

## RUNNING IN THE SHADOWS: ANALYZING LEGALITY AND MORALITY IN MARATHON “BANDITING”

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*Runners who participate in organized races without officially registering, dubbed “race bandits,” have sparked intense debate in the running community. On one side are those who adamantly assert that banditing is a crime and that bandits are, as their nickname suggests, thieves or outlaws. On the other side are those who maintain that the roads are free for the public’s use and that deciding to bandit is strictly an independent moral decision.*

*This Note attempts to settle the contentious race bandit debate by first examining the role the law plays in the booming and ultra-lucrative road racing industry and then considering the role the law should play. Specifically, this Note examines theft of services statutes and trespassing statutes in New York, Illinois, and Massachusetts, as these states host some of the world’s most popular marathons—the New York City Marathon, the Chicago Marathon, and the Boston Marathon. This Note argues that the current legal consequences, if any, of race banditing are too uncertain to be effective and that, as a result, states should amend their existing laws to clearly outlaw race banditing. Ultimately, this Note suggests an approach designed to disincentivize banditing and punish those who choose to engage in it.*

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## I. INTRODUCTION

Rarely do people celebrate large, unexpected charges on their credit card statements, but each spring on “Drawing Day,” tens of thousands of people anxiously refresh their web browsers hoping to find that someone else has charged several hundred dollars to their credit card.<sup>1</sup> All around the world, they sit at their computers, cycling between Twitter, their credit card dashboards, and their e-mails, hoping to find a charge they did not explicitly make—a charge from the New York Road Runners, signaling an entry to the New York City Marathon.<sup>2</sup>

1. Hannah McGoldrick, *Twitter Reacts to New York City Marathon Lottery Results*, RUNNER'S WORLD (Mar. 3, 2015, 2:47 PM), <http://www.runnersworld.com/social-studies/twitter-reacts-to-tesnycmarathon-lottery-results>. In 2017, the Drawing Day winners lost anywhere from \$255 to \$358 depending on their membership status with the New York Road Runners and their residency status. *Entry Fees for the 2017 TCS New York City Marathon*, TCS N.Y. CITY MARATHON, <http://help.tcsnycmarathon.org/customer/en/portal/articles/1830613-entry-fees-for-the-2017-tcs-new-york-city-marathon> (last visited Jan. 15, 2018).

2. See McGoldrick, *supra* note 1.

Emotions run high,<sup>3</sup> and the winners are jubilant.<sup>4</sup> The majority of marathon hopefuls, however, experience only disappointment on Drawing Day.<sup>5</sup>

Those who are not selected have a variety of well-recognized options. First, the obvious solution: find a different race to run.<sup>6</sup> For some runners, however, running the New York City Marathon is a dream worth fighting for. Plenty of these runners will find a legitimate way to join the crowds, but some runners will “steal” the opportunity by sneaking into the race and running without registering.<sup>7</sup>

These runners, dubbed “race bandits,” have sparked intense debate in the running community.<sup>8</sup> On one side are those who adamantly assert that banditing is a crime and that bandits are, as their nickname suggests, thieves or outlaws.<sup>9</sup> On the other side are those who maintain that the roads are free for the public’s use and that deciding to bandit is strictly an independent moral decision.<sup>10</sup>

This Note attempts to settle the contentious race bandit debate by first examining the role the law plays in the booming and ultra-lucrative road racing industry and then considering the role the law should play. This Note argues that the current legal consequences, if any, of race banditing are too uncertain to be effective and that, as a result, states should amend their existing laws to clearly outlaw race banditing. Part II reviews the marathon’s growth as an event, the costs of organizing and participating in marathons, the ways of addressing the

3. Mike Plunkett, *Marathon Race Lotteries: Are the Odds Going to Be in Your Favor this Season?*, WASH. POST (Mar. 23, 2015), [https://www.washingtonpost.com/lifestyle/wellness/marathon-race-lotteries-are-the-odds-going-to-be-in-your-favor-this-season/2015/03/23/0b2b9230-c385-11e4-9271-610273846239\\_story.html?utm\\_term=.f4f4c98d11ec](https://www.washingtonpost.com/lifestyle/wellness/marathon-race-lotteries-are-the-odds-going-to-be-in-your-favor-this-season/2015/03/23/0b2b9230-c385-11e4-9271-610273846239_story.html?utm_term=.f4f4c98d11ec) (“Judging from comments on social media, making or not making the lottery is almost akin to running the race. The thrill of victory, the agony of defeat!”).

4. See e.g., Rick Frantz (@Rick\_Frantz), TWITTER (Mar. 3, 2015, 8:29 AM), [https://twitter.com/Rick\\_Frantz/status/572795908003393536?ref\\_src=twsrc%5Etfw](https://twitter.com/Rick_Frantz/status/572795908003393536?ref_src=twsrc%5Etfw) (“Pending credit card charge!! I’m one of the 18% of applicants that get in! I’m in!! #tcsnymarathon (& so glad I found out early in the day!”); Sarah Reid (@sarah\_c\_reid), TWITTER (Mar. 3, 2015, 10:21 AM), [https://twitter.com/sarah\\_c\\_reid/status/572808910970753024](https://twitter.com/sarah_c_reid/status/572808910970753024) (“Happy Drawing Day! The #tcsnymarathon stars have aligned, and I’m in! #tcsnymarathon”).

5. For example, in 2015 only 14,326 of the 80,080 “applicants” for nonguaranteed entry gained a spot in the race through the lottery. Megan Hetzel, *New York City Marathon Lottery by the Numbers*, RUNNER’S WORLD (Mar. 2, 2015, 10:39 AM), <http://www.runnersworld.com/newswire/new-york-city-marathon-lottery-by-the-numbers>. In 2014, only 12% of lottery entrants gained a spot in the race. *Id.*; see also Jason Nelson (@JasonANelson), TWITTER (Mar. 4, 2015, 6:59 AM), <https://twitter.com/JasonANelson/status/573120538782003200> (“That moment when you check your bank again in hopes that @nycmarathon made a mistake and decided to let you in a day later. #tcsnymarathon”).

6. See e.g., John Hagley (@john\_hagley), TWITTER (Mar. 4, 2015, 1:23 AM), [https://twitter.com/john\\_hagley/status/573036122852487168](https://twitter.com/john_hagley/status/573036122852487168) (“Didn’t get a ballot place for #tcsnymarathon Next plan-@ChiMarathon”). The Chicago marathon also utilizes a lottery system. See Plunkett, *supra* note 3.

7. See Erin Allday, *Unregistered S.F. Marathon ‘Bandits’ a Problem*, SFGATE (July 24, 2010, 4:00 AM), <http://www.sfgate.com/news/article/Unregistered-S-F-Marathon-bandits-a-problem-3180755.php> (“They’re called bandits. They’re runners who participate in road races even though they haven’t paid the entrance fee.”).

8. Compare Kevin Helliker, *Fleet of Foot and Blissfully Bold, Freeloaders at the Marathon Wear Fake Bibs—but Win No Prizes*, WALL ST. J. (Nov. 5, 2011, 12:26 AM), <http://www.wsj.com/articles/SB10001424052970203716204577015830896749236>, with Blaine Moore, *The #1 Reason Not to Bandit a Race*, RUNTOWIN, <http://news.runtowin.com/2008/10/17/the-1-reason-not-to-bandit-a-race.html> (last visited Jan. 15, 2018).

9. See Helliker, *supra* note 8 (“The response to Mr. Sagal’s blog was overwhelmingly negative, with some readers calling him a thief and vowing to boycott his program.”).

10. See *id.* (“There’s nothing illegal about jogging down city streets without a race bib, or even accepting aid-station refreshment offerings. But in the running world, Mr. Sagal’s offense is known as banditry, and any mention of it tends to produce righteous indignation.”).

rampant demand for marathons, and the birth of banditing. Part III analyzes the nature of organized road races as a service and the effect the history of organized road racing has on the common understanding of the relevant legal issues. Then, it considers existing state laws that could apply to race bandits, exploring their shortcomings for this unique legal issue. Specifically, this Note focuses on state criminal laws in Illinois, Massachusetts, and New York, since these three states are the homes of the country's most popular marathons,<sup>11</sup> which are prime targets for race bandits.<sup>12</sup> Part IV recommends an approach that clarifies the law on race banditing and gives race organizers clear legal mechanisms with which to protect their services. Part V concludes.

## II. BACKGROUND

Drawing Day is not a longstanding quasi-holiday because there was not always a need for it.<sup>13</sup> The first New York City Marathon took place in 1970.<sup>14</sup> The race consisted of only 127 runners who ran laps around Central Park.<sup>15</sup> It cost one dollar to register, and same-day registration was allowed.<sup>16</sup> The winners received “inexpensive wristwatches and recycled baseball and bowling trophies,” and the total budget for the race was \$1,000.<sup>17</sup> As the race's first winner, Gary Muhrccke, put it, “The whole city was out in the park, but nobody knew a marathon was happening.”<sup>18</sup>

Compared to its predecessor, the 46th annual TCS New York City Marathon, which took place in 2016, was barely recognizable.<sup>19</sup> The 46th TCS New York City Marathon broke the record for being the largest marathon ever, boasting over 51,000 finishers.<sup>20</sup> Race participants paid anywhere from \$255 to \$347 in registration costs.<sup>21</sup> Unlike Muhrccke, who registered fifteen minutes before the race,<sup>22</sup> participants had to register months in advance because of the race's immense popularity; over 80,000 runners paid \$11 to enter a lottery just for a

11. *2015 Running USA Annual Marathon Report*, RUNNING USA (May 25, 2016) <http://www.runningusa.org/marathon-report-2016?returnTo=main> [hereinafter *2015 Annual Marathon Report*].

12. See Dave McGillivray, *Why Banditing is Wrong*, RUNNER'S WORLD (Apr. 1, 2014, 2:03 PM), <http://www.runnersworld.com/ask-the-race-director/why-banditing-is-wrong>.

13. See Rob Jennings, *Lawsuit Against New York Road Runners Raises Questions About Race Drawings*, RUNNER'S WORLD (Jan. 22, 2016, 4:47 PM), <http://www.runnersworld.com/new-york-city-marathon/lawsuit-against-new-york-road-runners-raises-questions-about-race-drawings> (“NYRR launched the drawing about two decades ago amid rising interest in the New York City Marathon, which began in 1970.”).

14. *History of the New York City Marathon*, N.Y. ROAD RUNNERS, <http://www.tcsnycmarathon.org/about-the-race/history-of-the-new-york-city-marathon> (last visited Jan. 15, 2018).

15. James Dunaway, *New York City Marathon; It All Began on a Hot Summer Sunday in 1970*, N.Y. TIMES (Oct. 31, 1994), <http://www.nytimes.com/1994/10/31/sports/new-york-city-marathon-it-all-began-on-a-hot-summer-sunday-in-1970.html>; *History of the New York City Marathon*, *supra* note 14. Only fifty-five men finished the race, and the only female participant was unable to complete the course. *Id.*

16. *History of the New York City Marathon*, *supra* note 14; see Dunaway, *supra* note 15.

17. *History of the New York City Marathon*, *supra* note 14.

18. Dunaway, *supra* note 15 (quoting Gary Muhrccke, the winner of the first New York City Marathon) (internal quotation marks omitted).

19. See Erin Strout, *2016 NYC Marathon Breaks Record for Most Marathon Finishers*, RUNNER'S WORLD (Nov. 7, 2016, 3:58 PM), <http://www.runnersworld.com/new-york-city-marathon/2016-nyc-marathon-breaks-record-for-most-marathon-finishers>.

20. *Id.*

21. *Id.*

22. Dunaway, *supra* note 15.

chance to pay the registration cost and participate in the race.<sup>23</sup> The race offered \$803,000 in guaranteed prize money; 12,000 volunteers supported the events; and over 1,000,000 people came out to watch as runners made their way through all five of New York City's boroughs.<sup>24</sup>

The New York City Marathon's dramatic transformation from its humble beginnings reflects—albeit on the grandest scale—the general trend in the running industry. For nearly the last two decades, there has been a consistent increase in the number of runners finishing road races.<sup>25</sup> It has only been in the last two years that this growth has begun to taper.<sup>26</sup>

To put this growth in perspective, an estimated 25,000 Americans finished marathons in 1976.<sup>27</sup> That number grew to 509,000 in 2015, with a record-high 550,600 Americans crossing the finish line in 2014.<sup>28</sup> Those are only the figures for marathons. The year 2015 also saw 7,643,600 five-kilometer (“5K”) race finishers, 1,275,600 ten-kilometer (“10K”) race finishers, and 1,986,600 half-marathon finishers.<sup>29</sup>

Running has grown as a sport overall, but the New York City Marathon, the Chicago Marathon, and the Boston Marathon have clearly outpaced the crowd.<sup>30</sup> Due to their size, these three races provide some of the clearest examples of the value of large-scale organized running events.

