style, a treatment, worked. Students in the BioMentors program “outperformed their peers in the traditional lecture course by about 12% on common exam questions, and ... [had] higher final course grades overall.”¹⁰³ Beyond grades, the sense of “belonging” increased, students were connecting with professors more, and so far those in the program are “10% more likely than their peers” to take the next course in the series.¹⁰⁴ The authors of the study note that whether the approach can scale to classes larger than 300 and long-term retention needs to be studied.¹⁰⁵ But the point is that even at a campus with a large program focused on specific student cohorts, the room to study and improve how students are reached in other ways was present and supported.

Other campuses have addressed first-generation student success. UC San Diego has created a Student Success Coaching Program for first-generation students that grew from 800 to 1,200 participants in 2018.¹⁰⁶ The program focuses on increasing “cultural capital” so that first-generation students would better know about “where to find a study group, how to manage their time as midterms approached ... upcoming registration deadlines, and ... academic opportunities, like a new study abroad scholarship developed just for program participants.”¹⁰⁷ UCLA is pursuing new housing for first-generation students as a different way to build support and foster success.¹⁰⁸ UC Irvine is using a data-system so that professors can know whether a large number of students are first-generation, have taken other courses in the subject area, and “how well those students did academically.”¹⁰⁹ Options for ways to alter teaching methods to reach students are offered based on that

⁹⁹ Mike Wilton, Eduardo Gonzalez-Niño, Peter McPartlan, Zach Ternier, Rolf E. Christoffersen, & Joel H. Rothman, *Improving Academic Performance, Belonging, and Retention through Increasing Structure of an Introductory Biology Course*, 18 *CBE – LIFE SCIENCES EDUCATION* 1 (2019), www.lifescied.org/doi/10.1187/cbe.18-08-0155 [hereinafter *Improving Academic Performance*] (last visited Nov. 20, 2020).

¹⁰⁰ SCIENCE DAILY, *supra* note 91.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *Improving Academic Performance*, *supra* note 99.

¹⁰⁶ Freeling, *supra* note 98.

¹⁰⁷ *Id.*

¹⁰⁸ SCIENCE DAILY, *supra* note 91.

¹⁰⁹ *Id.*

information.¹¹⁰ UC Berkeley has opened a food pantry to address issues surrounding the high cost of living that faces students in general and especially low-income and first-generation students.¹¹¹

Returning to UC Santa Barbara's Promise Scholars Program, it is thus an example of seeing that the institution has broader goals and a larger vision of what it means to be an educational institution and indeed, to educate. The more UC Santa Barbara tells the public about its support for first-generation students and the way they can be served even at a top research institution, the more UC Santa Barbara is valued for its own mission. In addition, by providing room for professors to pursue teaching innovations such as the BioMentors program and recognizing that work, UCSB fosters broader recognition that scholarship and being a professor have a broad and valued range of possibilities.

Nonetheless, other campuses are finding, and will continue to find, ways to show how they address common challenges in particular ways. As California demographics change, the UC campuses will likely further differentiate how they address those changes. Some of those paths will end in failure or less than desired outcomes. As long as the experiments are studied to see what went wrong and the results shared, that is expected and good for the system. Other paths will do so well that, of course, other campuses will copy them. That too is good for the system. Despite the need to differentiate, best practices should be shared across a healthy public higher education system. For even with that, each campus's history, resources, and student population will differ enough that each campus will use tools differently as the different campuses continue to grapple with how they meet their specific mission.

In addition, by following the internal step of co-creating value with faculty by embracing a broader view of scholarship, students should benefit too. Students should end up with more options within the campus. Many may want the star teacher who inspires them to learn more.¹¹² Some students may want the professor who integrates and applies ideas.¹¹³ A few students may want to go deep into a field to perhaps even enter academia, and so access to research-focused faculty who nonetheless teach provides a different, important option. With a range of scholars, the campus now offers more to a diverse student body; and yet it still is a research campus. By extension, a student seeking training toward certain jobs should be able to see that they may be better served at a Cal State school or junior college.

¹¹⁰ *Id.*

¹¹¹ Jon Marcus & Felicia Mello, *California Takes Lead in Helping Students Get to College – and Stay There*, NBC NEWS, Dec. 3, 2019, www.nbcnews.com/news/education/california-takes-lead-helping-students-get-college-stay-there-n1094461: “This article about California higher education was produced by CalMatters (<https://calmatters.org/>) and The Hechinger Report, a nonprofit, independent news organization focused on inequality and innovation in education” (last visited Nov. 20, 2020).

¹¹² *Cf. Improving Academic Performance*, *supra* note 99, at 11, noting self-selection issues that may confound the results of the BioMentors program.

¹¹³ *Id.*

Co-creation, however, needs more than these steps. All of these efforts require support from within an education system and from the public. A system will have to communicate to students, parents, taxpayers, and legislatures why getting away from the easy-to-digest world of rankings is a good thing. The examples above provide details that matter for such a shift, data. Educational institutions are well placed to use their core skills not only to experiment but to track outcomes. Numbers return, but they are under terms that matter to the new goals and behaviors of the institution. Institutions must be sure to reach all stakeholders with concrete information about how a new program works and whether its goals are achieved. Saying, “We embrace first-generation students, because it’s just and fair,” is lovely, but not compelling. Saying the same thing *and showing* – as UC Santa Barbara or UC Merced do – that the programs have force by tracking the funding and outcomes of specific programs, is powerful. The combination makes those who oppose such endeavors come up with arguments against such programs. And those arguments will reveal the biases, or at least differences, of objectives. These contrasts would show differences, dare I say differentiation, and should offer students and all concerned rich ways to compare offerings and make meaningful, better informed, choices.

CONCLUSION

Criticisms of branding as it relates to education miss the point of branding. A focus on, and being beholden to, rankings and phony or inappropriate rankings drive a singular mindset. At the same time, higher education institutions and higher education systems cannot pretend they are not part of society. Indeed, higher education in the US has not been static. It began with early focus on developing moral character, preparing young men for “civic and religious leadership.”¹¹⁴ As the economy changed and the needs of society changed with it, higher education systems added a service-to-society-oriented model as exemplified by the land grant colleges and polytechnic schools to produce “builders of all kinds.”¹¹⁵ Basic research has been part of higher education institutions since the early days of the American republic, but did not gain a strong place until the mid-1800s.¹¹⁶ And it was only after World War II that the model of government-funded research and a focus on research faculty became the norm.¹¹⁷ At the same time, yet another goal was added, “moving from an *elite* to a *mass* system of higher education.”¹¹⁸ Thus, higher education institutions and higher education systems have a long and responsive history of working with society to add those elements that it needs addressed.

¹¹⁴ BOYER, *supra* note 19, at 57.

¹¹⁵ *Id.* at 58–59.

¹¹⁶ *Id.* at 61.

¹¹⁷ *Id.* at 63.

¹¹⁸ *Id.* at 64 (emphasis in original).

Put differently, higher education institutions and systems have co-created, and must continue to co-create, value with society, including responding to student views on what education is and should be.¹¹⁹ As the former dean of Harvard College, Harry Lewis, points out, the core question is: “Will the university be run for the benefit of students, faculty, or society?”¹²⁰ The answer to the question should be “Yes,” especially for public higher education institutions and systems. They will have to show how they benefit all three stakeholder groups and perhaps improve or add layers to their offerings as society changes. Establishing a brand that, (a) shows the nature of the offering at each type of higher education institution, and that, (b) also preserves the ability for innovation – that is, academic freedom – within each type and by individual members of an institution, can begin the process of allowing higher education institutions and systems to reclaim their role in not only offering but *explaining* what education is and should be. To be clear, escaping the current ranking obsession will not be easy, will take time, and any institution trying to do so will have to show why its approach is better than the approaches that follow the ranking herd. It is likely that schools will have to follow a dual approach where attention to ranking metrics is combined with innovative programs that deliver worthwhile results in ways beyond ranking metrics.

The key will be to take new actions and to show how and why they work. As a recent study on markets and education asked, “Why shouldn’t universities routinely consider alternative and radical structures and roles for themselves? There might be other exciting models that emerge if we think and talk and act.”¹²¹ Rather than the passive “why shouldn’t we consider alternative paths” perspective, I say higher education institutions and higher education systems must consider and *pursue* new paths that explore and shape education’s future structures and roles. And branding, properly understood and used, is the way to do so.

¹¹⁹ See Furedi, *supra* note 9.

¹²⁰ LEWIS, *supra* note 6, at 44.

¹²¹ Scullion, Molesworth & Nixon, *supra* note 14, at 234–35.

PART II

Local and Global Dimensions

Academic Brands and Online Education

Paul Schiff Berman

Online education both does and does not radically transform higher education and higher education brands. On the one hand, providing courses online potentially allows universities to reach a worldwide audience, helps them globalize their brand, changes the cost structure for both students and institutions, and could reshape the competitive branding landscape among universities. On the other hand, university brands are surprisingly regional, low student–faculty ratios are still necessary for truly high-quality education, and the online competitive landscape might ultimately simply replicate reputational hierarchies forged over decades in the world of on-campus education.

Thus, although it is probably an exaggeration to say that online learning will completely “disrupt” the higher education model and existing university branding hierarchies, online education will inevitably become more and more integral to universities and over time the distinction between on-campus and online education is likely to become increasingly blurred. As a result, online education brings both promise and peril for universities as they manage their brands while increasingly adopting online education modalities.

This chapter first provides an overview of the online education landscape in higher education. Then, it outlines some of the core issues that universities must address as they consider and implement online education strategies while managing their brand.

I. THE ONLINE EDUCATION LANDSCAPE

Online education, long relegated to the fringes of the American higher education system, has become mainstream. For example, between 2012 and 2016, although overall enrollment at four-year institutions increased by only 2 percent, exclusively

online enrollment grew by approximately 16 percent.¹ Similarly, the number of students enrolling in at least some online courses and programs grew by 39 percent.² Indeed, by 2018, one-third of all undergraduates at US institutions were enrolled in some online classes, and 13 percent were learning entirely online.³ These data suggest that not only are more students learning exclusively online, but even students in traditional on-campus programs are becoming more exposed to online and hybrid learning. This in turn reflects a shift in student preferences for increasingly flexible learning opportunities and also demonstrates the spread of technology-facilitated courses. With many secondary schools and universities moving instruction online as part of the response to the 2020 coronavirus pandemic,⁴ these trends have accelerated.

The movement to online is even more obvious if one focuses specifically on graduate education, particularly Master's programs oriented toward professional credentials. From 2012 to 2016, graduate enrollment in exclusively online programs at US-based institutions increased by approximately 28 percent.⁵ During this same period, overall graduate enrollment increased by only 2 percent, while undergraduate enrollment actually decreased by 5 percent.⁶ In the post-recession, post-pandemic economy, students may well be less willing to leave their jobs to gain a post-baccalaureate credential and instead may prefer working and studying simultaneously.

Even at the undergraduate level, university administrators in the United States are increasingly recognizing that the prototypical eighteen- to twenty-two-year-old resident college student actually constitutes less than half of today's undergraduate population.⁷ Instead, we see an increase in the number of so-called "non-traditional" undergraduates. These students have competing priorities and may prefer degree programs that allow for more flexible schedules.

Of course, education pursued away from campus is not a new phenomenon. The idea of correspondence degrees by mail extends at least as far back as the nineteenth century.⁸ However, until recently, most universities relegated such programs to the

¹ EAB Global, *Executive Guide to Online and Hybrid Education Strategy* 10 (2018), analyzing IPEDS (Integrated Postsecondary Education Data System) data from the National Center for Education Statistics.

² *Id.*

³ National Center for Education Statistics (2018), <https://perma.cc/F73Z-QDTJ>.

⁴ See e.g., Kevin Carey, *Everybody Ready for the Big Migration to Online College? Actually, No*, NY TIMES, Mar. 13, 2020, www.nytimes.com/2020/03/13/upshot/coronavirus-online-college-classes-unprepared.html.

⁵ EAB Global, *supra* note 1, at 11.

⁶ *Id.*

⁷ Leigh Guidry, *Older Students Are the New Normal at College*, USA TODAY, Oct. 3, 2018, <https://perma.cc/WM4M-BBYA?type=image>.

⁸ See Hope Kentnor, *Distance Education and the Evolution of Online Learning in the United States*, 17 CURRICULUM & TEACHING DIALOGUE, Nos. 1 & 2, 21, 23–24 (2015), <https://perma.cc/LU2E-6L8N>.

fringes of their educational missions. Correspondence courses were run out of continuing education or extension divisions and were generally operated on a cost-recovery basis as part of the school's community outreach mission.⁹ Certainly, no one thought that courses completed solely by mail could in any way replace or compete with traditional on-campus learning.

The rise of the commercial Internet in the 1990s, however, transformed the possibilities of so-called distance education. For the first time, off-campus students could engage in truly interactive sessions with faculty and other students, and the variety of teaching materials could be radically expanded to include prerecorded lectures, real-time adaptive assessments, interviews with experts, videos from the field, debates among leading scholars, interactive projects, virtual reality, and so on.

Still, traditional not-for-profit universities were slow to grab hold of this new opportunity. While some universities experimented with online programs – Duke launched a global MBA online, for example¹⁰ – most stayed on the sidelines, or they experimented with online only for non-degree continuing education. As a result, various for-profit universities – most notably the University of Phoenix – leapt in to fill the void. By 2010, there were 3 million students enrolled in online degree programs nationwide, 70 percent of whom were at for-profit institutions.¹¹ However, the result of this trend was that online education acquired the taint of a low-end, for-profit brand, and many people came to associate online education with diploma mills or fake universities.

The aftermath of the Great Recession of 2008 was a wake-up call for not-for-profit universities. Although initially many of those who were out of work sought graduate degrees, as the slow-down persisted, the popular press began focusing on higher education tuition prices and increasingly questioned whether the return on investment from education was worth the cost.¹² Over the following decade, student loan debt became a major topic in national political debates. On campus, graduate enrollments fell, and universities also began to focus on long-term demographic

⁹ See Ryan Craig, *A Brief History (and Future) of Online Degrees*, FORBES, June 23, 2015, <https://perma.cc/9NHG-25LL?type=image>.

¹⁰ See *id.*

¹¹ *Id.*

¹² One observer cataloged the factors leading to nationwide declining undergraduate enrollments at universities across the country: “the rising costs of a college education, the increasing skepticism that the return on investment of a college education is worth the cost, the relatively low rates of timely degree completion in both 4-year and 2-year colleges, the reluctance of many to travel far from home and to bear the cost of that travel, the reluctance to take on the burden of long-term debt, the perception of a relative lack of minority and low-income student social and academic support on campuses, and the feeling that there are too few people who share their culture, values, experiences, and interests.” Bob Hildreth, *U.S. Colleges Are Facing a Demographic and Existential Crisis*, HUFFINGTON POST, July 5, 2017, <https://perma.cc/ZQ48-Z8WT>.

shifts in the United States that are decreasing the number of eighteen- to twenty-two-year-old college students.¹³

These twin trends created a financial squeeze, and universities began to see online education as a source of increased tuition revenue, both for graduate and undergraduate programs. Flagship public universities, such as Arizona State and Penn State, sought to become national (and international) magnets for students, and even private universities long resistant to change began to see online education as a viable degree path, particularly for professional Master's students.

Meanwhile, the technology industry set its sights on the education sector as primed for "disruption" through the use of online modalities. New start-up ventures such as Coursera and edX partnered with elite universities to create MOOCs – Massive Open Online Courses – with superstar professors providing free education to potentially tens of thousands of students. The idea was that these MOOCs could bend the cost curve of higher education, providing a cheaper alternative by offering high-quality courses to the world at mass scale. This alternative education modality, Harvard Business School professor Clayton Christensen famously predicted, would put half of American universities out of business altogether.¹⁴

Inevitably, the hype about disruption turned out to be at least somewhat overstated. MOOCs still exist, but their leading purveyors have now moved into providing degree or certificate programs in collaboration with universities and are no longer offering them completely for free (though these certificates are sometimes significantly less expensive than full on-campus degrees).¹⁵ Thus, it does not appear that MOOCs are truly displacing the higher education model. However, their brief boom did succeed in making online education more attractive to higher-prestige universities that had been worried about online initiatives damaging their brands. With institutions such as Stanford, MIT, and Harvard embracing at least the idea of online education, the door was now open for other hesitant universities to explore online offerings in an effort to wrest students away from the for-profits. As a result, though the past decade began with a MOOC frenzy, the more lasting impact of their rise has been the massive growth in for-credit online graduate and undergraduate programs offered by both public and private not-for-profit universities: over a 20 percent increase in graduate programs and over a 15 percent increase in undergraduate programs.¹⁶

Although these programs are often launched with the hope of attracting new tuition revenue, it is important to recognize that creating them requires a major

¹³ See *id.*: "The nationwide number of high school graduates is declining and will continue to decline in both public and private schools through the 2029–2030 school year."

¹⁴ Abigail Hess, *Harvard Business School Professor: Half of American Colleges Will Be Bankrupt in 10 to 15 Years*, CNBC, Aug. 30, 2018, <https://perma.cc/T7F3-T93P>.

¹⁵ Dhawal Shah, *Massive Open Online Courses Used to Be 100% Free. But They Didn't Stay that Way*, FREE CODE CAMP, Apr. 25, 2017, <https://perma.cc/6227-8U5W>.

¹⁶ EAB Global, *supra* note 1, at 12.

upfront expenditure of resources, resources that universities often cannot provide prior to realizing any incoming tuition revenue from such programs. Accordingly, many universities launching online programs have partnered with for-profit online program management companies, or OPMs, which stay in the background but offer the student recruitment, instructional design, and technical and student services necessary to successfully operate an online program. In return, these OPMs either collect a set fee from the university or share a percentage of online tuition revenue. And while the use of OPMs has drawn criticism,¹⁷ it is difficult to see how universities can effectively invest the resources necessary to launch high-quality online programs without substantial upfront funding from somewhere. Nevertheless, these for-profit partnerships threaten to tarnish the overall branding of universities as not-for-profit institutions providing public goods, as opposed to neoliberal institutions scooping up as much tuition revenue as they can.

In addition to the cost of running online programs, universities also face increased competition in the online degree market. In theory at least, a student can take an online course from any university anywhere in the world (though, as discussed below, most students take online courses from universities located near them). So, how do universities differentiate themselves in this new space? This question leads to many others that implicate core issues of university branding. Is a university's brand helped or hindered by the creation of online programs? Can universities create a distinctive online brand that is separate from their pre-existing reputation? Does the partnership with a for-profit OPM affect the university brand? Does the rise of online education cause students (and employers) to de-emphasize the social role of the on-campus university experience, and can online programs recreate that social experience? Should online and on-campus versions of a degree both yield the same credential? If a *non*-university creates an online course, is that credential as valuable as a university credential, and does the answer depend on the university's brand reputation? If one university creates a best-in-class online degree program, why should other universities create their own, instead of licensing the best in class? But if they do that, then is the distinctive brand of each university diluted? And perhaps most important, over the long-term, how will even on-campus education ultimately be transformed by the rise of online educational possibilities, as students increasingly expect faculty to use class time for more than just lectures that could have been prerecorded, and most courses therefore become hybrid? Especially in light of the coronavirus pandemic of 2020, more and more universities will see online education as a significant complementary modality to their on-campus instruction. Ultimately, those universities that can forge the best combination of

¹⁷ See, e.g., Kevin Carey, *The Creeping Capitalist Takeover of Higher Education*, HUFFINGTON POST, Apr. 1, 2019, <https://perma.cc/XZ9E-684V>. But see Doug Lederman, *What Kevin Carey Got Right (and Wrong)*, INSIDE HIGHER ED, Apr. 10, 2019, <https://perma.cc/MQ77-JT4D> (collecting responses).

on-campus and online programming for *all* students – resident and non-resident alike – will be the universities that thrive. The following sections explore these various issues of online education and academic brands.

II. ONLINE EDUCATION AND THE UNIVERSITY AS A BRAND

A. Branding Online Education as Quality Education

Online education creates something of a branding conundrum for universities. Universities seeking to protect their brands are sometimes worried about online education because they fear that the actual quality of the educational experience will be lower, or because they fear others will *perceive* their institutions to be second-rate as a result of embracing online education. To some degree, these concerns reflect the taint that online education acquired from its past association with rapacious for-profit educational companies. On the other hand, if online programs generate new revenue – bringing in students who might not otherwise have enrolled at that university – the increased tuition revenue could be used to expand student financial aid and fund new faculty lines or research facilities or anything else a university might spend money on to improve quality and strengthen its reputation.

Universities therefore must work to ensure that their online programs are offered at the highest quality possible and that they are not perceived as “lesser” or “dumbed-down” versions of the equivalent on-campus degrees. This effort requires, first of all, that the online degree be in fact the same as its on-campus counterpart. There cannot be an asterisk or any other indication that it is somehow less than a full degree from that university. Second, the online degree must have the same number of credits and be equally rigorous. Third, it must have equivalent admissions requirements. If a school lowers its admissions standards for online programs in order to generate more tuition revenue, this could dilute the brand. Yet, while the admissions standards must be *equivalent*, they need not always be precisely the *same*. For example, because online graduate programs usually attract more mid-career professionals, a department might waive the GRE exam requirement in favor of some minimum number of years of relevant work experience. The important point is that the graduates of the online program cannot be seen as being substantially inferior to the students graduating from the equivalent on-campus program. Indeed, ideally if degrees were not designated as online or on-campus, employers would not know or care what modality the student used.

Of course, some might balk at the notion that the online academic experience could *ever* be equivalent to the on-campus experience. But there is nothing about the online modality per se that necessarily equates to lower-quality education. To the contrary, online education provides opportunities for student activities, interaction, and engagement that can sometimes even surpass on-campus learning. As with all teaching, it can be done poorly, or it can be done well.

Part of the problem is that when faculty members and others imagine online education, they often envision a grainy C-Span video with a single, stationary long shot from the back of a room and people simply talking for an hour. Or they imagine that online education must be like a MOOC, with one professor lecturing to 10,000 people online. And they rightly reject both of these as educationally lacking.

But online education can be much more than this.

First, both the technology and the instructional design thinking that power online education are now far more sophisticated than they once were. High-end video production can create engaging, short, and memorable presentations as well as other asynchronous materials that students can consume on their own time and that go far beyond just a video lecture. For example, a course on not-for-profit management can show footage of an actual Board of Directors meeting, an archeology course can take students to a field research site using virtual reality, a law course can provide excerpts from courtroom or appellate proceedings, and so on. Professors can also collaborate with other faculty members across the globe, provide students with video interviews and debates involving experts who might never find the time to come to an on-campus class, and show vivid video-based examples of classroom ideas in action. The days of C-Span videos are long gone.

Second, online education need not be offered at large scale, with massive student–faculty ratios. For example, a small group of students could take an intensive writing tutorial online, and there might only be a 5 to 1 student–faculty ratio. A US student taking a weekly one-on-one musical instrument lesson with a world-renowned musician located in India via Zoom is online education, and it certainly has lots of personalized attention and interactivity. There is no reason that the branding of online education need be synonymous with large scale. Instead, the online brand can imply more personalized instructional opportunities.

Third, online education can be branded as truly interactive education: it need not all be asynchronous. As bandwidth problems have decreased, it has become easier and easier for universities to provide synchronous discussion sessions, where all participants log in at the same time, everyone can see everyone else, and a real-time seminar discussion is easy to facilitate.¹⁸ Indeed, even many large online courses now divide the students in the class into smaller weekly discussion sections, with the student–faculty ratio capped at no more than 20 to 1. In addition, online programs can have on-campus elements, such as intensive weekends when all students gather for special programming. Some universities even use intensives to gather students for in-person programming at selected spots around the globe. These intensives allow for student bonding, more intense connections with faculty, and

¹⁸ Of course, bandwidth problems have not been eliminated, and the persistent digital divide in the United States means that students with fewer financial means may have difficulty obtaining both a working computer and a stable Wi-Fi connection, and universities will therefore need to address such concerns as a matter of equity.

customized educational experiences. As a result, calling online education “distance education” is in some ways simply a failure of branding. Universities would be well advised to emphasize close collaborative work, high interactivity, and low student–faculty ratios online, rather than physical distance and psychic remove.

Online programs also provide opportunities to create experiences tailored to individual students or discrete student groups. For example, imagine a statistics course in a Master’s of Business Administration program. Typically, such a course would include some strong math students as well as some who have not taken undergraduate math at all. Likewise, there might be a group of students particularly interested in going into the health care industry, while others want to be entrepreneurs, and still others plan on going into government, and so on. A professor teaching such a class on campus would pitch the class in a neutral way to try to accommodate all backgrounds, with the result that the course would never fully speak to anyone. In contrast, if the course were taught online, the professor could easily feed more challenging material to some and more remedial material to others. The students interested in health care could receive problems tailored to the health care sector, while the entrepreneurs could receive their own specific applications of statistical concepts. The synchronous online discussion sections could also be divided by interest or background to facilitate in-depth discussion of statistics in particular fields. And while all this could of course be done on campus as well, it is actually easier to accomplish online because professors can more easily feed different assignments or materials to different students. In addition, as adaptive learning algorithms progress in sophistication, students working through materials can automatically receive customized responses and follow-up assignments based on their prior answers. This personalization is difficult to do in an on-campus class, even if it has a fairly low student–faculty ratio, because online adaptive learning literally provides different content or exercises to every single student in real time, based on their responses. An on-campus classroom rarely offers such opportunities.

Even when lectures are delivered in a non-interactive, asynchronous format, the online modality can make them better than on-campus lectures. For example, each student can view an asynchronous lecture at a time when that student is most alert and prepared to listen, not when they are tired or multitasking. Students can rewind the material and listen to the content again; those for whom English is a second language can slow down the speed of the lecture or pause it to look up words, and so on.

Finally, although students lose the socialization of the on-campus experience, online Facebook groups, Slack and Discord servers, and homegrown social media platforms make interaction among students surprisingly robust, and the on-campus intensives add to those connections. Especially for professional Master’s programs, students capitalize on the fact that they and most of their colleagues are older and already working and can therefore use the program to build worldwide professional networks that continue long after graduation. Thus, while many may feel nostalgic

for their on-campus experience, meaningful social networks can in fact be formed online. This is particularly true for the new generations of students who have grown up interacting with friends through electronic media.

In short, while online education is clearly different from on-campus education, it need not be inferior. Indeed, though there are ways in which the on-campus experience is distinctive, there are also both pedagogical and social advantages to its online counterpart that we should not ignore. And, of course, when considering the quality and value of an online degree program, we must always ask ourselves: “As compared to what?” For example, if we are comparing an online class to a fifteen-person seminar taught on campus by a master teacher and discussion leader, the online class may not be able to compete (although that same fifteen-person synchronous session with that same master teacher could probably also occur online). But significantly, most students at most universities don’t take many fifteen-person seminars from master discussion leaders. Instead, they sit in large lecture halls with medium-level lecturers teaching at a time of day when the students’ biorhythms make them less alert and when many of them are multitasking. They are either bored or confused, they can’t ask questions or engage in discussion, they can’t ask for clarifications or rewind or look up materials that would help them understand, and so on. So, if that’s the comparison, it is not at all clear that an online modality provides an educational experience that a university needs to apologize for or that should hurt its brand. To the contrary, most professors, even those reluctant at first, find that teaching online forces them to be more thoughtful and intentional about what they are teaching and what their learning outcomes and methodologies are, and they emerge as better teachers, both online and on campus.

B. Prestige, Branding, and the Price of Online Programs

As mentioned previously, one of the reasons online education was supposedly going to disrupt traditional on-campus universities was that it would radically decrease tuition costs. But that has not turned out to be the case, and it is instructive to see why. First, quality online education actually requires significant expenditures. As discussed above, the asynchronous materials need to be well produced and edited, requiring sophisticated video production, virtual reality, and an instructional design team to work with faculty helping them transform an on-campus course into an online course that will be pedagogically excellent and – perhaps just as important – *seem* pedagogically excellent to prospective and current students or university accrediting bodies or funders. Second, in order to maintain a high degree of interactivity and a low student–faculty ratio, there must be many synchronous sessions, which requires a large number of permanent or adjunct faculty, as well as technical support to make sure it all runs smoothly. Third, the online student needs dedicated student support because university administrative logistics, tutorial help, disability services, technical support, course guidance, career counseling, and so on must all be offered online and

outside of normal business hours to accommodate the online student body. And finally, student recruitment in the competitive online environment requires sophisticated use of search engine optimization to try to ensure that one's program appears in the top five results of a Google search. Likewise, it is costly to ensure that if a student is interested in a program and makes an inquiry, that prospective student receives a call within hours if not minutes. Because most university admissions offices are not staffed to handle such inquiries, particularly outside of usual business hours, those tasks must be contracted to private companies. For all of these reasons, launching an online program requires a significant investment of capital up front, and so universities are hesitant to reduce the tuition price, particularly if part of the reason for launching the online program was to generate new revenue.

In addition to the purely economic reason for keeping tuition high, there is a branding justification as well. Universities are often hesitant to price their online programs lower than their on-campus equivalents because it might signal to students (and employers) that online programs are somehow cheaper or lesser than on-campus ones. Instead, universities hope to signal that the online degree is just as rigorous, just as pedagogically sophisticated, and just as selective, and therefore often insist on pricing it equivalently.

For all these reasons, online education has failed to bend the cost curve of university higher education. Of course, in theory a university that significantly increased overall tuition revenue through online programming would be in a position to decrease tuition across the board, for both the online and on-campus versions of the degree. But it is also possible that university administrators would be tempted to use that additional revenue either to cover shortfalls elsewhere in the budget or to pay for programmatic or faculty priorities or new initiatives. Thus, it is unclear whether there will ever be a large-scale correlation between online programs and decreased tuition, and at least part of the reason online tuition cost remains high stems from concern about maintaining the university's brand.

C. The Difficulty of Creating a Worldwide Online Education Brand

One of the great problems of the global higher educational system is that although there are approximately 25,000 universities in the world – with many of them providing an outstanding education to students – the reality is that they serve only a very small percentage of the global population. In theory at least, online education could help address that problem, and one can only imagine how transformative it would be if more people all over the world had access to a high-quality education.

Less idealistically, university administrators see the global population as an untapped revenue source, as well as a way of expanding a university's scope, scale, and influence. A university could try to develop a global brand as a purveyor of distinctive high-quality online education and build that brand among populations that do not, or cannot afford to, attend programs at the university's campus.

However, these dreams of global online education run into several difficult realities. To begin with, there are strong headwinds against online education in much of the world. Foreign corporations may only pay employees to obtain an on-campus degree, foreign governments may only sponsor on-campus students, foreign employers may have biases against online education, and so on. And many prospective students from foreign countries who seek a US degree also want (or their sponsors want them to have) the acculturation that comes from physically spending time on a US campus.

Of course, even if some foreign students demand the on-campus experience, there are undoubtedly others who seek the educational credential but do not need or cannot afford to come to the United States, leaving their jobs or families in the process. For them, online education with a US educational institution might be attractive, but these students then face a second problem: the price of tuition. For many foreign students the cost of US tuition is high, and so the question is whether online degree programs can be offered at a substantial discount. However, for the economic and reputational reasons discussed above, it is not clear that universities can afford to reduce tuition. Thus, the dream of a global brand has so far not been realized. Indeed, fewer than 3 percent of online students in the United States are from abroad, and even online ventures with explicitly global aspirations, such as Penn State World Campus, Touro University Worldwide, University of Arkansas Global Campus, Northern Michigan University Global Campus, and Kansas State University Global Campus, all struggle to draw even 5 percent of their student body from outside the United States.¹⁹

D. Academic Brands Are Local

Perhaps even more surprising than the difficulty universities have had attracting international online students is the fact that most of any given university's online student body actually lives in the immediate geographic vicinity of its physical campus. Indeed, it turns out that university brands are more local and regional than we often realize. This is true even for traditional on-campus admissions at supposedly elite or national universities. For example, although Yale receives applications from all over the country – indeed the world – the students most likely to accept offers of admission and actually matriculate are those who live in the eastern US.²⁰ And paradoxically, that same localized branding extends to online education. Although in theory students could attend an online program at a university based anywhere in the country (or the world), the reality is that students tend to gravitate toward university brands with which they are familiar. Recent data show that

¹⁹ See EAB Global, *supra* note 1, at 31.

²⁰ See Yale Office of Institutional Research Statistics, 1980–81 to 2018–19, <https://perma.cc/M72G-JXBF>.

66 percent of online students live within 50 miles of their institution, and another 12 percent within 100 miles.²¹ In addition, the proportion of students taking exclusively online courses who are located in the same state as the institution at which they are enrolled has increased over time, from 50.3 percent in 2012 to 56.1 percent in 2016.²²

Perhaps this should not be wholly surprising. Universities have often spent decades or even centuries building local knowledge and loyalty through sports teams, apparel, alumni networks, faculty appearances on local news, and so on. All of this contributes to a university having a much stronger brand locally, and that branding seems to carry over to online education. Thus, even though a student searching for an online degree program could choose one offered by a university located across the country, the local school is likely to seem more familiar, more legitimate, and more advantageous from a career networking point of view. Therefore, it may well be more attractive than the one that is distant. In addition, student data suggests that 75 percent of online students travel to campus at least once a year, and 56 percent travel to campus between one and five times a year.²³ More often than not these students come to campus to meet with an instructor, make a payment, meet with a study group, or make use of the library.²⁴ Thus, enrolling locally clearly has advantages for students. The bottom line is that online education does not wholly displace physical geography.

E. *The Promise and Peril of For-Profit Partnerships*

As discussed previously, because of the costs associated with launching online education programs, many universities have sought partnerships with for-profit online program management companies, or OPMs. Building the infrastructure to support both the necessary level of programmatic quality and an effective student recruitment operation requires a significant investment of resources, all without a guarantee in advance that any students will even show up. Not surprisingly, universities have been reluctant to do that. Commercial partners provide expertise, staffing, and financial resources that can help a university launch programs at the requisite quality level.

Many contracts with OPMs are structured as a revenue-sharing partnership. Under this model, the university does not need to invest much money up front to build or market the programs or create the infrastructure for student recruitment or technical or student support. Instead, nearly all upfront, out-of-pocket expenses are borne by the commercial partner. The only costs the university incurs are those

²¹ See EAB Global, *supra* note 1, at 32.

²² See *id.*

²³ See Andrew J. Magda & Carol B. Aslanian, *Online College Students* 2018, at 50, <https://perma.cc/LB77-9S9P>.

²⁴ See *id.*

associated with internal administrative staffing and faculty costs. Accordingly, any downside risk that the program will be unsuccessful is almost entirely incurred by the OPM.

The commercial partner, however, in return for its large upfront investment and willingness to shoulder all the risk, demands a long-term revenue-share arrangement; these contracts generally last from seven to ten years, and OPMs can demand up to 70 percent of revenue. These types of contracts sometimes generate concern because, particularly in the second half of the contract period when the online programs have potentially scaled sufficiently to be profitable, the university could be paying millions of dollars a year to an outside partner. Such an arrangement may prompt a visceral sense that the university is overpaying for functions that it could more cost-effectively fund itself from the gross revenue of the programs. This is certainly true, but of course it does not consider the fact that the partner had to front all the money and take all the *ex ante* risk, saving the university from having to make a substantial investment before any revenue was ever realized.

A second concern with regard to these revenue-share arrangements is that the commercial partner has a financial incentive to scale the programs as large as possible in order to maximize revenue. However, under most revenue-share agreements the university retains complete control over all of the actual admissions decisions. Therefore, the university ultimately determines the scale and sets any admissions criteria, not the partner. On the other hand, if the university consistently thwarts the partner's efforts to scale the programs without sufficient justification, the university may jeopardize the viability of the partnership.

This leads to a third concern, which is that if the university is sharing half or more of its revenue from online programs with a partner, the *university* might feel financial pressure to scale the programs larger than is appropriate, solely because it needs to derive sufficient revenue. Such pressure could lead to unduly loosening admissions criteria or developing online programs so big that they strain the faculty or university infrastructure. In any event, the OPM partnership makes it less likely that universities will reduce tuition prices for online instruction. Therefore, some contend that partnerships with online OPMs effectively drive up the cost of online education.²⁵

On the other hand, in the revenue-share model at least the interests of the university and the commercial partner are aligned in that the partner has a strong incentive to build a successful program in order to recoup its upfront investment. And even aside from the creation of the online program, the student recruitment effort for these programs requires both expenditures and marketing sophistication that are far in excess of typical university capacity. In addition, universities usually find that the increased marketing muscle associated with online recruitment has spillover effects into all areas of university recruitment, thus benefiting the school's

²⁵ See, e.g., Carey, *supra* note 17.

overall brand awareness. As a result, it may be that launching online with an OPM ultimately benefits a university's brand, so long as the university does not suffer reputational harms from the mere fact of the commercial partnership itself.

Finally, as mentioned previously, some might think it is inherently antithetical to the whole idea of a not-for-profit institution of higher learning for the university to undertake a large educational initiative in collaboration with a for-profit commercial partner that is taking half or more of the tuition revenue. Interestingly, this idea derives from a particular sense of the university as somehow immune from the logics of the neoliberal market, and ironically, that sense of the pure university operating separate from the market is actually a core component of its historic brand identity. Thus, even if there are very good reasons to form commercial partnerships with OPMs, universities may find that doing so harms their branding as an institution that supposedly operates at a remove from market capitalism.

F. *Academic Credentialing and the Power of Brands*

To the extent that universities resist launching online education programs, other entities might fill the niche, just as the University of Phoenix once did, and offer credentials at a much lower price. For example, online coding boot camps promise to teach students the basics of programming or cybersecurity and at least in theory provide a credential that employers will value. Likewise, online companies such as Khan Academy have built a strong academic brand for free educational videos, though these videos have little if any interactivity and do not purport to provide a credential in the marketplace.

These sorts of initiatives raise fundamental questions about the power of university academic brands as a kind of quality control gatekeeper and the academic degree as a signaling mechanism to employers in the market. To the extent that the knowledge and skills gained in at least some educational programs are fungible, does it matter whether or not one goes to a high-prestige university? For example, the Bachelor of Science in Nursing (BSN) degree is treated by many employers simply as a credential one either has or does not. These employers do not care where the BSN is awarded. As a result, many students will simply choose the least expensive online BSN degree program they can find, and there is little competition on quality. Thus, if a non-university such as Khan Academy ultimately offered a BSN degree program, perhaps it would be sufficiently valued on the job market that it could be successful.

Nevertheless, for many other degrees, the prestige and academic brand of the credentialing institution still matters. The reputation of the school, its ranking, and its history all are important indicia of quality, and it therefore benefits schools to signal the quality of their online programs through many of the program features described above: on-campus intensives, state-of-the-art technology, white-glove customer service, low student-faculty ratios, and so on.

In the end, however, the actual quality of the online program may not play *any* significant role in the brand value of the program. This is because it may be that a university's reputation in online education programs is entirely derivative of its pre-existing reputation for on-campus education. Thus, a degree through an online program offered by a top-twenty-five university could be inherently more valuable than one offered by a lower-ranked institution, even if the lower-ranked school's online program is better from the point of view of its instructional design or technological sophistication. If that turns out to be true, it would suggest that academic brands are "sticky" and persist even in this new modality. In contrast, it is conceivable that a university that is considered lower tier in traditional on-campus education might invest sufficient resources in online education, through branding, recruitment, and programmatic quality, that it would develop a distinct reputation for online education that is stronger than its more general reputation. Time will tell whether any university is successful in building a distinct online brand in this way. But in any event, the credentialing and signaling power of a university brand remains, and it is not at all clear that pop-up online educational credential purveyors will truly be able to compete effectively at scale.

H. A Hybrid Online/On-Campus Future

There is no reason that an educational program or even a particular course needs to be conducted either entirely online or entirely on campus. To the contrary, many on-campus students would prefer to take some courses online, or they would prefer that some materials within a particular course be presented online rather than in a classroom. Imagine a student conducting field research abroad who still wants to take classes back at their home institution and graduate on time; that student will want to take some courses online. Or imagine the on-campus student involved in an externship who would prefer not to have to leave work at 3 p.m. two or three times per week to attend a course lecture in person; or the commuting student who would simply prefer not to have to come to campus every day. Each of these students might want some online elements within their on-campus curriculum.

For professors, creating a hybrid course presents many pedagogical advantages as well. After all, some didactic material is best presented in a prerecorded asynchronous format. As a result, rather than wasting valuable class time on such material, it can be provided to the students asynchronously, and class time can then be used for exploring applications of those core concepts through project-based learning or group discussion. In short, a hybrid format might actually improve the classroom experience for everyone by reserving class time for only those types of educational experiences that are best accomplished through in-class group interaction.

Thus, it is highly likely that students will increasingly demand hybrid approaches to education and that the distinction between online and on campus will blur over

the coming years, as on-campus courses and programs increasingly incorporate online elements. Particularly because universities were forced to become more familiar with online modalities as a result of the coronavirus pandemic of 2020, there may now be an increased willingness on the part of both students and faculty to embrace a hybrid approach. Indeed, most students and faculty have realized that there are aspects of online education that are actually better than their on-campus equivalents, and they are likely to prefer to continue with those elements in the future, even in their on-campus education.

This sort of new hybrid reality may raise one final branding issue. Over time, applicants to a university may well begin to demand a school that offers hybrid online/on-campus education, not only because they want the flexibility, but also because it will signal to them that this is a forward-looking university that cares about its students. After all, applicants to a university five or ten years ago might well have looked to ubiquitous Wi-Fi on campus as a selling point, not only because they wanted wireless access, but also because it signaled that the university was technologically savvy enough and cared about its students enough to have invested in it. Thus, the existence of Wi-Fi was incorporated into applicants' brand perception of the university as a whole. In the 2020s, students may well begin to judge a campus experience in part based on their ability to take at least some courses (or some components of courses) online. As a result, a university stuck in an exclusively on-campus modality may actually suffer from the lack of online options and may be branded as an institution unable or unwilling to innovate.

CONCLUSION

Online education is here to stay. Indeed, in the wake of the coronavirus pandemic of 2020 more universities may find that online education is a pedagogically sound and attractive option for students, especially if universal broadband access becomes a reality and eliminates the economic digital divide that currently exists. New online programs are likely to be launched or expanded, and even universities that do not offer fully online programs are likely to increase hybrid online/on-campus programs or courses in order to accommodate student preferences and organizational imperatives. Thus, online education, though once considered a fringe activity relegated to specific programs serving niche audiences, will become increasingly integrated into the normal activities of universities. And this will be true, I suspect, for universities at all levels of prestige.

On the other hand, online education seems unlikely to completely upend the higher education model altogether. It is unlikely to put large numbers of universities out of business. It is unlikely to significantly alter tuition prices, at least in the near term. It is unlikely to create global mega-universities. And it is unlikely to move large segments of the educational system outside of universities altogether. Thus, though there will be innovations and adjustments, there are unlikely to be large-scale disruptions.

Ultimately, the reason that the university model is sticky and unlikely to be completely changed by online education is precisely the power of academic brands. It turns out that students want to go to known universities and that employers rely on known universities as credentialing and signaling institutions. Universities have been building up local knowledge of their brands and local connections through their alumni and faculty networks for many decades or even longer, and such brand recognition is difficult to dislodge.

For this reason, universities are rightly protective of their brands. And because of their desire to protect those brands, universities have been slow to adopt online education for fear that it will be perceived as less rigorous, thereby diluting the perceived quality of what their brand symbolizes. Yet, as online educational pedagogy and the technology that enables it keep increasing in quality, more and more universities are making forays into this once disparaged form of education, either on their own or with commercial partners. As this transformation occurs, the danger for branding might indeed reverse. Over time, a university that does *not* offer online or hybrid options may suffer damage to its brand, either because it does not have sufficient tuition revenue to invest in new initiatives, or because it has no way to serve student needs, or even because students will come to perceive a university with no online options as insufficiently innovative. In addition, it is possible that universities might be able to develop a distinctive brand identity by offering particularly high (or low) quality online education. As a result, building pedagogically strong online education opportunities is likely to become an increasingly important educational and reputational priority for universities seeking to survive and thrive as viable brands in the twenty-first century.

University Brands as Geographical Indications

Jeremy N. Sheff

I. INTRODUCTION

When lawyers and managers come together to discuss brands, very often discussion can slip between two distinguishable meanings of the term. The first meaning – the one managers typically use – is a marketing concept. In this view a brand is some set of meanings, beliefs, and associations formed around a particular symbol or set of symbols associated with a company, an institution, or a person. This is the sense in which university administrators and consultants typically use the word; it is also the primary sense of the word as used in Mario Biagioli's chapter and those by Celia Lury and Deven Desai. The second meaning of the term “brand” – the one lawyers typically use – is, unsurprisingly, a legal concept. In this sense, a brand is a legally protectable sign that serves as a symbol and repository of the meanings and associations implied by the marketing concept of a “brand,” typically enforced through intellectual property law (and more specifically, trademark and unfair competition law). This is the sense in which Jamie Boyle and Jennifer Jenkins seem to use the term.¹ In point of fact, a lot of slippage exists between these two senses of the term, and many have noted this ambiguity in the past.²

¹ James Boyle & Jennifer Jenkins, *Mark of the Devil: The University as Brand Bully*, 31 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 391 (2021).

² Deven Desai has paid particular attention to the relationship between these competing senses of the term “brand.” See generally Deven R. Desai, *From Trademarks to Brands*, 64 *FLA. L. REV.* 981 (2012); Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 *BYU L. REV.* 1425 (2010). The expansion of the legally protectable trademark to capture marketers' conception of brands, and the ambiguity between the legal and marketing concepts, have long been observed by courts and commentators. See, e.g., *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U.S. 203, 205 (1942): “The protection of trade-marks is the law's recognition of the psychological function of symbols . . . A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol”; Felix

In this chapter, I will focus on the second meaning, that is to say, on the intellectual property right in the sign itself, and particularly on the *justifications* for conferring such a right and delimiting its boundaries. Careful consideration of the legal context of university brand enforcement reveals that we have been mis-categorizing academic brands in the legal framework of intellectual property. I will argue that academic brands ought to be thought of less as trademarks – the species of intellectual property rights under whose rubric they are typically enforced – and more as geographical indications (GIs). As I hope to show, understanding university brands in this way both makes better sense of the legal doctrine around university trademark enforcement and also has implications for how we view university licensing and enforcement programs as a matter of normative justification.

II. TRADEMARKS AND THE UNIVERSITY

The other contributions to this volume demonstrate some of the difficulties that attend upon evaluating university brands through a trademark lens – at least under the American theory and doctrine of trademarks. The dominant theoretical account of trademarks in American law today is grounded in an economic model of markets in which buyers and sellers have asymmetric information.³ Sellers, it is said, stake their reputations and their going-concern values on the association of their products with particular marketing messages tied to a brand, which gives consumers a mechanism to punish dishonest sellers (the withholding of future business) and reward honest or high-quality ones with their repeat business. This association supposedly gives sellers an incentive to produce goods of high and consistent quality and to disseminate honest marketing messages. Conversely, if this incentive bears out, consumers will be able to shift the cost of discovering information about their purchase options – their “search costs” – to sellers (who are uniquely in possession of such information and thus face far lower information costs than prospective buyers), thereby facilitating welfare-increasing transactions by lowering the aggregate costs of entering into them.

Of course, such a shift of search costs depends on sellers being able to control who may use the symbol – the trademark – that serves as the vehicle for the information transfer and the mechanism for consumer discipline.⁴ Thus, the standard of liability for trademark infringement gives producers the right to enjoin conduct that

S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 814–17 (1935); Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L.J.* 1165, 1180–91 (1948); Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 *UCLA L. REV.* 621, 648–51 (2003).

³ George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 *Q. J. ECON.* 488 (1970).

⁴ William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 *J. L. & ECON.* 265 (1987); Nicholas Economides, *The Economics of Trademarks*, 78 *TRADEMARK REP.* 523 (1988).

jeopardizes the reliability of a mark as an indicator of information and a mechanism of consumer discipline. Defendants will be liable for infringement where their conduct is “likely to cause confusion, or to cause mistake, or to deceive” “as to the affiliation, connection, or association” between the defendant and the mark owner, “or as to the origin, sponsorship, or approval of [the defendant’s] goods, services, or commercial activities by another person.”⁵

This economic account has been subject to harsh and sustained criticism since it crystallized in the writings of Chicago School scholars in the 1980s. Some scholars point out that information transfer is only a small part of what branding does – that it also gives sellers opportunities to engage in spurious differentiation, exercise problematic persuasive influence, and leverage potential cognitive biases of consumers.⁶ Others point out that not all consumer efforts to identify their preferred purchase options need be considered “costs” in a negative sense.⁷ Still, this economic theory has gained authoritative approval, both from the leading trademark law treatise and from the US Supreme Court.⁸ But regardless of whether the Chicago School theory of trademarks is descriptively or normatively adequate to mainstream trademark doctrine, it clearly has very little (if anything) to do with the role of academic brands today.

As Professors Boyle and Jenkins illustrate, when universities try to enforce their trademark rights, they do so primarily in areas far removed from any aspect of their reputation as institutions of higher education or research.⁹ While occasionally a dispute may arise in which one university claims another university is using a trademark that might lead consumers to confuse the two institutions themselves,¹⁰

⁵ Lanham Act §§ 32(1)(a), 43(a)(1)(A), codified at 15 U.S.C. §§ 1114(1)(a), 1125(a)(1)(A). While Section 32 of the Lanham Act ostensibly deals with infringement of *registered* trademarks and Section 43(a) ostensibly deals with infringement of *unregistered* trademarks, the scope of infringement under both sections has – rightly or wrongly – long been held to be coextensive. See, e.g., *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 780 (1992) (Thomas, J., concurring); Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 *HARV. L. REV.* 867, 879–80 & n.54 (2017) (collecting cases).

⁶ See, e.g., Barton Beebe, *Search and Persuasion in Trademark Law*, 103 *MICH. L. REV.* 2020, 2066 (2005): “The tradeoff between information and persuasion described above goes far towards explaining one dynamic that has driven the expansion of trademark scope since the beginning of the twentieth century. At the heart of this dynamic is the trademark producer’s willingness to assume the costs of search in order to gain the benefits of persuasion”; Jeremy N. Sheff, *Biasing Brands*, 32 *CARDOZO L. REV.* 1245, 1293 (2011): “branding *biases* consumers. It leads us to hold subjective beliefs as to objectively knowable facts that may diverge from objective data and yet be resistant to influence by exposure to such data, and it influences our preferences and choice behaviors accordingly.”

⁷ Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 *VA. L. REV.* 67 (2012).

⁸ J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* ch. 2 (5th ed. 2020); *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 163–64 (1995).

⁹ Boyle & Jenkins, *supra* note 1.

