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America Singing: The Role of Custom and Usage in the Thoroughbred Horse Business

BY ROBERT S. MILLER*

INTRODUCTION

Is there a meaningful, identifiable body of American “equine law”—a separate voice, apart from all of the others, singing different words and tunes?

Horse traders are different from the rest of us. They are, for example, the paradigm practitioners of the art of “puffing.”¹ “Fancy has an influence in such cases.”² Apart from the rather pedestrian differences in the application of state³ and federal tax⁴ laws, and of the treatment of equine securities⁵ and security

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¹ Harting v. Cebrian, 51 P.2d 195, 198 (Cal. Ct. App. 1936).

² McKenzie v. Stretch, 53 Ill. App. 184, 187 (1893).

³ See, e.g., CAL. REV. & TAX. CODE §§ 5721-90 (West Cum. Supp. 1985); KY. REV. STAT. ANN. § 139.531 (Bobbs-Merrill 1982) [hereinafter cited as KRS].

⁴ See Brown, *Tax Proposal Could Change Industry*, The Thoroughbred Times, Sept. 20, 1985, at 7, col. 1; Craig, *Tax Planning for the Horse Industry*, TAX IDEAS (P-H), Dec. 18, 1984, at ¶ 17,011. As in other areas of the law, “customary commercial practice” may affect a tax result. Proposed Reg. § 1.168-4(d)(2)(ii)(A) (1985). No less than four articles in Vol. 70, No. 4, of the KENTUCKY LAW JOURNAL were devoted principally to tax matters.

⁵ See Kefalas v. Bonnie Brae Farms, Inc., 630 F. Supp. 6 (E.D. Ky. 1985); Campbell, *Stallion Syndicates as Securities*, 70 KY. L.J. 1131 (1981-82); Comment, *Equine Syndications: Are They Securities?*, 6 N. KY. L. REV. 361 (1979). Classification as a security may be affected by “terms or courses of dealing which establish their character in commerce”. Securities and Exchange Commission v. C.J. Joiner Leasing Corporation, 320 U.S. 344, 351 (1943).

interests,⁶ is there some role for the horseman's "fancy" that a court can recognize? Is there some way, within the rule of law, under which he can write and sing his special song?

More directly: Does the nature of the thoroughbred horse business⁷ call for substantively different rules in any reasoned way? The only source of such rules would be the special customs and usages of the industry itself. The popular wisdom in the thoroughbred horse industry is that *Marsh v. Gentry*⁸ dispenses forever with the notion that the customs and usages⁹ of the industry itself will determine the relations among its participants. The industry views that case as saying instead that the courts will impose standard, generalized doctrines on the industry. The

⁶ See *Trimble v. North Ridge Farms, Inc.*, 700 S.W.2d 396 (Ky. 1985). See also Lester, *Security Interests in Thoroughbred and Standardbred Horses: A Transactional Approach*, 70 Ky. L.J. 1065 (1981-82). The result of the determination made under Section VII below will flow back to the perfection of security interests. See *In re Blankenship-Cooper, Inc.*, 39 U.C.C. Rep. 1008, 1012 (N.D. Tex. 1984), which cites *Lee v. Cox*, 18 U.C.C. Rep. 807 (M.D. Tenn. 1976), for the proposition that the "alerting" of third parties perfects interests in horse registration papers.

⁷ In this Article we discuss only the thoroughbred horse business, the most prominent in the sporting press, and the one that generates the largest amount of dollars per transaction—thus, the best candidate for substantial litigation. It will always be necessary to be clear that customs vary among different horse industries. For example, the quarter horse industry has one custom which could not be more different from that of the thoroughbred industry: "The record reveals a custom in the horse auction business, and one announced and followed by McKnight, that when a mare is sold under the representation that she had been bred, such representation conveys a reasonable assumption that the mare is pregnant or in foal." *McKnight v. Bellamy*, 449 S.W.2d 706 (Ark. 1970). However, a custom in the show horse business appears to be like that of the thoroughbred business: "Expert testimony in the record, which is uncontradicted, indicates that, unless there is an agreement to the contrary, the method of breeding is usually at the option of the owner of the stallion, and that the owner of the mare accepts the risk of injury by the stallion or by other mares while the mare is at the stud farm." *Sheets v. Robin*, 380 So.2d 137 (La. App., 1979).

⁸ 642 S.W.2d 574 (Ky. 1982).

⁹ The words "custom" and "usage" are used interchangeably in this Article, except as otherwise noted. In many cases and literature, they are sometimes used to make distinctions. See, e.g., *Aulich v. Craigmyle*, 59 S.W.2d 560, 562 (Ky. 1933) (The court claimed to use the term "custom" interchangeably with "usage," yet made the distinction that "[i]f the usage leaves some material element to the right of exercising an option, or discretion, of one of the parties, it does not constitute a custom."); C. ALLEN, *LAW IN THE MAKING* 135-36 (7th ed. 1964) (Not all usages of a particular trade meet the requirements of a proper custom.); Reid, *In Accordance With Usage: the Authority of Custom, the Stamp Act Debate, and the Coming of the American Revolution*, 45 *FORDHAM L. REV.* 335, 344-47 (1976-77) ("[C]ustom was law," whereas "[u]sage was a source of much of the common law.").

case does not remotely so hold,¹⁰ and because precisely the opposite conclusion flows from reason and the authorities, the initial focus of this Article measures the nature of this particular business, and the traditional uses of custom in general law. This Article then returns to *Marsh v. Gentry* and other thoroughbred cases and typical conflicts, to find a scale of common factors courts consider and weigh, concluding that custom's role is varied and powerful.

I. SOMETHING ABOUT THOROUGHBRED HORSES

The first thing to know about the thoroughbred horse business is that it has to do with thoroughbred horses. Economic gain or loss is focused on the speed with which a semi-domesticated animal runs more or less a mile, carrying a man or woman who weighs barely more than one-hundred pounds.¹¹ The first three or four finishers divide the prize money offered by the racetrack. The economics of the horse business depends on winning purses.¹² Stallions and mares—valued in the millions and tens of millions of dollars—have the sole function of producing offspring that can win such purses. The value of the offspring, in turn, is based in part on the probability of their breeding another generation of winners.

The speed of an animal and its ability to run a distance are variables not subject to market surveys, not influenced by advertising and sales techniques, and not obviously subject to rational analysis.

The money available for purses depends in large part on the amount of money bet at the racetrack. The racetrack applies a

¹⁰ See notes 122-160 *infra* and accompanying text.

¹¹ CRIST, *THE HORSE TRADERS* (1986), is a brilliantly written sportsman's guide to the exciting world of speed and value, but does not consider business issues.

¹² The publications of record in the thoroughbred business are *The Blood-Horse* and *The Thoroughbred Record*, both published in Lexington, Kentucky. *Spur* is also worthy of note and is published in Middleburg, Virginia. *The Horse Digest*, of Leesburg, Virginia, a more general publication, is also useful. All of these publications are devoted as much to economics as to sport. *Thoroughbred Business*, also published in Lexington, is a new entry, dedicated principally to economic matters. During the years when purses and yearling prices lost their proper relationship to each other, the effect was observed. See, e.g., Lawrence, *Where is the Yearling Market Headed?*, *THE THOROUGHBRED RECORD*, July 8, 1981. *The Blood-Horse's* June 29, 1985, issue contains a good analysis of the general subject.

portion of each bet to purses before computing the "odds" in a particular horse race. These funds, together with owners' entry fees, modest customer admission fees, various industry supplements, and occasional television revenues and sponsorships, are returned to the owners of winning horses.¹³

There are people in the horse business—the largest "players" in some respects—who do not own a racehorse, or whose racing stables are public relations adjuncts to larger breeding businesses. These people own mares (females of breeding age or status) and hold rights to breed to stallions. They are in the business of selecting successful couplings. A typical breeder will sell the result of the breeding at auction when the colt (male) or filly (female) is a yearling—that is, has lived past its first January 1. The prices obtained for yearlings, insofar as those amounts are determined by rational decision, are based on the purchaser's estimate of how fast and far the yearling and its descendants some day will run. This estimate is made before the colt or filly has had a saddle on its back—often without the ability to x-ray the yearling's bones or make any examination of its lungs, the two most important physical characteristics of a sound thoroughbred.¹⁴ The purchaser's decision can be based only on the physical appearance of a horse not yet fully grown and on its parentage—that is, how fast the yearling's parents and ancestors ran and how many speedy offspring they have produced.

The yearling buyer must make his or her calculation of the likely race winnings of the animal offered for sale and the likelihood that winnings can be extended forward into future generations through the blood of the yearling.¹⁵ On this basis, \$10,000,000.00 has been invested in a single horse, and

¹³ Some racetracks are not interested in operating at a profit, either because they are nonprofit institutions that are run for the benefit of the industry, or because their real profit comes from associated horse sales. The economics of such racetracks would be different.

¹⁴ T.W. Miller, *At Auction: What are the Buyer's Rights*, THOROUGHBRED BUSINESS, Nov./Dec., 1985.

¹⁵ The most commonly mentioned example is the difference in syndication price of AFFIRMED and ALYDAR. The former beat the latter in all three Triple Crown races, but his lineage suggested that he would be less able to transmit his racing qualities. The market was correct. AFFIRMED'S share and season values began lower and have dropped, and ALYDAR'S have increased.

\$2,000,000.00 and \$3,000,000.00 purchases are so frequent that they are no longer newsworthy.

It is the purchaser, who usually expects to own the horse while it is racing, who makes such calculations. His or her decisions control the breeder's livelihood. The breeder mates mare with stallion to produce speed and endurance—with an eye to what matings the buyers will suppose are the most likely to run fast and far. Some stallions and female bloodlines are more popular among Europeans and Arabs who race principally in Europe; some are more popular among Canadian and United States horsemen. The breeder will produce for the market he or she anticipates will bring the most money at the regular auction sales, occurring about two years after conception. With such calculations in mind, a champion racing mare has been purchased for \$7,000,000.00, and fractional interests ("shares") in stallions (entitling their owners to one breeding each year, and each representing about a one-fortieth interest in the animal) bring in excess of \$2,000,000.00 on a regular basis.

Fertile mares can be expected to fail to conceive once every four or five years. Over forty percent of apparently healthy yearlings are either unfit to run their first race or break down too early to run to their potential earnings. About three percent of all registered yearlings win stakes races, and except for a handful, even the leading sires produce only about ten percent stakes winners. One can easily understand the incredible, imponderable odds that this industry absorbs. Thoroughbred horses are animals of speed and grace, not intelligence, but it has been properly noted that they do not bet so extravagantly on humans.

It is not surprising, then, that the horse business did not develop like other businesses. Because of the industry's focus on the racing stake, the enforceability of early horse partnership agreements was questioned.¹⁶ The courts frequently washed their hands of horsemen, and horsemen, generation after generation, returned the favor.

The horseman is not only a gambler, but also a deal maker. Added to the horseman's love of the animal and his or her

¹⁶ See, e.g., *Morrison v. Bennett*, 52 P. 553 (Mont. 1898) (noting some of the improprieties that accompanied these agreements).

comfort with the unknown, one finds an odd mixture of the bandit and the saint. The traditional horse deal was made between people who knew each other, who had dealt with each other before and who would deal with each other again. It was negotiated quietly, secretly in the clubhouse or the backstretch, and it was made in a context of shared expertise and known, accepted risk. If there was a writing, it was on the back of a cocktail napkin or a pari-mutuel ticket, or in the margin of the *Daily Racing Form*.

Because of the prior and presumed future dealings, and a shared sense of pride and honor, neither side of a deal clearly won when it fell through. It is still typical to find among horsemen the notion that the loser in today's deal will be accorded some advantage in a future transaction. And it is typical to do what is "fair," irrespective of legal rights.

Such practices are frequently found in what is known as a "foal sharing" arrangement. One breeder may own one or two mares, while another breeder owns a stallion share; the two may believe that the horses' mating would be successful. The breeders may make a one-year partnership agreement, sharing the ownership and proceeds of the offspring; but often they will make a two-year deal: the stallion will be bred to the mare or mares, and the offspring will be divided by the two owners, with one taking the first offspring, and the other taking the second. The breeders are not partners; they will not divide the profit of any particular animal. But they have a continuing relationship, and face together the risk of the mare's and the stallion's survival and value until the end of the second breeding season. If the mare or stallion dies after the first year, what happens? What often happens is that the parties simply make a new deal, reassembling their risks and probabilities. Apparently, there is no judicial decision on the subject, and a multiplicity of different deals occur. The uniqueness of each event and risk would make it impossible to establish a constant custom—or even a standard form of contract for the industry. It is a gambler's game, and the friendly parties "work it out."

A related practice occurs at horse auctions, the method by which thoroughbred yearlings are almost always bought and sold. Despite the fact that most yearlings are purchased without the benefit of an x-ray or a lung examination, the seller

(inaccurately called "consignor") usually gives no warranty of fitness in either respect.¹⁷ The auction "conditions of sale" typically contains the Uniform Commercial Code's provision for waiving implied warranties of fitness.¹⁸ Concealing a known defect would undoubtedly provide a cause of action for actual fraud,¹⁹ but the consignor typically also has not made his or her own examination. The seller, like prospective purchasers, has made only the examination permitted by observing the horse in its stall, the barn or a nearby ring, and having seen it run in the field. A defect in a hoof, or a chip or spur on a bone, although possibly ending a racing career before it begins, will be known by neither buyer nor seller. What happens when an x-ray shows a congenital defect, or an examination shows defective lungs? In the atmosphere of the clubhouse or the backstretch, the buyer and the seller will often reduce the risks, despite the lack of a legal requirement to do so. In one recent multi-million dollar transaction, for example, the seller bought back a large percentage of a yearling with a defective but operable hoof. The practices are so varied, the events so unique,

¹⁷ Horses are the most likely personal property for the exclusion of implied warranties. *Egan v. Call*, 34 Pa. 236 (1859) ("Certainly, there is no such engagement in the sale of such an article as a horse."); *Wood v. Ross*, Tex., 26 S.W. 148 (1894) ("In a general sale of a horse the seller only warrants it to be an animal of the description it appears to be, and nothing more."); *Merchants & Mechanics' Sav. Bank v. Frazee*, Ind., 36 N.E. 378 (1894) ("If a man sells a horse generally, he warrants no more than that it is a horse."); *Moore v. Miller*, 100 S.W.2d 331 (Mo. 1936). See also Annot., 55 A.L.R. 2d 892. In *Cohan*, *The Uniform Commercial Code as Applied to Implied Warranties and 'Merchantability' and 'Fitness' in the Sale of Horses*, 73 Ky. L.J. 665 (1985), the author says: "In circumstances where the seller of a horse cannot be deemed a merchant for purposes of triggering the U.C.C.'s implied warranty of merchantability, one should consider whether an alternative cause of action exists for negligent liability based on the seller's failure to exercise due care." *Id.* at 673. The author gives no citation.

¹⁸ Uniform Commercial Code § 2-316(2)-(3) (1962) [hereinafter cited as U.C.C.]. See notes 105-108 *infra* and accompanying text.

¹⁹ See note 104 *infra* and accompanying text. See *Overhulser v. Peacock*, 128 S.W. 526 (Mo., 1910) ("The main point urged here is that, if plaintiff knew the horse had heaves, he was bound, in every event, to notify defendant of the fact; was, ipso facto, guilty of a fraud if he did not, regardless of whether the disease was detectable by an ordinary inspection, or of the price defendant was to pay. In our opinion this proposition is not the law.") The court also says that "the silence must be attended by circumstances which render it a fraud," but continues, suggesting that "there must be some agreement or relationship that makes it a duty of the seller to divulge the defect."

that no two such deals are alike. Only in an exceptional circumstance²⁰ could such a practice be considered for its legal effect.

The negative side of the typical horse transaction—every bit as fundamental as the honor among horsemen—is the remnant of the industry's traditional respect for the bandit. "Pulling a fast one" is as much a characteristic of some "horse traders" as any other trait. On its face, a public auction appears to be the best way for a seller to obtain the highest price for his horse, and for the market to set a true value on thoroughbred bloodlines. All of the largest breeders, and all of the substantial purchasers, are represented at the several premier Keeneland sales in Kentucky and Saratoga sales in New York each year, and a great many appear at lesser auction sales at those locations and elsewhere across the country. The problem with this economic market theory is that the dealmakers—the horse traders—are operating in the wings. The industry understands that it cannot know whether the auction prices reveal the true sales prices of at least one-half of the animals auctioned.

