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Googling Down the Cost of Low Sanctions

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GOOGLING DOWN THE COSTS OF LOW SANCTIONS

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When we as a society decide that a particular conduct is problematic, we are faced with a choice of how to prevent and punish such conduct. Generally speaking, the more problematic the conduct, the higher the sanction imposed as punishment and the more likely that a putative perpetrator will think twice before engaging in the frowned-upon conduct.¹ It is thus unsurprising that we impose long jail terms for murder while limiting ourselves to moderate fines for speeding and jaywalking.² It is equally not surprising, then, that we (thankfully) have more instances of speeding than of murder.³ Given the spectrum of human conduct, the spectrum of punishment for inappropriate conduct seems appropriate. Indeed, we generally consider societies that impose overly severe punishment for minor transgressions barbaric.⁴ Conversely, we tend to impose fairly low sanctions for conduct that, though we have adjudged as problematic, we do not believe is sufficiently serious to warrant severe punishment.⁵ The low sanctions, in turn, send a signal that the conduct is not particularly loathsome, and therefore engaging in it is not a great wrong.⁶ Such signals then lead more people (than would if the sanctions were higher) to engage in the conduct and in turn be sanctioned.⁷ When it comes to speeding or parking, this sort of loop may well be efficient for everyone. Most of the time people can engage in the prohibited conduct, thus getting the psychic benefit of doing so, and when caught they will pay

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1. See, e.g., Patrick M. Fahey, *Payne v. Tennessee: An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205, 236 (1992); Robert A. Mikos, “Eggshell” Victims, Private Precautions, and the Societal Benefits of Shifting Crime, 105 MICH. L. REV. 307, 317 (2006).

2. Fahey, *supra* note 1 at 236; Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 700 (2005). Cf. Russell L. Christopher, *The Trilemma of Meta-Blackmail: Is Conditionally Threatening Blackmail Worse, the Same, or Better Than Blackmail Itself?*, 94 GEO. L.J. 813, 817 (2006).

3. See *United States v. Mills*, 472 F.2d 1231, 1239 (1972) (“A huge proportion of the public is guilty of some sort of petty infraction almost every day—jaywalking, exceeding the 25-mph limit, using high beams, parking in a loading zone, among many others.”). Of course “[a] huge proportion of the public” isn’t guilty of murder. *Id.*

4. See Charles J. Reid, Jr., *Tyburn, Thanatos, and Marxist Historiography: The Case of the London Hanged*, 79 CORNELL L. REV. 1158, 1195 (1994).

5. See Fahey, *supra* note 1 at 236; Lee, *supra* note 2 at 700.

6. See John Alan Cohan, *Honor Killings and the Cultural Defense*, 40 CAL. W. INT’L L.J. 177, 206 (2010) (noting that even murder may be subject to a low sanction if the society in which the murder occurred deems that specific type of murder to be not particularly problematic).

7. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 181 (1989) (“[T]he levels of punishment the state provides for a particular crime themselves give a message about how shameful that offense is.”).

the fine, thus enriching the local budget and benefitting the community.⁸ Everyone comes out the winner. But do they?

In her article, Professor Irina Manta argues that to the extent the substantive law is unjust, low sanctions, in the long run, potentially create more problems and are more likely to perpetuate injustice than high sanctions would.⁹ This is counter-intuitive and at first glance seems wrong. After all, to the extent that a law is unjust, the injustice is seemingly mitigated by the low sanctions attached to the prohibited conduct.¹⁰ Consider, for example, a law that prohibited the teaching of evolution in school and imposed a \$5 fine for the violation of the prohibition. While such a law may be both foolish and unjust, it is unlikely to cause much hardship to anyone, including anyone charged with violating the law.¹¹ This is especially true if the law is rarely enforced, because the true sanction for violation is the prescribed penalty times the likelihood that penalty would be imposed.¹² So how is it that low sanctions can be worse than high sanctions?