¹⁰ See, e.g., *Board of Regents of the University of Houston System v. Houston College of Law, Inc.*, 214 F.Supp.3d 573 (S.D. Tex. 2016).

for the most part university trademark disputes involve secondary and tertiary lines of business – branded apparel and gifts, often connected to athletics programs – or the use of a university name in expressive works. And as Mark Bartholomew points out in [Chapter 7](#) of this volume, universities’ trademark enforcement activities in these areas may actually be in deep tension with their academic missions.

Many of these types of enforcement actions involve what we’ve come to call “merchandising rights” – the right of a mark owner to control the use of their mark on promotional merchandise such as branded apparel and gifts, notwithstanding that the mark is primarily associated with other goods or services. These merchandising rights are of relatively recent vintage: prior to the late 1970s or early 1980s, apparel and merchandise bearing university names and logos were often produced and sold by independent businesses local to the university in question, and this practice was widely tolerated.¹¹ A similar commercial ecosystem arose around sports franchises and third-party-manufactured merchandise bearing their logos. But in a series of court victories starting in 1975, professional sports franchises in the United States began arrogating this trade in team-branded merchandise to themselves.¹² Over the ensuing years, universities followed suit, attempting (not always successfully) to put the manufacturers that supply university-branded merchandise under tribute, and steering the trade to their preferred vendors.¹³

In the earliest of these merchandising rights cases, courts held that where consumers demand university-branded or sports-franchise-branded apparel and merchandise in order to manifest their identification with the team or school, the team or school has an exclusive right to satisfy that demand, even if there is no plausible argument that such consumers are confused as to the affiliation of the merchandise manufacturer with the university or the team – and indeed even where it seems likely that consumers do not care about that commercial affiliation.

¹¹ *University of Pittsburgh v. Champion Products Inc.*, 686 F.2d 1040, 467–68 (3rd Cir. 1982), *rev’d in part*, 686 F.2d 1040 (3d Cir.); *University Book Store v. University of Wisconsin Board of Regents*, 33 U.S.P.Q.2d 1385, 1396 (Trademark Trial and Appeal Board 1994).

¹² *Boston Professional Hockey Ass’n, Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004 (5th Cir. 1975); *National Football League Properties, Inc. v. Consumer Enterprises, Inc.*, 327 N.E.2d 242 (Ill. App. Ct. 1975).

¹³ *University Book Store*, 33 U.S.P.Q.2d 1385; *Board of Supervisors for Louisiana State University Agricultural and Mechanical College v. Smack Apparel Co.*, 550 F.3d 465 (5th Cir. 2008). The litigation between the well-known sportswear maker Champion and the University of Pittsburgh in the early 1980s generated district court opinion in Champion’s favor on laches grounds, which was reversed with respect to prospective remedies by the Third Circuit, which led the District Court to reject the merchandising right entirely, which led the parties to settle and prevail upon the Third Circuit to vacate the District Court’s opinion. *University of Pittsburgh v. Champion Products, Inc.*, 529 F. Supp. 464 (W.D. Pa. 1982), *rev’d in part*, 686 F.2d 1040; *University of Pittsburgh v. Champion Products, Inc.*, 566 F. Supp. 711 (W.D. Pa. 1983), *vacated pursuant to settlement as noted in University Book Store*, 33 U.S.P.Q.2d at 1394 & n.25.

The classic explanation was given by the Fifth Circuit in the early merchandising case, *Boston Hockey*:

The confusion or deceit requirement is met by the fact that the defendant duplicated the protected trademarks and sold them to the public knowing that the public would identify them as being the teams' trademarks. The certain knowledge of the buyer that the source and origin of the trademark symbols were in plaintiffs satisfies the requirement of the act. The argument that confusion must be as to the source of the manufacture of the emblem itself is unpersuasive, where the trademark, originated by the team, is the triggering mechanism for the sale of the emblem.¹⁴

As I and others have argued elsewhere, it is extraordinarily difficult to square this argument with the likelihood-of-confusion standard for trademark liability, or with the conventional “search costs” justification for that standard – indeed, it is difficult to square the argument with *any* theoretical justification for trademark law other than a fairly crude anti-misappropriation impulse.¹⁵ Indeed, in Europe courts freely admit to the anti-misappropriation impulse as a basis for trademark liability,¹⁶ and the leading EU merchandising case – *Arsenal Football Club plc v. Reed* – rests in no small part on the assertion that “the proprietor [of a trademark] must be protected against competitors wishing to take unfair advantage of the status and reputation of the trade mark by selling products illegally bearing it.”¹⁷ The question-begging circularity of the word “illegally” in this passage gives the game away.

But because anti-misappropriation theory is not explicitly countenanced by American trademark law, with its historical antipathy to “rights in gross,”¹⁸ some American courts have sought means of indulging the anti-misappropriation impulse

¹⁴ *Boston Professional Hockey Ass'n*, 510 F.2d at 1012.

¹⁵ See generally Jeremy N. Sheff, *Misappropriation-Based Trademark Liability in Comparative Perspective*, in *CAMBRIDGE HANDBOOK OF INTERNATIONAL AND COMPARATIVE TRADEMARK LAW* 452 (Irene Calboli & Jane C. Ginsburg eds., 2020); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 *EMORY L.J.* 461 (2005).

¹⁶ *L'Oréal SA v. Bellure NV*, [2009] I-05185, ¶50: “the taking of unfair advantage of the distinctive character or the repute of a mark . . . does not require that there be a likelihood of confusion or a likelihood of detriment to the distinctive character or the repute of the mark or, more generally, to its proprietor. The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an advantage taken unfairly by that third party of the distinctive character or the repute of the mark where that party seeks by that use to ride on the coat-tails of the mark with a reputation in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image.”

¹⁷ *Arsenal Football Club plc v. Reed*, [2002] ECR I-10273, ¶50.

¹⁸ *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918): “The asserted doctrine is based upon the fundamental error of supposing that a trade-mark right is a right in gross or at large . . . There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. The law of trade-marks is but a part of the broader law of unfair competition; the right to a particular mark grows out of its use, not its mere adoption . . . it is not the subject of property except in connection with an existing business.”

sub rosa. The most successful means of doing so has followed the “rights accretion” feedback pattern identified by Jim Gibson: because trademark liability turns on consumer psychology, and because “consumer perception reflects an acquired familiarity with licensing practices,” the successful assertion of a merchandising right in some areas of commerce – even if grounded in a mistaken legal theory – can over time give rise to real, measurable confusion as to whether any new use of a trademark is in fact licensed, and thereby justify a finding of infringement that would not have been justified but for the assertion of the merchandising right in the first place.¹⁹ Today, courts upholding the merchandising right tend to justify trademark liability by reference to supposed consumer confusion as to whether unauthorized manufacturers of merchandise were “sponsored by” or “affiliated with” the university or sports franchise plaintiffs.

This reasoning leads to the same result as the reasoning of *Boston Hockey*, but aligns more closely with the Lanham Act’s text regarding confusion as to affiliation, sponsorship, or approval. The Fifth Circuit has explicitly endorsed this move. In the course of affirming a district court opinion denying relief in a merchandising case regarding fraternal organization emblems used in jewelry, the Fifth Circuit quoted with approval the district court’s assertion that “It is not unreasonable to conclude, given the degree to which sports emblems [as contrasted with fraternal order symbols] are used to advertise teams and endorse products, that a consumer seeing the emblem or name of a team on or associated with a good or service would assume some sort of sponsorship or association between the product’s seller and the team.”²⁰ And in *Board of Supervisors for Louisiana State University Agricultural and Mechanical College v. Smack Apparel Co.*, the Fifth Circuit invoked this argument to rest the merchandising right explicitly on confusion as to sponsorship:

We hold that given the . . . overwhelming similarity between the defendant’s t-shirts and the Universities’ licensed products, and the defendant’s admitted intent to create an association with the plaintiffs and to influence consumers in calling the plaintiffs to mind – that the inescapable conclusion is that many consumers would likely be confused and believe that Smack’s t-shirts were sponsored or endorsed by the Universities . . . We further recognize the public’s indisputable desire to associate with college sports teams by wearing team-related apparel. We are not persuaded that simply because some consumers might not care whether Smack’s shirts are officially licensed the likelihood of confusion is negated. Whether or not a consumer *cares* about official sponsorship is a different question from whether that consumer would likely *believe* the product is officially sponsored.²¹

¹⁹ James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882, 886, 920–23 (2007).

²⁰ Supreme Assembly, *Order of Rainbow for Girls v. J.H. Ray Jewelry Co.*, 676 F.2d 1079, 1085 (5th Cir. 1982).

²¹ *Board of Supervisors for Louisiana State University Agricultural and Mechanical College v. Smack Apparel Co.*, 550 F.3d 465, 485 (5th Cir. 2008).

Many commentators have criticized this species of sponsorship confusion liability as bad policy. Stacey Dogan and Mark Lemley have argued that such confusion, even if proved, should only give rise to liability where it is shown that consumers “are likely to believe that [the defendant] *makes or stands behind* the t-shirt, cap, or other merchandise at issue in the case,” or where they suffer confusion “that could affect the trademark holder’s reputation and *cannot be dispelled with a disclaimer*.”²² Mark Lemley and Mark McKenna have argued that sponsorship approval cases should be thought of through a false advertising lens – requiring trademark plaintiffs to establish that any alleged confusion as to sponsorship is material to consumer purchasing decisions.²³ These commentators seek to prevent rent-seeking or otherwise anti-competitive behavior by trademark owners that raises prices without providing corresponding consumer benefits, and which may also pose a threat to freedom of expression. But they are ultimately dismissive of the anti-misappropriation impulse that clearly guides these cases, and they do not closely examine *why* sponsorship might matter to some consumers and indeed motivate their purchasing decisions.²⁴

I may share the view of such critics on the normative desirability of anti-misappropriation rationales for *trademark* protection generally. But there is something at work in university merchandising programs that goes beyond simple misappropriation, and even these critics seem to recognize it as an issue. As Dogan and Lemley explain:

there may be merchandising cases in which the trademark serves as both source-identifier and as a critical feature of the product, so that it confers both reputation-related and nonreputation-related advantage to those who use it. In these cases, the ultimate competitive effect of allowing trademark rights may be difficult to gauge. On the one hand, reputational concerns may drive some purchasers to mistakenly assume an affiliation between the parties and thereby increase search costs; on the other hand, the absence of competition may force consumers to pay a premium for the good, even when many of them do not particularly care whether the product was officially licensed.²⁵

As this analysis suggests, markets for branded products used by consumers to signal affiliation with the source of the brand create what Michael Grynberg has referred to as “consumer conflict”:

While trademark litigation is literally a battle between competing sellers, it is also a struggle between consumer classes. The conflict arises because each class attaches a

²² Dogan & Lemley, *supra* note 15, at 500, 505 (emphasis added).

²³ See generally Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 *STAN. L. REV.* 413 (2009).

²⁴ Dogan & Lemley, *supra* note 15, at 479: “These [misappropriation-based] justifications are circular and ultimately empty”; Lemley & McKenna, *supra* note 23, at 438–39.

²⁵ Dogan & Lemley, *supra* note 15, at 504 (footnote omitted).

different value to the defendant's conduct. The "plaintiff" consumer class seeks to avoid confusion of its members by depriving the "defendant" consumer class of access to a particular product or service.²⁶

In disputes over merchandising, this conflict is particularly acute. As Dogan and Lemley point out, some consumers actually care whether merchandise is licensed, and others do not. Consumers who do not care about sponsorship or approval are simply seeking a means of signaling their affiliation, and are happy to do so at the lowest cost. Those who *do* care expect branded merchandise to be licensed and have reasons for wanting that expectation to be honored – and, if need be, enforced. But in the case of university merchandise, I think it is a mistake to call these reasons "reputation-related," as Dogan and Lemley do. A university supporter who wishes to signal their support by wearing licensed, branded apparel is unlikely to demand the university's sponsorship because they trust in the university's reputation regarding any *quality of apparel*. But such a person might still want to be assured that the apparel is licensed, because they want their purchase to *provide some material support to the university*, in the form of licensing revenues. Thus, if trademark enforcement – even under affiliation, sponsorship, or approval confusion theories – is about *reputation*, I think it provides scant justification for university merchandising programs.

But that is not to say that no such justification is possible, or even that intellectual property law is incapable of providing such justification. Even though the consumer class that aligns with universities in their licensing enforcement activities are not motivated by reputation-related concerns, they still diverge from consumers seeking the lowest-cost token of affiliation signaling in ways that reproduce precisely the consumer conflict described above. So long as we conceive of intellectual property rights in university-branded merchandise as trademark-based and thus reputation-based, we will lack the tools to describe and analyze this conflict. But I think we can find another and potentially less problematic justification for these types of university practices in a different branch of intellectual property law – the law of geographical indications.

III. GEOGRAPHICAL INDICATIONS AND THEIR EVOLUTION

The World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) defines a Geographical Indication (GI) as a sign that identifies "a good as originating in the territory of a [WTO] Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."²⁷

²⁶ Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 *NYU L. REV.* 60, 87 (2008).

²⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, as amended, January 23, 2017, 1869 UNTS 299, 33 ILM 1197 (1994), www.wto.org/english/docs_e/legal_e/31bis_trips_e.pdf, art. 22.1 [hereinafter TRIPS Agreement].

The paradigm example is denominations of origin for wine,²⁸ but other agricultural products such as Parma ham and Roquefort cheese have long been subject to GI protection. The classic theoretical defense of GIs is that they prevent fraud regarding certain objective characteristics of products – especially agricultural products – that are uniquely and causally connected to that combination of *physical* geographic, agronomic, and climatic features that are collectively referred to as “terroir.”

I have always been deeply skeptical of terroir arguments for GI protection, because I am dubious about the relationship between geographic origin and any objective quality or characteristic of a product. Perhaps the most famous example I could cite is the 1976 blind wine tasting dubbed the “Judgment of Paris,” in which a panel of illustrious French wine experts collectively gave top honors to upstart California vintners over their venerable French counterparts. The aspect of this episode that is most damning to the terroir theory of GIs is not that the California wines were deemed better, but that the blind tasters confused which wines came from which region – they couldn’t tell the difference.²⁹

But if examples such as the Judgment of Paris put the lie to terroir-based justifications for GI protection, more recent developments in the law of GIs offer an alternative. The Lisbon Agreement, and particularly the Geneva Act of the Lisbon Agreement, provides a new argument about what it means for the quality, reputation, or characteristics of a good to be “essentially attributable” to its geographical origin. Specifically, it contemplates that such a connection between goods and place may be attributable to a combination of *both natural and human factors*.³⁰ The European Commission, in a recent Green Paper, has put its authority behind this position, going so far as to say that for some GIs, human factors may be *entirely* responsible for the connection between the reputation of a good and its geographical origin.³¹ And increasingly, cultural products outside of agriculture (often labeled

²⁸ This historical source of the system of GI protection now has its own special body of protections and qualifications in addition to those applicable to other GIs. See TRIPS Agreement arts. 23, 24.4, 24.6.

²⁹ GEORGE M. TABER, JUDGMENT OF PARIS: CALIFORNIA VS. FRANCE AND THE HISTORIC 1976 PARIS TASTING 3 (2005).

³⁰ Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, October 31, 1958, as revised, July 14, 1967, 923 UNTS 205 [hereinafter Lisbon Agreement], <https://wipolex.wipo.int/en/text/285856>; World Intellectual Prop. Org. [WIPO], Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulations under the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, WIPO Lex No. TRT/LISBON/009 (May 20, 2015), [hereinafter Geneva Act], <https://wipolex.wipo.int/en/treaties/textdetails/15625>, art. 2(1)(i).

³¹ European Commission, *Green Paper: Making the Most Out of Europe’s Traditional Know-How: A Possible Extension of Geographical Indication Protection of the European Union to Non-Agricultural Products*, COM(2014) 469 final (July 15, 2014), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0469&from=EN> [<https://perma.cc/T425-9XSF>].

as forms of “intangible cultural heritage”) have been seeking and obtaining such protection in some jurisdictions.³²

This trend is consistent with the arguments of scholars like Delphine Marie-Vivien who have advocated for recognition of such human factors as craft, culture, and tradition as a sufficient basis for GI protection, particularly for goods such as textiles, pottery, and other non-agricultural traditional products.³³ Dev Gangjee generalizes this view of GIs into a historical theory of justification, where GIs exist to recognize the historical continuity of a particular productive community, defined by human factors that have persisted in a particular location as to a particular product.³⁴ This reasoning recognizes that a particular geographically defined community may find value in, and seek to protect and preserve, its shared history, shared culture, shared forms of life, and shared experience in particular modes of production, and may find a GI a useful means of doing so.

The availability of this historical, human-factors-based account of GI protection gives my inner GI-skeptic some pause. The historical account suggests that the reason for protecting GIs is not that they indicate some physical quality or characteristic of the products to which they are affixed, but that they indicate a cultural tradition of the people who make those products – a tradition that others might deem worthy of support and protection – and provide a means for that community to identify itself to others in commerce. By identifying the products of particular productive communities in the marketplace, GI protection gives people who wish to provide material support to those communities a tool to direct their resources with confidence that they will reach their targets.

This cultivation of geographically and historically defined productive communities shares clear affinities with the logic of the university: a geographically defined community convened and perpetuated over time for the purpose of producing and disseminating knowledge. Such a conception of the university is best expressed in Michael Oakeshott’s classic description:

What distinguishes a university is a special manner of engaging in the pursuit of learning. It is a corporate body of scholars, each devoted to a particular branch of learning: what is characteristic is the pursuit of learning as a co-operative enterprise. The members of this corporation are not spread about the world, meeting occasionally or not at all; they live in permanent proximity to one another. And

³² Steven Van Uytsel, *When Geographical Indications Meet Intangible Cultural Heritage: The New Japanese Act on Geographical Indications*, in *GEOGRAPHICAL INDICATIONS AT THE CROSSROADS OF TRADE, DEVELOPMENT, AND CULTURE* 508 (Irene Calboli & Wee Loon Ng-Loy eds., 2017).

³³ Delphine Marie-Vivien, *A Comparative Analysis of GIs for Handicrafts: The Link to Origin in Culture as Well as Nature?*, in *RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND GEOGRAPHICAL INDICATIONS* 292 (Dev S. Gangjee ed., 2016).

³⁴ See generally Dev S. Gangjee, *From Geography to History: Geographical Indications and the Reputational Link*, in *GEOGRAPHICAL INDICATIONS AT THE CROSSROADS OF TRADE, DEVELOPMENT, AND CULTURE* 36 (Irene Calboli & Wee Loon Ng-Loy eds., 2017).

consequently we should neglect part of the character of a university if we omitted to think of it as a *place*.³⁵

Of course, today's university branding identifies not just the community of scholars and learners, but also the athletics programs that coexist with them in uneasy symbiosis. Even so, just as with professional athletics franchises, such programs are inextricably tied to a particular historically continuous community convened in a particular place.

If we think of the university's right to control uses of its name and logo on merchandise (such as apparel) as serving this interest of a geographically defined productive community in preserving and advancing its particular way of life, I think we run into far fewer analytical problems than when we try to justify that right by reference to protecting the university's reputation. As an illustration, imagine a person who respects and values particular European (or Californian) traditions of craft and culture in winemaking, for example, and wishes to preserve those traditions against the encroaching pressures of global competition in an environment where goods, labor, and capital are increasingly mobile. Such a person might well seek to give their custom to producers who presently embody and promise to carry on the traditions that person holds dear – and those producers may well be identifiable most readily by their particular geographical and historical affiliations. The reasons why such a person might seek out goods bearing a particular GI strike me as essentially the same as the reasons why consumers might seek out merchandise sold (or licensed) by a particular university. That is: they wish to offer both expressive solidarity with, and pecuniary support for, a *particular productive community*. This is not a purchase motivated by reputation, but by a kind of *charity*: a desire to provide material support to communities that cannot extract sufficient resources to sustain themselves through the competitive market as currently constituted (and, perhaps, to signal to the purchaser's social audience that they harbor this desire).

Now, while this justification for enforcement of academic brands in university merchandise strikes me as more descriptively plausible than a reputation-based account, and while the concept of charity has positive connotations, it also has a dark side. In the GI context, at worst, the desire to cultivate patronage by customers of particular geographic communities simply by reference to place and history may smack of chauvinism or jingoism – it can devolve into a desire to shield one's tribe from competitive pressures even at the cost of pouring valuable resources into wasteful endeavors. This is a tendency that the European Union, for example, has worked hard to resist in reconciling GI protection with the principle of the common market.³⁶ And

³⁵ Michael Oakeshott, *The Idea of a University*, 1 *ACADEMIC QUESTIONS* 23, 24 (2004) (emphasis added).

³⁶ *Compare* Case 12/74, *Commission of the European Communities v. Federal Republic of Germany* (Sekt/Weinbrand), 1975 ECR 181 (rejecting minimum-domestic-content and domestic-production restrictions on wines and spirits as unjustified by any quality or characteristics peculiar to any geographic location) with Cases C-465/02 and C-466/02, *Federal Republic*

in the university context as in political economy more broadly, discrete communities that come to rely on a flow of resources from a small number of well-resourced supporters open themselves up to the dangers of complacency, corruption, and even ruin, as they become increasingly beholden to the idiosyncratic preferences of those who command such resources at particular moments.

IV. THE DARK SIDE OF THE ACADEMIC GI

In the case of GIs, a cautionary tale for universities can be found, again, in the wine industry. The 1982 vintage of Bordeaux wines is famous for cementing the reputation of the leading wine critic of the past half-century, Robert Parker. Parker famously raved about the high-alcohol, jammy, concentrated quality of that year's vintages, contradicting the judgment of some more established critics who preferred the more restrained and balanced style typical of the region's history.³⁷ Wine merchants capitalized on Parker's 100-point rating system to launch a media marketing campaign that triggered a speculative frenzy, bringing the ordinary affluent American consumer, for the first time, into the world of intensive interest in buying and drinking world-class wines. The new entry of American money, guided by Parker's tastes and judgments, irreversibly upended the world of wine. If high-priced wine could be a marker of taste, status, and wealth, Parker's 100-point system gave Americans a perfectly calibrated tool to buy in, and they bought in big. By the mid-1990s, Parker's nod could make or break a winemaker: "the difference between a score of 85 and 95 was 6 to 7 million Euros. If a château received a score of 100, it could multiply its price by four."³⁸ This money brought new levels of prosperity to Bordeaux – a region Parker has always championed – but it also changed the region's wines. The "American" style – fruit-forward, high-alcohol, young-drinking, and concentrated – took over these most venerable of *appellations d'origines contrôlées*, the geographically and historically defined communities whose traditions of austere, balanced, and restrained wines of great longevity had supposedly justified the protection of their coveted indicia of origin in the first place. Parker's biographer quotes one importer who neatly encapsulated the dilemma: "The French can see Parker is magic for their wine, but they resent having to do things the American way."³⁹

of Germany and Kingdom of Denmark v. Commission of the European Communities (Feta), 2005 ECR I-9178 (upholding a GI for the term "Feta" despite its long-standing use by producers outside of Greece, based in part on the Greek government's documentation of certain geographic characteristics claimed to influence the characteristics of the version of the cheese produced in Greece).

³⁷ ELIN MCCOY, *THE EMPEROR OF WINE: THE RISE OF ROBERT M. PARKER, JR., AND THE REIGN OF AMERICAN TASTE* ch. 4 (2014).

³⁸ *Id.* ch. 8 (internal quotation marks omitted).

³⁹ *Id.* at 253.

If university brands are best thought of as GIs, the Parkerization of Bordeaux illustrates the dilemma they present. A university that seeks to resist broad competitive pressures by relying on supporters of its GI-like brand puts itself – its community identity – at the mercy of the interests of its wealthiest supporters. At worst, it surrenders to wealthy patrons' control over those characteristics, traditions, and ways of life that defined the university community in the first place. And it is entirely possible that those patrons' views about the proper way of life for the university community may systematically differ from that community's historical traditions. The university analogue of Parkerization, then, can be seen in the cultivation of donor funding, and the efforts of university managers to organize their institutions in pursuit of that goal.

This problem is not a new one, and is reflected in two long-standing and competing visions of the university as an institution. In one vision, most famously expressed by Wilhelm von Humboldt, the university is and should be an enclave dedicated to the pursuit of knowledge for its own sake, insulated from the pressures and demands of both the market and politics. While the fruits of academic study will surely advance both the material and moral welfare of the state that is presumed to be the university's natural sponsor (and ultimate beneficiary), Humboldt warned that those fruits could only materialize if the university is provided ample public resources and allowed to deploy them as it sees fit with minimal public oversight.⁴⁰

⁴⁰ Wilhelm von Humboldt, *On the Spirit and the Organisational Framework of Intellectual Institutions in Berlin*, repr. in *University Reform in Germany*, 8 *MINERVA* 242, 242–46 (1970). Humboldt writes:

The idea of disciplined intellectual activity, embodied in institutions, is the most valuable element of the moral culture of the nation . . . Since these institutions can only fulfil their purpose when each of them bears continuously in mind the pure idea of science and scholarship, their dominant principles must be freedom and the absence of distraction (*Einsamkeit*). The intellectual exertions of men, however, only prosper through a process of collaboration . . . Given this collective character of individual accomplishment the inner life of these higher intellectual institutions must be such as to call forth and sustain a continuously self-renewing, wholly uncoerced and disinterested collaboration . . .

The state must understand that intellectual work will go on infinitely better if it does not intrude. The state's legitimate sphere of action must be adapted to the following circumstances: in view of the fact that in the real world an organizational framework and resources are needed for any widely practiced activity, the state must supply the organizational framework and the resources necessary for the practice of science and scholarship. The manner in which the state provides the organizational framework and resources can be damaging to the essence of science and scholarship; the very fact that it provides such organizational structures and resources, which are quite alien to the nature of the activity which they are to serve, can result in the degradation to a basely material level of what should be intellectual and lofty . . .

The state must not deal with its universities as *Gymnasias* or as specialized technical schools; it must not use its academy as if it were a technical or scientific commission. It must in general . . . demand nothing from them simply for the satisfaction of its own needs. It should instead adhere to a deep conviction that if the universities attain their highest ends, they will also realise the state's ends too, and these on a far higher plane. On this higher plane, more is comprehended and forces and mechanisms are brought into action which are quite different from those which the state can command.

Contrast this idealist vision with the jaundiced assessment of Thorstein Veblen, who at the turn of the last century diagnosed the market's infiltration into the university and identified it with the professionalization of university administration along the lines of business enterprises – the metrics-based management of his day.⁴¹ The tension between the Taylorist university of Veblen's polemic and the ivory tower of Humboldt's imagination turns in no small part on the type of community affiliation that we can now identify with the GI-like university brand – its promises and its threats. And nowhere is the tension between the risks and rewards of GI-like branding more evident than in the role of athletics programs in university management.

This was true even in Veblen's day, as he wrote:

Unquestionably, an unreflecting imitation of methods that have been found good in retail merchandising counts for something [in university promotional activities] . . . There is also the lower motive of unreflecting clannishness on the part of the several university establishments. This counts for something, perhaps for more than one could gracefully admit. It stands out perhaps most baldly in the sentimental rivalry – somewhat factitious, it is true – shown at intercollegiate games and similar occasions of invidious comparison between the different schools. It is, of course, gratifying to the clannish conceit of any college man to be able to hold up convincing statistical exhibits showing the greater glory of “his own” university, whether in athletics, enrolment, alumni, material equipment, or schedules of instruction; whether he be an official, student, alumnus, or member of the academic staff; and all this array and circumstance will appeal to him the more unreservedly in proportion as he is gifted with a more vulgar sportsmanlike bent and is unmoved by any dispassionate interest in matters of science or scholarship; and in proportion, also, as his habitual outlook is that of the commonplace man of affairs.⁴²

⁴¹ THORSTEIN VEBLEN, *THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN* 220–21 (1918). Veblen writes: “Business principles take effect in academic affairs most simply, obviously and avowably in the way of a business-like administration of the scholastic routine; where they lead immediately to a bureaucratic organization and a system of scholastic accountancy . . . the ideal of efficiency by force of which a large-scale centralized organization commends itself in these premises is that pattern of shrewd management whereby a large business concern makes money. The underlying business-like presumption accordingly appears to be that learning is a merchantable commodity, to be produced on a piece-rate plan, rated, bought and sold by standard units, measured, counted and reduced to staple equivalence by impersonal, mechanical tests. In all its bearings the work is hereby reduced to a mechanistic, statistical consistency, with numerical standards and units; which conduces to perfunctory and mediocre work throughout, and acts to deter both students and teachers from a free pursuit of knowledge, as contrasted with the pursuit of academic credits. So far as this mechanistic system goes freely into effect it leads to a substitution of salesmanlike proficiency – a balancing of bargains in staple credits – in the place of scientific capacity and addiction to study.” *Id.* This critique of metrics-based university management as a threat to other values instantiated by universities is still with us a century later, though the metrics themselves have changed dramatically. See generally, e.g., Mario Biagioli, *Quality to Impact, Text to Metadata: Publication and Evaluation in the Age of Metrics*, 2 *KNOW: A JOURNAL ON THE FORMATION OF KNOWLEDGE* 249 (2018).

⁴² VEBLEN, *supra* note 41, at 234–35.

Veblen claims that the types of people who could be won over by “clannish” chauvinism are precisely the types of people who lack the disposition to the pursuit of knowledge that Humboldt (and implicitly Veblen) associate with the true purpose of the university and the highest calling of its members. Nearly a century later, Derek Bok put it more bluntly: “Another reason some have given for operating big-time athletic programs is that the publicity and excitement of a winning team can attract more applicants and better students. Those who make this claim rarely pause to explain why a college would want to attract students who chose it because of its football team.”⁴³

Veblen and Bok may be indulging in some chauvinism of their own, but they may also have a point. What little research there is on the motivation of consumers to purchase officially licensed university merchandise suggests that the most powerful contributor to such motivation is a desire to support the university’s athletics programs – more than the desire to support academic programs, more than the desire to support a university’s religious mission, more even than the quality of the goods bearing the university brand.⁴⁴ And combined with the observations of critics of market-based university management like Veblen and Bok, this suggests a distributive dilemma in the university branding context that mirrors the distributive dilemma of the university as a whole. In pursuing GI-like recognition as productive communities, universities may believe they are securing the means to protect their tradition of knowledge production, but they may in fact be surrendering that tradition to the control of others who do not value it. Whenever the occasion arises for a community to define its values, it will be required to prioritize certain values over others – and as we saw in Bordeaux, control over those priorities may ultimately devolve on those who *give* support rather than those who *receive* it.

In [Chapter 2](#) of this volume, Celia Lury argues that market relations tend over time toward hierarchy, while solidarity on the basis of identity is an essentially horizontal relation. Obviously, the GI-based conception of the university brand I am developing has the potential for both. The horizontal solidarity that I have identified as a justification for the historical, human-factor-based theory of GI protection has a long history in university communities. It is implicit in Humboldt’s valorization of the collaborative community of scholars set apart from ordinary life. Indeed, the first university, in Bologna (Italy), originated in a sort of medieval solidarity movement among students organizing against their grasping landlords and idling professors.⁴⁵ But a hierarchical dynamic of market relations is obviously present as well, particularly when the university looks to its identity as a community as a potential tool to attract material resources. Inevitably, with boosters as with customers, material support tends

⁴³ DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 48 (2009).

⁴⁴ Joan M. Phillips et al., *Mind, Body, or Spirit? An Exploration of Customer Motivations to Purchase University Licensed Merchandise*, 4 *SPORT, BUSINESS AND MANAGEMENT* 71 (2014).

⁴⁵ CHARLES HOMER HASKINS, *THE RISE OF UNIVERSITIES* 13–14 (1923).

to come with demands for a measure of control – charity, even motivated by solidarity, can ultimately start to look like a purchase.

V. CONCLUSION

The linking of social identification to market behaviors is a move that we might associate with the currently unfashionable and vaguely defined school of political economy that passes under the name “neoliberalism.” If neoliberalism stands for anything, it stands for a preference for markets as a tool of social organization.⁴⁶ It is thus directly opposed to the Humboldtian model of the university as a social institution insulated from the market and protected (but not dominated) by the state. As critics of neoliberalism note, particularly in the context of intellectual property, driving social interactions into markets can have the effect of elevating the interests of particular constituencies over others: markets are biased in favor of those who *already have* disproportionate control over material resources.⁴⁷

The dark side of the GI-based view of academic brands is thus, at bottom, really just one manifestation of the neoliberal approach to university management that has been criticized at least since Veblen. Its implications for the university are analogous to the implications for the polity of increased economic inequality and decreased public social spending that critics of neoliberalism consistently warn us against. Rather than a collective obligation of either a particular university community or (following Humboldt) of society as a whole, higher education and knowledge production may come to be seen as (perhaps eccentric or arbitrary) charitable causes, and thereby threaten to become subject to the (again, perhaps eccentric or arbitrary) preferences and priorities of individuals with surplus resources and a chauvinist affinity for a particular university community. And if there is no such thing as pure charity in the marketplace, university brand development makes it difficult to distinguish boosterism from outright corruption. Recent revelations about donor influence at George Mason and the University of Oregon (both, notably, public institutions) are illustrative of this danger.⁴⁸ In such episodes, some

⁴⁶ DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 2 (2007): “Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.”

⁴⁷ Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 *UCLA L. REV.* 970, 1005 (2012): “even [for] a nonbasic good a case can be made on distributive grounds that we should direct its production and distribution in a way that is not systematically sensitive to the underlying distribution of wealth, when that distribution is itself unjust, and when alternative systems exact no toll in efficiency terms.”

⁴⁸ JOSHUA HUNT, *UNIVERSITY OF NIKE: HOW CORPORATE CASH BOUGHT AMERICAN HIGHER EDUCATION* (2018); Erica L. Green & Stephanie Saul, *What Charles Koch and Other Donors to George Mason University Got for Their Money*, *NY TIMES*, May 5, 2018, www.nytimes.com/2018/05/05/us/koch-donors-george-mason.html.

will see universities making managerial decisions that happen to attract donors' material support. Others will see donors corrupting the university's mission with their quid pro quos and starving academic pursuits for the benefit of ideological or commercial ones. But the very fact that different constituencies view these episodes in such starkly different terms is exactly the point. When a university uses its geographic and historical identity as a productive community *distinct from* the market as a tool to try to marshal material resources, it inevitably subjects that identity to market forces, and may ultimately end up destroying it.

This is the paradox of the GI-based view of academic brands. Where donors' and boosters' preferences and priorities systematically diverge from those that would emerge from either democratic processes or expert stewardship (or both), the productive work of the university that justified its protected status in the first place – preparation of students for civic life and knowledge production through free inquiry – may lose priority to other concerns *precisely because* the university seeks to solicit material support for that productive work. Thus, while a view of academic brands as justified by the logic of geographical indications seems doctrinally and theoretically more plausible to me than a view based on trademark law, examining academic brands through a GI lens also focuses our attention on the particular dangers such brands pose to the idealized forms of life of universities.

Elite Universities as Luxury Brands

Haochen Sun

INTRODUCTION

In characterizing a recent college admissions fraud case brought by the US Attorney for the District of Massachusetts, Judge Douglas Woodlock bluntly labeled the fraud “a sneaky crime of conspicuous consumption.”¹ In this chapter, I explore the legal implications of consuming elite higher education as a luxury good. Like luxury goods companies, elite universities are regarded as owners of luxury brands under trademark law. Companies such as Louis Vuitton, Ferrari, and Hermès own brands that enjoy a high level of exclusivity and attract conspicuous consumption. So do elite universities. I propose that Harvard, Stanford, and Yale can be viewed as analogous to Louis Vuitton, Ferrari, and Hermès.

This “luxurification” of higher education, however, perpetuates class division and violates *the right to education* by favoring students from families who can pay the tuition. In this chapter, I consider how luxury brands prosper through exclusivity and conspicuous consumption. I then explore the extent to which elite universities can be compared to luxury brands and why their institutional names and logos should, primarily from a trademark protection perspective, be regarded as hyper luxury brands. Finally, I consider the legal and social implications of the luxurification of higher education.

I. THE MAKING OF A LUXURY BRAND

Ranging in price from \$40,000 to \$500,000 and with a waiting list of up to six years, the Hermès Birkin is the most coveted of handbags.² Why are luxury items such as

¹ Transcript of Sentencing at 62, United States v. Bizzack, No. 19-cr-10222 (D. Mass. Oct. 30, 2019).

² Jack Houston & Irene Anne Kim, *A Handbag Expert Explains Why Hermès Birkin Bags Are So Expensive*, BUSINESS INSIDER, June 13, 2019, www.businessinsider.com/hermes-birkin-bag-real-handbag-expert-so-expensive-2019-6.

the Hermès Birkin so appealing? Consumers are drawn to luxury goods like Birkin bags due to their exclusivity.³ This aura of exclusivity entails superior quality, enhanced creativity, and the steep price of goods or services marketed by these luxury brands.

Quality. Luxury brands are synonymous with exceptional materials, craftsmanship, and service. High-quality leather, fabrics, and rare stones are sourced by luxury companies from carefully selected supply chains,⁴ and rigorous screening processes are used to maintain premium product craftsmanship.⁵ Luxury companies are also recognized for offering high-quality in-store and post-sale services dedicated to their customers' needs.⁶

Creativity. Luxury brands also signify the high level of creativity that is embedded in their goods and services. Luxury fashion companies vigorously support innovation in product design, constantly redefining fashion trends and luxury lifestyles.⁷ Legendary designers, such as Giorgio Armani, Coco Chanel, Valentino Garavani, Gianni Versace, and Yves Saint-Laurent, created and branded their own luxury business empires with highly creative designs.⁸ Luxury conglomerates such as Compagnie Financière Richemont SA, Kering SA, and LVMH Moët Hennessy Louis Vuitton rely on gifted designers and artists.

Price. Luxury companies maintain the exclusivity of their brands through pricing strategies, with high prices normally commensurate with the quality and creativity invested in their products or services.⁹ Harry Winston and Van Cleef & Arpels sell their jewelry at a much higher price than other brands because of the high quality of their diamonds and creative designs, craftsmanship, and services.¹⁰ The same applies to other luxury brands. Normally, the better the materials, craftsmanship, and services a luxury company provides and the more it invests in creativity, the more it charges for its products.

³ See JEAN-NOËL KAPFERER & VINCENT BASTIEN, *THE LUXURY STRATEGY: BREAK THE RULES OF MARKETING TO BUILD LUXURY BRANDS* 104–05 (2012).

⁴ *Id.* at 100–01.

⁵ “According to current CEO Axel Dumas, the main strength of the Hermès brand is the love for craftsmanship”: “each and every product coming out under the brand’s name should reflect the hard work put into it by the artisan.” *Hermès—The Strategy Insights Behind the Iconic Luxury Brand*, MARTIN ROLL (Sept. 2018), <https://martinroll.com/resources/articles/strategy/hermes-the-strategy-behind-the-global-luxury-success>.

⁶ See Haochen Sun, *Reforming Anti-Dilution Protection in the Globalization of Luxury Brands*, 45 *GEO. J. INT’L L.* 783, 794 (2014).

⁷ KAPFERER & BASTIEN, *supra* note 3, at 207–08.

⁸ See e.g., UCHE OKONKWO, *LUXURY FASHION BRANDING: TRENDS, TACTICS, TECHNIQUES* 30–31 (2007).

⁹ Franck Vigneron & Lester W. Johnson, *A Review and a Conceptual Framework of Prestige-Seeking Consumer Behavior*, 1999 *ACADEMY OF MARKETING SCIENCE REV.* 1 (1999).

¹⁰ See e.g., FRED CUELLAR, *HOW TO BUY A DIAMOND: INSIDER SECRETS FOR GETTING YOUR MONEY’S WORTH* 55–56 (2018).

As price is an important indicator of the level of exclusivity, luxury brands apply marketing strategies like offering limited editions and controlling sales channels.¹¹ To safeguard these exclusivity-oriented marketing strategies, luxury companies have taken legal action against retailers who sell their products too cheaply or without a license.¹²

A. Conspicuous Consumption

Apart from quality and creativity, what else does the high price of a Birkin bag signal? And why are consumers willing to buy this extremely expensive item? The high price is a public statement of the Birkin bag as a status symbol,¹³ and many consumers purchase these bags for this reason. The exclusivity of luxury brands like the Hermès Birkin is inextricably linked with their signifying function vis-à-vis the conspicuous consumption of luxury goods or services.¹⁴

Conspicuous consumption refers to people's willingness to pay a much higher price for a functionally equivalent good for the purpose of the public display of that good as a status symbol. A person's acquisition of wealth does not necessarily level up his or her social status. Instead, this wealth must be used to publicly display certain indicators. According to Veblen, "In order to gain and to hold the esteem of men, wealth must be put in evidence, for esteem is awarded only on evidence."¹⁵ One's consumption of the bare necessities of life does not produce such evidence, but lavish spending on luxury goods and services does. Luxury goods in Veblen's time, such as precious metals and gems,¹⁶ expensive "food, drink, narcotics,"¹⁷ hand-made silver spoons,¹⁸ and fashionable dress,¹⁹ were costly and sold to a relatively small number of people because they were naturally scarce and crafted in a sophisticated manner. "Since the consumption of these more excellent goods is an evidence of wealth," Veblen observes, "it becomes honorific; and conversely, the failure to consume in due quantity and quality becomes a mark of inferiority and demerit."²⁰

¹¹ See Sun, *supra* note 6, at 791.

¹² Case C-59/08, Copad SA v. Christian Dior couture SA, 2009 E.C.R. I-3421, ¶¶ 7–8 (reporting that Dior refused its licensee to sell its products in discount stores).

¹³ Katya Foreman, *The Birkin Bag: Fashion's Ultimate Status Symbol*, BBC (Jan. 16, 2015), www.bbc.com/culture/story/20150116-the-ultimate-status-symbol.

¹⁴ Youngseon Kim, *Power Moderates the Impact of Desire for Exclusivity on Luxury Experiential Consumption*, 35 *PSYCHOLOGY MARKETING* 283, 286 (2018).

¹⁵ See THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 29 (Martha Banta ed., Oxford University Press 2007) (1899); see also, ROGER S. MASON, *CONSPICUOUS CONSUMPTION: A STUDY OF EXCEPTIONAL CONSUMER BEHAVIOUR* 7 (1981); Jeremy N. Sheff, *Veblen Brands*, 96 *MINN. L. REV.* 769, 795 (2012).

¹⁶ VEBLEN, *supra* note 15, at 86–87.

¹⁷ VEBLEN, *supra* note 15, at 52.

¹⁸ VEBLEN, *supra* note 15, at 85–86.

¹⁹ VEBLEN, *supra* note 15, at 111–24.

²⁰ VEBLEN, *supra* note 15, at 53.

Conspicuous consumption leads to the so-called Veblen effect, through which the demand for luxury goods increases as their price increases.²¹ Subject to this effect, a luxury good or service has a two-segment pricing scheme: the real price and conspicuous price. The former stands for the normal market price that ordinary consumers pay for the good.²² It covers the costs for design, production, and circulation. The conspicuous price refers to the extra costs the seller charges for the status-signifying function of its luxury goods. People who consume conspicuously are willing to buy luxury goods at higher conspicuous prices. This is because they care much more about the status-signifying function of conspicuous prices than other consumers, who are only willing to pay real prices.²³ The higher the conspicuous prices of luxury goods, the more elite consumers are willing to buy these goods as signifiers of status.²⁴

For a long time, the conspicuous consumption phenomenon applied to luxury goods without brand names attached. However, since the 1980s, the luxury goods sector has radically transformed its elites-oriented business model through branding. First, as more people are able to afford luxury goods, sales volume increases. Marketing luxury goods through brand names is cost-effective and impactful.²⁵ This trend has intensified since the formation of luxury brand conglomerates, making each luxury company more profit-driven.²⁶

Second, extensive advertising of luxury goods through television and social media increasingly relies upon brand names. Many luxury good advertisements contain a trademark or a combination of trademarks that represents the brand names of the good. These trademarks indicate the identity of product manufacturers and service providers and signify the quality, creativity, and price of their products or services. Luxury companies also routinely incorporate celebrities into their advertisements to show that their products or services are so distinctive and elegant that they ought to be enjoyed only by people with elite lifestyles.²⁷

²¹ See e.g., H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 *Q.J. ECON.* 183, 189 (1950).

²² *Id.* at 203.

²³ According to Veblen, a person who consumes conspicuously “makes his estimate of value of the article chiefly on the ground of the apparent expensiveness of the finish of those decorative parts and features which have no immediate relation to the intrinsic usefulness of the article; the presumption being that some sort of ill-defined proportion subsists between the substantial value of the article and the expense of adornment added in order to sell it.” VEBLEN, *supra* note 15, at 256–57.

²⁴ Laurie Simon Bagwell & B. Douglas Bernheim, *Veblen Effects in a Theory of Conspicuous Consumption*, 86 *AM. ECON. REV.* 349 (1996).

²⁵ See MARK TUNGATE, *LUXURY WORLD: THE PAST, PRESENT AND FUTURE OF LUXURY BRANDS* 2 (2009).

²⁶ *Id.*

²⁷ See Haochen Sun, *Living Together in One Civilized World: How Luxury Companies and Consumers Can Fulfill Their Ethical Responsibilities to the Poor*, 46 *UC DAVIS L. REV.* 547, 553–54 (2013); KLAUS HEINE, *THE CONCEPT OF LUXURY BRANDS* 79–88 (2d ed. 2012).

As Jean Baudrillard famously observed, “[in order to] become an object of consumption, the object must become a sign.”²⁸ Mikimoto sells jewelry made of cultured pearls, each of which is worth a mere 10 percent of a natural pearl.²⁹ The value resides in the Mikimoto trademark; the sign, represented by its conspicuous price. With increased prevalence of trademarks, consumers increasingly associate these symbols not only with luxury goods and services but also with prestige and social status.³⁰

Trademark law has also come to recognize trademarks as symbols of prestige and social status. Courts have held that the Christian Dior mark stands for “the allure and prestigious image [with] an aura of luxury,”³¹ the Ferrari mark “reputation for rarity and quality,”³² Hermès for “scarcity” and “status,”³³ the Lexus mark for “exclusive luxury experience,”³⁴ Gucci for “luxury status,”³⁵ and the Rolex and Vacheron & Constantin-Le Coultre marks for “prestige.”³⁶ Given that luxury brands signify their users’ social positions, courts have further recognized their function in relation to conspicuous consumption. For instance, based upon the judicial recognition of Louis Vuitton’s “luxury status” and “image of exclusivity and refinery,”³⁷ a Louis Vuitton product is “something wealthy women may handle with reverent care and display to communicate a certain status.”³⁸

In a similar vein, attorneys who have argued cases for luxury brands have emphasized in their court filings that these brands function as high status signifiers. For example, attorneys asserted that Lexus “is a very prestigious luxury brand and it is an indication of an exclusive luxury experience,”³⁹ and is also well known for its “power, attraction, reputation and prestige.”⁴⁰

II. ELITE UNIVERSITIES AS LUXURY BRANDS

In the acclaimed *The Great Gatsby*, protagonist Jay Gatsby pretends to be an Oxford University graduate in order to increase his reputation and his chances of

²⁸ JEAN BAUDRILLARD, *THE SYSTEM OF OBJECTS* 200 (James Benedict trans., Verso 1996) (1968).

²⁹ Hannah Elliott, *You’re Buying Fancy Jewelry Wrong*, BLOOMBERG, Dec. 13, 2017, www.bloomberg.com/news/articles/2017-12-13/how-to-buy-jewelry-an-expert-shares-what-you-are-doing-wrong.

³⁰ Sidney J. Levy, *Symbols for Sales*, 37 *HARV. BUS. REV.* 117, 121–22 (1959).

³¹ Case C-59/08, *Copad SA v. Christian Dior couture SA*, 2009 E.C.R. I-3421, ¶ 37.

³² *Ferrari S.p.A. Esercizio Fabbriche Automobili e Corse v. McBurnie*, No. 86-1812-B(IEG), 1989 WL 298658, at *7 (S.D. Cal. June 1, 1989).

³³ *Hermès Int’l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 108–9 (2d Cir. 2000).

³⁴ *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1175 (9th Cir. 2010).

³⁵ *Gucci America Inc. v. Guess? Inc.*, 868 F. Supp. 2d 207, 218 (S.D.N.Y. 2012).

³⁶ *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955).

³⁷ *Louis Vuitton Malletier S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425, 435 (S.D.N.Y. 2016).

³⁸ *Id.* at 435.

³⁹ *Toyota*, 610 F.3d at 1175.

⁴⁰ *Toyota Jidosha Kabushiki Kaisha v. Munchy Food Indus.* [2014], *Opposition to Trademark Application No.30117999*, ¶ 32.

winning over the woman he loves.⁴¹ How can a university's name carry so much allure and prestige? What is the relevance of this amid the recent college admissions scandals?

In this section, I argue that elite university names also represent exclusivity and serve conspicuous consumption and, thus, such names should be regarded as luxury brands. Moreover, mainly from the trademark protection perspective, I further contend that elite universities should be regarded as owners of *hyper* luxury brands.

Elite universities achieve exclusivity through bolstering their quality of education, creativity of research, competitiveness of the admissions process, and rates of tuition.

Quality. With large endowment funds plus high tuition fees,⁴² elite universities are financially capable of offering excellent software for teaching and learning. These universities top the relevant educational rankings and have the largest endowments. Thirteen have individual endowments valued at \$10 billion or more.⁴³ Elite universities endeavor to recruit talented scholars through rigorous hiring processes and further provide training programs to improve the quality of teaching. They also dedicate resources to innovating curricula that will equip students with cutting-edge knowledge for postgraduate and professional pursuits. Moreover, elite universities generously capitalize on their endowments, creating an excellent peer learning atmosphere by enrolling high-caliber students. Meanwhile, elite universities are well known for their excellent hardware, such as libraries, classrooms, and dormitories. For example, Harvard University has the largest university library in the US and the largest private library in the world.⁴⁴

Creativity. With vibrant academic traditions, culture, and capabilities, elite universities excel in research performance, producing impactful findings. The top positions in ranking lists are mostly occupied by elite universities. These universities have a vital role to play in fostering innovation and inventing new technologies.⁴⁵ Stanford, the Massachusetts Institute of Technology (MIT), and Harvard have been ranked as the top three most innovative universities in the world for five straight years since 2015,⁴⁶

⁴¹ Michael Dirda, *A New Look at Gatsby – as an Oxford Man*, WASH. POST, May 8, 2019, www.washingtonpost.com/entertainment/books/a-new-look-at-gatsby-as-an-oxford-man/2019/05/08/51c1ff50-7023-11e9-8be0-ca575670e91c_story.html.

⁴² Not all universities that could be characterized as “elite” charge high tuition across the board. For example, UC Berkeley charges lower tuition fees for in-state undergraduate students, but still charges high tuition fees for out-of-state undergraduate students. See Cost, U.C. BERKELEY, <https://admissions.berkeley.edu/cost> (last visited Sept. 15, 2020).

