

The High Cost of Low Sanctions

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THE HIGH COST OF LOW SANCTIONS

Irina D. Manta^{*}

Abstract

Low sanctions can initially appear to be a mitigating factor for unjust or inefficient laws, but this perception is likely wrong. This Article argues that low sanctions may have a pernicious effect on the democratic process and on legislative rule making because, as both public choice theory and historical precedent suggest, the laws accompanying these sanctions are more likely to perpetuate themselves and become part of the unquestioned background fabric of society. This Article focuses on intellectual property law (in particular, copyright) and examines the progression of suboptimal laws through widespread low sanctions that may mostly escape the public eye until sanctions then grow to more significant size. In intellectual property, as elsewhere, low-level sanctions coupled with problematic laws are less likely than their high-sanction counterparts to attract the attention of the media and lead to political action. This Article makes several claims about low sanctions. The first is that low sanctions increase the likelihood that a problematic law will be passed. Second, low sanctions decrease the odds that such a law will be repealed. Third, unjust laws with low sanctions bear the risk that the sanctions will (sometimes gradually) rise, and thus reduce any upsides that accompany the initial low level of the sanctions. By the time this occurs, it may prove an irreversible change because it is more difficult to abolish a law than to prevent its initial passage. The media plays a key role in these processes when it focuses on the identifiable victims of high sanctions and fails to pay attention to the statistical victims of low sanctions. Last, whether sanctions for single offenses are high or low, prosecutors can

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accumulate counts in a way that significantly intimidates alleged offenders with sometimes dramatic consequences. This practice was visible in the recent stories about computer coder and Internet activist Aaron Swartz’s prosecution and suicide. Examples from intellectual property and other legal areas should encourage us to take a closer look at existing or proposed legislation that appears harmless enough at first glance due to its low sanctions or lack of enforcement.

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INTRODUCTION

At first blush, low sanctions can appear to be a mitigating factor for unjust or inefficient laws, but this perception is likely wrong. This Article argues that low sanctions have a pernicious effect on the democratic process and on legislative rule making. Both public choice theory and historical precedent demonstrate that, even when they accompany unjust laws, such sanctions are likely to perpetuate themselves and become part of the unquestioned background fabric of society. In short, there are few popular uprisings and little lobbying activity for change because of inappropriate \$100 fines. While the injustice or disutility that any individual suffers from a low unwarranted sanction is relatively small, the aggregate effect could prove dangerously problematic, to the point of adding up to a greater overall injustice or reduction in utility than a high sanction would induce. Indeed, in some instances we may find ourselves more disturbed by the

knowledge that 1,000 individuals paid an unfair \$200 fine (collectively paying \$200,000) than that one individual paid an undue \$10,000 fine.¹ The \$200 fines, however, make for boring press. Therefore, the media leaves the public unaware of the problem, whereas the larger the unjust sanction is, the likelier the media is to publicize the story and the likelier it is that the public and, as a result, lawmakers will pay attention to it, which is usually the first step toward changing a law.

What compounds the problem of selective popularization of stories in the media is many people's bias toward caring about the fate of specific, concrete human lives (also known as identifiable lives) much more than about the fate of statistical lives.² Hence, even in a world in which everyone accepts a utilitarian framework to view the law, people will show excessive concern for named individual victims of unjust laws over statistical victims. Because of this phenomenon, even if society is theoretically aware that large numbers of people suffer from low sanctions, it is unlikely to develop a strong sense of indignation. Were the media to cover a few of these people's stories, this would only begin to scratch the surface, and most individuals whom the sanctions affect would remain statistical regardless, which would trigger a much reduced level of outrage. Viewed mathematically, a newspaper story that discusses the \$200 fines levied against five individuals will still add up to a total of only \$1,000 brought to the public's attention—a mere pittance in comparison to the single \$10,000 fine. And this calculation makes the presumption that individuals are necessarily able to recognize and understand collective disutility in such a way that it affects their decision-making.

Public choice theory teaches us that political action is unlikely when the costs of the status quo are widely distributed, so the individuals who pay the \$200 fines are unlikely to organize collectively because each has only a small stake in the matter and the transaction costs of organization are high.³ The public at large may not take action because each individual is relatively unafraid to face the risk of paying a \$200 fine at some point in her life even if the probability of doing so is high, and she therefore views the certain cost of political involvement as excessive in comparison with the chance of facing a small unjust fine.⁴

1. This is reminiscent of scammers that are difficult to uncover because they only take a few cents each from large numbers of individuals. I would like to thank Professor Rebecca Tushnet for her comments on this point.

2. See discussion of statistical versus identifiable lives *infra* Section I.C.

3. For a discussion of this type of collective action problem in the political context, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 58 (1965).

4. In this example, one could argue that for some individuals of very low socioeconomic

If neither the individuals who may or do face low sanctions nor those who watch others receive unjust low sanctions will take action (or if that latter group of watchers never exists given the absence of media coverage), then the legislative status quo is likely to persist.

This Article makes several claims about low sanctions. The first is that low sanctions increase the likelihood that an unjust law will be passed. Second, low sanctions decrease the odds that such a law will be repealed. Third, an additional risk of unjust laws with low sanctions is that the sanctions will (sometimes progressively) rise and thus reduce any upsides that accompany the initial low level of the sanctions. By the time this occurs, it may prove an irreversible change because it is more difficult to abolish a law than to prevent its initial passage. Fourth, whether sanctions are high or low, prosecutors can often bring multiple counts against individuals for a single offense, and thus create large threats to those individuals' futures in a manner the statutes' drafters probably failed to consider. This practice was apparent in the prosecution and suicide at age twenty-six of computer coder and Internet activist Aaron Swartz, who was charged with thirteen criminal counts that added up to a theoretical total of thirty-five years in prison for hacking into MIT's network to download and release a large amount of articles from an academic database.⁵ His story also provides an example for my claim that a known individual victim, especially a high-profile one, can prove key to encouraging discourse about legal changes and increase the likelihood of implementing them.

After presenting the general case for the dangers that lie in low sanctions for unjust laws, this Article turns its attention to several diverse areas that exemplify the previously described trends. These areas include criminal laws prohibiting marijuana and sodomy and, most relevantly, intellectual property infringement such as some forms of copyright infringement. The argument focuses especially on the evolution toward higher sanctions that encountered successful resistance only after (1) the courts asked infringers to pay hundreds of thousands of dollars or the government threatened them with extradition, and (2) the threat of prison and other repercussions for actions such as the unauthorized streaming of illegal content led to significant media and individual responses. The examples from copyright law illustrate the cautionary tale that laws with low sanctions provide. They should also encourage individuals to take a closer look at existing and proposed legislation that appears harmless enough at first glance, be it in intellectual property or other areas of law.

status, a \$200 fine is not insignificant. These same individuals, however, are unlikely to wield political power in most instances.

5. See *infra* Section II.C.

This Article begins in Part I with an examination of how the side effects of low sanctions in legislation differ from those of high sanctions, what the consequences of unenforced laws can be, and how the media contributes to individuals' bias toward causes that involve high sanctions. Part II shows how the principles that Part I demonstrates have played out in the area of offenses against intangible property, and particularly in the contexts of copyright statutory sanctions, the downfall of the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA), and the prosecution of Aaron Swartz. Part III is the conclusion.

I. THE EFFECT OF LOW SANCTIONS

This Part illustrates several points about low sanctions through examples from a variety of legal contexts. First, it shows how low sanctions promote the enactment of unjust laws and make it more difficult to repeal them. Second, it demonstrates the dangers of low sanctions observable through the resistance to change of unenforced or other unpopular laws. Third, this Part elucidates how the media's focus on identifiable victims at the expense of statistical ones exacerbates the fact that, to society's detriment, people generally pay insufficient attention to laws that impose low sanctions.

A. *Enacting and Repealing Legislation*

After legislators propose a bill at the federal or state level, passage most basically requires that a majority of the people's representatives vote in favor of it. But what motivates a representative to vote in a particular way? The numerous factors affecting such decisions include the sentiments of the representative's constituents, the level of financial contributions tied to a piece of legislation, the prominence of the representative(s) who propose the legislation, and the media's attitude toward the legislation as well as the level of coverage that it gives to a specific bill. This Article argues that if the goal is to pass a law that a significant portion of the population will view as unjust or inefficient, then lower sanctions will prove strategically useful in many situations. As a corollary, the existence of low sanctions will make it more difficult for opponents to effectuate the repeal of existing laws. This is true both of laws that are considered unjust regardless of the level of sanctions and of those that will only be viewed as unjust if their sanctions rise to a particular level over time.

This Article's use of the terms "high" versus "low" with regard to sanctions is fairly loose, in part because sanctions lie on a spectrum that has neither clear cut-off points nor entirely neat categories. Hence, this Article does not draw an artificial bright line between the two. Generally speaking, civil fines that represent a small percentage of most people's income usually qualify as "low." Large civil fines and many

criminal sanctions fall into the “high” designation. It is also important to recognize the distinction between possible sanctions on the books and sanctions as enforced. The level of either can affect public attitudes about pending or enacted legislation depending on the circumstances.⁶ A number of this Article’s claims should thus be viewed as comparing relatively higher to relatively lower sanctions in their respective effects. The distinctions between the levels include elements such as the type of sanctions (e.g., civil versus criminal), the height of the sanctions in the law as written, the likely height of the sanctions in the law as applied, as well as individuals’ likely subjective experiences of different types and heights of sanctions, among other factors.

This Article does not attempt to provide a comprehensive definition of what makes a law unjust or inefficient. Indeed, for purposes of this Article, it is presumed that such laws are simply those which large numbers of the voting public *perceive* to be more disadvantageous than advantageous. Or, to put it differently, this involves laws that society likely would not have supported at the time of passage if it (1) had been aware of them and (2) understood how they would be implemented.⁷ Therefore, one could say that this Article examines how to best minimize outcomes that are undemocratic over the long run. This Article will not reiterate or reanalyze the existing general arguments about the ability of the public choice framework to explain individual versus collective behavior.⁸ Rather, this Article specifically analyzes how the level of sanctions changes behaviors if the foundations of that model are taken as given, and to what extent the media influences the degree of political involvement with high versus low sanctions.

6. Most of the time, the relevant total punishment (P) consists of the maximum possible sanction for an offense (S) times the odds of enforcement (O) and multiplied by the discount value of the actual punishment that a court imposes (DI), as follows: $P = S \times O \times DI$. It is noteworthy that the same value of P will not necessarily have the same effect on all individuals’ behavior and that, at some times, people care more about the level of sanctions while at other times they care more about the sanctions’ frequency. See, e.g., *infra* notes 130–34 and accompanying text.

7. This is not to say that democratic desire always aligns with what one would define as “just” based on abstract theories of morality, but this Article often uses democratic notions of justice as a proxy to derive general principles. As all proxies, it is imperfect, but it provides a number of advantages such as serving the goals of administrability (the extent to which a law pleases the public is measurable through polls and other tools) and legitimacy (the consent—and assent—of the governed is of recognized importance to the American legal system even among individuals who disagree on the relative merits of various abstract moral theories). See generally Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000) (advocating for the use of norm-shifting “soft nudges” at times precisely to pass legislation that would fail if it contained “hard shoves”).

8. See, e.g., OLSON, *supra* note 3, at 57–60 (providing some of the foundational work in this context).

One situation particularly prone to allowing for the passage of suboptimal laws may occur when a single crisis, or one of a few, gives rise to reactionary legislation. Crises can temporarily crystallize public sentiment in such a way that the majority of society is either not willing or not able to forestall sweeping legal changes despite the fact that these changes, as a whole, go against the overall will of the relevant population at either the national or local level. The immediate aftermath of crises can bring about a potentially dangerous combination of heightened public emotions, the real or perceived need to pass legislation quickly, a willingness to exchange substantive liberties and procedural rights for perceived safety, and political opportunism.⁹ One example where these factors possibly combined was the passage of the USA PATRIOT Act (Patriot Act) after the terrorist attacks of September 11, 2001. Commentators noted a number of years after the attacks that many Americans “have accepted possible privacy intrusions at times of national crisis—but not on an unlimited or permanent basis. As the immediacy of the sense of crisis wanes, interest in privacy rights can reassert itself.”¹⁰ While the likelihood that many (and perhaps most) legislators who voted in favor of the Patriot Act failed to read the text of the bill¹¹ does not, in itself, authoritatively put the law into the suboptimal category, it does cast a shadow on the Act’s legitimacy.¹² This piece of evidence also shows the strength of the effect of crisis on lawmaking, as Congress fears a much greater backlash if it fails to act

9. See Roberta Romano, *Regulating in the Dark* 4–5 (Yale Law & Econ., Research Paper No. 442, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974148 (“For a legislator, ‘doing something’ in response to a crisis is both easier to explain to anxious constituents, and more likely to be positively reported in the media, than inaction, and therefore it would appear to be a clear-cut superior route to reelection, which is the posited focus of legislators.”). But see Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1643 (2009) (providing a more complex picture of crisis legislation that stems from the idea that “[t]he basic dilemma for legislatures is that before a crisis, they lack the motivation and information to provide for it in advance, while after the crisis has occurred, they have no capacity to manage it themselves” (emphasis omitted)); Adrian Vermeule, *Emergency Lawmaking After 9/11 and 7/7*, 75 U. CHI. L. REV. 1155, 1155 (2008) (“[T]he circumstances of emergency lawmaking do not create a systematic tilt towards increasing executive power beyond the point that a rational legislature would specify.”).

10. Gary Langer, *Poll: Support Seen for Patriot Act*, ABC NEWS (June 9, 2005), <http://abcnews.go.com/US/PollVault/story?id=833703#.UNOAom80WS0>. For a discussion and proposals about how to achieve a sensible trade-off between safety and liberty, see generally JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* (2004).

11. JONATHAN SIMON, *GOVERNING THROUGH CRIME* 267 (2007).

12. See Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135, 141, 148 (2011) (arguing that legislators have a duty to read bills before voting to pass them).

rapidly than if it fails to act optimally.¹³

In the face of the great forces present after crises, only a massive and concerted public outcry can stop inefficient laws or even moderately reshape them. Some factors that may determine the level of outcry include the particular area of legislation that a law involves, a bill's level of perceived injustice, the level of media scrutiny, and the amount of resources available to the outraged individuals. For several of these factors, the level of sanctions is likely to have a direct or indirect effect on the degree of outcry that results. As this Article mentions in the Introduction, high sanctions make for better media stories. This is true not only for implemented laws, but also for the stimulation of the public's imagination and emotions about a proposed bill. It is helpful to envision the following matrix that depicts part of the relationship between public sentiment and sanctions. Each row depicts a different level of perceived "pure" injustice, which means injustice as defined before lawmakers apportion any sanctions for an offense.¹⁴ As previously mentioned, this Article mainly uses democratic understandings of justice, and these could entail public perceptions that the crime is unjust in substance or that its enforcement entails

13. For one historical account of the passage of the Patriot Act, see generally Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145 (2004). The actual effects of the Patriot Act remain in controversy, as some scholars argue that its downsides have been exaggerated. See, e.g., Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother that Isn't*, 97 NW. U. L. REV. 607, 608 (2003) (arguing that the Patriot Act did not dramatically expand law enforcement power and made "mostly minor amendments to the electronic surveillance laws"); see also Eric Posner, *There's Still a Need*, N.Y. TIMES (June 7, 2013, 12:03 PM), <http://www.nytimes.com/roomfordebate/2011/09/07/do-we-still-need-the-patriot-act/theres-still-a-need-for-the-patriot-act> ("As we lose some of our security, it is natural and proper for government to increase surveillance and other security measures at the margin, and to some extent the Patriot Act was just making up for lost time."); Nathan A. Sales, *A Vital Weapon*, N.Y. TIMES (Sept. 8, 2011, 11:54 AM), <http://www.nytimes.com/roomfordebate/2011/09/07/do-we-still-need-the-patriot-act/the-patriot-act-is-a-vital-weapon-in-fighting-terrorism> (arguing that the Patriot Act remains a key tool in the fight against terrorism). Meanwhile, other scholars state that "[f]rom the beginning, Democratic and Republican critics of the Patriot Act warned that its extraordinary surveillance powers would be used to investigate political dissent or low-level offenses rather than terrorism. And their fears were soon vindicated." Jeffrey Rosen, *Too Much Power*, N.Y. TIMES (Sept. 8, 2011, 11:54 AM), <http://www.nytimes.com/roomfordebate/2011/09/07/do-we-still-need-the-patriot-act/the-patriot-act-gives-too-much-power-to-law-enforcement>. See generally SUSAN N. HERMAN, *TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY* (2011) (compiling civil liberties violations since the events of September 11, 2001).