#### A. *The Marathon: A High-Demand Commodity*

The high demand for running events, specifically marathons, has proven to provide a fruitful business opportunity. Since 2007, the average entry fee for the top twenty-five U.S. marathons has gone up three-and-a-half times faster than inflation, increasing 35%.<sup>31</sup> Running, in short, has become “a victim of its own success,” “a community movement that’s grown into a business.”<sup>32</sup>

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23. Kurt Badenhausen, *2016 NYC Marathon: By the Numbers*, FORBES (Nov. 5, 2016, 8:00 AM), <http://www.forbes.com/sites/kurtbadenhausen/2016/11/05/2016-nyc-marathon-by-the-numbers/#658fd0373a57>. The nonrefundable entry fee has been the cause of controversy, resulting in a lawsuit against the New York Road Runners. Jonathan Stempel, *Lawsuit Over NYC Marathon Lottery is Settled*, REUTERS (Sept. 9, 2016, 5:55 PM), <http://www.reuters.com/article/us-new-york-marathon-lawsuit-idUSKCN11F2V1>. The 2017 New York City Marathon still had a “lottery” drawing, but it was free to enter. *Id.*; TCS NYC Marathon (@nycmarathon), TWITTER (Jan. 19, 2017, 4:56 PM), <https://twitter.com/nycmarathon/status/822231332155748356> (“The #TCSNYC Marathon application is open! Want to be part of the biggest marathon in the world? Apply today at no cost!”).

24. Badenhausen, *supra* note 23.

25. *2016 State of the Sport—U.S. Road Race Trends*, RUNNING USA, <http://www.runningusa.org/state-of-sport-us-trends-2015> (last visited Jan. 15, 2018) [hereinafter *2016 State of the Sport*] (“After more than two decades of consistent and often double-digit increases, the number of recreational athletes completing road races declined for the second straight year in 2015.”).

26. *Id.*

27. *2015 Annual Marathon Report*, *supra* note 11.

28. *Id.*

29. *2016 State of the Sport*, *supra* note 25.

30. *2015 Annual Marathon Report*, *supra* note 11 (listing the New York City Marathon as the largest marathon, the Chicago Marathon as the second largest marathon, and the Boston Marathon as the third largest marathon for 2014 and 2015).

31. Jon Marcus, *How Big Business Wrecked the Marathon*, ESQUIRE (Apr. 12, 2013), <http://www.esquire.com/news-politics/a21913/the-running-racket/>.

32. *Id.* (quoting Larry DeGaris, Director of Sports Marketing at the University of Indianapolis).

Despite the price increases, demand rages on. The New York City Marathon is the world's most expensive marathon,<sup>33</sup> but its regular price increases have not chilled enthusiasm for the race.<sup>34</sup> Even when entering its lottery carried a charge, the race still turned away over 60,000 runners—each of whom agreed up front to pay anywhere from \$255 to \$347 had they been selected.<sup>35</sup> Other high-demand races—like the Chicago Marathon—have followed suit, although those “lotteries” have not historically carried a fee.<sup>36</sup>

Boston hopefuls must clear even greater hurdles to reach the starting line. Unlike the New York City Marathon and the Chicago Marathon, the Boston Marathon does not have traditional nonguaranteed entries—all runners must qualify by meeting the race's strict proof-of-time standards.<sup>37</sup> Those talented enough to earn a spot pay a \$185 registration fee for the privilege.<sup>38</sup> For those who cannot qualify, the cost of participating skyrockets; runners who enter as charity runners must fundraise at least \$5,000, possibly more, depending on the charity.<sup>39</sup>

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33. Kate Carter & Ami Sedghi, *Running Costs: What Are the World's Most Expensive Marathons?* GUARDIAN (Mar. 17, 2015, 3:00 PM), <https://www.theguardian.com/lifeandstyle/datablog/2015/mar/17/running-costs-what-are-the-worlds-most-expensive-marathons>. Registrants for the 2017 New York City Marathon paid \$255 to \$358. *Run in 2017*, N.Y. ROAD RUNNERS, <http://www.tcsnycmarathon.org/plan-your-race/run-in-2017> (last visited Jan. 15, 2018).

34. See Jennifer Blecher, *Fees Are Price of Running New York*, N.Y. TIMES (Nov. 4, 2006), <http://www.nytimes.com/2006/11/04/sports/sportsspecial/04fee.html>. The 2006 New York City Marathon had more than 90,000 applicants, and the cost to register for the New York City Marathon was \$97. *Id.* In comparison, 125,000 combined runners applied for guaranteed and nonguaranteed entries for the 2016 New York City Marathon. Press Release, 19,083 Runners to Be Accepted into 2016 TCS New York City Marathon Through Entry Drawing Process, N.Y. ROAD RUNNERS (Mar. 8, 2016, 5:00 AM), <http://www.nyrr.org/media-center/press-releases/19083-runners-to-be-accepted-into-2016-tcs-new-york-city-marathon-through-entry-drawing-process>.

35. See Badenhausen, *supra* note 23; *19,083 Runners to Be Accepted into 2016 TCS New York City Marathon Through Entry Drawing Process*, *supra* note 34 (reporting that 82,172 runners applied for nonguaranteed entry drawings and 19,083 runners would be accepted through the drawing process); *2016 Non-Guaranteed Entry (The Drawing)*, N.Y. ROAD RUNNERS, <http://www.tcsnycmarathon.org/plan-your-race/getting-in/2016-non-guaranteed-entry> (last visited Jan. 15, 2018) (“To be selected, you must provide a valid credit card, future expiration date, and authorization to charge. The provided credit card will be charged when the entry is drawn; if the charge is not approved, the entry will be removed and another entry will be drawn from the pool. Once you submit the application into the nonguaranteed drawing, you have authorized NYRR to immediately charge your credit card a nonrefundable processing fee. Upon acceptance into the 2016 TCS New York City Marathon, you will be charged a nonrefundable entry fee.”).

36. As noted earlier, the New York City Marathon's “lottery” will, at least temporarily, be free as a result of the lawsuit filed against the race organizers. Stempel, *supra* note 23. The Chicago Marathon first switched to a lottery system in 2014. Megan Hetzel, *Chicago Marathon Lottery by the Numbers*, RUNNER'S WORLD (Apr. 29, 2015, 1:54 PM), <https://www.runnersworld.com/newswire/chicago-marathon-lottery-by-the-numbers>. The Chicago Marathon's 2015 lottery attracted 54,800 applicants, slightly over half of whom were awarded spots in the race. *Id.*

37. *Participant Information: Registration FAQs*, BOS. ATHLETIC ASS'N, <http://www.baa.org/races/boston-marathon/participant-information/athlete-registration/registration-faqs.aspx> (last visited Jan. 15, 2018) [hereinafter *Boston Registration FAQs*]; see also Scott Douglas, *2018 Boston Marathon Registration FAQ*, RUNNER'S WORLD (May 1, 2017 5:00 PM), <http://www.runnersworld.com/boston-marathon/2017-boston-marathon-registration-faq>. Even runners who meet the announced time for their age and gender are not guaranteed a spot. *Id.* In 2017, for example, 2,957 qualifying runners were turned away. *Id.* Only runners who beat their respective divisions' qualifying times by at least two minutes and nine seconds were able to register. *Id.*

38. *Boston Registration FAQs*, *supra* note 37.

39. Alison Wade, *Tension Between Boston's Charity Runners and Qualifiers Disappears by Race Day* (Apr. 15, 2016, 2:18 PM), <http://www.runnersworld.com/boston-marathon/tension-between-bostons-charity-runners-and-qualifiers-disappears-by-race-day>.

It is against this backdrop of raging demand and increasing prices that the “race bandit” problem is born.

### B. *The Birth of the Bandit*

Race bandits are runners who jump onto race courses and run portions, or entire races, without ever registering or paying an entry fee.<sup>40</sup> The bandit problem, unsurprisingly, is most prevalent in high-demand races that sell out quickly and in races that require qualifying times.<sup>41</sup>

Bandits cause major headaches for race directors, who are already coordinating thousands of people on race day.<sup>42</sup> Bandits can pose security risks and overcrowd courses, and they make it hard for race directors to anticipate how many supplies they need to order to accommodate paying customers.<sup>43</sup> The race bandit phenomenon has spawned a contentious debate in the running community over whether banditing is illegal or just an individual moral evaluation.<sup>44</sup>

The deadlocked divide within the running community centers on the idea that these races take place on public roads.<sup>45</sup> Pro-banditers cite this fact as the source of their authorization to run past barriers without a bib.<sup>46</sup> Anti-banditers are adamant that bandits are (as the name would suggest) thieves, given that they are participating for free while others are spending, at minimum, hundreds of dollars to participate in the same race, regardless of the fact that the race is on public land.<sup>47</sup>

#### 1. *Current Consequences for Banditing*

Further exacerbating the problem is the fact that, currently, no great enforcement mechanism exists for stopping bandits, and banditing a race carries few consequences.<sup>48</sup> The New York City Marathon has an established practice of employing volunteer “bandit catchers,” who pull runners from the course shortly before the finish line.<sup>49</sup> This strategy focuses solely on preventing people from crossing the finish line and fails to address other consequences of banditing, such as overcrowding and depletion of on-course resources.<sup>50</sup>

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40. See McGillivray, *supra* note 12.

41. Helliker, *supra* note 8; McGillivray, *supra* note 12.

42. McGillivray, *supra* note 12.

43. *Id.*

44. Compare Helliker, *supra* note 8, with Moore, *supra* note 8.

45. McGillivray, *supra* note 12.

46. *Id.*

47. Karla Bruning, *Ask the Running Nerd: Racing as a ‘Bandit,’* RUN, KARLA, RUN! (Apr. 26, 2011), <http://www.runkarlarun.com/2011/04/26/ask-the-running-nerd-racing-as-a-%E2%80%98bandit%E2%80%99/> [hereinafter Bruning, *Racing as a Bandit*].

48. John Branch, *Trying to Sneak Across the Finish Line? Not So Fast*, N.Y. TIMES (Nov. 2, 2008), <http://www.nytimes.com/2008/11/03/sports/othersports/03bandits.html>.

49. *Id.*

50. See *id.* (“Their job was to make sure that people who did not start the race also did not finish it.”).

The Wharf to Wharf race in Santa Cruz, California,<sup>51</sup> which has offered—and sold out—15,000 entries each of the past twenty-seven years, utilizes a different approach.<sup>52</sup> In addition to the race’s registered runners, an estimated 7,000 bandits plague and congest the course.<sup>53</sup> The race director, Scott McConville, has attempted to address the problem by “call[ing] out” bandits in an attempt to use “a little public humiliation” to educate the community that banditing is wrong.<sup>54</sup> This approach, if successful, would lower the number of bandits (and all of their associated consequences) long term. At the same time, a number of things need to be true for this strategy to be effective.<sup>55</sup> For example, it needs to be the case that bandits do not already know that what they are doing is wrong and that they would both agree that what they were doing is wrong and care that it is wrong.<sup>56</sup> Further, publicly shaming the 7,000 bandits could backfire and encourage some of the 15,000 paying runners to trade their \$40 entry fee for the bandit lifestyle.<sup>57</sup>

Some report that a bandit can be banned from future races,<sup>58</sup> but this “punishment” seems circular and its effectiveness is questionable. Bandits presumably do not have a lot of respect for the formalities of organized racing. Practically, it appears that the same obstacles that make the bandit problem hard to address would also make a race ban difficult to enforce. With a marathon course covering 26.2 miles, upwards of 20,000 runners participating, and an equal or higher number of spectators watching, it seems that bandits (if they are even caught in the first place) could probably evade a “ban” from future races.

## 2. *Bandits’ Varying Motives and Methods*

The varying motives for banditing, the different degrees of banditing, and the different methods of banditing further complicate the problem. While race bandits who run unauthorized because they did not feel like paying or did not get a spot through a “lottery” (or just otherwise did not register) are viewed with indignation by a large portion of the running community,<sup>59</sup> there are multiple reasons to bandit a race, and with these different reasons come varying levels of toleration.