⁴³ *Which Colleges Have the Largest Endowments?*, CHRON. OF HIGHER EDUC., Jan. 31, 2019, www.chronicle.com/article/Which-Colleges-Have-the/245587.

⁴⁴ Benjamin Elisha Sawe, *Largest Libraries in the United States*, WORLDATLAS, Apr. 25, 2017, www.worldatlas.com/articles/largest-libraries-in-the-united-states.html.

⁴⁵ Farnam Jahanian, *4 Ways Universities Are Driving Innovation*, WORLD ECON. F., Jan. 17, 2018, www.weforum.org/agenda/2018/01/4-ways-universities-are-driving-innovation.

⁴⁶ David M. Ewalt, *Reuters Top 100: The World's Most Innovative Universities 2019*, REUTERS, Oct. 23, 2019, www.reuters.com/innovative-universities-2019.

and all ten universities with the highest number of Nobel Prize winners between 2000 and 2017 are elite universities.⁴⁷

Competitiveness. The highly competitive admissions process is another factor contributing to the exclusivity of elite universities. Every year, the number of applications to elite universities far exceeds the number of students they can admit. It is estimated that only 6.4 percent of 368,806 applicants were admitted by the top ten US universities as ranked by the *U.S. News & World Report* for the fall 2019 entering class.⁴⁸ There has been a tendency for elite universities to raise admissions standards, making enrollment even more competitive.

The acceptance rates of Ivy League universities and other top colleges have dropped to record lows in recent years. Harvard's acceptance rate fell from 4.6 percent in 2018 to 4.5 percent in 2019, resulting in only 1,950 students accepted out of 43,330 applicants.⁴⁹ Duke University cut its acceptance rate from 8.6 percent in 2018 to 7.4 percent in 2019, the biggest drop among the top ten US universities.⁵⁰ Other elite colleges also operate with extremely low acceptance rates, including Columbia (5.1 percent), Yale (5.9 percent), the University of Chicago (5.9 percent), MIT (6.6 percent), and the University of Pennsylvania (7.4 percent).⁵¹

Price. Exceptionally high tuition is another force driving the exclusivity of elite university education. Price reinforces the luxury aura of such educational services as it creates a financial barrier to entry, separating those who can afford education as a luxury good from those who cannot. In fact, if elite universities charged lower tuition, their quality and status could be questioned.⁵²

Current tuition and fees for full-time undergraduate students at all of the top ten US universities exceed \$50,000 per year, while the average cost for in-state students at public universities is \$10,440.⁵³ Columbia University charges the highest tuition among the top ten at \$64,380.⁵⁴ Over the last forty years, the tuition and fees of US

⁴⁷ Ellie Bothwell, *Top 10 Universities for Producing Nobel Prizewinners 2017*, TIMES HIGHER EDUC., Oct. 13, 2017, www.timeshighereducation.com/news/top-10-universities-producing-nobel-prizewinners-2017. This list excludes the winners of literature and peace prizes.

⁴⁸ See Kevin J. Delaney, *New Data Show How Hard It Was to Get into an Elite US College This Year*, QUARTZ, Mar. 31, 2019, <https://qz.com/1584304/acceptances-rates-at-top-us-colleges-dropped-further-for-the-class-of-2023>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Alia Wong, *Six-Figure Price Tags Are Coming to Colleges*, THE ATLANTIC, Nov. 8, 2019, www.theatlantic.com/education/archive/2019/11/some-colleges-could-soon-cost-100000-year/601648: "Being expensive is seen as being good – if one [elite] college is 20 percent cheaper than another [elite] college, students are going to wonder what's wrong with it."

⁵³ COLL. BD. TRENDS IN COLLEGE PRICING 2019, 9 (2019), <https://research.collegeboard.org/pdf/trends-college-pricing-2019-full-report.pdf> (last visited Sept. 26, 2020).

⁵⁴ 2021 *Best National University Rankings*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-colleges/rankings/national-universities> (last visited Sept. 21, 2020).

elite universities have risen faster than US inflation rates and household income, deterring middle- and low-income students from applying.⁵⁵

The high costs of elite university education are justified not only by the quality of education, creative output, and competitive admissions process, but also by access to highly compensated jobs upon graduation. Most Wall Street bankers are recruited from the Ivy League and other elite universities such as MIT and Stanford.⁵⁶ Four-fifths of US law firm partners earning \$5 million in profits per partner are graduates of the top five law schools.⁵⁷ A recent survey of Harvard, Princeton, and Yale alumni shows that three-quarters of them live in zip codes ranking in the top 20 percent on an index of income, half in zip codes in the top 5 percent, and a quarter live in zip codes in the top 1 percent.⁵⁸

Duke is an elite university located in Durham, North Carolina, charging undergraduate students approximately \$60,000 in tuition and fees.⁵⁹ Located only about ten miles away, the University of North Carolina at Chapel Hill (UNC) is a public university, charging in-state undergraduate students approximately \$9,000 in tuition and fees.⁶⁰ However, many students and their parents may still choose Duke over UNC. This is because they may attach more importance to Duke's exclusivity accrued from its quality of education, creativity, and admissions process. The acquisition of prestige and social status through conspicuous consumption of education is another reason why families might make such a decision.⁶¹ Elite universities facilitate conspicuous consumption of education in the following two ways.

First, elite universities' efforts to boost their exclusivity produce an inevitable corollary to the Veblen effect. As discussed in Section I, above, the Veblen effect reverses the classic relationship between price and demand by increasing the demand for luxury goods despite (or as a result of) their rise in price. This effect is observable in elite higher education.⁶² Each year, more students apply to increasingly expensive elite colleges. Research shows that after adjusting for inflation,

⁵⁵ Jon Marcus, *New Data Show Some Colleges Are Definitely Unaffordable for Many*, HECHINGER REPORT, Oct. 18, 2018, <https://hechingerreport.org/new-data-show-some-colleges-are-definitely-unaffordable-for-many>.

⁵⁶ KAREN HO, *LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET* 11 (2009).

⁵⁷ DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* 11 (2019).

⁵⁸ *Id.* at 48–49.

⁵⁹ *Compare Duke University vs. University of North Carolina – Chapel Hill*, U.S. NEWS AND WORLD REP., www.usnews.com/best-colleges/compare/2920-2974/duke-university-vs-unc?xwalk_id=198419&xwalk_id=199120 (last visited Sep. 26, 2020).

⁶⁰ *Id.*

⁶¹ See Richard H. McAdams, *Relative Preferences*, 102 *YALE L. J.* 1, 90 n.330 (1992): "Education has been noted as being a positional good because people often seek simply to be more educated or at least more credentialed, than others," citing FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* 48–51 (1976); see also Siva Vaidhyanathan, *A Study in Total Depravity*, THE BAFFLER, July 2015, <https://thebaffler.com/salvos/study-total-depravity>.

⁶² GEOFFREY SCHNEIDER, *MICROECONOMIC PRINCIPLES AND PROBLEMS: A PLURALIST INTRODUCTION* 225 (2019).

tuition and fees charged by private colleges rose by 140 percent between 1985 and 2016.⁶³ The Ivy League and other top colleges like Duke, MIT, and Stanford increased tuition and fees roughly 3–4 percent every year from 2013 to 2018.⁶⁴ Nonetheless, every year these elite universities have received more applications, driving acceptance rates lower.⁶⁵ In fact, rising tuition and fees in elite universities boost applications.⁶⁶ For instance, it was found that for elite colleges, an additional \$1,000 increase in tuition and fees contributed to a 3.6-point increase in SAT scores, a 1.2 percent reduction in acceptance rates, and a 0.5 percent increase in the number of admitted students who enrolled.⁶⁷

Elite universities treat low acceptance rates as a means of enhancing prestige.⁶⁸ They have an incentive to reject more applicants because lowering acceptance rates could improve their university ranking performance, which in turn encourages more students to apply.⁶⁹ Students and their parents become more anxious when they realize that gaining admission to an elite college is becoming more difficult, and this pushes them to apply to more schools to maximize their chances of acceptance.⁷⁰ The globalization of higher education is another factor driving down acceptance rates. The past two decades have witnessed a rapidly increasing number of international applicants who can easily afford the high tuition and fees at elite universities.⁷¹

Second, the Veblen effect shows that the impetus for conspicuous consumption of elite education is the prestige and social status conferred by these elite universities. Given their exclusivity, elite universities confer prestige on their students and

⁶³ ROBERT KELCHEN, HIGHER EDUCATION ACCOUNTABILITY 3 (2018).

⁶⁴ See JinAh Kim, *Ivy League Tuition Has Been Rising Almost the Same Amount Every Year: Is This Just Coincidence?*, DAILY PENNSYLVANIAN, Apr. 19, 2017, www.thedp.com/article/2017/04/tuition-increase-across-ivies.

⁶⁵ See e.g., Vaidhyathan, *supra* note 61: “Elite higher education in America has long been a Veblen good – a commodity that obeys few, if any, conventional laws of economic activity. In some cases . . . the higher the sticker price of a particular college or university, the more attractive it is.”

⁶⁶ Terence Kealey, *Free the Market: Take the Cap Off Tuition Fees*, TIMES, Mar. 29, 2011, www.thetimes.co.uk/article/free-the-market-take-the-cap-off-tuition-fees-bzowz3z3kpk.

⁶⁷ Nicholas A. Bowman & Michael N. Bastedo, *Getting on the Front Page: Organizational Reputation, Status Signals, and the Impact of U.S. News and World Report on Student Decisions*, 50 RSCH. HIGHER EDUC. 415, 430 (2009).

⁶⁸ See MITCHELL L. STEVENS, CREATING A CLASS: COLLEGE ADMISSIONS AND THE EDUCATION OF ELITES 16 (2007): “The measure of an institution’s prestige has come to be defined, in part, by the proportion of each year’s applicants it turns away.”

⁶⁹ See Michelle Lou & Brandon Griggs, *Acceptance Rates at Top Colleges Are Dropping, Raising Pressure on High School Students*, CNN, Apr. 4, 2019, <https://edition.cnn.com/2019/04/03/us/ivy-league-college-admissions-trnd/index.html>.

⁷⁰ Anemona Hartocollis, *Greater Competition for College Places Means Higher Anxiety, Too*, N.Y. TIMES, Apr. 21, 2016, www.nytimes.com/2016/04/21/us/greater-competition-for-college-places-means-higher-anxiety-too.html.

⁷¹ See FRANK BRUNI, WHERE YOU GO IS NOT WHO YOU’LL BE: AN ANTIDOTE TO THE COLLEGE ADMISSIONS MANIA 35 (2015).

graduates through their admissions and educational programs.⁷² Limited numbers and restrictive entrance requirements mean that only a very small portion of students can be admitted and complete their studies at these universities. The amount of status elite universities can confer on students and graduates depends on the status they themselves enjoy, measured to a certain extent by rankings. The higher a university ranks, the more prestige its students and graduates enjoy. The status of an alumnus also has an impact on the status of his or her alma mater. Elite universities tout their networks of distinguished alumni, such as leading government officials and accomplished entrepreneurs, to raise their national and international profiles.

The Veblen effect explains why some parents are keen to foot the bill for their children's expensive, elite education. While they care about the academic benefits of elite universities,⁷³ they also value the prestige and social status that they impart. Parents may treat the payment of high tuition and fees as an opportunity to show off their wealth and enjoy the prestige and social status that are associated with these universities.⁷⁴ From this perspective, the high tuition and fees become the conspicuous price of the status-signifying function of elite higher education.⁷⁵ Moreover, many parents see their children's achievements as a reflection and extension of their own.⁷⁶

As revealed earlier, conspicuous consumption of luxury goods has evolved into a focus on brands that signify exclusivity and prestige. So has conspicuous consumption of elite education. Elite universities have increasingly relied upon their institutional names and logos as brands, and parents and students increasingly care about these brands.

Elite universities adopt luxury branding strategies to strengthen the exclusivity and prestige of their educational services. Given their long history, incumbent universities such as those in the Ivy League have already gained the status of luxury educational brands.⁷⁷ Their management teams endeavour to maintain and

⁷² See Mitchell L. Stevens & Josipa Roksa, *The Diversity Imperative in Elite Admissions, in DIVERSITY IN AMERICAN HIGHER EDUCATION: TOWARD A MORE COMPREHENSIVE APPROACH* 64 (Lisa M. Stulberg & Sharon Lawner Weinberg eds., 2011).

⁷³ Some believe that rich parents actually know very little about the quality of education offered by elite universities. See Michael Martin, *Veblen Saw It Coming*, INSIDE HIGHER EDUC., July 3, 2019, www.insidehighered.com/views/2019/07/03/thorstein-veblens-writings-about-rich-are-relevant-ongoing-admission-scandal.

⁷⁴ See id.: "very high tuition is a marketing advantage rather than a barrier for 'conspicuously consuming' parents with the means to easily cover it. And bidding for the opportunity to pay that high tuition fully demonstrates the special status of these parents."

⁷⁵ See Paul F. Campos, *The Extraordinary Rise and Sudden Decline of Law School Tuition: A Case Study of Veblen Effects in Higher Education*, 48 SETON HALL L. REV. 167, 179 (2017).

⁷⁶ Emilie Beecher, *The College Admissions Scandal Was All About Bragging Rights*, MEDIUM, Mar. 25, 2019, <https://medium.com/age-of-awareness/the-college-admissions-scandal-was-all-about-bragging-rights-4229f689e221>.

⁷⁷ See TUNGATE, *supra* note 25, at 203 (statement of Stanley Katz): "There isn't any doubt that brand matters and Harvard is the prestige brand . . . It's the Gucci of higher education, and the most selective place."

improve their top rankings by strengthening their exclusivity and soliciting donations for further institutional development.⁷⁸

On the other hand, some universities adopt luxury branding strategies in order to rebrand themselves as elite. For example, several universities have implemented the so-called Absolut Rolex Plan to boost the quality and reputation of their educational services.⁷⁹ Quoting from George Washington University's former president Stephen Trachtenberg, who initiated the plan:

"College is like vodka. Vodka is by definition a flavorless beverage. It all tastes the same. But people will spend \$30 for a bottle of Absolut vodka because of the brand. A Timex watch costs \$20, a Rolex \$10,000. They both tell the same time."⁸⁰

This Absolut Rolex Plan paid off⁸¹ for George Washington University, which has since significantly increased the exclusivity and reputation of its educational services, as have other universities that implemented this luxury branding strategy.⁸²

Wealthy parents are often consumers of luxury educational brands.⁸³ For example, affluent families in China are increasingly sending their children to US universities. Soon after they become wealthy, they regard university degrees, especially those conferred by elite universities, as status symbols for themselves and their children.⁸⁴ These status symbols are built around the high cost, scarcity of seats, high proportion of the best and brightest students, first-class campuses and facilities, high-quality education, and better graduate career prospects. Increasingly, affluent families in China are sending their children to US universities.⁸⁵ In 2014–15 alone, more than 300,000 Chinese students attended university in the United States.⁸⁶ These families sometimes spend heavily on admissions counselling, private tutoring, and extracurricular activities for their children, and

⁷⁸ See *id.* at 203, pointing out that Ivy League schools are in "the luxury brand management business."

⁷⁹ See KEVIN CAREY, *THE END OF COLLEGE: CREATING THE FUTURE OF LEARNING AND THE UNIVERSITY OF EVERYWHERE* 63 (2015).

⁸⁰ *Id.*

⁸¹ *Id.*; Kevin Carey, *How to Raise a University's Profile: Pricing and Packaging*, NY TIMES, Feb. 6, 2015, www.nytimes.com/2015/02/08/education/edlife/how-to-raise-a-universitys-profile-pricing-and-packaging.html.

⁸² CAREY, *supra* note 79, at 64.

⁸³ See Vaidhyanathan, *supra* note 61: "Parents might boast of a child attending [an elite university] (and their own ability to foot the bill) with stickers on their Audis."

⁸⁴ See WILLIAM J. BENNETT & DAVID WILEZOL, *IS COLLEGE WORTH IT?: A FORMER UNITED STATES SECRETARY OF EDUCATION AND A LIBERAL ARTS GRADUATE EXPOSE THE BROKEN PROMISE OF HIGHER EDUCATION* xi (2013); Joyce Lau, *Can Job Training Trump a Degree?*, NY TIMES BLOGS, June 5, 2013, <https://rendezvous.blogs.nytimes.com/2013/06/05/can-job-training-trump-a-degree>.

⁸⁵ See Lia Zhu, *Rich Chinese Parents Also Caught Up in College Admissions Scandal*, CHINA DAILY, May 9, 2019, www.chinadailyhk.com/articles/8/118/57/1557382867918.html.

⁸⁶ See CARL MINZNER, *END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* 48–49 (2018).

even make donations to universities in order to increase the chances of their childrens' admission.⁸⁷

The tremendous popularity of university rankings evinces the effectiveness of elite universities' luxury branding strategies. Oftentimes, university rankings simply highlight elite universities' institutional names and/or logos encapsulating many university achievements. Therefore, these names and logos are perceived as brands symbolizing exclusivity, prestige, and social status. The higher a university is ranked, the more exclusive and prestigious its name and logo are in the minds of students and parents.⁸⁸

Guided by the symbolic ramifications of ranked names and logos, students and parents rely increasingly upon university rankings to make their selections.⁸⁹ For instance, Monks and Ehrenberg's research found that a university's drop in rankings led to a greater acceptance rate, a smaller percentage of admitted students, and an entering class of lower academic quality.⁹⁰ Among prospective international students, 32 percent have been found to consider ranking an important factor when choosing their university.⁹¹ Chinese students cited the *U.S. News & World Report* rankings as the most influential factor.⁹²

III. ELITE UNIVERSITIES AS HYPER LUXURY BRANDS

I have demonstrated that, like a luxury good, the exclusivity of elite higher education makes it a target for conspicuous consumption. It follows, then, that elite university names and logos can be regarded as luxury brands in the educational services marketplace. While elite universities and luxury companies both apply luxury branding strategies, the names and logos of universities are more exclusive and prestigious. In this section, I consider from a trademark protection perspective why elite university names and logos should be regarded as *hyper* luxury brands.

Luxury companies rely heavily on trademark law to protect the exclusivity and prestige of their brands, which in turn drive conspicuous consumption. Trademark

⁸⁷ See Alexis Lai, *Hong Kong in Hot Pursuit of Ivy League Education*, CNN, Dec. 3, 2012, <https://edition.cnn.com/2012/12/02/world/asia/hong-kong-ivy-league-admission/index.html>.

⁸⁸ See ELLEN HAZELKORN, *RANKINGS AND THE RESHAPING OF HIGHER EDUCATION: THE BATTLE FOR WORLD-CLASS EXCELLENCE* 92 (2d ed. 2015): "Rankings can provide branding and advertising value."

⁸⁹ See Mahsood Shah et al., *Do High Ranked Universities Have Better Graduate Employment Outcomes?*, in *WORLD UNIVERSITY RANKINGS AND THE FUTURE OF HIGHER EDUCATION* 217 (Kevin Downing & Fraide A. Ganotice, Jr. eds., 2017).

⁹⁰ See James Monks & Ronald G. Ehrenberg, *The Impact of U.S. News & World Report College Rankings on Admissions Outcomes and Pricing Policies at Selective Private Institutions* 9 (NBER Working Paper No. 7227, 1999), www.nber.org/papers/w7227.pdf.

⁹¹ QS, *INTERNATIONAL STUDENT SURVEY 2019*, 10 (2019), http://info.qs.com/rs/335-VIN-535/images/QS_ISS19_Global.pdf.

⁹² See Madeline A. Rafi, *Influential Factors in the College Decision-Making Process for Chinese Students Studying in the U.S.*, 8 *J. INT'L STUDENTS* 1681, 1685 (2018).

law confers upon business owners, such as luxury companies, an exclusive right to a trademark that is capable of indicating the source of a product or service in the marketplace.⁹³ If trademark protection were to be suspended or eliminated in a country or across the globe, the pervasiveness of counterfeit goods or services would cause a crisis of survival for the entire luxury industry.

On the one hand, the absence of trademark protection would embolden counterfeiters to flood the market with fake goods without any legal liability, which would significantly impair the exclusiveness and prestige of luxury brands.⁹⁴ On the other hand, other forms of intellectual property such as copyright and design patents have proven to be ineffective in protecting luxury companies in warding off free-riding activities.⁹⁵ Therefore, courts have attached great importance to trademark law's function in weeding out counterfeits by holding that it is legal to sell knockoffs *only* if they do not bear a counterfeit trademark.⁹⁶

Trademark law protects luxury brands as status symbols in four primary ways. First, it guards against the use of marks that are confusingly similar, which helps luxury companies preserve the exclusivity of their trademarks. Normally, courts apply a multi-factor test⁹⁷ to decide whether the party sued by the luxury company has used its mark in such a way as to mislead consumers into believing that the goods in question were manufactured by the luxury company. By prohibiting the use of confusingly similar marks, the test's "competitive proximity" and "bridging the gap" factors also entitle luxury companies to control not only their existing market channels⁹⁸ but also the potential market sectors they legitimately intend to expand into.⁹⁹ The more famous and distinctive a luxury mark is, the stronger the legal protection the anti-confusion test would afford.¹⁰⁰

Second, the post-sale confusion doctrine prevents knockoffs from causing harm to luxury brands' quality reputation and prestige.¹⁰¹ In *Rolex Watch U.S.A., Inc.*

⁹³ See generally Haochen Sun, *The Distinctiveness of a Fashion Monopoly*, 3 *NYU J. INTELL. PROP. & ENT. L.* 142, 150 (2013).

⁹⁴ See *Hermès Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 109 (2d Cir. 2000).

⁹⁵ See C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 *STAN. L. REV.* 1147, 1176 (2009); Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH* 115 (PETER K. YU ED., 2006).

⁹⁶ See *People v. Rosenthal*, No. 2002NY075570, 2003 WL 23962174, at *1 (N.Y. Crim. Ct. Mar. 4, 2003).

⁹⁷ See *Polaroid Corp. v. Polaroid Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961), setting forth eight factors to be considered in determining the likelihood of confusion.

⁹⁸ *Polaroid Corp.*, 287 F.2d at 495; see generally *Nabisco, Inc.*, 220 F.3d 43.

⁹⁹ See *Louis Vuitton Malletier, S.A. v. Hyundai Motor Am.*, No. 10 Civ. 1611(PKC), 2012 WL 1022247, at *22 (S.D.N.Y., March 22, 2012), quoting *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 504 (2d Cir. 1996).

¹⁰⁰ See *Kenner Parker Toys Inc. v. Rose Art Indus.*, 963 F.2d 350, 353 (Fed. Cir. 1992). But see Barton Beebe & C. Scott Hemphill, *The Scope of Strong Marks: Should Trademark Law Protect the Strong More than the Weak?*, 92 *NYU L. REV.* 1339, 1342 (2017), calling for reconsideration of the Kenner doctrine.

¹⁰¹ See Jeremy N. Sheff, *Veblen Brands*, 96 *MINN. L. REV.* 769, 791 (2012).

v. *Canner*¹⁰² and *Ferrari S.P.A. v. Roberts*,¹⁰³ the courts ruled that the public circulation of knockoff watches that bore the “Rolex” trademark and cars that looked very similar to Ferrari’s had led consumers to question the quality, reputation and prestige of Rolex and Ferrari.¹⁰⁴

Third, the anti-dilution doctrine guards against blurring the distinctiveness of a famous trademark and tarnishing its reputation. The anti-blurring doctrine¹⁰⁵ “functions to prevent the prestigious images of luxury brands from being diluted into brands accessible to the mass public, an effect that would gradually whittle away the prestige of luxury brands.”¹⁰⁶ Tarnishment may occur when a trademark is linked to “products of shoddy quality, or is portrayed in an unwholesome or unsavory context.”¹⁰⁷ In this context, the harm caused by dilutive use is “that the public will associate the lack of quality or lack of prestige in the defendant’s goods with the plaintiff’s unrelated goods.”¹⁰⁸

Fourth, trademark law has widened the scope of the registrability of marks, enabling non-traditional luxury marks to receive legal protection against confusing and dilutive uses. These trademarks differ from those that are traditionally registered as word or logo marks. Famous examples are single-color marks such as the Tiffany blue¹⁰⁹ and Christian Louboutin red-sole marks,¹¹⁰ and motion marks such as the vertical opening mechanism of a Lamborghini door.¹¹¹

There is a key difference between brands owned by elite universities and those of luxury companies. Elite universities can be elevated to the status of *hyper* luxury brands,¹¹² due to their extremely low admission rates, enrolling just 5 percent of

¹⁰² *Rolex Watch U.S.A., Inc. v. Canner*, 645 F. Supp. 495, 490 (S.D. Fla. 1986).

¹⁰³ *Ferrari S.P.A. Esercizio Fabriche Automobili E Corse v. Roberts*, 944 F.2d 1235, 1244 (6th Cir. 1991).

¹⁰⁴ See Sheff, *supra* note 15, at 795.

¹⁰⁵ 15 U.S.C. § 1125(c)(2)(B) (2012).

¹⁰⁶ Sun, *supra* note 6, at 789.

¹⁰⁷ *Hormel Foods Corp. v. Jim Henson Prods.*, 73 F.3d 497, 507 (2d Cir.1996), quoting *Deere & Co. v. MTD Prods.*, 41 F.3d 39, 43 (2d Cir.1994).

¹⁰⁸ *Id.* See also Case C-408/01, *Adidas-Salomon AG v. Fitnessworld Trading Ltd.*, [2003] E.C.R. I-12537, ¶ 38.

¹⁰⁹ See *Color Branding & Trademark Rights*, COLOR MATTERS, www.colormatters.com/color-and-marketing/color-branding-legal-rights.

¹¹⁰ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012).

¹¹¹ See *Image Trademark with Serial Number 75883661*, JUSTIA TRADEMARKS, <https://trademarks.justia.com/758/83/n-75883661.html>.

¹¹² See José Amorim, *Luxury is Dead, Hyper-Luxury is the New Black*, LUXURY ACTIVIST, Sept. 9, 2015, <https://luxuryactivist.com/blog/friday-chronicle-16-luxury-is-dead-hyper-luxury-is-the-new-black>: “Consumers looking for premium products and services get more demanding and a real segmentation has happened. Some of them are looking for hyper exclusive products and services . . . Hyper luxury represents products that are rare, exclusive, extremely high quality, often handmade and unapologetically expensive.”

applicants every year.¹¹³ Luxury companies generally open their stores and services to the general public, selling goods or services to anyone who can afford them. Elite education goes beyond the purchase of luxury goods because money is not generally enough to gain admission to an elite university.

Another major factor determining the hyper luxury brand status of elite universities is their very limited recourse to trademark protection. For a number of reasons, elite universities do not need to rely on strong trademark protection in the same way that luxury companies do.

First, elite university brands rely very little on anti-confusion protection.¹¹⁴ For instance, Hotel Stanford is a three-star hotel located near Pennsylvania Station in New York City.¹¹⁵ It is highly unlikely that anyone would believe Stanford University has any affiliation with it because, according to the test set out in *Polaroid Corp. v. Polaroid Elecs. Corp.*¹¹⁶ for assessing the likelihood of confusion, there is no “competitive proximity” between a hotel and a university, nor would Stanford extend its business activities to hotel services. However, if a secondary school were to name itself Stanford High School, its position in the educational domain suggests an affiliation with the university that might cause confusion among the target consumers.¹¹⁷ Yet any journalist or curious parent could quickly and easily defeat the validity of this suggestion by fact-checking with Stanford University. Therefore, few schools would attempt such a false affiliation.

Second, elite university brands are impervious to post-sale confusion. Trademark law prevents circulation of counterfeit goods that damage the reputation and prestige of luxury brands.¹¹⁸ However, wearing a poor-quality counterfeit Harvard-branded hat, for example, does not necessarily harm Harvard’s brand reputation or prestige because they are related to the quality of educational services, not hats.¹¹⁹

Third, elite university brands can defeat dilutive uses largely because there is moral backlash against such uses. Suppose a company registered the “Princeton”

¹¹³ See John Fabian Witt, *Elite Colleges Don’t Understand Which Business They’re In*, THE ATLANTIC, Mar. 15, 2019, www.theatlantic.com/ideas/archive/2019/03/admissions-scandal-shows-real-goal-elite-colleges/584968.

¹¹⁴ See James Boyle & Jennifer Jenkins, *Mark of the Devil: The University as Brand Bully*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 391 (2021), showing that the top ten US universities are inactive in filing trademark oppositions, except Duke University.

¹¹⁵ A short walk from Pennsylvania Station, Hotel Stanford has a convenient setting, making it an ideal place to stay when in New York City. It is close to the Empire State Building, eateries, and shops, See *Hotel Stanford*, HOTELS COMBINED, www.hotelscombined.com/Hotel/Search?fileName=Hotel_Stanford&date=SundayFortnight&gclid=EAlalQobChMI952UvZfT5wIVW aSWCh2_YAVmEAAyAIAAEgKs6PD_BwE.

¹¹⁶ See *Polaroid Corp.*, 287 F.2d at 495.

¹¹⁷ See Mark Bartholomew, *Trademark Morality*, 55 WM. & MARY L. REV. 85, 119 (2013): “when a court perceives that the merchandiser intended to profit from the university’s brand goodwill, the university will typically succeed in its infringement claim.”

¹¹⁸ See *Hermès Int’l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 108 (2d Cir. 2000).

¹¹⁹ See Boyle & Jenkins, *supra* note 114: “When most people buy a T-shirt with Duke on it, they are not saying ‘wow, Duke makes such high-quality T-shirts.’”

mark for its toilet plungers. This mark, however, would blur the distinctiveness of the Princeton mark, because it would now be associated with products other than educational services.¹²⁰ Moreover, the reputation of the mark might be tarnished as it is “portrayed in an unwholesome or unsavory context.”¹²¹ However, universities are highly regarded by the public. Therefore, the public would treat such dilutive uses of educational marks as an offense to the moral mission of a university and it would be unlikely to be attracted to any toilet plungers bearing the Princeton mark.¹²² For these reasons, it is unlikely that a manufacturer would make such dilutive use of an educational mark.

Fourth, due to the importance they attach to history and tradition, elite university brands tend to use only conventional words and logos as trademarks. Unlike luxury goods companies, they have not (yet) used or sought to protect non-traditional marks such as color, smell, and motion marks.

IV. SOCIAL JUSTICE AND THE RIGHT TO HIGHER EDUCATION

The luxurification and conspicuous consumption of elite education are phenomena that do not only involve elite universities and wealthy families. In this section, I examine their implications for the protection of every human being’s right to higher education as a means of promoting social justice.

Since its inception within the framework of the United Nations, the right to higher education has paved the way for the enjoyment of higher-education equality: The 1948 Universal Declaration of Human Rights¹²³ states that “Everyone has the right to education” and “higher education shall be equally accessible to all on the basis of merit.”¹²⁴ And the ICESCR¹²⁵ states that to protect the right to education, states should ensure “higher education shall be made equally accessible to all, on the basis of capacity.”¹²⁶ The shift from “merit” to “capacity” broadens the coverage of the right to education to benefit students from disadvantaged backgrounds,¹²⁷ who may not have benefited from a strong primary and secondary education but

¹²⁰ 15 U.S.C. § 1125(c)(2)(B) (2012).

¹²¹ See *Hormel Foods Corp. v. Jim Henson Prods. Inc.*, 73 F.3d 497, 507 (2d Cir. 1996), quoting *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 43 (2d Cir. 1994).

¹²² See *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 422 (S.D.N.Y. 2002), ruling that tarnishment harms a famous mark because it “ceases to serve as a *wholesome* identifier of the owner’s products” (emphasis added), quoting *Deere & Co. v. MTD Prods., Inc.* 41 F.3d at 43.

¹²³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 26 (Dec. 10, 1948).

¹²⁴ *Id.*

¹²⁵ G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966.

¹²⁶ ICESCR, *id.* art. 13.; KLAUS DIETER BEITER, *THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW* 95 (2006), arguing that the term “capacity” is intended to include those who come from disadvantaged backgrounds.

¹²⁷ *Id.*, at 97.

nonetheless have the capacity for further study. The scope of the right to education is not clearly defined in the ICESCR because the cost of education is very high; states are only required to have higher education that is “equally accessible.”¹²⁸

Although the right to education is not a fundamental right provided for under the US Constitution,¹²⁹ US courts have attached importance to its protection as a civil right. In *Brown v. Board of Education*,¹³⁰ the Supreme Court relied upon “the importance of education to our democratic society” and the right to education to resoundingly invalidate racial segregation in the public school system.¹³¹ In *Grutter v. Bollinger*,¹³² the Supreme Court recognized the value of equality in higher education, ruling that the Equal Protection Clause of the US Constitution did not prohibit the University of Michigan Law School’s narrowly tailored use of race in its admissions decision to “further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”¹³³ This ruling was made because access to legal education “must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”¹³⁴ Moreover, the Court stressed the importance of equal access in public school to all segments of American society, and that “Nowhere is the importance of such openness more acute than in the context of higher education.”¹³⁵ Although *Grutter* deals with the Fourteenth Amendment as it applies to a public school, as a state actor, Congress has established the importance of equality in private educational institutions receiving federal financial assistance in Title VI of the Civil Rights Act of 1964.¹³⁶

What does the luxurification of higher education mean for access to it? In modern societies, higher status is as important as seeking more political and economic power

¹²⁸ ICESCR, *supra* note 126, art. 13(2)(c). See also, The UNESCO Convention against Discrimination in Education, art. 4.

¹²⁹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18, 30–39 (1973), ruling that education is not a constitutionally protected fundamental right that would trigger strict scrutiny of its infringement. Cf. *Gary B. v. Whitmer*, 2020 WL 1951894, at *32: “When combined with the historical analysis discussed above, this means that access to such a basic minimum education is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.”

¹³⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹³¹ *Id.* at 493: “education is perhaps the most important function of state and local governments . . . the opportunity of an education . . . where the state has undertaken to provide it, is a *right* which must be made available to all on equal terms” (emphasis added).

¹³² *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹³³ *Id.* at 343.

¹³⁴ *Id.* at 333.

¹³⁵ *Id.* at 331–32.

¹³⁶ See 42 U.S.C. § 2000d (2018): “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

because people care about how they are perceived by others.¹³⁷ Against this backdrop, the luxurification of higher education reinforces how the receipt of education confers social status.¹³⁸

People attain higher status with increasing, highly differentiated levels of educational attainment. A functionalist theory of education argues that the bestowal of different statuses by reason of educational attainment is beneficial to society, as people need to occupy a variety of social positions in order for society to function well. Education can help sort people into appropriate social positions by equipping them with the job skills needed for specialized occupations. The educational system reinforces social stratification and preserves social class inequalities from one generation to the next by sorting students according to social class and transmitting class-oriented norms, values, beliefs, and behaviors.

The luxurification of higher education drives social class division and inequality in education. This is because universities are stratified, just like people in society, and differentiated by students' social class background and academic accomplishments. Highly ranked universities tend to draw students with higher socioeconomic status, and students from more privileged backgrounds are more likely to attend high-quality, prestigious universities.¹³⁹ Receiving education at an elite university is a means of accruing, maintaining, and signaling economic power and prestige.

Such luxurification is completely at odds with equal access as the ethical basis for the right to higher education recognized by international human rights treaties, Congress, and the Supreme Court. US elite universities date back to colonial times when religious groups sponsored the college education of their clergy.¹⁴⁰ Later, upper-class men established colleges to nurture children of their own class.¹⁴¹ Until the 1950s, elite universities and colleges reserved admission for students "fortunate enough to have been born into the right family or to have attended a particular . . . high school."¹⁴²

According to the 1947 Truman Commission on Higher Education, "the social role of education in a democratic society is at once to insure equal liberty and equal opportunity to differing individuals and groups, and to enable the citizens to understand, appraise, and redirect forces, men, and events as these tend to strengthen or weaken their liberties."¹⁴³ From an individual standpoint, higher education is linked to an important array of benefits ranging from better personal

¹³⁷ See Stevens, *supra* note 68, at 32.

¹³⁸ *Id.* at 33.

¹³⁹ *Id.* at 215; RACHEL BROOKS, *EDUCATION AND SOCIETY: PLACES, POLICIES, PROCESSES* 70 (2019).

¹⁴⁰ See JEANNE H. BALLANTINE ET AL., *THE SOCIOLOGY OF EDUCATION: A SYSTEMATIC ANALYSIS* 415 (8th ed., 2017).

¹⁴¹ *Id.*

¹⁴² JACQUES STEINBERG, *THE GATEKEEPERS: INSIDE THE ADMISSIONS PROCESS OF A PREMIER COLLEGE* xiii (2002).

¹⁴³ GEORGE F. ZOOK ET AL., *HIGHER EDUCATION FOR AMERICAN DEMOCRACY: A REPORT OF THE PRESIDENT'S COMMISSION ON HIGHER EDUCATION* 5 (Harper & Bros.) (VOL. 1 1947).

and spousal outcomes, children's educational gains, greater longevity, and even lifelong happiness.¹⁴⁴ From a societal standpoint, higher education is the key to social mobility and creativity and a catalyst for free speech and democracy.¹⁴⁵

Elite universities have been utilizing diversity programs to admit students from different races through affirmative action and from low-income families through financial aid awards. In *Fisher v. University of Texas*,¹⁴⁶ the Supreme Court upheld the legality of race-based diversity programs provided that they can pass the strict scrutiny test.¹⁴⁷ Similarly, in *Students for Fair Admissions v. Harvard*,¹⁴⁸ the District Court for the District of Massachusetts upheld the legality of race-based diversity programs on the same grounds.¹⁴⁹

While elite universities promote equal access to higher education through affirmative action and financial aid, these schemes have had little effect on the luxurification of higher education. It is estimated that only 9 percent of freshmen attending elite universities are from families in the bottom half of the socioeconomic distribution,¹⁵⁰ and just 5 percent of American students at prestigious law schools come from families in the bottom half.¹⁵¹ Financial aid schemes also have limited impact. A study has shown that most elite universities, including five in the Ivy League, have more students from the top 1 percent of the US national income scale than from the entire bottom 60 percent.¹⁵² Scholars have pointed out that Americans have become accustomed to the reality that higher education comes at a phenomenal cost, requiring most middle-class families to save throughout a lifetime for their children's education at elite universities.¹⁵³

A recent proposal to shift the responsibility solely to the public educational sector has proven too politically controversial and is thus very unlikely to be accepted

¹⁴⁴ See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923): "The American people have always regarded education and acquisition of knowledge as matters of supreme importance"; Omari Scott Simmons, *Class Dismissed: Rethinking Socio-Economic Status and Higher Education Attainment*, 46 ARIZ. ST. L.J. 231, 260 (2014).

¹⁴⁵ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), ruling that education is "the very foundation of good citizenship"; Martha Minow, *Education and Democracy*, Oct. 17, 2017, <https://blog.harvardlawreview.org/education-and-democracy>: "Civics education ... leads to greater political engagement, voting, and higher degrees of acceptance toward people of different backgrounds."

¹⁴⁶ 133 S.Ct. 2411 (2013).

¹⁴⁷ *Id.* at 2421.

¹⁴⁸ 397 F.Supp.3d 126 (D. Mass. 2019).

¹⁴⁹ *Id.* at 191.

¹⁵⁰ MCKINSEY & CO., THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA'S SCHOOLS 9 (2009).

¹⁵¹ Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 632–33 (2011); Richard H. Sander, *Are Law Schools Engines of Inequality?*, 48 J. L. & EDU. 243 (2019).

¹⁵² See Gregor Aisch et al., *Some Colleges Have More Students from the Top 1 Percent than the Bottom 60*, NY TIMES, Jan. 18, 2017, www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html.

¹⁵³ See e.g., Heidi R. Gilchrist, *Higher Education Is a Human Right*, 17 WASH. U. GLOBAL STUD. L. REV. 645, 663 (2018).

nationally. In his failed bid for the 2020 presidency, Senator Bernie Sanders argued that “It is time to build on the progressive movement of the past and make public colleges and universities tuition-free in the United States – a development that will be the driver of a new era of American prosperity.”¹⁵⁴

Given the deep-seated problems caused by the luxurification of higher education and the ineffectiveness of federal government intervention, I propose that elite US universities should devote more of their resources to promoting equal access to higher education. One means of doing so is promoting equal access to knowledge. Intellectual properties include original expression of ideas in the form of textbooks, research papers, and literary books, and inventions with novel solutions to existing technological problems. Therefore, intellectual properties embody a rich repertoire of knowledge.¹⁵⁵ Moreover, the enjoyment of intellectual properties is non-rivalrous,¹⁵⁶ meaning that a person’s use of a work or an invention does not hamper others’ simultaneous use of the expression or technical features embodied in the work or invention. Therefore, the responsible exercise of rights over intellectual properties by IP owners has an enormous impact on the public’s access to knowledge.¹⁵⁷

Elite universities’ socially responsible use of intellectual properties can help promote the right to higher education through providing equal access to knowledge. First, they should take advantage of their copyrights over staff publications to participate actively in open access knowledge sharing and dissemination. Second, they should prudently exercise the fair use doctrine, a user right under copyright law, to make available the tens of millions of books housed in their libraries through an e-lending program.

Through fulfilling such responsibilities, elite universities will help bring protection of the right to higher education into a new era of social justice, so that students from all walks of life can benefit from the democratization of knowledge. The beauty of this democratization is that while at present only some students are able

¹⁵⁴ Bernie Sanders, *Make College Free for All*, WASH. POST, Oct. 22, 2015, www.washingtonpost.com/opinions/bernie-sanders-america-needs-free-college-now/2015/10/22/a3d05512-7685-11e5-bc80-9091021aeb69_story.html.

¹⁵⁵ See MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 4 (2012): “Intellectual property [bears] considerably on central features of human flourishing, from the developing world’s access to food, textbooks, and essential medicines; to the ability of citizens everywhere to participate democratically in political and cultural discourse; to the capacity to earn a livelihood from one’s intellectual contributions to our global culture.”

¹⁵⁶ See e.g., WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 199 (2004); JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 3 (2008).

¹⁵⁷ See e.g., Haochen Sun, *Copyright and Responsibility*, 4 HARV. J. SPORTS & ENT. L. 263, 317 (2013), concluding that “the law’s embracement of copyright holders’ responsibilities with their rights would serve as the path through which people can act in concert and then make wonders for the continuity of human civilization.”

to physically receive their education on elite university campuses, all students (whether nationally or globally, financially well placed or challenged, and of all ethnicities and genders) might benefit from the knowledge these universities and others commit to disseminating as widely and openly as possible.

CONCLUSION

The conspicuous consumption of elite higher education, as this chapter has revealed, is a phenomenon that treats elite universities as owners of luxury brands. The more surprising reality is that elite universities have actually become hyper luxury brands. Due to their extremely low admission rates, elite university brands are more exclusive than most luxury brands. This luxurification of higher education, however, runs counter to the ethos of education in general and the right to education in particular. As both international human rights treaties and the US Supreme Court have emphasized, the right to education entitles everyone to equal access to higher education. The luxurification of higher education stands in the way of this equality.

PART III

Conflicted Interests, Haunting Associations

Academic Branding and Cognitive Dissonance

Mark Bartholomew

Harvard's motto is "Veritas" ("Truth"). Yale's motto is "Lux et Veritas" ("Light and Truth"). The University of Arkansas tells people that it will "Veritate Duce Progredi" ("Advance with Truth as Our Guide"). Most other university mottos suggest something similar, maybe with some references to faith or virtue sprinkled in as well.

These mottos about the discovery of truth are federally registered trademarks for their respective schools.¹ Yet "Veritas" does not exactly match the perceived mission of university licensing directors and marketing consultants responsible for shaping higher educational brands. How does attempting to register the word "THE" as a trademark for Ohio State University advance the search for knowledge?² Is licensing the use of university logos on caskets anything more than a money grab? When a university articulates its brand identity through a constellation of empty signifiers – "excellence," "community," "purposeful engagement" – does this contradict the motto that encapsulates its original reason for being?

In general, it is hard to square the university's search for truth with its practices for building brand awareness and equity. As Derek Bok, Harvard's president from 1971 to 1991, noted, the values bound up in university research and teaching are not the ones shared by advertising professionals. "Advertising has very different values, animated by an overriding desire to sell the product," he says. "Although constrained by law from misrepresenting the facts, advertisers continually stretch the

¹ U.S. Trademark Registration No. 4,146,627 (Harvard) (registered May 22, 2012); U.S. Trademark Registration No. 1,666,147 (Arkansas) (registered Nov. 26, 1991); U.S. Trademark Registration No. 1,275,126 (Yale) (registered Apr. 24, 1984).

² In 2019, Ohio State filed an application to register "THE" as a federal trademark in connection with the sale of various items of clothing. The US Patent and Trademark Office denied the application, concluding that consumers would interpret the word as merely decorative and not as indicating the source of the goods.

truth, engage in hyperbole, omit contrary and qualifying information, and otherwise act in contradiction to standard precepts of good teaching.”³

If the university is meant to foster the search for truth and advertising is meant to provide narratives that only have a tangential relationship to the truth, how do different university actors conceptualize academic branding? When an individual holds two or more cognitions that are in conflict, psychologists posit that the individual feels an unpleasant mental state – dissonance – that they are driven to resolve. Cognitive dissonance is so distasteful that we alter our ways of thinking or develop new ways of thinking to push it away.⁴

The university is composed of many constituencies and it would be inaccurate to suggest that all of them have the same relationship to academic branding. Brand managers and athletics staff will be more intimately involved with university marketing efforts than professors. Those in the central administration may view themselves as perfectly aligned with such efforts, whereas students may be more conflicted and some faculty members may even define themselves in partial opposition. Still, I think it would be incorrect to deem university marketing as the exclusive preserve of college presidents and provosts with no impact on the thoughts or behaviors of other university actors. As I will try to illustrate below, the disconnect between the university’s traditional mission and the logic of today’s academic branding strategies may influence the attitudes and conduct of various university stakeholders even if they are not aware of this influence.

In this chapter – after further illustrating the divide between the university’s historical mandate to uncover knowledge and the very different goals of modern university marketing – I will discuss the rationales advanced to try and reconcile academic branding with the university’s traditional reason for being. First, there is the confusion rationale, which ameliorates concerns over university marketing behaviors by conceptualizing them as providing informational inputs that can be used for rational decision-making. Second, there is the compartmentalization rationale, which contends that less-than-truthful university branding does not do violence to the university’s larger goals so long as it is quarantined from the core aspects of the university’s truth-seeking function. Third, there is the competition rationale, which maintains that a new era of reduced public funding and global competition has so fundamentally reshaped the university’s mission that a turn to hyper image consciousness in university messaging is necessary. How well these rationalizations succeed in reducing the dissonance that might otherwise trouble

³ DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 177 (2003).

⁴ In this chapter, I am using the concept of cognitive dissonance as a way to examine the internal reshaping of the beliefs and attitudes of university constituents. Not all of the phenomena I describe here will match everyone’s definition of cognitive dissonance, but I use the term to emphasize the way in which positions on academic branding in today’s university are often rationalizations that are less than fully considered by various university actors.

different university actors remains to be seen. But their presence signals rhetorical strategies and cognitive adaptations that could influence the shape of the academy for years to come.

I. THE TENSION BETWEEN ACADEMIC BRANDING AND THE UNIVERSITY'S MISSION

The reasoned pursuit of knowledge is the historical lodestar of the modern university. By contrast, academic branding relies on irrational appeals devoid of information. Changes in the prevalence and content of university self-promotion have made the gulf between the university's traditional reason for being and its methods of self-promotion wider than ever.

A. *Reason and the University*

If you had to come up with a guiding rationale for the modern research university, you would likely center on the production of knowledge. Patricia Gumpert, a sociologist of higher education, maintains that higher education should be understood primarily as “a knowledge-processing system.” Knowledge, she says, serves as “the defining core of academic work and academic workers.”⁵ “The proper function of a university is the imaginative acquisition of knowledge,” said the philosopher Alfred North Whitehead.⁶

Acquiring this knowledge necessitated an environment built for the development and operation of rational thought. Universities in the late nineteenth century were designed for “the teaching of reason to selves and citizens.”⁷ Essential to this teaching was the use of one's deliberative, rational faculties. This was a shift from the previous conception of the American university as a training ground for moral (not logical) rightness. Aligned with religious institutions, early universities used rote memorization to instill a mental and moral discipline considered more important than the acquisition of knowledge. Then, influenced by a German model of higher education that stressed original investigation over instruction in moral or cultural traditions, a group of new university leaders reconceptualized the American university with knowledge production as its centerpiece. This new approach to higher education took “reason as the only authority” for the university.⁸

⁵ Patricia J. Gumpert, *Academic Restructuring: Organizational Change and Institutional Imperatives*, 39 HIGHER ED. 67, 81 (2000).

⁶ Alfred North Whitehead, *Universities and Their Function*, 14 BULL. AAUP 448, 449 (1928).

⁷ CHRISTOPHER NEWFIELD, *IVY AND INDUSTRY: BUSINESS AND THE MAKING OF THE AMERICAN UNIVERSITY, 1880–1980* 15 (2003).

⁸ James Arthur, *Faith and Secularization in Religious Colleges and Universities*, 29 J. BELIEFS & VALUES 197 (2008).

This view of the university still holds sway today. In 2015, Scott Walker, the former governor of Wisconsin, tried to change the University of Wisconsin's mission statement (enshrined in a state statute). Walker proposed striking the sentence "Basic to every purpose of the system is the search for truth," instead substituting the phrase "The mission of the system is to develop human resources to meet the state's workforce needs." Walker's edits ignited a "political firestorm," perhaps revealing that "the search for truth" still held center stage in public (as well as academic) conceptions of the state university system.⁹ Ultimately, Walker bowed to public pressure and Wisconsin's mission statement remained the same.

The American Association of University Professors deems "reasoned inquiry" to be the university's overriding goal.¹⁰ Of course, exactly what grounds the principle of reasoned inquiry is open to question. In an address on the purpose of the university, the philosopher Jacques Derrida described this largely uninterrogated underpinning as "a most peculiar void" that the modern research university was "suspended above." But for Derrida, it was unquestionable that reason, which involves a search for explanatory roots and causes of phenomena, was at the heart of the university's mission: "one cannot think the possibility of the modern university, the one that is re-structured in the nineteenth century in all the Western countries, without inquiring into that event, that institution of the principle of reason."¹¹

B. *Truth in University Advertising*

If the mission of the modern research university is the reasoned pursuit of truth, then it is hard to reconcile modern university marketing with that mission. Both in general terms and in the particular context of academic branding, modern advertising's reliance on persuasive techniques unrelated to a product's actual attributes or functionality seems out of step with the work of the university.

In general, most advertising promises audiences psychological satisfaction based on some abstract or imagined quality that cannot be verified by purchase or consumption of the advertised product. Trademarks become the repositories of these emotional appeals. Through arguably artificial product differentiation, brands and their associated commercial entreaties promise life satisfaction from individualist and materialist pursuits.