14. It is understood that the level of sanctions then also affects the perceived justice of a bill. One of the starkest illustrations of this principle is enshrined in the Eighth Amendment, which prohibits "cruel and unusual punishments" with the understanding that a law that is otherwise legitimate can become illegitimate if it crosses a certain threshold of harshness. See U.S. CONST. amend. VIII.

unacceptable discriminatory aspects.¹⁵ Meanwhile, the columns in the following table delineate the level of sanctions:

	High sanctions	Low sanctions
High injustice	Likely outrage	Possible outrage
Low injustice	Possible outrage	Unlikely outrage

While outrage is still possible in the low-sanctions scenario, it is not as likely as in the high-sanctions scenario. Indeed, there are cases in which the level of sanctions makes the marginal difference as to (1) whether there is outrage or (2) what the level of outrage is. This determines whether groups mobilize on particular issues, how much money individuals and groups spend on issues, and so on.

In some situations, legislators have clear incentives to set sanctions high when they draft and pass bills. For example, they may want to show that they are “tough on crime” and that they take an appropriately stern stance against terrorists.¹⁶ In other cases, however, the sanctions that the problematic laws include are low or even nonexistent. An example might include a law that seeks to expand a specific national or local executive power with murky consequences rather than create a new offense type. These cases are more likely to create an impression that, while a law may seem dubious in other ways, the harm to any of the victims of its inherent injustice is not egregious enough to warrant the requisite investment for an effective public outcry. The government also has other incentives to exercise some degree of moderation in setting punishments, and its rent-seeking nature may lead to the creation of “enforcement and punishment with the goal of appropriating the rents of the criminal market. Deterrence is still relevant in this context, although, paradoxically, it is something that often impedes the government’s objective. When high probabilities of detection and high fines deter offenses too much, revenue from fines goes down.”¹⁷ One consideration in the passage of laws is that the government must expend resources on enforcement, so fines of various forms can prove more

15. *See supra* note 7.

16. Indeed, sometimes legislators or constituents do not perceive a law with low sanctions as important, which could present an impediment to its passage. *See* Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1277–78 (2005) (arguing that the “tough-on-crime” language irrationally tends to lead only to harsher sanctions because any alternative would be perceived as “soft on crime”).

17. Nuno Garoupa & Daniel Klerman, *Optimal Law Enforcement with a Rent-Seeking Government*, 4 AM. L. & ECON. REV. 116, 117 (2002).

lucrative than punishments like incarceration or probation.¹⁸

It bears mention that repealing laws tends to be at least as difficult as passing them.¹⁹ Indeed, it is most likely quite a bit harder to repeal a law than to block its initial passage, in part because the public becomes more indifferent to even constitutional violations once these violations gain status as “the new normal.” One of the reasons it is so difficult to study the number of laws that legislators repeal each year is that a repeal often takes the form of the passage of a different bill. Further, many legislators modify laws rather than eliminate them altogether, so the development of a metric as to what constitutes a genuine repeal is extremely difficult. It is clear, however, that more laws are enacted yearly than are removed.²⁰ This fact could stem from the positive effects that many laws bring—the idea being that there are more laws because they benefit society, which would make repeal undesirable—but this is far from certain.

One extreme example of the difficulties that the repeal process involves is the prohibition of alcohol in the United States. The prohibition wrought disastrous consequences before it could be abolished, such as the rise of the Mafia, widespread corruption, and extensive inequality of enforcement between socioeconomic classes.²¹ Not only that, but the federal government, tasked primarily with the protection of citizens, may have purposefully poisoned alcohol during that period and killed at least 10,000 individuals who imbibed the substance.²² While most examples do not entail such dramatic consequences, on balance it seems reasonable to move forward with the assumption that repeal is generally at least as difficult as initial passage

18. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 179–80 (1968).

19. See, e.g., Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1606 n.146 (2007) (“[F]ederal lawmaking procedures make it difficult not only to adopt, but to repeal federal law. The Founders recognized this danger, but thought that Congress could draft around it if necessary.” (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (comments of James Madison) (Max Farrand ed., 1911))).

20. State legislatures alone passed 29,000 new laws in 2012, the vast majority of which are unlikely to constitute “repeals” of other laws in any meaningful sense. See Yamiche Alcindor, *More than 400 New Laws Take Effect Tuesday*, USA TODAY (Dec. 31, 2012 11:10 AM), <http://www.usatoday.com/story/news/nation/2012/12/29/new-laws-in-2013/1797249/>.

21. See, e.g., THOMAS R. PEGRAM, *BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA, 1800–1933*, at 174–75 (1998) (describing the resulting corruption and violence during the Prohibition era). Meanwhile, the “War on Drugs” of other sorts continues despite what some view as its far-reaching negative effects. For a discussion of marijuana laws in the context of the difficulty of changing relatively unpopular laws, see Section I.B.

22. Deborah Blum, *The Chemist’s War*, SLATE (Feb. 19, 2010, 10:00 AM), http://beta.slate.com/articles/health_and_science/medical_examiner/2010/02/the_chemists_war.html.

and probably more so.²³

The factors that affect outrage during repeal resemble those during initial passage, except that low sanctions may prove even more pernicious in that context. The passage of a new bill yields some natural media attention and public reaction, while a law that sits on the books requires a greater amount of energy for any public reaction to gain momentum. One factor that facilitates repeal of a suboptimal law compared to passage is that there is time for individual stories to develop about the people who experienced negative effects such as unjust sanctions. Nevertheless, these stories are more likely to appear and to make an impression if they involve high sanctions.

B. *The Lowest Sanction of Them All: Nonenforcement?*

This section shows how unenforced laws, which imply sanctions of zero, can still have uniquely pernicious effects.²⁴ It also discusses how both unenforced and generally unpopular laws can persist in the face of large-scale criticism.²⁵ Some of the concerns behind unenforced laws gave rise to the doctrine of desuetude, which allows for the judicial abrogation of laws that have not been enforced for a long time. This doctrine, however, is officially recognized only in West Virginia among American jurisdictions.²⁶ An interesting example in the context of nonenforcement is sodomy laws. While sodomy laws carried high sanctions on the books of many states in the past,²⁷ in practice the average person “guilty” of acts of sodomy rarely suffered any official sanctions even before courts declared the laws unconstitutional.²⁸ This

23. The treatment of marijuana legislation is instructive in this respect. See Section I.B.

24. This section does not imply that it is necessarily optimal to enforce every law at all times. Frequently, there is space for a sensible buffer for minor infractions, and perfect enforcement is prohibitively expensive in any case, among other problems.

25. Some argue that not all laws need to be popular and that, occasionally, legislatures should shape preferences rather than perpetuate them. See, e.g., Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1. While this may prove true under some circumstances, American government is generally understood as one that seeks to respect and enforce the democratic will.

26. Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006). Whether more jurisdictions should recognize desuetude has been a question for lively scholarly debate. See *id.* at 2209–10 nn.4 & 6 (referencing sources arguing both sides of the question).

27. WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003*, at 388–407 app. (2008).

28. In fact, Professor Cass Sunstein believes that the *Lawrence v. Texas* decision that declared sodomy laws unconstitutional “is best understood as responsive to what the Court saw as an emerging national awareness, reflected in a pattern of nonenforcement, that it is illegitimate to punish people because of homosexual conduct—and that the decision therefore embodies a kind of American-style desuetude.” Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 45 (2003). The impact

was likely known at the time when new laws of this sort were passed and increases the understanding that legislators mainly wanted to scare and send a symbolic message to persons engaged in acts of sodomy rather than directly punish them for their behavior. Indeed, Professor William Eskridge explains that “police rarely enforced sodomy laws against anyone before 1880, even when such illegal activities were notorious in the community,”²⁹ and “sodomy laws were understood, in the nineteenth century, primarily as instruments to regulate sexual assault.”³⁰ This pattern changed somewhat for a period of time, however, when states expanded the scope of these laws to include oral sex, and the number of arrests for sodomy greatly increased.³¹ Once sodomy laws were no longer enforced due to changing mores, they still created numerous problems. For one, individuals who were previously prosecuted continued to bear significant stigma as registered sex offenders despite the fact that their consensual homosexual acts took place potentially dozens of years earlier.³² Professor William Stuntz also notes that for crimes of vice, enforcement must necessarily be selective because it is impossible to police all such behavior.³³ As a result, who gets caught is largely a function of where the police decide to investigate.³⁴ While the law itself may not specifically discriminate against particular people, police and prosecutors can choose their targets, which may lead to more unfairness when the choices depend on specific attributes of offenders such as race or class.³⁵ Even after

that *Lawrence* will have on some other generally unenforced criminal laws in the area of sexual relationships, such as those pertaining to adultery, remains uncertain. See, e.g., Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 543 (1995) (describing the status of criminal laws against adultery historically and in modern America); Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837, 845, 851–61 (2006) (discussing the possible effects of *Lawrence* on criminal laws against adultery and stating that they remain on the books in close to half of all American states).

29. ESKRIDGE, *supra* note 27, at 21; see also RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 51 n.9 (1988) (“Sodomy laws are very rarely enforced against consenting adults in clearly private environs.”).

30. ESKRIDGE, *supra* note 27, at 20.

31. *Id.* at 55–56; see also JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 49–51 (1983) (describing arrests and police harassment of homosexual individuals in the 1950s).

32. Robert L. Jacobson, “*Megan’s Laws*” *Reinforcing Old Patterns of Anti-Gay Police Harassment*, 87 GEO. L.J. 2431, 2460 (1999). These examples also show how laws that are generally no longer enforced can still interact with laws that are enforced (such as registration for sex offenders) and have a negative effect on the lives of those who violate the unenforced laws. See *id.*

33. William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1875 (2000).

34. *Id.*

35. See *id.* at 1880.

criminal prosecutions ceased, sodomy laws continued to stigmatize homosexual individuals and kept them worried that any sexual encounter could suddenly result in criminal penalties.³⁶

While some of the concerns that result from nonenforcement are unique to the context of sodomy laws, other issues that relate to nonenforcement arise generally. As Christopher Leslie states: “Unenforced laws need not be repealed, the argument goes, because they are harmless. Unfortunately, this reasoning can lull legislators and the electorate into unwarranted complacency.”³⁷ A person’s knowledge that she is committing an illegal act often produces some degree of fear and anxiety. It potentially exacerbates her relations with law enforcement and leads to avoidance behaviors that could put her at risk of various harms. For example, many people (in fact, quite possibly the majority of Americans)³⁸ would place smoking marijuana in the category of behaviors that should not lead to legal sanctions. Currently, a victim of a violent crime who was smoking marijuana at the time of the incident is probably less likely to contact the police, even if she experiences continued risk of some level of bodily harm and although the odds of a marijuana-related prosecution of such a victim are likely low.³⁹ The risk of underreporting in such situations may be heightened

36. See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 128 (2000) (noting that despite the modern assumption “that the abuses of the 1950s and 1960s are relics, the persecution of gay people continues today”). For a discussion and empirical study related to the social effects of criminal sodomy laws in South Africa, see generally Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643 (2001).

37. Leslie, *supra* note 36, at 103.

38. In a recent poll, 58% of Americans were in favor of the legalization of pot nationwide and 39% were in favor of keeping it illegal. Ariel Edwards-Levy, *Pot Legalization Support at Record High, Poll Finds*, HUFFINGTON POST, (Dec. 4, 2012 5:57 PM), http://www.huffingtonpost.com/2012/12/04/pot-legalization_n_2240257.html. Other figures suggest that nine out of ten adults in the United States believe that people who possess or consume small amounts of marijuana should not go to jail, and 85% of polled voters support therapeutic use of marijuana. See Allen St. Pierre & Paul Armentano, *Americans Agree: Marijuana Shouldn’t Be Criminalized*, CNN (Aug. 12, 2013), <http://www.cnn.com/2013/08/09/opinion/st-pierre-armentano-marijuana/index.html>.

39. This is particularly disconcerting in light of the fact that in 2003, as many as 18% of the urine samples that rape treatment centers across the United States submitted for testing in cases of suspected drug-facilitated rape tested positive for marijuana, which suggests a fairly large involvement for marijuana even for cases that went through some form of reporting. See Erica Weir, *Drug-Facilitated Date Rape*, 165 CAN. MED. ASS’N J. 80, 80 (2001) (providing statistics regarding drug-facilitated rape). Criminals sometimes prey specifically on individuals that they believe are less likely to turn to the police. See, e.g., Jordan Blair Woods, Comment, *Taking the “Hate” out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes*, 56 UCLA L. REV. 489, 490 & n.1 (2008) (discussing robberies targeting homosexual men who sought out sex in public parks).

for populations that already fear the police.⁴⁰

The ban on smoking marijuana represents a good example of how difficult it can be to change relatively unpopular laws, especially federal ones. Forty-two percent of American survey respondents reported that they had tried marijuana at least once, which represents double the percentage of that present in the more permissive Netherlands and may still underestimate the real figure.⁴¹ The explanations for this disparity between countries are manifold, but one factor may be the reactionary posture of individuals who face laws that they consider unjust.⁴² America has had a complex relationship with marijuana. At times, parts of the country encouraged or mandated the production of hemp, but then later initiated state efforts to declare the drug illegal due to its association with socially deviant behaviors and with feared Mexican immigrants. Eventually the 1937 Marihuana Tax Act effectively declared the substance illegal.⁴³ This law included sentences of up to \$2,000 or five years in prison for certain types of marijuana handling.⁴⁴ The sanctions against the use of marijuana rose to a minimum sentence of two to ten years with a fine of up to \$20,000 in the 1950s. While legislators lifted this type of mandatory sentence in the 1970s, the Anti-Drug Abuse Act enacted in the 1980s included other mandatory sections that eventually included a “three strikes and you’re out” provision, requiring life sentences for repeat drug offenders of some types.⁴⁵ The number of arrests for marijuana rose from a rate of about two an hour in 1966 to over eighty an hour in the current era, the equivalent of around

40. A number of studies have examined fear of the police and tried to understand the factors that contribute to this sentiment. See, e.g., Avdi S. Avdija, *The Role of Police Behavior in Predicting Citizens’ Attitudes Toward the Police*, 6 APPLIED PSYCHOL. CRIM. JUST. 76 (2010), available at http://www.apcj.org/documents/6_2_AvdijaArticle.pdf (stating that police behavior is the largest determinant of citizens’ attitudes toward the police and that citizens’ demographic characteristics are the second largest).

41. Louisa Degenhardt et al., *Towards a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PUB. LIBR. SCI. MED. 1053, 1057, 1062 (2008).

42. See Ben Depoorter et al., *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1269–70 (2011) [hereinafter Depoorter et al., *Copyright Backlash*] (mentioning the war on soft drugs, Prohibition laws, and excessive measures against tax evasion as examples of backfiring policies); see also Stuntz, *supra* note 33, at 1872 (explaining that criminalization can achieve the opposite of its intended effect and undermine the norms it seeks to promote).