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51. This race is not a marathon, but it is a popular racing event. See Jacob May, *Wharf to Wharf Opens Registration Early for Santa Cruz County Runners*, SANTA CRUZ SENTINEL NEWS (Mar. 20, 2014, 12:01 AM), <http://www.santacruzsentinel.com/general-news/20140320/wharf-to-wharf-opens-registration-early-for-santa-cruz-county-runners>.

52. Jon Gugala, *Why Running Bandits are Bastards*, DEADSPIN (Apr. 25, 2014, 2:21 PM), <http://deadspin.com/why-running-bandits-are-bastards-1567697065>.

53. See *id.*

54. See *id.* (internal quotation marks omitted).

55. See, e.g., *id.* (noting that it is possible that some bandits do not realize what they are doing is wrong).

56. See, e.g., *id.*

57. See Helliker, *supra* note 8 (“Any public talk of it causes some race directors to cringe, for fear of giving the idea to runners who had never thought of doing it.”); see also May, *supra* note 51.

58. Bruning, *Racing as a Bandit*, *supra* note 47.

59. See Peter Sagal, *I, Bandit*, RUNNER’S WORLD (Apr. 12, 2012, 12:00 AM), <http://www.runnersworld.com/road-scholar/i-bandit>.

### i. Motivations for Banditing

Runners who jump onto a race course without a bib simply because they want to run a particular race are the most obvious bandits, as they fit the description and have selfish motives.<sup>60</sup>

Other forms of banditry are subtler. For example, some people run just a portion of a race to help a loved one who is struggling after grinding through the first twenty miles of a marathon.<sup>61</sup> Race directors do not condone—and might even prohibit—this practice, but most everyday runners (who have struggled at mile twenty of a marathon and may have wished they could have had a companion) are, for the most part, fairly tolerant of these well-intentioned bandits.<sup>62</sup>

Some bandits are even celebrated. For example, Roberta “Bobbi” Gibb, the first woman to finish the Boston Marathon, had to dress as a boy, hide her ponytail, and wait in the bushes to bandit the 1966 Boston Marathon after being denied entry for being a woman.<sup>63</sup> Today, she is viewed as a running hero for lacing up against discrimination and paving the way for women in major marathons.<sup>64</sup>

### ii. Levels of Banditry

Another complicating factor when it comes to race bandits is that, in addition to the diverse motivations for banditing, there are varying levels of banditry.<sup>65</sup> Some bandits might jump the course but bring their own snacks and water, making sure to throw all of their trash directly into trashcans. Others might bring their own supplies but discard them along the course as the other runners do. Some might take only water along the course, leaving the sports drinks and snacks to paying runners. Others might take everything that is handed out along the course. Some bandits will bring their own snacks and drinks but use the

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60. See Allday, *supra* note 7.

61. Bruning, *Racing as a Bandit*, *supra* note 47.

62. See *id.*; see also Branch, *supra* note 48; Phil Zolan, Comment to Sarah Catherine’s Photo Post in “Half Fanatics,” FACEBOOK (Oct. 14, 2014, 9:35PM), <https://www.facebook.com/photo.php?fbid=10204509731799110&set=gm.10152705707560831&type=1&theater> (“At Chicago on Sunday, I saw a woman join the course around mile 20 and pace with her friend for about a mile or so, giving her encouragement. Then she rejoined the crowd. Technically a bandit, but I saw nothing wrong with it at all, it was encouraging to me as well.”).

63. Roy M. Wallock, *How Bobbi Gibb Changed Women’s Running, and Finally Got Credit For It*, ESPN (Jan. 6, 2016), [http://www.espn.com/sports/endurance/story/\\_id/15090507/endurance-sports-bobbi-gibb-first-woman-run-boston-marathon](http://www.espn.com/sports/endurance/story/_id/15090507/endurance-sports-bobbi-gibb-first-woman-run-boston-marathon). Eventually, the Boston Athletic Association came around, honoring Bobbi Gibb on multiple occasions—including adding her to the Boston Marathon Hall of Fame—and retroactively awarding her first-place medals for her past performances. *Id.* Kathrine Switzer, who is often cited as the first woman to run the Boston Marathon, was the first to run the race *officially*; she registered under the registered name “K.V. Switzer.” Sarah Amer & Kristen Dahlgren, *First Woman to Officially Run Boston Marathon Makes Triumphant Return*, NBC NEWS (Apr. 18, 2017, 10:46 PM), <http://www.nbcnews.com/feature/inspiring-america/first-woman-officially-run-boston-marathon-makes-triumphant-return-n747616>. Women were not welcome at the time, so she was a “bandit” of sorts, despite having formally registered for the race. *Id.*

64. See generally Brigit Katz, *The Incredible Story of Bobbi Gibb, the First Woman to Run the Boston Marathon*, N.Y. TIMES: WOMEN IN THE WORLD (Apr. 20, 2015), <http://nytlive.nytimes.com/womenintheworld/2015/04/20/the-incredible-story-of-bobbi-gibb-the-first-woman-to-run-the-boston-marathon/> (recounting the story of Gibb’s historic performance in the 1966 Boston Marathon).

65. @Ginger, *Bandit on the Run*, SALTY RUNNING (Aug. 27, 2012), <http://www.saltyrunning.com/wanted-race-bandits/>.

course's bathrooms. Some bandits go "all in" and will even take a finisher's medal at the end of the race if given the opportunity.<sup>66</sup>

Another dimension of the "levels" of banditry is the length "bandited." Some runners will sneak through an entire race from start to finish.<sup>67</sup> Other bandits only run a portion of the course to spice up their regularly planned training runs.<sup>68</sup>

### iii. Methods of Banditry

The last major consideration regarding variations in banditry involves examining how the bandit went about committing the act. Some bandits just slip past the barriers and jump onto the race course.<sup>69</sup> These bandits would be the easiest to catch since most races require bibs to be displayed throughout the entire race.<sup>70</sup> Other bandits run on bibs that are not theirs.<sup>71</sup>

There are two main approaches to running on an invalid bib. The first is running on a counterfeit bib.<sup>72</sup> As noted, these race entries are hot commodities, and, as a result, people often excitedly share photos of their bibs on social media.<sup>73</sup> This practice is "giving new legs" to bandits, who can use these photos to generate fake bibs—making it even harder for race directors to catch them.<sup>74</sup>

The second—less nefarious, but equally troublesome—method is to run on someone else's official bib.<sup>75</sup> Most major races—the New York City Marathon, the Boston Marathon, and the Chicago Marathon included—specifically prohibit this practice and do not facilitate formal bib transfers.<sup>76</sup> Again, this problem is

66. *Id.*

67. See *Boston Marathon Runners Find 'Bandits' in Bibs*, USA TODAY (Apr. 24, 2014), <http://www.usatoday.com/story/sports/olympics/2014/04/25/boston-marathon-bandits-bibs/8182603/> [hereinafter *Bandits in Bibs*] (detailing multiple instances of people using fake bibs to gain entry to the starting corrals during the 2014 Boston Marathon).

68. See, e.g., Sagal, *supra* note 59 ("I didn't come to banditing blindly. Every runner I know, it seems, has bandited a race once or twice, for a mile or eight.").

69. See *id.* ("I waited for the 3:00 pace group to zip by, then jumped in . . .").

70. See, e.g., *Participant Information: Expo and Bib Number Pick-Up*, BOS. ATHLETIC ASS'N, <http://www.baa.org/races/boston-marathon/participant-information/expo-and-number-pick-up.aspx> (last visited Jan. 15, 2018) ("Your official race bib number has important information printed on it and, therefore, it is critical for it to be clearly displayed on the front of your torso during the entire race.").

71. See *Bandits in Bibs*, *supra* note 67.

72. See *id.*

73. See *id.* ("With runners bragging about their bibs on Instagram, anyone with a computer can find a bib and print a copy, making banditry even easier at the same time that security threats make it more of a concern.").

74. See *id.*

75. Steve Annear, *There's a Black Market for Boston Marathon Bibs*, BOS. MAG. (Apr. 9, 2013, 10:44 A.M.), <http://www.bostonmagazine.com/news/blog/2013/04/09/boston-marathon-bibs/> ("Davis [communications manager for the Boston Athletic Association] says giving away bibs to those who aren't officially registered in the BAA's system is an 'extremely, extremely dangerous' thing to do. 'From our side, we don't know who that person is, they haven't abided by our rules and haven't agreed to our terms and participating in our race,' he says. 'On the other side, it's extremely risky for the individual to run under someone else [sic] bib because if they go down for any reason . . . we know nothing about this person.'").

76. See, e.g., *Event Rules*, BANK AM. CHI. MARATHON, <https://www.chicagomarathon.com/participant-information/event-rules/> [hereinafter *Chicago Marathon—Event Rules*]; *Frequently Asked Questions*, BOS. ATHLETIC ASS'N, <http://www.baa.org/faq.aspx> [hereinafter *Boston Marathon—FAQs*] (from Frequently Asked Questions page, search for question, "What do I do if I cannot participate (injury or otherwise) in the Boston Marathon once I have registered?"); *Rules of Competition*, N.Y. ROAD RUNNERS, <http://www.nyrr.org/races-and-events/rules-of-competition> (last visited Jan. 15, 2018) [hereinafter *N.Y. Marathon—Rules of Competition*].

difficult for race organizers to police since runners appear to be validly registered when they show up on race morning.<sup>77</sup>

The practical effects of running on the course without a bib and running on the course with an invalid bib are largely the same: both situations result in undocumented runners on the course. Public opinion varies on these issues, however, which could, in turn, impact the rate at which various banditry methods are utilized.<sup>78</sup>

### C. *Public Opinion, Morality, and Legality*

In light of bandits' varying degrees, motives, and methods, opinions on bandits, accordingly, vary.<sup>79</sup> Many anti-banditers cite theft as the reason that banditing is illegal.<sup>80</sup> They note that race directors are providing a service: they are paying to shut down the roads; they map out a course; and they take measures to ensure that runners are safe.<sup>81</sup> Others are more disturbed by the thought of bandits actually taking supplies.<sup>82</sup> In addition to the thrill of running with a crowd of 20,000–50,000 people, these runners are paying for t-shirts, medical supplies, food, drinks, and pre- and post-race celebrations, among other things.<sup>83</sup> It is unclear, then, how much, if anything, a bandit must take to have “stolen” from a race organizer according to public opinion.

Further, toleration levels for banditry have not always necessarily held constant.<sup>84</sup> For example, the Boston Marathon more or less turned a blind eye to bandits until 2014.<sup>85</sup> In 2014, the Boston Athletic Association spoke out against

77. Annear, *supra* note 75 (“Davis says the association doesn’t have time to police everyone and make sure every runner is who they say they are . . .”).

78. See generally @Mace, *The Gift Race Directors Don’t Want Us to Give: Race Bib Transfers*, SALTY RUNNING (Dec. 6, 2012), <https://www.saltyrunning.com/the-gift-race-directors-wont-let-us-give-a-bib/> (expressing dissatisfaction with anti-transfer policies and inviting runner community feedback). The post initiated a brief discussion in which other runners shared their opinions on the matter. See, e.g., @Mint, Comment to *The Gift Race Directors Don’t Want Us to Give: Race Bib Transfers*, SALTY RUNNING (Dec. 6, 2012, 11:03AM), <https://www.saltyrunning.com/the-gift-race-directors-wont-let-us-give-a-bib/> (“I am against banditting, [sic] but I too think race bibs should be transferable. I understand the liability part and the administrative nightmare big races would have, but it is hard to watch your money go to waste when you know someone else could have run in your place.”).

79. @Ginger, *supra* note 65.

80. See Bruning, *Racing as a Bandit*, *supra* note 47 (quoting USA Track and Field’s “Road Racing Rules & Etiquette” guide).