Just like pitches for luxury cars and handbags, direct mail solicitations to prospective students typically rely on sex appeal and prestige, not actual information about the school. For example, a recent multimillion-dollar ad campaign for the University of Oregon focuses on the tagline "IP" and "shows vague scenes . . . and

⁹ Adam Harris, *The Liberal Arts May Not Survive the 21st Century*, THE ATLANTIC, Dec. 13, 2018.

¹⁰ AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, FREEDOM AND RESPONSIBILITY (1970), www.aaup.org/report/freedom-and-responsibility.

¹¹ Jacques Derrida, *The Principle of Reason: The University in the Eyes of Its Pupils*, 13 DIACRITICS 2, 8 (1983).

doesn't highlight with any detail the specific academic programs at the university."¹² Justifying the rollout of an expensive new brand awareness initiative for DePaul University, that school's "senior vice president of Enrollment Management and Marketing" explained: "At DePaul, we know what sets us apart – a purposeful education, in a bold environment, supported by a caring ethos."¹³ This is the kind of empty blandishment used to sell any kind of product, from Doritos to Campbell's Soup. Cross-licensing arrangements – like the one between Victoria's Secret and nearly seventy public and private universities to feature both brands on T-shirts, sweatpants, and underwear – further tie academic brands to the well-worn path of emotional differentiation already blazed by non-educational entities.¹⁴

Advertising not only traffics in emotion rather than reason, but traffics largely in mistruths. In contrast to other modes of discourse, exaggeration is the rule rather than the exception when it comes to advertising. Although various parts of the advertising law ecosystem try to prevent deceptive marketing from infecting the marketplace, this ecosystem allows hyperbole to flourish with companies carefully skirting the line between verifiable falsehood and unverifiable prevarication. As described by one court, the legal doctrine of puffery amounts to "a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him."¹⁵ Thanks to this legal loophole, our daily diet of advertising is chock full of boastful, untruthful claims.

Seemingly bemoaning the untruthful nature of modern advertising, Judge Learned Hand described it as "a black art" that "every year adds to its potency."¹⁶ But it is not just the courts that recognize that most of the marketing messages that surround us are ones no one should take at face value. A 2013 survey of adult consumers in the United States revealed that 76 percent believed advertising claims were either "very exaggerated" or "somewhat exaggerated."¹⁷ A 2018 Gallup poll of Americans' views on different business sectors showed that the advertising and

¹² Kellie Woodhouse, *Scaling Back on Branding*, INSIDE HIGHER ED, Jan. 20, 2016, www.insidehighered.com/news/2016/01/20/university-oregon-drops-multimillion-dollar-branding-campaign.

¹³ *DePaul University to Launch New Comprehensive Brand Awareness Campaign*, DEPAUL.EDU, Apr. 19, 2018, <https://resources.depaul.edu/newsroom/news/press-releases/Pages/here-we-do-brand-awareness-campaign.aspx>.

¹⁴ One might object to juxtaposing emotion and reason here. Neuroscientists argue over whether an actual split exists between emotional and cognitive thinking. See PETER A. ALCES, *THE MORAL CONFLICT OF LAW AND NEUROSCIENCE* 84, 92 (2018). Yet even if emotion and reason do not represent discrete physical processes, there are still benefits to encouraging actors to engage their more deliberative faculties and to prompting advertisers to rely on techniques that engage such faculties. See Alfred C. Yen, *The Constructive Role of Confusion in Trademark*, 93 N.C. L. Rev. 77, 125 (2014).

¹⁵ *Pizza Hut, Inc. v. Papa John's Intern.*, 227 F.3d 489, 496 (5th Cir. 2000).

¹⁶ *Proceedings in Memory of Justice Brandeis*, 317 U.S. ix, xiv–xv (1942).

¹⁷ Lenna Garibian, 3 in 4 *Say Claims in Ads Are Exaggerated*, MARKETINGPROFS, Jan. 9, 2013, www.marketingprofs.com/charts/2013/9822/3-in-4-say-claims-in-ads-are-exaggerated.

public relations industry ranked toward the bottom, with an overall positive rating of just 3 percent.¹⁸ Another survey found that 65 percent of buying-age Americans agreed that they are “constantly bombarded with too much” advertising.¹⁹ If advertising is not filled with outright lies, the public considers it to be omnipresent, intrusive, and stuffed with vague untruthful promises and emotional appeals that a rational actor should not take seriously.

Modern university branding campaigns are no different. As explained by IMG College Licensing, which helps nearly two hundred US colleges and universities protect and promote their brands, “College is a lifestyle brand.” IMG’s mission is to stoke the “passion” of college consumers, not engage their deliberative faculties.²⁰ Like other marketers, universities engage in persuasive techniques that are less than completely honest. College admissions offices across the country tell high school seniors that they have been awarded “priority consideration” status even though virtually all candidates receive the same consideration. Purposely vague university marketing tends to obscure the real relationship between classroom offerings, actual learning outcomes, and job placement rates. Diversity is a characteristic that universities often sell through exaggeration rather than through information on the actual composition of their faculty or student body. One study determined that the whiter a school, the more diversity depicted in its college brochures.²¹ The exaggeration and non-informational content typical of today’s academic branding initiatives have little relationship to “reasoned inquiry.”

C. *Is There Really a Conflict?*

There is a long tradition of maintaining that the intrusion of commercial forces into the academic setting compromises the ability of university constituents to exercise their capacity for rational thought. Describing the philosophy that guided the rise of the research university in the nineteenth century, Christopher Newfield writes: “The faculty of reason could be developed and instilled in those fields where politics and commerce were held at bay. When politics and commerce intruded on these faculties, that would damage the development of reason.”²² In the early twentieth century, Upton Sinclair complained that advertising was unfit to serve as an academic subject in the modern research university because it lacked the rigor of real academic disciplines. For Sinclair, because advertising trafficked in racial

¹⁸ Lydia Saad, *Computer, Restaurant Sectors Still Top-Rated Industries*, GALLUP, Sept. 5, 2018, <https://news.gallup.com/poll/241892/computer-restaurant-sectors-top-rated-industries.aspx>.

¹⁹ Stuart Elliott, *The Media Business: A Survey of Consumer Attitudes Reveals the Depth of the Challenge that the Agencies Face*, NY TIMES, Apr. 14, 2004.

²⁰ About IMG College Licensing, IMG COLLEGE LICENSING, <https://imglicensing.com/clients/clc>.

²¹ Timothy D. Pippert et al., *We’ve Got Minorities, Yes We Do: Visual Representations of Racial and Ethnic Diversity in College Recruitment Materials*, 23 J. MKTG. HIGHER EDUC. 258 (2013).

²² NEWFIELD, *supra* note 7, at 15.

stereotypes and primal appetites, it grossly mismatched the reasoned discourse that was meant to be found in the university.²³ Along similar lines, Thorstein Veblen objected that business schools were “incompatible with the collective cultural purpose of the university.”²⁴

We see similar complaints from more modern critics. David Kirp maintains that embedded within the university are “values that the market does not honor,” including “the professor as a pursuer of truth and not an entrepreneur.”²⁵ Michael Sandel contends that advertising acts as a corrupting influence on the logical habits of mind that education is meant to cultivate. “Advertising encourages people to want things and to satisfy their desires,” he says. “Education encourages people to reflect critically on their desires, to restrain or to elevate them.”²⁶

A skeptic might argue that any diagnosis of a true disconnect between the university’s mission and today’s academic branding is overblown. The objections might come from two sides. First, one can argue that universities have always engaged in a bit of smoke and mirrors when it comes to presenting themselves to outsiders. Isn’t “Veritas” a branding exercise itself, more Barnum than Agassiz? If so, then maybe the university has been satisfactorily managing the tension between what it really does and how it sells itself to others for years.

It is true that universities have always engaged in a certain amount of self-promotion. Harvard sent out a promotional tract in 1643 entitled “New England’s First Fruits.” It depicted the college as a flourishing enterprise even though it had been temporarily closed for lack of funds. Over three hundred years later, a 1979 article in *The Atlantic* lamented “desperate new promotional techniques” in higher education, like handing out Frisbees to lure potential students.²⁷

Yet the prevalence and content of university self-promotion has changed greatly in recent years. There has been a sea change in the amount of university marketing from a flood of branded merchandise for sale to billion-dollar college sports television deals to full-body decals touting various schools wrapped around cars and buses. Academic branding now commands a significant share of higher education resources. American colleges spend over \$10 billion per year on marketing and the trend is headed steadily upward.²⁸

The actual messages imparted in university marketing have changed as well. Less and less of the message of university marketing is about tangible differences between one learning institution and another. Instead, much of today’s academic advertising

²³ UPTON SINCLAIR, *THE GOOSE-STEP: A STUDY OF AMERICAN EDUCATION* 315 (1923).

²⁴ Earl F. Cheit, *Business Schools and Their Critics*, 27 CALIF. MGMT. REV. 43, 44 (1985).

²⁵ DAVID L. KIRP, SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION 7 (2003).

²⁶ MICHAEL J. SANDEL, *WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS* 200 (2013).

²⁷ Edward B. Fiske, *The Marketing of the Colleges*, *THE ATLANTIC*, Oct. 1979, at 93.

²⁸ John Katzman, *The Spending War on Student Recruitment*, *INSIDE HIGHER ED*, Apr. 18, 2016, www.insidehighered.com/views/2016/04/18/too-much-being-spent-higher-education-marketing-assault-essay.

tries to concoct a narrative difference rather than showcasing an existing intrinsic one. When schools like Arcadia University (née Beaver College) change their name based on focus group research, that is not advertising designed around reasoned deliberation.

Second, there is the argument that academic branding, rather than disseminating emotional narratives for unreflective consumption by the university's consumers, represents a dialogue with students, alumni, and others. Free discourse between the university mark holder and outside audiences makes academic brands valuable only because consumers actively choose to invest the brand with their own predispositions, thoughts, and concerns so that the brand will service their personal identity projects. No matter how hard they try, the argument goes, advertisers cannot force audiences to accept their interpretation of inevitably multivalent messages. Academic branding can be better reconciled with the university's traditional function if we view much of the power to control brand meaning as being held by outsiders rather than the university itself.

Undoubtedly, the targets of academic branding messages, like other consumers, have some power to resist and reshape those messages. Not every effort at university branding is successful. Universities have abandoned some marketing campaigns after negative student reactions. And often the branding process involves solicitation of various university constituencies – alumni, faculty, students, etc. – for input before settling on a brand message.

Yet even if the targets of academic branding do participate in the creation of meaning, it still does not follow that academic branding matches the research university's mission of truth and rational deliberation. The meaning that arises through the interplay between advertiser and consumer is often irrational or emotional or created with less than full awareness on the part of the consumer. As I have suggested in other work, this meaning is often devoted to the construction of social identity. Advertisements are used to build affinities within particular groups and to signal difference with other groups. This may be a natural process of human self-definition, but it can also reflect instinct rather than reason.²⁹ It is hard to argue that the ultimate end product of university branding demonstrates a knowing collaboration between academic institutions and their target audiences. Most of the time, the students subject to these marketing blitzes argue that they are not affected by them at all.

Hand in hand with university branding come efforts to restrict the speech of those both inside and outside the university in service of maintaining a consistent brand ethos. Duke University blocks a business from registering DRANK UNIVERSITY as a trademark for use on athletics apparel. Harvard sues [NotHarvard.com](https://www.notharvard.com/), a website offering free online educational services. Ohio State insists that a tailgating event for

²⁹ Mark Bartholomew, *Advertising and Social Identity*, 58 BUFF. L. REV. 931, 936–44 (2010).

charity not be called “Eat Too Brutus.”³⁰ Enforcement of trademark rights means using the law to stop others from talking in order to protect the goodwill bound up in corporate identity. By leveraging trademark law to protect the value of their brands, university marketers engage in activity that can run counter to the university’s traditional goal of disseminating knowledge.

It is not just trademark litigation but the university’s approach to trademark management that runs counter to the ethos of the research university. University licensing guidelines attempt to screen out certain products from association with the university in an effort to preserve mark goodwill. But these guidelines are meant to police “taste” rather than facilitate the university’s truth-seeking mission. Indiana University prohibits use of its trademarks in “statements impugning other universities.”³¹ You can buy an official University of Georgia casket or barbecue set, but you can’t mention the DAWGS on a sex toy or merchandise involving “political issues.”³² The link between university trademark enforcement and taste suggests a throwback to an earlier era when universities were finishing schools teaching manners to young elites rather than engines for reasoned inquiry.

Another key element of today’s academic branding, cross-licensing, also makes the university complicit in restricting discourse. Victoria’s Secret, Dooney & Bourke, and Disney (specifically, the Star Wars franchise) all sell their own branded merchandise that simultaneously features university-held marks. Most recognizable is the cross-licensing that takes the form of sponsorship deals with sporting goods retailers. These arrangements can involve serious payouts for college athletics powerhouses as brands like Nike and Under Armour become fused with collegiate brands like the University of Oregon and Notre Dame. Even community colleges, which have much smaller athletics budgets and alumni networks than flagship universities, enter into multi-year arrangements with retailers like Adidas. But these deals come with many requirements, including contractual provisions obligating universities to take “reasonable steps” to address any remarks by university employees that disparage the supplier or its products. These contracts also specify the penalties for any attempts to avoid displaying the suppliers’ marks, including detailed sanctions for “spatting,” whereby a student athlete covers up the supplier’s logo with tape. Even though university branding guidelines routinely pay lip service to facilitating the university’s “educational mission,” it is hard to argue that such governance regimes are geared to the mission of seeking knowledge through reasoned inquiry.

³⁰ Brutus Buckeye is the athletics mascot of Ohio State University.

³¹ *Licensing and Trademark Policy*, UNIVERSITY POLICIES – INDIANA UNIVERSITY, <https://policies.iu.edu/policies/fin-licensing-trademark/index.html>.

³² *Trademark Policy*, MARKETING & COMMUNICATIONS – UNIVERSITY OF GEORGIA, <https://mc.uga.edu/policy/trademark#general-requirements>. DAWGS is a common nickname for the University of Georgia football team, also known as the Bulldogs. It is also a federally registered trademark of the University of Georgia. U.S. Trademark Registration No. 3,075,673 (registered Apr. 4, 2006).

II. DEALING WITH THE DISSONANCE CREATED BY ACADEMIC BRANDING

Cognitive dissonance theory conceptualizes dissonance as an aversive state much like hunger or thirst that we are compelled to reduce. According to Leon Festinger, the psychologist who introduced the theory, dissonance can be reduced by changing or downplaying one of the two cognitions that produce it.³³ If different university actors feel a tension between the university's mission of using the tools of reason to uncover truth and academic marketing strategies that appeal to the emotions rather than reason, then cognitive dissonance theory suggests that they will engage in a cognitive restructuring to ameliorate this tension. In the rest of this chapter, I unpack what I believe are the three primary rationalizations being deployed as part of this restructuring process.

A. *The Confusion Rationale*

Festinger proposed three primary methods for reducing dissonance: (1) altering one of the dissonant conditions; (2) minimizing the importance of a dissonant cognition; or (3) adding a new consonant cognition to the overall web of cognitions.³⁴ Under the confusion rationale, those troubled by academic branding can ease their discomfort by reconceptualizing university marketing as a benign means of providing relevant information for rational purchasing decisions. This rationale posits that academic branding does not traffic in irrational and emotional appeals. Instead, it provides outsiders with valid informational signals for making choices.

Under the confusion rationale, trademarking of university names, logos, slogans, and color schemes is valuable because it prevents consumers from confusing one school with another. As the person who oversees Stanford University's trademark licensing remarked in an interview, "if we didn't enforce our trademark rights in the name Stanford, the Block S and the Stanford seal, we might no longer be able to keep others from using them, and schools named Stanford could start popping up."³⁵ Seen from this perspective, university marketing teams and collegiate licensing firms are preventing confusion and promoting informational efficiencies in a way that does not clash with the university's mission.

There are some trademark disputes involving universities that do reflect a concern with making sure that consumers do not act under the influence of false information. Oklahoma State University objected to Ohio State University's attempt to register "OSU" as a trademark. One can disagree about the likelihood of confusion

³³ See LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

³⁴ Amanda S. Hinojosa et al., *A Review of Cognitive Dissonance Theory in Management Research: Opportunities for Further Development*, 43 J. MGMT. 170, 173 (2017).

³⁵ *Working to Protect Stanford's Good Name*, STANFORD REPORT, Mar. 15, 2010, <https://news.stanford.edu/news/2010/march/weinstein-trademark-qanda-031510.html>.

in this scenario, but at least Oklahoma State's action seemed to track trademark law's prime directive: protecting consumers from acting under a misimpression. Trademark law promotes competition by making sure that buyers can rely on truthful information about the source of the products they are buying. If consumers are likely to accidentally purchase "OSU"-branded merchandise thinking they are supporting the Cowboys of Oklahoma when they are really funding the Buckeyes of Ohio, then it makes sense for the law to step in and allow the Cowboys to enforce their trademark rights.

But much of academic branding is not about leveraging trademarks as efficient source identifiers. Instead, the goal is to turn university names, seals, mottos, and mascots into products themselves. At this point, protecting the academic brand means giving one entity exclusive control over a product desired by consumers, something that would seem to stymie competition rather than aid it. "When a trademark is sold, not as a source indicator, but as a desirable feature of a product, competition suffers – and consumers pay – if other sellers are shut out of the market for that feature."³⁶ University brands are valuable not just for their role in providing information, but for the way they provide ornamentation for consumers wanting to display narratives about themselves. The concern is that universities can wield trademark law to enforce a monopoly on these desirable product features and blockade competing and complicating (yet not confusing) communications.

Just look at the kinds of enforcement actions prosecuted by universities that reflect more of a concern with image maintenance than actual confusion. Much of what gets trademarked is not what one might think of as a classic university source identifier, like the name YALE or the image of the Florida Gator. University slogans, which university counsel federally register to ensure maximum protection, typically employ somewhat empty turns of phrase designed to have the effect of creating a positive brand valence for university audiences.³⁷ Non-academic entities are targeted for selling products that may clash with the brand meaning sought to be engineered by the university, not because of an actual likelihood of confusion. It's hard to believe that the use of "12th Man Hands" by a Washington State soap company would confuse fans of Texas A&M University, which holds a federal trademark registration in the mark "12th Man." Likewise, did Duke University really oppose a trademark registration effort by a small California winery for the name "Duke's Folly" because it "deceptively and falsely" signals a link to the North Carolina school? Schools like the University of Florida and the University of Wisconsin police against any use of their marks by high schools even though it seems unlikely that even the most unthinking consumer would confuse secondary education with these institutions of higher learning.

³⁶ Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 465 (2005).

³⁷ JACOB. H. ROOKSBY, *THE BRANDING OF THE AMERICAN MIND* 242 (2016).

Instead of being genuinely worried about consumers laboring under a misimpression, these legal actions are motivated by a desire to stifle any semiotic resistance to the university's desired brand personality. University marketing teams fret that outsider uses will cause people to change their impression of the academic brand or diminish the strength of that brand in their imaginations. The University of Texas, for example, filed a lawsuit to prevent a parody of its longhorn logo. The offending merchandise – a T-shirt featuring a longhorn silhouette, showing horns detached and drooping with the accompanying phrase “Saw ’Em Off” – was sold by an alumnus of Texas A&M. The T-shirts seemed unlikely to confuse anyone. Instead, the University of Texas wanted to use trademark law to prevent anyone supporting its in-state rival from depicting its longhorn logo in a bad light.

Even the legal action between Oklahoma State and Ohio State morphed from a dispute over consumer confusion into an effort to safeguard brand reputation. The schools reached a seemingly sensible settlement, agreeing to allow each other to use the OSU mark but stipulating that each school would avoid potentially confusing uses (e.g., Ohio State products featuring an orange-and-black color combination or referencing Oklahoma State's mascot Pistol Pete). But the settlement agreement also prohibits each school from using the OSU mark to disparage the other. The agreement offered these examples: Oklahoma State will not make T-shirts calling Ohio State a “wannabe OSU,” and Ohio State cannot produce T-shirts dubbing Oklahoma State a “copy-cat OSU.”³⁸ These are situations more relevant to “brand safety” than actual consumer confusion.

Using trademark law to centralize control over trademark meanings can be problematic, particularly when the trademark itself becomes the product being sold. Academic brands are increasingly used by consumers not to identify their source but to provide ornamentation. At the same time, trademark doctrine has become less rooted in protecting trademarks as vehicles for identifying a source, expanding instead to safeguard the emotional valences bound up with brands. The problem here is not trademark law as a whole but branches of trademark law that facilitate investment in the brand rather than the product itself.³⁹ Normally, trademark law spurs investment in product quality. If consumers are fooled into purchasing inferior

³⁸ Mark Cooper, *Oklahoma State, Ohio State Reach Agreement on Trademark Dispute over 'OSU' Acronym*, TULSA WORLD, Sept. 20, 2017, www.tulsaworld.com/sportsextra/osusportsextra/oklahoma-state-ohio-state-reach-agreement-on-trademark-dispute-over/article_a73a2be7-162d-5eba-8240-6c8646459299.html.

³⁹ Trademark law now recognizes confusion beyond source, including mere confusion as to whether a trademark use has been sponsored by or is affiliated with the university. Confusion away from the point of sale is also recognized. *E.g.*, *General Motors Corp. v. Keystone Automotive Indus.*, 453 F.3d 351, 358 (6th Cir. 2006). Maybe most significant in demonstrating how capacious current trademark protection can be, a cause of action for trademark dilution potentially allows colleges and universities to prevent unauthorized uses of their marks that are not confusing at all but somehow threaten to diminish their reputation or signaling power. 15 U.S.C. § 1125(c); *University of Kansas v. Sinks*, 565 F. Supp. 2d 1216, 1258-60 (D. Kan. 2008).

goods under false pretenses, consumers will punish the holder of the trademark by taking their business elsewhere and the incentives to invest in the quality of the underlying product decline. Trademark protection helps prevent this scenario and safeguards investments in goods and services by limiting consumer confusion. But business investment not in an underlying product but in the merchandising of the brand itself should arguably not be the concern of trademark law.⁴⁰

Concerns over granting trademark holders exclusive rights over ornamental use of their marks take on greater salience in the university context. For good reason, trademark law deems geographically descriptive marks as one of the weakest mark types and limits their protectability accordingly. Not only are such marks less likely to serve as an indicator of source to the public, but they are competitively important to other businesses as well. As one tribunal evaluating rights in the WISCONSIN BADGERS mark and Bucky the Badger logo surmised, these academic brands signify more than just the university, for some identifying the entire state.⁴¹ Many businesses in Wisconsin may want to use “Badger” in their names or the cardinal and white colors most associated with the state in their advertising. They may want to use such words and symbols to communicate their location in college towns or in the relevant state. Collegiate marks are also attractive because public universities can provide a source of civic belonging not just for students, faculty, and alumni but the greater community. Those outside of the public university often feel a sense of ownership and pride in it and use references to academic brands to convey their support not just for the institution itself but also for the larger public that institution is meant to serve. Nevertheless, state universities vigorously assert their exclusive rights to use state names and symbols on merchandise and courts have been favorably disposed to such efforts.

B. *The Compartmentalization Rationale*

Instead of reframing a problematic cognition, the compartmentalization rationale reflects an effort to minimize the importance of the belief that today’s university marketing strategies are antithetical to the truth-seeking mission of the university. By trivializing this concern, participants in academic branding can better justify their own counter-attitudinal behavior.

Under the compartmentalization rationale, appeals to non-reason designed to generate academic brand meaning are less of a concern because they can be walled off from the “real” work of the university. Corruption can be avoided in two chief ways. First, responsibility for academic branding can be outsourced to external actors

⁴⁰ Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of Rights Management*, 97 MICH. L. REV. 462, 506–14 (1998).

⁴¹ *University Book Store v. Board of Regents*, 33 U.S.P.Q.2d 1385, 1994 WL 747886, *10 (T.T.A.B., June 22, 1994).

that are not part of the research and teaching process. Second, certain spaces can be viewed as suitable for advertising, allowing the university to continue in its mission so long as marketing efforts are confined to those spaces.

The compartmentalization rationale posits that a quarantine of academic branding is successful when the responsibility for making appeals to non-reason is given only to external actors not considered part of the university's core mission. This is a key point because cognitive dissonance theory predicts that dissonance only occurs when behavior is perceived to have an unwanted consequence. If different university constituents believe that they can continue to satisfy the university's core mission while outside actors take care of the dirty business of marketing, meaningful dissonance can be avoided.

At least if we look to current practice, it appears that this rationalization holds some sway over university decision makers. A variety of tasks that the university itself used to manage – dining, health care, computer services, student housing – have increasingly been tasked to outside vendors. At this stage, few would argue with the privatization of at least some of these activities. Whether or not Panda Express is in the dining halls or Barnes & Noble runs the bookstore should have little to do with the scholarly mission of the university's faculty and students.

Other outsourcing decisions, however, do seem to come uncomfortably close to the core mission of the university. The school "brand" is mapped out by marketing consultants, not the teachers and researchers that arguably have the most to do with the actual university experience. And admissions offices have been increasingly outsourced, leaving the character of the student body to be determined by those not involved in the rest of the university's activities.

Entrusting such tasks to outsiders has consequences. After initially addressing licensing and trademark enforcement concerns within the university, a switch occurred in the 1990s and 2000s, as responsibility for trademark licensing and enforcement devolved to outsiders. As a result, the collegiate trademark licensing industry became more professionalized and enforcement more stringent. Along similar lines, some contend that the outsourcing of admissions and financial aid departments has put a greater premium on standardized test scores and a student's ability to pay, with the consequence that first-generation and minority students experience more difficulties than if admissions decisions were still performed in house.

These changes to how the university conveys what it is about, who can share that message, and who becomes part of the student body are critical to the university's primary functions. But maybe the scholar says that such changes have little impact on her individual research or students maintain that these changes do not affect their experience in the classroom. Better to have public relations firms manage academic branding and third-party vendors calculate how to yield the best students so that professors can focus on their real areas of expertise and interest.

The problem with the compartmentalization rationale is that the academic branding imperative is so totalizing that faculty and students cannot escape its

influence. Even though an outside agency may determine the content of an academic branding push, faculty and administrators are frequently deputized into carrying that branding message. In fact, higher education marketing consultants contend that faculty engagement is “essential” to the success of university branding campaigns.⁴² As a result, pressure develops to force faculty to toe the marketing firm’s line. Faculty are criticized for being guided by their own vision of the university and not following the marketing plan. Take this commentary from the higher education “communications agency” Noir sur Blanc: “It is also important to carefully monitor the consistency not only of the messages expressed by the communications department, but also those of the professors, students, and governing authorities . . . They must all speak with the same voice.”⁴³

Pushback from administrators meant to keep the faculty on brand can take various forms. Academic workers are instructed to include only designated university branding on stationery, PowerPoint slides, and other media shown to the outside world. This is just part of a larger package of very specific branding guidelines, including approved logos, fonts, and color palettes, that faculty are expected to comply with. For example, Waldorf University commands its employees to communicate in the way considered best for brand positioning: “All faculty and staff must use the designated Waldorf University email signature. The design of the signature should not be adjusted or revised. Only terminal degrees may be listed on email signatures.”⁴⁴

Of course, faculty may resist these branding imperatives, whether actively or passively. But these communications commands can have an effect not just on faculty actions but on the way faculty think about the institutions in which they work. Slight behavioral changes can produce lasting attitudinal changes. Psychologists have shown that rather than being simply the product of rational choice, preferences often flow from actions. The more actions academic actors are compelled to take in support of academic branding, the more inclined they will be to trivialize earlier beliefs that such actions run counter to the university’s underlying ethos.

Branding instructions are examples of hard power, edicts from the university command structure to comply with a chosen marketing message. But perhaps more important is the soft power exercised over university constituents thanks to constant exposure to a branding message and ethos. For example, faculty are urged to “develop their brand,” just like the school.⁴⁵ Scholars are advised to leverage their

⁴² Woodhouse, *Scaling Back*, *supra* note 12.

⁴³ HANOVER RESEARCH, TRENDS IN HIGHER EDUCATION MARKETING, RECRUITMENT, AND TECHNOLOGY 7 (2014).

⁴⁴ *Waldorf University Branding Guidelines*, WALDORF UNIVERSITY, www.waldorf.edu/about/brand.

⁴⁵ Jack Stripling, *Even for ‘Mad Men’ Obsessives, Higher-Ed Marketing Inspires Unease*, CHRON. HIGHER ED., June 5, 2016 (describing pressure for faculty members to engage in self-branding).

identity (along with their home institution's) on multiple platforms like Google Scholar and ResearchGate. These interfaces encourage professors to solicit clicks and downloads, the currency of reputation in these forums, which can be fostered through acts of self-promotion and the reciprocal self-promotion of peers. When you are already busy selling yourself, it becomes less disturbing to sell your institution at the same time.

Psychologists have demonstrated that we feel dissonance based not just on our own behaviors but the behaviors of those social groups to whom we feel a connection or affinity. The dissonance experienced by one social group member will be inferred and can spread to other members of the same group. And just as dissonance can spread vicariously, so can the attitudinal changes designed to reduce dissonance. Group members find themselves engaging in the same attitude changes in an effort to reduce discomfort. Just observing a fellow group member behave in a counter-attitudinal fashion can cause onlookers to alter their own attitudes to match. Hence, outsourcing responsibility does not really isolate the strategies of academic branding. Marketers influence other members of the university administration who in turn influence faculty and students.

The other way the compartmentalization rationale plays out is through arguments about space and territory within the university. One can rationalize the tension between academic branding and reasoned inquiry by believing that branding initiatives take place in designated zones that have little to no impact on scholarship and teaching. If marketing messages reliant on irrational appeals and exaggeration are confined to certain sectors outside the university's core or to areas that have already been ceded to the forces of commercialism and cannot be reclaimed, then little violence is being done to the university's central mission.

An example of this line of thought comes from Derek Bok. He distinguishes between selling ad space in football programs and college yearbooks (which he considers well outside the university's core mission) versus the touting of private products in campus classrooms. He cautions that this boundary is not watertight: "At the periphery of the educational process, however, advertisers wait like predators circling a herd of cattle and occasionally manage to pick off some careless member that strays too far from the group."⁴⁶ Still, the idea seems to be that the "educational process" is not threatened by branding exercises that take place in agreed-upon spaces.

The problem with this rationalization about university geography is that advertisers tend not to be content with annexing one campus territory while showing respect for the supposed sanctity of others; rather, they are constantly seeking to colonize new spaces. One of the main attractions of advertising in the university setting is that this setting (for now) has more credibility precisely because of its

⁴⁶ BOK, *supra* note 3, at 73.

commercially resistant history. As a result, there is a continual push to infiltrate previously ad-free spaces.

The colonization of particular territories in the university that would have triggered concern years ago no longer raises objections. The first sale of football stadium naming rights by a Division 1-A school occurred in 1996. Now dozens of schools have signed such deals. Duke Law School offers the opportunity to sponsor a stairwell. Harvard Law School and the University of Colorado even sold off the naming rights to their bathrooms.

This adcreep can also be observed in the kinds of products that are eligible for academic branding. University merchandizers have moved far past T-shirts, coffee mugs, and chairs embossed with the university seal. Now, specialized lines of Pop-Tarts feature the logos of public universities. Forty-eight higher educational institutions allow their trademarks to be licensed for college-themed caskets. Some institutions periodically make statements attempting to draw the line on what items are acceptable spaces for academic branding. Merchandising is acceptable on T-shirts and mugs, says Stanford's top trademark official, but "You won't find Stanford on caskets, toilet seat covers or shoddy merchandise."⁴⁷ But that is also what the University of Georgia maintained until it lobbied for a change in state law to permit the licensing of its trademarks to the funeral industry.

C. *The Competition Rationale*

To lessen dissonance, people will sometimes add a new consonant cognition to their mental web that acts to tip the scales in their thought process. If the new cognition takes hold, this mode of resolving mental tension can be quite successful. The competition rationale suggests that the tension between marketers and other university constituents is minimal because the marketing tactics employed by the former are essential given the economic realities of the modern market for higher education. Prioritizing university marketing, perhaps at the cost of other, more traditional priorities, may not always be desirable but it is necessary to compete in an era of globalization and reduced public funding for education.

Academic branding is necessary, according to the competition rationale, to successfully compete in the now all-important domains of admissions and alumni development. A frequent suggestion is that universities need to be run more like businesses in order to respond to the decline in public funding. If universities can no longer be propped up by the state, then they need donor dollars and an influx of students willing to pay high tuitions to stay afloat. To win over these audiences, universities must engage in a somewhat ruthless effort to differentiate their product from their competitors. This effort at differentiation requires using all the tools in the modern marketer's arsenal, including a focus on vague, emotional appeals.

⁴⁷ *Working to Protect*, *supra* note 35.

The dissonance between reasoned inquiry in the university and university marketing based on image rather than substance still exists. But the competition rationale helps soothe this tension as university stakeholders believe they have no real choice if they want the university to survive. Studies reveal that dissonance from a behavior is only triggered when individuals believe they have a choice to act in one way or another; if the individual believes she has no decisional freedom, then dissonance is avoided.

We see this rationale advanced by universities to justify their academic branding activities, often in cases of zealous trademark enforcement. The University of Alabama sued artist Daniel Moore for painting famous college football scenes that used the school's crimson and white colors. Moore, an alumnus of the university, maintained that he was just seeking verisimilitude in his art and avoided likely confusion by being careful not to feature Alabama trademarks anywhere outside the four corners of his realistic paintings. Alabama and a group of twenty-seven other universities that filed a brief of support in the case disagreed. They maintained that the case was about more than just confusion; it was also about the need for tight control over the university's image by the university itself. According to the brief, without such control over messaging, critical relationships with existing and prospective donors would founder, jeopardizing the schools' financial survival.⁴⁸

A similar point is made as regards the importance of branding in attracting students. University presidents and other administrators explicitly link successful branding strategies to student yields. For example, in announcing a partnership with Nike to revamp her university's name (emphasizing "Uconn" over "University of Connecticut") and unveil a new, fiercer, more modern look for its Husky mascot, President Susan Herbst said:

We're not breakfast cereal, and we're not a detergent. But we still need to communicate what we do, why we do it, how we do it, and that we do it well. So branding actually matters a great deal. As an institution with a global reach, we must compete on an international level for virtually everything: for students, faculty, staff, grants, awards, donations – you name it. And when we compete, we need to present ourselves at our very best, because how key audiences perceive our academic strength and overall reputation influences the choices they make.⁴⁹

Statements like this suggest that the use of modern branding techniques is imperative to differentiate the university from its competitors and ensure its financial survival.

For those in university administration, branding is not just necessary but central to the university's overall mission. According to George Mason University's vice president for enrollment management, winning new students, often from out of state or

⁴⁸ Brief of Amici Curiae, *Board of Trustees University of Alabama v. New Life Art*, 683 F.3d 1266 (11th Cir. Sept. 22, 2010) (Nos. 09-16412-FF, 10-10092-FF), 2010 WL 5650459, at *4–6.

⁴⁹ Stefanie Dion Jones, *UConn Announces New Visual Identity Program*, UCONN TODAY, Apr. 4, 2013, <https://today.uconn.edu/2013/04/uconn-announces-new-visual-identity-program>.

out of the country, is now “core to the work” of the university.⁵⁰ Indiana University’s associate vice president of marketing views his role as not “merely supporting institutional priorities” when it comes to student recruitment, but as “shaping those priorities.”⁵¹ In other words, the process of academic branding for students becomes a priority on par with the pursuit of truth.

Of course these last two statements are from university marketing managers, individuals who may not experience any cognitive dissonance over academic branding in the first place. But their comfort in speaking these sentiments openly reveals the competition rationale at work. If they believe that a hyper-image-conscious approach to student recruitment outweighs other concerns, then perhaps other university constituents are starting to believe that too. While faculty members may view chief marketing officers and the central administrations they work for as far removed from their own goals and priorities, the public pronouncements of university leadership surely have a role in steering the behavior and attitudes of its rank and file members.⁵²

Notwithstanding the rhetoric surrounding today’s academic branding, one thing that should be made clear is that these marketing strategies do not actually rely on differentiation, at least not on the basis of tangible campus qualities, which could be seen as providing rational inputs for students and donors to make decisions. Differentiation solely on the basis of a trademark, as opposed to actual product characteristics, is a controversial strategy, at least for law professors and economists. By codifying goodwill, trademarks naturally serve as symbols to distinguish one business from another. But a too expansive protection of trademarks – including protection of the valences created by effective advertising as opposed to improved product design – “can inefficiently impede competition through artificial product differentiation.”⁵³

Nevertheless, businesses routinely try to differentiate themselves based on the various emotional auras they create for basically interchangeable products. The Supreme Court recognized this as far back as 1942, describing successful branding as “people float[ing] on a psychological current engendered by the various advertising devices which give a trade-mark its potency.”⁵⁴ For consumers, Nike is different from Under Armour. Apple is different from Microsoft. Pepsi is different from Coke,

⁵⁰ Hal Conick, *Can Marketing Save Failing University Enrollment Rates?*, AMERICAN MARKETING ASSN., Nov. 1, 2017.

⁵¹ Rob Zinkan, *Beyond the Brand: The Marketing Department of the Future*, INSIDE HIGHER ED, May 3, 2018, www.insidehighered.com/blogs/call-action-marketing-and-communications-higher-education/beyond-brand-marketing-department.

⁵² Nicolas Raineri & Pascal Paillé, *Linking Corporate Policy and Supervisory Support with Environmental Citizenship*, 137 J. BUS. ETHICS 129, 142 (2016) (discussing how executive practices and pronouncements can alter an employee’s environmental values).

⁵³ Hannah Brennan, *The Cost of Confusion: The Paradox of Trademarked Pharmaceuticals*, 22 MICH. TELECOMM. & TECH. L. REV. 1, 13 (2015).

⁵⁴ *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 208 (1942).

with the former suggesting youth and the latter suggesting patriotism. These products are different in people's minds even if they are not very different from the perspective of product functionality.

Yet if academic marketing is meant to differentiate, it doesn't seem to be doing a very good job. University branding does little to indicate difference, and seems unlikely to be geared toward the product differentiation described by the Supreme Court, despite lip service to the contrary. "Sadly, all too many schools have branding messages that are interchangeable with hundreds of other schools. Happy students. Engaged profs. An emphasis on innovation."⁵⁵ Most people cannot articulate much difference between one university and another apart from geography and perhaps the record of their athletics teams. Part of the problem is that it is difficult to actually innovate in the university in a way that meaningfully changes the on-the-ground experience for students. Curricular reforms require staffing changes that can take years to accomplish.⁵⁶

Despite all the talk about the need for differentiation, scrutiny of university marketing shows that much academic branding is really about a message of sameness. Just a handful of consulting firms design university promotional materials, and they end up making them all look alike.⁵⁷ Schools rely on the same glossy viewbooks of pastoral scenes in their marketing. They employ buzzwords like "excellence" that are devoid of content. Attempts to define a unique brand personality collapse into vague signifiers that every school can lay claim to. For example, my institution lists its four brand attributes as "Purposeful Ambition," "Radical Empathy," "Global Perspective," and "Bold Participation." Branding guidelines claim these attributes "reflect the unique character of the university," but it is hard to argue there is anything unique about them.⁵⁸ Or take this supposed "revelation" from the focus groups convened to develop the brand strategy for Northern State University:

Our focus groups overwhelmingly showed NSU stakeholders want to see a caring and supportive brand instead of an angry or intimidating portrayal. Certain exceptions, such as athletics, are anticipated. Stakeholders also want to see professional portrayals of campus and its students, faculty and staff, but also fun and engaging interactions among faculty and students. Stakeholders believe students should be serious and focused, but willing to have fun, while being responsible.⁵⁹

Again, this is an effort to convey a brand message that does not yield to rational scrutiny. No one reading this or Northern State University's associated marketing appeals should think that the school is particularly "caring" or "fun" or "responsible"

⁵⁵ Roger Dooley, *College Branding: The Tipping Point*, FORBES, Feb. 5, 2013.

⁵⁶ Jeffrey Selinger, *Colleges Try to Make Humanities Majors More Popular*, THE ATLANTIC, Nov. 1, 2018.

⁵⁷ WESLEY SHUMAR, *COLLEGE FOR SALE: A CRITIQUE OF THE COMMODIFICATION OF HIGHER EDUCATION* 129 (1997).

⁵⁸ *Identity and Brand*, BUFFALO.EDU, www.buffalo.edu/brand/strategy/brand-attributes.html.

⁵⁹ *Northern's Brand*, NORTHERN.EDU, www.northern.edu/brand.

any more than they should believe non-university advertising that touts “delicious” food or “quality” service. Instead, university marketers flood targets with these vague signifiers in the hope that they will unreflectively associate those signifiers with the academic brand.⁶⁰

This is puffery, not a strategy of rational product differentiation in a competitive marketplace. Aside perhaps from the University of Chicago, schools are reluctant to emphasize scholarly rigor as a mark of difference between them and their competitors. And even “the place where fun comes to die” has been backing away from this method of differentiation, preferring to position itself as merely one part of a prestigious pack.⁶¹ As one marketing critic aptly writes, “Most higher education taglines are Weekend-at-Bernie’s-esque lifeless husks that do little more than reflect the pool of generispeak in which they float.”⁶²

Even if actual differentiation is not the goal, one can try to justify the current state of academic branding as necessary for other reasons. Advertising can be used to create positive emotional auras, even if those auras are not meant to develop a unique brand personality. Just by creating a positive emotional valence for their brand, advertisers can partially inoculate themselves from competitive forces. Sheer repetition, along with other efforts to reach consumer perceptions at a subconscious level, can produce positive somatic markers that are retrievable at subsequent moments of brand exposure and resistant to negative information the consumer may later be exposed to. This is advertising that does not serve an informational purpose, but may be useful for generating affirmative affective responses in its targets.

Yet if one is to believe this justification for the state of modern university marketing, then the university loses much of what made it different from other marketplace actors in the first place. Just because universities are supposedly becoming more sensitive to market forces, this does not mean they need to adopt the same persuasive strategies as all other commercial actors.⁶³ After all, the university has

⁶⁰ You may be able to think of a couple of exceptions. Deep Springs College stands out for its belief in student self-governance and the requirement that its students work as ranch hands during their undergraduate careers. Berea College charges no tuition. But these schools are outliers, exceptions that prove the rule when it comes to the general failure to differentiate the product of American higher education.

⁶¹ Meredith Meyer, *GPA's Get a .76 Boost from Grade Inflation*, CHICAGO MAROON, Jan. 18, 2005.

⁶² Ryan Millbern, *Taglines Are Dead: Who Killed Them, and How We Can Bring Them Back to Life*, RHB, July 3, 2016, www.rhb.com/taglines-are-dead.

⁶³ Part of the competition rationale maintains that schools need to use these non-informational advertising tactics to build a positive emotional aura for their donors lest they choose to spend their dollars elsewhere. But philanthropic donations are a drop in the bucket compared to the portion of university budgets that continue to rely on public funding and tuition dollars. Admittedly, in austere times every dollar helps. But it does seem strange to craft the university's image in an effort to reach a relatively small and non-essential group of people when it comes to the university's financial well-being. See CHRISTOPHER NEWFIELD, *THE GREAT MISTAKE: HOW WE WRECKED PUBLIC UNIVERSITIES AND HOW WE CAN FIX THEM* 126 (2016).

been treated as a special case under the law because it is thought to be a special, non-commercial place doing work for the public good. If the competition rationale is right, then higher education is no different from other enterprises seeking an advantage in the marketplace and its legal exceptionalism no longer makes much sense.

CONCLUSION

Academic branding is an intentionally public act with real consequences. Outsiders judge these acts. Insiders internalize them. We can't compartmentalize academic branding and assume it will have little effect on the university's public mission. And if we continue to believe that reasoned inquiry should form the centerpiece of that mission, the recent trajectory of university marketing initiatives is cause for concern.⁶⁴

Then there is the question of how to better harmonize academic branding with the tools of reason. Maybe debunking the rationalizations justifying the disconnect between current university marketing practices and the university's core mission will prompt a voluntary realignment, but I'm not optimistic. A more drastic but perhaps beneficial approach would be to alter the legal framework in which the university operates.

The vast majority of advertisers avoid telling outright lies, but university advertisers should be held to an even higher standard. In several areas of the law, exceptions exist for the special space of the university. Designed to promote the public externalities generated by higher education (e.g., technological advancement, supplying the workforce with skilled graduates), massive property tax exemptions for nonprofit status benefit both public and private universities. Another set of generous tax subsidies exists to stimulate demand on the part of potential students. Courts decline to do much to interrogate tenure decisions, in contrast to other employment actions, out of concern for academic freedom. Patent law provides special carve-outs for academic research.

All of these legal exceptions benefit higher educational institutions. But perhaps there is also room for special legal burdens for universities. To claim the benefit of its public mission, the university's communications messages should reflect that mission. Other businesses engage in puffery, but university marketers should decline

⁶⁴ Management studies reveal that cognitive dissonance represents a real and sometimes expensive psychological tax on the workers who experience it. When someone is unable to resolve cognitive dissonance, they remain in a negative affective state. Employees pushed to publicly display unfelt emotions can experience emotional exhaustion as well as higher turnover rates and tendencies toward alcoholism. Alicia A. Grandey et al., *When Are Fakers Also Drinkers? A Self-Control View of Emotional Labor and Alcohol Consumption Among U.S. Service Workers*, 24 J. OCCUPATIONAL HEALTH PSYCH. 482 (2019); S. Douglas Pugh et al., *Willing and Able to Fake Emotions: A Closer Examination of the Link between Emotional Dissonance and Employee Well-Being*, 96 J. APPLIED PSYCH. 377 (2010).

the legal privilege to lie their heads off so long as they say nothing specific. Effective advocacy requires telling a good story, so narratives that have emotional as well as factual components should continue to be a staple of academic branding. However, these narratives should be more strictly scrutinized than the marketing of other products and services. The more the university engages in the same branding techniques as the rest of the marketplace, the less claim it has to a public character, or any distinguishing character at all.

A Captive Audience

Corporate Propaganda on the American College Campus

Joshua Hunt

Edward Bernays, nephew to Sigmund Freud and architect of the modern public relations industry, built his career as a public intellectual around a single idea, which he articulated in the opening lines of his 1928 book *Propaganda*:

“The conscious and intelligent manipulation of the organized habits and opinions of the masses is an important element in a democratic society. Those who manipulate this unseen mechanism of society constitute an invisible government which is the true ruling power of our country.”¹

Such plain talk about propaganda was possible in part because the word was then seldom used in America, and loaded with fewer negative connotations than it holds for us today.² It was, from the very moment it was coined by Pope Gregory XV in 1622,³ a term associated with the weaponization of language and information – in particular, combating the spread of Protestantism by “propagating” the Roman Catholic faith. But its agnostic use remained uncommon until the nineteenth century, and its association with deception and falsehood did not arise until after the First World War.⁴ By writing *Propaganda*, Bernays hoped to rehabilitate the word and relieve it of some of its wartime associations, which he had, in fact, helped attach in the first place.

Propaganda remains an influential, foundational document for public relations and marketing professionals, but its core ideas were not drawn from private-sector experience; instead, they emerged from what Bernays learned during his time working as a propagandist for the United States government.⁵ As director of the

¹ Edward L. Bernays, *Propaganda* (Brooklyn, NY: Ig Publishing, 2005), 37.

² Bernays, *Propaganda*, 9.

³ Francis J. Weber, “Roman Archives of Propaganda Fide,” *Records of the American Catholic Historical Society of Philadelphia* 76.4 (1965): 245–48.

⁴ Bernays, *Propaganda*, 10.

⁵ Larry Tye, *The Father of Spin: Edward L. Bernays and the Birth of Public Relations* (New York: Henry Holt, 2002).

Latin News Service Branch of the Committee on Public Information, he'd helped President Woodrow Wilson gain public support for US involvement in the First World War. Even his insistence that propaganda is "an important element in a democratic society" was borrowed from George Creel, a former journalist who had served as the Committee's chairman. The organization's methods for stirring up a pacifist society to support American involvement in the war, Creel said, did not constitute "propaganda as the Germans defined it, but propaganda in the true sense of the word, meaning the 'propagation of faith'" – a distinction which conveniently leaves aside the anti-Protestant origins of the word and its use.⁶

In his book, what Bernays sought to propagate was faith in his own brand of propagation, which he claimed would benefit broad swaths of the American public. Businessmen, politicians, scientists, and even women's rights activists had much to gain by deploying propaganda, Bernays argued throughout the text. He was, of course, correct on every account, but in a roundabout way. Throughout the twentieth century, every aspect of American society, from business and politics to science and activism, was subsumed by corporate values, which privileged profits over every other consideration; but unlike the private businesses which ruled previous centuries, these publicly traded corporations were forced to disclose certain information to shareholders, regulatory bodies, and the public, even when that information might prove unfavorable to their bottom line.⁷ And so the production of propaganda came to be a core function of the modern corporation, which necessarily made it a core feature of the corporatized realms of modern business, politics, science, and activism.⁸

Propaganda in service of public higher education was of special interest to Bernays. In one of *Propaganda's* most prescient chapters, the author made a case for deploying professional propagandists in service of America's public universities:

The state university prospers according to the extent to which it can sell itself to the people of the state. The state university is therefore in an unfortunate position unless its president happens to be a man of outstanding merit as a propagandist and a dramatizer of educational issues.⁹

It would be many decades after Bernays wrote these words before America's public universities faced financial straits dire enough to resort to such tactics. And when at last they did embrace propaganda and dramatic narratives, university presidents chose to ignore the "educational issues" Bernays had suggested as the dramatis

⁶ James R. Mock, "The Creel Committee in Latin America," *Hispanic American Historical Review* 22.2 (1942): 262–79.

⁷ William G. Roy, *Socializing Capital: The Rise of the Large Industrial Corporation in America* (Princeton University Press, 1999).

⁸ David Miller and William Dinan, *A Century of Spin: How Public Relations Became the Cutting Edge of Corporate Power* (London: Pluto Press, 2008).

⁹ Bernays, *Propaganda*, 138.

personae. Instead, they sought to transform their institutions in ways that made them a better conduit for something which was already inherently spectacular: college athletics. They did this not as an end unto itself but in service of forging more lucrative partnerships with the global corporations which manufacture and market athletics shoes and apparel – most prominently Nike and Adidas.

The origins of these partnerships can be traced back to the late 1970s, when Nike employees paid college basketball coaches what was euphemistically called “sneaker money” – cash payments in exchange for a promise that their team would wear only Nike shoes on the basketball court.¹⁰ By May 1986, university administrators were so tired of being cut out of such deals that an NCAA committee was convened to draft new rules which authorized formal partnerships between universities and apparel makers; the following year, Nike cut its first “all-school” deal with the University of Miami, allowing the school to profit from a shoe company which had once charged them for sneakers and gear. All they had to do in exchange for free gear and a little cash was transform their student athletes into walking billboards for the brand.¹¹ The university presidents who approved such deals became, in effect, a kind of corporate propagandist.