43. *Marijuana Timeline*, PBS: FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited Feb. 26, 2014).

44. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551, 556.

45. *Marijuana Timeline*, *supra* note 43. For an explanation of how the Anti-Abuse Act works in practice, see Eric E. Sterling, *Drug Laws and Snitching: A Primer*, PBS: FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer> (last visited Feb. 26, 2014).

800,000 arrests a year.⁴⁶ In 2001, marijuana was the primary drug type for which judges sentenced 7,758 out of 23,483 offenders (roughly a third) under the sentencing guidelines for drug trafficking.⁴⁷ The high overall rate of arrests and relatively high rate of sentencing for marijuana offenders is striking when contrasted with public attitudes about marijuana. When asked whether marijuana should be made legal, respondents answered “yes” 12% of the time in 1969 and 50% in 2011, with a progression toward “yes” in a virtually linear fashion during the years in-between.⁴⁸ Strikingly, there were roughly half as many arrests for marijuana offenses in the 1970s as there are now even though (1) twice as many people want to make marijuana legal today,⁴⁹ and (2) there are about as many new users of marijuana every year now as there were in the 1970s.⁵⁰ While there are a number of different factors that may help to explain these statistics, it appears that, overall, marijuana laws have experienced both absolute and relative increases in enforcement of various sorts despite a potential disconnection between these laws and the popular will. Dan Kahan’s explanation for the history of marijuana laws is that initially the public supported their tough regulation because the existing laws were unable to inhibit the drug trade and politicians exploited the increasing fear of drugs.⁵¹ At the same time, given that “individuals’ condemnation preferences are not

46. Paul Armentano, *Incarceration Nation—Marijuana Arrests for Year 2009 Near Record High*, NORML (Sept. 15, 2010), <http://blog.norml.org/2010/09/15/incarceration-nation-marijuana-arrests-for-year-2009-near-record-high>. There are also allegations of vast racial disparities in marijuana-related arrests, with African-Americans being at a fourfold risk of arrest in comparison with Caucasians. See Ian Urbina, *Blacks Are Singled Out for Marijuana Arrests, Federal Data Suggests*, N.Y. TIMES (June 4, 2013), <http://www.nytimes.com/2013/06/04/us/marijuana-arrests-four-times-as-likely-for-blacks.html> (noting that African-Americans “were nearly four times as likely as whites to be arrested on charges of marijuana possession in 2010, even though the two groups used the drug at similar rates”).

47. Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621, 714 n.414 (2004) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, 2001 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 68 tbl.33 (2001)).

48. HINDELANG CRIMINAL JUSTICE RESEARCH CTR., UNIV. AT ALBANY SCH. OF CRIMINAL JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.2.67.2011 (2011), <http://www.albany.edu/sourcebook/pdf/t2672011.pdf>.

49. See *id.*; Armentano, *supra* note 46, tbl.

50. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DEP’T OF HEALTH & HUMAN SERVS., RESULTS FROM 2001 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: VOLUME 1. SUMMARY OF NATIONAL FINDINGS 44, 45 fig.5.1 (2001), available at <http://www.samhsa.gov/data/nhsda/2k1nhsda/PDF/ch5.pdf>. A 2012 study states, however, that about 7.3% of Americans ages twelve or older reported regular marijuana use, which may represent a slight increase from 2007 when it was 5.8% (though some suggest that this may simply result from more willingness to report such use). Jen Christensen, *Regular Marijuana Use on the Rise, Survey Says*, CNN (Sept. 5, 2013), <http://www.cnn.com/2013/09/05/health/marijuana-use-rising>.

51. Kahan, *supra* note 7, at 632.

infinitely adaptable, the steady expansion of criminal punishment at some point risks triggering a backlash. . . . [When] the law began to be applied to white middle-class college students, members of the social mainstream began to object, triggering a self-reinforcing wave of opposition.”⁵²

There are some reasons to believe that changes to marijuana laws may finally be on the horizon. In November 2012, after some other states failed in similar efforts,⁵³ voters in Washington and Colorado legalized the limited use of recreational marijuana for individuals over twenty-one years of age,⁵⁴ which created a conflict with the federal ban on marijuana.⁵⁵ This prompted President Barack Obama to openly state: “[A]s it is, the federal government has a lot to do when it comes to criminal prosecutions. It does not make sense from a prioritization point of view to focus on drug users in a state where the state has said that that’s legal.”⁵⁶ Legalization advocates hope to expand their victories to states such as California and Oregon,⁵⁷ which were among the first to permit medical marijuana.⁵⁸ It appears that even though the federal

52. *Id.*

53. *See, e.g., November 6, 2012, General Election Abstract of Votes*, OR. SEC’Y OF STATE, available at http://www.oregonvotes.gov/doc/history/nov62012/G12_Abstract.pdf (last visited Feb. 26, 2014) (indicating the failure of Measure 80, which would have legalized recreational marijuana use in Oregon); *Official Declaration of the Vote Results on November 2, 2010, State Ballot Measures*, CAL. SEC’Y OF STATE, available at <http://www.sos.ca.gov/elections/sov/2010-general/06-official-declaration.pdf> (last visited Feb. 26, 2014) (discussing the defeat of Measure 19, which would have legalized recreational marijuana use in California).

54. *See, e.g., COLO. CONST.* art. XVIII, § 16 (legalizing marijuana use for persons twenty-one years of age or older in Colorado); *November 06, 2012 General Election Results*, WASH. SEC’Y OF STATE, available at <http://vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana.html> (last updated Nov. 27, 2012) (indicating the passage of Measure 502, which legalized recreational marijuana use in Washington).

55. For a discussion of the federalism issues that the enforcement of drug laws involves, see generally Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783 (2004).

56. Valerie Richardson, *Obama: Marijuana Enforcement Low Priority for Feds*, COLO. OBSERVER (Dec. 14, 2012), <http://thecoloradoobserver.com/2012/12/obama-marijuana-enforcement-low-priority>; see also Kevin Liptak, *Obama Says Marijuana ‘No More Dangerous than Alcohol,’* CNN (Jan. 19, 2014, 11:21 AM), <http://politicalticker.blogs.cnn.com/2014/01/19/obama-says-marijuana-no-more-dangerous-than-alcohol>.

57. *But see* sources cited *supra* note 53.

58. Alex Dobuzinskis, *Pro-Marijuana Campaign Looks Ahead After 2012 Victories*, REUTERS (Dec. 30, 2012), <http://www.reuters.com/article/2012/12/30/us-usa-marijuana-legalization-idUSBRE8BT09X20121230>. For a discussion of the status of medical marijuana, see generally K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 223–26 (2005); Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen’s Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673 (2009); see also David Frum, *Be Afraid of Big Marijuana*, CNN (Sept. 10, 2013), <http://www.cnn.com/2013/09/10/opinion/frum-big-marijuana-cv> (questioning the validity of the diagnoses of a vast percentage of medical marijuana users).

government won its legal disputes on medical marijuana and the Supreme Court agreed that the federal government could make even medicinal use illegal,⁵⁹ the Executive Branch may be losing interest in having fights in states that have declared various forms of marijuana legal.⁶⁰ The Obama Administration recently ordered prosecutors to stop listing drug quantities in indictments for low-level cases to avoid the imposition of statutory mandatory minimums.⁶¹ That being said, the federal government has remained slow in actually taking marijuana-related laws off the books, which perpetuates uncertainty and leaves open the possibility that, at least in some states, offenders could still be placed in prison for long terms.⁶²

Last, it bears emphasis in this Section that for some offenses, while no ultimate punishment (and thus completed enforcement) results, an investigation or arrest—negative events in their own right—may take place.⁶³ Enforced or not, laws can create a class of people who self-

59. *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (upholding the validity of the federal Controlled Substances Act and holding that “Congress’ power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally”).

60. See Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice, to All U.S. Attorneys 3 (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (noting that in jurisdictions that legalize marijuana in some form with a system for effective regulation and enforcement, “state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity”). See generally Zachary Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. (forthcoming Apr. 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359685 (arguing that it is unconstitutional for the Executive Branch to prospectively license prohibited conduct or to cease enforcing, on the basis of policy, federal laws for entire categories of offenders). Some have proposed that the Executive Branch could at least have the Drug Enforcement Agency reclassify marijuana so it would no longer qualify as a Schedule I narcotic. See, e.g., Jacob Sullum, *Obama, Who Evidently Has Not Read the Controlled Substances Act, Denies that He Has the Power to Reclassify Marijuana*, REASON.COM (Jan. 31, 2014, 1:00 PM), <http://reason.com/blog/2014/01/31/obama-who-evidently-has-not-read-the-con>.

61. Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html>. But see Ilya Somin, *Obama Opposed to Changing Legal Status of Marijuana “at this Point,”* VOLOKH CONSPIRACY (Aug. 22, 2013, 10:20 AM), <http://www.volokh.com/2013/08/22/obama-opposed-to-marijuana-legalization-at-this-point> (expressing skepticism as to the steps taken by the Obama Administration with regard to the legalization of marijuana and stating that federal targeting of medical marijuana use has increased in this Administration).

62. This issue continues to develop, and there is at least some interest in changes on both sides of the political aisle. See, e.g., David Weigel, *Forgive and Forget*, SLATE (Feb. 6, 2014), http://www.slate.com/articles/news_and_politics/politics/2014/02/republicans_are_favoring_going_easy_on_drug_offenders_the_young_gop_leaders.html (discussing the split within the Republican Party on drug enforcement).

63. Professor Christopher R. Leslie describes in his work on homosexual sodomy laws

identify as criminals or at least outcasts. This can lead to further marginalization and to the commission of more serious crimes.⁶⁴ This should give observers further pause, and it raises the possibility that punishment through a suboptimal law could increase the number of offenses that society wants to minimize. This effect is unlikely to remain limited to the offenders themselves. It could expand to include non-offending citizens who still lose respect for the legal system due to its unjust treatment of the offenders.

C. *The Media and the Bias Toward Identifiable Victims*

As the Introduction states, the media plays an important role in shaping public perceptions of the law, in part because it has the power to turn a statistical victim into an identifiable one. Society is generally a lot more willing to expend resources to protect identifiable victims than statistical ones.⁶⁵ While scholars have proposed different possible causes for this phenomenon,⁶⁶ one set of experiments found that “the

how, for instance, “in solicitation cases, the arrest itself is often the intended punishment.” Leslie, *supra* note 36, at 128–29.

64. There may be a psychological slippery slope of unethical or illegal behavior. One study found that the simple act of wearing counterfeit sunglasses led individuals to feel less authentic and increased the occurrence of unethical behavior on their part as well as their likelihood to view others as unethical. Francesca Gino et al., *The Counterfeit Self: The Deceptive Costs of Faking It*, 21 PSYCHOL. SCI. 712, 717–18 (2010).

65. See, e.g., GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 21 (1978) (noting that “the United States will spend a million dollars to rescue a single, downed balloonist but will not appropriate a similar sum to provide shore patrols”); see also Deborah A. Small & George Loewenstein, *Helping a Victim or Helping the Victim: Altruism and Identifiability*, 26 J. RISK & UNCERTAINTY 5, 5 (2003) (observing the same phenomenon). Studies on the value of statistical lives (VSL) also affect regulatory decisions, though there is some debate as to the optimal calculation mechanisms to do so. See Arden Rowell, *The Cost of Time: Haphazard Discounting and the Undervaluation of Regulatory Benefits*, 85 NOTRE DAME L. REV. 1505, 1532–33 (2010) (arguing that the current regulatory use of VSL studies undervalues the amount that people are willing to pay to prevent mortality risks). There are some situations, however, in which the identifiable/identified victim is an unsympathetic one, and the public may treat that victim no better or even worse than a statistical victim. See, e.g., Small & Loewenstein, *supra*, at 14 (“Victims are victims because they are not responsible for their situation and thus evoke sympathy and pity. If, instead, a person in need is considered responsible for their adverse situation, then the resulting emotions might instead be anger and disgust.”) (citation omitted).

66. One of these explanations is that specific examples influence individuals because they are much more vivid than statistical data. RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 44–53 (1980). Another is that identifiable victims are ones that a particular set of actions definitely hurts, whereas there is no such guarantee for statistical victims. This phenomenon has been dubbed the “certainty effect.” See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 265 (1979) (defining the certainty effect as the phenomenon by which people “overweight outcomes that are considered certain, relative to outcomes which are merely probable”).

major cause of the identifiable victim effect is the relative size of the reference group compared to the number of people at risk. Identified victims constitute their own reference group, 100% of whom will die if steps are not taken to save them.”⁶⁷ Translated into utilitarian terms, what may happen is that when observers perform a (formal or informal) cost-benefit analysis in situations that involve identifiable victims, they tend to focus on only the costs and benefits that pertain to those specific victims. Professors Arden Rowell and Lesley Wexler explain that some of these trends of discounting victims at the margin may relate to the observed phenomenon of “psychic numbing,” which occurs as early as when observers begin to think about more than a single victim.⁶⁸

There is no reason to believe that this type of thinking restricts itself to life or death situations. Most people likely read crime-related news stories with the implicit question as to whether the outcome was fair. Was the offender caught, and if so, what sentence did he receive? A recent tragic example in this context is the gang rape and beating of an Indian woman on a New Delhi bus and her subsequent death at a Singapore hospital.⁶⁹ The media widely reported on her plight, and the incident led thousands of people to defy a ban on demonstrations and to protest the Indian government’s ineffectiveness in its prevention and punishment of the rising number of rapes.⁷⁰ Victims of rape in India often do not report the crime because they fear repercussions against themselves, so perpetrators frequently go unpunished.⁷¹ While this is a long-standing issue in India, it is the individual story of a woman nicknamed “Damini”—“Lightning” in Hindi—who captured the attention of not only the nation, but also of international audiences.⁷²

67. Karen E. Jenni & George Loewenstein, *Explaining the “Identifiable Victim Effect,”* 14 J. RISK & UNCERTAINTY 235, 253 (1997); accord David Fetherstonhaugh et al., *Insensitivity to the Value of Human Life: A Study of Psychophysical Numbing*, 14 J. RISK & UNCERTAINTY 283, 293–95 (1997) (reporting a study in which a majority of respondents exhibited “psychophysical numbing” and were willing to spend \$10 million to save 100,000 lives out of a pool of 290,000 yet agreed to do so to rescue as few as 9,000 lives out of a pool of 15,000).

68. Arden Rowell & Lesley Wexler, *Valuing Foreign Lives* 13 (Ill. Pub. Law Research Paper No. 13-42, 2013) (quoting Paul Slovic et al., *Psychic Numbing and Mass Atrocity*, in *THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY* (Eldar Shafir ed., 2012)), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240564.

69. CNN Staff, *Doctor: Young Woman Gang-Raped in India Dies*, CNN (Dec. 28, 2012), <http://www.cnn.com/2012/12/28/world/asia/india-rape-victim/index.html>.

70. See Vibhuti Agarwal, *Delhi Protesters Defy Ban, Clash over Rape Laws*, WALL ST. J. (Dec. 23, 2012, 6:05 PM), <http://online.wsj.com/news/articles/SB10001424127887323291704578197350453571588> (“The protests reflect the disenchantment that the country’s young generation feels toward what they see as India’s failure to protect women’s rights.”).