Usually at the auction sales, the auctioneer will publicly announce that the conditions of sale allow owners to bid on their own horses,²¹ a practice that otherwise would be unlawful.²² "By bidding" is used to force up the sales price, beyond what it might have been if the owner had not bid against the final bidder. Similarly, a horse placed on the auction block may have been sold privately before the first bid was made,²³ and the apparent auction price reflects the fact that a rogue bidder has forced the horse's true owner to keep entering bids, benefitting only the auction company whose commission is based on the final bid. A horse trader may also wish to give the appearance that the offspring of a particular stallion bring high prices at auction, and he or she may then arrange for two bidders to make phantom bids against each other. The ultimate price may not represent a sale at all, but a consciously created apparent

²⁰ See text accompanying note 256 *infra*.

²¹ U.C.C. § 2-328(4) (1962).

²² *Burdon v. Seitz*, 267 S.W. 219 (Ky. 1924).

²³ See Chamblin, *On Integrity of Sales*, THE BLOOD-HORSE, March 16, 1985.

price—to the benefit of the stallion's owners and, incidentally, the auction company.

The persistence in the thoroughbred horse business of both honor and banditry²⁴ are more recently coupled with something new: the appearance of “new money” in the business. Increasingly in recent years, people accumulating large fortunes in other businesses have entered—for sport, social life, tax shelter and greed—into a business in which prestige is high and profits are apparently volatile and great. In addition, and for some of the same motives, persons of more modest wealth have entered into the business as purchasers of interests in racing and breeding syndicates, often in the form of public or semi-public offerings of limited partnerships.²⁵ Although the industry's old sense of comradery and status is a goal of many newcomers, the closed-in community that was the foundation of those traits has been gradually diluted. Consequently, the expertise with which breeders and race horse owners protected themselves—or accepted their fate—is dissipated. Similarly, the newcomers to the business bring with them different standards of honor and different expectations of the legal effects of what they do.

Another, parallel change in the industry has been its increased openness to information. What had been a closed society, jealous of its secrecy, has become in some part an open market. Typical of this change is the advent of the Matchmaker Breeders Exchange and the subsequent development of Stallion Access, two companies that provide computer-accessed markets. These companies allow breeders to buy and sell fractional interests in stallions (“shares”), and annual breeding rights (“seasons”), by making and accepting open offers to buy and sell—on and from continually changing, highly visible and published lists of price quotations. Both markets restrict their membership to individuals having experience in the thoroughbred horse business, and both require that all purchases be made for the purpose

²⁴ Of course the author is not suggesting actual illegal behavior; the word “bandit” is used in this Article solely metaphorically. In the course of discussing with horsemen the facts of *Taylor v. Johnston*, 539 P.2d 425 (Cal. 1975), see note 139 *infra*, there was general agreement as to the custom described and a frequent admiration for the successful trickery involved.

²⁵ See Heckerman, *Taking Stock of Shares*, *THE BLOOD-HORSE*, January 14, 1984.

of breeding, and not for resale. Thus they studiously avoid the essential features of a commodities market²⁶ and avoid bringing to the business some of the characteristics of securities.²⁷ These markets also prohibit the market manipulation practices employed at horse auctions. They bring a new character to the business; some fundamental transactions are done openly, for everyone to see. That is a revolution indeed.

And so the business is faced with the challenge of newcomers and new techniques. What this Article takes to be persistent practices, subject to rational analysis and application, remain. The customs discussed below are based, it is believed, on the peculiar nature of this business—its sense and appreciation of the gamble, its love of the animal and the sport, its odd mixture of honor and trickery, and the persistent proximity of its practitioners. Is there some way to capture those qualities in the law?

II. SOMETHING ABOUT THE HISTORIC ROLE OF CUSTOM

There is no need for a systematic attempt to trace the history of custom in the law.²⁸ It is not without some interest, however— if of limited relevance—to note that Aristotle, customs' most impressive advocate as a source of law,²⁹ held that first among the most "useful parts of wealthgetting" was the ability to know "what sort of horses . . . are most likely to give a return."³⁰

²⁶ See *CFTC v. Co Petro Marketing Group, Inc.*, 680 F.2d 573 (9th Cir. 1982) (commodities firm that acted as agent for customers buying and selling gasoline futures contract was a "board of trade"); *In re Stovall*, COMM. FUT. L. REP. (CCH) ¶ 20,941 (CFTC 1979). See also CFTC Interpretive Letter No. 77-12 (Aug. 17, 1977); COMM. FUT. L. REP. (CCH) ¶ 20,467.

²⁷ See note 5 *supra*.

²⁸ For a general discussion of the history of custom in the law, see C. ALLEN, *supra* note 9; Bermon, *The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe*, 45 U. CHI. L. REV. 553 (1978); Furnish, *Custom as a Source of Law*, 30 AM. J. COMP. L. 31 (Supp. 1982); J. GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1921); Reid, *supra* note 9.

²⁹ "[T]he law has no power to command obedience except that of habit, which can only be given by time." POLITICS Book 2, Chapter 9, ¶ VIII (P. Jouett trans. 1957). "[C]ustomary laws have more weight, and relate to more important matters, than written laws, and a man may be a safer ruler than the written law, but not safer than the customary law." *Id.*, Book 2, Chapter 9, ¶ IX.

³⁰ *Id.*, Book 1, Chapter 11, ¶ XI.

Most of what should be said in this Article is negative, a list of traditional and rhetorical concerns that need not remain a burden. There flows from them a more limited ambition than most discussions of the subject, and a broader, more relaxed view of the relationship of several factors that seem consistently to be involved in particular cases. An application of such an approach to this one interesting business will, it is here assumed, be generally applicable in the law.

First, one must acknowledge that the word custom means many things.³¹ For the most part, it seems wise to avoid "the confusions caused by overprecise definitions,"³² and to let the context of each issue speak for itself. Such an approach is required; it is not always possible to conceive "objectively determinable" standards or theories.³³

This analysis also studiously avoids the most common theoretical debate dominating all of the secondary sources cited here: What is the priority in history and legal theory between custom and judicial pronouncement? Which came first, and which should control the other?³⁴ This Article simply makes the practical assumption that all practicing lawyers make: The appropriate task is to offer a reasonable suggestion to a court of proper jurisdiction.³⁵

Although this analysis identifies what are believed to be a limited number of factors to be taken into account in judging the applicability of customs in various contexts, and although this Article also frequently suggests a method of balancing those factors, it does not purport to identify the sources of jurisdictional decisionmaking. The entire current debate³⁶ on how judges

³¹ See B. LEISER, *CUSTOM, LAW AND MORALITY* 10-38 (1969).

³² *Id.* at 8.

³³ See D'Amato, *Wanted: A Comprehensive Theory of Custom in International Law*, 4 *TEX. INT'L L.F.* 28 (1968) (presenting a framework for a "theory of custom" in international law).

³⁴ See, e.g., J. GRAY, *supra* note 28, at 297; Furnish, *supra* note 28, at 31; Reid, *supra* note 9, at 344-58.

³⁵ Both John Adams and Alex De Tocqueville saw that the adoption of custom made it inevitable that courts would be the final arbiters of the law of the land. See A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 72 (R. Heffner ed. 1956); 1 V. PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* 315 (1927).

³⁶ See, e.g., Easterbrook, *Method, Result, and Authority: A Reply*, 98 *HARV. L.*

make and should make their decisions, including the structure of proper judicial analysis, is here intentionally avoided.

While this Article suggests a substantial role for custom and usage in an exciting arena, it does not adopt the rationale that there is something morally superior about custom-made law when compared to court-made law.³⁷ In particular, this Article does not reflect the notion³⁸ that "fairness, regularity, and principle" are matters that are "fostered by custom,"³⁹ whereas "elitist" judicial arguments based on public policy have the "baleful effect" of taking control of human life away from "the people themselves."⁴⁰ The problem with such a view—imposed by reality itself—is that custom can be every bit as unfair, irregular and unprincipled as judicial fiat. Courts can be accused of "amending" statutes⁴¹ and the constitution,⁴² and of illogic and loose thinking,⁴³ when they act on the basis of their views of policy. They may be guilty of the same errors, however, if they seek and apply custom.⁴⁴

REV. 622 (1985); Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985). Although discussed in a slightly different context, the application of custom could be rationalized under a radically new theory: "Its apparent justification lies in the attempt to defend private community against the disruptive intervention of the law and of the regime of rigidly defined rights and duties that the law would bring in its wake." Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 621 (1983).

³⁷ Though custom is often "vague, confused, and impractical," it also can be "creative, sublime, and suited to human needs." See F. KERN, *KINGSHIP AND LAW IN THE MEDICAL AGES* 179 (1939).

³⁸ Fernandez, *Custom and the Common law: Judicial Restraint and Lawmakings by Courts*, 11 SW. L. REV. 1237 (1979).

³⁹ *Id.* at 1238 (citing G. KEETON, *ENGLISH LAW; THE JUDICIAL CONTRIBUTION* 40-145 (1974) and T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 157-59 (5th ed. 1956)).

⁴⁰ Fernandez, *supra* note 38, at 1239.

⁴¹ *Id.* at 1244-52.

⁴² *Id.* at 1252-54.

⁴³ *Id.* at 1262-64.

⁴⁴ Thus, one can accuse the United States Supreme Court of creating bad law when it held in *Elrod v. Burns*, 427 U.S. 347 (1976) that "the spoils system interferes with the freedom of political association." *Id.* at 357. See also Fernandez, *supra* note 38, at 1261-62. A court can also depart from logic and achieve unfortunate results, however, when it relies affirmatively on the spoils system as giving color of law to the act of its practitioners—because "it has been sanctioned by practice and usage and

A custom is neither good nor bad for its longevity.⁴⁵

There is no overwhelming evidence that courts have adopted the populist approach.⁴⁶ With Professor Bermon, it seems fair to suggest that “the professionalization and systemization of law” has made it impossible to broaden (or often to preserve) the scope “left for people’s attitudes and beliefs, and for their unconscious ideas, their processes of mythical thought.”⁴⁷

That is not to say that the populist-elitist controversy is not an important and historic one, even though today it cloaks itself in a generalized hostility toward courts and lawyers. Depending on how seriously one takes the content of public argumentation (as opposed to underlying economic and social realities), it can be said that the same debate lay at the core of the American Revolution.⁴⁸ Along with those who championed “natural rights,”

specifically found to be a fact of political life in municipal governments.” *Wisconsin v. Tronca*, 267 N.W.2d 216, 220 (Wis. 1978).

In *Tronca*, the Wisconsin Supreme Court held that it was a part of an alderman’s official duty to dispense patronage, so he could be found guilty of bribery when he accepted money to influence the disbursal of patronage. *See id.* at 221-26. That is something quite different from following a statutory mandate that directs attention to the “customs and usages” and “force of law” discriminations that are enjoined by Congress. *See, e.g., Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658 (1978).

⁴⁵ *But see* note 178 *infra* and accompanying text.

⁴⁶ *See* Fernandez, *supra* note 38, at 1285-87. Judge Fernandez compares an Iowa case, *Kimple v. Schafer*, 143 N.W. 505 (Iowa 1913) (a decision that he agrees with), to a California case, *Li v. Yellow Cab Co.*, 532 P.2d 1226 (1975) (a decision that he does not agree with).

In Iowa, the ancient, court-approved custom of allowing chicken farmers to permit their chickens to run at large was overturned by a recent decision. Judge Fernandez praised the Iowa court, which noted that chicken farmers for the most part no longer follow this ancient custom. He criticized the California court for giving only lip service to the changing custom when it followed the lead of juries in rejecting the rigid contributory negligence defense. *Id.* at 1288-89. The problem is that the Iowa Court also made its decision, according to its opinion, in part because of the general public interest in high speed automobile travel. In both Iowa and California, then, there was a convergence of public interest with popular practice. It is usually the case that “custom, policy and law unite” in horse cases as elsewhere. *Thompson v. Miser*, 92 N.W. 420, 421 (Ohio, 1910). Judge Fernandez is left with preferring that a court emphasize the practice over the interest. He has not offered an example in which the two conflict.

A horse case in which custom was unsuccessfully argued to create so clear an expectation that the statute could not constitutionally supersede it is *Horsemen’s Benev. v. Division of Pari-Mutuel*, 397 So. 2d 692 (Fla. 1981) (The statute, requiring a 1% purse pool payment, was overturned on other constitutional grounds.).

⁴⁷ Bermon, *supra* note 28, at 588.

⁴⁸ This Article deals with the views of the lawyers who were in the American

and sometimes from the same voices, colonial lawyer-revolutionaries argued that the Stamp Act and other intrusions of Parliament and the Crown were unconstitutional under the written British Constitution—a product (they argued) of the customary relations between the subjects and the sovereign.⁴⁹ Such views reflected the notion commonly held among seventeenth century English lawyers, and eighteenth century American lawyers, that custom and law are identical.⁵⁰ John Adams said, “Judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law.”⁵¹ That view was fully in accord with Blackstone, who held that custom and law are the same.⁵²

Such a view could not be maintained in a fluid and complex society, and certainly it does not fit the horse industry that this Article has described and will pursue. Evidence is found later in this Article: The difficulty of proving usage, changes in industry and common custom, and the conflicts of interest among different segments of society and business, conspire to make so pure a view impractical in real life. The ambivalence nonetheless is reflected as late as the first RESTATEMENT OF CONTRACTS. Section 249 recognized the modern rule that “[u]sage cannot change a rule of law,”⁵³ but the comment to that section supposed that “[l]ong continued usage may develop a rule of law in accordance with the usage.”⁵⁴

A more logically balanced view, and a fair starting point from which to view the horse cases and thoroughbred hypothet-

Revolution. See notes 49-52 *infra* and accompanying text. Those views also were reflected by the non-lawyers, led by Samuel Adams. Adams would have expressed “a commitment of America to the familiar ways of his ancestors.” P. MAIER, *THE OLD REVOLUTIONARIES: POLITICAL LIVES IN THE AGE OF SAMUEL ADAMS* 272 (1980). Vernon Parrington characteristically says that “Adams was probably fully aware of the weakness of the argument.” 1 V. PARRINGTON, *supra* note 35, at 244. See also note 164 *infra*.

⁴⁹ Reid, *supra* note 9, at 336-37.

⁵⁰ *Id.* at 345.

⁵¹ *Id.* at 346 (quoting J. Adams, [From the Boston Gazette, 1 February 1773], reprinted in 3 *WORKS OF JOHN ADAMS* 540-41 (1851)). Parrington calls John Adams the “pioneer” of this “narrow field,” and suggests that the view is only of “historical interest.” 1 V. PARRINGTON, *supra* note 35, at 315. See also note 164 *infra*.

⁵² See W. BLACKSTONE, *COMMENTARIES* 72-79 (1765).

⁵³ RESTATEMENT OF CONTRACTS § 249 (1932).

⁵⁴ *Id.* at § 249 comment a. “Do I contradict myself?/Very well then I contradict myself.” WALT WHITMAN, *Song of Myself*, *LEAVES OF GRASS* 101 (1940).

icals, is found in Professor Furnish's 1982 article,⁵⁵ which in turn draws on the earlier sources. The inception of the English common law was heavily dependent on custom, but "it occupies a vestigial position today."⁵⁶ Custom and usage will affect the outcome of a judicial decision if and only if some other source of law—the constitution, the legislature, or a judicially-adopted principle directs an examination of custom and usage.⁵⁷ That is not to say that the role is small, but "custom" has lost its battle with "public policy," and the law can get on with the more instructive process of finding those areas in which public policy is best served by the adoption of custom.⁵⁸

III. TRADE USAGE AND MODERN LAW

The basic observation here is that when custom guides judicial decisions, it does so with the support of generally applicable policy. One policy is the inherent value of diversity. There are those who say that this is America's central quality.⁵⁹ This

⁵⁵ See Furnish, *supra* note 28.

⁵⁶ *Id.* at 31. Professor Furnish's evidence for even that vestigial role is thin: Customs are adopted by the court in contexts that appear to be obscure, free of conflict among important elements of the society, and innocent of obvious public policy resolutions. When customs are adopted, they carry with them the nontraditional test of demonstrable "reasonableness," a matter discussed in this Article. See *infra* notes 78-270 and accompanying text. The reasonableness test imports into the area claimed by custom a trojan horse carrying with it any public policy consideration a court chooses to impose.