Dave Frohnmayer, who served as president of the University of Oregon for more than a decade, was a pioneer and a model for this kind of public university propagandism. When he took over as the University of Oregon’s top administrator in 1994, Frohnmayer found himself at the helm of an institution facing a dismal financial situation. Four years earlier, Oregon voters had narrowly passed a piece of legislation called Ballot Measure 5, which severely cut the property-tax revenues that public schools across the state relied on for funding.¹² The institutions affected by these cuts included places of higher education like the University of Oregon (UO), which lost 10.5 percent of its state funding during Frohnmayer’s first two years as president.¹³ More funding would be lost with each passing year, Frohnmayer knew, but rather than appeal to “the people of the state,” as Bernays had advised, he turned instead to one Oregonian in particular: Phil Knight, a UO alumnus who also happened to be the founder and chief executive of the Nike corporation.¹⁴

Frohnmayer’s move made a certain kind of sense: while he was determined to replace his school’s lost public funding with private financial support, Knight, as the founder and chief executive of Oregon’s biggest corporation, had nearly endless

¹⁰ J.B. Strasser and Laurie Becklund, “Vaccaro: The Dean of Shoes,” *Los Angeles Times*, February 15, 1992.

¹¹ Richard W. Stevenson, “Supplying the Athletes: A High-Stakes Business,” *New York Times*, June 10, 1986.

¹² Richard J. Ellis, “Direct Democracy,” in Richard A. Clucas, Mark Henkels, and Brent S. Steel (eds.), *Oregon Politics and Government: Progressives Versus Conservative Populists* (Lincoln: University of Nebraska Press, 2005), 67–69.

¹³ David Sarasohn, “State Colleges: Onward and Downward,” *Oregonian*, February 12, 1995.

¹⁴ University of Oregon Archives Department, Dave Frohnmayer, major speeches, box 1, “State of the University Address,” 150 Columbia, University of Oregon, 3:00 p.m. on October 5, 1994.

financial resources.¹⁵ The business impresario also stood to gain much from a partnership with Oregon's flagship university: Nike, which had become a billion-dollar juggernaut selling basketball and running shoes, was increasingly focused on apparel deals with professional and collegiate football teams.¹⁶ Frohnmayer, meanwhile, had an appealing piece of drama with which to lure Knight. The University of Oregon needed to secure enough private funding to build an indoor practice facility for the school's football team, which had recently made a surprise trip to the Rose Bowl only to falter in the big game; with a top-flight indoor practice facility, rainy Oregon's flagship school could attract top recruits who might otherwise go to schools in California. Better recruits would lead to more wins, which would raise the school's profile and, Frohnmayer hoped, lead to more out-of-state students, who would pay higher tuition than Oregon residents.¹⁷

In theory, Knight's \$8 million gift toward the building of that indoor training facility, called the Moshofsky Center, should have been the start of a mutually beneficial relationship between Nike and the University of Oregon.¹⁸ But in practice, the power dynamic remained too unequal for the university to ever be anything but a silent partner. This was by design: Knight was not a philanthropist but a businessman, and his gifts to the University of Oregon were a kind of investment. And like any smart investor, Knight sought to gain maximum value through minimum buy-in – instead of paying for entire buildings or athletics facilities on UO's campus, he would pay up to half of the cost of a project and leave the school to find the rest elsewhere.¹⁹ Meanwhile, Knight maintained naming rights and an enormous degree of control over how these facilities would be built, unveiled, and used. For its part, the University of Oregon gained – along with each shiny new edifice – the tremendous debt which resulted from paying interest on cumbersome state bonds issued to shore up funds for Knight's on-campus projects.²⁰

There was another, far more fundamental reason why this lopsided power dynamic endured for so many years. The University of Oregon's financial relationship with Nike did nothing to address the core problem Frohnmayer set out to solve when he first courted Knight as a potential donor. The school's reliance on public funds had been too great, and the loss of those funds too sudden, for increased tuition dollars to completely erase the deficit left by Oregon's devastating property-

¹⁵ Kenny Moore, *Bowerman and the Men of Oregon: The Story of Oregon's Legendary Coach and Nike's Cofounder* (New York: Rodale, 2006), 156.

¹⁶ Mark Asher, "NCAA Schools Search for Shoe Deals that Fit," *Washington Post*, November 19, 1995.

¹⁷ Kerry Eggers, *The Civil War Rivalry: Oregon vs. Oregon State* (Charleston, SC: History Press, 2014), 380.

¹⁸ "Matching Gifts Endow Knight Chairs," *News & Views: Faculty and Staff Newsletter of the University of Oregon*, June 11, 1998; author interviews.

¹⁹ Greg Bolt and David Steves, "Legislators Demand Transparency from UO Arena Project," *Eugene Register-Guard*, May 25, 2010; author interviews with Eugene labor representatives.

²⁰ Henry Stern and Mark Zusman, *Willamette Week*, May 18, 2010.

tax cuts. And so, rather than improving the school's financial position, Knight's funds merely improved its image in the world of collegiate sports. Functionally, it grew more debt-ridden with each partially funded project, which Knight, on more than one occasion, forced the school to issue bonds against as a means of securing the remaining funds.²¹ This led the school to become increasingly dependent on Knight's continued support, which in turn transformed Frohnmayer into something Bernays had not imagined when writing his chapter on propaganda and American education: an educator as corporate propagandist.

Frohnmayer's role as a Nike propagandist was not metaphorical or symbolic. It was, in fact, shockingly literal. In 1999, he allowed Knight, who was by then the school's most generous private benefactor, to have his company rebrand the state's flagship public university. It was in every way unprecedented and, for most, unimaginable – a private corporation, with shareholders and executives and quarterly profit targets, constructing for a public institution of higher learning a “brand identity” which would for years to come define it in the public sphere. The task was carried out by Rick Bakas, a Nike designer working in the company's apparel department. It was, he said, “unlike anything that had ever been done before in terms of corporate branding.”²²

The level of secrecy surrounding the endeavor was also unlike anything previously undertaken as part of a corporate partnership with a public university. Thomas Hager, who was then the University of Oregon's director of communications, called it “a sort of *fait accompli*,” known to more people on Nike's Beaverton, Oregon campus than on the UO campus itself.²³

“Supposedly I was in charge of external communications for the university and I had not been privy to any discussions about changing things,” Hager said. In this case, however, he found out only when he was called into a meeting for a kind of unveiling of the school's new logos and branding materials. One reason that people like Hager were increasingly left out of the loop is because some university work was actually being outsourced to Nike employees; other times, it was passed off to a new generation of university employees who were trained from the beginning of their careers to act in deference to those Nike representatives who were collaborating with the university.²⁴ These employees were overwhelmingly communications, public relations, and marketing staff, whose ranks grew so quickly at the University of Oregon that by 2018 they numbered more than the combined faculty of the school's departments of history, economics, and philosophy. And because they were dispersed throughout various departments and offices at the school, these propagandists spread their habits and impulses to every facet of university operations. The damage

²¹ University of Oregon Archives Department, “UO Building Costs 97–06,” 11.151.A, Box 3, file 3.

²² Rick Bakas, “How the Oregon Ducks Brand Was Created,” Bakas Media blog post, December 16, 2014; author interviews with Rick Bakas.

²³ Author interviews with Thomas Hager.

²⁴ Author interviews with Thomas Hager.

they caused through unbridled obfuscation and spin is incalculable, but the symptoms of this disease are easy enough to examine once they do come to light.

One especially egregious example surfaced in May 2014, when various media outlets discovered that a University of Oregon student had reported being raped by three of the school's basketball players two months earlier.²⁵ Instead of sanctioning the players and investigating the incident when it was reported, the school had sought to keep the victim's criminal report quiet until the team's post-season "March Madness" participation was complete. And rather than launching a Title IX investigation in accordance with federal law, university administrators instead tasked the school's top public relations professionals with devising a plan for dealing with the scandal that would unfold if the rape report ever came to light. Within twenty-four hours of the sexual assault, those public relations staff set to work on what they called a "Sexual Violence Prevention Communications Plan." It consisted primarily of various talking points meant to persuade media outlets that the "University of Oregon provides a safe environment for its students, and leaders are committed to cultural change to focus on survivor support."²⁶

In interviews with local media, Vice President of Student Affairs Robin Holmes reiterated claims about "survivor support," which was among the "key messages" of the communications plan – a document which effectively served as a blueprint for creating propaganda that cast the school's mishandling of campus sexual assault in a more favorable light. In an interview with the *Oregonian* daily newspaper, for example, Holmes emphasized that the University of Oregon has "counseling center staff who have specialty in regard to sexual assault."²⁷ This was true, and in fact Holmes, a licensed therapist herself, was in charge of the office which oversaw such student counseling. But as if to underscore how thoroughly corrupting Nike's influence on the University of Oregon had become, its Counseling and Testing Center soon developed into yet another arm of the institution's growing propaganda apparatus. Rather than taking part in the actual production and dissemination of propaganda, its role was one that has been essential to state propaganda operations since the First World War: intelligence gathering.

The case, which unfolded in December 2014, involved the student who reported being raped by three University of Oregon basketball players earlier that same year. Some months after the incident, this student began seeing a therapist named Jennifer Morlok at the school's Counseling and Testing Center. Another woman working there in an administrative capacity was Karen Stokes, who opened her email one day in December 2014 to find a strangely informal request from a superior named Shelly Kerr. Her request was that Stokes make a complete copy of a medical

²⁵ Police report: http://media.oregonlive.com/ducks_impact/other/14-04131.pdf.

²⁶ Julie Brown email to Rita Radostitz, March 10, 2014.

²⁷ Andrew Greif, "Q&A: Oregon VP Robin Holmes Speaks on Rape Accusations and Oregon's Response," *Oregonian*, May 7, 2014.

file belonging to a patient seeing Morlok, and send the copied file to the University of Oregon's general counsel. Stokes was also asked not to stamp these copied pages, as was usually done with documents that were not originals, and not to document the fact that the file had been copied. Kerr further asked her not to discuss the matter, which was maybe the strangest and most suspicious comment of all. Stokes was unnerved by the odd request, which violated a number of standard procedures and protocols, so she checked the student's file to see if it included a consent form authorizing any of what she'd been asked to do; when she found no such form, Stokes printed out Kerr's email and brought it to Morlok, who was also disturbed by it. Before long, the two women realized what was going on: the university, which had mishandled this student's sexual assault complaint and was anticipating a lawsuit, sought to find information in her confidential therapy files which it might use against her in court.²⁸

As propagandists for Nike, the University of Oregon didn't merely seek out information that might discredit or defame a woman allegedly raped by three athletes wearing the brand's shoes and apparel. Its agents further sought to conceal information which might cast the company or its relationship with the university in a bad light. In the university's Office of Public Records, for example, incoming employees were given an intake interview by top public relations officials working at the school. During these interviews, they were asked to forward all public records requests to someone from the Office of Public Relations for vetting, especially if it involved anything which might reflect poorly on the University of Oregon or Nike. Such behavior is, of course, a serious breach of state and federal laws concerning public records, which are supposed to be made available to anyone requesting them, swiftly and with few exceptions – FERPA laws, for example, require that personal identifying information be redacted from emails or other documents released to the public.

It is also a serious breach of ethics to treat an office of public records as an instrument of propaganda: stewards of public records, who are on staff at all public institutions, are tasked with releasing information to journalists and members of the community based on state and federal laws. Work emails sent by university administrators, faculty, and other school employees, for example, are all public records, and are supposed to be made available to anyone who asks for them – whether they contain information that would be embarrassing to the school or its corporate benefactor should not be a consideration. And yet, for Nike's propagandists at the University of Oregon, the latter was very often the first and only consideration, according to former UO Office of Public Records employees.²⁹

²⁸ *Stokes and Morlok v. University of Oregon et al.* (2016), US District Court for the District of Oregon; author interviews with Jennifer Morlok.

²⁹ Author interviews with current and former employees of the University of Oregon, Office of Public Records.

Such behavior casts two very different shadows over claims Bernays made regarding the usefulness of propaganda in a democratic society. On the one hand, its efficacy is unquestionable, especially in the realms of politics, business, activism, and education, as Bernays outlined in *Propaganda*; at the University of Oregon, propaganda deployed in service of the school's financial relationship with Nike has been so successful that many now refer to the school as "the University of Nike" – a sobriquet, once derogatory, which it now embraces.³⁰ On the other hand, propaganda's utility for democracy is questionable, and in the realm of public education it is quite clear that it is often incompatible with democratic ends. Because of the school's relationship with Nike, students at the University of Oregon have unequal access to an education and to facilities funded by their tuition dollars; some students, like the rape victim from March 2014, are even denied access to the most basic forms of justice and dignity. Instead of making Oregon's flagship university a more egalitarian institution, Knight's largesse and Nike's corporate influence have transformed it into a kind of corporate fantasy world. It became the kind of place where reality was less important than appearances; instead of the truth, public records stewards and media relations specialists at the university worked hard to ensure that the outside world saw only favorable coverage of their institution. Like state-run media organizations in authoritarian regimes, they accredit for sporting events only those journalists who cover them favorably, and seek to discredit, censor, or hobble those who offer critical analysis of how the school operates. By restricting the public's access to information which may reflect poorly on the university or its corporate benefactor, the only options available to the media are positive stories. But of course, propaganda has its limits, and the illusions it creates can only stand up to a certain degree of scrutiny before they collapse.

Until recently, one of the most effective propaganda campaigns carried out by Nike and the University of Oregon had to do with the nature of the partnership between these two entities. Despite the fact that the university has for years remained perpetually underfunded and reliant on significant tuition hikes,³¹ while funding from Nike and Knight goes almost exclusively toward building projects that in time become a drain on the school's dwindling financial resources, it has long been held up as a model of success. Administrators at the University of Maryland, in fact, cited Nike's partnership with Oregon as its inspiration for pursuing a similar relationship with Under Armour, an athletics apparel company founded by Maryland alumnus Kevin Plank. In 2014, the school signed a \$33 million athletics equipment deal with the company, which had positioned itself as a challenger to Nike and Adidas.³² But several years later, when faced with financial pressure amid a global economic

³⁰ Greg Bishop, "Oregon Embraces 'University of Nike' Image," *New York Times*, August 2, 2013; author visits and interviews.

³¹ University of Oregon, Office of Admissions.

³² Marc Tracy, "Under Armour Seeks to Do for Maryland What Nike Did for Oregon," *New York Times*, August 25, 2015.

downturn, Under Armour announced in June 2020 that it would seek to pull out of two major college sponsorship deals. One of these deals was, at the time of its signing in 2016, the largest apparel deal in the history of college sports: \$280 million paid out to UCLA over the course of fifteen years in exchange for making Under Armour the school's exclusive sports apparel partner. The other deal, with UC Berkeley, was worth \$86 million over the course of ten years.³³ With the matter now headed to the courts, it will not be the first time UC Berkeley has had a corporate partnership end in acrimony and embarrassment. In 2007, the school entered into a controversial partnership with the British oil company BP, which pledged \$350 million for the construction of an Energy Biosciences Institute on the Berkeley campus. In the end, the oil company pulled much of its funding after the project failed to improve its image as a company committed to renewable energy sources.³⁴

This was a prime example of what Bernays called the promotion of “artificial values,” and in the end it was a disaster for both the institutional propagandist and its corporate client. There is reason to believe that a less artificial pairing might have produced better results – for example, collaboration with a corporation whose executives held some shared values with the leaders of its university partners. But increasingly, it seems that a public university like Berkeley would almost certainly be better served by focusing on ways to “sell itself to the people of the state,” as Bernays emphasized.³⁵

In the coming years, it is entirely likely that America's public universities will need to reimagine propaganda in order to sell themselves to the people of the state, as Bernays once advised – to “propagate faith” in public higher education, which has been diminished in reputation by years of corporatization only to now face financial collapse as a result of an unforeseen global pandemic. Administrators at institutions like the University of Oregon have endured years of criticism for selling out to Nike and other corporate benefactors, but they could at least console themselves with the money, the building projects, and the endowments these partnerships produced. And, of course, they could point to the rising out-of-state enrollment, which helped shore up lost state funding by making the university more reliant on those students willing to pay more to attend. Now, over the course of a year living through a global pandemic, such funding models, which were never well thought out to begin with, have come under tremendous strain and may need to be replaced with something better – many corporations, after all, will be in no position to hand over millions of

³³ Sara Germano, “Under Armour Pulls Out of Two Major University Sport Deals,” *Financial Times*, June 30, 2020.

³⁴ Eli Kintisch, “BP Bets Big on UC Berkeley for Novel Biofuels Center,” *Science* 315.5813 (February 9, 2007); Erik Neumann, “Not So Fast: At UC Berkeley, Biofuel Research Takes Hit as BP Oil Company Backs Away,” *California Magazine*, February 4, 2015, <https://alumni.berkeley.edu/california-magazine/just-in/2015-02-20/not-so-fast-uc-berkeley-biofuel-research-takes-hit-bp-oil>.

³⁵ Bernays, *Propaganda*, 138.

dollars for building athletics facilities or libraries on college campuses. And students from out of state, as well as those paying in-state tuition, will question in ever larger numbers the wisdom of paying immense sums of money for classes which must be taught partly online; others may question the wisdom of ever going back to the way things were before, especially if the college experience is no longer much of an experience at all.

When the pandemic has ended and America's public universities must once again sell themselves to prospective students, they will undoubtedly turn to Bernays and the methods he outlined in *Propaganda*. Their success or failure may depend, ironically, on the effects of propaganda elsewhere in society: What use is a university, after all, in a society which has no use for truth?

When Brands Go Bad

The Rise and Fall, and Re-Rise and Re-Fall, of Isaac Royall, Jr.

Janet Halley*

I am the current holder of the Royall Chair at Harvard Law School (HLS). I inhabit a troubled brand. This chapter tells a story of a mark associated with it: a heraldic shield with three gold wheat sheaves on a field of blue (Figure 9.1). The vicissitudes of this mark, going on 300 years old, demonstrate how even a long-lived and much-valued brand can fall to the winds of reputational change; and how even a devastated brand can recover its lustre when those winds change course. Looking it all over, I am struck by the stubbornness of symbolic value as much as I am by its frailty in the face of political and moral contestation.

For me, the story starts with my becoming eligible for a Chair, through sheer seniority, in 2006. I had come over from Stanford Law School in 2000, and there was a lot about my new local academic culture that escaped me. There are no monetary or other upsides of a Chair designation to the faculty member, and the only expectation it entails is the delivery of an inaugural “Chair lecture.” But still, getting so senior that you qualify for a Chair is not nothing. I noticed that a number of the Law School’s oldest Chairs were empty, and I called up Dean Elena Kagan (who served in this capacity from 2003 to 2010) with a simple request: “Give me an old one.” She took it under consideration, and that was the end of our conversation.

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FIGURE 9.1 Royall family shield with crest. W.H. Whitmore (ed.), *The Heraldic Journal Recording the Armorial Bearings and Genealogies of American Families*, vol. 1 (Boston: J.K. Wiggin, 1865), 12.

At the year-end faculty lunch where the new Chairs are announced, Dean Kagan announced that I was the new Royall Chair. A gasp went around the room. Why? I was completely in the dark.

Soon afterwards, I learned that I had a tiger by the tail. Daniel R. Coquillette, who was co-writing the unofficial history of the Law School together with Bruce A. Kimball,¹ graciously provided me with all his files on Isaac Royall, Jr., the donor of the Chair. His research assistant at the time, Elizabeth Kamali – now a tenured colleague on the faculty – helped me figure out the old documents.

What I learned from these files astonished me. This donor had come with his father and family to New England from Antigua in 1737, where they had owned multiple sugar plantations and held dozens of human beings in bondage. They traded in sugar and slaves as part of the Triangle Trade. In 1734 alone, Isaac Royall, Sr. sold 121 human beings.² After a drought and an earthquake, followed by a panic over a slave uprising and its severe repression, the family left Antigua for New England, settling in Medford, a town very close to Cambridge. They brought a large number of enslaved persons to their large Medford estate and proceeded to farm the land and live like the 1 percent of their era. Their large slaveholding was unusual in New England: essentially, they pared down the sugar plantation model of slaveholding and transposed it onto the more household-based New England slave/indentured-labor landscape.

When Isaac Royall, Sr. died in 1739, Isaac Royall, Jr. stepped into his father's life. Today we can tour the grand Georgian home he and his family inhabited on the banks of the Medford River; it is now run as the Royall House and Slave Quarters and curated to enable a deep comparison of the lifeways of the white Royalls and the people they held as slave labor (Figure 9.2). The site includes the large and well-preserved and probably only surviving slave quarters in New England. The Royall

¹ Daniel R. Coquillette and Bruce A. Kimball, *On the Battlefield of Merit: Harvard Law School, the First Century* (Cambridge, MA: Harvard University Press, 2015).

² Alexandra A. Chan, *Slavery in the Age of Reason: Archaeology at a New England Farm* (Knoxville: University of Tennessee Press, 2007), 50.

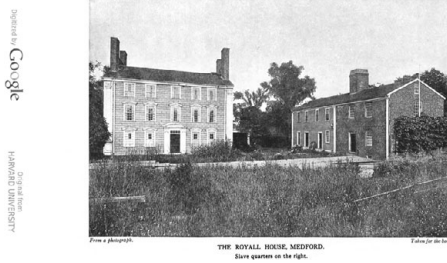


FIGURE 9.2 Royall House and Slave Quarters. Samuel Adams Drake, *Some Events of Boston and Its Neighbors* (Boston, 1917).

House and Slave Quarters Board commissioned Alexandra Chan to do an archaeological study of the latter, which yielded considerable information unattainable from the written record.³

Isaac Royall, Jr. fled to London at the outbreak of the Revolutionary War, and wrote his final will there.⁴ It had two provisions that continue to provoke interest. In one, he made a grant to Harvard College to establish a “Professor of Laws . . . or . . . Professor of Physick & Anatomy” (what we would call medicine) (Item 12, Codicil Item 5). This is the Chair I now hold. And secondly, he provided for a single one of his enslaved human beings, Belinda, the option of freedom or becoming the personal property of his daughter, and stipulated (as the law of Massachusetts then required) that if she chose her freedom, she would not become a charge upon the town of Medford (Item 5). This implied that his estate would provide her with maintenance, if needed, to prevent her from becoming so needy that the town would be obliged under the Poor Law to support her, but the will made no explicit provision for her support.

Isaac Royall, Jr. had no income of which we are aware that was not directly or indirectly derived from slave labor. In light of this whole story, it’s no exaggeration to say that the commencement of legal education at Harvard was enabled by the large-scale exploitation of black slaves. Symbolically, the link from that money to HLS was my *Chair*.

For my 2006 Chair lecture, I stood beneath the Robert Feke portrait of Isaac Royall, Jr., his wife, their daughter, his sister, and his wife’s sister in the Treasure Room in Langdell Library (Figure 9.3)⁵ – now named for a donor, the Caspersen Room – and told his story as best as I could figure it out. I published the lecture soon

³ *Ibid.* For information not included in Chan’s book, see Alexandra A. Chan, “The Slaves of Colonial New England: Discourses of Colonialism and Identity at the Isaac Royall House, Medford, Massachusetts, 1732–1775,” Ph.D. dissertation, Boston University (2003).

⁴ A copy of the will, dated May 26, 1778, is available at <https://royallhouse.org/home/education/primary-resources/primary-sources/public-records>. Thanks to Gracelaw Simmons for providing me her transcript.

⁵ See Chan, *Slavery in the Age of Reason*, 115, for a reproduction.



FIGURE 9.3 Robert Feke, “Isaac Royall and Family.” Harvard Law School Library, Historical & Special Collections.

afterwards in the *Harvard BlackLetter Law Journal*.⁶ What Coquillette and Kamali did was an amazing act of scholarly generosity: Coquillette let me scoop him on his own research, and Kamali helped him do it.

As Coquillette and Kimball explain in the first volume of their history of HLS, *On the Battlefield of Merit: Harvard Law School, the First Century*, the Royall Chair did not automatically lead to the establishment of the Law School. Rather, the original idea was that the Royall Professor would give a lecture series on law to students in the College. This embodied a new theory of legal education: not apprenticeship in a lawyer’s office but the study of legal science equivalent to philosophy and theology as knowledge systems fit for instruction to undergraduates. But when they finally got underway in 1815, the endowment barely yielded enough to pay Isaac Parker, Chief Justice of the Massachusetts Supreme Judicial Court, for part-time work at Harvard. Throughout his service, his primary responsibilities were as a judge. A two-stage, lurching process led to the establishment of a viable Law School. Stage one, beginning in 1817, added a tuition-funded professor, Ashael Stearns, and inaugurated the Law School proper.⁷ Yet stability and growth were out of reach for this tiny, overburdened faculty; it was not until 1829, when Nathan Dane and Joseph Story

⁶ Janet Halley, “My Isaac Royall Legacy,” *Harvard BlackLetter Law Journal* 24 (2008): 117–31.

⁷ Coquillette and Kimball, *Battlefield of Merit*, 98–102, 109–15.

orchestrated the Dane Professorship with a significant endowment – and Story as its first occupant – that the Law School faculty could grow to three professors with a comprehensive curriculum and a stable business model.⁸ Coquillette and Kimball exaggerate by quite a bit when they designate Isaac Royall, Jr. as the “founder” of Harvard Law School.⁹ By their own account, that role went to Parker, Story, and Dane. But the Royall Chair was the spark that started Harvard out in its commitment to legal education. It remains the Law School’s oldest Chair. That is my Chair. What does it mean? A lot of different things, it turns out.

ISAAC ROYALL, JR.

In his final will, Isaac Royall, Jr. directed that the vicinity of his house in Medford be called Royall Ville “always” and that anyone who inherited this entailed estate must take Royall as his last name (Items 21 and 22). He was a man obsessed with promoting and celebrating himself as a brand, specifically as the patriarchal, slave-holding, faux-aristocratic social capital of which he was the human embodiment.

His marks were many. The Feke portrait of him as paterfamilias, the John Singleton Copley portrait of his daughters festooned with luxury clothes and toys, the paired Copley portraits of Isaac, Jr. and his wife,¹⁰ and the Royall House and Slave Quarters themselves: all survive to us as marks of his brand. But the most literal *sign* of his identity is the heraldic shield that he and his father adopted as their family crest.

A brief introduction to British heraldry is in order. In British usage, a shield or “coat of arms” is granted by the Crown – and by the Crown only – as a mark of honor and for the exclusive use of the grantee, who may be a knight or aristocrat, an individual who has accomplished something the Crown wishes to reward, a unit of government, or an institution. When granted to a human being, and as befits its character as a mark of royal or aristocratic status, it’s heritable. It is explicitly honorific, and when used by non-royal individuals along the line of descent, it signifies aristocratic status, notable achievement, or royal favor belonging to the original grantee.

These marks frequently take the shape of a martial shield in reference to the idea that in the British tradition, which vastly predominated in colonial New England, the very first such arms were actual shields carried by aristocratic or knightly warriors into actual battle, and are called coats of arms because warriors would wear heraldic devices on coats worn over their armor. It’s called heraldry because, in premodern usage, heralds combed the countryside for family births and deaths and granted shields. The entire system involves an elaborate history and detailed technical know-

⁸ *Ibid.*, 113–15, 131–39.

⁹ *Ibid.*, 75–76.

¹⁰ See Chan, *Slavery in the Age of Reason*, 61, 116, for reproductions.

how. Each coat of arms is a state-sponsored, state-designed, state-bestowed mark, deliberately held scarce to the point of being unique, intended to enhance the status – the brand – of its bearer.

In the special language of heraldry, the verbal description of the Royall family shield (its “blazon”) is “azure three garbs 2 and 1 or,”¹¹ that is, three wheat sheaves with one centered for a top row and two more below it in a second row, in gold on a background of azure. Surprisingly, we know a lot about how it was used by the Royall family. It appears on silver vessels given to churches attended by Isaac Royall, Jr. and his family, on a tomb erected in Dorchester to memorialize the grandfather and father, on bottles, bookplates, and wax seals¹² – and that’s just what remains after more than 300 years! Isaac Royall, Jr. and his father clearly engaged in an extravaganza display of the shield.

Correspondence with a Windsor Herald in the British College of Arms confirms that the Royall arms “appear to be those of the medieval Earls of Chester.”¹³ In heraldic lingo, this means that the Royall family shield was assumed or assumptive, and not invented but pirated (more heraldry-speak) from arms authentically borne

¹¹ Charles Knowles Bolton, *Bolton’s American Armory: A Record of Coats of Arms Which Have Been in Use within the Present Bounds of the United States* (Boston MA: F.W. Faxon, 1927), 142–43. See also the American Heraldry Society’s webpage entry for this shield, www.americanheraldry.org/layouts/roll-early/royall-william-d.-north-yarmouth-me-1724.

¹² Bolton shows the Royall shield in two forms – with and without a crest bearing “a demi-lion rampant with a garb . . . in his paws and the motto ‘Pectore Puro’” – and traces two examples of each. Bolton, *Bolton’s American Armory*, 142–43. The shield alone appears on a two-handled cup made for First Church in Medford at the direction of Isaac Royall, Jr.’s will, thus in or soon after 1781. E. Alfred Jones, *Old Silver of American Churches* (Letchworth: Arden Press, 1913), 275. It also appears on the tomb dedicated to William Royall of North Yarmouth, Maine (d. 1724) and his son “Hon. Isaac Royall of Antigua and N.E.” (d. 1739), in the Burying Ground, Dudley Street, Dorchester: see W.H. Whitmore (ed.), *The Heraldic Journal Recording the Armorial Bearings and Genealogies of American Families*, vol. 1 (Boston, MA: J.K. Wiggins, 1865), 12–14. The tomb includes an elaborate encomium to Isaac Royall, Sr., which has been transcribed by Chan, *Slavery in the Age of Reason*, 98. The shield with crest, inscribed to “Isaac Royall, Esq., of Antigua,” appears in several books in the collections of the Royall House and Slave Quarters and the American Antiquarian Society: Royall House and Slave Quarters, bookplate, <https://royallhouse.org/the-royall-bequest-and-harvard-law-school>; American Antiquarian Society, Bookplate Collection Name List, www.americanantiquarian.org/bookplate-name-list (two entries). The crested shield also adorns a baptismal font that Isaac Royall, Jr. gave to St. Michael’s Church, Bristol, Rhode Island in 1747 (Jones, *Old Silver*, 97). Mason Hammond indicates that Isaac Royall, Jr.’s wife came from Bristol, in “A Harvard Armory: Part I,” *Harvard Library Bulletin* 29.3 (1981): 261–97 (hereinafter Hammond, Part I), at 285 n.43. Chan unearthed several bottles embellished with the crested shield at the site of the Royall House and Slave Quarters. Chan, “Slaves of Colonial New England,” 259, figs. 6.8 and 6.9. Finally, the Harvard Law Library also possesses a seal with two wax impressions showing the shield with crest. The latter would have been used to authenticate signatures on documents. *Historical Treasures: A Look at HLS’s Special Collections*, September 4, 2015, <https://today.law.harvard.edu/historical-treasures-a-look-at-hlss-special-collections> (slide show including brass seal and wax impressions).

¹³ John Petrie, Windsor Herald, email correspondence with author on March 5, 2020 (on file with the author).

by an ancient aristocratic family.¹⁴ That is to say, the Royall shield is not only fake but also stolen.

There is certainly nothing aristocratic about the Royall family. The grandfather, William Ryall, and another man emigrated to New England in 1629 as indentured servants to work as “coopers and cleavors of tymber.”¹⁵ He first settled in Salem, and gave his name to a section of the newly settled town: “Ryal Side.”¹⁶ Once free, he moved to Maine,¹⁷ where according to some sources he gave his name to a river along which he owned land.¹⁸ He died in North Yarmouth, Maine.¹⁹ The name is recorded as Ryall, Ryal, and Rial before it was converted to the more pretentious Royal and Royall.²⁰ At the apex of the family’s prosperity, they were agricultural

¹⁴ Heraldic handbooks agree with this conclusion. Bolton and the first volume of *The Heraldic Journal*, a Boston-based mid-nineteenth-century effort to sort out genuine from spurious arms in the colonial period, include the grandfather in their accounts of the shield, but abstain from tracing the coat of arms to any official source. Bolton, *Bolton’s American Armory*, 142–43; Whitmore (ed.), *Heraldic Journal*, 21–22, 31–33. See also Hammond, *Part I*, 284, 286 n.43. Collections of arms that strive to include only authentic grants consistently omit the Royall arms. William H. Whitmore, *Elements of Heraldry: Containing An Explanation of the Principles of the Science and a Glossary of the Technical Terms Employed, with an Essay upon the Use of Coat-Armor in the United States* (New York: W.J. Widdleton; Boston, MA: Lee and Shepherd, 1866), 63–70 (focusing on American arms); William S. Appleton, *The Gore Roll of Arms and Positive Pedigrees and Authorized Arms* (Baltimore, MD: Heraldic Book Company, 1964) (reprinting sources from an early seventeenth-century Boston coachmaker and *The New England Historical and Genealogical Register* 1891 and 1898); *Fairbairn’s Book of Crests of the Families of Great Britain and Ireland*, vol. 1, rev. edn (London: T.C. and E.C. Jack, 1905); *Matthews’ American Armoury and Blue Book* (New York: Gorham, 1907); E. de V. Vermont, *America Heraldica: A Compilation of Coats of Arms, Crests, and Mottoes of Prominent American Families Settled in this Country Before 1800* (New York: Heraldic Publishing, 1965) (omitting the Royall name from all lists of authenticated arms but including “Jacob Royal,” Isaac Royall, Jr.’s uncle, on a list of subscribers to a 1736 Boston publication designated “esquire,” who the compiler surmised bore coats of arms, 14–15; and including “Isaac Royall” on a list of colonists associated with “Early American Heraldic Bookplates,” 16–17); Thomas Woodcock and John Martin Robinson, *The Oxford Guide to Heraldry* (New York: Oxford University Press, 1988), Chapter ix, “American Heraldry,” 156–71 (College of Arms grants to American colonies, individuals, cities, and a tribe). Meanwhile, the Royall shield is included in three compilations that make no systematic effort to determine authenticity: Bolton, *Bolton’s American Armory*, ix (“Readers whose chief interest is in ‘authentic’ arms or the right to bear arms must look elsewhere.”); Eugene Zieber, *Heraldry in America* (Philadelphia: Department of Heraldry of the Baily, Banks & Biddle Co., 1895), 51; William Armstrong Crozier (ed.), *Crozier’s General Armory: A Registry of American Families Entitled to Coat Armor* (New York: Fox, Duffield & Co., 1904), 113.

¹⁵ Calvin P. Pierce, *Ryal Side from Early Days of Salem Colony* (Cambridge, MA: Riverside Press, 1931), 1–2; see also James Henry Stark, *The Loyalists of Massachusetts and the Other Side of the American Revolution* (Boston, MA: W.B. Clarke, 1907; photo repr. Miami, FL: HardPress Publishing, n.d.), 290 (also available from Project Gutenberg at www.gutenberg.org/files/39316/39316-h/39316-h.htm).

¹⁶ Pierce, *Ryal Side*, 1–2; see also W.E. Butler, “The Royall Bookplate, Slavery, and Harvard Law School,” *Bookplate Journal* 14.2 (2016), 132–33, 127–28.

¹⁷ Pierce, *Ryal Side*, 1–2.

¹⁸ Whitmore (ed.), *Heraldic Journal*, 13.

¹⁹ Bolton, *Bolton’s American Armory*, 142–43.

²⁰ Butler, “Royall Bookplate,” 127; Pierce, *Ryal Side*, 1–2.

magnates and traders, including active participation in the slave trade. At the Royall House and Slave Quarters in Medford you can still see the wooden statue that Isaac Royall, Jr. placed in the center of his formal garden. It is of Mercury, the god of trade, an emblem I take as a warrant to claim that Isaac Royall, Jr. was himself not the least bit ashamed of his commercial success, and that he, at least, felt he had no nobility to lose.

Charles Knowles Bolton, one of the primary sources on American heraldic practices, traces the Royall shield back to the grandfather.²¹ This is unlikely. The above-mentioned bookplate is surely attributable to Isaac Royall, Sr. and corresponds with a large library, twelve times larger than that of any other Boston household inventoried in the decade of his death.²² The church silver dates to Isaac Royall, Jr.'s time, and Chan excavated the bottles decorated with the device from the Medford home, first owned by Isaac Royall, Sr. This is not an ancestral mark: father and son used it to dignify new money.

What would it have meant to the contemporaries of the Royall father and son that they lavishly displayed the shield? There was never a College of Arms in any of the North American British colonies. The Constitution includes clauses barring ranks of nobility,²³ and the founders rejected the idea of establishing a national College of Arms.²⁴ Heraldry bore a strong anti-republican stigma. But it was permitted, tolerated, and in widespread use. Very seldom did colonial arms-bearers show authentic arms. Far more often they assumed arms to which they had no home-country right.

Indeed, what made heraldry controversial in the revolutionary period and early republic was any claim that it should be *made* authentic by the establishment of an American College of Arms. The following story is indicative. On July 4, 1776, the same day that the Declaration of Independence was issued, the new nation's leadership authorized the creation of a national seal.²⁵ A state seal would symbolize the country's full independence and its equality with other seal-bearing states of the world. As a mark, a state seal is far from the heraldic shield of an aristocratic or merely rich family. The state seal is given to the control of an authorized officer, who must apply it to certain official documents for them to be valid; it played an important role in international diplomacy, particularly in the recognition of states by other states as formal co-equals. The US could adopt a state seal without implying anything about establishing a College of Arms issuing family shields in America.

²¹ Bolton, *Bolton's American Armory*, 142–43.

²² Butler, "Royall Bookplate," 132–33.

²³ U.S. Constitution Art. 1 Sec. 9 (federal government); Art 1 Sec. 10 (state governments).

²⁴ Dom William Wilfrid Bayne, "Heraldry in Democratic America," Part II, *Coat of Arms* 56 (1963): 325–33 (at 327); see also Bayne, "Heraldry in Democratic America," Part I, *Coat of Arms* 55 (1963): 283–91.

²⁵ Stephen Slater, *The Complete Book of Heraldry: An International History of Heraldry and Its Contemporary Uses* (New York: Lorenz, 2002), 223.

But in 1788, William Barton, who had already contributed the eagle to the design of the Great Seal of the United States (which was not finally promulgated until 1782),²⁶ wrote to George Washington urging the establishment of state-authenticated heraldry:

I have endeavoured, in my little tract, to obviate the prejudice which might arise in some minds, against Heraldry, as it may be supposed to favor the introduction of an improper distinction of ranks. The plan has, I am sure, no such tendency; but it is founded on principles consonant to the purest spirit of Republicanism and our newly proposed Fœderal Constitution. I am conscious of no intention to facilitate the setting up of any thing like an order of Nobility, in this my native Land[.]²⁷

Washington himself made prolific use of ancestral arms, probably brought to America by his great-grandfather, and cared enough about their authenticity to obtain ratification from the College of Arms in 1791.²⁸ But setting up a College of Arms in the United States was a bridge too far. He gently rejected Barton's argument that heraldry could harmonize with life in a republic of juridical equals. Washington's diplomatically stated response declares that he was chary of introducing official heraldry not because he deprecated it, but solely because the political moment was too inflamed to risk even an innocent move that could enable the opponents to denounce "the proposed general government . . . [as] pregnant with the seeds of distinction, discrimination, oligarchy and despotism[.]"²⁹

Thus authentic arms were extremely rare and highly prized, but derived from a remote and contested sovereign; assumed coats of arms were ubiquitous and unregulated; and heraldry signified social rank, even aristocratic family origins, in a society committed both to social hierarchy and to legal equality for white men. In these circumstances, what would people make of a shield like the Royalls'? Much later, heraldry and genealogy aficionados earnestly heaped contempt on assumed arms.³⁰ But these strenuous efforts all have an antiquarian feel to them: it would be a

²⁶ Letter, William Barton to George Washington, August 28, 1788, *The Papers of George Washington Digital Edition* (Charlottesville: University of Virginia Press, Rotunda, 2008), <https://rotunda-upress-virginia-edu.ezp-prod1.hul.harvard.edu/founders/GEWN-04-06-02-0463>.

²⁷ *Ibid.*

²⁸ *Washington's Mount Vernon: Coat of Arms*, www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/coat-of-arms.

²⁹ Letter, George Washington to William Barton, September 7, 1788, *Papers of George Washington*, <https://rotunda-upress-virginia-edu.ezp-prod1.hul.harvard.edu/founders/GEWN-04-06-02-0446>.

³⁰ Condemnations of the proliferation of assumed arms in the US abound, but none of them seems to reflect colonial and immediate-post-revolutionary sentiment. Bayne concludes, from a discussion of the frequent pirating of arms in the colonial period, that "The motives behind this activity are understandable, and ignorance explains, if it does not excuse, the abuse, but the result is deplorable." Bayne, "Heraldry in Democratic America," *Part II*, 331. Johnson warns that "To usurp the use of another person's coat of arms is highly improper and is a dishonest practice." David Pittman Johnson, *The Heraldic Register of America*, vol. 1 (University, AL: American College of Heraldry, 1981), ix. More recently, in a beautiful handbook on heraldry,

mistake to read them back onto the colonial cultural milieu. At the time the Royall family was brandishing its shield, the distant past that these later strivers were trying to preserve was the common present. Rules and rolls separating authentic wheat from assumed chaff would have been unnecessary where the very few who had authentic arms would have been known to do so. Isaac Royall, Jr.'s use of his faux-ancestral shield could have indicated some fondness for the aristocratic hierarchy of the homeland or sympathy with colonial officialdom; but its ersatz origins could equally have signaled disrespect for colonial pretensions to aristocratic status. With his flight at the outbreak of the Revolution, it might have been used as part of the case against his loyalty to the new government – but it would not do to take that line of thought too far. According to the American Heraldry Society, thirty-five signatories of the Declaration of Independence, including John Hancock and Benjamin Franklin, were armigerous;³¹ even John Quincy Adams bore assumed arms.³²

Fittingly, perhaps, the very issue of revolutionary fervor for a government dedicated to freedom and equality – to life, liberty, and the pursuit of happiness and to the proposition that all men are created equal – had a direct, personal impact on Isaac Royall, Jr., in the form of a precipitous fall from political grace. The revolutionaries' rapid victory in the Battles of Concord and Lexington on April 19, 1775, switched out the governing powers in eastern Massachusetts overnight. Isaac Royall, Jr. had gone to Boston three days earlier, separating himself from the patriot-controlled countryside and lodging in an urban, armed camp controlled, at King George's command, by General Gage.³³ Did his travelling to Boston at that

Steven Slater derided inauthentic arms as “‘bucket-shop’ heraldry” and “bogus.” Slater, *Complete Book of Heraldry*, 243. For more, see Whitmore, *Elements of Heraldry*, iii–iv, 77, fulminating against the practice of assuming arms based on a shared last name rather than precise genealogical descent, and hoping to promote “a decrease of the ridiculous assumptions which have thrown an undeserved stigma upon American heraldry”; Zieber, *Heraldry in America*, 75–76; and Vermont, *America Heraldica*, v–xii, bewailing assumed arms as forcible theft deserving “perfect and justified contempt.” The literature is also replete with proposed schemes to regularize heraldry in the US. See Slater, *Complete Book of Heraldry*, 223, relating the successive establishment of the American College of Heraldry in 1972 and of the College of Arms Foundation in the 1980s; Johnson, *Heraldic Register of America*, x, lamenting US federal and state governmental failure to establish a registry of authentic arms and relating the establishment of the American College of Heraldry; L.G. Pine, *The Story of Heraldry* (London: Country Life, 1952), 125–27, approving the New England Historic Genealogical Society of Boston's establishment of a registry and Rolls of Arms for American grantees. Several have proposed specific rules to govern the use of heraldic signs in the US precisely to enable dissemblers to be exposed as such. See Zieber, *Heraldry in America*, 77–81; Crozier, *Crozier's General Armory*, [preface], “Coat Armor in America,” v–viii; Vermont, *America Heraldica*, x–xii.

³¹ American Heraldry Society webpage, Arms of Famous Americans, Founding Fathers, Signers of the Declaration of Independence, www.americanheraldry.org/heraldry-in-the-usa/arms-of-famous-americans/founding-fathers/category/declaration-of-independence.

³² Bayne, “Heraldry in Democratic America,” Part II, 331.

³³ Mark Peterson, *The City-State of Boston: The Rise and Fall of an Atlantic Power* (Princeton University Press, 2019), 291, 299, 343.

moment suggest loyalty to the Crown (the thinking would run: “Royall was with the Royalists so he must be one”) or was he on an anxious mission to repair bridges to the British after his bold refusal of the oath to become a Mandamus Councilor as part of George III’s plan for repression of the colonists?³⁴ Close reading of his political engagements before this crisis suggests that he preferred a mediating role between the increasingly alienated extremes;³⁵ on April 19, 1775, the space for such political ambivalence shrank to the vanishing point. Even if his trip to Boston were entirely innocent of political intentions, it could not now be unmarked by political *signification*. But the polarization of the semiotic field and the emptiness of his sign produce an ambiguity that will probably never be resolved.

Nor did his subsequent actions bestow a clear meaning on his travel to, and his subsequent flight from, Boston. Within days of the opening of the Revolutionary War, he fled in the general evacuation of loyalist civilians from Boston, landing in Halifax. About a year later, he proceeded to London.³⁶ When seeking to ingratiate himself with the British aristocracy and to obtain a share of the monetary support being doled out to loyalists forced into exile by the Revolution, he represented himself as “one of the unfortunate persons who from the dreadful tempest of the times in the Massachusetts Bay was obliged to leave that country and finally take refuge in this[.]”³⁷ But when seeking to ingratiate himself with Massachusetts elites he explained his trip from Medford to Boston as the first stage of a voyage to Antigua to settle some financial matters, his trip to Halifax as an effort to gain a safe harbor whence to complete his trip to Antigua, and his decision to shift to London instead as a concession to his desperate family, who had already settled there. How else could he see his grandchildren, he pathetically asked.³⁸ In the former letter, he denounced the “Colonists” as “deluded” and unable to see that their “true interest” lay in “their duty to their Mother Country and to the best of Kings”; in the second letter he professed loyalty to the new Commonwealth. If in controversies over his character centuries later Isaac Royall, Jr. has been subject to radically divergent interpretation – the dizzying oscillation that this chapter traces – it is perhaps safe to say that it began in his own acts of self-branding.

This calamitous bouleversement was family-wide. Isaac Royall, Jr. and his sons-in-law Sir William Pepperell and George Erving were named in the Banishment Act of 1778; the latter two were also named in the Conspirator’s Act of 1779 and thereby lost all their Massachusetts holdings; the Massachusetts property of Isaac Royall, Jr. was

³⁴ Stark, *Loyalists of Massachusetts*, 136 (“Mandamus Counsellors”).

³⁵ Colin Nicholson and Stuart Scott, “A ‘Great National Calamity’: Sir William Pepperell and Isaac Royall, Reluctant Loyalists,” *Historical Journal of Massachusetts* 28 (2000): 117–41.

³⁶ Chan, “Slaves of Colonial New England,” 81.

³⁷ Letter from Isaac Royall, Jr., to Lord North, May 31, 1777, <https://royallhouse.org/home/education/primary-resources/primary-sources/correspondence>.

³⁸ Letter from Isaac Royall, Jr., to Reverend Samuel Cook, March 29, 1779, <https://royallhouse.org/home/education/primary-resources/primary-sources/correspondence>.

seized under the Absentee Act of 1779 and was returned to his estate only near the end of the century.³⁹ These seizures included personal as well as real property. And having left Massachusetts after April 19, 1775 and “join[ed] the enemy,” they were all subject to the Test Act of 1778, proscribing their return.⁴⁰ The only reason that their exile was not spent in complete destitution was the continued enjoyment of their West Indian holdings and any assets they had managed to extract from North America prior to restrictions being imposed by the loyalty acts.⁴¹

From its very first day, the Revolutionary War and its eventual turning-upside-down of political control crashed the Royall brand. Two subsequent stories, one involving his bequest to Belinda, the other involving his bequest to Harvard College, show how temporary this nadir was.

BELINDA SUTTON

After Isaac Royall, Jr. died in 1781, Belinda took her freedom and triggered his estate’s legal duty to support her if she were in need.⁴² Starting only two years later, she filed six petitions – in 1783, 1785, 1787, 1788, 1790, and 1793⁴³ – with the

³⁹ “State of Massachusetts-Bay. In the year of our Lord one thousand seven hundred and seventy eight. An act to prevent the return to this State of certain persons therein named, and others, who have left this State or either of the United States, and Boston,” *Massachusetts. Laws, Statutes, Etc.*, <https://hdl.loc.gov/loc.rbc/rbpe.04002100>; “An Act to Confiscate the Estates of Certain Notorious Conspirators against the Government and Liberties of the Inhabitants of the Late Province, Now State, of Massachusetts Bay,” *Province Laws – 1778–79*, Chapter 48 (April 30, 1779); “An Act for Confiscating the Estates of Certain Persons Commonly Called Absentees,” *Province Laws – 1778–79* (May 1, 1779). The Absentee Act provided defenses and a right to appeal in lieu of the summary processes of the Banishment Act and the Confiscation Act. Stark provides transcriptions in *Loyalists of Massachusetts*, 137–44.

⁴⁰ “An Act for Prescribing and Establishing an Oath of Fidelity and Allegiance,” *Province Laws – 1777–78*, Chapter 18, Sect. 4 (February 3, 1778).

⁴¹ Stark, *Loyalists of Massachusetts*, 290 (“The Vassalls”).

⁴² An Act Relating to Molato and Negro Slaves, ch. 1, Act of July 28, 1703. Technically, this Act conditioned the enslaved person’s freedom on the manumitting master’s providing to his or her town “sufficient security” to keep the emancipated person off the poor rolls. Apparently no one attempted to prevent Belinda from claiming her freedom. By 1783, the year of her first petition, Chief Justice William Cushing gave his jury instructions in the *Quock Walker* case declaring slavery inconsistent with the Massachusetts constitution. A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (Oxford University Press, 1978), 94–95 (quoting the jury instructions). Nevertheless, the manumission statute was not repealed until 1807. See Kunal M. Parker, “Making Blacks Foreigners: The Legal Construction of Former Slaves in Post-Revolutionary Massachusetts,” *Utah L. Rev.* (2001): 75–124 (at 97 n.46).