81. See Gugala, *supra* note 52.

82. See McGillivray, *supra* note 12.

83. See Carter & Sedghi, *supra* note 33. Where the line of public tolerance is drawn is interesting. For example, a self-identified bandit described bandits as the “the inspirational embodiment of Nike’s ‘Just Do It’ slogan.” Darren Garnick, *Marathon Bandits Will Be Missed*, BOS. GLOBE (Apr. 20, 2014), <https://www.bostonglobe.com/opinion/columns/2014/04/19/missing-from-this-years-marathon-those-lovable-bandits/XHb0yyIHECNtUBdxCCwqgO/story.html>. He argued that it was “intellectually dishonest to suggest that [bandits] are cheapskates motivated by saving a few bucks,” but he drew the line at taking medals, asserting “[A]nyone who wears a medal they didn’t qualify for should be strangled with it.” *Id.*

84. Garnick, *supra* note 83.

85. This, of course, is likely related to the bombing at the 2013 Boston Marathon. *Id.*; Peter Schworm, *Marathon ‘Bandits’ Fall Prey to Stricter Security*, BOS. GLOBE (Apr. 12, 2014), <https://www.boston.com/metro/2014/04/12/long-accepted-boston-marathon-bandits-fall-prey-stricter-security/sluP6HB8xVY18GChTz5S5H/story.html> (“The number of bandits has since declined [since the advent of the Boston Athletic Association’s charity entry program], and the BAA has generally let them be. But this year, new security

banditing more explicitly.<sup>86</sup> Prior to this quasi-policy change,<sup>87</sup> several formally established groups of bandits would train and even fundraise to bandit the race together.<sup>88</sup> Bandits were controversial even at the time,<sup>89</sup> and this change in enforcement policies is an example of something that might further sway public opinion. The history of bandit “toleration” could explain some of the confusion surrounding race-banditing policies.

The wide variety of bandits and the varying levels of understanding and toleration from the running community could lend credence to the idea that race banditing, at least in some of its manifestations, is strictly an individual moral decision, not a crime. These ideas—criminality and morality—are not necessarily intertwined, however. Not all crimes are *mala in se*, or “wrong in themselves”—crimes can be *mala prohibita*, or “wrong merely because they are punished by statute.”<sup>90</sup> The dispute within the running community plays on ideas of *mala in se* crimes and *mala prohibita* crimes, but those who do not attach moral fault to banditing are going the extra step of stripping it (potentially) of its status as a crime.<sup>91</sup>

Whether banditing is a crime depends on the legality of the actual act of banditing, not on moral evaluations.<sup>92</sup> The debate surrounding banditing indicates that the most likely applicable laws are those that focus on the issues of whether organized road races have value that can be stolen (theft of services statutes)<sup>93</sup> and whether the public can trespass on otherwise public roads during a race.<sup>94</sup> The moral assessments do not impact the legality of banditing, but they are still important because they will (and clearly already do) impact public opinion and actions.

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measures will make it far more difficult for unregistered runners . . .”). This provides further support for the idea that bandits cause safety concerns.

86. Cindy Boren, *Boston Marathon 2014: No Bags, Backpacks or Bandits Allowed*, WASH. POST (Feb. 27, 2014), [https://www.washingtonpost.com/news/early-lead/wp/2014/02/27/boston-marathon-2014-no-bags-backpacks-or-bandits-allowed/?utm\\_term=.ab2219dfb656](https://www.washingtonpost.com/news/early-lead/wp/2014/02/27/boston-marathon-2014-no-bags-backpacks-or-bandits-allowed/?utm_term=.ab2219dfb656) (quoting Boston Athletic Association statements regarding the race).

87. Garnick, *supra* note 83 (“For the first time this year, the Boston Marathon is officially banning bandits. The Boston Athletic Association has forbid uncredentialed runners for years, but always looked the other way when it came to enforcement.”).

88. See Schworm, *supra* note 85.

89. See Garnick, *supra* note 83 (describing bandits positively but also reporting an “overwhelmingly vicious” response to a Facebook question about opinions on bandits).

90. Note, *The Distinction Between Mala Prohibita and Mala in se in Criminal Law*, 30 COLUM. L. REV. 74, 74 (1930).

91. See, e.g., @Ginger, *supra* note 65 (“There is no law being broken by a [bandit who doesn’t take supplies or cross the finish line].”).

92. James B. Haddad, *The Mental Attitude Requirement in Criminal Law—and Some Exceptions*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 4, 8 (1968) ([C]riminality today depends upon the actor’s mental attitude . . . toward the material elements of an offense. It does not depend upon proof of an ultimate moral blameworthiness, if it ever did. . . . ‘A crime may be committed from the best of motives and yet remain a crime.’”).

93. See discussion *infra* Section III.B.1.

94. See discussion *infra* Section III.B.2.

#### D. *The Value of Organized Road Races*

The raging demand for marathons has created a great source of revenue. The race industry is booming. It has been valued at around \$1.4 billion.<sup>95</sup> For comparison, that figure rivals the NFL's ticket revenue for 2015 and exceeds the NCAA's 2015 revenue by \$500 million.<sup>96</sup> Multiple groups split the profits, and corporate sponsors are clambering to put their names on events.<sup>97</sup> For perspective, Active, a company that manages race registrations, made \$257.8 million in 2012 just from charging a fee on race registrations,<sup>98</sup> and the New York Road Runners—the group that organizes the New York City Marathon—generated \$74.2 million in revenue in 2014.<sup>99</sup>

Charities also benefit tremendously. Most major marathons have multiple associated charity partners,<sup>100</sup> and participating as a charity runner is a popular workaround for those who could not otherwise register for a popular race.<sup>101</sup> Each race handles its charity arrangements somewhat differently,<sup>102</sup> but, regardless of the program's structure, the results are great for charities.

For example, roughly 8,700 charity runners—who had to meet at least a \$2,500 fundraising minimum<sup>103</sup>—at the New York City Marathon raised \$33.9 million dollars in 2015,<sup>104</sup> and approximately 8,500 runners raised \$34.5 million for charities in 2014.<sup>105</sup> Similarly, the Boston Marathon allows roughly 6,000 nonqualifying runners to enter for charity, each of whom must raise a minimum of \$5,000.<sup>106</sup> Boston Marathon charity runners raised \$30.6 million in 2016, \$28.3 million in 2015, and \$38.4 million in 2014.<sup>107</sup>

95. Phil Wahba, *Why Big Business Loves Marathons*, FORTUNE (Oct. 26, 2015, 8:00 AM), <http://fortune.com/2015/10/26/business-marathons/>.

96. 2016 *State of the Sport*, *supra* note 25.

97. Wahba, *supra* note 95 (“For sponsors, running holds unique appeal. Rich Harshbarger, CEO of Running USA, says marathoners—dedicated by nature—make particularly loyal customers for the brands that prop up their sport.”).

98. Marcus, *supra* note 31.

99. Phil Wahba, *New York City Marathon: Q&A with NYRR CEO and Race Director*, FORTUNE (Oct. 25, 2015), <http://fortune.com/2015/10/25/new-york-city-marathon/>.

100. Michelle Hamilton, *Charity Running More Competitive Than Ever*, RUNNER'S WORLD (July 2, 2013, 12:00 AM), <http://www.runnersworld.com/newswire/charity-running-more-competitive-than-ever>.

101. Karla Bruning, *Run for Charity, Not as a Running Bandit*, ACTIVE, <http://www.active.com/walking/articles/run-for-charity-not-as-a-running-bandit> (last visited Jan. 15, 2018) [hereinafter Bruning, *Run for Charity*]; Liz Robbins, *Running for Charity Fuels a Boom in Marathoning*, N.Y. TIMES: ON THE RUN (Oct. 21, 2010, 10:26 AM), <https://marathon.blogs.nytimes.com/2010/10/21/running-for-charity-fuels-a-boom-in-marathoning/>.

102. Robbins, *supra* note 101 (“Each major marathon with significant charity programs—London, New York, Chicago, Washington's Marine Corps and Boston—operates on a slightly different financial model.”).

103. *TCS New York City Marathon Official Charity Partner Program*, N.Y. ROAD RUNNERS, <http://www.nyrr.org/charities-clubs-and-community/charities/tcs-new-york-city-marathon-official-charity-partner-program> (last visited Jan. 15, 2018).

104. Badenhause, *supra* note 23.

105. *Id.* But see Mary Pilon, *Hitting the Wall: For Marathon Charities, Numbers are Slowing*, N.Y. TIMES (Oct. 24, 2013), <http://www.nytimes.com/2013/10/25/sports/hitting-the-wall-for-marathon-charities-numbers-are-slowing.html>.

106. Wade, *supra* note 39. As the article notes, some tension surrounds the admission of nonqualifying runners given the ultra-competitive nature of the Boston Marathon. *Id.* This might explain the higher fundraising requirements.

107. Press Release, Bos. Athletic Ass'n, Boston Marathon Fundraising Raises \$30.6 Million in 2016 Race (June 30, 2016), <http://www.baa.org/news-and-press/news-listing/2016/june/boston-marathon-fundraising->

### 1. *Travel Impacts of Major Organized Races*

Further, runners in these popular sell-out races come from all over the world. For example, the New York City Marathon had finishers from all fifty states and 155 different countries.<sup>108</sup> Of the 51,394 people who finished the race, only 13,304 were from New York state.<sup>109</sup> The 2016 Boston Marathon had finishers from fifty-six states and territories and seventy-nine different countries of residence.<sup>110</sup>

Traveling racers make a big economic impact on the host cities. The 2010 New York Marathon had a total estimated economic impact of \$250 million for the city, making it a bigger sporting event than the Super Bowl.<sup>111</sup> Similarly, the Boston Athletic Association reported estimates from the Greater Boston Convention & Visitors Bureau's President and CEO that the 2016 Boston Marathon would bring \$188.8 million in "spending impact" to the area.<sup>112</sup> Given the cost of registration and the number of participants in each of these races, this impact cannot possibly be from the cost of registration alone.

### 2. *Costs of Banditry*

Races, while potentially incredibly profitable to organizers and charities, carry a hefty price tag to organize. Despite what some may think, the expenses race directors face go past paying for t-shirts and bananas.<sup>113</sup> Successful races are incredibly lucrative, but races generally are "labor-intensive events with razor-thin margins, and [they] typically require a significant investment before they start to turn a profit."<sup>114</sup> "Running a race isn't cheap. Not for the runner, who typically has to pay a handsome registration fee, and certainly not for the group organizing the race."<sup>115</sup>

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raises-30-6-million-in-2016-race.aspx; Press Release, Bos. Athletic Ass'n, Boston Marathon Fundraising Remains Strong After Record Year (July 7, 2015), <http://www.baa.org/news-and-press/news-listing/2015/july/boston-marathon-fundraising-remains-strong-after-record-year.aspx>; Press Release, Bos. Athletic Ass'n, Boston Marathon Raises Historic Amounts for Local Non-Profits (July 1, 2014), <http://www.baa.org/news-and-press/news-listing/2014/july/boston-marathon-raises-historic-amounts-for-local-non-profits.aspx>.

108. *Finisher Demographics*, N.Y. ROAD RUNNERS, [http://results.nyrr.org/event/M2016/customStatisticsDetails/M2016\\_yBnvyNLq](http://results.nyrr.org/event/M2016/customStatisticsDetails/M2016_yBnvyNLq) (last visited Jan. 15, 2018).

109. *Id.*

110. *2016 Boston Marathon Statistics*, BOS. ATHLETIC ASS'N, [http://registration.baa.org/2016/cf/Public/iframe\\_Statistics.htm](http://registration.baa.org/2016/cf/Public/iframe_Statistics.htm) (last visited Jan. 15, 2018).

111. Hélène Franchineau, *The New York Marathon: 26 Very Profitable Miles*, N.Y. WORLD (Nov. 22, 2010), <http://archives.jrn.columbia.edu/2010-2011/thenewyorkworld.com/2010/11/22/the-new-york-marathon-26-very-profitable-miles/index.html>.

112. Press Release, Bos. Athletic Ass'n, Marathon-Related Events Will Bring an Estimated \$188.8 Million (USD) in Spending Impact to the Greater Boston Region (Apr. 7, 2016), <http://www.baa.org/news-and-press/news-listing/2016/april/2016-boston-marathon-will-mean-188-8-million-for-greater-boston-economy.aspx>.

113. *See, e.g.*, Gugala, *supra* note 52.

114. Kerry Miller, *Entrepreneurs Race for the Prize*, BLOOMBERG (Apr. 24, 2007, 4:47 PM), <http://www.bloomberg.com/news/articles/2007-04-24/entrepreneurs-race-for-the-prizebusinessweek-business-news-stock-market-and-financial-advice>.