71. *Id.*

72. CNN Staff, *supra* note 69.

Most major U.S. news outlets featured the developments in the story, some even on their front pages.⁷³ Publicized high-level harm against one rape victim thus attracted attention in a way that years of mostly lower-level yet often still very violent crimes against Indian women failed to do.⁷⁴

For most crime cases in the press, there is a perpetrator and a victim, and the empathy tends to focus on the victim. The reaction is somewhat different, however, when society considers the crime “victimless” or where, at least, it is unclear if there was any real harm. In those situations, the offender can take on the role of victim in the public’s mind. The literature on identifiable versus statistical victims may provide a partial explanation of why identifiable and identified high-sanctions stories have a greater impact on public policy than the statistical, albeit at times widespread effect of low sanctions.⁷⁵ The tendency of the press to report on stories that involve high sanctions or high harm both stems from and sharpens the contrast in the level of attention that people pay to different stories, a phenomenon that occurs at the potential expense of maximal utility.

An interesting story in this context is that of speeding in Washington, D.C. Nationwide, 89% of polled American drivers admit that they have driven faster than the posted speed limit, and 40% state that they have exceeded the speed limit by over twenty miles per hour.⁷⁶ As a result, when the level of sanctions for speeding changes, many

73. See, e.g., *India Gang-Rape Victim’s Condition Deteriorates*, USA TODAY (Dec. 28, 2012, 12:03 PM), <http://www.usatoday.com/story/news/world/2012/12/28/indian-rape-victims-deteriorates/1796235> (reporting in detail the condition of “Damini”); Heather Timmons & Sruthi Gottipati, *Woman Dies After a Gang Rape that Galvanized India*, N.Y. TIMES (Dec. 28, 2012), <http://www.nytimes.com/2012/12/29/world/asia/condition-worsens-for-victim-of-gang-rape-in-india.html> (reporting the death of “Damini”). The outrage level increased further when the sole juvenile defendant in the case received a sentence of only three years in prison. See Tanvi Sharma & Mark Magnier, *Teen Sentenced to Three Years in Prison for Fatal Gang Rape in India*, L.A. TIMES (Aug. 31, 2013), <http://www.latimes.com/world/worldnow/la-fg-wn-india-rape-20130831,0,5439549.story>. The four adult offenders received the death penalty. Harmeet Shah Singh et al., *Court Sentences 4 Men to Death in New Delhi Gang Rape Case*, CNN (Sept. 14, 2013), <http://www.cnn.com/2013/09/13/world/asia/india-gang-rape-sentence/index.html>.

74. See CNN Staff, *supra* note 69 (discussing the large number of unpublicized claims). Another case that surfaced around the same time was that of a seventeen-year-old girl who committed suicide after her allegations of gang rape were initially disbelieved. Harmeet Shah Singh & Hilary Whiteman, *Indian Girl Commits Suicide over Alleged Gang Rape*, CNN (Dec. 30, 2012), <http://www.cnn.com/2012/12/28/world/asia/india-rape-suicide/index.html>.

75. See *supra* notes 65–68 and accompanying text.

76. *New Allstate Survey Shows Americans Think They Are Great Drivers—Habits Tell a Different Story*, PR NEWswire (Aug. 2, 2011), <http://www.prnewswire.com/news-releases/new-allstate-survey-shows-americans-think-they-are-great-drivers---habits-tell-a-different-story-126563103.html>.

Americans tend to feel an effect. The District of Columbia recently decided to more than double the number of traffic cameras it plans to employ, a decision that many people met with a groan as it represents an increase in the sanctions that the average speeder can expect to suffer.⁷⁷ Meanwhile, some legislators have proposed reductions in the maximum fines that speeders must pay.⁷⁸ While part of these legislators' rationale has been to reduce the public perception that the traffic cameras are a revenue-generating machine rather than a truly justifiable safety measure,⁷⁹ increases in the frequency of enforcement and decreases in sanctions may also cleverly serve as a tool against social protest of the camera-driven pursuit of speeders.⁸⁰

There is no definitive assessment about the public's opinion on speed limits in various localities, but there is some evidence to suggest that the public would prefer higher rather than lower limits within a reasonable range. One possible indicator is individuals' large-scale willingness to drive faster than the speed limit,⁸¹ although there is a chance that while they trust their own judgment in choosing to speed, they do not trust other people's judgment and thus they do believe in legal punishment for this activity. Another indication is the opposition that people can have when a state proposes decreases in the maximum speed limit, such as in 2008 when Kansas considered decreasing the limit from seventy to sixty-five miles per hour and found that residents

77. Alan Blinder, *D.C. Traffic Cameras to More Than Double Amid Record Revenues*, WASH. EXAMINER (Dec. 25, 2012, 6:40 PM), <http://washingtonexaminer.com/district-traffic-cameras-to-more-than-double-amid-record-revenues/article/2516807>.

78. Martin Austerhuhle, *D.C. Legislators Propose Dropping Traffic Camera Fines to \$50, Directing Half of Revenue to Safety Programs*, DCIST (Oct. 16, 2012, 10:00 AM), http://dcist.com/2012/10/dc_legislators_propose_dropping_tra.php.

79. *See id.* (quoting Councilmember Tommy Wells who stated: "Most people I talk to are convinced that our automated traffic enforcement cameras are mostly about raising revenue"); *DC to Add 134 Traffic Cameras, Will More than Double Traffic-Camera Network*, MY FOXDC.COM (updated Jan. 23, 2013, 3:54 PM), <http://www.myfoxdc.com/story/20427813/dc-to-add-134-traffic-cameras-will-more-than-double-traffic-camera-network> ("[D]etractors say the cameras are driven more by revenue than public safety."); *see also* Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1076 (2001) (discussing, in the context of traffic cameras in Washington, D.C., the lower need for high fines if technology facilitates frequent enforcement). For an overview of national use of speed and red light cameras, *see Speed and Red Light Camera Laws*, GOVERNORS HIGHWAY SAFETY ASS'N (last updated Feb. 2014), http://www.ghsa.org/html/stateinfo/laws/auto_enforce.html.

80. *See generally* EVGENY MOROZOV, *TO SAVE EVERYTHING, CLICK HERE: THE FOLLY OF TECHNOLOGICAL SOLUTIONISM* (2013) (analyzing the drawbacks of attempting to solve all problems, including legal ones, through technology).

81. *See* Margaret Raymond, *Penumbra Crimes*, 39 AM. CRIM. L. REV. 1395, 1401–02 (2002) (discussing how "[m]any drivers, perhaps most drivers, routinely speed" and that "when asked, most drivers do not view driving 10 mph over the speed limit as wrong").

opposed the change by more than a five-to-one margin.⁸² Meanwhile, few complained when Texas recently opened a forty-mile stretch of highway that has the highest maximum speed limit in the nation at eighty-five miles per hour.⁸³

Given these examples of public behavior and perception regarding speed limits, imagine what would have happened if, instead of announcing a doubling in the number of cameras targeting speeding (accompanied by a potential reduction in the size of fines), Washington, D.C. had announced a significant increase in the size of fines. Even if the latter actually meant a smaller overall reduction in the population's available private resources, the odds of public protests would have been heightened. While the Washington, D.C. area newspapers reported on the doubling of the number of traffic cameras,⁸⁴ the tone and amount of coverage was relatively subdued. There is significant reason to suspect that high fines would have attracted more calls of injustice and public opposition. Had police then enforced such sanctions, the media would have soon featured stories about an outrageous fine that a sympathetic character who barely exceeded the speed limit had to pay. It is unlikely that any newspaper would feature a lot of individualized profiles of those who paid \$50 as a result of being caught speeding by the traffic cameras, regardless of the total size of this group of people.⁸⁵

II. THE ROLE OF SANCTIONS AND ENFORCEMENT IN COPYRIGHT AND RELATED LAWS

Sanctions have played a key role in the history of copyright law, and this Part analyzes how copyright law exemplifies the principle that once low sanctions are introduced for an offense, they can grow into large sanctions through a combination of increases in penalties and enforcement itself.⁸⁶ Part II also shows the sanctions/injustice matrix

82. See Scott Rothschild, *Public Opinion Largely Against Lower Speed Limits*, LAWRENCE J.-WORLD (Oct. 6, 2008), http://www2.ljworld.com/news/2008/oct/06/public_opinion_largely_against_lower_speed_limits.

83. Ryan Owens & Gina Sunseri, *Speeding Through Texas: Going 85 MPH on the Nation's Fastest Highway*, ABC NEWS (Oct. 24, 2012), <http://abcnews.go.com/US/speeding-texas-85-mph-highway-opens/story?id=17549839>.

84. See *supra* notes 77–79.

85. Some of the cities that use traffic cameras have been embroiled in court battles, and a court recently deemed Cleveland's program unconstitutional. Alison Grant, *Cleveland Traffic Camera System Unconstitutional, Appellate Court Rules*, PLAIN DEALER (Jan. 23, 2014), http://www.cleveland.com/metro/index.ssf/2014/01/cleveland_traffic_camera_syste.html.

86. Indeed, this principle is not unique to intellectual property. Over the last few decades, for instance, the federal government has repeatedly increased penalties for white-collar crimes, which include mail and wire fraud. See Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1299 (2008).

from Section I.A. in action and demonstrates how recent popular and legislative behavior, in addition to the latest empirical data, suggest that a step beyond a critical threshold level of sanctions can lead to uprisings that have legal impact. Last, it illustrates, through the events that surrounded Aaron Swartz's legal case and his death, how prosecutors can stack up counts and intimidate defendants with sanctions that may exceed the level that legislators and the population at large considered appropriate when the original related bills were passed.

A. *The Evolution of Sanctions in Copyright Law*

Having delineated the history of criminal sanctions in copyright law in past work,⁸⁷ this Article focuses on only a brief sketch here and says a few words about civil sanctions. Traditionally, the distinctions between civil and criminal sanctions are that criminal sanctions generally impose a higher level of social stigma, can lead to the temporary or permanent loss of rights such as voting, affect future employability, erode family structures, and carry more significant psychological harm to offenders.⁸⁸ These effects militate for special attention to new criminal legislation even when it contains low sanctions, but a number of the phenomena that this Article describes apply to civil sanctions as well. Furthermore, the distinction between civil and criminal law is so blurred in a variety of contexts⁸⁹ that the possibility of a focus solely on criminal law is precluded.

Over a hundred years passed between the enactment of America's first copyright legislation and the implementation of criminal sanctions for related offenses.⁹⁰ As time progressed, criminal liability expanded to more offenses and the sanctions grew in size.⁹¹ The expansions and increases were varied; they extended coverage to sound recordings, shifted criminal liability from the realm of misdemeanors to felonies, added infringement against software products, included some types of

87. Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 481–85 (2011).

88. See Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 2–3 (2005) (discussing the social and psychological effects that a felony criminal conviction may have on an individual).

89. See *id.* at 4 n.6 (citing to several sources agreeing with this point).

90. Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835, 840 (1999).

91. See Manta, *supra* note 87, at 481–84 (tracking the history of criminal sanctions for copyright infringement); Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 780–84 (2001) (discussing how the “term, scope, and power of copyright law has steadily increased over the years”).

not-for-profit infringement, provided for stricter application of sentencing guidelines, made copyright counterfeiting a racketeering activity, and increased punishments for repeat copyright infringers, among other changes.⁹² The shift from misdemeanor to felony liability occurred because the motion picture and sound recording industries successfully lobbied Congress and gained support for the arguments that civil lawsuits failed to deter sophisticated infringers and that “the modest penalties prescribed under then-existing law tended to discourage criminal enforcement efforts. U.S. Attorneys confronted with a wide range of possible prosecutions clearly preferred the prospect of almost any felony conviction to a misdemeanor conviction for copyright infringement.”⁹³

For a long time, the trend toward ever-increasing sanctions and enforcement seemed unstoppable. A combination of factors—including the perceived need to stop infringers armed with increasingly powerful technologies and the strong unity among copyright owners who lobbied for intellectual property maximalism—expanded the boundaries of the law one bill at a time.⁹⁴ Why did many individuals fail to stand up to copyright lobbies until fairly recently if some of these expansions may not have served the greater good? It is as true in copyright as in other legal areas that “the rational individual in the large group in a socio-political context will not be willing to make any sacrifices to achieve the objectives he shares with others. There is accordingly no presumption that large groups will organize to act in their common interest.”⁹⁵ In short, it is likely that people did not believe the pain was worth the gain.

One interesting turn of events took place when the Recording Industry Association of America (RIAA) and other organizations started to litigate more intensively against individuals who made illegal copies of songs on the Internet. Unsatisfied by victories against the hosts of peer-to-peer networking and other technologies that facilitate the illegal copying of music files, the RIAA and related entities began pursuing some of the individuals who engaged in copying.⁹⁶ These lawsuits took strategic advantage of the provisions in copyright law that allow courts to award plaintiffs statutory damages in the amount of \$750 to \$150,000

92. See Manta, *supra* note 87, at 481–85.

93. Mary Jane Saunders, *Criminal Copyright Infringement and the Copyright Felony Act*, 71 DENV. U. L. REV. 671, 675 (1994).

94. See Bell, *supra* note 91, at 781–84, 786 (attributing the expansion of copyright law in part to an effective intellectual property lobby).

95. OLSON, *supra* note 3, at 166–67.

96. See, e.g., *infra* notes 102–09 and accompanying text.

per infringed work.⁹⁷ The Copyright Act of 1909 introduced statutory damages to address cases in which damages were difficult to compute,⁹⁸ but the law originally stated that they “shall not be regarded as a penalty.”⁹⁹ When the Copyright Act of 1976 was passed, however, it omitted this language, which led some commentators and at least one court to suggest that statutory sanctions took a more punitive nature at that stage.¹⁰⁰ During the debate over whether to pass the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 and approve its accompanying raise in both minimum and maximum statutory sanctions, Representative Howard Coble spoke openly about how the goal of increasing statutory sanctions was to “deter copyright infringement.”¹⁰¹ It is clear that (1) these sanctions had come a long way from being simply necessary tools in a world where determining damages was so complex that prescribed sums would help, and (2) they now contained a punitive aspect that sought to discourage future wrongdoing.

Plaintiffs like the RIAA and their attorneys saw a unique opportunity in the existence of statutory damages because it is easy to find defendants who have downloaded or shared a significant number of songs and have done so willfully.¹⁰² These do not tend to be cases of

97. 17 U.S.C. § 504(c) (2012). For a discussion of statutory copyright damages, see generally J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004) (discussing the large statutory awards that copyright law permits and how most defendants choose to settle rather than face those large damages); Pamela Samuelson & Ben Sheffner, Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. PA. L. REV. PENNUMBRA 53–63 (2009) (discussing whether excessively large statutory damage awards in copyright cases are constitutional); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009) (discussing the plaintiff’s option to receive an award of statutory damages at any time before the final judgment in copyright cases).

98. Samuelson & Wheatland, *supra* note 97, at 446 n.22.

99. Copyright Act of 1909, 35 Stat. 1075, 1081 (1909) (current version at 17 U.S.C. § 504 (2012)), available at <http://www.copyright.gov/history/1909act.pdf>.

100. Samuelson & Wheatland, *supra* note 97, at 460–61. *But see generally* H. Tomás Gómez-Arostegui, *What History Teaches Us About US Copyright Law and Statutory Damages*, 5 W.I.P.O.J. 76 (2013) (providing historical background on why the statutory sanctions may not have become more punitive in 1976 despite this omission). Note that in some cases, lost profits may potentially exceed statutory damages. *See, e.g.,* *Arista Records LLC v. Usenet.com, Inc.*, No. 07 Civ. 8822(HB), 2010 WL 3629587, at *4–5 (S.D.N.Y. 2010) (awarding \$6,585,000 where the judge estimated actual damages at \$17,560,000).

101. 145 CONG. REC. 30,636, 30,785 (1999).