⁴³ I am reproducing simplified citations for these petitions; complete citations can be found at the links. Petition of Belinda Royall, Repository Collection Development Department, Widener Library, HCL, Harvard University, <http://nrs.harvard.edu/urn-3:FHCL:13906083?n=1> (hereinafter 1783 petition or first petition); Petition of Belinda Royall, Collection Development Department, Widener Library, HCL, Harvard University, <http://nrs.harvard.edu/urn-3:FHCL:10935254?n=1> (hereinafter 1785 petition or second petition); Petition of Belinda, Collection Development Department, Widener Library, HCL, Harvard University, <http://nrs>

Massachusetts Legislature, sitting as the General Court, seeking that support. Belinda signed all these petitions with “her mark,” an X, a reliable indicator that she was illiterate and could not have written them herself. In response to the first petition, the General Court ordered that fifteen pounds, twelve shillings be paid to her annually from the Commonwealth Treasury.⁴⁴ The fair copy of this “resolve” was signed by John Hancock and Sam Adams.⁴⁵ The next two petitions complained that payments had stopped after one annual cycle; Belinda’s petition of 1793 indicates that only one further payment had been made, in 1787; and in 1790 she sought payment from the estate of a promised ten shillings per week for life. In 1788 and 1793 she signed as Belinda Sutton; apparently she had married. The latter petition was witnessed by Priscilla Sutton: was this the infirm daughter Belinda mentioned in her first petition? In 1793, Belinda alleged that she had sought recourse to Isaac Royall’s son-in-law, Sir William Pepperell, and that he “made her some allowances, but now refuses to allow her any more[,]” causing her to seek once again the original “bounty.”

As the years go by, the petitions become increasingly desperate, speaking of her old age, inability to work, and poverty. And indeed, she would have been very old: she indicated in the first petition that she was seventy years old, so by the time of the last one she would have been about eighty-three. There is a crescendo of misery: Belinda spoke of “her distress and poverty” (1785); averred herself “thro’ age & infirmity unable to support herself” (1787); and complained that she was “perishing for the necessaries of life” (1790).

The nearly perfect failure of the Treasury to follow the 1783 order, despite dramatic signatory support from Hancock and Adams and continually renewed petitions from Belinda, has the earmarks of back-channel controversy: someone or some ones inside government was or were putting themselves in the way. Who was responsible for Belinda’s suffering?

The first petition blames Isaac Royall, Jr., the exploitation of slavery, and the hypocrisy of the revolutionary elite. It is an indictment of the man precisely *for* his role in enslaving human beings. The petition links his tyranny over Belinda to his affinity for British tyranny: Belinda denounces them both and shames the

.[harvard.edu/urn-3:FHCL:12208672?n=1](http://nrs.harvard.edu/urn-3:FHCL:12208672?n=1) (hereinafter 1787 petition or third petition); Petition of Belinda Sutton, Collection Development Department, Widener Library, HCL, Harvard University, <http://nrs.harvard.edu/urn-3:FHCL:12208701?n=1> (hereinafter 1788 petition or fourth petition); Petition of Belinda, Repository Collection Development Department, Widener Library, HCL, Harvard University, <https://iif.lib.harvard.edu/manifests/view/drs:4662104882i> (1790 petition or fifth petition); Petition of Belinda Sutton, Collection Development Department, Widener Library, HCL, Harvard University, <http://nrs.harvard.edu/urn-3:FHCL:11148838?n=1> (hereinafter 1795 petition or sixth petition) (this petition includes some inscriptions made in 1795, giving rise to inconsistencies in its date; the text declares that it was *filed* in 1793).

⁴⁴ The original 1783 order is included in the folder with Belinda’s first petition.

⁴⁵ The fair copy of the 1783 order is included in the folder with Belinda’s 1790 petition.

Legislature for seeking freedom for white colonists but not black slaves.⁴⁶ This was the first time – and, as far as I know the last time, until the Royall House and Slave Quarters leadership and then Coquilletto took up the issue – that Isaac Royall, Jr. was in any way held to account *as a slaveholder*. This singeing document appealed to the wartime⁴⁷ legislature of Massachusetts – a body of men who had staked all on independence from Britain – by praising them for their commitment to freedom and equality for all, and then shaming them for not extending succor to a victim of slavery and oppression much worse than anything they had suffered at the hands of Britain. It pointed the finger of hypocrisy directly at them, and gave them a handy exit from moral opprobrium: relieve Belinda's need.

The petition begins with an idyllic account of Belinda's birth and childhood on the African Gold Coast. It then tells of her seizure by white slave traders, of the misery she endured on what we call the Middle Passage, and of her shock when she arrived in America to find herself in a Babel of strange tongues and in slavery till death. Then she made her appeal for justice, which is worth quoting in full:

Fifty years her faithful hands have been compelled to ignoble servitude for the benefit of an ISAAC ROYALL, untill, as if Nations must be agitated, and the world convulsed for the preservation of that freedom which the Almighty Father intended for all the human Race, the present war was Commenced – The terror of men armed in the Cause of freedom, compelled her master to fly – and to breathe away his Life in a Land, where, Lawless domination sits enthroned – pouring bloody outrage and cruelty on all who dare to be free.

The face of your Petitioner, is now marked with the furrows of time, and her frame feebly bending under the oppression of years, while she, by the Laws of the Land, is denied the enjoyment of one morsel of that immense wealth, apart whereof hath been accumulated [*sic*] by her own industry, and the whole augmented by her servitude.

⁴⁶ The rhetoric of Belinda's first petition resembles that of freedom petitions, which were frequently lodged with the General Court, and of contemporary demands for reparations for the intergenerational harm wrought by the Atlantic slave system. See Roy E. Finkenbine, "Belinda's Petition: Reparations for Slavery in Revolutionary Massachusetts," *William and Mary Quarterly* 64 (2007): 95–104. But Belinda already had her freedom: she was seeking private support that was mandated by the Poor Law system to keep reliance on town support to a minimum. The idea that the first petition is a model for modern reparations claims finds support in its strong moral objection to the enrichment of Isaac Royall, Jr., through Belinda's labor, and the unfairness of barring her from sharing in the resulting wealth. But the analogy has two impediments, only one germane to the first petition itself. First, the remedy sought was based in the Manumission Act and the Poor Law system, not unjust enrichment. And second, once the campaign for her support was taken over by Royall's own executor, Willis Hall, this theme drops out entirely, but the prayer for support was carried on for years nevertheless. The OED definition of reparation contemporary with the first petition requires wrongdoing by the obligor, something Willis Hall would not have conceded. *Oxford English Dictionary Online*, "Reparation," 3.a.

⁴⁷ The petition is dated February 14, 1783; the Treaty of Paris was signed September 3 of the same year.

WHEREFORE, casting herself at the feet of your honours, as to a body of men, formed for the extirpation of vassalage, for the reward of Virtue, and the just return of honest industry – she prays, that such allowance may be made her out of the estate of Colonel Royall, as will prevent her and her more infirm daughter from misery in the greatest extreme, and scatter comfort over the short and downward path of their Lives – and she will ever Pray.

Boston 14th February 1783

the mark of Belinda

Note that when the petition names Isaac Royall in its first sentence, it shifts to a strikingly larger script, exaggerating the pun involved in his last name: even Isaac Royall's name condemns him.

Roy E. Finkenbine tells the story of this petition's publication by revolutionary-era critics of slavery.⁴⁸ Whoever wrote it – probably Prince Hall, a member of the politically and culturally active free black community of Boston⁴⁹ – intended, and got, an audience wider than the Massachusetts Legislature. Belinda's first petition thus marks a second nadir for the Isaac Royall brand.

After wrangling with the records, I can explain how but not why Belinda was subjected to such prolonged deprivation of the support due to her. If Royall had not fled Medford, if his estate, once in probate, had remained under his executor's control, and if Belinda, once freed, became (as she did) unable to support herself, the Poor Law overseer of Belinda's town could have brought suit against the estate for emancipating Belinda without providing security. But Royall's estate was under the control of the state, though it never escheated. Ironically, it was Royall's fall from grace *as an absentee* that made it possible for as-yet unidentified forces in the colonial and then new Commonwealth government to choke off her support. Only when Isaac Royall was relieved of that opprobrium were funds returned to the control of his executor.

The story of this gradual re-rise of Isaac Royall is a law story.⁵⁰ On May 25, 1778, the Town of Medford placed Royall's estate in probate, with Simon Tufts as agent.⁵¹ The Selectmen based this move on the fact that "the said Isaac Royall voluntarily went to our enemies and is still absent from his habitation and without the State."⁵²

⁴⁸ Finkenbine, "Belinda's Petition."

⁴⁹ Chan, *Slavery in the Age of Reason*, 1.

⁵⁰ Margot Minardi, "Why Was Belinda's Petition Approved?," <https://royallhouse.org/why-was-belindas-petition-approved>.

⁵¹ Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817–1967* (Cambridge, MA: Harvard University Press, 1967), 39. Simon Tufts, Jr., a medical doctor, hailed from a prominent Medford family and is an ancestor of Charles Tufts, who established Tufts University in 1852. Charles M. Green, *The Early Physicians of Medford* (Boston, MA: Rockwell and Churchill Press, 1898), 9–11; Mindy Kent, "Genealogy of the Tufts Family" (on file with the author).

⁵² *Middlesex County, MA: Probate File Papers, 16481871*, Middlesex Cases 18000–19999, p. 19546:2, New England Historic Genealogical Society, www.americanancestors.org/DB536/i/14466/19546-c02/38382086; see also David Edward Maas, "The Return of the Massachusetts Loyalists," Ph.D. dissertation, University of Wisconsin–Madison (1972), 315 n.212. Maas

Two years later, the Massachusetts Legislature adopted the Absentee Act. A letter from Tufts dated May 26, 1780 indicates that he and Willis Hall (to be distinguished from Prince Hall, the probable drafter of the first petition), already named executor under Royall's will, petitioned together for release of the estate, but that "the Court . . . have . . . *Hung it up*"⁵³ – that is, opted for inaction with the result that the estate remained in state hands.

Royall died in 1781. Belinda's first petition resulted in the 1783 General Court order on her behalf, which directed: "That their [*sic*] be paid out of the Treasury of this Commonwealth out of the rents and profits arising from the estate of the late Isaac Royall esq an absentee fifteen pounds twelve shillings p[er] annum[.]" The Absentee Act had moved the funds into the Commonwealth Treasury. The verso of the original order includes calculations of the recent income to the Treasury from Royall's property. There were sufficient funds to pay Belinda her due.

Isaac Royall, Jr.'s will was entered in probate in 1786, empowering Willis Hall to serve as his executor.⁵⁴ On February 28, 1787, Hall registered a list of Royall's legacies and debts in the Suffolk County Probate Court. The debts included "for support of Belinda his aged Negro servant per annum for 3 years £30."⁵⁵ This roughly corresponds with the Treasury's then-unpaid support allowances for 1784, 1785, and 1786 (shaving off twelve shillings). Hall apparently had control of some assets, but in the 1790 petition Belinda (that is, probably, Willis Hall) indicated that "the Executor of [Isaac Royall's] . . . will doubts whether he can pay the said sum without afurther [*sic*] interposition of the General Court[.]" So Hall took Belinda's cause to the General Court: he witnessed and probably wrote the 1787 and 1793 petitions, and likely had at least a guiding hand in those of 1788 and 1789.

It is very possible that Willis Hall believed that, in petitioning for Belinda's relief, he was pursuing his principal's intentions. From a contemporary perspective, this is not entirely exonerating. Isaac Royall's will bequeathed four enslaved human beings – "my Negro Boy Joseph & my Negro Girl Priscilla" to "my beloved Son in Law Sir William Pepperell Baronet" (Item 4) and "my Negro Girl Barsheba & her sister Nanny" to his daughter, Mary Erving (Items 5) – and Hall may have executed those instructions. Nor is it clear why both Royall and Hall were so committed to relatively favorable treatment of Belinda Sutton. But I think it is evident that, even after the abandonment of the fiercely political strategy embodied by the first petition, Mrs. Sutton was not without friends.

published his dissertation as a book – *The Return of the Massachusetts Loyalists* (New York: Garland, 1989) – but I have been unable to obtain a copy.

⁵³ Letter from Simon Tufts to Edmund Quincy, May 26, 1780, <https://royallhouse.org/home/education/primary-resources/primary-sources/correspondence>. Isaac Royall, Jr. tells the saga of his confiscation and banishment in his letter to Reverend Samuel Cook, March 29, 1780. See also Sutherland, *Law at Harvard*, 40, for a discussion of Tufts' letter.

⁵⁴ Sutherland, *Law at Harvard*, 40.

⁵⁵ Suffolk Co. Massachusetts Probate File Papers, No. 18863_1786 (February 28, 1787).

The stakes for Belinda of Isaac Royall, Jr.'s flight to London were therefore very high. Willis Hall was clearly dedicated to her support. If Royall had not fled, and had been able to appoint Hall his executor, Hall would have had not only the inclination but also the power to pay for her support. But because of Royall's flight, his estate was locked up in the Commonwealth Treasury for most of her time as a free woman.

Two years after Isaac Royall, Jr. died in London, Britain and the United States concluded a peace. After independence, anti-loyalist confiscations continually lost ground, a process that indirectly improved Royall's reputation. The Treaty of Paris (1783) nominally committed Congress to urge the states to restore property they had confiscated under their loyalty statutes.⁵⁶ David Edward Maas shows in detail the ever-so-gradual success of Massachusetts absentees in regaining legal capacity between 1784 and 1790: permissions to possess and inherit, to collect debts, and to return were gradually granted to the lucky few, with an equally gradual diminuendo of anti-loyalist vitriol and controversy.⁵⁷ Harvard started receiving land granted to it by Royall in 1795/96.⁵⁸ And in 1805, the General Court issued a resolve allowing Royall's loyalist heirs to convey property that they inherited under his will.⁵⁹

Belinda's 1788 and 1790 petitions designated the man she had denounced in her first petition as "the honorable Isaac Royall." Her petitions were now in the hands of Willis Hall, not Prince Hall: she may have still felt intense scorn for her former owner, but expressing it was no longer an option. Between 1793, the year of Belinda's last petition, and a 1799 petition filed by successors to Hall acting as executors of the Royall estate – thus roughly in the same period during which Harvard started taking possession of its Royall land bequests and well before his loyalist heirs were allowed to step into their inheritance – a settlement was reached securing support for Belinda and Priscilla Sutton.⁶⁰ The atmospherics as well as the institutional situation had changed dramatically. Royall's new executors felt safe in offering an exonerating description of his 1775 flight from Boston. They depicted him not as a refugee or absentee, but as a loyal albeit hapless invalid, and made note that the estate had been returned to his executors. Isaac Royall had, it seems, gotten a posthumous moral get-out-of-jail-free card:

Humbly sheweth that the said Isaac Royall being in an infirm state of health was induced to leave this commonwealth in the year 1775 by the Earnest entreaties & solicitations of his friends & that he was for some time considered as an absentee & his Estate taken possession of by the Government, but upon consideration of the

⁵⁶ "The Definitive Treaty between Great Britain and the Thirteen United States of America" (The Treaty of Paris), Art. V, in *The Treaties Between the United States and Great Britain* (Boston: E.G. House, 1815), 5.

⁵⁷ Maas, "Return of the Massachusetts Loyalists," 468–84.

⁵⁸ Sutherland, *Law at Harvard*, 41.

⁵⁹ Chap. 77, Resolves 1804, Jan. 31, 1805.

⁶⁰ Stark dates the release of the Royall estate to 1805, but the 1799 petition places it at least six years earlier. Stark, *Loyalists of Massachusetts*, 293.

circumstances under which he went away the whole was afterwards restored, a sum of money however remained in the treasury of the commonwealth – intended to provide for the support of two family servants who were left behind & to prevent their becoming public incumbrances [*sic*]. As the last of said family servants is now dead your Petitioners pray that the Treasurer of the Commonwealth may be authorized and directed to settle & pay over the balance of said deposit remaining in his hands to your said petitioners for the benefit of the heirs of said Isaac Royall.⁶¹

Belinda and Priscilla must be the two servants for whom these funds were reserved: there simply are no other candidates. That neither woman petitioned again after 1793 suggests that sufficient support payments had been made from the escrow set aside in the Commonwealth Treasury – or that both of them had died so soon after funds became available that no legal process could be brought on their behalf. I have not found any record of their deaths.

Isaac Royall, Jr.'s bequests to Harvard and other elite public interests in the new Commonwealth cemented his posthumous rehabilitation. In 1797, Hall petitioned the General Court seeking to recoup for Royall's heirs funds which, he claimed, had been wrongfully appropriated from the estate. He supported his claim by emphasizing Royall's "very large and liberal Donations . . . to the University at Cambridge, and to other Public and benevolent uses, in this Commonwealth."⁶² James Henry Stark, in his biography of Isaac Royall, Jr., in *The Loyalists of Massachusetts and the Other Side of the American Revolution*, acknowledges that Isaac Royall, Jr.'s bequests to Harvard College and other public causes constituted an intentional and successful rehabilitation campaign.⁶³ The unpaid bequests also created important incentives for an array of Massachusetts elites to side with Hall and the Royall heirs. When those bequests were paid out, they reintegrated him, symbolically, into the elite symbolic landscape of Boston and Cambridge.

The capstone of Isaac Royall's re-rise came in 1815 when Harvard accepted its bequest and established the Royall Chair. This decision had to be both the effect and the cause of a complete reversal of reputational fortunes. And it paid itself forward. Isaac Parker, the first occupant of the Royall Chair, gave an inaugural lecture in which he invited "future benefactors" to follow in Royall's footsteps, and to fund not just a Chair but a school of law. They too could bask in the glow of the commitment to freedom and equality that motivated, Parker imagined, Royall's original bequest:

[Law] should be a branch of liberal education in every country, but especially in those where freedom prevails and where every citizen has an equal interest in

⁶¹ Petition of James Scott and George William Erving, Collection Development Department, Widener Library, HCL, Harvard University, <http://nrs.harvard.edu/urn-3:FHCL:12208682?n=1>.

⁶² Petition of Willis Hall, Collection Development Department, Widener Library, HCL, Harvard University, <http://nrs.harvard.edu/urn-3:FHCL:10935266?n=1>.

⁶³ Stark, *Loyalists of Massachusetts*, 293.

preservation and improvement. Justice therefore ought to be done to the memory of Royall, whose prospective wisdom and judicious liberality provided the means of introducing into the university the study of law.⁶⁴

The university as reputation-launderer – (re)cycling virtue from its production of socially beneficial knowledge to its donor base and back again – here rears its immemorial head. There is nothing “neo” about it.

Isaac Royall, Jr. was back in the 1 percent. Not only that: surprise! He was a fount of the liberality that defined the new republic. Meanwhile, the voice denouncing Royall as a slaveholder, slave trader, and exploiter of slave labor had been silenced over the long course of Belinda’s miserable treatment – and perhaps by it. It now goes quiet for almost 200 years.

THE ROYALL/HLS SHIELD

The next major merger of the Royall brand with that of HLS came in 1936, when Harvard University adopted the Royall coat of arms as the Law School’s mark (Figure 9.4). We are going to follow its rise and successive transformations up to 2016 when, in response to a Law School report concluding that the mark was so stigmatic that University leadership should “release us from” it, the Royall/HLS shield was disappeared.⁶⁵

By 1936, a small near-hagiography of Isaac Royall, Jr. had come into print, provided by boosters of Medford and Harvard. An 1855 history of Medford by Charles Brooks picked up where the 1799 petition left off, regretting that Royall, a “timid” man,⁶⁶ was “frightened into Toryism”⁶⁷ by the outbreak of hostilities on April 19, 1775. “He was a Tory against his will,”⁶⁸ but only because “He wanted that unbending, hickory toughness which the times required.”⁶⁹ But much could be said on Royall’s behalf, including his bequest founding the Royall Chair.⁷⁰ “Happy would it be for the world, if at death every man could strike as well as he did the balance of this world’s accounts.”⁷¹

⁶⁴ Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America* (New York: Lewis, 1908), 301, quoting Isaac Parker’s address from *North American Review* 3 (May 1816).

⁶⁵ “Recommendation to the President and Fellows of Harvard College on the Shield Approved for the Law School,” March 2, 2016, 10 (hereinafter Mann Report), available through Michael Shammas, “After Months of Advocacy and Debate, Harvard Law Recommends Shield Change,” *Harvard Law Record*, March 3, 2016, <http://hlrecord.org/harvard-law-recommends-shield-change>.

⁶⁶ Charles Brooks, *History of the Town of Medford, Middlesex County, Massachusetts, from Its First Settlement, in 1630, to the Present Time, 1855* (Boston, MA: James M. Usher, 1855), 172.

⁶⁷ *Ibid.*, 170.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, 177.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, 181.



FIGURE 9.4 Royall/HLS shield. HLS retired and removed this shield in March, 2016 (see Figure 9.13). Harvard Law School Office of Communications.

Brooks acknowledged that Royall had been a slave owner, but it did not appear to weigh heavily against him: after all, “As a master he was kind to his slaves, charitable to the poor, and friendly to everybody.”⁷² This assessment comes just pages after Brooks reports Royall’s instructions to Simon Tufts, by then his agent, on March 12, 1776, almost a year into his exile:

Please to sell the following negroes: Stephen and George: they each cost £60 sterling; and I would take £50, or even £15 apiece for them. Hagar cost £35 sterling, but will take £25. I gave for Mira £35, but will take £25. If Mr. Benjamin Hall will give the \$100 for her which he offered, he may have her, it being a good place. As to Betsey, and her daughter Nancy, the former may tarry, or take her freedom; and Nancy you may put out to some good family by the year.⁷³

Perhaps it was kind to prefer a good place for Mira and a good family for Nancy. But the fire sale prices contemplated for Stephen and George suggest that they were old or disabled; they were being offloaded in all their vulnerability. Chan argues that the Royalls seldom separated mothers and daughters,⁷⁴ and we know that emancipating a slave without providing security for her support was against the law. Yet in his driving need for money, Isaac Royall, Jr. was blowing through multiple norms held even in a slave society. The sheer audacity of selling human beings because you can do it makes this letter, to us, a scandal; Brooks had no problem with it, or any of the lesser cruelties embedded in this episode.

When Charles Warren published a history of HLS in 1908, he lifted entire passages from Brooks’ account, including the “kind to his slaves” nostrum,⁷⁵ but he balked at including Royall’s letter to Tufts. In Warren’s eyes, Harvard’s reputational requirements – or maybe just space limitations – subjected Royall’s character as a slave owner to a deliberate forgetting.

⁷² *Id.*, 176.

⁷³ *Ibid.*, 178.

⁷⁴ Chan, *Slavery in the Age of Reason*, 167.

⁷⁵ Warren, *History of the Harvard Law School*, 179 (nostrum and another unacknowledged borrowing), 180 (a third unacknowledged borrowing).

All of that preceded the 1936 adoption of the Royall/HLS shield by a generation. We are about to trace the Royalls' ersatz heraldry as it morphed into a modern logo with various forms of ever-deepening oblivion covering Isaac Royall, Jr.'s political and moral deficits.

The backdrop of this struggle is, again, British practice. When a royal or aristocratic family chartered and endowed a college at Oxford or Cambridge, the Crown would authorize a shield, adapted ("differenced" in heraldry-speak) from the granting family's shield, for its exclusive use. The result was *another* official, state-sponsored system of marks representing the carrier's royal charter or memorializing the aristocratic or institutional status of its founding donors.⁷⁶

Seven years after the founding of Harvard College, way back in 1641, its Overseers imitated this homeland practice by adopting a mark for the College. They authorized a "seal," shaped like a shield and bearing the word VERITAS across the figures of three books (Figure 9.5).⁷⁷ The mark was not granted by Crown authorities in London or in the colony. Once again, assumed arms.

Though the motto and design have changed from time to time,⁷⁸ this shield-shaped seal had remained in intermittent use for almost 300 years when, in 1935/36, the University tercentenary loomed. Outgoing President Abbott Lawrence Lowell had bestowed arms on the first seven residential houses and he was gunning to carry on.⁷⁹ He strove for authenticity when he could get it, but when the British College of Heralds charged a heavy fee to authenticate a pirated coat for Dunster House, "President Lowell resolved that thereafter the University would proceed heraldically on its own."⁸⁰ The new president, James B. Conant, who disliked Lowell's pomp and circumstance, ceded to him the role of "President of the Day" of the tercentenary celebrations. Doubtless following Lowell's cue, the director of the tercentenary celebrations decided that sub-units of the University should display heraldic shields in the upcoming celebrations. He commissioned Pierre de Chaignon La Rose, a member of the University's Committee on Arms, Seal, and Diplomas and its expert on heraldry, to design banners for the College, the graduate schools, and seven

⁷⁶ See, for instance, J.P. Brooke-Little, *Boutell's Heraldry*, rev. edn (New York: Frederick Warne, 1978), 231–33; Heraldry Society webpage on University Heraldry, www.theheraldrysociety.com/articles/topic/university-heraldry.

⁷⁷ Hammond, Part I, 261.

⁷⁸ Corydon Ireland, "Seal of Approval: Harvard's Motto, Veritas, Has a Long, Swirly History – Including Two Centuries of Invisibility," *Harvard Gazette*, May 14, 2015; Samuel Eliot Morison, "Harvard Seals and Arms," *Harvard Graduates' Magazine* 42 (September 1933): 1–15.

⁷⁹ On Lowell's reputational downfall and Harvard officials' March 2019 decision not to display his portrait in a renovated Lowell House, see Sheara S. Avi-Yonah and Delano R. Franklin, "Renovated Lowell House Will Not Display Portrait of Controversial Former University President Abbott Lawrence Lowell," *Harvard Crimson*, March 26, 2019, www.thecrimson.com/article/2019/3/26/lowell-portraits-removed.

⁸⁰ Mason Hammond, "A Harvard Armory: Part II," *Harvard Library Bulletin* 29.4 (1981): 361–402 (hereinafter Hammond, Part II), 370.

C. The marking of the Governors of Harvard
College, held in the College Hall this 27
of 10th - 1640.

It is agreed that

1. The accounts of Mr. Harbards Gift are to be finished, in
Mr. Dethat, Mr. Howell, Mr. Stillens, Mr. Jones, Mr. Wilson are chosen
to finish it, if an agreement may be made Mr. Stillens
and Mr. Jones if they find some clear in the full filling
you will of the Board they are to defer the Governor of the
College his hand to it at a full determination & agreement.
2. Mr. Dethat is chosen Treasurer of the College by the
vote of the Governors of the College.
3. It is agreed that you shall be a College's seal in same
bearing



A copy of Mr. Adams & Mr. Howells letter to Mr. Eaton
Mr. Eaton

After of late remembrance to you whereas are understood by
your former letter that the money at the was appropriated
proportion for building what was not all the money
of the Governor for the College, which that it is not
convenient, may be expended wholly about the building
of the new College at Cambridge, in N. England, we
understand it now seeking. So we Rest your loving
friends

Thomas Adams
Oliver Howells

26 March 1640.
This money was wholly put into the hands of my brother Nath. Eaton
Aug 9 1647.

5. For the 10th of June in respect of the Lady Moultons
gift of 100th to the Governor for 2 scholars. First because
we have not the money, and 2^d we cannot give any more
at the present Treasury, till a General Court. had we the
money in hand we would possibly effect it.
 6. It is agreed that 2 Bachelors shall be chosen for the
first of the year to read to the Junior men
as the President had for the first & be allowed out
of the College's Treasury 4th of June for each of us
for your payment.
- So the 10th of June are appointed for the
first to continue for the year.

FIGURE 9.5 Original sketch of the Harvard seal. Harvard University. Corporation.
College Book 1, 1639-1795. UAI 5.5 Box 1. Harvard University Archives.

residential houses to fly at the tercentenary celebrations.⁸¹ In a later defense of his insignia, La Rose invoked the British practice of bestowing coat armor on Oxbridge colleges.⁸²

Not only did his suite of arms lack official authorization, they trenched on the exclusivity of the University's almost 300-year-old seal. Resistance came from Samuel Eliot Morison, the Chair of the University's Committee on Arms, Seal, and Diplomas, who had written in 1933 that the Harvard shield could be used by sub-units of Harvard with limited variation of the design, but that the seal was a legal mark for the exclusive use by the President and Fellows of Harvard College.⁸³ He was probably the moving force when, a year before the tercentenary celebrations, the Office of the Governing Boards issued a four-page pamphlet, *The Arms of Harvard University: A Guide to Their Proper Use*, asserting its exclusive right to the use of the seal:

Any member of the University or any group of graduates is at liberty, as are the University and its various departments, to make decorative use of the Harvard Arms. But no one, except the Governing Boards of the University, may use the official Seal; for a seal is not a decoration but a legal symbol of authentication.⁸⁴

The pamphlet instructed sub-units of Harvard that they could “combine the Arms with their own title” and advised them to seek advice from the Secretary to the Corporation (the term for the governing body made up of the President and Fellows) about how to draw up a design to surround it, such as an ivy garland or cartouche; however, it ruled out a circular inscription, which would make the overall design too similar to the seal. Commercial firms were instructed that they could use the arms as “a pleasant decoration on stationery (printed in black or red), on jewelry, book-ends, etc.,” but not on “clothing, arm-bands, ‘stickers,’ and the like.” “The Arms should always be treated with dignity[.]” For guidance, manufacturers using the arms were directed to the University Purchasing Agent. The pamphlet left it to be understood that the Office of Governing Boards would police uses inside the University and possibly even sue outsiders who exceeded the narrow

⁸¹ Hammond, *Part I*, 261–97, 263–64 (authorities involved; Lowell's and Conant's attitudes toward ceremony); Pierre de Chaignon la Rose, “The Tercentenary Flags and Gonfalons,” Appendix K to *The Tercentenary of Harvard College: A Chronicle of the Tercentenary Year, 1935–36* (Cambridge, MA: Harvard University Press, 1937), 448–51.

⁸² La Rose reported that his “heraldic procedure follows a wide-spread ancient practice, especially common in the arms of the Colleges of the Universities of Oxford and Cambridge” (“Tercentenary Flags,” 450).

⁸³ Morison, “Harvard Seals and Arms,” 14–15.

⁸⁴ Office of the Governing Boards of Harvard University, *The Arms of Harvard University: A Guide to Their Proper Use* (1935). The pamphlet tracks the policies advocated in Morison, “Harvard Seals and Arms.”

permissions granted.⁸⁵ In a tentative and uncertain way, the Corporation was invoking common-law and equitable rights to exclusive use of its trademark.⁸⁶

La Rose's design for the College's shield adopted a design apparently ruled out in the pamphlet: it was "the present coat of the University, differenced, however, by the reintroduction of the chevron which for many years appeared on the Harvard seal."⁸⁷ He went even further into conflict with the pamphlet's proper-use guidelines in his design for the Graduate School of Arts and Sciences, adding a "'fess' (horizontal stripe) between the books instead of a chevron." La Rose defended these unauthorized innovations as "strictly in accord with heraldic precedents."⁸⁸

For the Law School, La Rose's choice was obvious: the Oxbridge analogy led directly to the Royall shield. Isaac Royall, Jr., if he could have lived to see this, would have been delighted. He was being analogized to an aristocratic British family – even a royal one – founding an Oxbridge College; and the Law School *tout court*, not merely its first professorship, was being credited to his gift. There was not the slightest acknowledgement of Belinda or the other human beings held in bondage.

But once again the mark was controversial – this time, simply in its status as a mark. La Rose brought on the controversy by seeking official University adoption of his arms. In June 1937, he petitioned the University's Committee on Arms, Seal, and Diplomas to approve his designs: to make them official at least as far as the University went, and thus to elevate them closer to the status that their analogues occupied in the Oxbridge symbolic branding landscape.⁸⁹ Within days, the Committee forwarded La Rose's petition to the Corporation, thereby placing the proposal in President Conant's court.

The Corporation did not act on the proposal until early December,⁹⁰ and during this interval the Committee received a letter from the New England Historic Genealogical Society Committee on Heraldry attacking the La Rose designs in the name of heraldic purity. "[M]ost of the school arms" designed by La Rose were based on "false assumptions." We know by now that "assumptions" is used here as a term of heraldic art, not as a reference to an unproven premise in a logical argument. "[I]t would be a mistake" for the University to "put itself in the position of sanctioning" them. The Royall arms came in for particular criticism:

⁸⁵ It appears that the Corporation adopted a rule governing use of the seal at about this time.

⁸⁶ In 1935, trademark law in the US was largely based in state law, which provided remedies in common law and in equity. The comprehensive Lanham Act, from which the current federal trademark protection system derives, was not adopted until eleven years later. Trademark Act of 1946, 15 U.S.C.A. §§ 1051–1127. See Barton Beebe, *Trademark Law: An Open-Source Casebook*, version 6.0 (Summer 2019), 13–16, 20–22.

⁸⁷ La Rose, "Tercentenary Flags," 450.

⁸⁸ *Ibid.*

⁸⁹ Hammond, Part I, 265.

⁹⁰ *Ibid.*

...this Committee has no evidence that the New England family of Royall had a right to the coat. It should be remembered that the unauthorized assumption of arms became extremely fashionable in our colony at about the time that the local Royalls seem to have begun using the arms of the English family of that name. The parentage of William Royall of Dorchester, the progenitor of the family, who died in 1724, is unknown to this Committee.⁹¹

The Royall name was dashed again, this time for pirating the authentic arms of an English family of the same name.

In the end, the Corporation gave a very limited sanction for the use of the designs: “the Corporation, while having no objection to the use for decorative purposes on the occasions of ceremony or festivity of the blazons proposed for the several departments or faculties, do not approve their use for other purposes.”⁹² The idea that the graduate faculties and residential houses should have official marks of their own would have given them equal status, as far as heraldry goes, with the University itself. But the University and its seal had already occupied this field, and the Corporation had no wish to share it. To this day, degrees are not granted until approved by the Corporation, and diplomas throughout the University bear the University seal; the La Rose shields are not allowed to authenticate – or even to adorn – these critical documents.⁹³

By the time the Royall shield next became the object of campus controversy, its origins in heraldry and the controversies belonging to its heraldic dignity (or lack thereof) had been forgotten; over the latter half of the twentieth century, the semiotic register in which it signified shifted from the language of heraldry to that of commercial trademarks.

FROM NEW CORNE TO CORPORATE TRADEMARK

My colleague Charles Donahue fills in the next stage in the re-re-re-signification of the Royall brand: this time, he argues, as an effort to erase Isaac Royall and rewrite the shield quite completely. Donahue reports that early in his deanship, HLS Dean Erwin Griswold (served 1946 to 1967) had the shield inscribed on the pediment of a beautiful bookcase that had been permanently installed in the Treasure Room (now the Caspersen Room)⁹⁴ (Figure 9.6). The inscription originates in Chaucer’s poem *The Parliament of Fowls*:

⁹¹ Letter to Professor S.E. Morison, Chairman, Committee on Seals, Badges and Banners, Harvard University, from the New England Historic Genealogical Society Committee on Heraldry, November 6, 1937, repr. in Hammond, *Part II*, 397–401.

⁹² Hammond, *Part I*, 265.

⁹³ Mann Report, 6 n.17.

⁹⁴ Charles Donahue, “The Harvard Law School Shield: Royall, Chaucer, and Coke,” <https://exhibits.law.harvard.edu/harvard-law-school-shield-royall-chaucer-and-coke#pediment>. See also Bruce A. Kimball and Daniel R. Coquillette, *The Intellectual Sword: Harvard Law School, the Second Century* (Cambridge, MA: Harvard University Press, 2020), 564–69.



FIGURE 9.6 Bookcase in the Caspersen Room with the Royall/HLS shield. Brooks Kraft.

For out of olde felde, as men seyth,
Cometh al this newe corn from yer to yere;
And out of olde bokes, in good feyth,
Cometh all this newe science that men lere.⁹⁵

As Donahue reports, this was a favorite source for the English jurist Sir Edward Coke, to whom it signified the ever-renewing traditionalism of English common law: “To the Reader mine Advice is, that in Reading of these or any new Reports, he neglect not in any Case the Reading of the old Books of Years reported in former Ages, for assuredly out of the old Fields must spring and grow the new Corn[.]”⁹⁶ And for that reason, in turn, it was a favorite motto for Griswold, who borrowed from it for the title of his memoir, *Ould Fields, New Come: The Personal Memoirs of a Twentieth Century Lawyer*.⁹⁷ There is no sign in Griswold’s papers, housed in Langdell Library, that he knew or cared that Isaac Royall, Jr. had been a major

⁹⁵ “The Parliament of Fowls,” 1.22–25, in *The Works of Geoffrey Chaucer*, ed. F.N. Robinson, 2nd edn (Boston: Houghton Mifflin, 1961), 311.

⁹⁶ Edward Coke, *The Reports of Sir Edward Coke, Kt.* (London, In the Savoy: E. and R. Nutt and R. Gosling, 1738), sig. A5.

⁹⁷ Erwin Griswold, *Ould Fields, New Come: The Personal Memoirs of a Twentieth Century Lawyer* (St. Paul, MN: West Publishing, 1992).

slaveholder and trader;⁹⁸ rather, Donahue suggests that Griswold probably thought it would be good to have less of Isaac Royall because of his doubtful loyalty to the American cause. And so he rewrote the shield in the key of Coke, as a symbol of the ever-stable, ever-renewing fount of human wisdom that is the common law.

This was a normatively rich, highly self-congratulatory gloss on the shield. Senior colleagues have told me that, to them, this was *what the shield meant*. It anchored, in their minds, high ideals for the proximate relationship between law and justice. For them, the association with the Royall family, much less with its slaveholding and slave-trading practices, was not even forgotten: it was simply and completely *unknown*.

Fast-forward to the postwar Law School, when the shield began to appear on a few “old school ties” (Figures 9.7 and 9.8). In an eerie echo of the bottles then still buried in the slave quarters’ yard at Isaac Royall’s house in Medford, HLS Professor Archibald Cox had it embossed on a wine bottle (Figures 9.9 and 9.10). The 2016 HLS report recommending the shield’s removal observes that its use expanded dramatically in the mid-1990s.⁹⁹ This is when it appeared carved in wood as a presiding emblem high behind the bench in Ames Courtroom, and replaced the University seal behind the introductory matter to Ames Competition videos.¹⁰⁰ It began to appear *everywhere*: on letterhead, mats laid down to protect people from slipping when entering buildings on rainy days, webpages, syllabi, infinite varieties of Law School swag offered for purchase at the Coop or given away at conferences, retreats, fundraisers, alumni gatherings, graduation celebrations, et cetera.

In cultural use, it was becoming a logo, the equivalent of the Nike swoosh or the (football) Patriots’ helmeted avenger. All of this was in flagrant violation of the restrictions set by the Corporation in 1936, of course, but who cared? It was also quite out of tune with Griswold’s lofty ambitions for the resignified shield, but who needed anything so heavy? Let a thousand shields bloom!

The dean under whom this efflorescence took place, Robert C. Clark (served 1989 to 2003), still speaks of developing the School’s “brand,” especially to distinguish it from Yale Law School. HLS was vastly larger, more international, more global, more connected to its sister professional schools:¹⁰¹ a city to Yale’s club. The “university as brand” – complete with a charismatic mark – had arrived at HLS. Clark, who remembered enjoying the mentorship of Griswold during his deanship, has repeatedly told me that he saw the shield through the “ould fields, new come”

⁹⁸ Karen Beck, email correspondence with author on February 20, 2020 (on file with the author). I was on the verge of checking Griswold’s papers in the University Archives when the COVID-19 closures made that impossible.

⁹⁹ Mann Report, 6.

¹⁰⁰ Meghan M. Green, HLS Office of Communications, email correspondence with author on April 2, 2020 (on file with the author) (photo galleries of Ames Courtroom, graduation ceremonies, etc.).

¹⁰¹ Conversation with Robert C. Clark, April 8, 2020.



Meanwhile, three miles away from the Law School, the institution founded to preserve Isaac Royall's actual home was shaking itself to its foundations to take seriously Royall's legacy as a slave owner and slave trader.



FIGURE 9.9 Glass bottle with Royall family shield. Theresa Kelliher for the Royall House and Slave Quarters.

FROM THE ELEGANT ROYALLS TO THE ROYALL HOUSE AND SLAVE QUARTERS

In 1906, the Royall house in Medford faced demolition to make way for suburban homes. The Daughters of the American Revolution – made up exclusively of proven female descendants of patriot fighters in the Revolutionary War – bought the property and entrusted its care to a newly established nonprofit, the Royall House Association.¹⁰² To them, the value of the house would have been its association with George Washington, who is said to have interrogated two British soldiers there, and with General John Stark, who encamped there.¹⁰³ They curated the site in the spirit of colonial-revival nostalgia. As Chan reveals, the Royall House Association

¹⁰² Gladys N. Hoover, *The Elegant Royalls of Colonial New England* (New York: Vantage Press, 1974), 113.

¹⁰³ Royall House and Slave Quarters website, “The Property: Mansion House,” <https://royallhouse.org/what-youll-see/mansion-house>.



FIGURE 9.10 Heitz Wine Cellars, St. Helena, CA, “Wine bottle belonging to Archibald Cox.” Harvard Law School Library, Historical & Special Collections.



FIGURE 9.11 Charles Hamilton Houston Institute for Race & Justice Grand Opening Celebration web page. Harvard Law School.

sponsored re-enactments of high tea out on the lawn, complete with white gentlemen and ladies in elaborate colonial garb and servants in blackface (Figure 9.12).¹⁰⁴

Almost simultaneously, a similarly Tory interpretation of Isaac Royall, Jr. was underway in the form of a hagiography of the loyalists (such are the reversals wrought by time). In 1907, James Henry Stark published his massive *The Loyalists*

¹⁰⁴ Chan, “Slaves of Colonial New England,” 56, fig. 3.1.



FIGURE 9.12 Tea ceremony at the Royall House. *Harper's Bazaar*, 1915.

of *Massachusetts and the Other Side of the American Revolution*, a thoroughgoing, family-by-family account of the victimization of the loyalists by the revolutionary elites, both during and after the Revolutionary War. He included detailed and highly favorable accounts of Isaac Royall, Jr. and his sons-in-law Sir William Pepperell and George Erving as well as his brother-in-law Henry Vassall.¹⁰⁵ Isaac Royall's colonial politics and flight to London were reinterpreted yet again: he and his family finally found voice as the darlings of pro-loyalist reactionaries.

Much-softened revisions of these apologies reappeared sixty years later, once again reworking Isaac Royall's reputation to serve the reputational needs of contemporary institutions, this time HLS and the Royall House Association. In a 1967 history of HLS, Arthur E. Sutherland styled the Revolutionary War a "civil war"; construed Royall's Anglican and Anglophile alliances to his credit; and reflected that the Feke portrait, then hanging in the entrance hall to Langdell Library, and the Royall Chair offered fitting reminders that, even at stressful moments in history like Sutherland's present – 1967 was plenty tumultuous politically in the US – "generous impulses could survive even ingratitude, disappointment, and disillusion."¹⁰⁶ Like many

¹⁰⁵ Stark, *Loyalists of Massachusetts*, 205–15 ("Pepperell"), 285–90 ("Vassalls"), 290–94 ("Royall"), 299 ("Erving").

¹⁰⁶ Sutherland, *Law at Harvard*, 35–36, 39.

historical accounts produced in mid-century America, Sutherland reconfigured Royall's enslaved human beings as "Negro 'servants'" and is otherwise silent on the subject.¹⁰⁷

And just a few years later, in 1974, Gladys N. Hoover, a member of the Royall House Association,¹⁰⁸ published *The Elegant Royalls of Colonial New England* as her contribution to the upcoming national bicentennial. Explicitly following Brooks, she defended Royall as a timid mediator.¹⁰⁹ Juxtaposing him with Paul Revere the patriot and Sir William Pepperell the true loyalist, she urged: "Honor to the consciences of all three!"¹¹⁰ But she did not think that the family's slavery legacy needed excuse. Of their years in Antigua, she noted the island's "equable and delightful climate" and optimal conditions for agriculture: "Conditions for growing sugar cane were perfect there and black slave labor was abundantly available."¹¹¹

The turning point came in 1988, when Peter Gittleman, a freshly minted Master of Arts in Preservation Studies from Boston University, toured the house. The site included the Georgian mansion house built by Isaac Royall, Sr. and, only thirty-five feet away, the highly conspicuous slave quarters. The tour guide dwelt on Isaac Royall's wealth and de luxe way of life, making no mention of the enslaved people so manifestly connected to the site. As Gittleman later related, "my jaw dropped." He joined the Board and formed an alliance with Julia Royall, an eighth-generation collateral descendent of Isaac Royall already on the Board, and together they mounted a long, careful campaign to convert the Royall House to the Royall House and Slave Quarters.¹¹²

It was slow work. Clearly there was significant opposition within the Board. In 1999, it commissioned Chan to do her archaeological explorations, specifically to enrich knowledge about the lives of those enslaved at the site. She conducted digs over three seasons and published the results as her dissertation in 2003.¹¹³ The Board held a Planning Retreat in June 2005 and began to revise the mission statement and to redirect the Association.¹¹⁴ The following December, the Board announced "A New Vision for a New Age":

...we have adopted a new mission statement:

The Royall House Association explores the meanings of freedom and independence before, during and since the American Revolution, in the context of a household of wealthy Loyalists and enslaved Africans.

¹⁰⁷ *Ibid.*, 34.

¹⁰⁸ Hoover, *Elegant Royalls*, back cover.

¹⁰⁹ *Ibid.*, 78–94 (treatment of IR, Jr.'s politics), 94 (quoting Brooks' "balance of the world's accounts" conclusion as her own conclusion).

¹¹⁰ *Ibid.*, n.p. (Preface).

¹¹¹ *Ibid.*, 2.

¹¹² Linda Matchan, "One House, Two Histories in Medford," *Boston Globe*, September 3, 2013.

¹¹³ Chan, "Slaves of Colonial New England," 147–228.

¹¹⁴ Minutes, Royall House Planning Retreat, June 11, 2005 (on file with the author).

In charting this course, we recognize that many people will have strong emotional and philosophical reactions. Some may feel we are devaluing what has been the primary narrative thread, playing to political correctness. Others may feel that an organization that has been run and supported primarily by white people has no legitimacy to tell the story of enslaved blacks. Still others may feel it is a story that is too painful or embarrassing, that it would not appeal to visitors simply looking for a pleasant journey into the past. We do not underestimate the task before us. It will be difficult and, at times, unpleasant. It will require a different sort of organization than we have been. We would be sorry to lose some friends and supporters but trust that people who share our passion for the educational potential of this place will replace them. But these are all reasons to work harder, not to avoid the challenge.¹¹⁵

A majority of the Board was moving forward even if it meant that some members and donors, strongly opposed to the new direction, resigned or closed their checkbooks. The reformers changed the site's name and embarked on its top-to-bottom reinterpretation.

Meanwhile, on an entirely separate path, HLS was also moving toward a reckoning. In September 2000, Professor David B. Wilkins inaugurated a semi-annual Celebration of Black Alumni, welcoming hundreds of graduates back to campus for programs held under a huge white tent in Holmes Field. The lunchtime speaker – Coquillette, who was at the time preparing his history of the Law School, together with Kimball – was asked to share his research on the history of black students at HLS. The audience expected a retelling of a familiar story, from George Lewis Ruffin to Charles Hamilton Houston to Reginald Lewis, and that's what they got, but with a surprise. Coquillette distributed a “Black History Quiz” made up to look like a Law School examination, with images of important figures in the Law School's history. The first question – essentially, “Who is this person?” – was about a collection of three images: Isaac Royall, Jr. (taken from the Feke portrait), the Slave Quarters in Medford, and a group of enslaved black workers toiling in a sugarcane field. Spectacularly, no one could identify these images or how they were associated. Coquillette then dropped an Isaac-Royall bombshell: these were Isaac Royall, Jr., the donor of the first Chair in law at Harvard; his slave quarters in Medford; and enslaved laborers in Antiguan sugarcane fields.¹¹⁶ Coquillette proceeded to publish a short “banner” article in the Law School's alumni magazine titled “A History of

¹¹⁵ “A New Vision for a New Age: The Royall House in its Second Century,” December 2005 (on file with the author).

¹¹⁶ Daniel R. Coquillette, “A Celebration of Black Alumni: Luncheon Speech, September 22, 2000” (on file with the author); Coquillette, “Black History Quiz: Harvard Law School,” September 22, 2000 (on file with the author). See also David B. Wilkins, Elizabeth Chambliss, Lisa A. Jones, and Haile Adamson, *Harvard Law School Report on the State of Black Alumni 1869–2000* (2002), 5–6, 57 n.4; Wilkins and Bryon Fong, *Harvard Law School Report on the State of Black Alumni II: 2000–16* (2017), 22.

Blacks at Harvard Law School.” In sixty-seven words, he published, for the first time, the bare-bones story of Isaac Royall, Jr., his Chair bequest, and his slaveholding.¹¹⁷

Chan’s and Coquillette’s researches were simultaneous but independent.¹¹⁸ Gathering the fruits of their work, I gave my 2006 lecture to the gathered law faculty: the title was “Our Isaac Royall Legacy.”¹¹⁹ Then, in 2015, Coquillette and Kimball published *On the Battlefield of Merit*, complete with their full account of the legacy of the Chair – and, subsequently, Harvard Law School itself – in enslaved labor.¹²⁰

In Medford and at HLS, the stigma of slavery that Belinda had affixed to Isaac Royall’s name was back.

ENGAGEMENT V. REPUDIATION

Knowledge that Isaac Royall, Jr. was tied to HLS through the Royall Chair *and* that he was a slaveholder and slave trader, called many to offer some kind of moral and/or political response. Two approaches emerged: clean hands, which required repudiation or distancing of some kind, and engagement, which could never be conclusive or fully perfect. The Royall House and Slave Quarters had chosen engagement. What would HLS do?

In 2003, when Elena Kagan stepped into the HLS deanship, she did not select the Royall Chair, which was available to her because Dean Clark had vacated it and the office simultaneously. Instead, she took the newly endowed Charles Hamilton Houston Chair. That Chair, funded by an anonymous gift, was named for a black HLS graduate who had played a leading role in fostering a cadre of black civil rights lawyers,¹²¹ who is sometimes dubbed “the man who killed Jim Crow,”¹²² and who mentored Thurgood Marshall, the Justice for whom Kagan had clerked.¹²³ This made a lot of sense: Coquillette had affixed the slavery stigma to the Royall Chair in his Celebrating Black Alumni lecture three years before, a fact of which Kagan had to be fully aware. Why go there? And the Houston Chair was brand-fresh; it’s very possible that Kagan had even been involved in its creation. Quoted in *Harvard Law Today*, the School’s in-house outlet for carefully groomed news about itself, she

¹¹⁷ Daniel R. Coquillette, “A History of Blacks at Harvard Law School,” *Harvard Law* (Fall 2000), 22.

¹¹⁸ Conversation with Daniel R. Coquillette, March 20, 2020.