The problem is that low sanctions are less likely to provoke outrage at the injustice.¹³ It is easy to make the public care about extraordinary hardships that flow as a result of unjust laws, precisely because the penalty is so jarring to the neutral observer. On the other hand, when a law, however unjust, is not frequently enforced and results in only minor penalties, the public is unlikely to spend much effort attempting to get it repealed.¹⁴ Consider various laws that prohibited consensual homosexual conduct between adults.¹⁵ Though widely viewed as unjust and anachronistic, the laws were rarely enforced, and even when they were enforced, they resulted in fairly minor sanctions.¹⁶ As a result, there was no

8. See Alex Raskolnikov, *Irredeemably Inefficient Acts: A Threat to Markets, Firms, and the Fisc*, 102 GEO. L.J. 1133, 1186 (2014).

9. Irina D. Manta, *The High Cost of Low Sanctions*, 66 FLA. L. REV. 157, 157 (2014).

10. Indeed, Professor Manta acknowledges that intuition in the very first sentence of her article. *Id.* at 158.

11. There may well be problems with the mere fact of having such laws on the books. They may chill speech, cause unwarranted embarrassment and impose costs to those violating the law, prevent the imparting of information to others, etc. I do not mean to discount these very real costs. All I am suggesting is that to the extent there are unjust laws, it would seem, at least at the first pass, that low sanctions for violating these laws mitigate the ill effects of such laws.

12. Richard Craswell, *Deterrence and Damages: The Multiplier Principle and its Alternatives*, 97 MICH. L. REV. 2185, 2211 (1999).

13. Manta, *supra* note 9 at 159.

14. See David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 877 (2009).

15. Professor Manta recognizes this very issue. Manta, *supra* note 9 at 167–69.

16. *Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring); *Lawrence v. Texas*, 539 U.S. 558, 569 (2003); Melissa J. Mitchell, *Cleaning out the Closet: Using Sunset Provisions to Clean up Cluttered Criminal Codes*, 54 EMORY L.J. 1671, 1675–76 (2005) (discussing how rarely these laws were enforced and how they remained on the books). *But cf.*

significant nation-wide movement clamoring for repeal of these laws.¹⁷ And because there was no significant pressure for the abolition of such laws, they persisted until the Supreme Court struck them down.¹⁸ Compare this with the movement to legalize same-sex marriage. As society began to realize the penalties attendant to the inability to get married, laws prohibiting same-sex marriage began to be repealed legislatively and a number of high-ranking officials in both parties began supporting such efforts.¹⁹ Perversely then, the under-enforcement of anti-sodomy laws let them persist as long as they had, but the consistent enforcement of anti-same-sex marriage laws has led to a relatively rapid loss of support for these laws. Thus, as Professor Manta astutely observes, it is the low level of sanctions that help unjust laws persist and in the aggregate impose high costs on those subject to these laws.²⁰

An additional consequence of laws that impose low sanctions is that as a result of the public not being particularly concerned about these near-phantom laws, a small but dedicated constituency is able to lobby for ratcheting up the sanctions, at least until such time as the public begins to perceive the sanctions as too severe and unjust.²¹ Making matters worse

Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.–C.L. L. REV. 103 (2000) (explaining that unenforced criminal laws may still cause harm to society).

17. To be sure, there were people fighting for the repeal of these laws for decades. There was not, however, a sustained campaign with the President, senators, congressmen, governors, and other public officials pressing for the repeal of these laws.