102. Willful infringement is, as one would intuitively expect, the type accompanied by the highest statutory damages per infringed work. *See* 17 U.S.C. § 504(c)(2) (allowing up to \$150,000 in statutory awards). Some scholars have suggested, however, that the tripartite structure that Congress created through the Copyright Act of 1976, which calibrated sanctions to

accidental infringement of one work against another similar work;¹⁰³ rather, defendants illegally download exact copies because they are free. In one of the best-known cases of this kind, a federal district court ordered a Minnesota woman named Jammie Thomas to pay \$1.92 million in damages for the willful illegal sharing of twenty-four copyrighted songs.¹⁰⁴ After further procedural steps in the litigation, the U.S. Court of Appeals for the Eighth Circuit vacated the decision but did order Thomas to pay \$222,000,¹⁰⁵ which remains an exorbitant sum for an infringement that amounted to “the equivalent of approximately three CDs, costing less than \$54.”¹⁰⁶ Some news outlets began referring to her as the “download martyr” as a result.¹⁰⁷ Another case involved Boston University student Joel Tenenbaum, whom a federal district court sentenced to pay \$675,000 for illegally sharing thirty songs.¹⁰⁸ After a protracted court battle, the U.S. Court of Appeals for the First Circuit held that this sentence should stand and that it does not violate Tenenbaum’s due process rights.¹⁰⁹ Some may question why juries are willing to award such large amounts if these amounts are out of step with societal norms and expectations. Dan Kahan argues on this subject that, up to a certain point, “the desire of most decisionmakers to carry out their legal obligations is likely to dominate their personal commitment to the norm.”¹¹⁰ While this phenomenon applies to both

the level of moral culpability of infringers, “has devolved into a regime in which the innocent infringer provision is essentially never used, and willful infringement is commonly found in cases when infringement should properly be deemed ordinary.” Samuelson & Wheatland, *supra* note 97, at 460.

103. For a discussion of non-willful copyright infringement, see generally Irina D. Manta, *Reasonable Copyright*, 53 B.C. L. REV. 1303, 1331–36 (2012) (analyzing different tests for determining whether a work is “substantially similar” and the problems that arise in applying such a standard).

104. Greg Sandoval, *Jammie Thomas Asks for New Trial*, CNET (July 6, 2009, 3:28 PM), http://news.cnet.com/8301-1023_3-10280531-93.html.

105. Greg Sandoval, *Appeals Court Sides with RIAA, Jammie Thomas Owes \$222,000*, CNET (Sept. 11, 2012, 9:25 AM), [http://news.cnet.com/8301-1023_3-57510453-93/appeals-court-sides-with-riaa-jammie-thomas-owes-\\$222000](http://news.cnet.com/8301-1023_3-57510453-93/appeals-court-sides-with-riaa-jammie-thomas-owes-$222000).

106. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (2008).

107. See, e.g., Nick Pinto, *Jammie Thomas-Rasset: The Download Martyr*, CITY PAGES (Feb. 16, 2011), <http://www.citypages.com/2011-02-16/news/jammie-thomas-rasset-the-download-martyr>.

108. *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85, 89 (D. Mass. 2009), *aff’d in part, vacated in part*, 660 F.3d 487 (1st Cir. 2011).

109. *Sony BMG Music Entm’t v. Tenenbaum*, 719 F.3d 67 (1st Cir. 2013). For a criticism of the decision to impose such high sanctions against Tenenbaum in the name of societal deterrence, see Wendy J. Gordon, *The Lost Logic of Deterrence: When ‘Sending a Message’ to the Masses Outstrips Fairness*, COGNOSCENTI (July 11, 2013), <http://cognoscenti.wbur.org/2013/07/11/joel-tenenbaum-wendy-gordon>.

110. Kahan, *supra* note 7, at 644.

criminal and civil sanctions, it is especially true for civil cases.¹¹¹

While juries were thus unwilling to nullify the laws that imposed statutory sanctions, the public at large did not appreciate the fact that the awards against Thomas and Tenenbaum far exceeded anything that the single mother and the graduate student could afford to pay.¹¹² Further, Tenenbaum launched a public relations campaign to protest the situation and created a website that distributes information about his case, collects money to defray his costs, and gathers the stories of some of the 30,000 individuals who settled their cases with entertainment companies for amounts between \$3,000 and \$12,000.¹¹³ Other cases involved the RIAA suing defendants such as a family that did not own a computer, a teenager,¹¹⁴ a homeless man,¹¹⁵ and a dead grandmother.¹¹⁶

In addition to the cases directly related to file sharing, around the time of the SOPA/PIPA discussion, a high-profile story made the rounds on the Internet about the threatened extradition to the United States of a British college student named Richard O'Dwyer who ran a website that posted links to pirated movies and TV shows.¹¹⁷ O'Dwyer faced ten years in American jail for his activities, though he ultimately

111. *See id.* at 642 (explaining that decision makers “are likely to experience less aversion to enforcing civil remedies, which tend to be milder both in their regulatory incidence and in their social meaning; yet as they become accustomed to enforcing civil sanctions, decisionmakers are likely to become progressively more condemnatory of the underlying conduct and thus more supportive of punitive measures at a later time”). In the realm of criminal sanctions, scholars have discussed how legislators must respect the principle of “fair labeling” in an effective legal system that seeks to ensure compliance across various actors. This means that laws must signal the distinctions between both different types of offenses and their magnitudes. *See, e.g.*, STUART P. GREEN, 13 WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 52–54 (2012) (discussing fair labeling and the law’s obligation to “punish the more blameworthy act more severely and the less blameworthy act less severely”). For another take on the issue of gradations in the law, see generally Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CAL. L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1992034.

112. *See* Depoorter et al., *Copyright Backlash*, *supra* note 42, at 1265 (noting the “public sentiment that the awards are disproportionate and excessive”).

113. JOEL FIGHTS BACK, available at <http://archive.is/2G6Rg> (last visited Feb. 26, 2014). For a brief history of these types of cases, see Depoorter et al., *Copyright Backlash*, *supra* note 42, at 1259–63.

114. Anders Bylund, *RIAA Sues Computer-Less Family, 234 Others, for File Sharing*, ARS TECHNICA (Apr. 24, 2006, 2:47 PM), <http://arstechnica.com/uncategorized/2006/04/6662-2>.

115. Jamie Lendino, *RIAA Sues Homeless Man, After Deciding Dead Grandmother Wasn't Enough*, SOCIAL TIMES (Apr. 21, 2008, 11:24 AM), http://socialtimes.com/riaa-sues-homeless-man-after-deciding-dead-grandmother-wasnt-enough_b1662.

116. Eric Bangerman, *“I Sue Dead People...”*, ARS TECHNICA (Feb. 4, 2004, 4:43 PM), <http://arstechnica.com/uncategorized/2005/02/4587-2>.

117. Peter Walker, *‘Piracy’ Student Loses US Extradition Battle over Copyright Infringement*, GUARDIAN (Jan. 13, 2012, 3:16 PM), <http://www.guardian.co.uk/law/2012/jan/13/piracy-student-loses-us-extradition>.

struck a deal in November 2012 to avoid both extradition and jail time.¹¹⁸ The O'Dwyer saga added to the perception that the media companies have a lot of power and can reach even individuals abroad who may not have violated their own local laws.¹¹⁹

Due to a number of factors including the suffering public relations image of entertainment companies as a result of such lawsuits, which this Article analyzes further in Section II.B, and the large amounts spent on legal fees versus sums recovered,¹²⁰ the record companies decided to mostly cease their legal efforts. At one point, these companies set up a settlement website. The goal of the site was for college students who infringed copyright laws whose universities disclosed their information and for users whose data was revealed by Internet service providers to enter into settlements for a few thousand instead of hundreds of thousands of dollars.¹²¹ At the time of this writing, that website is no longer functional,¹²² and questions remain as to whether the entertainment companies have genuinely forsaken the initiation of new cases.

B. *The Public's Reaction to Copyright Enforcement and to Varying Levels of Sanctions*

Historically, intellectual property laws were not a subject that angered much of the population. There were occasional battles on the subject, but most of them took place on a fairly small scale.¹²³ The subject became truly heated when America turned into a “nation of

118. Dasha Afanasieva, *UK Student Escapes U.S. Extradition in Copyright Case*, REUTERS (Nov. 28, 2012, 11:46 AM), <http://www.reuters.com/article/2012/11/28/net-us-britain-usa-tvshack-idUSBRE8AR0VE20121128>.

119. See Walker, *supra* note 117 (discussing that according to his lawyers, O'Dwyer's website acted as little more than a “[G]oogle-type search engine”); see also Somini Sengupta, *U.S. Pursuing a Middleman in Web Piracy*, N.Y. TIMES (July 13, 2012), <http://www.nytimes.com/2012/07/13/technology/us-pursues-richard-odwyer-as-intermediary-in-online-piracy.html> (noting the entertainment industry's stringent effort to pass SOPA).

120. Ray Beckerman, *Ha Ha Ha Ha Ha. RIAA Paid Its Lawyers More Than \$16,000,000 in 2008 to Recover Only \$391,000!!!*, RECORDING INDUSTRY VS THE PEOPLE (July 13, 2010, 11:26 AM), <http://recordingindustryvspeople.blogspot.com/2010/07/ha-ha-ha-ha-ha-riaa-paid-its-lawyers.html>.

121. See Eliot Van Buskirk, *A Poison Pen from the RIAA*, WIRED (Feb. 28, 2007), <http://archive.wired.com/politics/onlinerights/news/2007/02/72834> (discussing the settlement process).

122. Attempts to access any content at <http://www.p2plawsuits.com> failed (last visited Feb. 26, 2014).

123. For one example of an early intellectual property conflict, see Adam Mossoff, *The Rise and Fall of the First American Patent Thicket: The Sewing Machine War of the 1850s*, 53 ARIZ. L. REV. 165, 165–66 (2011) (analyzing the history of an early patent thicket on sewing machine parts).

constant infringers.”¹²⁴ The RIAA warns that in the decade after peer-to-peer file sharing began with Napster in 1999, music sales in the United States dropped 47% from \$14.6 billion to \$7.7 billion, that from 2004 through 2009, individuals illegally downloaded 30 billion songs on file-sharing networks, and that only 37% of the music Americans acquired in 2009 was legally purchased.¹²⁵ The RIAA also notes that even though peer-to-peer downloading remained flat over the last few years, the use of digital storage lockers to spread illegal music files increased.¹²⁶ Other actors greatly question the economic effects of illegal downloads, and a recent report argues that increases in creation and revenues exist in virtually every sector of the entertainment industry.¹²⁷

With the rise in lawsuits by organizations like the RIAA, every American that engaged in illegal file sharing—at least 27% of all Internet users as of 2005, based on self-reports likely to underestimate the true figure¹²⁸—became a potential target of hefty sanctions. Some studies set the figure of the percentage of the population that purchases, copies, or downloads unauthorized music, TV shows, or movies at 46%, and as high as 70% among 18–29 year olds.¹²⁹ Had the pattern remained one of nonenforcement or of low sanctions, it is very unlikely that the public would have mustered the same level of outrage as it did over Jammie Thomas’s, Joel Tenenbaum’s, and related cases. Observers would have probably both felt less empathy for the defendants of low-

124. John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543.

125. *For Students Doing Reports*, RECORDING INDUS. ASS’N AM., <http://www.riaa.com/faq.php> (last visited Feb. 26, 2014).

126. *Id.* A recent study suggests that the amount of Internet bandwidth used for illegal downloads increased by 160% between 2010 and 2012. Richard Verrier, *Online Piracy of Entertainment Content Keeps Soaring*, L.A. TIMES (Sept. 17, 2013), <http://www.latimes.com/entertainment/envelope/cotown/la-fi-ct-piracy-bandwith-20130917,0,1550997.story>.

127. MICHAEL MASNICK & MICHAEL HO, FLOOR 64, THE SKY IS RISING: A DETAILED LOOK AT THE STATE OF THE ENTERTAINMENT INDUSTRY 4 (2012), available at <http://www.techdirt.com/skyisrising>. Additionally, 2012 apparently set a box-office record for Hollywood movies. Scott Bowles, *A Happy 2012 for Hollywood as It Sets Box-Office Record*, USA TODAY (Dec. 26, 2012, 6:00 PM), <http://www.usatoday.com/story/life/movies/2012/12/25/box-office-christmas-avengers/1790601>.

128. MARY MADDEN & LEE RAINIE, PEW RESEARCH CTR., MUSIC AND VIDEO DOWNLOADING MOVES BEYOND P2P 1 (2005), available at http://www.pewinternet.org/~media/Files/Reports/2005/PIP_Filesharing_March05.pdf.

129. JOE KARAGANIS, AM. ASSEMBLY, COPYRIGHT INFRINGEMENT AND ENFORCEMENT IN THE US, 2 (Nov. 2011), available at <http://piracy.americanassembly.org/wp-content/uploads/2011/11/AA-Research-Note-Infringement-and-Enforcement-November-2011.pdf>.

sanctions cases and been less concerned about the issue from a self-interested point of view. Even though the copyright owners could argue that they were simply exerting their rights, the public viewed such enforcement as an unjust power dynamic and saw the settlements as characteristic of blackmail or harassment that lacked legitimacy, resulted in random enforcement, and entailed disproportionate and excessive awards in court.¹³⁰

But the RIAA had a number of reasons not to want low sanctions, as it believed that these would not provide the same type of large-scale deterrence it envisioned from high sanctions and because recovering low sanctions from each suit would have done even less to offset the significant legal costs that the organization incurred with each suit. While the RIAA was mostly unable to realize its goals, its position at the time held some intuitive appeal to its members in light of the level of financial investment that each lawsuit represented. Ben Depoorter and his coauthors studied the matter and found that high sanctions generated the greatest amount of backlash against copyright owners even if subjects were indeed less likely to download if faced with high sanctions and a low probability of getting caught as opposed to low sanctions and a high probability of getting caught.¹³¹ It appears that study subjects who qualified as frequent downloaders were the most sensitive to high sanctions both in terms of behavioral measures and their expressed intention to *increase* their downloading if given an opportunity to do so in a risk-free manner.¹³² Annemarie Bridy notes that, as Depoorter and his coauthors' study suggests, the fear of lawsuits indeed did not lead to a linear decrease in actual illegal downloading behaviors after an initial dip, the reason being that the threat of litigation "[rang] hollow for the millions of file sharers who continued to share copyrighted material without permission (or reprisal)."¹³³ Part of the problem is the disconnection between norms and the law, and the fact that harsh enforcement tactics can encourage distaste against copyright altogether and prove counterproductive in the quest to decrease infringement.¹³⁴ This issue is likely to be exacerbated

130. Depoorter et al., *Copyright Backlash*, *supra* note 42, at 1265–66.

131. *Id.* at 1281–83.

132. *Id.* One of the difficult choices that the entertainment industry has had to make is whether to pursue only the largest-scale offenders (thus drawing less disapproval but reducing overall deterrence) or a cross section of offenders, which attracts more controversy. *Id.* at 1283–84.

133. Annemarie Bridy, *Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L.J. 565, 604 (2009).

134. See Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127, 1158, 1161 (2005) (warning against the danger of "strong-armed enforcement tactics"); see also Depoorter et al., *Copyright Backlash*, *supra* note

by the fact that 83% of teenagers between thirteen and seventeen years of age believe that there is nothing morally wrong with file sharing.¹³⁵

Generally speaking, whether a person complies with a law is greatly influenced by not only whether the penalty for breaking the law is high or low, but also whether she agrees with the law.¹³⁶ At the same time, a person's perceptions about the threat of sanctions can change depending on whether the person actually engages in the criminal activity and what the consequences of those crimes are.¹³⁷ One study of high school students found that whether he was caught in the past himself and whether his peers were caught for their behavior influenced an individual's beliefs about his future likelihood of being caught for a crime.¹³⁸ Both this study and others like it tend to confirm the deterrence theory of punishment.¹³⁹ The combination of knowledge

42, at 1280 (noting that “[r]aising the level of both severity and certainty of enforcement produced a potentially powerful counterproductive effect”). Years before these particular IP battles, Professor Tom Tyler stated that “reliance upon threats of punishment to enforce intellectual property laws is a strategy that is likely to be ineffective.” Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 234 (1996–97). Other countries have shared some of these experiences, with a backlash finally leading to a legislative change in France that removed the sanction of cut-off Internet access after three instances of copyright infringement. See Stephen Shankland, *French Three-Strikes Law No Longer Suspends Net Access*, CNET (July 10, 2013), http://news.cnet.com/8301-1023_3-57593000-93/french-three-strikes-law-no-longer-suspends-net-access/?part=rss&subj=news&tag=readMore. See generally Rebecca Giblin, *Evaluating Graduated Response*, 37 COLUM. J.L. & ARTS 147 (2014) (criticizing the international lack of success of graduated responses to copyright infringement).