¹¹⁹ This was later published as “My Isaac Royall Legacy” (see [note 6](#) above).

¹²⁰ Coquillette and Kimball, *Battlefield of Merit*, 81–91.

¹²¹ Kenneth W. Mack, *Representing the Race: The Creation of the Civil Rights Lawyer* (Cambridge, MA: Harvard University Press, 2012).

¹²² Brett Milano, “The Man Who Killed Jim Crow: The Legacy of Charles Hamilton Houston,” *Harvard Law Today*, September 5, 2019.

¹²³ Mack, *Representing the Race*; “Kagan Becomes Dean of Harvard Law School,” *Harvard Law Today*, July 1, 2003.

proudly pointed to the lineage from Houston to Justice Marshall to herself.¹²⁴ It was a deft, elite, civil-rights- and self-affirming branding strategy.

Seven years later, however, when rumors flew that President Obama was going to nominate Kagan for a post on the US Supreme Court, a group of left-of-center law faculty of color attacked her decanal faculty-hiring record for being a diversity desert.¹²⁵ They basically accused her of talking the talk but not walking the walk. In response, nominee Kagan's supporters offered a Royall-themed talking point: the Royall Chair was by "tradition" the Dean's Chair, and yet Kagan had "declined" it when she became dean in 2003 precisely because of its slavery taint, taking instead the Charles Hamilton Houston Chair, symbolically the Royall Chair's new virtual opposite.

The tradition/taint/decline/instead narrative became a small but persistent element of Kagan's vicarious campaign for confirmation as Supreme Court Justice, debuting on May 12, 2010. HLS Professor Randall Kennedy offered support for Kagan's nomination with praise for her pride in being the first Charles Hamilton Houston Chair, but made no reference to her declining the Royall Chair.¹²⁶ His version was fully supported by Kagan's own public statement quoted in *Harvard Law Today*.¹²⁷ The full story complete with the taint of the Royall Chair, the tradition that it was the Dean's Chair, and Kagan's refusal to take it, first emerged in a post by HLS Professor Charles J. Ogletree, Jr., which claimed that *all* the Law School deans had held the tainted Chair.¹²⁸ HLS clinical faculty member Ronald Sullivan made the more modest claim that the Chair was merely traditionally the dean's.¹²⁹ And from there the narrative jumped to position papers supporting Kagan's nomination that national political groups submitted to the Judiciary Committee.¹³⁰ Sullivan

¹²⁴ "Kagan Becomes Dean."

¹²⁵ Guy-Uriel Charles, Anupam Chander, Luis Fuentes-Rohwer, and Angela Onwuachi-Willig, "The White House's Kagan Talking Points are Wrong," *Salon*, May 7, 2010, www.salon.com/2010/05/07/law_professors_kagan_white_house. The more tepid hesitation of civil rights centrists found its way into print later: Josh Gerstein, "Civil Rights Vets Uneasy with Kagan," *Politico*, May 16, 2010.

¹²⁶ Randall L. Kennedy, "The Media Jabs are Unfair, Kagan Will Fight for Equality on the Court," *huffpost*, May 12, 2010, www.huffpost.com/entry/post_603_b_573085.

¹²⁷ "Kagan Becomes Dean."

¹²⁸ Charles J. Ogletree, Jr., "Your Take: Why Elena Kagan is a Good Choice for the Supreme Court," *The Root*, May 12, 2010.

¹²⁹ Ronald Sullivan, "A Black Kagan Recruit Makes the Case for Confirmation," *thegrio*, May 13, 2010, <https://thegrio.com/2010/05/13/a-black-kagan-recruit-makes-the-case-for-confirmation>; George Curry, "Questions Linger about Obama's Second Supreme Court Pick," *Pittsburgh Courier*, May 19, 2010.

¹³⁰ NAACP Legal Defense and Education Fund, "Report on the Nomination of Elena Kagan to the Supreme Court of the United States," June 24, 2010, 22 n.130; Lawyers' Committee for Civil Rights Under Law, "Report on the Civil Rights Record of Supreme Court Nominee Solicitor General Elena Kagan," n.d., 7–8; Report of the American Civil Liberties Union on the Nomination of Elena Kagan to be Associate Justice of the U.S. Supreme Court," June 21, 2010, 24.

repeated it at Kagan's confirmation hearing.¹³¹ And thence it entered the bloodstream of journalistic copy-and-paste, in articles written without any effort to fact-check the dubious elements of the story.¹³²

After much searching, I have found no instance of Kagan relating the tradition/taint/decline/instead narrative; nor have I been able to find any press or other coverage of it before 2010. In addition, I have two further bits of evidence that Kagan was probably not deeply invested in repudiating Isaac Royall, Jr., and his Chair. Leaving the Chair empty was an option, but in 2003 she gave it to David Herwitz, a very distinguished, very senior tax and accounting specialist. I doubt that a supreme strategist – which Dean Kagan assuredly was – would have placed what she understood to be an institutional reputational liability on the shoulders of a faculty member with zero track record in social-justice mud wrestling. And then, when Herwitz retired, she gave it to me, when I was in the *most* bad-girl phase of my career. Armed with the Royall Chair, I could have done the institution a lot of damage. She seems not to have fully grokked the potential for virtue-signaling repudiation that Coquillette's revelations enabled.

And I think that's to her credit. This story can help us see one of the dangers of the repudiation route: the way in which it tempts those on it to craft Manichean good-and-evil patterns out of more complex and ambiguous human material.

It starts back in 2000, right in Coquillette's quiz lecture. His Royall narrative contains two exaggerations, both of which can be reduced to more accurate size using his, and Kimball's, own work on the Royall Chair! In 2000, it was not enough for Coquillette that the Royall Chair was the first Chair in law at Harvard; instead, Royall's "bequest established the Harvard Law School." And it was not enough that the Royall Chair "was the most senior endowed chair in the Law School"; rather, it was also "traditionally occupied by the Dean."¹³³ The latter exaggeration is probably the origin of the link to tradition found in the pro-Kagan campaigners' tradition/taint/decline/instead narrative. Turns out, sadly for the narrative, that it isn't true. Nor did the Royall bequest establish the Law School. Here is what happened instead.

As we have seen, the Royall Chair, first established in 1815, and first occupied by Isaac Parker in 1816, was initially a part of Harvard College. The Law School did not open until 1817.¹³⁴ In expanding from a single professorship to a School, the University launched on an experiment in legal education as a university-based professional education for postgraduates. As Coquillette and Kimball reveal, the

¹³¹ "The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States," Hearing before the Committee on the Judiciary, United States Senate, June 28–30 and July 1, 2010, Serial No. J-111-98, p. 356.

¹³² Jacob Gershman, "Harvard Law Students Urge Removal of Slaveholder Reference from School Seal," *Wall Street Journal*, updated November 4, 2015.

¹³³ Coquillette, "Black History Quiz."

¹³⁴ Coquillette and Kimball, *Battlefield of Merit*, 98–99.

School's original business model – an inadequately funded Royall Chair held by Parker and dedicated to undergraduate lectures, when he could be spared from his duties as Chief Justice of the Massachusetts Supreme Judicial Court, plus a tuition-funded professor, Ashael Stearns, with responsibility for *everything* necessary for the construction of a Law School – was profoundly unstable.¹³⁵ The Royall Chair did not establish the School, though Parker, its first holder, tirelessly campaigned for it.¹³⁶

And second, it was the Dane Chair, not the Royall Chair, that traditionally, in the School's first seventy-five-odd years, belonged to the dean. The Law School enterprise did not become viable until Joseph Story took a second endowed chair, the Dane Professorship, on carefully negotiated terms that made him the leader of the new School.¹³⁷ When Story died in 1845, Simon Greenleaf *relinquished* the Royall Chair to assume both leadership and the Dane Professorship.¹³⁸ The place was known as the “Dane Law College,”¹³⁹ and rightly so: Nathan Dane's endowment gift enabled the establishment of a full-fledged, sustainable School. He later made the loan that structured co-financing by himself and the College to create Dane Hall, the School's first freestanding building.¹⁴⁰ He contributed a major impetus to Story's career as treatise-writer *par excellence*.¹⁴¹ And he was an anti-Royall in the sense that he consistently played a role in anti-slavery politics. He had drafted the Northwest Ordinance in 1787, which abolished slavery in the new territory; and participated in the secessionist Hartford Conference in 1814.¹⁴² If a new twenty-first-century dean wanted to signal commitment to civil rights by *taking* a Chair traditionally associated with the leadership of the School – the Dane Chair, specifically – he or she might have to revive this forgotten, *anti-slavery* piece of HLS history.

In 1846, the Corporation issued new rules interrupting the Dane leadership tradition. They required that the senior professor would be considered the “head” of the School; that the Dane and Royall professors had joint responsibility for the course of instruction; and that the faculty “equally and jointly ha[d] the charge and oversight of the students.”¹⁴³ In this arrangement, there was a “head” of the School

¹³⁵ *Ibid.*, 91–113.

¹³⁶ *Ibid.*, 91–97.

¹³⁷ *Ibid.*, 113–14, 131–39, 157.

¹³⁸ *Ibid.*, 158.

¹³⁹ *Ibid.*, 138.

¹⁴⁰ *Ibid.*, 136–37.

¹⁴¹ *Ibid.*, 138.

¹⁴² *Ibid.*, 132. To be sure, the Northwest Ordinance included a fugitive slave clause, and promised amity with Native Americans as long as there was no war (which did happen, with calamitous results for the tribes).

¹⁴³ *Ibid.*, 336 n.9 (quoting the Harvard Law School Catalog, 1852–53, 28, but noting that the same policy had been in place constantly from 1846).

but no dean, and both the Royall and Dane Chairs were subordinates with defined responsibilities.

In 1870, President Eliot erased this teamwork division of labor when he inaugurated the office of dean and persuaded Christopher Columbus Langdell to fill it¹⁴⁴ – as the Dane Chair.¹⁴⁵ The President wanted, and got, a strong dean with the power to make big changes and answerability to him rather than to a disorganized passel of colleague-subordinates.¹⁴⁶ The Dane Chair was back on top, and for the first time it was the Chair of a dean.

But Langdell proceeded to break the revived link between the Dane Chair and the leadership role by holding onto the former when he resigned from the latter in 1895.¹⁴⁷ Between Langdell and Robert C. Clark there were nineteen deanships, but only two were Royall Professors. Joseph Henry Beale took the Royall Chair in 1913,¹⁴⁸ and served as dean in 1929/30; Edmund Morris Morgan occupied the Royall Chair from 1938 to 1950,¹⁴⁹ and served as acting dean in 1936/37 and from 1942 to 1945.¹⁵⁰ In neither case was there any relationship between their holding the Chair and serving as dean. Clark provided the first reason to think of the Royall Chair as the dean's Chair when he assumed it upon becoming Dean in 1989 and relinquished it when he returned to the faculty in 2003. There is a rumor, which I have heard several times but cannot substantiate, that Clark *took* the Royall Chair from its prior occupant because he thought that, as dean, he was privileged to hold it. The rumor, to be sure, supports the traditionally-the-dean's-chair line but only as an urban legend: it can't be true. Vern Countryman, the Royall Chair right before Clark, retired in 1987,¹⁵¹ leaving the Chair vacant until Clark selected it two years later. Clark informed me – and I believe him – that when he left the deanship, he gave up the Royall Chair not to make way for the new dean but because he had cultivated the gift of the Austin Wakeman Scott Chair in part by promising the donor that he would be its first occupant.¹⁵²

Thus the Royall Chair was not traditionally the dean's chair. Originally, the *Dane* Chair belonged to the head of the School; in the late nineteenth and through the twentieth centuries, *no* chair was associated with the deanship. Clark's one-off stint as both Royall Chair and dean provided the hook for an *invented* tradition that, like most invented traditions, is a pastiche of truth and fiction.

¹⁴⁴ Coquillette and Kimball, *Battlefield of Merit*, 4, 309.

¹⁴⁵ *Ibid.*, 309, 625.

¹⁴⁶ *Ibid.*, 308–11.

¹⁴⁷ *Ibid.*, 625.

¹⁴⁸ *Ibid.*

¹⁴⁹ Finding Guide to the Papers of Edmund Morris Morgan in HOLLIS, <https://hollisarchives.lib.harvard.edu/repositories/5/resources/4434> (see “Historical/Biographical Information”).

¹⁵⁰ “Deans of Harvard Law School,” <https://hls.harvard.edu/about/history/hls-deans>.

¹⁵¹ “Countryman, Vern,” *AALS Directory of Law Teachers* (1988–89), 111.

¹⁵² Conversation with Robert C. Clark, April 8, 2020.

I think there is a lesson here about the dangers of moral repudiation as a branding exercise. On the repudiation path, Royall, the Royall Chair, and their relationship to the School had to be aggrandized in order to more effectively convey a shocking taint and to deflect all the light in the room onto the virtue of the repudiator. This happened when Coquille first introduced the HLS community to Isaac Royall, Jr., at the Celebrating Black Alumni event, and again when nominee Kagan's supporters embellished her careful decisions and messages about her Chair in an effort to make of them a good-against-evil story. Yet the Isaac Royall precedent is bad enough without exaggeration.

Much later, when the press began to add that Dean Martha Minow (served 2009–17) had also declined the Royall Chair, “traditionally reserved for the dean,”¹⁵³ the story made even less sense. She would have had to take it away from me to bestow it on herself (which she never suggested doing) and, by then, why would she? The taint was public knowledge and I was doing my sorry best to keep it alive by distributing the published version of my Chair lecture and taking tours for various HLS constituencies to the Royall House and Slave Quarters. Moreover, Minow's path was engagement, not repudiation. She hosted welcome-to-HLS dinners for 1L sections in the Caspersen Room so that she could point to the Feke portrait and invoke the Isaac Royall slavery legacy as an object lesson in the chasm that can separate law and justice.¹⁵⁴ She was acknowledging the hard work of moral sorting. The opposite of repudiation.

The momentum to repudiation would not begin its rush until 2015.

“ROYALL MUST FALL” AND THE DEMANDS

During the academic year 2015/16, HLS was the scene of multiple student movements focused especially on racial injustice in the world and at the School. Students mounted sustained and multi-front protests against their legal education and called for change. They re-re-re-re-signified the Isaac Royall/HLS shield to focus directly and exclusively on the fact that it memorialized the donor of the first Chair in law at Harvard *who was a slaveholder*. Isaac Royall, Jr.'s brand took a nosedive; the dean convened a special committee to make a recommendation about the shield; the committee recommended elimination of the Royall/HLS shield; and the Corporation acceded to that advice. The shield came down all over the School and throughout its many productions (Figure 9.13).

I was involved in the protests, in consulting with some of the protesters, in faculty discussion of the School's response to the protesters, and on the special committee empaneled to consider what to do about the shield. I was also personally denounced

¹⁵³ See, for example, Kristen Decarr, “Students Protest Harvard Law School Seal,” *Education News*, November 7, 2015.

¹⁵⁴ Mann Report, 7.



FIGURE 9.13 Removing the shield from Ames Courtroom. Lorin Granger/HLS Staff Photographer.

as a racist by one of the protesters, in part for benefiting from the Royall Chair. Every step of the way was intensely controversial. It will be even more than usually impossible for me to be objective about what it all meant. But I'll try to write it so that those who disagree with my interpretation of it, and those who chose for themselves very different roles in it, can see it in retrospect as a story not only about social good and evil, or political wisdom and folly, but also about a brand and its mark.

And a note on method is also in order. The student activists (both right and left) and the HLS administration, and, more occasionally, the involved faculty, all had press strategies. They often staged events precisely for their value as public messaging. After these interventions, controversies – which were also performances – routinely followed. Groups and individuals accused one another of distorting, omitting, exaggerating, and grandstanding. Fights over meaning abounded. This was, in addition to being a social-justice conflict, a battle over a large assemblage of brands. In this chapter, I rely on the products of this struggle – journalism, an admittedly unscientific public opinion survey, physical/visible installations, open letters, intercepted meeting notes¹⁵⁵ – not as evidence of what really happened, but *as what happened*. This is an account of people deploying artifacts in a fight over multiple brands.

A brief introduction to the dramatis personae will help readers follow this story. The dean was Martha Minow, a lifelong center-left social-justice scholar, teacher, expert, and advocate. A group formed by students in the three-year Juris Doctor (or JD) program – mostly from the US – called Students for Inclusion, dedicated to ensuring that legal education at HLS foster “productive and contextualized

¹⁵⁵ Some documents that I rely on here were disclosed not by their authors but by pugilists in this struggle as part of their tactical weaponry, often against their authors. I have been unable to verify their authenticity, but – when I do have primary knowledge of their contents – they seem to me to be unaltered. When I am citing such a document, the footnote will indicate that it is “intercepted and of uncertain provenance.”

conversations on matters related to race, gender, and class,”¹⁵⁶ had been developing a critique of the School since Spring Term 2014. After the police killings of Eric Garner and Michael Brown in the summer of 2014, Students for Inclusion significantly expanded its local activism, becoming the School’s most explicit engagement with Black Lives Matter and the national upsurge in racial-justice activism. A distinct group, initiated in the fall of 2015 by LLMs from sub-Saharan Africa, named itself Royall Must Fall and demanded, *inter alia*, removal of the Royall/HLS Shield. JD activists from Students for Inclusion joined Royall Must Fall as soon as it issued its first call to action, and Students for Inclusion reframed itself as a coalition of student groups named Reclaim Harvard Law School (aka Reclaim HLS, Reclaim, etc.). Reclaim’s major achievements were a list of Demands for reform of the Law School, and a long-running occupation of a major lounge area at the center of student life, which they named Belinda Hall. Behind the scenes, if you were witnessing the whole thing from my perch on the faculty, Royall Must Fall and Reclaim merged around Thanksgiving, but the two groups retained separate public profiles. Because their agendas were distinct, they coursed through the upcoming year on very different pathways. Finally, Minow appointed Professor Bruce H. Mann to head a committee to address the issue of the Royall/HLS shield: in early March 2016, it issued what I will call the Mann Report recommending removal of the shield.

Protest started slowly and quietly, and got faster and louder over time. According to Students for Inclusion’s published “Timeline of Student Activism” at HLS, its own commencement as an activist group dated to the spring of 2014, marked by some private meetings with Minow and Dean of Students Ellen Cosgrove.¹⁵⁷ It argued for what it called contextualized learning – learning law, in detail, as the effect and cause of a radically unequal society.¹⁵⁸ The following fall, it launched a tumblr, “Socratic Shortcomings,” which displayed students’ posts about the many failings of their teachers and each other.¹⁵⁹

On December 7, 2014, a coalition of HLS student affinity groups posted an open letter to Minow urging her to address the crisis produced by the deaths of Garner and Brown and the failure of grand juries to indict their killers. The letter expressed students’ anguish about racial injustice in America, their determination to use their legal training to uproot it, and their deep distress, described as trauma and

¹⁵⁶ Harvard Law School, “Student Organizations and Student Life: Students for Inclusion,” <https://archive-it.org/collections/8420?q=Students+for+Inclusion&page=1&show=Sites>.

¹⁵⁷ Reclaim Harvard Law School, “Timeline of Student Activism for Diversity and Inclusion,” <https://reclaimharvardlaw.wordpress.com/timeline-of-student-inclusion-requests> (hereinafter Timeline).

¹⁵⁸ Reclaim Harvard Law School, “Reclaim Harvard Law Demands,” December 4, 2015, <https://reclaimharvardlaw.wordpress.com/demands>.

¹⁵⁹ Timeline (dating the inauguration of “Socratic Shortcomings” to November 11, 2014); for that first set of posts, see <https://web.archive.org/web/20141110091309/https://socraticshortcomings.tumblr.com>.

exhaustion, about their semester-long deep dive into protest and activism. Invoking Garner's last words, they intoned, "We can't breathe." A follow-up letter urged Dean Minow to commit the Law School to a message about racial justice at least equivalent to ones that she had issued at the time of the Boston Marathon Bombing, the death of Nelson Mandela, and the Sandy Hook school shooting.¹⁶⁰ The coalition stated that "we expect" the dean to allow students, at their individual discretion, to postpone their exams, scheduled to begin on December 10; to provide them "grief/trauma counselors"; and to create school-sponsored programming on social-justice issues. They staged a die-in outside the last faculty meeting of the fall term in a dramatic bid for faculty support: an event I witnessed myself.

The dean's response did not satisfy the protesters. Together with Yale Law School Dean Robert Post, and in her personal capacity, Minow published an op-ed in the *Boston Globe* arguing that accountability and police reform were necessary for the preservation of the rule of law.¹⁶¹ She held a public meeting on December 10 in Ames Courtroom at which students related their experiences of racism and marginalization at the School.¹⁶² But the bid for exam postponement and trauma counseling met with stiff off-campus rebuke. Black alumni of the School issued strong objections to the exam-postponement proposal; for instance, one posted: "Nope. No. Absolutely not. You don't get an extension because this racism is killing you inside ... A lawyer kind of has to be able to *function* in the face of grand jury decisions. That's part of the job."¹⁶³ Mockery emerged from right-wing media and quickly spread to centrist venues.¹⁶⁴ HLS exams took place as planned.

¹⁶⁰ Harvard Law Coalition, "Letter to Dean Minow and Harvard Law School Administration," December 7, 2014, <https://harvardlawcoalition.wordpress.com>.

¹⁶¹ Martha Minow and Robert Post, "Trust in the Legal System Must Be Regained," *Boston Globe*, December 9, 2014.

¹⁶² Timeline. This is my only source for this meeting.

¹⁶³ Elie Mystal, "Black Law Students Ask for Race-Based Exam Extension," *Above the Law Redline*, December 8, 2014, <https://web.archive.org/web/20141227122301/https://www.atlredline.com/black-law-students-ask-for-race-based-exam-extension-1668250360>.

¹⁶⁴ Chuck Ross, "'Traumatized' Georgetown, Harvard Law Students Demand Postponed Finals," *Daily Caller*, December 8, 2014, <https://dailycaller.com/2014/12/08/tramautized-georgetown-harvard-law-students-demand-postponed-finals>; Julia Glum, "Eric Garner Protests 2014: Columbia Law School Postpones Final Exams for Students Traumatized by Grand Jury Decision," *International Business Times*, December 9, 2014, www.ibtimes.com/eric-garner-protests-2014-columbia-law-school-postpones-final-exams-students-1745032; Maggie Lit, "Ivy League law school delays finals for students traumatized by Ferguson," *Campus Reform*, December 9, 2014, www.campusreform.org/?ID=6129; Charles C.W. Cooke, "Social Injustice Ate My Homework," *National Review*, December 9, 2014, www.nationalreview.com/2014/12/social-injustice-ate-my-homework-charles-c-w-cooke; Genevieve Belmaker, "Law Students Grieved by Grand Jury Decisions," *Epoch Times*, December 10, 2014, www.theepochtimes.com/law-students-grieved-by-grand-jury-decisions_1134922.html; Peter Schworm and Kiera Blessing, "After Protests, Harvard Law Students Request Exam Delay," *Boston Globe*, December 10, 2014, www.bostonglobe.com/metro/2014/12/10/harvard-law-students-request-delay-exams-amid-post-ferguson-national-emergency/Y57bkeocKzqG65T8vXrMtM/story.html.

Stung, student activists reconsidered their strategy. They made a decisive pivot from asking the Law School to side with them against racism, to aligning racism *with the School* and mounting a thoroughgoing critique of their legal education.¹⁶⁵ Early in Spring Semester 2015, Students for Inclusion sponsored a major conference, “Law School Matters: Reassessing Legal Education Post-Ferguson,” with Dean Minow appearing on a panel after the keynote address by HLS alums Gary Peller and Kimberlé Crenshaw. Professors modeled contextualized teaching of important 1L cases, and panels explored the history of racial activism at HLS and the contributions of critical race theory to the study of law.¹⁶⁶ The road to the Demands was now under construction.

Over the remainder of the semester, Students for Inclusion and affinity groups met with Dean of Students Ellen Cosgrove several times with reform proposals, including student access to faculty meetings and disclosure of the names of faculty on Law School committees and of lists of recent faculty visitors; course evaluation questions about contextualized learning; and changes to orientation. Students for Inclusion co-sponsored teaching awards for five faculty members, most of whom were, conspicuously, visitors.¹⁶⁷ During this time, I also remember large meetings of activist students with regular and clinical faculty who supported institutional reform, at which we discussed a broad array of possible changes such as a mandatory 1L course focused on social justice and student representation on important faculty committees. The spring and early fall of 2015 were thus the Time of Closed Meetings, hours and hours of them, in which students met with administrators, students met with faculty, faculty met with faculty, administrators met with faculty – in small and large groups, one-on-one – to seek out common understandings of the possibilities for institutional change.

Campus activism lurched back into the public eye in the middle of Fall Semester 2015. The impetus came from our LLM program, a one-year Master’s Degree program largely focused on students coming from abroad with non-US law degrees. Some of our new LLM students arrived on campus that fall fresh from the massive protests underway in South Africa against large proposed increases in higher education tuition fees at public universities, which protesters saw as a way to cement post-Apartheid racial inequality in South African society. One element of those protests was a demand that Rhodes Must Fall: that statues of Cecil J. Rhodes – a primary architect of South African Apartheid – be removed from a central plaza at the University of Cape Town and from a façade niche at Oriel College, Oxford. Another

¹⁶⁵ Anonymous faculty informant.

¹⁶⁶ Timeline. For a video of one of the panels, see The Systemic Justice Project at Harvard Law School, “Contextualization in Legal Education: A Teach In,” https://youtu.be/RE8wG8g_Jkw.

¹⁶⁷ Timeline. This is my only source for the narrative above.

was an effort to critique and reimagine the substance of higher education that protesters framed as “decolonizing the curriculum.”¹⁶⁸

Arriving from that heated context, several LLMs from sub-Saharan Africa explicitly announced a *Royall Must Fall* campaign. Their initial call to action, issued October 23, 2015, was almost entirely focused on the South African struggle. It invited “solidarity with the college students of South Africa in their brave stand against escalating fees . . . and against the continued economic and social oppression that black students continue to experience in South Africa.”¹⁶⁹ It also launched the call for removal of the Royall/HLS shield, which was promptly taken up by *The Harvard Crimson* (aka *The Crimson*) as the whole point.¹⁷⁰ On November 18, Royall Must Fall issued an open letter shifting its full attention to HLS and the issue of the shield.¹⁷¹

To Royall Must Fall, the Royall/HLS shield was a “symbol of mass atrocities” committed in the brutal 1736 suppression of the slave uprising on Antigua. Seventy-seven slaves were burned alive, five broken on the wheel, six gibbeted, and thirty-six banished.¹⁷² Two Royall slaves were caught up in this cataclysm of punishment: Hector, a driver, burned alive; and Quaco, banished.¹⁷³ Royall Must Fall took care to describe, in gruesome detail, precisely what being broken on the wheel involved.¹⁷⁴ They followed the lead of Coquillette and Kimball¹⁷⁵ in laying the responsibility for this cascade of cruel punishment at the feet of Isaac Royall, Sr. and Jr.; Coquillette has gone further, attributing it personally and directly to Isaac Royall, Jr.¹⁷⁶

This is another instance in which making the moral case against Isaac Royall, Jr. as extreme as possible required getting slightly out ahead of the historical record.

¹⁶⁸ Amit Chaudhuri, “The Real Meaning of Rhodes Must Fall,” *Guardian*, March 16, 2016; Zethu Matebeni, “#RhodesMustFall – It was Never Just about the Statue,” *Heinrich Böll Stiftung*, February 19, 2018, <https://za.boell.org/en/2018/02/19/rhodesmustfall-it-was-never-just-about-statue>.

¹⁶⁹ Royall Must Fall Facebook page, at www.facebook.com/events/984985958190163.

¹⁷⁰ Andrew M. Duehren, “At Harvard Law School, Students Call for Change of Seal,” *Harvard Crimson*, November 2, 2015.

¹⁷¹ “An Open Letter to Dean Minow from Students of Harvard Law School: Royall Must Fall,” *Harvard Law Record*, November 18, 2015, <http://hlrecord.org/an-open-letter-to-dean-minow-from-students-of-harvard-law-school-royall-must-fall>.

¹⁷² David Barry Gaspar, *Bondmen and Rebels: A Study of Master-Slave Relations in Antigua* (Durham, NC: Duke University Press, 1985), 30–36.

¹⁷³ *Ibid.*, 32–33, 36.

¹⁷⁴ Antuan Johnson, Alexander Clayborne, Sean Cuddihy et al., “Royall Must Fall,” op-ed, *Harvard Crimson*, November 20, 2015, <https://www.thecrimson.com/article/2015/11/20/hls-royall-must-fall/>.

¹⁷⁵ “[I]t is a historical fact that . . . [the Royall Chair] is directly linked to a slave revolt on the island of Antigua.” Coquillette and Kimball, *Battlefield of Merit*, 81.

¹⁷⁶ Jennifer Schuessler, “Confronting Academia’s Ties to Slavery,” *New York Times*, March 5, 2017, www.nytimes.com/2017/03/05/arts/confronting-academias-ties-to-slavery.html?searchResultPosition=11.

The centrist Mann Report determined, instead, that it remains unclear whether Isaac Royall, Jr., or even his father, was actively involved in the suppression process.¹⁷⁷ The historical record is indeterminate. First, it is not even clear that there was a plot: historians disagree, with some designating the event a panic.¹⁷⁸ There can be no doubt, however, of the ferocity of the repression. Isaac Royall, Jr. was almost certainly in Antigua at the time: he would at least have witnessed it.¹⁷⁹ And he and his father were surely complicit, being integral to the island's planter class. But the premier study of the slave revolt and repression does not mention either father or son in its lengthy analysis of records of trials assigning blame and punishments, and of the legislative reports compiled soon after the events.¹⁸⁰ Many prominent planters played large roles in this terrible process, but the Royalls go unmentioned. We simply cannot know how close they were to the many, many decisions made then about interrogations, charges, convictions, and punishments.

But none of that mattered in the heat of denunciatory politics. In the activists' October 2015 rebranding of Isaac Royall, Sr. and Jr., accurately or not, they stepped anew into a classically late-twentieth-century species of extreme wrongdoer: they became violators of human rights not so much because of slaveholding and slave-trading but because of mass atrocities.

Royall Must Fall's second plea assumed that a new shield would be forthcoming and that it would symbolize the structural bias built into US society by its roots in the slave system:

Replacing the seal would not erase the brutal history of the slave trade. Instead, it would appropriately acknowledge the dark legacy of racism that is presently hidden in plain sight. Many people see no clear connection between the slave trade and the present. That is how structural racism becomes entrenched; forgetfulness and indifference are tools of oppression. The refusal of our society to remedy past

¹⁷⁷ Mann Report, 3.

¹⁷⁸ See Gaspar, *Bondmen and Rebels*, 6–13 (probable plot); Jason T. Sharples, "Hearing Whispers, Casting Shadows: Jailhouse Conversation and the Production of Knowledge during the Antigua Slave Conspiracy Investigation of 1736," in Michele Lise Tarter and Richard Bell (eds.), *Buried Lives: Incarcerated in Early America* (Athens: University of Georgia Press, 2012), 35–59 (probable panic); and Mike Dash, "Antigua's Disputed Slave Conspiracy of 1736: Does the Evidence against these 44 Slaves Really Stack Up," *Smithsonian Magazine*, January 2, 2013, www.smithsonianmag.com/history/antiguas-disputed-slave-conspiracy-of-1736-117569 ("the verdict remains in the balance").

¹⁷⁹ See Chan, "Slaves of Colonial New England," 427–44, where Chan transcribes the account book of Isaac Royall, Jr.'s uncle and guardian Jacob Royall. Payouts for living expenses to the nephew stopped abruptly in 1736, suggesting a sudden departure from the Boston area. Chan (79) concludes that Isaac Royall, Jr. returned to Antigua, thus placing him on the island in time to witness, and perhaps participate in, the repression.

¹⁸⁰ Gaspar, *Bondmen and Rebels*, 3–62, 215–58. For an analysis of the same records as evidence of Akan culture among the Antiguan enslaved population, see Kwasi Konadu, *The Akan Diaspora in the Americas* (Oxford University Press, 2010), 133–40.

discrimination has resulted in enduring racial disparities in nearly every quality-of-life metric in the United States.

We cannot stop working toward the eradication of structural racism until every member of our society is treated with equal worth and dignity. Royall Must Fall.¹⁸¹

Two distinct social-justice visions are merged here. One version is both material and distributive: removing and replacing the shield would be a dramatic act highlighting the roots of contemporary racial maldistribution in the legacy of slavery and the slave trade; redistribution rectifying material racial disparities would (somehow) follow. But the other is symbolic and dignitary: the acceptability of the shield for all these years is just like endemic racism hidden in plain sight; repudiation of the shield would signify the reverse by transferring value from the shield to disrespected persons, producing a recognition of “the equal worth and dignity” of “every member of our society.” Neither vision came with a plan for its realization. Though Royall Must Fall members stipulated that “The Royall crest is merely one aspect of [a] . . . broader justice project,”¹⁸² the bottom-line call – Royall Must Fall – was for an erasure: it could be satisfied by disappearing the shield without any accompanying program of redistribution *or* recognition.

The next morning, November 19, the Law School exploded. Early arrivals in the main hallway of our biggest building, Wasserstein Hall and Caspersen Student Center, nicknamed WCC, reported black tape placed across the faces of some, not all, of the black faculty depicted in the “tenure” portrait gallery there (Figure 9.14).¹⁸³ Royall Must Fall quickly issued a statement announcing that they had created an anti-racism installation in the middle of the previous night. They claimed that they had put black tape across Royall/HLS shields in WCC and mounted educational posters about Isaac Royall, Jr. Then, they implied, their black tape had been highjacked and repurposed for defacement of the black faculty portraits.¹⁸⁴ No identification of the individuals responsible for either action has ever been made public.

Outrage ruled the day. When Professor Randall Kennedy, whose portrait had been among those defaced, told students that he didn’t feel indignation because he didn’t know who had done it or why – that it could even be a hoax – he provoked a second explosion from students “bristling with certainty” that the tape was a manifestation of the systemic racism of the School.¹⁸⁵

¹⁸¹ “An Open Letter to Dean Minow.”

¹⁸² Johnson et al., “Royall Must Fall.”

¹⁸³ Brianna Rennix, “Portraits of Black Harvard Law Professors Vandalized, Covered in Black Tape,” *Harvard Law Record*, November 19, 2015. I witnessed the early-morning crowd in WCC marveling at the portrait defacements.

¹⁸⁴ Statement from Royall Must Fall, *Harvard Law Record*, November 19, 2015, <http://hlrecord.org/statement-from-royall-must-fall>.

¹⁸⁵ Randall Kennedy tells this story in his op-ed, “Black Tape at Harvard Law,” *New York Times*, November 27, 2015. Many indignant students related it to me at the time.



FIGURE 9.14 Black Tape Incident. Lark Turner.

Given the sense of crisis that the black-tape episode produced, Dean Minow held a town hall meeting that very afternoon, the first of three that were attended by hundreds of students and by scores of faculty, administrators, and staff. These were open mike meetings; I attended the first and the last of them. The dean, and sometimes faculty and top administrators were gathered on the stage and students in the audience; the open mike ensured that speakers could hold the floor for long, passionate denunciations; and the dean was chronically unable to convince activist students that she was on their side. Predictably, perhaps, these gatherings intensified rather than allayed the sense of crisis.

Students for Inclusion and Royall Must Fall were flooded with new recruits, including more middle-of-the road students activated by the turmoil.¹⁸⁶ Students for Inclusion reformatted itself as Reclaim Harvard Law. Royall Must Fall and Reclaim Harvard Law began working behind the scenes on a major intervention targeting not only the shield but the HLS brand *tout court*. They merged around Thanksgiving, but kept distinct public profiles.¹⁸⁷

By now, the University had an Office of Trademark Programs (OTP) with web-available rules requiring units of the University to obtain permission before licensing any Harvard insignia and warning third parties that the University planned to protect its name and marks to the full extent of its own policies and trademark law.¹⁸⁸ The website announced to the world that the University had registered the Royall/HLS shield as one of its marks with the US Office of Trademarks and Patents.¹⁸⁹ The transformation of the shield from (assumed) heraldry to decoration to logo to trademark had been completed.¹⁹⁰

¹⁸⁶ Anonymous student informants.

¹⁸⁷ *Ibid.*

¹⁸⁸ Harvard University, "Policy on the Use of Harvard Names and Insignias," November 6, 2015, <https://web.archive.org/web/20150910002658/http://trademark.harvard.edu/pages/policies-forms>.

¹⁸⁹ Harvard University, "Trademark Notice," November 6, 2015, <https://web.archive.org/web/20150909223817/http://trademark.harvard.edu/pages/trademark-notice>. The shield had been registered as of March 6, 2012. Trademark Electronic Search System (TESS) Registration number 4146627.

¹⁹⁰ During the summer of 2019, formalization went a step further: the OTP posted "Guidelines for the Creation of a New Shield Design or Logo by Harvard Departments, Units, and Officially Recognized Harvard Organizations for Themselves or Their Activities," <https://trademark.harvard.edu/guidelines-creation-new-shield-design-or-logo-harvard-departments-units-and-officially>. The first posting I could find on the "Wayback Machine" (a search tool for past states of the web, available at <https://archive.org/web>) was August 9. The rules bar sub-units from designing new insignia until they have OTP permission to do so, set forth requirements for new insignia, and give the OTP the power to veto proposed designs. Clearly the OTP anticipated that communal disgust with Harvard insignia would not stop with the protest against the Royall/HLS shield. Note that the shield is now explicitly a logo: "The Harvard VERITAS shield, as well as the School shields and other official University logos ("Harvard insignia") are representations of the University and cannot be altered in any way . . . The shield shape is acceptable for new logos" ("Guideline 2.a").

It was against this regulatory backdrop that Dean Minow acted. Between November 30, 2015 and January 22, 2016,¹⁹¹ she assembled the Mann committee, made up of faculty, alumni, students, and staff, with the charge to “study, discuss, and make a recommendation about the law school shield.”¹⁹² It is highly unusual at HLS for such a broad range of “stakeholders” to be included on any committee: this was about establishing a legitimate consensus on a community-wide issue. The job of the committee was to make a recommendation to the University President and Fellows – that is, the Corporation. Far from seeking to modify the permission granted in 1936 to make decorative but dignified use of the shield, the Law School was now seeking permission to change a legal trademark from its legal proprietor.

By the time the committee started to meet, a lot had happened. Much of it never made it into the press. But published as well as intercepted documents indicate the depth and breadth of the conflict going on at the School, and indeed were one of the many media in which the conflict was conducted.

On December 4, 2015, Reclaim HLS issued a list of eight Demands for institutional reform.¹⁹³ The Demands incorporated the Royall Must Fall agenda while also operationalizing the Students for Inclusion agenda across the breadth of the student-facing Law School. They brought to fruition hard work on Law School issues that had begun in earnest after the exam postponement request had blown up in students’ faces.

Thus, Demand Number 1 called for the “remov[al of] the Royall family crest from the HLS seal.” But the new document went further by demanding the creation of a permanent monument acknowledging “the institution’s legacy of slavery,” and renaming of the Royall Chair as the Belinda Chair *or* allocating the Chair to a scholar in critical race theory (which I manifestly am not).¹⁹⁴ This agenda far exceeds the mere disappearance of the Royall/HLS shield. It would have cost money and institutional effort, possibly required legal action (to deviate from the terms of a bequest), and modestly but substantively changed the educational and research profile of the School.

Other Demands sought (inter alia) the establishment of a Critical Race Program, with a tenured faculty member hired in a process featuring student input; equal status of clinical faculty with classroom faculty, including tenure; a mandatory 1L

¹⁹¹ Mann Report, 1.

¹⁹² Andrew M. Duehren, “Harvard Law School Will Reconsider Its Controversial Seal,” *Harvard Crimson*, November 30, 2015. By early February, the Mann Committee was holding open meetings with the community. Claire E. Parker, “Committee and Activists Debate Law School Seal,” *Harvard Committee*, February 5, 2016.

¹⁹³ Reclaim Harvard Law School, “Reclaim Harvard Law Demands,” December 4, 2015, <https://reclaimharvardlaw.wordpress.com/demands>.

¹⁹⁴ *Ibid.* The Demands included a separate “Proposal for the Harvard Law School Committee on Diversity and Inclusion,” setting forth detailed rules – “Within 14 days of the report’s issuance, the Dean shall: . . .” – to govern the new committee.

course “contextualizing racial justice and inequality”; new student evaluations allowing students to assess faculty on whether they contextualized legal materials; establishment of an Office of Diversity and Inclusion outside of and coequal with the Dean of Students Office; improved financial aid for students of color and other marginalized student populations; and increased effort to enable students to begin careers outside the big firms.

The Demands were a detailed blueprint for reform. Sub-demands included, for instance, a timetable for hiring critical race theory specialists; mandatory cultural competency training for all faculty; student, clinician, and staff membership on all faculty committees; and full tuition forgiveness for any student committing to a “civic-minded career.”

Taken together, the Demands sought a major reorientation of institutional energy, funds, and ways of doing business. Faculty and administrators privately exclaimed over the lack of insider knowledge about “how things really work” that the Demands betrayed, but – to me – they read as a very thoughtful list of sites for concrete institutional self-examination and reform. If students articulated the need for this much change, I thought, surely we would engage with them and examine our practices across the board.

Roughly simultaneous with the rollout of the Demands and in an act of graphic genius, activists adopted a counter-mark. They redesigned the Royall/HLS shield, now with three silhouetted black bodies bent under the heavy load of the wheat sheaves. It began to appear everywhere. In the context of the Demands, which it soon adorned, it was not about the taint of *the shield* but about the taint of *the School*. My own view is that this single act doomed the Royall/HLS shield. But it was an equivocal victory. Students were aware that the shield issue could be bait for the administration, absolving it of the onus levied by the full suite of Demands, but there was no going back.¹⁹⁵

Reclaim HLS gave Dean Minow forty-eight hours to respond to its Demands, a move that personalized its address to her. When a group of Reclaimers showed up at her office on Monday, December 7 (a year to the day after the publication of the affinity group open letter), they were told she was traveling. In an email to the community, the dean declined to respond on the students’ terms: “Some students and staff presented a list of demands. We are, however, a community of many voices and hopes, and we have an obligation to provide and protect the opportunity for all to participate, speak and be heard.”¹⁹⁶ Though the dean’s door remained open to Reclaim HLS and Royall Must Fall, it was closed to the Demands.

¹⁹⁵ Anonymous student informant. For the counter-mark, see <https://www.youtube.com/watch?v=Zns7lQycN3s>.

¹⁹⁶ Andrew M. Duehren and C. Ramsey Fahs, “Law School Students Protest Minow’s Response to Demands,” *Harvard Crimson*, December 9, 2015.

Briefly, controversy gripped the School. Reclaim members met with three faculty members on December 5, the day after the Demands went public. One or two of the faculty supported a proposal for a major curricular effort, involving faculty and students over months in the development of a reform project for “the real world,” perhaps focusing on mass incarceration or policing. Reclaimers pushed back, insisting that faculty solidarize with the Demands.¹⁹⁷ Students received death threats and were doxed in blog posts; they consulted with HLS administrators and at least considered seeking the aid of the FBI and Harvard University Police Department (HUPD), all in an effort to protect members’ safety and to discover “who is behind the blogs.”¹⁹⁸ On December 10, thirty-seven HLS students – twenty-three of them signing anonymously – criticized the Demands for attempting to infuse the curriculum with left ideology and to suppress not only academic freedom but also ideological diversity (code for conservative voices). In the open letter’s comment section, its anonymous manager disclosed that a student had tried to sign it as “U.R. Acist.”¹⁹⁹ The next day, thirty-three left-leaning regular faculty, clinical faculty, and staff (myself included) published an open letter joining in the call for reform at the School.²⁰⁰ Dean Minow met repeatedly with students.²⁰¹ With thirteen other faculty members, I attended a December 14 meeting with student activists about strategies for securing reforms called for in the Demands. I have intercepted two sets of notes with fairly complete transcripts of this meeting.²⁰² I am struck by my optimism: I really thought that we would work together to get resolutions onto the agenda for faculty meetings. In retrospect, I look so naïve.

These open letters and meetings punctuated exam period. Soon, winter break depopulated the School, and January Term reconvened the teaching program but in highly fragmented ways. Activism had lost its theatre.

On February 15, 2016, Reclaim opened an entirely new front in its campaign. It staged an “occupation” of the large lounge at the center of WCC, which it renamed

¹⁹⁷ Anonymous, “Dec. 5 notes” (on file with the author). This document is intercepted and of uncertain provenance.

¹⁹⁸ Email from [name omitted] to Reclaim and Royall Must Fall members, December 6, 2015; Email to [name omitted] to Reclaim and Royall Must Fall members, December 8, 2015 (on file with the author). These documents are intercepted and of uncertain provenance.

¹⁹⁹ silentnomorehls, “Remove Demands that Infringe on Academic Freedom,” posted to Responsible Speech at HLS, December 10, 2015, <https://web.archive.org/web/2016011141406/https://responsiblespeechhls.wordpress.com> (click on Comments to see discussion of the attempted “U.R. Acist” signatory).

²⁰⁰ Andrew M. Duehren, “Law School Faculty and Staff Commend Student Activism,” *Harvard Crimson*, December 11, 2015.

²⁰¹ Martha Minow, email to students, December 14, 2015 (referring to a recent meeting and offering times for a subsequent one). This document is intercepted and of uncertain provenance.

²⁰² Anonymous, “December 14 Notes,” two versions (on file with the author). Like the documents cited in nn. 197, 198, and 201, this document is intercepted and of uncertain provenance. However, I was present at this meeting and the document accurately reflects my memory of it.

Belinda Hall.²⁰³ At first an overnight event complete with drawn curtains and sleeping bags, the occupation evolved into a rich program of “justice school” teach-ins and meetings clustered in the center of the room and sometimes so well attended as to be standing room only. Posters lined the walls; meals were shared there; Reclaim held an alternative graduation in the space. The group got outsize exposure for its programming because that lounge is a passageway between two of the School’s most heavily used buildings. For Reclaim, the occupation constituted an alternative law school within the School.²⁰⁴

The occupation brought into play the possibility of student discipline before the Administrative Board. A rule limiting posters to bulletin boards was openly flouted without consequence. Top administrators disagreed about whether the occupation avoided a rule against interfering with Law School programs and facilities, which has often led to protesters being disciplined. No one’s access to or egress from Belinda was blocked, though the central area of the hall was in fact full of Reclaimers and their events. The space was effectively cancelled as a *lounge*. But the occupation was tacitly permitted, while complaints about it flooded into administrators’ offices and students who found it inhospitable took alternate routes through campus.²⁰⁵

Intercepted emails show that, in the days immediately before the occupation, Dean Minow and leadership of both Reclaim HLS and Royall Must Fall had been meeting to produce a slate of reforms, but that the administrators and students were very far apart on what it should look like.²⁰⁶ After launching the occupation, Reclaim seems to have abandoned this strategy, shifting to a sustained volley of criticisms of Dean Minow and her every move. The capstone event in this campaign took place on February 26 at Brandeis University, where, through spokesperson Brandeis Professor Anita Hill, the University honored Minow for her lifelong dedication to social-justice work. Her talk, “Bystanders, Upstanders, and Justice,” discouraged bystanding and urged upstanding. Several Reclaim members, in collaboration with a Brandeis student group, upstood – by entering the lecture hall with signs denouncing Minow. They chanted during her remarks and remonstrated her during Q&A. So impoverished were Minow’s and Hill’s toolkits for defending the

²⁰³ Amanda Hoover, “Harvard Law Students Occupy a School Building,” *Boston.com*, February 17, 2016, www.boston.com/news/local-news/2016/02/17/harvard-law-students-occupy-a-school-building. Much of this paragraph also relies on my own memory of the occupation.

²⁰⁴ *Ibid.*

²⁰⁵ Nic Mayne, “*Harvard Law Record* Poll on Reclaim HLS Shows Divided Community,” *Harvard Law Record*, February 29, 2016.

²⁰⁶ Email from student to Martha Minow, February 8, 2016 (on file with the author); email from Dean of Students Marcia Sells to student, February 10, 2016 (on file with the author). These emails are intercepted and of uncertain provenance. Both emails cc’d a large group of students who were prominent in the leadership of Reclaim HLS and Royall Must Fall. Dean Sells publicly announced the slate of reforms on February 17: none of them matched any of the Demands. “Message from Dean Sells,” February 17, 2016, <https://hls.harvard.edu/message-from-dean-sells>.

institutional legitimacy within which they envisioned effective upstanding that they both felt compelled to praise and thank the demonstrators.²⁰⁷

Through its spokesperson, Reclaim took responsibility for this action.²⁰⁸ For what it's worth, the incident crashed my own confidence both in the group and in the Law School's response to it. The School had backed itself into a corner hiding behind the dean, leaving Minow alone out there to face the activists. And she was nonplussed that the protesters – whose Demands she had categorically refused to consider – scorned her vast trove of social-change knowledge. She seemed incredulous that she was being framed as part of the problem, not part of the solution. Meanwhile, Reclaim's personal focus on her, initiated with the forty-eight-hour ultimatum, was crystalized in the last student comment thrown at her at the Brandeis event: "You are constantly condescending, like you know what's best for us."²⁰⁹ To me, the optics recalled not progressive wisdom, political opposition, or tough resistance, but rather the confrontation between a baffled, frustrated parent and her angry teenager.

I was not alone in my sense that alliances were being tested to and beyond the breaking point. During the week of the Brandeis protest, the *Harvard Law Record* conducted an (admittedly unscientific) poll to determine the level of support among students for the various Demands. Students could vote and post comments online; only students could participate, only once, and only anonymously. The *Record* published all the comments posted to the poll. This substantial, if random, archive of contemporary statements confirms my sense that, by the time of the Brandeis demonstration, many students who had been in solidarity with social-justice activists after the black-tape incident were stepping away and even turning against.²¹⁰

Centrifugal forces surged dramatically on March 28, the first Monday after Spring Break. A student who had long criticized Reclaim, and who had co-sponsored the conservative-student open letter, mounted posters in Belinda that equated Reclaim HLS with Donald Trump, then a candidate for the Republican presidential nomination. Reclaimers promptly took them down, and proceeded to adopt a formal policy of removing further posters.²¹¹ Calling Belinda "its own space," Reclaim declared that the occupation was an Office of Diversity and Inclusion and that, as such, it was entitled to "retain control over its own decorating policy to maintain a space that

²⁰⁷ Abby Patkin, "Protesters Disrupt Gittler Lecture for Racial Justice," *the Justice*, February 26, 2016; Claire E. Parker, "Student Activists Protest Ceremony for Law School Dean," *Harvard Crimson*, February 26, 2016, www.thecrimson.com/article/2016/2/26/activists-interrupt-minow-brandeis. Minow's talk became a published paper the following year: "Upstanders, Whistle-Blowers, and Rescuers," 2017 *Utah Law Review* (2017): 815–37.