18. See Mitchell, *supra* note 16 at 1675–77.

19. In a span of four years, 11 states have legislatively repealed prohibitions on gay marriage, with two of such decisions having been sustained in a state-wide referendum. MARYLAND STATE BOARD OF ELECTIONS: CIVIL MARRIAGE PROTECTION ACT; WASHINGTON SECRETARY OF STATE: PROPOSED REFERENDUM MEASURES – 2012. The Democratic Party formally endorsed gay marriage as part of its platform in 2012. See *Democratic Party on Civil Rights*, ON THE ISSUES, http://www.ontheissues.org/celeb/Democratic_Party_Civil_Rights.htm (last visited Jan. 25, 2015). The Republican Party remains opposed, but a number of prominent Republicans (including former Vice President Dick Cheney, Senators Rob Portman, Susan Collins, Mark Kirk, Lisa Murkowski, and others) have come out in favor of extending marriage rights to same-sex couples. Associated Press, *Cheney backs gay marriage, calls it a state issue*, NBCNEWS (June 2, 2009, 2:54 PM), http://www.nbcnews.com/id/31066626/#.VO5ZaPnF_po; Sabrina Eaton, *Sen. Rob Portman comes out in favor of gay marriage after son comes out as gay*, CLEVELAND.COM (Mar. 15, 2013, 12:01 AM), http://www.cleveland.com/open/index.ssf/2013/03/sen_rob_portman_comes_out_in_f.html; Mario Moretto, *Susan Collins becomes fourth GOP senator to publicly support same-sex marriage*, BANGOR DAILY NEWS (June 25, 2014, 7:06 PM), <http://bangordailynews.com/2014/06/25/politics/elections/susan-collins-i-support-same-sex-marriage>; Andrew Kaczynski, *Republican Sen. Mark Kirk Endorses Marriage Equality*, BUZZFEED (Apr. 2, 2013, 12:56 PM), <http://www.buzzfeed.com/andrewkaczynski/republican-sen-mark-kirk-endorses-marriage-equality#.hf6AX6QOO>; *Senator Lisa Murkowski Endorses Marriage Equality*, HUMAN RIGHTS CAMPAIGN (June 19, 2013), <http://www.hrc.org/press-releases/entry/senator-lisa-murkowski-endorses-marriage-equality>.

20. Manta, *supra* note 9 at 161–67.

21. *Id.* at 160.

still, even when *de jure* sanctions are nominally kept low, the *de facto* sanction visited on any given individual can be quite high. The recent case of Eric Garner, a man who was killed after police suspected he was illegally selling cigarettes, illustrates the point.²² New York City law prohibits the sale of loose cigarettes,²³ and fixes the penalty at no more than \$1,000 for the first offense and \$2,000 for a subsequent offense.²⁴ Yet, when attempting to enforce that law, the police officer ended up killing Mr. Garner. In reality, then, a \$1,000 crime turned into a capital offense.²⁵

All of these arguments are applicable to copyright and other intellectual property law, as Professor Manta demonstrates. However, I think that the argument gives too little consideration to other factors that led to the seemingly sudden public awareness of penalties associated with IP infringement. In Professor Manta's account, the public's rising skepticism of the fairness of copyright laws can be explained by the fact that infringement has become ubiquitous akin to speeding.²⁶ This, combined with the ability to stack together relatively low individualized sanctions, has caused the public to be significantly more concerned about the copyright regime.²⁷ There is, however, an alternative, or at least a complementary explanation. Over the last decade or so, entire business empires have been born that were built on ability to gather and disseminate information created by others. Google, YouTube, Wikipedia, and other businesses now provide counterweight to the Disneys, Viacom, and RIAAs of the world.²⁸ For the first time, the increase in copyright sanctions affects not just individual consumers or the abstract notions of robust public domains, but also business enterprises on which large sections of the economy depend. It is the involvement of these businesses (and their customers) that was instrumental in stopping Congress from further

22. Nick Gillespie, *Eric Garner Was Choked to Death for Selling Loosies*, THE DAILY BEAST (Dec. 3, 2014), <http://www.thedailybeast.com/articles/2014/12/03/the-policies-behind-eric-garner-s-death.html>.

23. N.Y. ADC. LAW § 17-618.

24. *Id.* at § 17-624.

25. See Kelly Phillips Erb, *NY Man Who Died During Arrest Attempt Allegedly Targeted For Selling Untaxed Cigarettes*, FORBES (Aug. 8, 2014, 3:13 PM), <http://www.forbes.com/sites/kellyphillipserb/2014/08/08/ny-man-who-died-during-arrest-attempt-allegedly-targeted-for-selling-untaxed-cigarettes>.