115. Jack Craver, *How Much Does it Cost to Put on a Marathon in Madison?*, CAP. TIMES (July 16, 2014), [http://host.madison.com/ct/news/local/writers/jack\\_craver/how-much-does-it-cost-to-put-on-a-marathon/article\\_3fa2a106-0c61-11e4-ab37-001a4bcf887a.html](http://host.madison.com/ct/news/local/writers/jack_craver/how-much-does-it-cost-to-put-on-a-marathon/article_3fa2a106-0c61-11e4-ab37-001a4bcf887a.html).

To provide some concrete numbers, the New York Road Runners, the organization that hosts the world's largest marathon, the New York City Marathon, paid \$850,000 to the city for services in 2010, even before the police increased the charge for their services.<sup>116</sup> That cost has increased by almost \$2 million.<sup>117</sup> Even smaller races are getting hit with big bills. For example, a race director for a modest-sized race reported paying a \$15,000 bill for police services for a race that had 1,500 runners.<sup>118</sup>

Bandits do not contribute to revenues or benefit charities, but they impact the cost of organizing a race by taking supplies that are guaranteed to paying participants.<sup>119</sup> While there is not much case law available on the issue, there is a lingering sense that, despite the risks runners assume by participating in road racing events, race directors owe participants a certain duty of care.<sup>120</sup> The California Court of Appeal held, in one of the rare cases on the matter, that “the organizer of a marathon has a duty to produce a reasonably safe event.”<sup>121</sup> The court then specifically stated that the duty involved minimizing the sport's risks without altering its nature as a sport, “which includes providing sufficient water and electrolyte replacement drinks as represented in the informational materials provided to the participants.”<sup>122</sup> Bandits are hard to anticipate, but race directors must account for them while planning to ensure that they can meet their obligations to paid registrants.

Apart from benefiting from the convenience of the race organizers' work and taking supplies meant for paying runners, bandits also contribute to some of the downsides of racing, like crowding.<sup>123</sup> Merely by being present, bandits detract from the experience of other runners.

Behind all of these costs, profits, and entry fees is the idea that, presumably, people who sign up to run races are paying for *something*.<sup>124</sup> What exactly that is and whether it can be stolen are the issues at the heart of the race bandit debate. The current answers to those questions may be discerned by evaluating certain state laws. New York, Illinois, and Massachusetts all have laws related to thefts of at least some services, as do most states.<sup>125</sup> Anti-banditers cite these

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116. Marc Chalufour, *Why Are Road Races So Expensive?*, RUNNER'S WORLD (July 29, 2011, 12:00 AM), <http://www.runnersworld.com/races/why-are-road-races-so-expensive#>; see also Ken Belson, *New York Marathon Raises Entry Fee, Citing Police Costs*, N.Y. TIMES (Jan. 2, 2012), <http://www.nytimes.com/2012/01/03/sports/new-york-city-marathon-raises-entry-fee.html>.

117. See Badenhausen, *supra* note 23.

118. Chalufour, *supra* note 116.

119. Allday, *supra* note 7.

120. See Saffro v. Elite Racing, Inc., 119 Cal. Rptr. 2d 497, 498 (Ct. App. 2002).

121. *Id.*

122. *Id.*

123. McGillivray, *supra* note 12; see also Gugala, *supra* note 52 (“The Boston Marathon's notoriously narrow starting area in Hopkinton is the reason for its number of entries, and not because they want to crush your dreams.”).

124. See Gugala, *supra* note 52 (“Clearly there's a value.”) (internal quotation marks omitted).

125. See discussion *infra* Section III.B.1; see also Julien Ross, *A Fair Day's Pay: The Problem of Unpaid Workers in Central Texas*, 10 TEX. HISP. J.L. & POL'Y 117, 144–45 (2004) (providing background on the concept of a theft of services crime).

types of laws abstractly as the source of the purported prohibition on banditing.<sup>126</sup> Similarly, anti-banditers also turn to trespass laws—again, in the abstract—as another justification for their belief that banditing is illegal.<sup>127</sup>

### III. ANALYSIS

Recurring arguments within the race bandit debate focus on whether bandits are actually stealing anything.<sup>128</sup> Bandit defenders argue that nothing is illegal—or maybe even wrong at all—with banditing, which is inclusive of the argument that nothing is being stolen.<sup>129</sup> Opponents to those arguments cite both the tangible goods that are given out at races<sup>130</sup> and the costs of organizing a race to suggest that there is something of value in play.<sup>131</sup>

Bandit defenders also cite the fact that the races take place on public roads.<sup>132</sup> Opponents of these arguments point to other instances in which people are restricted from accessing public lands.<sup>133</sup> For example, one blogger wrote: “Your taxes pay for school chemistry labs too but you can’t just waltz in and fire up a Bunsen burner whenever you want.”<sup>134</sup>

Independent of these commonsense arguments based on life experiences and observations about how the world generally works, existing state laws might offer insights into this longstanding debate. First, it is important to evaluate whether there is something for the law to protect.

#### A. *Conducting a Race is Clearly Providing a Service*

A number of people who have participated in the race bandit debate have focused considerably on whether the bandit took anything tangible.<sup>135</sup> These people fail to consider the fact that a service can be stolen.<sup>136</sup>

Again, much of the problem stems from the fact that these races take place on streets that are open to the public, which makes it harder for people to conceptualize that a person crossing an erected barrier is crossing into a private business. The USA Track and Field “Road Racing Rules & Etiquette” guide

126. See, e.g., Bruning, *Racing as a Bandit*, *supra* note 47 (quoting USA Track and Field’s “Road Racing Rules & Etiquette” guide); @Dane, *On Being a Race Bandit*, BLOGSPOT: SEEDANERUN (Mar. 31, 2014), <http://danerunsalot.blogspot.com/2014/03/on-being-race-bandit.html>.

127. See, e.g., Helliker, *supra* note 8 (“There’s nothing illegal about jogging down city streets without a race bib, or even accepting aid-station refreshment offerings.”).

128. See, e.g., *id.*

129. See, e.g., *id.*

130. To offer an idea of the volume of supplies involved, there are fluid stations every mile along the New York City Marathon Course. Andrew Mach, *8 Things You Didn’t Know About the New York City Marathon*, PBS (Oct. 31, 2015, 8:45 PM), <http://www.pbs.org/newshour/rundown/8-things-didnt-know-new-york-city-marathon/>. These stations contain a combined 62,370 gallons of Poland Spring water and 32,040 gallons of Gatorade, which are dispensed using more than 2.3 million paper cups. *Id.*

131. See, e.g., Helliker, *supra* note 8 (teasing the “righteous indignation” runners have about the cost of t-shirts, medals, and general race organizing costs).

132. See McGillivray, *supra* note 12; see also Gugala, *supra* note 52.

133. @Dane, *supra* note 126.

134. *Id.*

135. See @Ginger, *supra* note 65.

136. See generally Ross, *supra* note 125, at 144–45 (providing background on the concept of a theft of services crime).

highlighted the issue by posing the question: “Would these same individuals enter a theater or other public event without paying?”<sup>137</sup> The obvious answer would seem to be no, or, at the very least, it seems like most of the general public could agree that sneaking into events that charge admission would be illegal (even if the same people that bandit races would also “crash” other public events).

The conveniences and atmosphere that organized road races provide are services, much like the set of services and conveniences achieved by going to a restaurant. Of course, when a person goes to a restaurant to buy dinner, he or she is paying for the cost of the actual supplies used to make the food. Past that, though, the extra charges are for the convenience—not having to cook, not having to clean, and not having to get up to get a refill. In a similar way, race registrants pay for the tangible goods they receive—they pay for a shirt, a banana, and a medal—but they also pay for the conveniences that come from participating in an organized event—they pay for having a marked route, they pay to have their race timed, and they pay to be able to run unimpeded by traffic.<sup>138</sup> Depending on their “degree of banditry,” race bandits absorb a lot of these benefits without paying anything for them.

The benefits, even the intangible ones, have associated costs. For example, race organizers pay for security, for permits to close the roads, for portable toilet rentals, for trash pickup, and for food and medical supplies.<sup>139</sup> Sometimes, depending on the race, the cost a race organizer pays per runner comes out to more than the cost of registration, and sponsors help with the additional expenses.<sup>140</sup>

Perhaps a bandit who only runs the course (without taking any supplies, creating any mess, or using any restrooms) is not benefiting from a race director’s “services,” but given the costs race directors pay to establish a course, even these most minimalist bandits seem to be gleaning a benefit for which they are not paying.

#### *B. Existing Confusion on the Law Complicates Potentially Applicable Laws*

The present situation is legally uncertain, partly due to the various categories and degrees of banditry and the history of inconsistent self-regulation by race directors. This uncertainty is demonstrated by the running community’s ongoing debate about whether banditing is illegal or just immoral.<sup>141</sup> The result is that mental-state requirements for already existing crimes might be harder to meet.<sup>142</sup>

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137. Bruning, *Racing as a Bandit*, *supra* note 47.

138. See Carter & Sedghi, *supra* note 33.

139. See *id.*

140. See *id.*

141. Compare Helliker, *supra* note 8, with Moore, *supra* note 8. As previously noted, the concepts are largely distinct. Haddad, *supra* note 92, at 8.

142. See generally Haddad, *supra* note 92 (exploring the general requirement of a culpable mental state for conviction of a crime but noting that there are exceptions to that general rule, such as strict liability crimes).

### 1. *Theft of Services Statutes*

Most states already have laws criminalizing thefts of services, but the provisions vary drastically from state to state.<sup>143</sup> The inconsistencies in state laws can complicate matters because a large number of participants travel from across the United States and around the world to participate in big marathons like New York, Chicago, and Boston.<sup>144</sup> The likely result is that awareness of the applicable laws in a state will be low.

#### i. New York Statute

New York's theft of services law specifically enumerates a number of services.<sup>145</sup> The qualifying thefts include crimes such as not paying at a restaurant, not paying for transportation (public or private), or tampering with meters (such as water or electric meters), to name a few.<sup>146</sup> Banditing a marathon is, predictably, not enumerated in New York's theft of services statute.<sup>147</sup>

Most often, the theft of services statute is used to prosecute "turnstile jumpers,"<sup>148</sup> (people who jump the turnstile to ride the subway for free) who clearly fall within an enumerated category.<sup>149</sup> Court decisions in gray-area cases relating to the theft of services statute are not always apparently consistent, but they do demonstrate that courts interpret the statute narrowly.<sup>150</sup>

For example, in *People v. Choi* the defendant persuaded the court to dismiss the accusatory instrument that charged him with theft of services because the \$273 of alcoholic drinks he allegedly drank (and did not pay for) were not ordered from a restaurant; they were ordered from a bar.<sup>151</sup> The court's opinion observed: "It appears from the defendant's arguments and a reading of the statute that the alcoholic beverages are not restaurant services in that a bar is not necessarily a restaurant."<sup>152</sup> Noting that the state did not address the defendant's legal arguments, the court dismissed the information.<sup>153</sup>

Several years later, in *People v. McDonald*, the defendant utilized a similar approach.<sup>154</sup> The defendant in *McDonald* allegedly ordered \$126.33 worth of alcoholic drinks at a hotel's bar, drank them, and left without paying his bill.<sup>155</sup> The state charged him with theft of services, and the defendant moved to dismiss

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143. Compare 720 ILL. COMP. STAT. 5/16-3 (2012), with N.Y. PENAL LAW § 165.15 (McKinney 2016); see also Ross, *supra* note 125.

144. See, e.g., *Finisher Demographics*, N.Y. ROAD RUNNERS, <http://www.tcsnycmarathon.org/about-the-race/results/finisher-demographics> (last visited Jan. 15, 2018).

145. See N.Y. PENAL LAW § 165.15.

146. See *id.*

147. See *id.*

148. See *People v. Washington*, 25 N.Y.S.3d 523, 526 (N.Y. Sup. Ct. 2015).

149. N.Y. PENAL LAW § 165.15.

150. Compare *People v. McDonald*, 689 N.Y.S.2d 600, 603–04 (N.Y. Crim. Ct. 1999), with *People v. Choi*, 651 N.Y.S.2d 859, 860 (N.Y. Crim. Ct. 1996).

151. *Choi*, 651 N.Y.S.2d at 860.

152. *Id.*

153. *Id.*

154. *McDonald*, 689 N.Y.S.2d at 602.