135. Steve Hanway & Linda Lyons, *Teens OK with Letting Music Downloads Play*, GALLUP (Sept. 30, 2003), <http://www.gallup.com/poll/9373/teens-letting-music-downloads-play.aspx>.

136. See Caroline Virginia Anderson, *Are Fines Fine? A Mixed Methods Study of the Effectiveness of and Attitudes to Overdue Fines Among Various Borrower Groups (Age, Gender, Ethnicity, Student Status, Faculty and Degree) of the University of Canterbury Library (June 2008)* (unpublished M.L.I.S. thesis, Victoria University) (on file with Kelburn Library, Victoria University of Wellington), available at <http://library.canterbury.ac.nz/files/news/AndersonCINFO580ResearchReport.pdf> (discussing the extent to which fines deter library book borrowers from keeping books past their due dates). For a discussion of the relationship between criminal law and the average individual's perceptions of justice, see Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1839–40 (2000) (arguing that the credibility of a criminal code depends on the public's perception of its level of justice).

137. Greg Pogarsky et al., *Modeling Change in Perceptions About Sanctions Threats: The Neglected Linkage in Deterrence Theory*, 20 J. QUANTITATIVE CRIMINOLOGY 343, 364–65 (2004).

138. *Id.* at 364–66.

139. See *id.*; accord Ross L. Matsueda et al., *Detering Delinquents: A Rational Choice Model of Theft and Violence*, 71 AM. SOC. REV. 95, 100–03 (2006) (noting that a person generally makes rational choices based on the risk of arrest as derived from prior perceptions

from these studies and from Depoorter and his coauthors' work suggests the following: the decision to infringe could vary depending on the salience of the risk of being caught and experiencing high sanctions, and this salience was increased in the Depoorter study compared to the real world where individuals only occasionally encounter stories of enforcement. Indeed, while cases like Thomas's and Tenenbaum's may be enough to stir outrage, when it comes to individual behavior, these stories could prove insufficient to overcome the fact that most people do not know even one person who has ever been in trouble for unauthorized file sharing. The probability of being caught for file sharing may, for better or for worse, be perceived as so low by many people that they will continue to flaunt the law.

Many people follow laws because "it is the right thing to do."¹⁴⁰ This preexisting belief, plus the costs and benefits of abiding by a specific law, affect the effectiveness of the law and its enforcement. People frequently disobey a law if it conflicts with their beliefs of what is just and legitimate.¹⁴¹ In fact, an excessive sanction can reaffirm a person's belief that the law is unjust or a lawmaker is illegitimate¹⁴² and may encourage a person to engage in the illegal behavior even more because of its conformance with the individual's own normative beliefs.¹⁴³ When the law no longer has a deterrent effect, lawmakers may create or increase sanctions or may give up on the law or its enforcement.¹⁴⁴ This all fits well with what one can observe in the context of unauthorized file sharing: people have some degree of fear of getting caught after they read about high-profile cases like Thomas's or Tenenbaum's, but they then experience a reduction in fear as time goes by and as they focus more on the benefits of file sharing again. This is especially true if they do not have moral qualms about file sharing because they do not see it as hurting anyone and because they may believe that the politicians who passed the laws were in the pockets of the entertainment companies.¹⁴⁵

and new information regarding his own arrest or that of his peers, from subjective expected psychic rewards, and from perceived opportunities).

140. Depoorter et al., *Copyright Backlash*, *supra* note 42, at 1268.

141. *Id.* See generally EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP (2010) (describing the way that violators can improve property and intellectual property laws).

142. Depoorter et al., *Copyright Backlash*, *supra* note 42, at 1269.

143. *Id.* at 1270.

144. Stuntz, *supra* note 33, at 1878.

145. Indeed, empirical evidence shows that in the patent context, the lobbies of the large IT and pharmaceutical companies "have a strong influence on the voting behavior of congresspersons, and they have a real influence on the direction of patent reform." Jay P. Kesan & Andres A. Gallo, *The Political Economy of the Patent System*, 87 N.C. L. REV. 1341, 1385

Matters reached a breaking point between copyright owners and the public when congressional legislators introduced a set of bills whose goal was to further crack down on Internet-related intellectual property offenses. 2011 saw the proposal of the Stop Online Piracy Act (SOPA)¹⁴⁶ in the House of Representatives and of the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PIPA, also known as the PROTECT IP Act)¹⁴⁷ in the Senate, both of which were put on hold indefinitely after wide-spread opposition.¹⁴⁸ These bills included provisions that secured the ability to obtain (1) court orders to prevent advertisers and banks from financially dealing with infringing websites as well as (2) court orders that could force Internet Service Providers to block access to websites or force search engines such as Google and others to block links to websites that infringe copyright laws.¹⁴⁹ SOPA also added criminal sanctions for the illegal streaming of copyrighted works, with penalties rising up to five years' imprisonment.¹⁵⁰ The bills received criticism from numerous quarters, such as from intellectual property scholars who criticized the "potentially disastrous consequences for the stability and security of the Internet's addressing system, for the principle of interconnectivity that has helped drive the Internet's extraordinary growth, and for free expression."¹⁵¹

Scholars were not the only ones up in arms, however. As one commentator put it:

[T]he rebels detonated their nuclear option. Wikipedia and Reddit, along with other popular websites, went black, generating thousands of calls and millions of emails, many from constituents who had likely never heard of the

(2009). It is reasonable to infer that politicians are more likely to succumb to the pressures of lobbyists on issues that are of little interest to most citizens, which is traditionally the case for patents and, until recently, copyright. Meanwhile, citizens may respond by partially ignoring the outcomes of lobbying and violating the resulting laws. *See* Depoorter et al., *Copyright Backlash*, *supra* note 42, at 1270 (explaining that "violating an unjust or immoral law might sometimes increase utility to an individual, perhaps sufficiently so that it outweighs the costs associated with the illegal behavior"). There is also the danger that such unjust laws will create subcultures of offenders whose community bonds are counterproductively strengthened when the judicial system pursues offenders. *Id.* at 1286.

146. H.R. 3261, 112th Cong. (2011).

147. S. 968, 112th Cong. (2011).

148. *See* Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES (Jan. 20, 2012), <http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html>.

149. *See* H.R. 3261 § 102(c)(2)(A)–(D); S. 968, § 3(d)(B)–(D).

150. *See* H.R. 3261 § 201(a); *see also* 18 U.S.C. 2319(b)(1) (2006).

151. Mark Lemley et al., *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34, 34 (2011).

legislation the day before. Online petitions picked up 10,000,000 signatures, members of Congress received 3,000,000 emails and a still-unknown number of phone calls. Thirty-four Senators felt obliged to come out publicly against the legislation. That night, all four Republican candidates condemned the bills during a televised debate.¹⁵²

The demise of SOPA and PIPA certainly did not signify an end to the powerful lobbying forces in intellectual property.¹⁵³ Indeed, the breakdown of the traditional unity among copyright owners accelerated the downfall of the bills,¹⁵⁴ and Silicon Valley provided a real opponent to the entertainment industry for the first time.¹⁵⁵ Regardless, even scholars who view the public choice framework as powerful agree that the role that the technology companies play does not tell the whole story.¹⁵⁶ Rather, “[w]hile there was plenty of traditional interest group politics at work here, the big story . . . was the great awakening of Internet users.”¹⁵⁷

So why did this call to action rise when SOPA/PIPA explicitly did not seek to change the contours of substantive intellectual property law? The harshness of the sanctions involved, set against a backdrop of the content industries’ recent history of causing the imposition of other harsh sanctions against the likes of Thomas and Tenenbaum, partly caused this activism. To the extent that one considers the many successful previous expansions of the scope and duration of copyright to have resulted in suboptimal laws,¹⁵⁸ however, concerns remain that

152. Larry Downes, *Who Really Stopped SOPA, and Why?*, FORBES (Jan. 25, 2012, 1:15 AM), <http://www.forbes.com/sites/larrydownes/2012/01/25/who-really-stopped-sopa-and-why>.

153. For a discussion of the history and role of public choice factors in copyright lawmaking, see generally Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989).

154. See *supra* note 94 and accompanying text.

155. Yochai Benkler, *Seven Lessons from SOPA/PIPA/Megaupload and Four Proposals on Where We Go from Here*, TECHPRESIDENT (Jan. 25, 2012), <https://techpresident.com/news/21680/seven-lessons-sopapipamegaupload-and-four-proposals-where-we-go-here>; see also David Post, *What the Hell Happened? The Campaign Against (and Defeat of) SOPA*, VOLOKH CONSPIRACY (Sept. 17, 2013, 11:21 AM), <http://www.volokh.com/2013/09/17/happened-bring-sopas-downfall> (analyzing the factors that led to the downfall of SOPA).

156. See *supra* note 155; see also Yafit Lev-Aretz, *Copyright Lawmaking and the Public Choice: From Legislative Battles to Private Ordering 1–2* (Aug. 19, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2131865.

157. Downes, *supra* note 152; see also Benkler, *supra* note 155; Lev-Aretz, *supra* note 156. One news article mused that the SOPA/PIPA incident “quite possibly ushered in a new age of Web activism.” Doug Gross, *The Top 10 Tech ‘Fails’ of 2012*, CNN (Jan. 4, 2013, 5:21 PM), <http://www.cnn.com/2012/12/28/tech/web/tech-fails-2012/index.html>.

158. There have been critical empirical examinations, for instance, of whether increases in scope or sanctions truly lead to increased creativity as the traditional copyright incentives story

the popular uprising during the SOPA/PIPA battle may not fully translate to future intellectual property contexts. Individuals' willingness and ability to expend emotions and resources on political issues is limited. Hence, even with the many additional resources available for political activism, such as social networking,¹⁵⁹ the next bill that proposes an extension of copyright terms or proposes new sanctions for existing violations may not lead to the same kind of mobilization. The lower the sanctions that bills carry, the more likely they are to slip through the cracks.

Relatedly, the fact of the matter is that individuals' views on what is ethical in the punishment of copyright offenses is directly tied to the level of sanctions imposed. While, in a survey on Internet use and copyright infringement, "[v]ery few think it is reasonable to upload copies to websites where anyone can download them (16%), post links to illegal copies on websites such as Facebook (8%) or sell illegal copies (6%),"¹⁶⁰ only 52% believed that individuals should ever face punishment for downloading illegal songs or movies on websites or through file-sharing services.¹⁶¹ Among the people that supported penalties, the vast majority supported warnings and fines, but a bit fewer than half wanted limitations on speed or functionality of Internet service and just about a quarter supported disconnecting offending users altogether; only 20% supported jail time.¹⁶² Of the 16% of the overall surveyed population that supported disconnection, over half favored periods that were either less than a month (25%) or less than a year (34%).¹⁶³ Of the people who approved of fines, 75% limited that support to amounts under \$100, which is significantly below the current statutory penalties for copyright infringement.¹⁶⁴

Not only were individual opinions thus calibrated to the specific level of punishment, but they were also strongly swayed depending on

argues. *See, e.g.,* Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1672–73, 1704 (2009) (noting that laws increasing criminal penalties had an effect on creativity, as measured by the number of copyright registrations in a given time period, only in six out of twenty-three instances, four of which were increases and two decreases); MASNICK & HO, *supra* note 127, at 2, 4 (showing that the entertainment industry made great economic strides despite the existence of large-scale copyright infringement).

159. *See* Lev-Aretz, *supra* note 156, at 4–5.

160. KARAGANIS, *supra* note 129, at 5.

161. *Id.* at 6.

162. *Id.* Of course, this meant that—viewing the entire surveyed group rather than just those in favor of penalties—only half support warnings and fines of any sort, 28% support limits on Internet use, and only 16% approve of disconnection from the Internet for individuals (and over half of this 16% would refuse to support disconnection if it extended to households). *Id.*

163. *Id.*

164. *Id.*

how the survey questions were phrased,¹⁶⁵ particularly when the questions gave the sense that blocking infringement was “easy” as opposed to “messy.”¹⁶⁶ This likely suggests that the particular portrayal of copyright issues in the media may have an especially significant influence on individuals’ perceptions and willingness to take political action. The landscape of Americans’ opinions may have compounded the effect of the media to reinforce people’s biases toward identifiable victims and away from statistical ones in the copyright context. The high sanctions against Thomas, Tenenbaum, and others, and the stories of extradition tied to copyright infringement, as pitted against an entertainment industry that may or may not suffer real economic harm depending on whose empirical data one believes, created identifiable victims out of the copyright infringers. The introduction of SOPA/PIPA unleashed the public’s wrath because it combined high sanctions with a degree of individual fear of the possible consequences. If statutory damages could affect a mom in Minnesota or a student in Massachusetts, might SOPA/PIPA’s sanctions not also have an impact on any other average individual?¹⁶⁷

In a sense, one could view the SOPA/PIPA battle as a public success and as evidence that perhaps low sanctions are not so disastrous if a backlash can halt their increase. The story of low sanctions is, however, more complicated than that. First, we see in many areas, such as the example of drug laws that this Article discusses above,¹⁶⁸ that the public can become unwilling or unable to stop increases in sanctions even if, by most accounts, these implicate more harm than good and even if the public would not have deemed the increased sanctions acceptable upon passage of the initial bills.¹⁶⁹ Second, focusing on copyright alone,

165. Naturally, the ability of survey questions to influence responses is a well-known phenomenon not limited to this context.

166. KARAGANIS, *supra* note 129, at 10.

167. One could argue that this may show only that while the public finds the making of unauthorized copies on the Internet unjust and favors low sanctions, it does not support high sanctions. Even if that is the case, the question becomes whether the public would have agreed to laws against such copying if it had known how large the sanctions would later grow and how difficult it would be to stop that growth. It is far from certain that society would have entered this bargain.

168. *See supra* note 38 and accompanying text.

169. That being said, there are situations in which a society and its legislature see the need to raise sanctions if the initial low ones are not as effective as legislators initially believed. My statement refers specifically to situations in which the public, even with the benefit of hindsight about the effect of the low sanctions, would not agree to go back and pass the bill with higher sanctions if it could. There is no fail-proof method to ascertain whether an increase in sanctions stems from legitimate policy reasons versus phenomena such as lobbying. Some of the ways to protect against the latter are initial skepticism toward any increases, thorough discussion in the media and other public forums, and inquiries into the extent to which the general public or, in

while the SOPA/PIPA legislation was stopped, the sanctions previously imposed against Thomas, Tenenbaum, and others remain. Also, the high statutory sanctions of copyright stay on the books without clear empirical backing and with easily observable potential harms. The SOPA/PIPA battle harnessed highly specific forces whose presence cannot be assumed in future copyright contexts that have a bit less pervasive yet still important repercussions.