⁵⁷ Furnish, *supra* note 28, at 32.

⁵⁸ The terms "policy" or even "public policy", and "reasonable", as used in this Article, have the same general meaning, each suggesting an approach to judicial decision making based on values. This Article does not rigorously distinguish the differences. See Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985) (focus of American common law system should be on "right," as in other legal systems, rather than on "reasonableness").

⁵⁹ "I hear America singing, the varied carols I heard,/Those of mechanics . . . The carpenter . . . The mason . . . The boatman . . . The shoemaker . . . The wood-cutter . . . /Each singing with open mouths their strong melodious songs." WALT WHITMAN, *I Hear America Singing*, LEAVES OF GRASS 16 (1940). Parrington suggests that "diversity may prove to be symptomatic of the hurrying changes that the rise of the middle class was bringing to America." 2 V. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 175 (1927). See note 164 *infra*. Even John Stuart Mill, the great enemy of custom, argues that the diverse practices of interacting communities can approximate the value of the individuality he advocates. See, e.g., J. MILL, THREE ESSAYS 83, 89 (1975).

Article more modestly claims that diversity is a legitimate public policy, to be given effect if not counter-balanced by more important policies. Again, in the negative: Who cares how messy the child leaves his own room?

Usages of particular trades have been the stepchildren of custom and usage generally. The fight of centuries ago was between custom and the sovereign. Today, America grants ascendancy to the sovereign, and is free to recognize that the "imperfect communities" that operate beneath the umbrella of the greater community have a role to play in their own governance.⁶⁰ First we must admit that a particular trade sets its own rules only with the sufferance of the rest of society, and then a court can consider the scope of self-regulation without a compulsive need to find and compare "conflicts with the rule of law."⁶¹

The most intriguing aspect of the modern law of custom and usage is the effort of the RESTATEMENT (SECOND) OF CONTRACTS (hereinafter referred to as Restatement) and of the Uniform Commercial Code (U.C.C.) to make a reasoned return to the roots of our common law system and to encourage the creation of various bodies of law fitted to particular trades. Somehow, maritime contracts divided themselves from ordinary common law principles and created implied agreements peculiar to their own industry.⁶² Will thoroughbred horses carve out the same sort of niche? Sailors and pirates are no more colorful than breeders and horse traders.

The U.C.C. and the *Restatement* have removed the two highest barriers to the development of individualized bodies of law. They have removed the "universality"⁶³ requirement of traditional common law customs and have made their own judgment as to the importance of a major public policy.

The *Restatement* dispenses with the "universality" requirement by demanding only so much "regularity" as will "justify

⁶⁰ See B. LEISER, *supra* note 31, at 65-70; note 36 *supra*.

⁶¹ See C. ALLEN, *supra* note 9, at 135.

⁶² See, e.g., *Booth Steamship Co. v. Neier & Oelhaf Co.*, 262 F.2d 310, 312-13 (2d Cir. 1958).

⁶³ For a discussion of the universality requirement, see notes 124-135 *infra* and accompanying text.

an expectation” on the part of the party claiming the usage that will be observed in the particular transaction.⁶⁴ Once that regularity is established, the parties not only have given meaning to their contract, but also have created circumstances in which the usage will supplement or even qualify their agreement.⁶⁵ That radical policy determination should be made clear: A supplement is a term supplied to a contract that the parties did not explicitly discuss and that may be in conflict with an otherwise declared public policy.⁶⁶ The supplement might even be held to create a contract when otherwise a contract might not have been found.⁶⁷ No longer must courts look for “latent and patent” ambiguities,⁶⁸ nor “indefinite” provisions to make definite.⁶⁹ Furthermore, the qualification of a contract can alter the otherwise plain language of an agreement.⁷⁰

The U.C.C. commissioners, intending to adopt those dramatic results, included the exact language of the *Restatement* in sections 1-205(2) and (4) of the U.C.C.⁷¹ The courts are in sharp conflict as to just how far they will allow these radical changes to go. Courts have given consideration, for example, to whether an absolute prohibition on the sale of mortgaged property by a dealer will be overcome by a usage and/or a course of dealing and/or performance that recognizes his or her customary sales.⁷²

⁶⁴ RESTATEMENT (SECOND) OF CONTRACTS § 222(1) (1979).

⁶⁵ *Id.* at § 222(3).

⁶⁶ See *Woodcrest Fabrics, Inc. v. B. & R. Textile Corp.*, 464 N.Y.S.2d 359, 363-64 (App. Div. 1983) (Sandler, J., concurring) (citing *Schubtex, Inc. v. Allen Snyder, Inc.*, 399 N.E.2d 1154 (N.Y. 1979) (agreement to arbitrate, supplementing the express terms of a contract, may be implied from course of past conduct or from custom and practice in the industry)).

⁶⁷ See *Freeman v. First State Bank of Albertville*, 401 So. 2d 11, 13 (Ala. 1981).

⁶⁸ See, e.g., *Colonial Pipeline Co. v. Robert W. Hunt Co.*, 296 S.E.2d 633, 635 (Ga. Ct. App. 1982).

⁶⁹ See, e.g., *Crossland v. Kentucky Blue Grass Seed Growers' Co-Op Ass'n.*, 103 F.2d 565, 567 (6th Cir. 1939).

⁷⁰ See *Gholson, Byars and Holmes Construction Co. v. United States*, 351 F.2d 987, 999-1000 (Ct. Cl. 1965).

⁷¹ For a detailed discussion of usage of trade and course of performance in the Uniform Commercial Code, see J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 3-3 (2d ed. 1980). *Miron v. Yonkers Raceway*, 400 F.2d 112, 121 (2d Cir. 1968), a racehorse case, recognized the U.C.C.'s “more liberal” standard.

⁷² *Id.* at §§ 3-3, 25-12, 25-13. See also R. ANDERSON, 4 *ANDERSON ON THE UNIFORM COMMERCIAL CODE* § 9-306:18 (2d ed. 1971).

There certainly is room for judicial maneuvering within the framework of the factors reflected by the earlier cases.⁷³ Whatever the legitimate range of disagreement and discretion, courts failing to see that the U.C.C. has created contracts and contract terms where they did not exist before are simply in error and should be overruled.⁷⁴

It is useful to rationalize and systematize the range of discretion exercised by courts that must apply custom to a transaction before them—whether or not the U.C.C. is applicable, and whether or not there is a contract in whose interpretation or application the *Restatement* would be of interest. Generally, a usage of a trade is applied (or not applied) depending upon various policy factors, which may point in different directions.⁷⁵ Each type of transaction is examined on the basis of the competing policies that might be relevant.

IV. THE RECURRING QUESTION OF "CONSENT"

The hook upon which custom often hangs its hat is the language of a statute or judicial declaration that allows a form of behavior with (and only with) the "consent" of another party,⁷⁶ or with (and only with) the grant of "authority"⁷⁷ to act. In accordance with the general framework of this Article, a commonly accepted policy is to permit behavior that otherwise would be improper, when the person affected by the improper behavior gives his or her permission.

Frequently, the facts present the largest problem. The person who would benefit from the application of a general rule (and

⁷³ See notes 162-171 *infra* and accompanying text. For this Article's proposal for the framework, see notes 171, 180 *infra* and accompanying text.

⁷⁴ See, e.g., *Martin v. Ben P. Eubank Lumber Co.*, 395 S.W.2d 385 (Ky. 1965). In *Martin* the Court held, "Certainly, 'course of dealing between parties' and 'any usage of trade' may be competent to explain any ambiguities in a contract; this does not mean that a course of dealing or trade usage may be used to *make* a contract between parties." *Id.* at 386 (emphasis added).

⁷⁵ "Always a knit of identity, always distinction, always a breed of life." WALT WHITMAN, *supra* note 54, at 36.

⁷⁶ See, e.g., W.P. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 10 (5th ed. 1984); West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Michael Posner*, 99 HARV. L. REV. 384 (1985); RESTATEMENT (SECOND) OF TORTS § 892A (1979).

⁷⁷ See note 79 *infra* and accompanying text.

thus the one who has the right to waive it) does not give his or her explicit consent, but nonetheless *knows and implicitly agrees* to the exceptional behavior. Is he or she just as much bound as if there were a sealed document granting permission for the exceptional behavior to occur?

A further central question arises at the level of proof. The person who can change the rules by his acquiescence may say that he or she really did not know of or agree to the other party's behavior. Can knowledge and acquiescence be found as a matter of practical reality merely because the pattern of behavior is so customary and predictable that the person benefited by the rule *must have known* that the behavior would occur? Can the known custom, then, take the place of actual knowledge?

A. *The Insertion of Policy*

There are some cases in which a court would reject such a suggestion out of hand. If, for example, it were suggested that customarily lawyers forge another's name to fraudulent documents, the court would not be the slightest bit interested in giving effect to the custom.⁷⁸ That would be the clearest case of a blatantly unreasonable custom—that is, one that conflicts with a major public policy—and no court would give it effect. Society has such a serious stake in the honor of the Bar that this usage would be ignored and condemned.

The result may or may not properly be the same when a statute creates a crime for the use of property or services “without authority,” and it is demonstrated that there is a well-understood custom among superior employees of using the services of inferior employees for their personal, individual benefit. In such a case, the Sixth Circuit held that the custom could not prevail, as it would be in “violation of the criminal code.”⁷⁹ This analysis is entirely circular. If authority can be given by

⁷⁸ See, e.g., *Kentucky Bar Ass'n v. Hammond*, 619 S.W.2d 696, 699 (Ky. 1981) (“Respondent's attempt to justify [the forging of a physician's name to fraudulent medical records for workers' compensation claims] by asserting that his conduct is customary among attorneys . . . falls flat on its face.”).

⁷⁹ *Burnett v. United States*, 222 F.2d 426, 427 (6th Cir. 1955).

custom, then the pursuit of the custom does not violate the statute. The following would be a correct form of reasoning: Such use of employees may be so immoral and unreasonable that it cannot be proved. The court would focus on the true policy issue before it. Should society make allowance for such a source of unexpressed authority? Should the courts protect shareholders or taxpayers as it protects clients?

Two cases, one from New York⁸⁰ and one from Florida,⁸¹ provide an extraordinary example of this policy analysis. Each case involved the well-known custom of a newspaper reporter's intrusion into the privacy of private homes. Does that custom replace the actual consent of an individual to a trespass? The New York court had no difficulty with holding that no such custom will be allowed.⁸² The Florida court strained and struggled with the competing policies, and ended with the same result,⁸³ a result that it reached with considerably more ease when the intruder was a mere creditor with a right to repossess mortgaged personal property.⁸⁴ The degree of unreasonability of the custom plainly was affected by the public policy that the court perceived as supporting the challenged behavior. First amendment-type policies created a greater counterweight than property-type policies. There is no escape from the fact that courts must make such judgments.

B. Reasonability as a Tort-like Concept

Examples from the area of tort law have been used, thus far, to illustrate a proper approach to consent which is princi-

⁸⁰ *Anderson v. WROC-TV, WHEC-TV, WOKR-TV*, 441 N.Y.S.2d 220 (N.Y. Civ. Ct. 1981).

⁸¹ *Fletcher v. Florida Publishing Co.*, (Cir. Ct. Duval County) (unreported trial court decision granting summary judgment in favor of defendant on the issue of trespass), *rev'd*, *Fletcher v. Florida Publishing Co.*, 319 So. 2d 100 (Fla. Dist. Ct. App. 1975) (reversing lower court's grant of summary judgment on issue of trespass), *rev'd*, *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976) (reversing District Court of Appeals holding that no recovery could be had on trespass claim because of implied consent from custom and usage authorizing entry), *cert. denied*, 431 U.S. 930 (1977).

⁸² See 441 N.Y.S.2d at 223, in which the court emphatically stated, "The gathering of news and the means by which it is obtained does not authorize, whether under the First Amendment or otherwise, the right to enter into a private home by an implied invitation arising out of a self-created custom and practice."

⁸³ See 319 So. 2d at 104-09.

⁸⁴ See *Quest v. Barnett Bank of Pensacola*, 397 So. 2d 1020, 1023-24 (Fla. Dist. Ct. App. 1981).

pally a contract question. The same relationship is found between tort and contract matters by an examination of more traditional tort concerns. The ordinary use of custom in tort law does not involve issues of consent. Rather, a custom is examined to determine whether an actor has acted reasonably (as opposed to negligently) in the circumstances.⁸⁵ In such cases, "the customs of the community, or of others under like circumstances," are taken into account when a "reasonable man" would follow them.⁸⁶ The test as to uniformity is somewhat different in applying a common tort analysis, as is later noted.⁸⁷ Pure tort questions may be treated differently as customs change.⁸⁸ The tests are different, however, not because one question is raised by tort and another by contract, but because the court is seeking advice on a different subject. In the contract cases, the court is trying to determine whether an actor knew a practice well enough that one can assume he made a judgment with respect to it. In the tort cases, the court is directly seeking the community's judgment as to the reasonability of the actor's behavior. This Article does not involve many tort questions, but it is centrally necessary to distinguish between those factors that honestly reflect on the intent of the parties, and those that reflect only society's values. In tort questions, only the latter factors would be involved.

The tort judgment can, however, be required in a contract situation as well. There is such a case in the thoroughbred horse business, wherein one of the parties was also a party to *Marsh v. Gentry*.⁸⁹ Thus, in the case of *Schleicher v. Gentry*⁹⁰ (herein-

⁸⁵ "If the actor does what others do under like circumstances, there is at least a possible inference that he is conforming to the community standard of reasonable conduct; and if he does not do what others do, there is a possible inference that he is not so conforming." RESTATEMENT (SECOND) OF TORTS § 295A comment b (1965).

⁸⁶ *Id.* A horse case in which the customary standard for the care of horses was used offensively is *Matherne v. Terrebonne Parish Police*, 462 So. 2d 274 (La. Ct. App. 1984). A horse case in which the customary standard of care of horses was unsuccessfully so used is *Forsyth v. Jefferson Downs, Inc.*, 152 So. 2d 369 (La. Ct. App. 1962).

⁸⁷ See notes 134-135 *infra* and accompanying text.

⁸⁸ Thus, "state of the art" standards may be mixed with "customary practice" standards. See *Koch v. Gorrilla*, 552 F.2d 1170, 1175 (6th Cir. 1977). Or state of the art may supersede customary practice. See *Hancock v. Paccar, Inc.*, 283 N.W.2d 25 (Neb. 1979). In the latter analysis, the tort question becomes a more complex policy matter, very much like the tort-type contract questions raised here.

⁸⁹ 642 S.W.2d 574 (Ky. 1982). See also notes 8-10 *supra* and accompanying text.

⁹⁰ 554 S.W.2d 884 (Ky. Ct. App. 1977).

after referred to as *Gentry I*) the seller of a thoroughbred mare (Schleicher) had mixed up two horses, and had sold and delivered to the buyer (Gentry) a mare less valuable than the one whose pedigree was listed in the sales catalog.⁹¹ The sale occurred at auction in the fall of 1974, and Schleicher apparently contended that Gentry's delay in discovering the error foreclosed recovery:

It was not until August of 1975 that Mr. Gentry checked the identification in his mare's mouth in order to have the papers properly prepared for the Jockey Club for the mares and foal. It was established that it was the common and accepted practice in the industry to make these checks in August.⁹²

The *Gentry I* court passed onto other defenses, eventually holding that Gentry could not recover his asserted lost profits on the transaction because of their uncertainty.⁹³ Nonetheless, it is useful to note that the Kentucky Court of Appeals used a "common and accepted" practice to test a matter roughly like contributory negligence—but in the area of contract law. *Gentry I* illustrates the interdependence of tort analysis with the contract cases, because the specific question before the court would have been whether Gentry had waited an unreasonable time to make his discovery and assert his complaint (a tort question), in the context of asking whether he had waived his rights⁹⁴ or perhaps accepted the wrong horse⁹⁵—both of which indicate the intention to form or alter a contract.⁹⁶ That precise analysis was made under the U.C.C. in another horse case by the Court of Appeals for the Second Circuit,⁹⁷ in which one discovers that horsemen

⁹¹ The difference in value between the two mares was reflected by the great disparity in the sales prices of the two mares. The mare that was represented as the less valuable mare was sold at the Keeneland sales in the fall of 1974 for \$2,700.00, while the mare represented as the more valuable of the two was purchased by Mr. Gentry at the Keeneland sales in January, 1975, for \$50,000.00. *Id.* at 885.