155. *Id.* at 601–02.

the complaint as facially insufficient.<sup>156</sup> The defendant, citing *Choi*,<sup>157</sup> argued that the theft of services statute did not cover alcoholic drinks.<sup>158</sup> The state asserted that the bar was part of the hotel's restaurant, which made not paying the bar bill a theft of restaurant services.<sup>159</sup> The court noted that *Choi* "did not hold that a defendant can never be prosecuted for theft of services for refusing to pay for alcoholic beverages."<sup>160</sup> The court then explained that, "[i]f the alcoholic beverages herein were served to the defendant in a restaurant, then they constituted restaurant services," and ruled against the defendant.<sup>161</sup>

While these cases had different results, they both held that services at a bar were not covered under the statute.<sup>162</sup> In doing so, both cases showed how strictly New York courts construe the theft of services statute. Practically identical transactions—transactions involving the exact same product—could be treated differently depending on whether the transaction took place in a bar or at a bar in a restaurant.<sup>163</sup> Considering the strict interpretations and the fact that marathon banditing is not enumerated, New York's theft of services statute clearly does not encompass banditing and also cannot be stretched (without amendment) to cover banditing.

## ii. Illinois Statute

The Illinois theft of services statute is broader and has greater potential for including race banditing.<sup>164</sup> The statute enumerates three general ways to commit the crime of "theft of services or use of property."<sup>165</sup> The first "category" of theft of services cases would be the most likely to encompass race bandits; it defines theft as when a person "knowingly obtains the temporary use of property, labor or services of another which are available only for hire, by means of threat or deception or knowing that such use is without the consent of the person providing the property, labor, or services."<sup>166</sup>

The way that bandit defenders discuss banditing highlights the potential problem with trying to address race banditing with this statute.<sup>167</sup> For anyone who thinks that public roads are open to the public for free use, it is entirely

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156. *Id.* at 601.

157. *Choi*, 651 N.Y.S.2d at 859. The defendant also cited *People v. Klas*, 141 N.Y.S. 212, 213 (N.Y. Cty. Ct. 1913). This case involved a different statute, which covered "lodging, food or accommodation." *See id.*; *see also* JOHN E. H. SHERRY, *THE LAWS OF INNKEEPERS* 776 (3d ed. 1993) ("Unlike the earlier New York statute (section 925 of the Penal Law), section 165.15 applies to restaurant patrons as well as hotel guests."). The court noted that the statute "only protects a hotel keeper for lodging, food and accommodations furnished, and in so far as the bar bill is for liquors no recovery can be had therefore." *Klas*, 141 N.Y.S. at 214.

158. *McDonald*, 689 N.Y.S.2d at 602.

159. *Id.*

160. *Id.* at 604.

161. *Id.*

162. Compare *McDonald*, 689 N.Y.S.2d at 604–05, with *Choi*, 651 N.Y.S.2d at 860.

163. *See McDonald*, 689 N.Y.S.2d at 602–04; *Choi*, 651 N.Y.S.2d at 860.

164. *See* 720 ILL. COMP. STAT. 5/16-3 (2012).

165. *See id.*

166. *See id.* at 5/16-3(a).

167. *See* McGillivray, *supra* note 12 ("Some say, 'It's a public road so I can do what I want, so what's the big deal?'""); *see also* Gugala, *supra* note 52 ("The roads in Boston are free 364 days a year, so why would you pay to run a marathon on that one odd day?").

possible that the mental-state requirements for the statute could prove prohibitive to using it to outlaw race banditing.<sup>168</sup>

The first requirement should be easy to meet. A person who jumps onto a race course (for any portion of the race) knows that he or she is at least obtaining the “temporary use of property,” regardless of whether the person realizes that use of that property is “available only for hire.”<sup>169</sup> The second requirement is where matters are more complicated. The person must use threats, use deception, or know that he or she is using the land without the consent of the person providing the property, labor, or services.<sup>170</sup>

This phrasing has interesting implications for the race bandit issue because of the spectrum of bandits. It is highly likely that not all bandits would be treated the same under this statute. Bandits who are running with an official bib that is not theirs,<sup>171</sup> for example, have clearly violated the statute, as they have used deception in representing that they are a registered runner for a given race when they are, in fact, not. The same holds even truer for those who have knowingly bought or made counterfeit bibs for the race.<sup>172</sup> Not only are these runners running the race without consent, but they also cannot even purport to glean consent from another’s proper entry to the race.

How this law might, or might not, apply to “simpler” bandits, those who brazenly jump the barrier without any sort of represented authorization, is more complicated because these runners are not being deceptive in the course of banditing. The statute, however, also covers those who obtain the “temporary use of property . . . knowing that such use is without the consent of the person providing the property, labor, or services.”<sup>173</sup> While these runners presumably know that they have not received explicit consent to run the race, the debate in the running community illustrates that not all runners realize that they need this consent. From the bandit-defender perspective, a person needs no more consent to run on a street on race day than he or she would need consent to walk down that same street on any other day.<sup>174</sup> With a mental state of “knowledge,” it seems that anti-banditers are out of luck, even with their seemingly obvious arguments that giant barricades, hired security guards, snacks, and other amenities are a tip-off that race day is different from the other 364 days of the year.<sup>175</sup> The Illinois statute, then, comes closer to addressing the problem than the New York statute,

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168. See 720 ILL. COMP. STAT. 5/16-3.

169. See *id.* at 5/16-3(a).

170. See *id.*

171. Amanda MacMillan, *Is It Ever Okay to Race with Someone Else’s Bib Number?*, RUNNER’S WORLD (Nov. 12, 2015, 2:27 PM), <http://www.runnersworld.com/racing/is-it-ever-okay-to-race-with-someone-elses-bib-number> (“[U]sing another person’s entry is prohibited in most races, including New York City.”).

172. See, e.g., Caitlin Giddings, *Runner Says 4 Others Bandited with Her Number at Boston*, RUNNER’S WORLD (Apr. 24, 2014, 2:18 PM), <http://www.runnersworld.com/newswire/runner-says-4-others-bandited-with-her-number-at-boston>.

173. See 720 ILL. COMP. STAT. 5/16-3(a).

174. See McGillivray, *supra* note 12; see also Gugala, *supra* note 52.

175. Cf. McGillivray, *supra* note 12 (“We understand it is a public roadway and they feel they have the right to be there but based on the facts presented above, I would think that they would reconsider their position and be respectful of the effort and dedication of thousands of people to make the race safe and well-managed for those who have earned the right to be there.”).

but the longstanding history of banditing might confuse the issues too much to apply to “innocuous,” simple bandits.<sup>176</sup>

### iii. Massachusetts Statute

Existing Massachusetts law undoubtedly does not cover theft of services in the race bandit context. Massachusetts law is based on the common law.<sup>177</sup> For a person to be convicted of larceny, “some tangible res must be converted.”<sup>178</sup> The general larceny statute explicitly includes a few nontangible objects—such as “electronically processed or stored data, either tangible or intangible, data while in transit, [or] telecommunications services . . . .”<sup>179</sup> Every other item listed in the definition of “property” is tangible.<sup>180</sup>

Massachusetts courts have clearly settled the issue. “The theft of services or the unauthorized use of property [i]s not ordinarily considered a criminal offense in the absence of special legislation.”<sup>181</sup> There is no legislation that specifically outlaws race banditing, so race banditing is not covered.

Under Massachusetts law, then, stealing a shirt, a banana, a medal, or other race “swag” would be a punishable criminal offense, but banditing a race without taking anything along the course would not constitute theft of services as it might in other states.<sup>182</sup>

## 2. *Trespass Statutes*

One of the most common rationales for race banditing is that the roads are public and that members of the public can use them as they please.<sup>183</sup> At the same time, the possibility looms that the opposite is true. New York, Illinois, and Massachusetts all have trespass statutes that could potentially be used to crack down on race bandits.<sup>184</sup>

### i. New York Statute

New York’s trespass law starts with the general pronouncement that “[a] person is guilty of trespass when he knowingly enters or remains unlawfully in

176. Compare 720 Ill. Comp. Stat. 5/16-3, with N.Y. Penal Law § 165.15 (McKinney 2016).

177. Commonwealth v. Rivers, 583 N.E.2d 867, 868–69 (Mass. App. Ct. 1991); see also MASS. GEN. LAWS ch. 266, § 30 (2014).

178. Commonwealth v. Geane, 744 N.E.2d 665, 670 (Mass. App. Ct. 2001); see also MASS. GEN. LAWS ch. 266, § 30.

179. MASS. GEN. LAWS ch. 266, § 30. While reviewing the manuscript for this Note, Joe observed that computer hacking could be a point of analogy. The language of this statute bolsters that idea. Unfortunately, these ideas are not explored further in this Note, but they could be an interesting area for future research and analysis.

180. Geane, 744 N.E.2d at 670.

181. Rivers, 583 N.E.2d at 869. The court then specifically noted that a broad interpretation of the larceny statute would “ignore the historical development of larceny from its common law origins to its ever-widening statutory base” and would also “defy [the Court’s] traditional policy of construing criminal statutes narrowly against the Commonwealth.” *Id.* (citing Commonwealth v. Green, 556 N.E.2d 387, 389 (1990)).

182. See *id.*; see also MASS. GEN. LAWS ch. 266, § 30.

183. See McGillivray, *supra* note 12; see also Gugala, *supra* note 52.

184. See 720 ILL. COMP. STAT. 5/21-9 (2012); MASS. GEN. LAWS ch. 266, § 120; N.Y. PENAL LAW § 140.05 (McKinney 2016).

or upon premises.”<sup>185</sup> The statute then goes on to define “criminal trespass in the third degree.”<sup>186</sup> Criminal trespass in the third degree applies if a person “knowingly enters or remains unlawfully in a building or upon real property (a) which is fenced or otherwise enclosed in a manner designed to exclude intruders . . . .”<sup>187</sup>

This trespass statute looks promising for application to major road races such as the New York City Marathon. The entire New York City Marathon course is explicitly closed to vehicular traffic.<sup>188</sup> Further, the race’s “spectator guidelines and tips” advise spectators to “[s]tay behind the blue tape or barricades” and to “[s]tick to the streets,” because “[s]pectators aren’t allowed on any of the bridges on the course.”<sup>189</sup>

There are two potential problems with applying this law, however. First, marathons cover 26.2 miles, which might make it difficult for race organizers to “fence [ ] or otherwise enclose [ ]” the course “in a manner designed to exclude intruders.”<sup>190</sup> There are a couple of ways this can be difficult.

The first difficulty may be actually covering (enclosing) the entire course. For example, the New York City Marathon, as noted, utilizes both tape (similar to police tape) and metal barriers (such as those seen at parades and concerts).<sup>191</sup> The bridges on the course, however, are not necessarily marked off, as spectators have already been told not to enter them.<sup>192</sup> It is debatable whether those bridges are inherently enclosed due to their nature as bridges or whether they require additional markings and barriers.

Second, race coordinators need to balance the need for quick access to the course—for example, to deal with medical emergencies<sup>193</sup>—with the need to keep others off the course. This need for quick access, combined with the logistics of “closing” miles upon miles of streets can explain why the course is “closed” only with tape at some points.<sup>194</sup> While the reasons for loosely restraining the course are understandable, there is an argument to be made that putting up tape (just regular tape—not police tape) is not designed to “exclude intruders.”<sup>195</sup> This argument is not necessarily a strong one, but the existing confusion surrounding banditry can exacerbate any points of ambiguity within statutes. Under the statute, it is unclear if the entire course would have to be completely barricaded to be considered sufficiently enclosed.

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185. N.Y. PENAL LAW § 140.05.

186. *Id.* § 140.10.

187. *Id.* “Criminal trespass in the third degree is a class B misdemeanor.” *Id.* Class B misdemeanors can be punished by up to three months in jail. *Id.* § 70.15.

188. *The Course*, N.Y. ROAD RUNNERS, <http://www.tcsnyymarathon.org/race-day/course> (last visited Jan. 15, 2018) [hereinafter *N.Y. Marathon—The Course*].

189. *Where to Watch on the Course*, N.Y. ROAD RUNNERS, <http://www.tcsnyymarathon.org/spectators/spectator-guide> (last visited Jan. 15, 2018) [hereinafter *N.Y. Marathon—Where to Watch*].

190. N.Y. PENAL LAW § 140.10.

191. *See N.Y. Marathon—The Course*, *supra* note 188.

192. *N.Y. Marathon—Where to Watch*, *supra* note 189.