26. Manta, *supra* note 9 at 184–85.

27. *Id.* at 194–95.

28. See Orit Fischman-Afori, *The Evolution of Copyright Law and Inductive Speculations As to Its Future*, 19 J. INTELL. PROP. L. 231, 236 (2012); John M. Newman, *Copyright Freeconomics*, 66 VAND. L. REV. 1409, 1433 (2013); Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235, 269 (2014).

increasing copyright sanctions during the SOPA/PIPA debate.²⁹

The contrast with patent laws is instructive. Although patent juries often return with eye-popping verdicts, which dwarf anything seen in the copyright world,³⁰ the public is generally blasé about such news stories. While there is no definitive explanation for why that is so (perhaps patent cases are harder to understand thus resulting in less public engagement with the law), but I suspect that one of the reasons why the public is not overly concerned about large verdicts in patent cases is because they trust the large corporations that litigate these matters to work it out between themselves. And indeed, that has been the case with patent legislation. Corporate titans do manage to present arguments for both stronger and weaker patent law, with the final bills ending up somewhere in between.³¹ In the copyright world, that has not been the case up until recently. On one side there were corporate copyright owners, and on the other side, there were unorganized consumers, few of whom expected to ever be directly affected by the statutorily created sanctions.³² So perhaps, the high cost is imposed not by low sanctions, but by absence of the organized and well-funded opposition that would be affected by these sanctions.³³

This criticism should not detract from Professor Manta's argument, and indeed likely works in tandem with it. After all, there may be multiple reasons why ill-considered laws survive or even get worse over time. The absence of a significant constituency for repeal of such laws may be driven in part by lack of meaningful financial incentives and by the low likelihood of a significant penalty. The upshot is that this combination of factors paradoxically results in high long-run costs which were never contemplated nor fully considered by the public or legislators. Laws in general, and intellectual property laws in particular, are balancing acts

29. Kristen E. Tullos, *From Cyber Attacks to Social Media Revolutions: Adapting Legal Frameworks to the Challenges and Opportunities of New Technology*, 26 EMORY INT'L L. REV. 733, 736 (2012).

30. See, e.g., *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 858 (Fed. Cir. 2010), *aff'd*, 131 S. Ct. 2238, 2253 (2011) (affirming a \$290 million verdict). There have been larger verdicts rendered by juries, but most of them have not survived appeals. See *Apple-Samsung Verdict Third Largest Ever In U.S. Patent Litigation*, LEXMACHINA (last visited Jan. 22, 2015), <https://lexmachina.com/media/press/apple-samsung-largest-verdict/>.

31. See Robert E. Thomas, *Vanquishing Copyright Pirates and Patent Trolls: The Divergent Evolution of Copyright and Patent Laws*, 43 AM. BUS. L.J. 689, 733 (2006); James M. Francis, *Patent Reform's Unintended Consequences In Biotech*, ASPATORE, 2014 WL 7247062 at *2 (Nov. 1, 2014).

32. See Annemarie Bridy, *Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA*, 30 CARDOZO ARTS & ENT. L.J. 153, 158–59 (2012).

33. For a discussion of the effect organized lobbies have on different legal regimes in intellectual property see Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J. L. & TECH. 469, 508–10 (2011).

meant to optimize the costs and benefits of particular policies.³⁴ But the proper weighing of these concerns only occurs when the full costs, including the public reaction to the severity and the likelihood of imposition of penalties on the violators, are taken into account.³⁵ For this reason, it is important to consider the counterintuitive effect of initial low sanctions on proscribed behavior even if there is no significant public opposition to the proposed law or clamor for their repeal. Professor Manta's article offers an important insight and a reminder of these concerns, especially now as Congress continues to engage with proposed intellectual property law reforms.

34. See generally Gregory Dolin, *Dubious Patent Reform*, 56 B.C. L. REV. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488220.

35. *Id.*