⁹² *Id.*

⁹³ *Id.* at 886.

⁹⁴ See, e.g., *Taylor v. Eblinger Shoe Mfg. Co.*, 257 S.W. 7, 8 (Ky. 1923) (buyer's duty to notify seller of defective goods).

⁹⁵ See, e.g., *Cogan v. Wall*, 266 S.W. 884, 884-85 (Ky. 1924) (right of rejection must be exercised within a reasonable time after acceptance).

⁹⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 84 comment b (1981).

⁹⁷ *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112 (2d Cir. 1968).

examine their potential race horses more quickly than they examine their breeding stock.⁹⁸

C. *Warranties and Fraud, Waiver of Warranties, and Standards of Care*

When a horseman states that a mare is "barren" he is saying that she has not conceived a foal.⁹⁹ If in fact she had conceived, but lost her foal before its birth, the correct term would be "slipped."¹⁰⁰ The difference may tell a prospective purchaser something about the mare's qualities as a future investment.¹⁰¹ The correct usage was common enough in the early 1980's to sustain a claim of breach of warranty for the mislabeling of the mare at an auction sale.¹⁰² The one reported case, and other unreported cases, have occasioned auction companies explicitly to require that distinction to be made by those who list mares for sale.¹⁰³ And so, in the mid-1980's, the custom has become so universal that it can support a judgment for fraud and punitive damages for the failure to abide by it.¹⁰⁴

This would seem to be a compelling example of a contract matter that blends into tort, and one that neatly illustrates the positive interaction of custom and law.

⁹⁸

[I]t is customary, when buying a *racehorse*, to have a veterinarian or trainer examine the horse's legs, and we agree that the existence of this custom is very important in determining whether there was a reasonable opportunity to inspect the horse. . . . We gather from the record that the reason it is customary to examine a racehorse's legs at the time of sale is that a splint bone is rather easily fractured.

Id. at 118 (emphasis added). A similar practice is discussed in *Grandi v. LeSage*, 399 P.2d 285 (N.M. 1965), in which a horse, represented as a possible stud, was claimed and was later discovered to be a gelding. The same fact pattern in a U.C.C. context is considered in the New York case of *White Devon Farms v. Stall*, 20 U.C.C. Rep. 291 (1976).

⁹⁹ See J. LOHMAN & A. KIRKPATRICK, *SUCCESSFUL THOROUGHBRED INVESTMENT IN A CHANGING MARKET* 84 (1984).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See *Keck v. Wacker*, 413 F. Supp. 1377, 1381-82 (E.D. Ky. 1976).

¹⁰³ See J. LOHMAN & A. KIRKPATRICK, *supra* note 99, at 84.

¹⁰⁴ See *Chernick v. Fasig-Tipton Kentucky, Inc.*, 703 S.W.2d 885 (Ky. Ct. App., 1986).

Another such illustration grows out of the universal custom at thoroughbred auctions for the "conditions of sale" to exclude all implied warranties. Although the enforceability of exculpatory clauses is a complex body of law on its own, the applicability of custom is particularly interesting in this context. Some cases hold that the fact that all similar sellers disclaim warranties tends to make disclaimers more reasonable.¹⁰⁵ Some courts make the more reasonable assumption that such generality (especially in an oligopolistic industry like the thoroughbred auction business) is evidence that the purchasers are not in a position to purchase fairly.¹⁰⁶ The former principle is usually applied in animal cases,¹⁰⁷ but the particular current needs of this business may require that a court recognize that such disclaimers are "pregnant with evil," or demand the recognition of a "public policy" against enforceability.¹⁰⁸

Similarly, tort and contract rules are substantially interchangeable by a court considering the implied duties of a paid bailee of horses. A set of California decisions¹⁰⁹ is illustrative, and is cumulated by a recent case¹¹⁰ which explicitly recognized and weighed the changing needs of the business, balancing the interests of the parties and the industry.

D. Custom Adopted by Contracts and Customary Contracts

One further, closely related convergence of the tort-contract interplay is found in connection with another common practice in the thoroughbred horse business. It is usual in contracts

¹⁰⁵ Posttape Associates v. Eastman Kodak Co., 450 F. Supp. 407 (E.D. Pa. 1978).

¹⁰⁶ Durham v. CIBA-Geigy Corp., 315 N.W.2d 696 (S.D. 1982).

¹⁰⁷ Kincheloe v. Geldmeier, 619 S.W.2d 272 (Tex. 1981); Torstenson v. Melcher, 241 N.W.2d 103 (Neb. 1976); Sessa v. Reigle, 427 F. Supp. 760 (E.D. Pa. 1972).

¹⁰⁸ See the case distinguished in the thoroughbred case of Rutter v. Arlington Park Jockey Club, 510 F.2d 1065 (7th Cir. 1975). By way of stark contrast, however, compare Belmont's Ex'r v. Talbot, 51 S.W. 588 (Ky. 1899) ("There being no custom to warrant at this public sale, it may be that a warranty by the auctioneer would not bind Mr. Belmont.") Professors White and Summers described this correctly as "no-worse-than-anybody-else ethics.'" WHITE AND SUMMERS, UNIFORM COMMERCIAL CODE § 9-7, at p. 353 (2d ed. 1980).

¹⁰⁹ Vaughan v. Bixby, 142 P. 100 (Cal. App. 2d Dist. 1914); Williams v. Dougan, 223 P.2d 631 (Cal. App. 1950).

¹¹⁰ Gebert v. Yank, 218 Cal. Rptr. 585 (Cal. App. 1985).

providing for the syndication of thoroughbred stallions to limit the liability of the syndicate manager and/or farm operator to the standard of those who manage stallions, sometimes in the locality where the stallion stands.¹¹¹ Such a provision allows a practical limitation on the proof that would be necessary in a trial. Thus, the parties to a contract adopt a trade usage from a locality in explicit terms—just as legislatures sometimes do.¹¹² Such an agreement is undoubtedly enforceable,¹¹³ unless it goes so far as to allow willful behavior to go unpunished, or to relieve from liability an offender of some special public policy.¹¹⁴

Such a case, however, is to be distinguished from the accustomed adoption by an industry of unlawful behavior. Thus, it is also common in the syndication of thoroughbred stallions to prohibit the sale of fractional interests at public auctions.¹¹⁵ This practice is a part of the traditional secrecy and self-control of the business, and it conflicts directly with the practice of both the Matchmaker Breeders Exchange and Stallion Access to auction stallion shares, since these companies conduct open auctions

¹¹¹ The only book-length study that is of any value in the law relating to horses is J. HUMPHREYS, *RACING LAW* (1963). Humphreys attaches the NASHUA Syndication Agreement as an appendix. *See id.* at appendix. That classic syndication has been carried forward in many respects to all modern syndicate agreements.

¹¹² *See, e.g.,* United States v. New York Tel. Co., 434 U.S. 159, 172-73 (1977); Castanho v. Jackson Marine Corp., 650 F.2d 546, 550 (5th Cir. 1981). *New York Tel. Co.* and *Castanho* interpret 28 U.S.C.A. § 1651 (West 1966), which states in pertinent part: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* (emphasis added).

¹¹³ *See, e.g.,* Franklin Fire Ins. Co. v. Chesapeake & O. Ry. Co., 140 F.2d 898, 899 (6th Cir. 1944) (allowing a common carrier to contract against its ordinary negligence); Hagen v. Parker, 175 N.W.2d 483, 486-87 (Wis. 1970) (allowing express agreement limiting agent's liability).

¹¹⁴ The balance between the freedom to contract and the public policy will be made by the courts. *See, e.g.,* Cobb v. Gulf Ref. Co., 145 S.W.2d 96, 99 (Ky. 1940) (contract provision that exempted lessor oil company from liability for damages caused to lessee by gasoline leakage from lessor-installed tanks was not against public policy).

¹¹⁵ This Article makes many firm statements about the customs in the thoroughbred horse business. There seemed no way to write about the subject without being concrete. Although the usages described are based on numerous interviews with many participants at all levels of the business, whose identities it seems an act of friendship to protect, the inevitable errors are those of the author. Courts will require expert testimony under oath.

whose results are made known to the public.¹¹⁶ The industry understands that the value of the fractional interests may decrease if a stallion progeny fails to win purses, and that even private sales may reflect reduced values. But so long as the general market is not informed of a price decline, the continuing owners will have (for a time at least) control of the market price, often set and advertised by the farm at which the stallion stands. The sole motive of prohibiting public sales, then, is price maintenance¹¹⁷—an anti-competitive and presumably unlawful motive.¹¹⁸ The unlawful ancillary provision does not affect the syndicate agreement, but is unenforceable.¹¹⁹ Such a situation involves no different issues than the case of the absconding lawyer or the intruding newspaperman considered earlier.¹²⁰

E. Summary

Four related areas of concern, each important in the thoroughbred horse business, have been shown to involve a relation-

¹¹⁶ For a discussion of Matchmakers Breeders Exchange and Stallion Access, see text accompanying notes 26-27 *supra*.

¹¹⁷ It is sometimes rationalized that the provision helps assure that high quality mares will be bred to the stallion. To the extent that mares with good records and bloodlines are bred to a stallion, his offspring have better odds of being runners, and his own value will be increased. After all, each offspring has two parents. And in a private sale the seller knows what sort of mares the buyer owns. The argument, however, rests on the highly doubtful assumption that the seller—who is now no longer interested in the stallion—cares about the stallion's future. Even if true, the rationalization returns us to the beginning point: The purpose of prohibiting auction sales is price maintenance. In any case, the rationalization is nothing more than that. If the quality of the mares were the issue, there would be (and there sometimes is) some provision for controlling the quality of mares, irrespective of the existence of private and public sales; even the original owners of fractional interests can otherwise breed whatever mare they choose. Syndicate members also have some control of who will buy a share (without affecting prices) by virtue of the nearly universal syndicate provision that existing syndicate members have a first refusal right to purchase fractional interests on the terms of any proposed sale, public or private. The exercise of that right does not hide the public sales price, but would give the buyer the absolute power to choose the mares for breeding to the stallion. A Kentucky court correctly analyzed a practice in the tobacco industry in *Germann v. Stanley*, 190 S.W.2d 547 (Ky. 1945).

¹¹⁸ See *United States v. Container Corp.*, 393 U.S. 333 (1969); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). *Container Corp.*, *Masonite Corp.*, and *Socony-Vacuum Oil Co.* suggest that any agreement, the purpose of which is to affect the price, is per se illegal.

¹¹⁹ See *Kelly v. Kosuga*, 358 U.S. 516, 521 (1959).

¹²⁰ See notes 78-84 *supra* and accompanying text.

ship between the law and a customary practice in the business. A fair restatement of that relationship is that custom can be used to identify what would be reasonable behavior and/or what might have been the subjective intent of the parties to the transaction. When no other recognized policy is suggested to limit the effect of that judgment, or that suggestion of intention, the special business environment can be allowed to direct the result of a lawsuit.¹²¹

V. TWO CENTRAL ISSUES RAISED BY THE LEADING CASE

Before leaping from these underlying principles to a general formulation of the use of custom and usage in the thoroughbred horse business, it seems appropriate to start with what is considered the leading custom case. In *Marsh v. Gentry*¹²² (*Gentry II*), a managing partner (Gentry) purchased two partnership assets without the required consent¹²³ of the inactive partner (Marsh). *Gentry II* can be used to illustrate two appropriate applications of the standards applied to usages by the courts. One standard concerns the "reasonability" of the alleged custom, and the other standard concerns the custom's required "universality."

A. *The Role of Universality in Gentry II*

An independent requirement frequently asserted in usage cases is the necessity of demonstrating a custom's universality. It is usually held that the court, of its own knowledge, can determine the existence of a custom (including its scope) when the custom is a general one,¹²⁴ whereas the parties must prove a special trade custom.¹²⁵ One of the principal teachings of *Gentry II* is that proof of a considerable degree of regularity is required. That teaching is overlooked by the popular wisdom in interpreting *Gentry II*.

¹²¹ A legislative classification can be held constitutionally reasonable if "based on long standing custom and practice in the racing industry." See *Jacobs v. Kentucky State Racing Comm'n*, 562 S.W.2d 641, 643 (Ky. 1977).

¹²² 642 S.W.2d 574 (Ky. 1982).

¹²³ See KRS § 362.250(1) (1954); UNIFORM PARTNERSHIP ACT § 21 (1969).

¹²⁴ See, e.g., *In re Bowling Green Mill Co.*, 132 F.2d 279, 283 (6th Cir. 1942).

¹²⁵ See *id.*; RESTATEMENT (SECOND) OF CONTRACTS § 222(2) (1981).

Neither the majority opinion nor the dissent suggested that a universal custom was involved. The dissent argued that Gentry's practice was "accepted" by the business,¹²⁶ while the majority said that "an accepted practice" will have no effect.¹²⁷ Neither side used the word customary, and this was no sloppy use of language. The dissent quoted the finding of the trial court in this respect. There was a "common" practice of horse owners purchasing their own horses at auction.¹²⁸ Outside the partnership context, this "occurs very frequently." But the practice of a partner to bid on the sale in secret was only "occasional." The secret bidding by a partner "might or might not" be within the knowledge of the nonbidding partner.¹²⁹ Thus, while the practice may be accepted, it does not very often occur—according to the majority and dissent alike.¹³⁰

A federal court had characterized prior Kentucky law as being adverse to accepting local customs in the face of general legal rules, and had held that "mere frequency" is not enough to establish a usage.¹³¹ The custom must be "almost a universal custom,"¹³² or perhaps even "uniform and notorious."¹³³ That rule is applied "[i]n its fullness"¹³⁴ in the law of contracts, and less rigidly when a "tort" standard is to be adopted—where "the great majority" may be the rule.¹³⁵

The more important point in *Gentry II* is that the majority opinion holds that what people accept is of no consequence.¹³⁶ It agrees with Professor Gray: "Custom is what men *do*, not

¹²⁶ See *Marsh v. Gentry*, 642 S.W.2d 574, 578 (Ky. 1982) (Stephenson, J., dissenting).

¹²⁷ *Id.* at 576.

¹²⁸ *Id.* at 578 (Stephenson, J., dissenting).

¹²⁹ *Id.*

¹³⁰ *Id.* at 576, 578.

¹³¹ See 132 F.2d at 283, *construing* *Aulich v. Craigmyle*, 59 S.W.2d 560 (Ky. 1933).

¹³² *Warfield Natural Gas Co. v. Moore*, 136 S.W.2d 1086, 1088 (Ky. 1940).

¹³³ *Illinois Central R. Co. v. Maxwell*, 167 S.W.2d 841, 843 (Ky. 1943). "Only what proves itself to every man and woman is so/Only what nobody denies is so." WALT WHITMAN, *Song of Myself*, LEAVES OF GRASS (1940).

¹³⁴ 167 S.W.2d at 843.

¹³⁵ See *Ellis v. Louisville & N. Ry. Co.*, 251 S.W.2d 577, 579 (Ky. 1952). *But see* *Louisville Trust Co. v. Nutting*, 437 S.W.2d 484, 486 (Ky. 1968). The standards with respect to custom in the law of torts are set out in RESTATEMENT (SECOND) OF TORTS § 295A (1965), in which the "reasonable" standard is stated also.

¹³⁶ See 642 S.W.2d at 576.

what they *think*.”¹³⁷ Any willingness to accept banditry would be rejected—at least when actual banditry is not practiced. If it were simply a matter of choosing what is accepted as right or wrong (as the dissent said), the court would look to its own morality rather than to that of the community at large, much less a particular community:

Is the opinion of his community on a question of morality, of right and wrong, not yet embodied in practice, a legitimate source of Law to which a judge ought to subordinate his own opinion? I know of no moralist or jurist who has answered this question in the affirmative.¹³⁸

The difficult test of these standards often (though not in *Gentry II*) comes in meeting an operational definition: Exactly what sort of proof is required? Obviously, proof of moral judgment is nearly impossible. To the extent that practice reflects acceptance, the common moral judgment provides an incidental supporting public policy, but to find knowledge of something that is not reflected in observable action is more than one can ask of a court.

Even proof of practice is not simple.¹³⁹ It would seem clear that a court could give no effect to the fact that horsemen work

¹³⁷ J. GRAY, *supra* note 28, at 285 (emphasis in original). See also B. LEISER, *supra* note 31, at 90-92.