193. *See* Denise M. Watson, *At Races, Medical Personnel Are Ready for Anything*, VIRGINIAN-PILOT (Sept. 1, 2014), [http://pilotonline.com/life/fitness/at-races-medical-personnel-are-ready-for-anything/artcle\\_0bc5f7e6-6135-5193-b100-09007ba6a929.html](http://pilotonline.com/life/fitness/at-races-medical-personnel-are-ready-for-anything/artcle_0bc5f7e6-6135-5193-b100-09007ba6a929.html).

194. *See N.Y. Marathon—Where to Watch*, *supra* note 189.

195. *See* N.Y. PENAL LAW § 140.10 (McKinney 2016).

Despite these potential problems, this law is (in all likelihood) applicable to race bandits. Still, the knowledge problem persists (as it did with the Illinois theft of services law).<sup>196</sup> A large number of people are still unlikely to realize that they are committing an actual crime by banditing.<sup>197</sup> Unlike some of the theft of services statutes,<sup>198</sup> it does not appear that this confusion will lead to the crime's mental-state requirement being left unfulfilled given the generally thin mental-state requirements for trespass and the fact that bandits (to violate this statute) have to cross a barrier.<sup>199</sup>

Still, the purpose to be served and the variety of motivations and methods of banditing must be kept in mind. It is unclear how much this law and its associated punishments could actually help race directors and the flow of races. The race bandit problem is unique in that even well-intentioned "trespassers" exacerbate it. Jail time does not seem appropriate for a friend who is trying to help someone else break through the marathon's notorious "wall" at mile twenty, but if no punishment is enforced, deterrence effects will be low. This statute *might* establish that race banditing is illegal, but that does not mean it is a practical and effective solution to the problem.

## ii. Illinois Statutes

Illinois has a trespass statute specifically for public places of amusement.<sup>200</sup> The statute defines a "public place of amusement" as "a stadium, a theater, or any other facility of any kind, whether licensed or not, where . . . a sporting event, or any other activity takes place for other entertainment."<sup>201</sup> Further, the statute notes that "public places of amusement" are, as the name would indicate, "made available to the public, regardless of whether admission is charged."<sup>202</sup> "These areas may include, but are not limited to: a playing field, an athletic surface, a stage, a locker room, or a dressing room located at the place of amusement."<sup>203</sup>

No case law examining what might qualify as "any other facility of any kind" exists.<sup>204</sup> The definition appears to be written very broadly,<sup>205</sup> but common definitions for the word "facility" generally indicate a requirement for (1) some sort of structure (2) built for some specific purpose.<sup>206</sup> Races the size of the New York City Marathon, the Boston Marathon, and the Chicago marathon typically have established starting areas and spectator areas.<sup>207</sup> As noted previously, race

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196. See discussion *supra* Section III.B.1.ii.

197. See McGillivray, *supra* note 12; see also Gugala, *supra* note 52.

198. See 720 ILL. COMP. STAT. 5/21-9 (2012); N.Y. PENAL LAW § 140.05.

199. See N.Y. PENAL LAW § 140.10(a).

200. 720 ILL. COMP. STAT. 5/21-9.

201. *Id.* at 5/21-9(d).

202. *Id.*

203. *Id.* at 5/21-9(a).

204. *Id.* at 5/21-9(d).

205. *Id.* ("or any other facility of any kind, whether licensed or not") (emphasis added).

206. *Facility*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/facility> (last visited Jan. 15, 2018).

207. See, e.g., Karla Bruning, *On the Run 2013 ING New York City Marathon Recap*, RUN, KARLA, RUN! (June 11, 2013), <http://www.runkarlarun.com/2013/11/06/2013-ing-new-york-city-marathon-recap/> [hereinafter

courses are usually at least partially marked off with barriers or tape,<sup>208</sup> but oftentimes the courses are not *completely* closed off—at least not with specially constructed structures.<sup>209</sup>

While it certainly seems that a race course for a major marathon would fit within the spirit of this statute, the absence of a definitive structure within which the entire event takes place is potentially problematic. Particularly considering the arguments bandit supporters make about how these races take place on public land, there is definitely ambiguity about whether a marathon course could qualify as a “public place of amusement.”<sup>210</sup>

Illinois also has a general trespass statute.<sup>211</sup> The general trespass statute prohibits, “enter[ing] upon the land of another, after receiving, prior to the entry, notice from the owner or occupant that the entry is forbidden.”<sup>212</sup> It also prohibits “remain[ing] upon the land of another, after receiving notice from the owner or occupant to depart.”<sup>213</sup> Further, the statute clarifies that “[a] person has received notice from the owner or occupant . . . if a printed or written notice forbidding such entry has been conspicuously posted or exhibited at the main entrance to the land or the forbidden part thereof.”<sup>214</sup>

This portion of the statute seems like it could cover banditing, even if it does not cover the races as they currently operate. As races are currently organized, there might not be enough notice throughout the entire course, or the existing notice might not be explicit enough. Race directors might have to sacrifice some of the fun atmosphere of race day with explicit notices that nonregistrants are not allowed on the course if they want to be sure to be covered under this statute.

### iii. Massachusetts Statutes

In Massachusetts, a person is guilty of trespassing if he or she “without right enters or remains in or upon . . . improved or enclosed land . . . of another . . . after having been forbidden so to do by the person who has lawful control of that premises, whether directly or by notice posted thereon.”<sup>215</sup> This statute’s application to the race bandit problem is not immediately apparent, given the phrase “of another.”<sup>216</sup> This language seems to relate to exactly the argument race bandits have been making to combat the argument that banditing

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Bruning, *2013 NYC Marathon Recap*] (providing a photograph of the starting line of the 2013 New York City Marathon).

208. See, e.g., *N.Y. Marathon—The Course*, *supra* note 188.

209. See Felix, *The FCRC in the Chicago Marathon*, FORT COLLINS RUNNING CLUB (Oct. 11, 2016), <http://fortcollinsrunningclub.org/2016/10/the-fcrc-in-the-chicago-marathon/> (featuring a photograph of a runner on the 2016 Chicago Marathon course in which there are clearly no barricades or tape fences separating spectators from the course).

210. 720 ILL. COMP. STAT. 5/21-9(d) (2012).

211. *Id.* at 5/21-3.

212. *Id.* at 5/21-3(a)(2).

213. *Id.* at 5/21-3(a)(3).

214. *Id.* at 5/21-3(b).

215. MASS. GEN. LAWS ch. 266, § 120 (2014).

216. *Id.*

is trespassing: People cannot trespass on public property, which does not belong to anyone but the taxpayers.<sup>217</sup>

Massachusetts courts have weighed in on this issue, however, and have clearly settled it. In *Commonwealth v. Egleson*, the defendant was convicted of trespassing for remaining in a city-owned building.<sup>218</sup> The defendant argued that the trespassing statute did not apply to “buildings owned by a municipality.”<sup>219</sup> The Supreme Judicial Court rejected this argument, noting that the same court had decided *Fitzgerald v. Lewis* in 1895, which assumed the opposite was true—that trespass could occur on city-owned property.<sup>220</sup> The court then expressly held “that ‘another’ in c. 266, § 120, includes the State and municipalities.”<sup>221</sup>

The Massachusetts trespass statute does not impose the same requirement as the New York trespass statute that the land be enclosed; trespass can occur on land that is “improved *or* enclosed.”<sup>222</sup> As noted earlier, it might prove difficult for a race director to “enclose” an entire race course, but the race directors would not have to under this definition because the land on which the Boston Marathon takes place (city streets) should easily qualify as “improved land.”<sup>223</sup>

Under the Massachusetts statute, an “innocent” entry can qualify as a trespass.<sup>224</sup> Further, if notice is properly posted in accordance with the law, it does not matter if the potential trespasser actually sees it.<sup>225</sup> All that is required is that the notices be “reasonably distinct and . . . posted in reasonably suitable places, so that by the exercise of due care they would be seen by persons who come upon the land.”<sup>226</sup>

The only concern left is who can post notice. The statute refers to “the person who has lawful control of that premises.”<sup>227</sup> It is not entirely clear, one way or the other, whether a permit to operate a race would give race directors themselves the authority to post the proper notice under the statute. It would seem from the statute and the case law, though, that the city could (under existing law) either (1) post the notice itself or (2) explicitly authorize the race directors to act as “agents of the city” to post notice.<sup>228</sup>

217. See McGillivray, *supra* note 12; see also Gugala, *supra* note 52.

218. 244 N.E.2d 589, 590–91 (Mass. 1969).

219. *Id.* at 591.

220. *Id.*

221. *Id.* at 592.

222. Compare N.Y. PENAL LAW § 140.10 (McKinney 2016), with MASS. GEN. LAWS ch. 266, § 120 (2014) (emphasis added).

223. *Improved Land*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Land that has been developed; esp., land occupied by buildings and structures. The improvements may or may not enhance the value of the land.”).

224. See *Fitzgerald v. Lewis*, 41 N.E. 687, 688 (Mass. 1895) (“There is nothing in the last-named statute which indicates that a belief on the part of the person entering upon land not in his control that the land is his, is to be regarded as a justification.”). While race bandits are not likely to claim land as their own, the arguments that the roads belong to the public mirror this type of “claim of right” argument. By extension, *Fitzgerald* suggests that belief in having the right to use the land is not sufficient to avoid criminal liability for trespass. See *id.*

225. *Id.* (“It is not necessary that the person entering should actually see the notices posted . . .”).

226. *Id.*

227. MASS. GEN. LAWS ch. 266, § 120.

228. See *Fitzgerald*, 41 N.E. at 688 (“The overseers of the poor, if in control of the farm, were in control either as public officers or as agents of the city, and were, we think, persons having lawful control under the laws and the ordinances of the city, for the purpose of excluding trespassers.”).

It seems that, given the proper procedural steps, Massachusetts's general trespassing statute could prove to be a useful tool for race directors. What would constitute appropriate notice on a 26.2-mile course is not entirely clear, but race directors could work with local government officials to determine what would meet the statutory requirements.

#### IV. RECOMMENDATION

Despite the existence of several state laws that could potentially aid race directors in their plight against race bandits, the law could be a much more useful ally if only it were clearer. Although running started out as a small, informal group activity for fun and fitness—which might have lent itself more to self-regulation—it has evolved into a multi-million-dollar, international industry.<sup>229</sup> To leave race organizers and volunteers to defend their craft without the clear support of the law risks preventable complications and instability.

This Recommendation is divided into several sections. First, it directs a recommendation to the states. The recommendation is framed, like this Note, with major marathon states like New York, Illinois, and Massachusetts in mind, but it is designed to be generalizable to any state that wants to encourage and facilitate the organization of these types of large-scale running events. Next, this Recommendation directs suggestions to race directors whose host states have adopted protective statutes to assist them with their bandit problems and contingency recommendations for race directors who do not have the explicit support of the law as a tool.

##### A. *Suggested State Action: Make the Law Clear*

States can easily take action by arming race directors with clear laws that defend their products and services. Of course, a law without an enforcement mechanism would be fruitless, and that enforcement mechanism must not be burdensome if it is going to be effective.<sup>230</sup>

To address these concerns while best alleviating the bandit problem, the punishment for race banditing should be a fine combined with restitution and community service (in the form of volunteering at a future marathon).<sup>231</sup> To be clear, these mechanisms are to be implemented collectively, not alternatively. The resulting three-part punishment should offer maximum deterrence by altering the cost-benefit analysis and simultaneously contradicting the underlying idea that races are not services by ratifying their value (the registration cost).

##### 1. *Rationale for Use of Restitution and Fines and Obstacles to Deterrence*

Having restitution combined with a fine will work to deter runners who did not register purely for the selfish reason that they did not want to pay the steep

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229. See Marcus, *supra* note 31.

230. Cf. Schworm, *supra* note 85 (describing new rules race organizers have implemented and the related enforcement mechanisms).

231. See Sagal, *supra* note 59.

price of a race registration. This approach addresses the circular nature of using a ban to “punish” race bandits (who are already running a race they are not supposed to) by establishing an actual, tangible, and enforceable consequence.<sup>232</sup>

This fine’s deterrence value will likely be lower for those who banded because they could not get a spot in the lottery or because they wanted to help a family member because those bandits’ motives are not tied to finances. Some of those runners might (depending on the amount of the fine) be incentivized to bandit if the fine (combined with the restitutionary payment) is lower than the cost of running for charity.

Similarly, this measure is unlikely to deter runners who are purchasing “black market” bibs—either legitimate bibs or forged bibs, as these runners have already demonstrated a willingness to pay. This “variety” of bandit, however, is usually already violating existing laws because of the active misrepresentations and obvious premeditation.<sup>233</sup> If enacted, this Recommendation would clarify and strengthen laws already prohibiting the practice of racing on an invalid bib.