Indeed, some do not view it as a coincidence that the federal government cracked down on the file-sharing site Megaupload just one day after the most significant demonstrations against SOPA, especially given that there is

a large number of functionaries throughout the federal government, most importantly the Justice Department's Computer Crime and Intellectual Property Section, a White House IP czar, and an IPR Center housed in the Department of Homeland Security, whose professional success, irrespective of the policy position of any given administration, [is] measured by (a) how threatening we think Piracy is, and (b) how many large prosecutions they are able to bring.¹⁷⁰

In January 2012, the Department of Justice (DOJ) both shut down and seized Megaupload assets in Hong Kong and New Zealand and caused some of the individuals who ran the site to spend a month in prison abroad and live under threat of extradition to the United States, all under a theory of contributory copyright infringement that many commentators malign.¹⁷¹ Not only did the Megaupload enforcement occur right after the SOPA protests, but questions also exist about the relationship between Aaron Swartz's activism against SOPA and the DOJ's decision to prosecute him harshly.¹⁷²

some situations, experts agree with the proposed measures. All of this militates for a significant period of time that should normally pass between when a sponsor first introduces a bill that involves a sanction increase and when it receives a vote, given that the dangers of crisis legislation could overshadow careful consideration and lead to temporary outliers in what constitutes average public opinion. For the general hazards of crisis legislation, see Romano, *supra* note 9.

170. Benkler, *supra* note 155.

171. *See id.*; Toby Manhire, *Kim Dotcom: The Internet Cult Hero Spoiling for a Fight with US Authorities*, GUARDIAN (Jan. 18, 2013), <http://www.guardian.co.uk/technology/2013/jan/18/kim-dotcom-fight-internet-freedom>; *see also* Eric Goldman, *Comments on the Megaupload Prosecution (a Long-Delayed Linkwrap)*, TECH. & MARKETING L. BLOG (Apr. 30, 2012, 9:30 AM), <http://blog.ericgoldman.org/archives/2012/04/megaupload.htm> (doubting that the U.S. government has a case at all due to repeated legal mistakes).

172. *See infra* Section II.C.

C. *The Prosecution and Death of Aaron Swartz*

No account of the role of sanctions in the world of intangible property would be complete without an analysis of the high-profile case of computer coder and Internet activist Aaron Swartz.¹⁷³ A technology prodigy, Swartz became involved in the development of the RSS standard in his teens and later contributed to the formation of Reddit, the Creative Commons project, and OpenLibrary.org.¹⁷⁴ It appears largely undisputed that in 2011, Swartz sought to provide the public with free access to subscription-only articles in the academic database JSTOR.¹⁷⁵ He broke into computer networks at M.I.T. by leaving a laptop hooked up to the system in a utility closet, signing in under a false account and downloading 4.8 million documents that he planned to release before law enforcement officials thwarted him.¹⁷⁶ Prosecutors initially charged him with four, but later with a total of thirteen criminal counts,¹⁷⁷ and according to the U.S. Attorney's Office, Aaron Swartz theoretically "face[d] up to 35 years in prison, to be followed by three years of supervised release, restitution, forfeiture and a fine of up to \$1 million."¹⁷⁸ According to statements that prosecutors allegedly made to his defense attorneys, Swartz's actual prison sentence was likely to be in the ballpark of seven years if a court convicted him.¹⁷⁹ The charges

173. By way of clarification, this Article's decision to include a section on Aaron Swartz should not be construed as a sudden endorsement of an excessive focus on individual instead of statistical victims in the making of public policy. Rather, this Article uses his tale to exemplify the power of individual stories as a historical matter and it expresses skepticism as to how society ignores the potential plight of lesser-known people in similar prosecutions. *See infra* note 187 and accompanying text.

174. Kevin Poulsen, *Aaron Swartz, Coder and Activist, Dead at 26*, WIRED (Jan. 12, 2013, 4:01 PM), <http://www.wired.com/threatlevel/2013/01/aaron-swartz>.

175. Of the 4.8 million documents, 1.7 million normally required payment to be accessed. Charles Arthur, *Reddit Co-Founder Accused of Stealing 4.8m JSTOR Documents from MIT*, GUARDIAN (July 19, 2011, 1:56 PM), <http://www.guardian.co.uk/technology/2011/jul/19/reddit-founder-swartz-jstor-accused>.

176. John Schwartz, *Internet Activist, a Creator of RSS, Is Dead at 26, Apparently a Suicide*, N.Y. TIMES (Jan. 12, 2013), <http://www.nytimes.com/2013/01/13/technology/aaron-swartz-internet-activist-dies-at-26.html>.

177. Tim Cushing, *US Government Ups Felony Count in JSTOR/Aaron Swartz Case from Four to Thirteen*, TECHDIRT (Sept. 18, 2012, 7:24 AM), <https://www.techdirt.com/articles/20120917/17393320412/us-government-ups-felony-count-jstoraaron-swartz-case-four-to-thirteen.shtml>.

178. *Alleged Hacker Charged with Stealing over Four Million Documents from MIT Network*, U.S. DEP'T JUST. (July 19, 2011), <http://www.justice.gov/usao/ma/news/2011/July/SwartzAaronPR.html>. Some others place that figure as high as fifty or more years in prison and \$4 million in fines. Cushing, *supra* note 177.

179. Orin Kerr, *The Criminal Charges Against Aaron Swartz (Part 2: Prosecutorial Discretion)*, VOLOKH CONSPIRACY (Jan. 16, 2013, 11:34 PM) [hereinafter Kerr, *Prosecutorial Discretion*], <http://www.volokh.com/2013/01/16/the-criminal-charges-against-aaron-swartz->

consisted of two counts of Wire Fraud, five counts of Computer Fraud, five counts of Unlawfully Obtaining Information from a Protected Computer, and one count of Recklessly Damaging a Protected Computer.¹⁸⁰ On January 11, 2013, Aaron Swartz hanged himself in his Brooklyn apartment, and his family and partner believe that the prosecution and threat of a long prison term and large fines contributed to his decision to end his life; they called his death “the product of a criminal justice system rife with intimidation and prosecutorial overreach.”¹⁸¹

Some commentators do not believe that the charges against Aaron Swartz stood on firm legal ground,¹⁸² but others, including cybercrime expert Orin Kerr, disagree.¹⁸³ Regardless of this disputed issue, however, a few points of consensus emerge among a majority of commentators. One is that whether a law is just or unjust and imposes high or low sanctions, prosecutors possess enormous power when they decide not only whether to bring a case in the first place but also how hard to push it.¹⁸⁴ In the aftermath of Swartz’s death, some commentators stated that criminal law has evolved such that many

part-2-prosecutorial-discretion. It is worth noting that for some types of defendants, “collateral effects [of criminal law] are quite steep, attach very early, and are often irrevocable.” Baer, *supra* note 86, at 1312.

180. Cushing, *supra* note 177.

181. Family and Partner of Aaron Swartz, *Official Statement*, SOUP (Jan. 12, 2013), <http://soupsoup.tumblr.com/post/40373383323/official-statement-from-the-family-and-partner-of-aaron-swartzs-father-says-reddit-co-founder-was-killed-by-the-government>, *Aaron Swartz’s Father Says Reddit Co-Founder Was ‘Killed by the Government,’* HUFFINGTON POST (Jan. 15, 2013, 7:18 PM), http://www.huffingtonpost.com/2013/01/15/aaron-swartz-father-says-killed-by-government_n_2482646.html. The reasons for any suicide are certainly complex, and there is no doubt that Swartz had preexisting struggles with depression. See Laurie Segall, *Activist Aaron Swartz’s Suicide Sparks Talk About Depression*, CNRMONEY (Jan. 14, 2013, 7:41 PM), <http://money.cnn.com/2013/01/14/technology/swartz-suicide-depression/index.html>.

182. See Max Kennerly, *Examining the Outrageous Aaron Swartz Indictment for Computer Fraud*, LITIG. & TRIAL BLOG (July 19, 2011), <http://www.litigationandtrial.com/2011/07/articles/series/special-comment/aaron-swartz-computer-fraud-indictment> (arguing that the charges against Aaron Swartz rest on a shaky legal basis); Mike Masnick, *The Lack of a Legal or Moral Basis for the Aaron Swartz Indictment Is Quite Troubling*, TECHDIRT (July 20, 2011, 12:06 PM), <http://www.techdirt.com/articles/20110720/00581915173/lack-legal-moral-basis-aaron-swartz-indictment-is-quite-troubling.shtml> (responding to Kennerly’s analysis regarding the charges against Aaron Swartz).

183. Orin Kerr, *The Criminal Charges Against Aaron Swartz (Part 1: The Law)*, VOLOKH CONSPIRACY (Jan. 14, 2013, 2:50 AM), <http://www.volokh.com/2013/01/14/aaron-swartz-charges>. For a partial critique of Professor Kerr’s take, see James Boyle, *The Prosecution of Aaron Swartz: A Reply to Orin Kerr*, HUFFINGTON POST (Jan. 18, 2013, 10:11 PM), http://www.huffingtonpost.com/james-boyle/prosecution-aaron-swartz_b_2508242.html.

184. See, e.g., Carrie Johnson, *Did Prosecutors Go Too Far in Swartz’s Case?*, NPR (Jan. 15, 2013, 4:45 PM), <http://www.npr.org/2013/01/15/169421636/did-prosecutors-go-too-far-in-swartz-case>.

respectable people today likely violate it.¹⁸⁵ Internet scholar James Grimmelmann believes that he himself probably violated some of the same laws as Swartz in the past when Grimmelmann engaged in a mass download of his own old blog posts.¹⁸⁶ While Orin Kerr thinks that the charges against Swartz conformed to the law, he poignantly writes:

[T]he broader point is that if we think aggressive prosecution tactics such as this are improper, we shouldn't be focused just on the Aaron Swartz case. Rather, we should be shining a light on the federal criminal system in its entirety. These sorts of tactics have been going on for years, without many people paying attention. If we don't want a world in which prosecutors have these powers, we shouldn't just object when the defendant in the crosshairs is a genius who went to Stanford, hangs out with Larry Lessig, and is represented by the extremely expensive lawyers at Kecker & Van Nest. We should object just as much—or even more—when the defendant is poor, unknown, and unconnected to the powerful. To do otherwise sends an extremely troubling message to prosecutors that they need to be extra sensitive when considering charges against defendants with connections. We have too much of a two-tiered justice system already, I think. So blame the system and aim to reform the system; don't think that this was just two or three prosecutors that were doing something unusual. It wasn't.¹⁸⁷

185. See, e.g., Tim Wu, *How the Legal System Failed Aaron Swartz—and Us*, NEW YORKER (Jan. 14, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/01/everyone-interesting-is-a-felon.html>.

186. James Grimmelmann, *My Career as a Bulk Downloader*, LABORATORIUM (Jan. 16, 2013, 12:43 PM), http://laboratorium.net/archive/2013/01/16/my_career_as_a_bulk_downloader.

187. Kerr, *Prosecutorial Discretion*, *supra* note 179; see also Ian Bassin, *In Remembering Aaron Swartz, Let's Not Forget Jamel Dossie*, MORUM (Jan. 18, 2013, 12:01 PM), <http://themorum.blogspot.com/2013/01/in-remembering-aaron-swartz-lets-not.html> (“Often it takes a rare injustice perpetrated against a privileged young person for our society to recognize the common injustices we visit every day upon less-privileged minorities.”); James Grimmelmann, Comment to *My Career as a Bulk Downloader*, LABORATORIUM (Jan. 16, 2013, 9:48 PM), http://laboratorium.net/archive/2013/01/16/my_career_as_a_bulk_downloader#comment-70137 (“The treatment he received—using an insanely disproportionate sentence as a threat to pressure him into accepting a sentence that is ‘only’ seriously disproportionate—is a standard part of the prosecutorial toolkit.”). For proposals to rein in prosecutorial discretion in the aftermath of Aaron Swartz’s and others’ legal cases, see Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime* (Legal Studies Research Paper Series, Paper No. 206, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=203713.

One of Kerr's proposals to improve the situation in the area of computer-related offenses is to amend the Computer Fraud and Abuse Act (CFAA) to make it more difficult for an instance of suspected unauthorized access to trigger felony liability.¹⁸⁸ He has proposed model language for such a statute,¹⁸⁹ and the Electronic Freedom Foundation (EFF) and others have suggested possible amendments to that language.¹⁹⁰ The time may indeed be ripe for a reexamination of the CFAA, although some believe that society may experience a counterproductive backlash against such efforts after the hacker group Anonymous attacked the DOJ's website and threatened to release confidential information about Supreme Court Justices unless Congress changes the way it handles sentencing and computer crime.¹⁹¹

Whether legislative alternatives succeed or not, Swartz's story and its sad ending provide further illustration for this Article's claim that sometimes it takes the threat of high sanctions—in this case in the form of potential punishments for accumulated counts against a fairly well-known individual who killed himself—to get the public's attention and put heft behind calls for legislative change.¹⁹² Aaron Swartz's death

188. Kerr, *Prosecutorial Discretion*, *supra* note 179.

189. Orin Kerr, *Proposed Amendments to 18 U.S.C. 1030*, VOLOKH CONSPIRACY (Jan. 20, 2013, 1:10 PM), <http://www.volokh.com/2013/01/20/proposed-amendments-to-18-u-s-c-1030>. For a critique of the proposal, see Stewart Baker, *A Dubious Proposal for Amending the Computer Fraud and Abuse Act*, VOLOKH CONSPIRACY (Jan. 28, 2013, 7:07 PM), <http://www.volokh.com/2013/01/28/a-dubious-proposal-for-amending-the-computer-fraud-and-abuse-act>.

190. See Orin Kerr, *Aaron's Law, Drafting the Best Limits of the CFAA, and a Reader Poll on a Few Examples*, VOLOKH CONSPIRACY (Jan. 27, 2013, 11:46 PM), <http://www.volokh.com/2013/01/27/aarons-law-drafting-the-best-limits-of-the-cfaa-and-a-reader-poll-on-a-few-examples-part-i> (summarizing suggested changes and clarifying the effect of the law in practice).

191. Stewart Baker, *Anonymous Attacks Again*, VOLOKH CONSPIRACY (Jan. 26, 2013, 1:39 PM), <http://www.volokh.com/2013/01/26/anonymous-attacks-again>; see also Jessica Meyers, *Online Activists Fret over Extremism*, POLITICO (Jan. 31, 2013, 4:38 AM), <http://www.politico.com/story/2013/01/online-activists-extremists-hurt-cause-86963.html> ("Supporters of online freedoms worry extreme acts may thwart the momentum gained last year with the crushing defeat of anti-piracy legislation."). Another incident potentially linked to the revenge campaign of Anonymous on behalf of Swartz is the hacking into the Federal Reserve that occurred shortly after his death. Charles Riley, *Hackers Access Federal Reserve Website, Data*, CNNMONEY (Feb. 7, 2013), money.cnn.com/2013/02/06/technology/federal-reserve-hack. Professor Eric Posner argues that Aaron Swartz's prosecution will ultimately help to promote open access policies. Eric Posner, *How Aaron Swartz's Cause Wins in the End*, SLATE (Jan. 22, 2013), http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/01/aaron_swartz_beat_prosecutors_by_increasing_political_support_for_open_access.html.