¹³⁸ J. GRAY, *supra* note 28, at 290.

¹³⁹ The largest problem can be in making a court penetrate even a clear custom. A good example of this is found in *Taylor v. Johnston*, 539 P.2d 425 (Cal. 1975), in which an appellate court reversed a judgment of the trial court, because the appellate court failed to understand a thoroughbred breeding usage that is crystal clear. Thoroughbred stallions are bred only between the beginning of each year and the end of July, the “breeding season” being established so that young animals will be born shortly after the beginning of the next year, and thus will be technically one year old (yearlings) after they have lived for nearly a year. In *Taylor*, the plaintiff, owner of two thoroughbred mares, had purchased the right to breed to a leading sire whose value increased enormously between the time the plaintiff obtained his right to breed and the breeding season when the right was to be exercised. The stallion’s custodian first tried to avoid the contract entirely, and then postponed the mare’s breeding to the stallion—month after month. When the next-to-last possible breeding time occurred, and there was another postponement, the mare’s owner had no choice but to breed the mare to another stallion. The appellate court toyed with the idea that “the year 1966” meant the calendar year, despite the industry custom. The court decided the case on the basis that there was one more possible month of breeding even within the breeding season. By so holding, the

out their problems when "foal sharing" deals fall through because of the death of the mare, or that promptly discovered bone chips call for an adjustment of the deal. A custom to do something that infinitely varies cannot be enforced.¹⁴⁰ What if there is a sharp divergence of testimony as to the existence of a simpler custom? It was already clear under Kentucky law prior to *Gentry II* that if there is real disagreement among the experts, there is not even a jury question as to the reality of a custom. The practice will be considered "a variable practice" and will not be recognized by the courts.¹⁴¹ The *Restatement* requires such "regularity of observance" as will "justify an expectation" of the parties.¹⁴² Whatever the exact parameters of the test, and whatever the effect of conflicting proof, it is clear that an "occasional" and a "might or might not" practice, however morally agreeable or accepted in a business, is not the custom and usage referred to in this body of law.¹⁴³

B. *The Role of Competing Policies in Gentry II*

A usage will be given application by reason of or in proportion to its reasonability,¹⁴⁴ and by now it seems clear that this is a method of giving effect to any respectable policy consideration. What a particular trade accepts may be irrelevant; what the community demands is not.

Gentry II teaches again that a reasonability—policy—standard will be considered. In *Gentry II*, the policy was the one

court ignored the well-established custom of obtaining the first breeding early enough in the breeding season so that if there is no conception, the mare can be returned again (sometimes up to five or six times) to effect the purpose of the contract, and so that the mare can foal early the next year and be ready for another breeding. The finder of fact had determined "that the defendants were just giving [the plaintiff] the runaround," in a "wholly unwarranted, high-handed, and oppressive" manner. *Id.* at 431. Because of the appellate court's failure to give effect to the custom, the defendants succeeded in the appellate court. This custom relating to the breeding cycle was given a tax effect in *Reineman v. United States*, 301 F.2d 267 (7th Cir. 1962).

¹⁴⁰ See text accompanying notes 16-20 *supra*.

¹⁴¹ See *Beech Creek Coal Co. v. Jones*, 262 S.W.2d 174, 177 (Ky. 1953).

¹⁴² RESTATEMENT (SECOND) OF CONTRACTS § 222(1) (1981).

¹⁴³ This distinction is discussed in *Ebert v. Fort Pierre Moose Lodge*, 312 N.W.2d 119, 124-25 (S.D. 1981).

¹⁴⁴ See U.C.C. § 1-205 (1972); RESTATEMENT (SECOND) OF CONTRACTS § 221 (1981). See also C. ALLEN, *supra* note 9, at 135-36; B. LEISER, *supra* note 31, at 65, 70, 156.

imposed by the Uniform Partnership Act. Partners have a high fiduciary duty toward one another.¹⁴⁵ This reflects an equally potent common law standard. Justice Cardozo demanded “the punctilio of an honor the most sensitive.”¹⁴⁶

Given such a standard, *Gentry II* did not present the court with a conflict any more difficult than the one it faced on the question of universality. In some other case, there may be a troubling issue—when, for example, the partner in Gentry’s position is merely silent, or when there is some temptation of fairness to impute consent from the apparent knowledge of one in Marsh’s position. In the partnership context, however, fairness will not be an issue.¹⁴⁷ And in *Gentry II*, the court affirmatively found “two covert acts” on Gentry’s part with respect to one partnership sale.¹⁴⁸ After the second sale, “Gentry told Marsh [the horse] had been sold to a third party,”¹⁴⁹ an affirmative misstatement. With proof of conscious acts, the court need not to be concerned further with competing equities.

It might be that a reasonability test would point in the same direction for weaker facts. Courts had already held, before *Gentry II*, that the strength of the partnership fiduciary relationship is such that consent will not be implied.¹⁵⁰ Thus one court held, “It scarcely need be again repeated that by established principles of law . . . partners occupy a [fiduciary] relationship to other partners in the transaction of the partnership business. A custom or practice that conflicts with established principles of law governing such relationships cannot prevail.”¹⁵¹

¹⁴⁵ *Marsh v. Gentry*, 642 S.W.2d 574, 576 (Ky. 1982).

¹⁴⁶ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

¹⁴⁷ Whether a fair price was received or a fair sale occurred is generally irrelevant when there has been a fiduciary breach—the asset simply inures to the benefit of the partnership at the price paid by the offending partner. See *Graham v. Tom Moore Distillery Co.*, 42 F. Supp. 853, 855 (W.D. Ky. 1941). See also *Hutchings v. Louisville Trust Co.*, 276 S.W.2d 461 (Ky. 1954); *Stephens v. Stephens*, 183 S.W.2d 822 (Ky. 1944); *Hammonds v. Risner*, 132 S.W.2d 533 (Ky. 1939); *Konsuvo v. Netzk*, 220 A.2d 424, 432 (N.J. 1966); RESTATEMENT (SECOND) OF TRUSTS § 170 comment (1)(b) (1960).

¹⁴⁸ 642 S.W.2d at 576.

¹⁴⁹ *Id.* at 575-76 (Gentry bid on a partnership horse at an auction through a secret agent and told Marsh that a buyer had been located for another horse that Gentry actually purchased.).

¹⁵⁰ See *Belcher v. Birmingham Trust Nat'l Bank*, 348 F. Supp. 61 (W.D. Ala. 1968).

¹⁵¹ *Id.* at 127.

Courts are willing to distinguish among different types of enterprises and different degrees of fiduciary relationship. For example, one would ordinarily presume the intention of an employer to pay compensation to an employee for his efforts.¹⁵² When, however, the employee is a public employee—presumably with the highest fiduciary duty of all workers—a “mere custom” to pay such an employee “without express authority” would not prevail.¹⁵³ Indeed, if the beneficiary of this rule is truly protected by a fiduciary relationship, his own unreasonableness is not held against him.¹⁵⁴

In many ways, absent the contrary policy associated with fiduciary duties, the thoroughbred industry appears to be a reasonably appropriate business for the application of its own standards. It is a fairly self-contained business, in which the participants deal with one another and do not have direct contact with a wider public.¹⁵⁵ One would not suppose that general public policy considerations would frequently intrude.¹⁵⁶ On the other hand, unlike the New York diamond market that was the subject of considerable analysis by Professor Furnish and several New York courts discussed by him,¹⁵⁷ the thoroughbred horse business is not entirely closed to outsiders. New participants come into the business on a fairly frequent basis, and a “newcomer to a trade is not bound by trade custom unless he knows of it or it is so widespread that he may be presumed to have known of it.”¹⁵⁸ The courts may use caution in adopting customs that

¹⁵² See *Becker v. Nahm & Turner, Inc.*, 435 S.W.2d 750, 752 (Ky. 1968).

¹⁵³ *Harlan County v. Blair*, 49 S.W.2d 1028, 1029 (Ky. 1932). See also *City of Fulton v. Shanklin*, 122 S.W.2d 733, 735 (Ky. 1938).

¹⁵⁴ See *Solomont v. Polk Dev. Co.*, 54 Cal. Rptr. 22 (Cal. App. 1966); *Muir v. Samuels*, 62 S.W. 481 (Ky. 1901).

¹⁵⁵ It may not be an accident that the author of the dissent in *Gentry II* (Kentucky Supreme Court Chief Justice Stephens) also wrote the dissent in *Trimble v. North Ridge Farms, Inc.*, 700 S.W.2d 396 (Ky. 1985).

¹⁵⁶ The commentary to the RESTATEMENT holds that if a “rule of Law” would override an explicit contract, it would also override a usage—but not otherwise. RESTATEMENT (SECOND) OF CONTRACTS § 221 comment c (1981). RESTATEMENT § 173 applies a less rigorous rule to the “abuse of a fiduciary relation,” making a contract voidable unless “it is on fair terms” and the parties have a “full understanding” of their rights and “all relevant facts . . . the fiduciary knows or should know.” RESTATEMENT (SECOND) OF CONTRACTS § 173 (1981).

¹⁵⁷ See *Furnish*, *supra* note 28, at 42-48.

¹⁵⁸ RESTATEMENT (SECOND) OF CONTRACTS § 219 comment b (1981).

involve purchase and sale by persons who may be newcomers.¹⁵⁹

It is important, then, to note that for these considerable reasons, *Gentry II* does not foreclose the applicability of industry customs in the appropriate context.¹⁶⁰ Instead, that case raises and easily settles some of the issues that will, however, continue to confront courts in more difficult cases.

VI. FACTORS TAKEN INTO ACCOUNT IN FINDING A CUSTOM OR USAGE¹⁶¹

There are literally thousands of cases reflecting the traditional method of determining whether a proven custom or usage will be considered in a contract situation. A typical formulation of the test is as follows:

A local custom must be well established, reasonable and generally known, of such age, uniformity of observance, certainty, fixedness of character and notoriety that a jury would be justified in saying that it was known to the party sought to be affected by it.¹⁶²

Note the repeated use of the word "and." Each and every factor must be present. With so rigid a rule, custom undoubtedly

¹⁵⁹ See, e.g., J. LOHMAN & A. KIRKPATRICK, *supra* note 99, at 84. A newcomer in the business should hire an adviser to teach him and lead him through the steps of acquiring and managing his equine assets. One simply assumes in such a context that this type of agent would be paid a fee, and have undivided loyalty to the newcomer, irrespective of the custom described later in this Article. *Id.* at 136, 139, 143.

¹⁶⁰ Neither the "usage of trade" provisions of the RESTATEMENT, *see* RESTATEMENT (SECOND) OF CONTRACTS § 222 (1981), nor those of the Uniform Commercial Code, *see* U.C.C. § 1-205(2) (1972), both of which have been discussed previously, *see* notes 142-144 *supra* and accompanying text, apply directly in the *Gentry II* situation. The duty imposed on *Gentry* was one imposed by the partnership statute, not a contract of sale, and prior to the statute, it was imposed by common law. Thus, a partnership is "founded on a voluntary contract," but the fiduciary duties grow out of a "status arising out of a contract." *Elcomb Coal Co. v. Hall Land & Mining Co.*, 115 S.W.2d 360, 365 (Ky. 1938) (emphasis added).

¹⁶¹ This list of factors will not be exclusive. Others will appear in a more thorough examination of the cases, and in a fuller view of the realities. If it appears from the analyses that are included in subsequent sections of this Article that all of the appropriate factors were included in this section, that is because this one was written and rewritten based upon what was found in the later cases and hypotheticals. It seems only fair to admit that circularity.

¹⁶² *In re Bowling Green Mill Co.*, 132 F.2d 279, 283 (6th Cir. 1942).

would gradually disappear as a source of decision. Economic life has become too complex, public policies too conflicting, and above all, change comes too rapidly. Where the history of a usage is or becomes "turbulent and discordant," where the business is in a "state of flux," customs are not created—they disappear.¹⁶³ This is not only a problem for courts over time, it is also the most compelling argument against the adoption of custom in the law.¹⁶⁴ It would be easier if there were some more stable source of decision.¹⁶⁵

If custom is to have any place in modern times, the factors listed by the traditional judicial formulation (and related ones) must be set out in a way in which they can be weighed against each other, and on some acceptable scale.¹⁶⁶ With only *Gentry II*¹⁶⁷ and this general discussion as background, it is appropriate to describe such a formulation. After this section of the Article, then, it will be possible to flesh out some more parts of the approach adopted, and to apply the same analysis to further, diverse, apparently unrelated horse cases and hypothetical situations.

Although elsewhere there is no systematic analysis in these terms, this Article's general, fluid approach is not itself radical. The comments to the *Restatement* propose that the reasonability

¹⁶³ See *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602 (1944) (refusal to create a custom from "so turbulent and discordant a history"); *Local 33, Int'l Hod Carriers Bldg. and Common Laborers' Union of America v. Mason Tenders Dist. Council of Greater New York*, 291 F.2d 496, 500 (2d Cir. 1961) (refusal to recognize a "custom and practice" when the "critical terms" were "in a state of flux").

¹⁶⁴ Parrington, the economic realist, speaking of the Revolutionary debate, notes: "If an unwritten constitution be no other than established practice . . . then the current practice of Parliament must be accepted as constitutional." V. PARRINGTON, *supra* note 35, at 191. Such was the "fatal weakness" of the argument. This Article agrees that it is a weakness, but not "fatal" where adequate stability exists in a particular case. For example, see Parrington's discussion of Francis Lieber, 2 V. PARRINGTON, *supra* note 59, at 89, in which even Parrington notes the "creative" use of such law. *Id.* at 92. See also note 59 *supra*.

¹⁶⁵ See note 88 *supra* and accompanying text.

¹⁶⁶ See A. DE TOCQUEVILLE, *supra* note 35, at 58. Reflecting his view that America survives and grows because of accepted mores, reflected in customs, De Tocqueville suggests that the central accepted maxim in the United States is that society must make a specific call on its citizens to limit their individual freedom—a "maxim" of "general influence" in American practice. *Id.*

¹⁶⁷ 642 S.W.2d 574 (Ky. 1982).

of the usage bear both upon the finding relevant to the existence of the usage,¹⁶⁸ and upon the decision to import it into an agreement irrespective of the parties' knowledge of it.¹⁶⁹ Similarly, a case involving an established custom of real estate brokers in a particular locality reflects a like flexibility:

There being no evidence to the contrary, the court did not err in assuming the existence of the custom. Nor is there any ground on which the custom may be attacked. It is not prohibited by statute, or violative of any established rule of law. It is not unreasonable, but appears to be a fair and just solution of a trying question. In entering into the arrangement by which the trade was finally consummated, appellants and appellees did not use any language, or intimate in any way, that the custom was not to prevail.¹⁷⁰

If the question is whether to disregard a clear usage, a court would call on the same approach. A well-established custom, understood by the parties, will not be given effect when a party (even the government) seeks to rely on it in "an unfair and dishonest manner."¹⁷¹ In short, some cases and authorities acknowledge a constant interplay among factors that were traditionally treated as discreet tests, and a court, exercising its traditional analysis of policy concerns, will arbitrate among them.

There are two types of factors involved in judging the effectiveness of the custom. The first type goes directly to whether it is truly logical that contracting parties consciously knew of, and thereupon knowingly consented to, a contract term or interpretation. A second type relates to the relative readiness of the law to make an implication or presumption based on some policy consideration. The first type implies a policy consideration of its own—society has an interest in enforcing the expectations and intentions of the parties. The second type includes that policy consideration—it may call for the court to create a contract where otherwise one might not have existed. The second

¹⁶⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 221 comment b (1981).

¹⁶⁹ See *id.* at § 220 comment c (1981).

¹⁷⁰ *Maddox-Grundy Co. v. Helm*, 37 S.W.2d 49, 50 (Ky. 1931).

¹⁷¹ *Molton, Allen and Williams, Inc. v. Harris*, 613 F.2d 1176, 1181 (D.C. Cir. 1980). The same negative implication from unreasonability limits the use of custom in tort law as well. See *Daniel's Adm'r v. Hoofnel*, 155 S.W.2d 469, 473 (Ky. 1941).

type also leaves open all other policy issues, and it will influence a decision whether to permit or require an "implication" of a term from more or less clear proof of a custom requiring that term, and also whether to create a presumption as to how to settle a question on conflicting proof.