## 2. *Rationale for Required Community Service and Obstacles to Deterrence*

Combining the fine/restitution with a community service requirement should bolster the deterrent effect by targeting people who underestimate the services offered by race directors. Like the fine/restitution, instituting a community service requirement for bandits would create actual consequences. Further, a community service requirement for race bandits would show them how much work goes into coordinating a race and would hopefully instill a greater respect for race directors.<sup>234</sup>

By adding a second layer of inconvenience to their punishments, this suggested provision should effectively target those who did not register because they did not want to pay and those who do not see the value of an organized race.

As for bandits who would have registered given the opportunity but did not qualify or otherwise have access to a regularly priced registration, adding a community service requirement reduces the likelihood that these runners will bandit a race and take their fine, if caught, as a discounted charity entry.<sup>235</sup> It adds to the cost analysis, and, if the bandit determines that the cost is worth it, at least provides some relief to the race director.

Again, deterrence is likely the most difficult for “buddy” bandits—those who jump onto a portion of the course to help a friend. First, it seems probable

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232. See *supra* Section II.B.2.

233. See discussion *supra* Section II.B.2. Because these bandits, and their enablers, can already be addressed under existing laws or involve at least one party in clear violation of agreed-upon race policies, see, e.g., *N.Y. Marathon—Rules of Competition*, *supra* note 76; *Boston Marathon—FAQs*, *supra* note 76; *Chicago Marathon—Event Rules*, *supra* note 76, this Recommendation will not focus on methods of deterring bandits who utilize unauthorized bibs of any variety.

234. See Sagal, *supra* note 59.

235. Recall the steep entry costs associated with charity registrations. See discussion *supra* Section II.D. This assertion operates under the assumption that the fine would not exceed the cost of a charity entry. If the fine did exceed the cost of a charity entry, then the rationale for adding a community service requirement would be more in line with the financial rationale mentioned in relation to “traditional” bandits.

that this type of bandit would be deterred by a clear pronouncement that banditing, even good-natured banditing, is against the law. This is the group that seemingly has the least reason to realize that what they are doing is illegal, as this is the group that most people treat with understanding and acceptance.<sup>236</sup> A clear pronouncement, then, might be enough. If a clear pronouncement is not enough, a community service obligation is an extra cost to the bandit, which, like with bandits who were willing to pay to register, will hopefully tip the cost-benefit analysis against banditing.

The biggest problem with the community service requirement is the cost of enforcement.<sup>237</sup> While there would certainly be remedies to compel compliance, utilizing those methods would defeat the convenience aspect of this solution. If a clear command from law enforcement is not enough to inspire compliance, then this community service requirement might not be cost effective enough to actually be enforced. Considering how much of the current bandit problem seems to stem from uncertainty regarding the law,<sup>238</sup> it is particularly difficult to anticipate how bandits would react to an express prohibition on their practice and how resistant they would be to their punishments.

### 3. *Method of Enforcement*

Given the commotion on race day, a quick and convenient solution is key. State and local law enforcement officers are already present at these major events.<sup>239</sup> Nothing has indicated that these law enforcement officers would be unwilling to crack down on race bandits. Logistically, though, any enforcement mechanisms adopted could be problematic given the sheer masses of people present on race day.<sup>240</sup> This is why ticketing, as opposed to arresting, bandits is the best approach. Drawing law enforcement officials away from the crowds to try to handle race bandits, some of whom might be banditing with good intentions, is not beneficial to anyone, especially if optimal deterrence can be achieved without jail time.

Because most races have a well-known requirement that race bibs must be worn,<sup>241</sup> anyone running without a bib can be presumed to be a bandit. As a result of this presumption, law enforcement officials that are already present at the race can write tickets for anyone who is not wearing a bib and is running on the course. Those who are properly registered can confirm their registration status after the race to avoid the bandit punishment.

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236. See, e.g., @Sassafras, Comment to *Bandit on the Run*, SALTLY RUNNING (Aug. 27, 2012, 8:56 PM), <https://www.saltyrunning.com/wanted-race-bandits/> (“I don’t think it’s okay, but I do make a distinction between someone who is trying to race (or do race-pace miles) versus someone who is helping their friend through 1-2 miles.”).

237. See discussion *supra* Section II.B.2.

238. See discussion *supra* Section II.B.

239. See Chalufour, *supra* note 116.

240. In addition to the New York City Marathon’s tens of thousands of runners, millions of spectators line the streets on race day. See Franchineau, *supra* note 111.

241. See, e.g., *N.Y. Marathon—Rules of Competition*, *supra* note 76; *Boston Marathon—FAQs*, *supra* note 76; *Chicago Marathon—Event Rules*, *supra* note 76.

Ticketing by law enforcement officers would be a step towards catching bandits all along the course, as law enforcement officials are spread out throughout the course—not just at the start and finish lines. Many race directors can already catch the brazen bandits who attempt to run the entire course from start to finish given the already existing security and check-in processes and the resources available at the start and finish lines.<sup>242</sup> Race courses are most vulnerable throughout the actual course. This highlights the potential problem with ticketing.

While law enforcement officers will be stationed throughout the course, a marathon course covers a lot of ground.<sup>243</sup> Law enforcement officials have to watch for more than just bandits. While a ticket would be easier to process than a full-blown arrest, there is still plenty of paperwork involved in issuing tickets. Further, ticketing could prove problematic if runners are not carrying formal identification to verify that they are giving law enforcement officials accurate information. While it would be a crime to do so, a bandit could easily provide incorrect information to a law enforcement official and slink away. That said, if bandits are generally law-abiding citizens who are just confused on the legality of their actions, which seems plausible considering the history of debate within the running community, then it seems less likely that a bandit would provide false information to law enforcement upon being “pulled over.”

#### *B. Suggested Race Director Action: With Support of Tailored Laws*

Race directors will obviously have a much easier job addressing their bandit problems if they have the law on their side. Still, notice will be key to making the transition as effective as possible.

As previously noted, a race having an anti-banditing policy does not necessarily mean that the policy is being enforced.<sup>244</sup> To supplement changes in state laws, races should continue to publicize their own policies on banditing. While this will not eliminate the problem, taking this measure is likely to alleviate it.<sup>245</sup>

Further, race directors need to follow through on making sure punishments are actually enforced—by working with state and local law enforcement officials and fine-tuning independent enforcement mechanisms. As one bandit put it, “I’ve got nothing to lose. If they pull me they pull me.”<sup>246</sup> This quote highlights the problems with the current system of enforcement: bandits are aware of the consequences, and they choose to accept them. If state laws are changed to back

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242. See, e.g., *Participant Information: Wave and Corral Information*, BOS. ATHLETIC ASS’N, <http://www.baa.org/races/boston-marathon/participant-information/wave-and-corral-information.aspx> (last visited Jan. 15, 2018).

243. Kathy McCabe, *Tight Security Planned for Upcoming Boston Marathon*, BOS. GLOBE (Apr. 6, 2013), <https://www.bostonglobe.com/metro/2016/04/06/tight-security-planned-for-upcoming-boston-marathon/3Cckttutbj9d0Lh3sSZUS6H/story.html>.

244. Schworm, *supra* note 85 (“Yet the Boston Marathon has long handled bandits with a light touch, turning a frowned-upon practice into a back-of-the-pack tradition.”).

245. See *id.* (reporting that several banditing groups altered their plans in response to the BAA’s “crack-down” but also reporting that at least some runners decided to bandit anyway because they had “nothing to lose”).

246. See *id.*

race directors as this Note recommends, race directors need to take every step the new laws require of them to ensure that punishments are enforced.

*C. Suggested Race Director Action: Without Support of Tailored Laws*

Race directors who are not backed by specifically tailored laws can still be proactive about reducing the incidence and effects of race banditing. First, it remains true that race directors should publicize their anti-bandit positions. This runs the risk of influencing runners who would not otherwise bandit to begin banditing, which is the reasoning behind some race directors currently keeping quiet about their bandit problems.<sup>247</sup> This is a particularly strong concern when the race directors do not have a clear legal remedy to utilize against bandits.

As highlighted earlier, however, there are some already existing laws that are fairly strong candidates for combating banditing.<sup>248</sup> Race directors can coordinate with local law enforcement officials during the race's planning stages to develop a strategy for busting bandits under existing law.

Alternatively, race directors can file a few civil suits against bandits to serve as warnings or examples for the rest of the running community. This option is, however, fraught with a variety of risks. First, litigation is expensive. While it is impossible to know what a jury would award in compensation for the harm caused by a race bandit, it seems unlikely that the money would be enough to justify the cost of litigation. This, of course, assumes that the race directors are even able to sustain a cause of action against a race bandit and then win the case on the merits.<sup>249</sup>

Further, this raises the same publicity concerns as merely talking about race banditing. Race directors run the risk of losing any potential lawsuits they bring. Given the intrigue and strong opinions about banditry in the running community, any lawsuit would certainly draw attention. A loss in court could bring new droves of bandits. At the same time, a win will not necessarily stop bandits, who are already difficult to catch and might realize that race directors will not routinely insist on their rights due to the costs of litigation. These issues display the weaknesses of race directors' current tools for combatting banditry.

Despite these problems, exemplary lawsuits might be one of the best options available to race directors. Race directors will have to evaluate the extent of their bandit problems and the potential for those problems to grow if left unaddressed to determine if it is worth pursuing a remedy in court to set an example of how bandits will be dealt with.

Lastly, race directors can follow the New York City Marathon's example by utilizing private bandit catchers, whether paid or volunteer. This solution

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247. See Helliker, *supra* note 8 ("Any public talk of it causes some race directors to cringe, for fear of giving the idea to runners who had never thought of doing it.")

248. See, e.g., 720 ILL. COMP. STAT. 5/21-3 (2012). Further, one weakness of this Note is that it does not explore the laws/ordinances of smaller government divisions. Local governments might also have existing laws that could aid race directors, and working with law enforcement would be a good way to learn of the existence of these potential tools.

249. This Note has examined *criminal* laws. Whether existing civil statutes could provide benefits to race directors is another area for future research.

would strain resources, but it avoids the risk of the adverse reaction a publicity campaign could invite. Employing this type of approach might even draw publicity in a way that increases deterrence by showing that banditing will not be tolerated. Race directors could vary the New York City Marathon's approach by staging bandit catchers at multiple locations along the course to alleviate the effects of bandits prior to the final stretch of the race. This solution could prove problematic if bandits resist leaving the course, as a self-help remedy is unlikely to be well received by local law enforcement if it results in a breach of the peace.<sup>250</sup> Further, this solution is incomplete because—absent any litigation or criminal charges related to being pulled from the course—merely pulling bandits from the course does not provide any real consequences, potentially perpetuating the “what do I have to lose?” bandit attitude.

## V. CONCLUSION

An examination of existing state laws in the host states of three of the country's largest and most popular marathons makes it immediately apparent why the race bandit debate has been so long-running. The different “categories” and degrees of race banditing complicate the quest for a resolution by presenting a variety of methods of committing the same basic act. While some forms and degrees of banditry seem worth tolerating—maybe even encouraging—others are widely viewed with indignation.<sup>251</sup> In the face of this moral uncertainty, the law is of little help, as it is far from clear and certainly not consistent from jurisdiction to jurisdiction. Unfortunately, this Note cannot provide a definitive and satisfying resolution to the race bandit debate.

Ending the long-standing race bandit debate was only the first goal of this Note, though. Past looking at how the law *does* play a role in race banditing, this Note also contemplated how the law *should* play a role. In short, the law should do what this Note cannot—end the debate. State and local laws and law enforcement officials should “arm” race directors with the benefit of clear laws protecting their craft. Much like anyone else who violates the rules of the road, race bandits should receive tickets for infractions. Presently, bandits are stealing the opportunity to participate in sold-out races and enjoying a virtually consequence-free experience. These races bring humanity together, encourage people to better themselves, and bring incredible amounts of revenue to their host cities. The race directors who work tirelessly to organize these events, and the participants who play by the rules when securing entry, deserve to enjoy the products of their money and labor. Bandits have no place on race courses, and the law should work to pull them from the shadows.

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250. Adam B. Badawi, *Self-Help and the Rules of Engagement*, 29 YALE J. ON REG. 14 (2012).

251. See @Ginger, *supra* note 65.