²⁰⁸ Parker, "Student Activists Protest Ceremony."

²⁰⁹ Patkin, "Protesters Disrupt Gittler Lecture."

²¹⁰ Mayne, "Harvard Law Record Poll."

²¹¹ Claire E. Parker, "Amid Debate, Law School Responds to Free Speech Concerns," *Harvard Crimson*, April 5, 2016.

reflects its values.”²¹² For the rest of the week, initially carefully crafted limits on the physical scope of the occupation gave way. Reclaim now claimed ownership of Belinda. Meanwhile conservative students appeared in Belinda many times a day, their leader posting dozens of posters mocking Reclaim – which were promptly taken down by Reclaimers.

Yet another sudden reversal: Reclaim was now the stodgy establishment pestered by its own ludic protester. As Admitted Students Weekend loomed, tensions between them escalated – so much so that faculty and administrators alike were concerned that some students in Belinda Hall were on the verge of physically assaulting other students. The conservative students’ posters were defaced; both sides accused each other of videotaping the action in violation of a Law School rule requiring advance consent. By Friday, administrators cracked down. They announced a new speech policy for the WCC lounge, requiring equal space for opposing posters and reminding students that poster removals, threats, and violence were violations of the student conduct code. They made a filmed record of activities for enforcement purposes; announced that “Matters are being referred to the Administrative Board as appropriate”; and prepared for arrests by asking HUPD to install plainclothes officers, which it did.²¹³

After Postergate, Reclaim rapidly unraveled as a coherent organization. Confusing events abounded. Reclaim reported discovering recording devices under tables in Belinda and a classroom, but declined to cooperate with School and law enforcement investigators.²¹⁴ The public never learned who had put them there, how long they had been there, or what had happened to the tapes. Open letters quibbling with Dean Minow’s smallest announcements and silences proliferated, with student affinity groups signing on en masse. Near the end of the semester, at speaker events, a Palestinian student affiliated with Reclaim but acting on his own called a Palestinian guest speaker, and a week later Tzipi Livni, former foreign minister of Israel, “smelly.” The latter intervention was met with an intense wave of grief and rage over the anti-Semitism attributed to it. The student apologized; Reclaim-affiliated students posted angsted-out statements to Socratic Shortcomings; some faculty demanded discipline despite the fact that the student had not broken any rule; and the Dean denounced the second “smelly” comment *faute de mieux*.²¹⁵

²¹² Reclaim Harvard Law, “A Message from Reclaim Harvard Law,” *Harvard Law Record*, April 1, 2016.

²¹³ Parker, “Amid Debate.”

²¹⁴ Claire E. Parker, “Police Investigate Hidden Recorder at Law School,” *Harvard Crimson*, April 10, 2016; Reclaim Harvard Law, “Update on Surveillance of Students of Color Fighting Racism in Belinda Hall,” press release, April 12, 2016, <https://reclaimharvardlaw.wordpress.com/2016/04/12/update-on-surveillance-of-belinda-hall>.

²¹⁵ Claire E. Parker, “Minow, Law Students Condemn Perceived Anti-Semitism,” *Harvard Crimson*, April 22, 2016; Parker, “‘Smelly’ Comment Reignites Free Speech Debate at Law School,” *Harvard Crimson*, April 27, 2016, updated April 29, 2016. The fact that the student had

Reclaim's last demand was a pale survivor of its initially robust policymaking élan: transplanting the South African students' demand that "#FeesMustFall" to an elite private law school, Reclaim now demanded that all students admitted to HLS should attend tuition free.²¹⁶ But a free-tuition proposal in a public university setting transplants very awkwardly into the HLS context. HLS financial aid is entirely need-based; when a student and/or his or her immediate family have adequate resources to finance a very expensive year of attendance and attributed living expenses, that student not only receives no support but also pays tuition, which in turn goes into the pool of funds available for the School's activities, including its financial aid program. Within its many constraints, including the debt it imposes on many students who *do* qualify for financial aid, it is a progressive redistributive policy. The Reclaim proposal could not be implemented without a massive redistribution of financial aid funds from the School to the adult children of rich and well-to-do families. It made no sense from any imaginable left perspective. As a politically coherent voice, Reclaim went out not with a bang but a whimper.

The Royall Must Fall process was something else entirely. Chairman Mann's committee set up a website open to submissions from all members of the Law School community; held open meetings in which members of the community sat in ten-person circles for public reflection on the issue (no open mikes here!);²¹⁷ spoke, through committee members, with scores of constituents; met a few times; and, on March 3, issued its report. The dean promptly referred the report to the President and Fellows of Harvard College, moving the entire issue out of the Law School.²¹⁸ The Corporation was quick to accept the Committee's recommendation,²¹⁹ and within days about 200 shields all around the School began to come down.²²⁰

During the quiescent period of the Belinda occupation, weeks before Postergate, the Law School had cleaned its hands of the shield. Call it cooptation, call it rational deliberation: this process was calm, official, and formal; the committee was appointed by the dean and reported directly to the highest authorities in the University; and it got what it asked for: the removal of the Royall/HLS shield.

recently called a Palestinian speaker "smelly" derives from my memory; I cannot find any reporting of it.

²¹⁶ Reclaim Harvard Law, "Fees Must Fall," April 17, 2016, <https://reclaimharvardlaw.wordpress.com/>.

²¹⁷ For a photo of one of these events, see Parker, "Committee and Activists Debate Law School Seal."

²¹⁸ Memorandum to Members of the Harvard Corporation from Martha Minow, March 3, 2016; Letter of Drew Faust and William F. Lee to Martha Minow, March 14, 2016. Both documents are available through "Harvard Corporation Agrees to Retire HLS Shield," *Harvard Law Today*, March 14, 2016.

²¹⁹ "Harvard Corporation Agrees to Retire HLS Shield"; "Harvard to Retire HLS Shield," *Harvard Law Record*, March 14, 2016.

²²⁰ Claire E. Parker, "After Corporation Approval, Law School Shield Quickly Disappearing," *Harvard Crimson*, March 21, 2016.



FIGURE 9.15 Drew Faust and Annette Gordon-Reed unveiling the monument in the Crossroads. Rose Lincoln/Harvard University.

The contrast between the two outcomes calls for comparative retrospection. But how to assess something as complex as Reclaim? You could say it was a failure because HLS officialdom never responded to its Demands. To be sure, Reclaim collaborated with Royall Must Fall in seeking removal of the shield and it is gone; and Reclaim demanded a monument to the School's legacy in human bondage, which did happen (Figure 9.15). But neither of those outcomes can be attributed to the Demands. The shield was disappeared in response to Royall Must Fall while institutional uptake of the Demands was explicitly refused; and the monument was unveiled in September 2017 by incoming dean John Manning as the kickoff event of the School's Bicentennial, entirely independently of the Demands.

More specifically, I continue to occupy the Royall Chair; the Chair has not been renamed; and the richly endowed center for the study of racial injustice has yet to appear. For the record, my position has consistently been that I will resign the Chair if a large constituency believes it has a better use for it that actively memorializes the Law School's slavery legacy and that has a reasonable chance of being put in place; and of course the dean can take it away from me at any time.

Overall, I think it's fair to say that not one single Demand was formally acknowledged or officially incorporated while the Demands were on the table.

Instead, in August 2016, Dean Minow appointed a Task Force on Academic Community and Student Engagement and charged it with identifying ways to promote "vigorous inquiry and debate" in a community that "embraces people of all races, sexes, identities, national origins, social and economic backgrounds, religions and political perspectives."²²¹ Professor Bruce Mann chaired the Task Force, and it had faculty and student members (no staff, no alumni). The Report reads to me as a translation of the Demands into institutionally tolerable language. In a not-very-veiled rejection of the zeitgeist of the Brandeis demonstration and of the post-Spring-Break occupation, the Report concluded that "Differing views and

²²¹ Report of the Task Force on Academic Community and Student Engagement (June 29, 2017), 1–2.

identities must be respected and engaged, not dismissed or stereotyped” and that “it is incumbent on everyone to recognize that learning how to express and navigate differences of opinion on fundamental and difficult issues is an essential part of legal education.”²²² The goal is to promote not diversity and inclusion alone, but “diversity, inclusion, respect, and belonging[.]”²²³ The report recommended many changes for faculty, administrators, and students: for instance, in lieu of a required course in contextualized learning, the Task Force recommended that faculty be provided with resources to enhance their teaching on issues of “social, racial, and economic justice,” and in lieu of a special professorship in critical race theory, the Report concluded that ongoing efforts to diversify the faculty “must continue.”²²⁴ The four students on the Task Force – joined by its only clinical professor – issued an “Addendum” (not a “Dissent”) that denounced the group’s investigation into student opinion as “utterly meaningless” and its recommendations as “worthwhile tweaks.”²²⁵ The Report and its Addendum were published on June 29, 2017, the penultimate day of Minow’s deanship, suggesting that it was DOA, but in my own experience the spirit of the Task Force has very much animated the deanship of John Manning.

And so Reclaim HLS *was* highly productive, for good or ill depending on your politics. The movement matured many young activists and deepened their alliances and antagonisms in ways that will endow their careers; shocked many with the learning they underwent in all that turmoil; encouraged many teachers and administrators to deepen their consciousness about the unequal reception of our legal education on many dimensions of disadvantage and to alter syllabi, pedagogy, and programming. Many faculty strove hard to contextualize more in their teaching, both individually and in curricular and extracurricular programming. Administrators installed dozens of reforms, selected for their pragmatism in addressing ascertained student needs and for their non-resemblance to the Demands.²²⁶

But Reclaim also broadened a rising stridency among students, especially on the left, that their ideology must be manifest in their teachers’ pedagogy; and confirmed in many hearts the precise opposite views to those that Reclaim espoused. My own journey with Reclaim, begun in admiration and hope, ended in melancholy and

²²² *Ibid.*, 21.

²²³ *Ibid.*

²²⁴ *Ibid.*, 22. In December 2018, HLS appointed an Assistant Dean for Community Engagement and Equity, not quite a Dean for Diversity and Inclusion but close. “Mark Jefferson Named Assistant Dean for Community Engagement and Equity,” *Harvard Law Today*, December 3, 2018. As I was completing this chapter for final submission, I received an email that Dean John Manning sent to the entire faculty announcing a suite of reforms to address the George Floyd wave of Black Lives Matter protests. Among them: a new Charles J. Ogletree, Jr. Chair with a search for a critical race theory specialist to fill it. Email from John Manning, June 24, 2020 (on file with the author). As of July 1, 2021, that chair was filled by Guy-Uriel Charles.

²²⁵ Addendum to the Report of the Harvard Law School Task Force on Academic Community and Student Engagement, (n.d.), 1.

²²⁶ For instance, see Claire E. Parker, “Law School Aims to Level Playing Field with New Orientation,” *Harvard Crimson*, September 16, 2016.

disenchantment in the post-Spring-Break unraveling of the organization. I am certain that the long-term activist genius of our students has by now recovered from that low point, and that they have done great things in the George Floyd renewal of Black Lives Matter energy, but I am sobered. Having come of age in an era when left protest devolved to bombings by underground radicals²²⁷ and the Woodstock Festival flickered out in the dark shadow of the Rolling Stones' deadly Altamont concert,²²⁸ I am disenchanted once again.

From its own perspective, I think, members of Reclaim would say that it had lost; but that it had won some important shifts in consciousness and practice even while losing. I am sure that – given the right conditions – their successors will try for institutional reform again.

Assessing the outcomes of Royall Must Fall is a simpler task. Here's my take: in the scrum between the activists and the dean, Royall Must Fall attained its specific goal at the expense of its broader one.

The Royall Must Fall bottom line was a demand for a disappearance. And that's what the Mann Report recommended. But two members of the Mann Committee – Professor Annette Gordon-Reed and one student – expressed their disagreement with that recommendation. In "A Different View" – again, nominally not a dissent – they argued that the Royall/HLS shield should be retained precisely *because* it was a constant reminder of the School's slavery legacy.²²⁹ Without the Royall/HLS shield, they argued, everyone at HLS was in constant danger of washing their hands of Isaac Royall, Jr. and his stigma, and moving to an unwarranted complacency about the moral status of our vast enterprise.

I worry that precisely this is happening. For many members of the HLS community, removing the shield was good because it would cleanse the institution of a terrible, revolting, and *undeserved* taint. One reason Royall Must Fall's demand for disappearance succeeded on its own terms is that it managed to align three powerful sets of interests: that of protesters calling for removal or for removal-plus; that of many who loved HLS and wanted to affirm its basic goodness; and that of the custodians of the institutional brand, who of course did not want a logo dripping in blood. Seen as a trademark, the shield had become a liability to the Law School imagined as a brand: it could go. Again, whether you call that a success or a failure depends on your politics. I now regret my vote to eliminate the shield: in retrospect, it appears to me as the easy way out.

²²⁷ Kirkpatrick Sale, *SDS* (New York: Vintage, 1974).

²²⁸ James E. Perone, *Woodstock: An Encyclopedia of the Music and Art Fair* (Westport, CT: Greenwood Press, 2005); Lester Bangs, Reny Brown, John Burks, Sammy Egan, Michael Goodwin, Geoffrey Link, Greil Marcus, John Morthland, Eugene Schoenfeld, Patrick Thomas, and Langdon Winner, "The Rolling Stone Disaster at Altamont: Let it Bleed," *Rolling Stone*, January 21, 1970, www.rollingstone.com/feature/the-rolling-stones-disaster-at-altamont-let-it-bleed-71299.

²²⁹ Annette Gordon-Reed, "A Different View," n.d., <https://exhibits.law.harvard.edu/harvard-law-school-shield-timeline>.

CONCLUSION

This chapter has been a story of three brands – that of a man and his family, that of an institution, and that of a social movement – through which people with ever-new and ever-surprising motives battled with and against each other for one of the richest resources of all: meaning. When Isaac Royall, Jr. sealed his will with a wax impression of his stolen heraldic mark – when Belinda and her allies in the free black community attempted to leverage the reputational downfall of Isaac Royall, Jr. in an anti-slavery campaign addressed to the white revolutionary elite – when Harvard turned to ersatz heraldry to make itself look like Oxford and Cambridge Universities – when the University converted a heraldic mark into a trademark and licensed it for sale on T-shirts and baseball caps – when Erwin Griswold and later Reclaim deployed the Royall/HLS shield to anoint and tarnish the Law School – they were involved in very serious symbolic play.

The Corporation made promises on HLS's behalf when it acceded to the recommendation that the Royall/HLS shield be retired. It announced that, in permitting the disappearance of the shield, "we do so on the understanding that the School will actively explore other steps to recognize rather than to suppress the realities of its history, mindful of our shared obligation to honor the past not by seeking to erase it, but rather by bringing it to light and learning from it."²³⁰ But – with the exception of the plaque in the plaza outside WCC, and tours for members of the HLS community of the Royall House and Slave Quarters that I, the Alumni Office, and the Graduate Program organize, and that I chaperone whenever I can – after the spring of 2016, the Law School largely fell away from the Isaac Royall slavery taint in a state of moral exhaustion. In retrospect, the Corporation's promise on the Law School's behalf reads like a branding exercise, not an institutional commitment.

Whither the Royall slavery taint now? I cannot predict. While I wrote much of this chapter, during the terrible spring of 2020, we were in the midst of an immense national revival of Black Lives Matter that is sure to matter for the School, whether through protest or reform or both; through denunciation or engagement or both. After the pandemic, I will continue to do what I can with the Royall Chair, primarily by continuing in a modest way to make the Royall House and Slave Quarters tour a part of student, faculty, alumni, and staff life at HLS, and teaching and writing about Isaac Royall, Jr., as in the present chapter. The School may eventually find a better person for the Chair, but I don't currently have plans to resign it.

And this even though I discovered in January 2020 that the University still has a budget line, with \$317,502 in assets as of January 2019, with Isaac Royall's name on it. It kicks off about \$14,000 a year, which is used to defray my salary: a state of affairs that makes me queasy. As Kimball and Coquillette show in the second volume of their history of HLS, throughout the nineteenth century the University appropriated most of the income and all of the appreciation of the Weld Chair into general funds, limiting

²³⁰ "Harvard Corporation Agrees to Retire HLS Shield."

the Law School to a small, capped *allowance* that fell far short of a professor's salary.²³¹ Doubtless it did the same with the much smaller Royall bequest. That would help explain why there is so little money in the account after more than two centuries' time for appreciation. It also means that the Royall taint is so thoroughly sprayed all over the University that it feels fetishistic and a little hysterical to claim that my Chair is dirtier than any other part of the institution. It even feels fictional to assert that that budget line "has Isaac Royall, Jr.'s money in it": that sum is an artifact of accounting, not a real link to the man and his evil way of making money. And who can warrant that Royall is the University's or the Law School's only or most morally dubious donor? Even this new discomfiting fact about my Chair is a branding problem: my choice is to make it known but to discourage efforts to make it a focal point of moral outrage when there is so much social suffering, right now, that so much more urgently calls for our engagement.

Looking back over this chapter's *longue durée*, vicissitude is the norm. Isaac Royall, Jr., his shield, and his Chair have had many meanings – often precisely the opposite of the ones they had had just moments before. Why are they so subject to secular revision? I think it's because he had a pretty ambiguous life, left a scant record, and was and remains sufficiently unimportant to be – relative to figures like Thomas Jefferson and George Washington, both slaveholders and both politically complex actors – reputational small change. The few things that can be known about him are like rocks on a beach: their GPS coordinates can stay precisely the same while waves of new political and moral consciousness transform the landscape around them, again and again. But, *mutatis mutandis*, the same can be said of Harvard Law School, its social-justice student movements, and even myself in my life as a brand. Our own moral certainties are historical artifacts: we labor over them, too often forgetting that they are contingent.

POSTSCRIPT

On April 26, 2022, Harvard University issued the massive *Report of the Presidential Committee on Harvard University and the Legacy of Slavery* detailing the institution's centuries-long involvement in slavery and subsequent racist regimes. In response, Dean John Manning of Harvard Law School announced that the School was renaming a central space of the School the Belinda Sutton Quadrangle and setting up a committee to commission an art installation memorializing its namesake; and inaugurating a Belinda Sutton conference and lecture series housed in Charles Hamilton Houston Institute for Race and Justice, then headed by HLS Professor Guy-Uriel Charles. In anticipation of these changes, which I regard as robust institutional ownership of the moral issues implicated in the Royall bequest and highly likely to ensure that the legacies of slavery at HLS will not be forgotten, I resigned the Royall Chair. Dean Manning announced that it would never be occupied again. Still, I intend to continue to conduct research into and teach about HLS's slavery legacies, and to take community tours out to the Royall House and Slave Quarters.

²³¹ Kimball and Coquillette, *Intellectual Sword*, 564–69.

Epilogue

The Aesthetic University

Madhavi Sunder

In the course of co-editing this volume on “Academic Brands,” the world suffered a once-in-a-century pandemic, the Black Lives Matter movement forced a national reckoning with racial injustice, and my oldest child applied to college. Our family dallied with US schools from coast to coast, public and private, rural and urban, research universities and liberal arts colleges. Each tour (or Zoom information session)¹ coyly revealed elements of a school’s brand – its assemblages of identity and values on display for purchase, for the mere price of a Tesla every year for four years. Some schools give thanks to the Native Americans on whose land the campus sits. Brochures and social media showcase multiethnic student bodies. One school boasts scholar athletes; another flaunts quirky geniuses unicycling through campus. Elite universities that admit 5 percent of applicants tout their generous financial aid. University Instagram filters reveal much more than who is socially distancing responsibly. University brands riff off other brands. Every school proclaims itself Hogwarts.

Brands are the lingua franca² through which individuals, celebrities, politicians, cities, and more distinguish themselves in a brand new world.³ Universities are no exception. Indeed, university brands are among *the world’s most recognizable and valuable brands*, as Haochen Sun argues in his contribution to this volume.⁴

¹ Rachel Wolfe & Kenny Wassus, *Can’t Make Your College Tour? The Campus Will Come to You*, WALL STREET JOURNAL, March 12, 2021 at A1, describing how campuses are using TikTok videos, Lego sets of campus buildings, and virtual reality tours using Oculus to engage prospective students during the Covid-19 pandemic.

² Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990).

³ Mario Biagioli, Anupam Chander, & Madhavi Sunder, *Brand New World: Distinguishing Oneself in the Global Flow*, 46 U.C. DAVIS L. REV. 455 (2013) (Introduction to Symposium).

⁴ Haochen Sun, [Chapter 6](#) above, oo, n.113 (2021), describing elite university brands as hyper luxury goods because they are “rare, exclusive, extremely high quality, often handmade and unapologetically expensive” (citing Amorim).

Harvard rivals Hermès in prestige and exclusivity – and is certainly more elusive than the purchase of a tie or scarf.⁵ This volume is the first to interrogate university brands as a distinct and influential form of branding. The chapters herein explore the brand as media and mediator, the filter through which the modern university perceives, represents, and ultimately remakes itself.⁶ How does the brand as a vehicle of self-fashioning transform the university? Furthermore, how do *university* brands reveal the peculiar nature of the brand itself?

But first – what is a brand? As a professor of trademark law, I have argued that brands transcend that narrow legal category. Where trademarks provide information – signaling the source of a product or service – brands commodify *meaning*. “[T]he brand is a social currency, a way in which people bring meaning to various exchanges,” Celia Lury wrote in her foundational book, *Brands: The Logos of the Global Economy* (2004).⁷ Another influential early investigation of brands, Adam Arvidsson’s *Brands: Meaning and Value in Media Culture* (2006), describes them as the “fusion” of “aesthetics and economics.”⁸ Brands commodify the communicative sphere of human life – the lifeworlds in which we play, experience, love, learn, and feel. Brands “become valuable through their ability to manage and program human communication and appropriate the ethical surplus – the commons – that it produces as a source of value.”⁹ Brand value derives from the sacred rituals, mythologies, stories, and emotions of life itself.¹⁰ Brands translate aesthetic feelings – joy, belonging, pride – into tradeable market commodities, bringing meaning into markets, yet also distorting the sacred acts of life itself.

The university as a site of enormous brand value should not be surprising. The more transformative the life experience, the more valuable the commodity.¹¹ The university “experience” far surpasses the four years typically required for a degree. University brands mediate identity from cradle to grave: from onesies for newborns that feature a parent’s alma mater to university-branded caskets.¹² Indeed, university

⁵ Harvard admitted 4 percent of applicants for the Class of 2025. See <https://college.harvard.edu/admissions/admissions-statistics>.

⁶ See Mario Biagioli, Chapter 1 above, 00: “For better or for worse, brands have become the university’s idiom of self-representation and marketing, but probably also the medium through which the so-called university of excellence – private, public, elitist, or inclusive – has come to think about itself.”

⁷ CELIA LURY, *BRANDS: THE LOGOS OF THE GLOBAL ECONOMY* 10 (2004) (citing Zelizer).

⁸ ADAM ARVIDSSON, *BRANDS: MEANING AND VALUE IN MEDIA CULTURE* 7 (2006). See also *id.* at 126: Brands move “on the abstract levels of ‘emotion’, ‘experience’.”

⁹ *Id.* at 13.

¹⁰ *Id.* at 8: Brands “mediate[] social life.”

¹¹ Madhavi Sunder, *Intellectual Property in Experience*, 117 *MICH. L. REV.* 197 (2018); Peter Lee & Madhavi Sunder, *The Law of Look and Feel*, 90 *S. CAL. L. REV.* 529 (2017).

¹² Collegiate Memorials sells officially licensed caskets bearing college insignia, writing that the company recognizes the meaningfulness of “college themed memorial products to status conscious college alumni, university friends, fans, that are designed to celebrate and tell the story of individual lives.” Proceeds from MLC’s officially licensed memorial products go to scholarships and special programs at the deceased’s alma mater. See <https://>

brands represent the complete colonization of life. Today the brand goes far beyond a school name, coat of arms, logo, colors, or a mascot. The university brand seeks to capture and commodify as completely as possible the aesthetic value in belonging and participating in an academic community and its storied past. For all life's pleasures, big and small – from intellectual transformation to social and emotional awakening, from sports games to all variety of university-branded kitsch – trademark laws are increasingly stretched and deployed to profit off the endorphins associated with memory and membership. The crux of trademark doctrines, from initial interest and post-sale confusion to sponsorship and endorsement confusion, is to keep all of the surplus value of a brand – its aesthetic meaning – for the profit of the brand holder alone. The aesthetic move in property seeks to capitalize on all thought and pleasure associated with one's alma mater.

In the experience economy mediated by brands, the commodification of human experience becomes, in turn, the new medium in which life itself is created and enacted. Life is mediatized, to use the word of cultural studies. Brands are a vehicle through which individuals create and perform the lifeworld. As Arvidsson puts it, “With a particular brand I can act, feel and be in a particular way.”¹³ The aesthetic university is a stage on which transformative life experiences are enacted, recast, and traded. One becomes a Harvard woman or man not by merely studying at Harvard, but by performing the brand and reshaping it from the inside. This is the sense in which the social theorist Bruno Latour describes human beings as “hybrids” of the techno-cultural worlds in which we live; as individuals we are formed by our media while simultaneously developing our agency through them. Students and faculty over generations re-enact the meaning of the university brand, from debates about tuition, debt, and access, to the institution's historic entanglements with slavery and white supremacy. Praise or critique takes place through celebrating or shaming not the university, but its brand meaning. This endeavor is prominently on display in the current moment of racial reckoning as universities rename buildings, tear down statues, and revisit curricula for their role in perpetuating systemic racism.

To be sure, the commodification of the aesthetic university raises a number of concerns. The university experience is considered a central part of a good life, but whose life? In the United States today, most people cannot afford the experience of a four-year college. Students coming from high-income families are six times more likely to complete a college degree than those from low-income families.¹⁴ Access to elite colleges is even more skewed. Two-thirds of students at Harvard come from the top one-fifth of income earners. Furthermore, long-standing requirements for

collegiatememorials.com. See also Sam Karlin, *Funeral Home Provides Purple and Gold LSU Casket*, REVEILLE, Dec. 1, 2015: “Die-hard LSU football fans can now swear their eternal allegiance to the team, taking their Tiger loyalty to the grave in an LSU-branded casket.”

¹³ ARVIDSSON, *supra* note 8, at 8.

¹⁴ Alain Poutré et. al., Institute for Higher Education Policy (IHEP), *Limited Means, Limited Options: College Remains Unaffordable for Many Americans* (March 2017).

admission to elite schools, including high standardized test scores, themselves correspond with income.¹⁵ In his book *The Tyranny of Merit: What's Become of the Common Good*, the philosopher Michael Sandel argues that while we have been touting “education, education, education” as the mantra of opportunity, in truth, a lack of access to higher education has led to stalled economic mobility and generations of Americans who have bought into the myth of merit at the expense of their own self-esteem and dignity.¹⁶ To make matters worse, universities are becoming luxury goods, with institutional rankings corresponding with the most exclusive admissions policies.¹⁷ Deven Desai in this volume proffers that branding may be a tool to help institutions distinguish themselves in the global flow – with public institutions emphasizing their role as engines of social and economic mobility, for example.¹⁸ My co-editor Mario Biagioli disagrees, arguing that branding measured by metrics – which emphasize student test scores first and foremost – forces schools into a cookie-cutter mold.¹⁹ There is some movement on this front. In May 2020, the influential public university system of California announced it would phase out standardized test scores, with the aim of ushering in a more diverse student body.²⁰ And calls to forgive college debt are gaining steam.²¹ At present, though, academic brands in the United States, at least, function more like exclusive luxury goods and services, fueling at best, ambition, at worst, greed, corruption,²² and widening social disparities.²³

In the meantime, the global lockdown due to COVID-19 left many paying full price for “the college experience” only to get a mere nugget of it – that is, academics – online. How does this pandemic-mediated experience compare to the ongoing expansion of universities into online and global campuses, which Paul Berman explores in this volume?²⁴ In the latter, the co-ed experience is left behind altogether in favor of the “auratic” experience of the university’s brand alone. Universities exploit association with the “aura” of the university in numerous ways – from

¹⁵ Zachary A. Goldfarb, *These Four Charts Show How the SAT Favors Rich, Educated Families*, WASHINGTON POST, March 5, 2014.

¹⁶ MICHAEL SANDEL, *THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD* (2020).

¹⁷ Sun, *Chapter 6* above. See generally *THE LUXURY ECONOMY AND INTELLECTUAL PROPERTY: CRITICAL REFLECTIONS* (Haochen Sun, Barton Beebe & Madhavi Sunder, eds. 2015).

¹⁸ Deven R. Desai, *Chapter 3* above.

¹⁹ Biagioli, *Chapter 1* above. See also *GAMING THE METRICS: MISCONDUCT AND MANIPULATION IN ACADEMIC RESEARCH* (Mario Biagioli & Alexandra Lippman, eds. 2020).

²⁰ Douglas Belkin, *University of California Will Stop Using SAT, ACT*, WALL STREET JOURNAL, May 21, 2020.

²¹ Danielle Douglas-Gabriel, *Calls for Biden to Cancel Student Debt Grow, Alongside Tensions Surrounding the Policy*, WASH. POST, Nov. 18, 2020.

²² *OPERATION VARSITY BLUES: THE COLLEGE ADMISSIONS SCANDAL* (Netflix 2021).

²³ Theodoris Kromydas, *Rethinking Higher Education and Its Relationship with Social Inequalities: Past Knowledge, Present State and Future Potential*, 3 *PALGRAVE COMM.* 1 (2017).

²⁴ Paul Schiff Berman, *Chapter 4* above.

seemingly endless tuition and fee hikes²⁵ to the low salaries paid to adjunct faculty, who receive value through affiliation with the university.²⁶

Others perceive university brands as an oxymoron. For Mark Bartholomew, the university is synonymous with truth, rationality, and the production of knowledge.²⁷ Brands, in contrast, are about emotion and feelings. Worse still, like the “black art” of advertising,²⁸ university brands obscure truth with the Veritas shield. The brand as filter creates an alternate reality, or alternate facts. A study of university catalogs, for example, found that students of color were overrepresented in images.²⁹ As the legal scholar Nancy Leong describes:

Asians made up 3.3% of enrolled students but 5.1% of portrayed students, and blacks made up 7.9% of enrolled students but 12.4% of portrayed students. Put another way, the percentage of blacks and Asians portrayed in viewbooks is more than 50% higher than the percentage of blacks and Asians enrolled in schools. Moreover, the researchers found that such overrepresentation is widespread: 75% of schools in the sample appeared to overrepresent black students in their materials. These disparities suggest that schools are motivated to capture the likenesses of black and Asian students in their viewbooks, which in turn suggests an institutional attempt to capitalize nonwhiteness by converting it into a recruitment tool.³⁰

A black student at the University of Wisconsin, Diallo Shabazz, successfully sued his school in 2000 for photoshopping him into a picture of students at a football game. The University admitted to including Shabazz in the photograph because of his race.³¹ While universities may argue these images are aspirational, reflecting values and commitments, a more cynical view is that the university cares more about image than truth.

Joshua Hunt’s contribution to the volume bemoans that in some cases the university has become all marketing. He writes that by 2018 at the University of Oregon, Nike’s sponsorship of the university eventually meant that communications, public relations, and marketing staff “numbered more than the combined faculty of the school’s departments of history, economics, and philosophy.”³² Sponsorship raises the question of whose identity university brands are promoting.

²⁵ Erik Sherman, *College Tuition Is Rising at Twice the Inflation Rate – While Students Learn at Home*, FORBES, Aug. 31, 2020.

²⁶ See Steven Shulman, *The Costs and Benefits of Adjunct Justice: A Critique of Brennan and Magness*, 155 J. BUS. ETHICS 163, 163 (2017).

²⁷ Mark Bartholomew, Chapter 7 above.

²⁸ Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948), characterizing trademark law as protecting “the demands of modern advertising, a black art whose practitioners are part of the larger army which employs threats, cajolery, emotions, personality, persistence and facts in what is termed aggressive selling.”

²⁹ Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2192 (2013).

³⁰ *Id.*

³¹ *Id.* at 2193.

³² Joshua Hunt, Chapter 8 above, 00.

How is the university's mission of promoting access to knowledge and the pursuit of truth compromised by its dalliance with corporate sponsors and the commodification of athletics? Hunt's contribution suggests the interests of women students may be compromised to protect the reputation of lucrative male sports teams.³³ How do universities recruit women students when their successful sports teams inadvertently create a macho, exclusive brand? Obsession with brand control may unduly override the plural commitments of a university – in particular, to the flourishing of a diverse student body. Hunt argues that the University of Oregon's ability to respond to sexual assault and other grievous charges against student athletes was compromised by Nike's sponsorship of student athletes. The critique of branding as myth-creation and fiction-over-fact has a parallel in critiques of identity politics. As the premier philosopher Kwame Anthony Appiah writes, identities are "lies that bind."³⁴ University brands fuse identity and branding, a potentially corrosive concoction that hoodwinks.

At the core, the essays in this volume interrogate *how the medium is altering the message of what the university is and aspires to be*. Jeremy Sheff argues that university brands are akin to geographical indications, with fans seeking to benefit the home team – what Sheff likens to "boosterism." He, too, like Hunt, is concerned that this gives donors outsized control over the university's mission.³⁵ Indeed, what is the university's mission in the age of brand marketing? The essays herein explore how tensions arising from privatization and escalating tuition costs, enormous endowments and low spending rates, #MeToo, athletics scandals, controversial Title IX and sexual assault policies and compliance, and the myth of meritocracy and social mobility create cognitive dissonance and ethical tensions for Brand U. "We can't compartmentalize academic branding and assume it will have little effect on the university's public mission," Mark Bartholomew argues.³⁶ And Haochen Sun suggests that universities should affirmatively counteract the effects of branding, for example by investing luxury-price-tag tuition dollars into scholarships to promote access for diverse students and to support public-facing research.³⁷ We must also contend with the "taint" on the university when ignominious donors, from Isaac Royall, Jr. in the eighteenth century³⁸ to Jeffrey Epstein in the twenty-first, seek to rebrand themselves by basking in a university's aura.³⁹

Finally, this volume explores what branding collegiate experience reveals about the nature of the brand itself. How distinctive or generic are university brands? Do

³³ *Id.*, at oo.

³⁴ KWAME ANTHONY APPIAH, *THE LIES THAT BIND: RETHINKING IDENTITY* (2018).

³⁵ Jeremy N. Sheff, [Chapter 5](#) above.

³⁶ Mark Bartholomew, [Chapter 7](#) above, oo.

³⁷ Sun, [Chapter 6](#) above, oo.

³⁸ Janet Halley, [Chapter 9](#) above.

³⁹ Susan Svruga, *Epstein's Donations to Universities Reveal a Painful Truth about Philanthropy*, WASH. POST, Sept. 5, 2019.

academic brands display traits and functions that differ significantly from other corporate brands? Are universities like other corporate “brand bullies,”⁴⁰ or even worse? Are students, scholars, and alumni co-creators of the university brand, and if so, how might this be different from the relationship between consumers and producers outside the university? This collection of essays is intended as an important start in addressing these questions, but is by no means the final say. These contributions do, however, reveal three qualities that university brands most exemplify, though to some extent they are shared by other brands as well: *kinship*, *exclusivity*, and *sites of reckoning*. I briefly consider these here, while also suggesting them as potential areas of future research for trademark and brand scholars on the commingling of markets and meaning in the artifact of the brand. Scholars have yet to fully grapple with the commodification of aesthetic experience, including that of life’s most transformative experience: education. Are university brands a contagion or a recursive tool for promoting engagement with all of one’s senses with the university? How do we reconcile the cognitive dissonance of brands themselves? Is a world without brands dull and less human? Can brands be democratic? Is brand recursion an inevitable feedback loop in the social construction of the world? These are some of the questions future scholars may wish to explore, with a focus on better understanding the following three features of university brands that emerge in this volume.

Kinship. University brands more than brands for other goods and services derive value from social relations, memory, and belonging over the life cycle. Arvidsson writes that:

it is this relational network that makes up the core of [the brand’s] productive utility as an everyday tool. When I use a brand, the network of meaningful social and aesthetic relations that has been established around it enables me to perform a certain personality or relate to a certain group of people. What brand owners own is the privilege of guarding and deriving value from this relational network.⁴¹

Brands are all in the family. To be sure, the underbelly of belonging is exclusion, social hierarchy, homogenization, and erasure of individuality.⁴² At the same time, brands are a site of dynamic “aesthetic production”⁴³ creating a feedback loop between producers and consumers who are continually updating brand meaning with new information and values. Arvidsson explains that “What consumers pay for is access to the communicative potential of the brand, the possibility of inserting the brand in their own assemblage of compatible qualities.”⁴⁴ In [Chapter 2](#) of this

⁴⁰ James Boyle & Jennifer Jenkins, *Mark of the Devil: The University as Brand Bully*, 31 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 391 (2021).

⁴¹ ARVIDSSON, *supra* note 8, at 125.

⁴² Madhavi Sunder, *Cultural Dissent*, 54 *STAN L. REV.* 495 (2001).

⁴³ ARVIDSSON, *supra* note 8, at 125.

⁴⁴ *Id.*

volume, Celia Lury highlights the next turn in university brands, that is, the emergence of what might be seen as a contradiction in terms – a personalized generic brand: MyUniversity. As Lury demonstrates, university brands offer a complex vehicle for self and group definition. Now the ultimate goal is a university that helps you brand yourself.

Exclusivity. Despite increased attention to the high costs of higher education – public and private⁴⁵ – and crippling student debt,⁴⁶ university brands paradoxically grow in value by virtue of their exclusivity. In his contribution to this volume, Haochen Sun notes that the world's most selective universities, which accept just 4–5 percent of applicants, have many of the qualities of luxury goods.⁴⁷ Like Louis Vuitton bags and Rolex watches, the price tag of admission is, in the broadest terms, elusive. But Veblen goods in scarves and handbags are one thing; higher education is another matter. What does it mean for universities, the engines of social and economic mobility, to have become largely the sanctum of the rich and well-educated? While interdisciplinary study of luxury goods has begun,⁴⁸ we need more work specifically focused on the university as a luxury and “hyper luxury”⁴⁹ good.

Sites of reckoning. More recently, university brands have revealed themselves as sites of historical reckoning. Yale's Calhoun College, originally named after John Calhoun, a prominent nineteenth-century alumnus and outspoken white supremacist and proponent of slavery, has been renamed after Grace Murray Hopper, a woman alumna, mathematician, computer scientist, and Navy rear admiral.⁵⁰ Following the death of George Floyd at the hands of Minneapolis police in May 2020, Princeton renamed its public policy school and one of its residence halls, both of which long adorned Woodrow Wilson's name.⁵¹ Wilson, who served as Princeton's president beginning in 1902,⁵² was known to have been a proponent of segregationist policies. He was believed to have supported the ideology of the Ku Klux Klan,⁵³ and discouraged enrollment of African American students during his

⁴⁵ Abigail Johnson Hess, *The Cost of College Increased by More than 25% in the Last 10 Years – Here's Why*, CNBC, Dec. 13, 2019.

⁴⁶ Douglas-Gabriel, *supra* note 21.

⁴⁷ Sun, Chapter 6 above, oo.

⁴⁸ See generally THE LUXURY ECONOMY AND INTELLECTUAL PROPERTY: CRITICAL REFLECTIONS (Haochen Sun, Barton Beebe & Madhavi Sunder, eds. 2015).

⁴⁹ Sun, Chapter 6 above, oo.

⁵⁰ *Grace Murray Hopper (1906–1992): A Legacy of Innovation and Service*, YALE NEWS, Feb. 10, 2017.

⁵¹ Jason Slotkin, *Princeton to Remove Woodrow Wilson's Name from Public Policy School*, NPR, June 27, 2020, www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/27/884310403/princeton-to-remove-woodrow-wilsons-name-from-public-policy-school.

⁵² *Id.*

⁵³ *Princeton to remove Woodrow Wilson's name from policy school*, BBC News, June 28, 2020, <https://www.bbc.com/news/world-us-canada-53207649>.

tenure as president.⁵⁴ At the University of Oregon, two statues known as the pioneers were toppled by a group of demonstrators amidst ongoing protests for racial justice.⁵⁵ The statues, which symbolized white supremacy against Native Americans, were an ongoing source of controversy.⁵⁶ The Rhodes Scholarship – one of the world's most competitive academic scholarships, enabling postgraduates to study at the University of Oxford – has also been under fire to rebrand.⁵⁷ It is named after Cecil Rhodes, a British imperialist who annexed large areas of land in southern Africa and started the De Beers diamond company.⁵⁸ In a movement called “Rhodes Must Fall,”⁵⁹ those calling for the university to rename the scholarship and take down a statue of Rhodes cite his imperialist beliefs and oppression of southern Africans, which they argue paved the way for Apartheid.⁶⁰ To date, the University of Oxford has indicated that the statue would be better served in a museum but has not made an indication that the name of the scholarship would be changed.⁶¹ In 2018, there was a call for the scholarship to be renamed the Mandela Scholarship.⁶²

Martha S. Jones led a research team that discovered that the namesake of Johns Hopkins was not, as lore had it, an abolitionist, but rather, had enslaved four individuals who tended to his comforts in his home and were used as collateral for loans. Jones shared that her discovery elicited shame, which directly affected her willingness to wear the university's logo with pride:

The historian in me took in these revelations as raw facts – until the last time I pulled on my university sweatshirt. It fits just right, with a high collar stitched from soft, thick cotton. It has kept me warm on chilly mornings. It has helped keep me grounded over long months of Zoom teaching. When I glanced down and saw JOHNS HOPKINS stitched in white across my chest, I remembered my connection to the students who appear on my screen for class. One arm sticking out of the

⁵⁴ Giuliana Viglione & Nighi Subbaraman, *Universities Scrub Names of Racist Leaders – Students Say It's a First Step*, NATURE, Aug. 13, 2020, www.nature.com/articles/d41586-020-02393-3. In 2015, members of Princeton's Black Justice League organized a sit-in at the president's office urging the administration to remove Wilson's name, but the Board of Trustees refused to do so.

⁵⁵ K. Rambo, *University of Oregon Ignored Calls for Removal of Racist Statue, Student Group Says*, OREGONIAN, June 24, 2020, www.oregonlive.com/news/2020/06/university-of-oregon-ignored-calls-for-removal-of-racist-statue-student-group-says.html.

⁵⁶ *Id.*

⁵⁷ Michael Race, *Cecil Rhodes: Oxford Scholarship 'Needs Reform'*, BBC NEWS, June 11, 2020, www.bbc.com/news/uk-england-oxfordshire-53006735.

⁵⁸ Justin Parkinson, *Why is Cecil Rhodes Such a Controversial Figure?*, BBC NEWS, Apr. 1, 2015, www.bbc.com/news/magazine-32131829.

⁵⁹ Race, *supra* note 58.

⁶⁰ Parkinson, *supra* note 59.

⁶¹ Anna McKie, *Rhodes Must Fall*, INSIDE HIGHER ED., June 19, 2020, www.insidehighered.com/news/2020/06/19/britain-campaign-renewed-take-down-statues-cecil-rhodes.

⁶² Peter Doyle, *Drop Rhodes' Name Completely and Call it the 'Mandela Scholarship'*, FINANCIAL TIMES, Feb. 16, 2018, www.ft.com/content/36465b8a-188c-11e8-9376-4a6390addb44.

right sleeve, I stopped and slid the thing back off. It was a small gesture of reckoning but a sincere one.⁶³

My own university, Georgetown, has grappled with the fact that early Jesuit leaders financed the University's operations from enslaved labor and later the sale of 272 enslaved people, including men, women, and children.⁶⁴ This Roman Catholic order, formally, the Society of Jesus, has pledged \$100 million to descendants of the enslaved people and to finance racial justice initiatives, the most significant reparations to date by an American university, and indeed, by any major institution.⁶⁵ And, of course, in this volume Janet Halley recounts the historic gift from an enslaver, Isaac Royall, Jr., to Harvard College, to endow the first Chair of law at what would eventually grow into the Harvard Law School.⁶⁶

The brand as an object of meaning is not static. It is, in Lury's words, "an object in movement."⁶⁷ This "complex artefact"⁶⁸ is propelled in time by the convergence of multiple actors and systems, from producer and consumer to community members, the institutions of advertising, the law, and the court of public opinion, to name just a few of the multiple forces at play in shaping and reshaping brand meaning. Halley vividly demonstrates the vicissitudes of the Royall name and its heraldic shield through 300 years of history: from the British loyalist Isaac Royall, Jr. falling out of favor during the American Revolutionary War; to charges made against him as an enslaver of human beings by a woman named Belinda, an enslaved person whom he freed in his will; to the benefactor's rehabilitation through his bequest to Harvard in 1815; to the student campaign "Royall Must Fall" to abolish the Royall shield as the de facto Law School logo 200 years later.⁶⁹ The brand – presented in three acts, from the man, to the heraldic shield, to the modern trademarked logo – is the stage on which each new generation of political actors "performs." The dramatis personae in Halley's gripping story include a formerly enslaved woman, Belinda, centuries of Harvard Law School deans (including an aspiring Supreme Court nominee), generations of law faculty, and more recently, international graduate students from South Africa and Black Lives Matter activist students. As Halley tells it, "Fights over meaning abounded" and the stories take on lives of their own, becoming real, however un-fact-checked.⁷⁰ There is room yet for prequels and sequels.

⁶³ Martha S. Jones, *Opinion: The Founder of Johns Hopkins Owned Enslaved People. Our University Must Face a Reckoning*, WASHINGTON POST, Dec. 9, 2020, arguing that "Displacing myth with historical fact is difficult but necessary."

⁶⁴ Rachel L. Swarns, *272 Slaves Were Sold to Save Georgetown. What Does It Owe Their Descendants?*, NY TIMES, April 16, 2016.

⁶⁵ Rachel L. Swarns, *Catholic Order Pledges \$100 Million to Atone for Slave Labor and Sales*, NY TIMES, March 15, 2021.

⁶⁶ Halley, *Chapter 9* above.

⁶⁷ Lury, *supra* note 7, at 15.

⁶⁸ *Id.* at 13.

⁶⁹ Halley, *Chapter 9* above, noting that in 2015 the "brand took a nosedive" (oo).

⁷⁰ *Id.*, oo.

Concerns about the ability of stakeholder engagement in brand meaning to produce genuine reform are on display in Halley's compelling history. The ultimate decision of the Harvard Corporation to abandon the Royall shield/logo/trademark was the "easy way out," she believes.⁷¹ To date, none of the thoughtful, challenging demands of student activists to decolonize the curriculum have been addressed. Is rebranding merely symbolic lip service, or will refashioning the university's imagery affect more deeply who is included, supported, respected, and recognized in the university? The symbols that wallpaper our halls matter. The fall of racist brands during summer 2020 – from Washington's National Football League team to Aunt Jemima⁷² – may seem like corporate whitewashing, but in truth, these logos have long been the target of equality activists who recognize how culture industries' production and circulation of images shape, perpetuate, and maintain racial hierarchy and white supremacy.⁷³ Brands are zeitgeist – the look and feel of the times. I see the abandonment of the shield as a required step to make the halls of Harvard Law more welcoming to diverse members. Indeed, the School should go further to interrogate the messages it sends to all who experience (or are subjected to) its aesthetic decor, from students to faculty to staff, from the unending portraits of white men that adorn the halls to the names of buildings and endowed Chairs. At the same time, the Harvard Law School "brand" goes well beyond these artifacts, to include the iL experience,⁷⁴ and more. Moving to this experiential terrain, perhaps Harvard Law (and peer schools that often seek to copy this luxury brand) will start to reconsider how structural inequality is embedded in legal education, from rethinking Socratic pedagogy to studying how doctrine and scholarship perpetuate white supremacy. The school should do this in conversation with its students and other community members asserting their desire to "reclaim" the Harvard brand.⁷⁵

In this volume, we have considered many of the cognitive difficulties of university branding. What are the implications of contesting meaning in this most meaningful domain, the university, through the artifact of the brand? The critiques notwithstanding, there is, perhaps, an important way in which the university brand connects with the university's broader mission. From the humanities to social and behavioral

⁷¹ *Id.*, oo.

⁷² Jemima McEvoy, *Here Are All the Brands that Are Changing Racist Names And Packaging*, FORBES, updated Oct. 6, 2020, www.forbes.com/sites/jemimamcevoy/2020/10/06/eskimo-pie-becomes-edys-pie-here-are-all-the-brands-that-are-changing-racist-names-and-packaging/?sh=6e1def3856a7.

⁷³ See e.g., MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE* (2012), arguing that trademark law, like other forms of intellectual property, must recognize its role in promoting dignity and respect through images and recognition of diverse creators.

⁷⁴ See SCOTT TUROW, *ONE-L* (2010); *THE PAPER CHASE* (20th Century Fox, 1973); *LEGALLY BLONDE* (Type A Films, Marc Platt Productions, MGM, 2001).

⁷⁵ For a powerful account of universities as sites for generating the ideas underlying white supremacy, see CRAIG STEVEN WILDER, *EBONY AND IVY: RACE, SLAVERY, AND THE TROUBLED HISTORY OF AMERICA'S UNIVERSITIES* (2013).

sciences, the university is the site for understanding who we are as human beings. This endeavor includes understanding human rationality *and* our yearning for aesthetic experience, art, narrative, belonging, and meaning itself. The brand may be the university's best hope yet of affirming the humanities. Brands reject the notion that reason is "the only authority for the university."⁷⁶ In contrast, the "primary task" of aesthetic theory, as John Dewey urged, is "to restore continuity between the refined and intensified forms of experience that are works of art and the everyday events, doings, and sufferings that are universally recognized to constitute experience."⁷⁷ Failure to engage aesthetic experience in everyday life, Dewey warns, deprives us of something essential because aesthetic perceptions "are necessary ingredients of happiness."⁷⁸ The aesthetic university makes life more meaningful. It is a stage for telling and retelling stories of who we are, collectively and individually *in a space that matters to us*. Starbucks learned this some time ago. Its brand "is not about the coffee."⁷⁹ It's about the stories in the cup. The university brand is a site for claiming and reclaiming the meaning of the university and of education itself. Social movements from #blackatharvard to the introspection over the luxurification of higher education exposed in the Varsity Blues scandal demonstrate the nimble tool of the brand to convey membership, exclusion, hope, and heartache. Brands re-enact life itself, once more with feeling.

⁷⁶ Bartholomew, [Chapter 7](#) above, ∞, arguing that "This view of the university still holds sway."

⁷⁷ JOHN DEWEY, *ART AS EXPERIENCE* 3 (1934).

⁷⁸ *Id.*

⁷⁹ HOWARD BEHAR, *IT'S NOT ABOUT THE COFFEE: LEADERSHIP PRINCIPLES FROM A LIFE AT STARBUCKS* (2007).