The predominant characteristic of the first type is "notoriety" and those parts of any other category from the earlier cases suggesting notoriety:

(a) *The length of the parties' participation in the business.* The required length of time will be affected by the nature of the business and of the sort of participants who are, or are likely to be, before the court on the issue at hand. Is it a business that deals with the public, or only with participants who have access to its intricacies?

(b) *The frequency with which the custom is observed.* It should be noted here that a "universal" custom may be practiced only twice a year, while a variable practice may be found five hundred times a year and violated an equal number of times. Thus, frequency may be as important as universality.¹⁷²

(c) *The openness of the industry's discussion of the custom.* Does it frequently appear in "form" contracts?

(d) *Whether the custom has obtained so much force that the industry participants perceive a sense of duty associated with it.* In the real world there is in fact such a difference in perception. One asks the question: "On certain facts, is certain behavior required?" Any lawyer experienced in litigating cases involving the proof of custom will recall many occasions when a client or witness has answered "yes"—and then "corrected" himself to defer to the attorney as to what "the law" and facts require. The instinctive perception ought to matter.¹⁷³

¹⁷² The antiquity of a custom is related to this factor. See note 178 *infra* and accompanying text. Despite the comment above that the age of a pernicious custom will not save it, see note 45 *supra* and accompanying text, it is clear that the antiquity of a fair or neutral custom will enhance its recognition by the law. See *Davis v. Board of County Commissioners of Carbon County*, 495 P.2d 21, 23 (Wyo. 1972), *overruled on other grounds*, *Collins v. Memorial Hospital of Sheridan County*, 521 P.2d 1339 (Wyo. 1974); *City and County of Denver v. Madison*, 351 P.2d 826, 830 (Colo. 1960).

¹⁷³ This consideration introduces enormous complexities, and may be impractical. This article has made much of the fact that the court will not take "acceptance" into

Before passing on to the other type of factor, there should be noted a frequent statement in the custom and usage cases that is not adopted as a subparagraph (e). It is said that custom will not be invoked to create “an option, or discretion” for one of the parties.¹⁷⁴ This is an erroneous application of the correct principle that there is no enforceable custom when practices are in fact contested or in flux.¹⁷⁵ There should be no obstacle to the creation of a right or duty by custom, simply because the beneficiary of the right or duty may or may not avail himself of it. What the law formally calls an option is no different in principle from any legal right, which may or may not be enforced by the person possessing it. The only formal difference is that the holder of the option has given his consideration in advance of knowing whether performance is expected of the other party.

The second group of factors—the pure “policy” factors—would include:

(a) *Whether there will be a contract if the custom is not given effect.* This is an expression of a common principle of contract law.¹⁷⁶

(b) *Whether the custom is merely to be used to interpret, or whether it is called on to make a substantial supplement to an agreement.* This factor is the converse of factor (a). One would encourage contract formation, but one would not want to extend express contracts beyond their own terms, other factors being equal.

account absent actual practice. See notes 136-143 *supra* and accompanying text. This factor at least has the advantage of requiring both practice and a form of acceptance. At a deeper level, this consideration raises the issue of *opinio necessitatis*, which was an original basis for the application of custom in the courts. It suggests that “individuals purposely follow a certain rule simply because they believe it to be a rule of law.” Watson, *An Approach to Customary Law*, 1984 ILL. L. REV. 561, 563. Watson debunks that basis for customary law, because it provides no mechanism for change, and because its reasoning is circular. This Article’s formulation does not have those difficulties. Allowing for such a factor—and recognizing that it is only a factor—leaves open the possibility of custom as a source not only of “descriptive laws” but also “normative or prescriptive laws”. B. LEISER, *supra* note 31, at 44 (citing John Stuart Mill). See note 166 *supra*.

¹⁷⁴ See, e.g., *Aulich v. Craigmyle*, 59 S.W.2d 560, 562 (Ky. 1933).

¹⁷⁵ See notes 162-163 *supra* and accompanying text.

¹⁷⁶ *First Nat. Bank v. Doherty*, 161 S.W. 211 (Ky. 1913); *Berry v. Frisbie*, 86 S.W. 558 (Ky. 1905).

(c) *The existence and degree of the fiduciary relationship between the parties.*

(d) *On which side of the fiduciary relationship the custom imposes a duty.* There may in fact be balancing duties.¹⁷⁷

(e) *The antiquity of the custom.* Weight would be given to the collective wisdom reflected by great antiquity.¹⁷⁸

(f) *The inherent fairness and utility of the usage.* As practitioners well know, courts often leave such concerns unspoken, or advert to them apparently in passing. They should be recognized and weighed directly with other factors.¹⁷⁹

(g) *The existence of a penal or other supporting or competing statute that declares an independent legislative or societal policy.* When the legislature has declared a policy, that policy would be given as much consideration as a court-created policy. Thus, if a court has the alternative of choosing or rejecting a custom to enforce, it may be influenced by the fact that the custom is supported by a legislative policy. When the legislature has created a penalty, however, the effect may be ambivalent: if the enforcement of a marginally understood custom results in the imposition of a jail sentence, a court might be less likely to enforce it.¹⁸⁰

¹⁷⁷ Recall that Gentry was the managing partner in *Gentry II* and, therefore, the duty was imposed on his side of the fiduciary relationship. 642 S.W.2d at 576.

¹⁷⁸ See cases cited *supra* note 172. The caveat is put best by Mill, "The traditions and customs of other people are, to a certain extent, evidence of what their experience has taught *them*; presumptive evidence, and as such, have a claim to his deference: but, in the first place, their experience may be too narrow; . . . Customs are made for customary circumstances, and customary characters; and his circumstances or his characters may be uncustomary." J. MILL, *supra* note 59, at 72 (emphasis in original).

¹⁷⁹ The need of Kentucky's thoroughbred industry to accommodate new entrants is explicitly recognized in *Chernick v. Fasig-Tipton Kentucky, Inc.*, 703 S.W.2d 885 (Ky. Ct. App. 1986).

¹⁸⁰ See *Vermilion County Prod. Credit Ass'n. v. Izzard*, 249 N.E.2d 352, 355 (Ill. Ct. App. 1969) (giving special force to the penal nature of the statute, in overcoming the effect of the custom); *Spirko v. Commonwealth*, 480 S.W.2d 169, 172 (Ky. 1972) (intention to abrogate the common law by statute must be clearly apparent). What we believe to be the correct approach is reflected by many of the cases that consider the civil effect of a "civil" complaint under the Racketeering Influenced and Corrupt Organizations RICO statute. See, e.g., *I.S. Joseph Co., v. J. Lauritzen A/S*, 751 F.2d 265 (8th Cir. 1984); *United States v. Thompson*, 685 F.2d 993, 1000 (6th Cir. 1982) ("unfair reflection upon innocent individuals.").

As suggested at the outset, this Article advances no general theory as to how the two types of factors interplay with each other. Specific contexts call for their own analysis.

This analysis can be applied to *Gentry II*: As to the notoriety factors, factor (a) (length of participation in the business) is not applicable because of the partnership context, but the remaining three factors were openly discussed. As to the policy factors in *Gentry II*, factor (a) (contract creation) would not be applicable, and factor (b) (degree of change of existing contract) would lean modestly against applying the custom. Of course, factors (c) and (d) (relating to fiduciary duties) were the critical ones, along with factor (g) (existence of a statute). Factors (e) (antiquity) and a part of (f) (fairness) are not applicable because of the partnership context. The "utility" of encouraging outsiders to invest in Kentucky's thoroughbred industry was an unspoken imperative of the decision.

In this, as in any other area of modern law, the application of such factors does not make it easy for a lawyer to advise his clients. The simplest rule is that when one or more of the first set of factors clearly and positively applies, and no contrary policy from the second set intrudes—and especially if some such policy supports it—the custom should be given effect. The reasonable expectations of the parties usually should be enforced. An example of this rule is discussed in section seven of this Article.¹⁸¹

On the opposite extreme, an overwhelming policy arising out of the second group of factors would change the result. When a case involves a long-standing, continuously recognized fiduciary relationship of the highest sort, imposed upon the person seeking to enforce the custom in the face of a clear statutory proscription, the custom will not be allowed to govern. *Gentry II* typifies this sort of case.

Even among the second set of factors there will be tension, and the two sets will offset each other.¹⁸² Many other permutations are conceivable. Generations of adherence may overcome the apparent force of a modern theory embodied in a statute or

¹⁸¹ See notes 185-211 *infra* and accompanying text.

¹⁸² See notes 213-246 *infra* and accompanying text.

case. When the custom goes to "mere" interpretation of an agreement—directing itself to filling a gap in an ambiguous situation—the even greater antiquity of a conflicting rule may be ignored.¹⁸³

The issues which follow could not be more diverse; but a proper analysis of each situation has in common with the others a recognition of judicial balancing of competing public policies.¹⁸⁴

VII. THE CUSTOMARY USE OF JOCKEY CLUB PAPERS

The context of *Gentry I*¹⁸⁵ called to the court's attention an underlying fact in the thoroughbred horse business: "[T]he Jockey Club in New York . . . customarily, and by agreement of thoroughbred owners throughout the country, controls the important task of registration of thoroughbred horses and the issuance of the proper papers for foals."¹⁸⁶ The Jockey Club has been described as consisting "largely of socially prominent people interested in horse racing," whose main function is "maintaining registries of thoroughbred horses. . . ."¹⁸⁷

The Jockey Club's function in *Gentry I* was to provide *Gentry* with a proper identification of the mare he bought.¹⁸⁸ The Jockey Club also provides a fund of information as to what are truly the customs in the industry,¹⁸⁹ and provides the sole efficient way to maintain the effective purity of thoroughbred bloodlines.¹⁹⁰

The Jockey Club registry's primary and long-recognized function is to establish the right (under various state laws) of the person named on the Jockey Club papers to race a horse of

¹⁸³ See notes 247-270 *infra* and accompanying text.

¹⁸⁴ The same is true when "state of the art" is judicially or legislatively injected into traditional "reasonable man" analysis, and thus "common practice" is diluted or abandoned in tort analysis. See note 88 *supra*.

¹⁸⁵ *Schleicher v. Gentry*, 554 S.W.2d 884 (Ky. Ct. App. 1977).

¹⁸⁶ *Id.* at 885.

¹⁸⁷ *Halpern v. Lomenzo*, 367 N.Y.S.2d 653, 656 & n.1 (Sup. Ct. 1975).

¹⁸⁸ See 554 S.W.2d at 885.

¹⁸⁹ See *Keck v. Wacker*, 413 F. Supp. 1377, 1381 (E.D. Ky. 1978).

¹⁹⁰ See *Jockey Club v. United States*, 137 F. Supp. 419, 421 (Ct. Cl.), *cert. denied*, 352 U.S. 834 (1956).

racing age.¹⁹¹ The most interesting question raised by Jockey Club registration papers, however, is what effect, if any, they have in solving questions of title. It is clear that a horse cannot race at any racetrack in America (and a mare's offspring cannot be registered) unless the person purporting to control the horse has possession of properly completed Jockey Club papers. Does the person shown thereon also own the horse? The court in *Baram v. Farugia*¹⁹² came close to so holding. The court said repeatedly that the execution and delivery of the papers constituted a "transfer" of the horse.¹⁹³

The problem with that court's decision, however, is that it was not informed of the industry's customary disregard of the Jockey Club papers on title questions. Although it is almost universally true that the Jockey Club papers are executed and the registration at the Jockey Club in New York is changed, when title to the thoroughbred horse changes hands, that process of registration is not considered crucial or relevant to title matters.¹⁹⁴ Ownership ordinarily passes by other means. Thus, at auctions, titles pass upon the fall of the hammer;¹⁹⁵ and in

¹⁹¹ See *Security First Nat'l Bank v. Tattersall*, 311 So. 2d 218, 222 (La. 1975); *Morgan v. New York Racing Ass'n*, 421 N.Y.S.2d 249, 251 (App. Div. 1979).

¹⁹² 606 F.2d 42 (3d Cir. 1979). See also *In re Blankinship-Cooper, Inc.*, 43 B.R. 231, 234 n.4 (Bankr. N.D. Tex. 1984) (citing Lester, *Security Interests in Thoroughbred and Standardbred Horses: A Transactional Approach*, 70 Ky. L.J. 1065 (1981-82)).

¹⁹³ See 606 F.2d at 43, 46.

¹⁹⁴ Even in the trotting horse business, where registration papers play a much more dominant role than in the thoroughbred business, they are not "documents of title." *Susi v. Belle Action Stables, Inc.*, 267 F. Supp. 293 (S.D.N.Y. 1967). It is only when new registration papers are obtained and the new party begins "racing the horse as owner" that enough ownership is claimed to amount to a conversion—"a proclamation of title to the racing world." *Susi v. Bell Acton Stables, Inc.*, 360 F.2d 704, 713 (2d Cir. 1966). Citing these cases, Professor Anderson, U.C.C., § 1-201:83, says: "It does not appear that a certificate of registration for a horse is a document of title within the meaning of U.C.C. § 1-201(15)." See also last two cases cited in note 6 *supra*.

¹⁹⁵ This Article notes later that the legal conclusion that parties place upon their acts—how they characterize their "intentions"—does not determine the true legal consequences of what they have done. See note 239 *infra* and accompanying text. In a well-known, reputable text on the thoroughbred horse business, the authors make exactly that sort of mistake. See J. LOHMAN & A. KIRKPATRICK, *supra* note 99, at 84-85, in which the authors note that the "risks and responsibilit[ies]" among the parties change upon the fall of the hammer, as specifically provided in most auction catalogs, but one page later say that "title" passes when the Jockey Club papers are transferred. See *id.* at 85. One must be careful of "legal" words used by non-lawyers.

claiming races, statutes control the passing of title.¹⁹⁶ Each form of transaction has its own type of documentation. The registration process follows in due course thereafter. Formal transfer in negotiated sales is now traditionally accomplished by bills of sale, separate and apart from (although coordinated with) the transfer of Jockey Club papers. The papers themselves are used to accomodate the racing of the animal, often not in the true owner's name. They are often largely ignored when the horse is retired to breeding—as was the case in *Gentry I*.¹⁹⁷

Although a newcomer to the business might not know of this practice,¹⁹⁸ and thus may be entitled to a different treatment, this usage was known to the parties in *Simpkins v. Ritter*,¹⁹⁹ which is a leading case on the subject.

In *Simpkins*, the owner of a horse of racing age (Simpkins) executed in blank and delivered to his trainer (Ritter) the Jockey Club papers. Ritter was authorized to fill in his name as transferee. No bill of sale or other written document was prepared or executed. The testimony for *Simpkins* was that the transfer was to facilitate the trainer's racing of the horse, and further to permit the trainer to receive the proceeds of racing for one year²⁰⁰—presumably to encourage him to pay special attention to developing the racing skills of this particular animal. The testimony for Ritter was that the document was executed as an absolute transfer of the animal.²⁰¹ The trial court found, as a matter of fact, that the parties intended an absolute transfer and not a mere bailment.²⁰² The dissent in the appellate court agreed; it emphasized the well-settled principle of law that the factual determinations of the finder of fact will not be overturned on contested proof. The dissent further pointed out that the Jockey Club papers themselves speak of "transfer," and that the Ne-

¹⁹⁶ See J. HUMPHREYS, *supra* note 111, at 256.

¹⁹⁷ The *Gentry I* court established that even when the mare was sold in January, "it was the common and accepted practice to make these [identification] checks in August." 554 S.W.2d at 885.

¹⁹⁸ See *Burket v. Claypool*, 39 N.E.2d 873, 876-77 (Ohio Ct. App. 1941).

¹⁹⁹ 204 N.W.2d 383 (Neb. 1973).

²⁰⁰ *Id.* at 384.