192. It turns out that a few years ago, the same prosecutor that went after Swartz was involved in a prosecution against another lesser-known hacker who also killed himself. See Justine Sharrock, *Internet Activist's Prosecutor Linked to Another Hacker's Death*, BUZZFEED (Jan. 14, 2013, 8:10 PM), <http://www.buzzfeed.com/justinesharrock/internet-activists->

drew bipartisan comments from members of Congress as well as led to both a decision by House Oversight Committee Chairman Darrell Issa to investigate the prosecution¹⁹³ and a public demonstration in New York City.¹⁹⁴ It also prompted an online petition to remove U.S. District Attorney Carmen Ortiz from office for her role in Swartz's prosecution, a petition that quickly crossed the threshold of 25,000 signatures needed to produce a response from the White House.¹⁹⁵ Most recently, Representatives Issa and Elijah Cummings wrote a letter to the Attorney General "to request a briefing about the decisions by federal prosecutors to bring criminal charges in 2011 and 2012 against Internet activist Aaron Swartz."¹⁹⁶ The letter asks incisive questions such as "[w]hat factors influenced the decision to prosecute Mr. Swartz for the crimes alleged in the indictment, including the decisions regarding what crimes to charge and the filing of the superseding indictment",¹⁹⁷ whether Swartz's association with SOPA or any advocacy groups influenced these choices; how the prosecution made decisions in regard to plea offers and sentencing proposals; and why the prosecution filed a superseding indictment.¹⁹⁸ When Attorney General Eric Holder faced questions as to whether the Swartz case involved prosecutorial overreach, he responded in the negative and stated that the relevant factor was not "what necessarily was charged as much as what was

prosecutor-linked-to-another-h. Swartz's attorney also accused the prosecutor, Stephen Heymann, of exploiting cases like Swartz's for his own publicity. Zach Carter, *Aaron Swartz's Lawyer: Prosecutor Stephen Heymann Wanted 'Juicy' Case for Publicity*, HUFFINGTON POST (Jan. 14, 2013, 4:42 PM), http://www.huffingtonpost.com/2013/01/14/aaron-swartz-stephen-heyman_n_2473278.html.

193. Ryan J. Reilly et al., *Darrell Issa Probing Prosecution of Aaron Swartz, Internet Pioneer Who Killed Himself*, HUFFINGTON POST (Jan. 15, 2013, 6:30 PM), http://www.huffingtonpost.com/2013/01/15/darrell-issa-aaron-swartz-_n_2481450.html.

194. Clare Trapasso & Daniel Beekman, *Crowd Mourns Reddit Founder Aaron Swartz*, N.Y. DAILY NEWS (Jan. 20, 2013, 1:01 AM), <http://www.nydailynews.com/new-york/friends-family-mourn-reddit-founder-article-1.1243444>.

195. Betsy Isaacson, *Petition to Remove Carmen Ortiz, Aaron Swartz Prosecutor, Reaches Threshold for White House Response*, HUFFINGTON POST (Jan. 15, 2013, 1:44 PM), http://www.huffingtonpost.com/2013/01/15/petition-to-remove-carmen-ortiz_n_2479458.html; see also *Petition to Remove Prosecutor in Aaron Swartz Case up for White House Response*, RT (Feb. 13, 2013, 8:48 PM), <http://rt.com/usa/news/swartz-prosecutor-petition-response-163> (discussing the petition and explaining that the petition threshold changed from 25,000 to 100,000 signatures shortly after Aaron Swartz's death).

196. Letter from Darrell E. Issa & Elijah E. Cummings, Comm. on Oversight & Gov't Reform, to Eric H. Holder, Attorney Gen., Dep't of Justice (Jan. 28, 2013), available at <http://oversight.house.gov/wp-content/uploads/2013/01/2013-01-28-DEI-EEC-to-Holder-re-Aaron-Schwartz-prosecution.pdf>.

197. *Id.*

198. *Id.*

offered, in terms of how the case might have been resolved.”¹⁹⁹ Suspicions run deep in many quarters that the DOJ sought to make an example out of Swartz because he was a prominent figure who had already angered the government by opposing SOPA and attempting to provide free access to public court documents that normally involve individual payments through the PACER system.²⁰⁰

Some, including Carmen Ortiz’s husband Tom Dolan, defended the prosecutors’ actions and argued that the prosecution offered Swartz a plea deal that involved only about six months in prison.²⁰¹ One commentator argues that prosecutors “go after defendants tooth and nail, overcharging them from the abundance of criminal laws with sentences so severe and out of proportion to the crime that, as now happens in 95 percent of criminal cases, the prudent choice is to cop a plea.”²⁰² Most of those deals—and hence the stories of people who go to jail or prison for six months here or six months there, which symbolizes relatively low sanctions in the grand scheme of terms of imprisonment despite the possible unfairness of some of those terms—never make it into the news. Swartz is one of the few who refused to take that option. While he worried about the prospect of prison, his greatest fear was to be labeled a felon.²⁰³

199. Justin Peters, *Eric Holder to Senate Judiciary Committee: Aaron Swartz Case Was “A Good Use of Prosecutorial Discretion,”* SLATE (Mar. 6, 2013, 12:49 PM), http://www.slate.com/blogs/crime/2013/03/06/aaron_swartz_eric_holder_calls_aaron_swartz_case_a_good_use_of_prosecutorial.html (criticizing Holder’s attempt to decouple the charges from the possible outcome).

200. See, e.g., Tim Carmody, *Memory to Myth: Tracing Aaron Swartz Through the 21st Century*, VERGE (Jan. 22, 2013, 12:30 PM), <http://www.theverge.com/2013/1/22/3898584/aaron-swartz-profile-memory-to-myth> (describing Aaron Swartz’s life, accomplishments, and the motivations behind his actions).

201. *Prosecutor’s Husband Defends Push to Jail Internet Activist*, BUZZFEED (Jan. 15, 2013, 7:20 AM), <http://www.buzzfeed.com/buzzfeednews/prosecutors-husband-defends-push-to-jail-internet>.

202. Lincoln Caplan, *Aaron Swartz and Prosecutorial Discretion*, N.Y. TIMES (Jan. 18, 2013, 10:06 AM), <http://takingnote.blogs.nytimes.com/2013/01/18/aaron-swartz-and-prosecutorial-discretion>; see also Erik Eckholm, *Prosecutors Draw Fire for Sentences Called Harsh*, N.Y. TIMES (Dec. 5, 2013), <http://www.nytimes.com/2013/12/06/us/federal-prosecutors-assailed-in-outcry-over-sentencing.html> (discussing the criticism that “federal prosecutors are strong-arming defendants into pleading guilty and overpunishing those who do not—undermining the fairness and credibility of the justice system”). Given the power of prosecutors, a further concern is the possibility that much prosecutorial misconduct and failure to turn over to the defense exculpatory evidence goes undetected. See Editorial, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 4, 2014), <http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html>.

203. David Amsden, *The Brilliant Life and Tragic Death of Aaron Swartz*, ROLLING STONE (Feb. 28, 2013), <http://www.rollingstone.com/culture/news/the-brilliant-life-and-tragic-death-of-aaron-swartz-20130215>; see also Lawrence Lessig, *Prosecutor as Bully*, HUFFINGTON POST

Did the drafters of the laws that Swartz allegedly broke envision defendants like him? If so, were the laws' sanctions calibrated properly and did the laws account for the possibility of overzealous prosecutors? Professor Lawrence Lessig and others have argued that thirty-five years in prison would have been a very disproportionate punishment.²⁰⁴ If that is the case, the DOJ's press release touting this figure appears morally dubious even if it was unlikely that a judge would have actually sentenced Swartz to anything near that length of time.²⁰⁵ If the laws did not envision defendants like Swartz, were the gains from those laws sufficient to warrant the potential level of excess seen in some individual cases like his? And, as a related matter, would Congress have passed those laws had it realized that this is how they would be used? Some of these questions are difficult to answer, whether in the abstract or in particular cases, because Congress often does not explain its actions, or different congressional actors may have digressing views and motives. Further, some of the answers depend on the specific time frame that one is examining. What is known is that the CFAA, which prosecutors used in Swartz's case, started off in 1986 as a criminal statute meant to protect national security interests but was amended four times since (including through the Patriot Act, which this Article discusses above)²⁰⁶ to significantly expand its scope.²⁰⁷ Given the often unavoidable expansion of scope of liability and the rise in sanctions for offenses—driven by either later legislative increases of the sanction levels or ambitious prosecutorial accumulation of criminal counts in indictments—the Aaron Swartz story shows that bills about offenses in the rapidly changing technological world of information appropriation and dissemination may deserve particular scrutiny.

(Jan. 13, 2013, 10:01 AM), http://www.huffingtonpost.com/lawrence-lessig/aaron-swartz-suicide_b_2467079.html (questioning the government's need to press for felony charges against Swartz). Swartz also likened his experience with the prosecution to the experience that Franz Kafka describes in the novel "The Trial." Amsden, *supra*.

204. See Lessig, *supra* note 203 (opining that the government overcharged Swartz for his crime); Alex Stamos, *The Truth About Aaron Swartz's "Crime,"* UNHANDLED EXCEPTION (Jan. 12, 2013), <http://unhandled.com/2013/01/12/the-truth-about-aaron-swartzs-crime> (stating that Swartz's illegal downloading did not merit thirty-five years in jail).

205. See Kerr, *Prosecutorial Discretion*, *supra* note 179 (discussing government press releases' tendencies to publicize maximum sentences, as opposed to the more realistic lower sentence possibilities).

206. See *supra* Section I.A.

207. For a discussion of the evolution of the CFAA, see Reid Skibell, *Cybercrimes & Misdemeanors: A Reevaluation of the Computer Fraud and Abuse Act*, 18 BERKELEY TECH. L.J. 909, 912–17 (2003).

D. *Lessons*

As shown in this Article, the phenomena that affect low sanctions are not necessarily limited to information-related offenses. The seemingly unique nature of copyright in the level of large-scale illegal behavior that it currently entails is partially due to the historical development of technology, but future development in addition to other events could lead to a different set of targeted areas. The lessons from the copyright context should make society reconsider its approach to lawmaking if that occurs. Before legislators resort to criminalization, caution is advised. Roberta Romano has proposed limitations to the potential damage from ill-advised crisis-based financial regulation through sunset requirements, among other measures.²⁰⁸ Perhaps we need this or another novel approach to any expansions in criminal laws (or civil laws likely to lead to criminal ones), at least at the federal level. At a minimum, a legislator who faces the question of whether to support a new law that carries low sanctions (law *A*) and is concerned that it could lead to a less acceptable law with high sanctions (law *B*) for the same offense

should consider all the mechanisms through which *A* might lead to *B*, whether they are logical or psychological, judicial or legislative, gradual or sudden. [She] should consider these mechanisms whether or not [she] think[s] that *A* and *B* are on a continuum where *B* is in some sense more of *A*, a condition that would in any event be hard to define precisely. [She] should think about the entire range of possible ways that *A* can change the conditions—whether those conditions are public attitudes, political alignments, costs and benefits, or what have you—under which others will consider *B*.²⁰⁹

This determination is complex and fraught with uncertainty, but it is better to attempt it than to forsake it altogether.²¹⁰ Along those lines,

208. See Romano, *supra* note 9, at 14.

209. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1031 (2003) (footnote omitted). Volokh makes this point in the context of legal slippery slopes generally, and he provides guidance throughout his article on how a proper analysis should proceed. See *id.* Legislators must consider the cost of refusing to pass law *A* as well, including in the context of the “broken windows” theory. BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 59–89 (2001) (describing the theory while rejecting its validity).

210. On a related note, David Schraub describes how at least some of the time, a phenomenon termed “sticky slopes” occurs, which can have the opposite effect of slippery slopes and lead a small legal reform to become an obstacle to a larger one. See David H.

lawmakers should be wary of low-sanction laws that sponsors propose as compromises between the people who do not wish to see any sanctions and those who advocate for harsh ones, as “relatively inconsequential measures might soften public resistance to much more restrictive forms of regulation. Indeed, the sponsors of such laws, who promote them . . . vehemently . . . , are no doubt banking on just this effect.”²¹¹

Public reactions to future legislative proposals in copyright and other areas that exhibit similar features will depend on many factors, but one of them is likely to be the height of sanctions. This is true both because stories of high sanctions will naturally raise more opposition in a public whose views on copyright are acutely tuned to the level of sanctions and because the high-sanction stories will more easily make their way into the media in the first place. For legal scholars, this phenomenon raises the importance of paying attention to the level of sanctions in bills and discussing important laws accompanied by low sanctions that the media may neglect. For the more interested members of the public (and this is certainly true for other reasons as well), it increases the necessity of seeking out information on policy topics outside of the mainstream media. For journalists, the lesson may be that to the extent they recognize the importance of particular pieces of legislation—be that recognition for their immediate wide-spread effect albeit in the form of low sanctions, or the likelihood that said sanctions will not stay low for long—they should consider incorporating elements into their writing that will attract a large readership despite the lack of an identifiable victim who suffered a shockingly high sanction. This may involve having journalists and other writers work on better ways to teach readers about statistical information.²¹² Very popular books such as *Freakonomics*²¹³ have shown that, while challenging, the task is not

Schraub, *Sticky Slopes*, 101 CAL. L. REV. 1249, 1249, 1252 (2013). Two situations in which this could take place are if “prior victories exhaust the political will of representatives and their constituents to support further efforts” or if “a particular high profile victory mobilizes opponents, creating an effective cadre of political activists where none had previously existed.” *See id.* at 1291, 1264. As to the latter point, like this Article discusses, few laws with low sanctions will have that effect. As to the former issue, laws with low sanctions will generally be insufficient to satisfy a group that has a high enough stake in the first place to engage in activism over a particular political question. Schraub describes a number of settings in which his thesis may hold, but these do not tend to be instances that involve sanctions, but rather ones related to civil liberties. *See id.*

211. Kahan, *supra* note 7, at 643.

212. For an account of the importance of numeracy in the legal context, see generally Arden Rowell & Jessica L. Bregant, *Numeracy and Legal Decisionmaking*, 46 ARIZ. ST. L.J. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2163645.

213. STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* (2005).

impossible.

CONCLUSION

This Article provides some evidence that the law generally and copyright law specifically contain risks tied to low sanctions. For the reasons explained previously, hard empirical evidence is difficult to gather, but the conclusions of this Article's argument are unlikely to be problematic even if the effect is smaller than anticipated. Anyone with an interest in policy making should pay attention if legislators propose new legislation that has low sanctions. Sanctions could rise over time, or they could be widespread enough to cause significant damage. The media and others are generally unlikely to intensely scrutinize legislation accompanied by low-level sanctions. In copyright, the results are evident from sanctions that have crept up and veered from merely civil penalties to criminal ones. It took a combination of (1) high sanctions, (2) the sudden realization that high sanctions could directly or indirectly affect large portions of the population, and (3) efforts by corporate entities, grassroots organizations, and individuals who used the tools of social networking to stop the tide for the first time. This is not the last occasion for expansion of substantive copyright law or of its enforcement. To the extent that the public perceives any of these expansions as inefficient or counterproductive, it must pay closer attention in coming years, and advocates will have to find ways to overcome the bias against the expenditure of energy when legislation involves low sanctions. At times, policy makers will have to make difficult decisions if a law may be just when it involves low sanctions but become unjust as the sanctions rise; indeed, they may need to predict how likely it is that sanctions will increase and whether the perceived benefits of the initial legislation are larger than the possible disadvantages down the road.

Future research on the psychological and practical effects of low sanctions will likely yield important information not only to avoid passing suboptimal laws but also to promote otherwise beneficial ones. Different levels of sanctions will always attach a variety of social meanings to the punished actions.²¹⁴ At times, it is traditionally understood, sanctions will signal that a behavior is unacceptable and will deter its occurrence. At other times, however, the message will be interpreted in a diametrically opposed way, such as was the case in a day-care study where fines for parents late to pick up their children

214. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995) (defining social meanings as "the semiotic content attached to various actions, or inactions, or statuses, within a particular context").

actually increased the occurrence of the behavior, perhaps because the fines made such events seem more socially acceptable.²¹⁵ The story of the role of sanctions in shaping human behavior, including people's decisions to follow proper laws or oppose undesirable ones, remains incompletely told for now. This Article provides just one step in highlighting some of the remaining puzzles and showing that when it comes to sanctions, everything may not be quite as it seems at first glance.

215. Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 13–15 (2000).