²⁰¹ *Id.* at 384. Ritter did admit that the horse was to be returned at the end of his racing career. *Id.*

²⁰² *Id.*

braska legislature adopted those papers in connection with "ownership." The dissent made the perfectly reasonable argument that even if the papers did not themselves establish ownership, they are "admissible evidence on the issue of ownership."²⁰³ That ought to be enough, taken together with Ritter's testimony, to establish his title—held the dissent.²⁰⁴

The majority opinion in *Simpkins* noted the greater "believability" of the original owner's testimony.²⁰⁵ One would think that factor would not be enough to overturn a finding of fact by the trial court.²⁰⁶ The appellate court, however, recognized the industry custom to treat the "transfer" as merely a transfer of the papers and possession, and not a transfer of title:

Simpkins contended the transfer of the certificate of foal registration was made in order to permit Kate Ritter to race the horse during the 1971 racing season. She adduced other evidence indicating that such arrangements are frequently made in the racing business.²⁰⁷

At a minimum, the court in *Simpkins* held that even a "frequent" industry custom is admissible evidence of intention of the parties.²⁰⁸ Viewed more precisely, if the frequent use of the papers to create a mere bailment is universally known, that use can be taken as a universal custom of recognizing the neutrality of papers as they affect title. That is, the frequency of transferring the papers without intending to transfer title can be taken to establish the fact that they are not considered title papers standing alone. The affirmative custom of passing title by other means (auction rules and papers, claiming statutes and documents, and bills of sale) was not discussed, but is the

²⁰³ *Id.* at 386 (Clinton, J., dissenting).

²⁰⁴ *Id.*

²⁰⁵ "It tests credulity to believe that under the circumstances she would give the horse to Kate [Ritter] for its entire racing life. The testimony of *Simpkins* is much more within the range of believability." *Id.* at 384.

²⁰⁶ *See id.* at 385 (Clinton, J., dissenting).

²⁰⁷ *Id.* at 384.

²⁰⁸ The court treats the title issues as if they included all of the issues of ownership rights, including, that is, a contract for the transfer of title. Except for the statute of frauds, *see* U.C.C. § 2-201 (1972), a horse can be sold and transferred under an oral agreement. *See Di Marco v. King*, 139 So. 2d 750, 751 (Fla. Ct. App. 1962).

positive way of saying what the court said. With that understanding, and in the face of further evidence to support the non-customary conclusion, *Simpkins* can be taken to hold that an industry custom will conclusively establish the understanding of the parties in a transaction.

One is required, however, to explain how it is that a proven oral agreement will not be given effect, merely because a contrary practice is “frequently” adopted. Despite the clear practices associated with passage of title, many horsemen still think that the papers have something to do with “title.”²⁰⁹ Perhaps one can take the *Simpkins* court’s analysis to be one special case of the rule that “acts which are known to be contrary to the rule cannot affect the rule’s efficacy.”²¹⁰ But can this be so in the face of an established oral contract? The ultimate answer must be no.

This conceptual problem aside—assuming there had been no oral testimony for the trainer—*Simpkins* is ideal for illustrating the application of the factors outlined in the preceding section of this Article.²¹¹ The notoriety factors—raising directly the issue of intent—include factors (a) (longevity) and (c) (openness), which encourage the application of the custom. Factors (b) (frequency) and (d) (sense of duty) do so as well, once *Simpkins*’ conceptual problem (the presence of testimony of an actual oral agreement) is overcome. Indeed, *Simpkins* is a useful case for demonstrating the applicability of the “sense-of-duty” factor—and showing its relationship to the “frequency” factor: Mere “frequency” is enough when the industry understands the implication of the frequent practice.

As to the second set of factors—the policy issues—the first two (having to do with the level at which the contract is affected) are neutral in this case, as is factor (g) (the existence of a separate statute). That is, there are identifiable legal relations among the parties, no matter how the case turns out, and no statute supports the plaintiff or the defendant in this situation.

The remaining factors all support the application of the custom. The fiduciary relationship in this case—factors (c) and

²⁰⁹ See note 195 *supra*.

²¹⁰ Watson, *supra* note 173, at 565. See note 173 *supra* and accompanying text.

²¹¹ See notes 172-180 *supra* and accompanying text.

(d)—is that of a bailee, perhaps an entrustee. That relationship, however, should not have been strong enough to overcome proof of the parties' agreement. Even the *Gentry II* partnership would have had no such effect had Marsh actually agreed to Gentry's purchases.

There is, however, a special utility to be found in the application of the custom in *Simpkins*—now applying policy factor (f). The business demands an easy way to create bailments sufficient to allow the horse to race about the country, without fear of creating the appearance that title has been transferred.

A fair conclusion, then, is that the Jockey Club papers could be treated presumably as neutral as to title. The rule would be different from the standard approach to automobile registration-title issues, in which the general rule seems to be that registration will create a rebuttable presumption of title.²¹² The acid test would appear to come in some future case when a party will claim that the Jockey Club papers satisfy the statute of frauds—such as U.C.C. section 2-201. The position of this Article is that they should not. If no exception to the statute is available, the result of *Simpkins* would be correct.

VIII. THE CUSTOMARY COMPENSATION OF THE BLOODSTOCK AGENT

One of the most peculiar features of the thoroughbred horse business is the existence of the "bloodstock agent."²¹³ No other industry quite replicates the bloodstock agent's role. Unlike real estate brokers, insurance agents and securities salesmen, there is no public or trade agency that registers or regulates their conduct. One need only declare himself or herself to be a bloodstock agent—and a bloodstock agent is born. For that reason, the quality and performance of bloodstock agents varies widely. Indeed, the rush of new competitors, and the consequent willingness of some of them to accept and promote deals on any

²¹² See *Siler v. Williford*, 350 S.W.2d 704, 706 (Ky. 1961); *McKenzie v. Oliver*, 571 S.W.2d 102, 106 (Ky. Ct. App. 1978).

²¹³ A bloodstock agent has been defined as: "A broker who represents the purchaser or seller (or both) of thoroughbreds at public or private sale, generally in exchange for a commission." J. LOHMAN & A. KIRKPATRICK, *supra* note 99, at 210. *But see* note 216 *infra*.

terms, has served to destabilize the traditional customs and practices in the business.²¹⁴

There is a traditional custom among bloodstock agents and their clients under which the seller pays the bloodstock agent's commission unless there is an agreement to the contrary.

Coupled with that custom, however, is another standard, complicating factor: Potential buyers often engage a bloodstock agent to find a mare with a certain bloodline, or an interest in a certain stallion (share), or the right to breed once to a stallion (season). No seller (who is expected to pay the fee) has yet been located. In another ordinary fact pattern—certainly the most usual one in the old days of the thoroughbred business—both a willing buyer and willing seller at different times mention a mutual, complimentary interest to a bloodstock agent who is a friend and/or business associate of both of them. One has a mare for sale and another wants to buy such a mare—or share or season. In either case, fees often are not discussed. The usual fee (which now seems to be five percent of the purchase price)²¹⁵ is understood, and there is sometimes a sense of impropriety in openly acknowledging that a friendly transaction is to be done for compensation—although everyone knows that it is.²¹⁶

The bloodstock agent, then, is paid by the seller, although his principal is the buyer, or both buyer and seller.

With that background, the commercial bribery statutes of various states, and of the United States, should be noted. Several states have adopted the provisions of the Model Penal Code:

“(1) A person commits a misdemeanor if he solicits, accepts or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as:

(a) partner, agent or employee of another. . . .²¹⁷

²¹⁴ For a general discussion of the pros and cons of employing a bloodstock agent, see J. LOHMAN & A. KIRKPATRICK, *supra* note 99, at 236.

²¹⁵ *Id.* at 135.

²¹⁶ See *id.* at 10. It is worth noting that these same authors have again misused a legal term (this time “broker”), to give this Article the opportunity once again to caution that experts should be asked to testify only about actions, and not about legal conclusions.

²¹⁷ MODEL PENAL CODE § 224.8 (1962).

Two of the most active thoroughbred states have their own, more specific, commercial bribery statutes. Kentucky's statute proscribes benefits to an agent for "conduct contrary to his employer's or principal's best interests" or "without the consent" of the principal, "contrary to his fiduciary obligation."²¹⁸

The New York statute describes the crime as accepting a benefit "without the consent" of the principal to "influence his conduct in relation to his employer's or principal's affairs."²¹⁹

The model act incorporates whatever "duty of fidelity" as established by common law or other statutes (which, as *Gentry II* notes, emphasize the principal's "consent")²²⁰ while the Kentucky and New York statutes focus explicitly on the "consent" of the principal.

New York courts have decided several civil cases under its criminal statute.²²¹ It is clear that the criminal statute creates a civil liability,²²² and allows a defense to the enforcement of contracts infected with an offending practice,²²³ but it is also apparent that "consent" is given a fairly broad reading: "It would seem there could be no violation of the statute if the principal or employer had knowledge and either approved or condoned the act of his employee or agent."²²⁴

A Massachusetts court has added a further liberalizing gloss to its statute, requiring "secretiveness," an element of affirmative stealth directed toward the principal. This requirement is not satisfied when the fee is offered openly to any agent who should come to the seller.²²⁵

²¹⁸ KRS § 518.020 (Bobbs-Merrill 1975).

²¹⁹ N.Y. PENAL LAW § 180.00 (West Supp. 1984-85).

²²⁰ See *Marsh v. Gentry*, 642 S.W.2d 574, 576 (Ky. 1982).

²²¹ See, e.g., *Donemar v. Molloy*, 169 N.E. 610 (N.Y. Ct. App. 1930); *Berry Packing Corp. v. Packer's Super Markets, Inc.*, 255 N.Y.S.2d 691 (Sup. Ct. 1965); *Shemin v. A. Black & Co.*, 240 N.Y.S.2d 622 (Sup. Ct. 1963); *Nathanson v. Brown & Williamson Tobacco Corp.*, 68 N.Y.S.2d 914 (Sup. Ct. 1947).

²²² See 169 N.E. at 611.

²²³ See 255 N.Y.S.2d at 692; 240 N.Y.S.2d at 624; 68 N.Y.S.2d at 920-21.

²²⁴ *June Fabrics, Inc. v. Teri Sue Fashions, Inc.*, 81 N.Y.S.2d 877, 882 (Sup. Ct. 1948).

²²⁵ See *N.J. Gendron Lumber v. Great Northern Homes, Inc.*, 395 N.E.2d 457, 461 (Mass. Ct. App. 1979) (defendant offered the bonus to all of its customers on a "to-whom-it-may-concern basis").

In addition to the various state acts, a portion of the Robinson-Patman Act creates a similar crime.²²⁶ This federal statute also is held to create a state cause of action.²²⁷ The Sixth Circuit opinion in *Fitch v. Kentucky-Tennessee Light & Power Co.*²²⁸ is particularly interesting in that it notes that this cause of action, unlike the standard Robinson-Patman requirement, does not require the showing of competitive injury.²²⁹ In this holding, the court is supported by other cases.²³⁰ A Ninth Circuit case²³¹ implies the "consent" exception—not explicit in the statute—by emphasizing the special importance of the fiduciary relationship under this statute.²³²

Even without a state or federal criminal statute from which a civil action can be derived or implied, similar responsibilities are created at common law. In a modern reported case about a bloodstock agent, a Kentucky court in *Beasley v. Trontz*²³³ held that a contract of purchase and sale of a thoroughbred horse can be void if the agent of the seller is also acting in the interest of the buyer—without the consent of the seller.²³⁴ This result follows irrespective of whether there is any ill-intent or injury to the principal as required by the Kentucky criminal statute.²³⁵ For purposes of this analysis, *Beasley* would apply in the converse situation as well, and is clearly in accord with general law.²³⁶

²²⁶ 15 U.S.C. § 13(c) (1985).

²²⁷ See 255 N.Y.S.2d at 692. See also *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12, 16 (6th Cir. 1943); *Computer Statistics, Inc. v. Blair*, 418 F. Supp. 1339, 1347 (S.D. Tex. 1976).

²²⁸ 136 F.2d 12 (6th Cir. 1943).

²²⁹ *Id.* at 15.

²³⁰ See *Calnetics Corp. v. Volkswagen of America*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976); *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 640 (D. Alaska 1982). *But see* *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 271 (5th Cir. 1979) (plaintiff must be hurt by alleged anticompetitive conduct); 418 F. Supp. at 1347 (principal purpose of payments was to induce business transactions with particular defendants).

²³¹ *Rangen, Inc. v. Sterling Nilson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 393 U.S. 936 (1966).

²³² *Id.* at 858.

²³³ 677 S.W.2d 891 (Ky. Ct. App. 1984).

²³⁴ *Id.* at 894.

²³⁵ See KRS § 518.020.

²³⁶ See RESTATEMENT (SECOND) OF AGENCY § 313 (1958). *But see* RESTATEMENT

Thus we have formulated a test of the importance of a custom in this industry: When a bloodstock agent is paid by the seller—but was hired by the buyer or both—does the “custom” establish the buyer’s “consent” without further proof of an express agreement or subjective satisfaction by the buyer? Is the sale voidable? Do the bloodstock agent and the seller go to jail?

The clearest way to pose the question under a traditional analysis is to ask first whether there has been one joint agency created, or two separate, unrelated agency contracts. If both principals are party to the same deal, their “consents” are each a part of that implied or presumed agreement.

The existence of a joint agency is properly and traditionally determined by referring to the customs of the particular trade and notions of reasonability. In the RESTATEMENT (SECOND) OF AGENCY, for example, two of the five factors listed by the *Restatement* directly involve usages in the particular business, and the third involves the public policy supporting the transaction.²³⁷ Such a determination frequently will depend on the trade

(SECOND) OF CONTRACTS § 193 (1981). The focus of this portion of this Article is on the notion of “consent.” We make nothing of any difference between the word “knowledge” as misused in various cases and authorities, and the word consent, although the latter plainly suggests something more active than the former. The “agreement” of a principal suggest something more active still. Compare RESTATEMENT (SECOND) OF TORTS § 892 (1979) (definition of consent) with RESTATEMENT (SECOND) OF CONTRACTS §§ 3, 4 (1981) (definitions of agreement, bargain and promise). Most issues can be resolved by an application of a formula much like that in *June Fabrics*. See note 224 *supra* and accompanying text. A combination of knowledge with either approval or condonation, seems a reasonable approach to the psychological or cognitive issues raised. The Restatements suggest the fair approach, focusing on the reasonable expectations of the parties. See RESTATEMENT (SECOND) OF AGENCY § 392 (1958). See also *Thompson-Starrett Co. v. Mason’s Adm’rs.*, 201 S.W.2d 876, 880 (Ky. 1946).

²³⁷ See RESTATEMENT (SECOND) OF AGENCY § 34 (1958), which states:

An authorization is interpreted in light of all accompanying circumstances, including among other matters:

- (a) the situation of the parties, their relations to one another, and *the business in which they are engaged*;
- (b) the general *usages of business, the usages of trades or employments of the kind to which the authorization relates*, and the business method of the principal;
- (c) facts of which the agent has notice respecting the objects which the principal desires to accomplish;
- (d) the nature of the subject matter, the circumstances under which the act is to be performed and *the legality or illegality of the act*; and
- (e) the formality or informality, and the care, or lack of it, with which an instrument evidencing the authority is drawn. (emphasis added.)

involved, and even on the geographical area in a very narrow range.²³⁸ Thus in a modern Second Circuit case, a broker was held to be an agent of both parties to a transaction, because that level of authority was "the customary practice of charter brokerage in the market" in which they acted, irrespective of the fact that neither party thought of the agent as his agent.²³⁹ Agency depends "not on their intentions or beliefs as to what they have done", but instead on their "manifest conduct" by participation in that business.²⁴⁰ The Second Circuit was wholly consistent with its prior decisions when it stated in dictum in a thoroughbred auction case²⁴¹ that "an agent dealing on behalf of several undisclosed principals" may rely on custom to take one principal's money and apply it to a third party's claim against that principal.²⁴² It is only one step further to say that he can apply it to his own benefit.

That additional step is not a great one. If the parties have agreed (explicitly or by the appropriate adoption of a custom) to a contract of joint agency, they have agreed to all of the terms of that contract. Every contract includes a duty to pay compensation,²⁴³ and the amount of the compensation can be set in accordance with what is fair, custom being an appropriate source of evidence for that standard.²⁴⁴ This latter use of custom is a tort type of application, but the general proposition—that the agreement of joint agency carries with it the agreement to

²³⁸ See *Columbia Broadcasting Sys., Inc. v. Stokely-Van Camp, Inc.*, 522 F.2d 369, 376 (2d Cir. 1975) (remanded to determine "the usages of the Madison Avenue advertising business"); *R.H. Kyle Furniture Co. v. Russell Dry Goods Co.*, 340 S.W.2d 220, 225 (Ky. 1960) (interpreting the custom of a local dry goods store).

²³⁹ See *Interocean Shipping Co. v. Nat'l Shipping and Trading Corp.*, 523 F.2d 527, 537 (2d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976).

²⁴⁰ *Id.* at 537 (citing RESTATEMENT (SECOND) OF AGENCY § 1 comment b (1958)).

²⁴¹ *Fuller v. Fasig-Tipton Co.*, 587 F.2d 103 (2d Cir. 1978).

²⁴² *Id.* at 107 (citing RESTATEMENT (SECOND) OF AGENCY § 299 comment a (1958)).

²⁴³ See RESTATEMENT (SECOND) OF AGENCY § 441 (1958). See also *Simmons v. Atteberry*, 310 S.W.2d 543, 545 (Ky. 1958); *Spitzlberger v. Johns*, 163 S.W.2d 286, 287 (Ky. 1942).

²⁴⁴ See RESTATEMENT (SECOND) OF AGENCY § 443 (1958). See also *Vogt Bros. Mfg. v. Stansbury*, 304 S.W.2d 787, 790 (Ky. 1957). For example, "hot walkers," whose duty is to cool off racehorses, traditionally are compensated out of purses, a practice that is given legal effect. See *Daugherty v. Catherwood*, 264 N.Y.S.2d 684 (1965).

pay fair compensation—seems to be the only logical approach to the question.²⁴⁵

One need consider, then, only the prior question—whether the joint agency (with its attendant compensation provision) will be adopted and enforced by the court. Again, the factors to be taken into account for all such questions are in fact appropriate to this one. As to the notoriety factors, the key issue will be factor (a)—the length of the principal's participation in the business. If the buyer in the particular case is a newcomer and has hired the agent generally to advise him, and if it is apparent that the buyer has relied on the bloodstock agent to make critical business judgments and to teach him the business, then consent will not readily be implied. Otherwise, every other factor of the first type leads to the conclusion that the principal gave his or her "consent."

The policy factors are similarly applicable and positive, except if a newcomer is involved as the principal. This time it is factors (c) and (d) that matter—the newcomer is protected by a fiduciary relationship. Factor (a) (whether there will be a contract without a custom-made one) will usually encourage enforcement of a custom like the one here proposed. Factor (b) will thus usually be inapplicable, since there is usually no contract without the custom, there can be no further question of adding to or interpreting an otherwise-created contract.

Factor (e) (the antiquity of the custom) in this context supports the implication of consent, and factor (f) (the fairness and utility of the transaction) will usually, strongly support the application of the custom to the experienced horseman. Factor (g) (the existence of a statute) is usually circular in such a situation, and thus inapplicable.

In short, among experienced horsemen, "consent" should usually be found; and with a newcomer, the contrary result should often be reached.

The same analysis applies even if the parties have testified that the agency is not a joint agency.²⁴⁶ Thus, if there were

²⁴⁵ *Louisville Cement Co. v. Clell Coleman & Sons*, 300 S.W. 633, 635-36 (Ky. 1927).

²⁴⁶ That is what happened on remand in *Beasley v. Trontz*, 677 S.W.2d 891 (Ky.

conversations that establish that the agent was clearly not representing the seller, there still might be a term implied in the contract of agency between the agent and the buyer-principal to the effect that "the agent must seek his compensation from someone other than the principal." Or there might be a condition implied in the agreement between the buyer and the seller to the effect that "the seller will pay all agents' fees." The permutations of such fact situations are almost infinite, and the reasonability of such implied contract provisions will depend on the particular facts, but the factors that are directly applicable in the more traditional joint agency context can be applied in any such situation.

IX. THE CUSTOMARY SALE OF A BREEDING RIGHT

The central business transaction in the thoroughbred business is the contract for the mating of a stallion and a mare. If the breeder owns both, there is no need for such a transaction; but typically, the owner of a mare sets out to purchase the right to breed to a stallion in which he does not own an interest, or a stallion share owner sets out to dispose of a right to breed that he does not plan to use in a particular year. Such a right is called a "season" or a "nomination" to the stallion.²⁴⁷

The season is bought ordinarily on one of two bases. The traditional method of purchase was on a "live foal" basis—sometimes called a "guaranteed" basis. Most written "stallion service agreements" provide—and it is well understood even without such a provision—that a live foal season fee is earned by the stallion owner only "when the foal stands and nurses."²⁴⁸

Ct. App. 1984). The agent made it clear that he was the agent of the seller only. The judgment after remand is now on appeal. Cf. *Hicks Realty Co. v. Stabile Const. Co., Inc.*, 292 S.W. 780 (Ky. 1927) (statement of joint representation by agent may be mere conclusion of law).

²⁴⁷ For a general discussion of thoroughbred breeding, see J. LOHMAN & A. KIRKPATRICK, *supra* note 99, at 119-22.

²⁴⁸ See *id.* at 120. There is a difference among agreements (and thus no custom) as to whether the relevant nursing must be unassisted. Most foals need help the first time or two. The mechanics of operating a live foal season sale are described in *Braugh v. Phillips*, 557 S.W.2d 155 (Tex. 1977). A discussion of appropriate provisions to be included in such agreements is contained in Knopp, Landen and Donath, *The Prevention and Treatment of Breeding Contract Controversies*, 74 Ky. L.J. 715 (1985-86).

In earlier times, such a deal was sometimes described as "foal insured"²⁴⁹ or as "a contract of warranty."²⁵⁰ The "no guarantee" nomination is not pursued in this Article.²⁵¹

Beyond the requirement that a foal be born that can stand and nurse, there are many risks in a live foal venture. For example, it has been held "that no usage or custom existed" ensuring that a live foal at any certain date would be "a good, sound" animal.²⁵² That holding remains in accord with current custom. The rule may be different, however, if the mare conceives and/or delivers twins.²⁵³ It is well-recognized in the industry that twins are "undesirables since they endanger the mare and are themselves seldom valuable for racing."²⁵⁴ In such a case, there is probably no consistent custom to excuse the fee if twins are born, but at least one court has recognized (but did not need to enforce) a custom that twins can be aborted by the mare owner, and thus the fee for the service can be avoided.²⁵⁵

The minority of contracts that recognize the general problem of twins solve it either by requiring payment if one twin stands and nurses, or by placing a choice on the owner of the mare—

²⁴⁹ See, e.g., *White v. Williams*, 49 S.W. 808 (Ky. 1899).

²⁵⁰ See, e.g., *Pinkhorn v. Libbey*, 45 A. 823 (Me. 1900).

²⁵¹ It has been said that despite the unambiguous term "no guarantee," there would be a guarantee "that the stallion will be breeding sound" at the time of breeding. See J. LOHMAN & A. KIRKPATRICK, *supra* note 99, at 120. The "no guarantee" season has been regularized by the Matchmaker Breeders Exchange and Stallion Access, two computer-based exchanges for acquiring seasons and shares in stallions within the industry. With respect to no guarantee seasons on such exchanges, "you're not even guaranteed the stallion will be alive when your mare is ready to be bred." *Id.* It is probably fair to say that these exchanges have changed whatever tradition there was about the no guarantee season. Even earlier, however, it had been held that once there has been a breeding on a season sold without "warranty," there is no guarantee that the stallion will be alive or well enough for the mare to breed back to him if the first breeding does not effect a conception. See 45 A. at 824.

²⁵² *Steppe v. Farber*, 236 N.W. 530 (Wis. 1931). Therefore, it might make a difference if the agreement were that the foal must stand and nurse unassisted. See note 248 *supra*.

²⁵³ Some contracts (but not more than one-half) call for a "single, live foal." This is not universal, but is frequent.

²⁵⁴ *Taylor v. Johnston*, 539 P.2d 425, 428 (Cal. 1975).

²⁵⁵ See *id.* at 428. The mare owner would be acting in good faith in effecting this result, giving meaning to an open contract term. See *California Lettuce Growers v. Union Sugar Co.*, 289 P.2d 785, 790-91 (Cal. 1955). See also Annot., 49 A.L.R.2d 508 (1956) (validity of sales contract as affected by a provision therein giving buyer power to control price).

providing that if one or more of the foals is registered with the Jockey Club, the fee for the season will be owed, but not otherwise. The practices of foregoing the fee in the case of abortion, but of paying upon Jockey Club registration, are widely, if not universally, recognized as duties in the thoroughbred business. To that extent, they would be included in factor (g) of the notoriety factors outlined in this Article.²⁵⁶ These practices are an example of the practice to "work it out"²⁵⁷—which, unlike the more variable situations, limit the "work out" to only two alternatives.²⁵⁸ If other factors exist—such as a strong fiduciary relationship—could there sometimes be an enforceable custom?

There is one further practice in the thoroughbred business that enjoys substantial, but less than universal, recognition at this time. Most stallion service contracts that are executed and signed provide a space for the owner of the mare to name the mare that will be bred on the season he purchases. Thus, if a season is purchased several months, or even years, before a breeding is to occur, many events could transpire that could affect the transaction. The named mare, for example, could be sold. This could happen before the breeding occurs,²⁵⁹ or more frequently, after the breeding but before the foaling of the offspring. It was once universally understood and agreed, even in the absence of a writing, that the sale of a mare during the period of gestation removed the live foal guarantee, and that the fee for the season was payable immediately. To one court,

²⁵⁶ See note 180 *supra* and accompanying text.

²⁵⁷ See text accompanying notes 16-20 *supra*.

²⁵⁸ *Cf.* text accompanying note 140 *supra* (indicating that a variable "work out" could not be enforced as a custom).

²⁵⁹ There seems to be no custom in this respect. There is a custom that the season contract is not transferable; this means that it is not transferable if the mare is sold. Nevertheless, that custom does not solve the problem—which is that if the mare is sold, the original owner no longer can breed that mare under his personal contract with the stallion owner. If the new owner of the mare cannot breed on it, is the contract now void? That is, does the mare owner who first purchased the season have a free option? The alternative would be that the original mare owner, making his own performance impossible, has altered the contract, and now owes the fee on a no guarantee basis. That is the rule when the mare is sold after conception. The stallion owner presumably would have some responsibility to minimize his damages if he could resell the season, but this problem must be solved by some body of law other than custom and usage.

at least, it was “not clearly apparent why this condition was annexed, nor how it could be of much importance.”²⁶⁰ One can imagine what that court would have said had a party attempted to convince it that there was a custom to be enforced. The fact is, however, that the provision for precipitating payment on sale is central to the transaction. That provision ought to be recognized as a custom, as it was on at least one occasion.²⁶¹ The reason is clear to horsemen: The entire notion of a live foal guarantee places the mare owner in a position of being a sort of attenuated partner with the stallion owner. Though this is undoubtedly not a *Gentry II* fiduciary relationship, it is one that would call into play the requirement of good faith, forcing the mare owner to exert every reasonable effort to obtain a live foal for the benefit of both himself or herself and the owner of the stallion.²⁶² The practicalities and risk parallel the continuing relationship involved in the foal sharing arrangement.²⁶³ With that in mind, one can easily see that the name of the mare to be bred is no more important than the identity of the person who will be caring for her during her gestation. In fact, despite the fact that most printed forms require the name of the mare to be filled in, more often than not the breeder does not do so. Both parties sign the contract too early for the season purchaser to know just which mare will be bred on the season he purchases. In a typical case, then, the person who is to manage the mare, and the circumstances of her care and foaling, will be of critical importance. So the sale of the mare properly converts the deal into a no guarantee sale.

This sort of “partnership”, of course, is not a concern with the no guarantee form of transaction²⁶⁴—the one that seems more and more to gain acceptance in the business. To what degree, however, will the changing nature of the business—the greater arms-length relationship among mare and stallion owners—be given effect by a court?²⁶⁵

²⁶⁰ *Webb v. Smith*, 5 S.W.2d 732, 733 (Ark. 1928).

²⁶¹ See *Pitchcock v. Donnahor*, 66 S.W. 145, 146 (Ark. 1902).

²⁶² See 289 P.2d at 790. See also Annot., 49 A.L.R.2d 508 (1956).

²⁶³ See text accompanying notes 16-18 *supra*.

²⁶⁴ See *Price v. Pepper & Cy.*, 42 Ky. (13 Bush) 42 (1877). But see *Green v. Ryan*, 242 Ill. App. 466 (1926) (enforcement of a contrary custom in the cattle business).

²⁶⁵ For example, on the one membership exchange that permits live foal guarantees,

All of these issues can be solved by contract. Frequently, however, they are not. On the exchange where live foal contracts are traded, most of these open questions are not answered, and it is still common in the industry to buy and sell a season on a handshake, or by a two sentence letter that spells out no details except the year of breeding and the price. In such instances, the first question that arises is whether there is a contract at all. If the terms are not "reasonably certain" there is no contract,²⁶⁶ and the courts will attempt to find whether there is included a provision for each "essential term".²⁶⁷ The need for the creation of a contract is the highest priority—factor (a)—of the policy-oriented factors that this Article recognizes.²⁶⁸ Courts commonly imply that the parties intended to include a reasonable solution to any open term. Awarding reasonable fees and compensation²⁶⁹ are the most common examples of this judicial practice. The comments to the *Restatement* pull together many of the points made in this Article in this context:

The more important the uncertainty, the stronger the indication is that the parties do not intend to be bound; minor items are more likely to be left to the option of one of the parties or to what is customary or reasonable.²⁷⁰

the seller of the season does not know who is buying the season until after the transaction is consummated. In fact, on Stallion Access, there is probably no contract at all until 48 hours after the offeror's bid has been accepted by computer. The season owner is allowed until then to add material terms to the offer, and the possession of the name of the proposed purchaser may give him or her the incentive to add some stringent terms.

²⁶⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981).

²⁶⁷ *Id.* at comment a. See *Walker v. Keith*, 382 S.W.2d 198, 201 (Ky. 1964); *Brooks v. Smith*, 269 S.W.2d 259, 260 (Ky. 1954). This is a different matter than the U.C.C.'s statute of frauds, which is considerably more relaxed. See U.C.C. § 2-201 (1972) ("writing is not insufficient because it omits or incorrectly states a term"). See also *Mitts & Pettit v. Burger Brewing Co.*, 317 S.W.2d 865, 866 (Ky. 1958).

²⁶⁸ See note 176 *supra* and accompanying text. *But see* *Talamini v. Rosa*, 77 S.W.2d 627, 630 (Ky. 1934). An uncertainty can be caused by later agreement or performance—if the deal has not clearly fallen apart.

²⁶⁹ See notes 243, 244 *supra*. This is the most common use of that technique, with "reasonable time" running a close second. See, e.g., *Crossland v. Kentucky Blue Grass Seed Grower's Co-op. Ass'n*, 103 F.2d 565, 567 (6th Cir. 1939). A horse case incorporating a "universal racing custom and usage" into the intent of the parties is *Centennial Turf Club v. Colorado Racing Comm'n*, 271 P.2d 1046, 1049 (Colo. 1954) (analyzing racing custom to interpret state statute on pari-mutuel wagering).

²⁷⁰ RESTATEMENT (SECOND) OF CONTRACTS § 33 comment f (1981).

This Article does not propose to detail all of the open issues in a live foal deal, nor even to apply the factors to the ones here discussed. There are simply too many permutations. A deal on an exchange between its experienced members may call for a different result from a negotiated transaction between a breeder and a newcomer; courses of dealing among the parties, different equities and utilities will intrude; and different terms will call for different analyses. Instead, this Article suggests that custom can supply many essential terms that are open—as can other legal rules that generally create contract terms by implication. Indeed, this analysis suggests that without the several consistent customs to work out these complexities, hundreds of unenforceable deals are made every day. There is enough common practice to give effect to the honor of this industry's traditional practitioners.

CONCLUSION

This Article began by posing the question whether the nature of the thoroughbred horse business called for substantially different rules in any reasoned way. Having travelled its course, a couple of answers are apparent. The first is that there are some areas of law in which the court has no choice but to look to the customs and usages that surround the transaction before it. The second is that in a broad range of fact situations, there is no reason that society cannot permit a colorful business to indulge its fanciful habits, recognizing the common acceptance of bizarre risks with consistent expressions of honor. Finally, it seems clear that from both ends of a continuum of hypothetical situations, there can be derived a limited number of factors that have been made by traditional judicial analysis, and that can be regularized and applied systematically to each question coming before a modern court.

Each analysis rests on the foundation that so long as it does not conflict with some concrete interest of the general society, a particular business will be permitted to write its own script, sing its own song—especially when the general society can be enriched by the diversity thus allowed.

