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## Copyright Infringement and the Separated Powers of Moral Entrepreneurship

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## COPYRIGHT INFRINGEMENT AND THE SEPARATED POWERS OF MORAL ENTREPRENEURSHIP

Joseph P. Fishman\*

*This Article examines the copyright industries' "moral entrepreneurs," sociologist Howard Becker's term for enterprising crusaders who seek to change existing social norms regarding particular conduct. Becker's conception of moral entrepreneurship consists of two groups performing separate tasks: rule creators work to translate their preferred norms into legal prohibitions, and then a separate class of enforcers administer those prohibitions. In a limited sense, U.S. copyright law hews to this scheme. Legislation such as the No Electronic Theft Act of 1997 and the Artists' Rights and Theft Prevention Act of 2005 has assigned the federal government an increasing role in defining intellectual-property deviance. At the same time, however, the Copyright Act's civil enforcement scheme elides this separation of powers by allowing the rule creators to serve as their own enforcers. Between its criminal and civil remedial schemes, the Copyright Act allows two different paradigms of moral entrepreneurship to operate in parallel: one assigns enforcement to the state while the other entrusts it to the original rule creators. As a result, both rule creators and prosecutors can use infringement litigation to try to map copyright's moral boundaries.*

*A side-by-side comparison of these two enforcement paradigms shows that the Department of Justice has proven more effective at instilling a norm against copyright infringement than the rightsholders whose interests it represents. By selectively focusing on unsympathetic defendants, prosecutors are defining deviance while avoiding the backlash that has greeted civil plaintiffs. This story offers a lesson, corroborated by other historical examples, concerning what I call the separated powers of moral entrepreneurship. Because professional enforcers tend to lack the moral fervor of the rule creators, they may decline to enforce the rule in situations where the rule creator, if given the opportunity, would forge ahead. This quality makes professional enforcers better equipped to avoid backlash when particular enforcement activities are out of step with widely held social norms. A rule creator who enforces her own rule risks cannibalizing the favorable norms upon which she had intended to build. As a result, where social norms are in flux, the agency cost of delegating enforcement to others is actually a benefit.*

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## INTRODUCTION

Industries dependent on copyright protection have always been in the business of creating new works. Recently, they have also been in the business of creating norms. In their attempts to change permissive attitudes toward copyright infringement, trade groups such as the Recording Industry Association of America ("RIAA") and the Motion Picture Association of America ("MPAA") have become examples of what sociologist Howard Becker calls a "moral entrepreneur," an enterprising crusader who seeks to change existing social norms regarding particular conduct.<sup>1</sup> Criminologists<sup>2</sup> and copyright scholars<sup>3</sup> alike have begun to note that rightsholders are seeking to build consensus on how intellectual property fits into popular notions of right and wrong, waging what has been described as "a moral and ideological battle for the hearts and minds of an increasingly global public."<sup>4</sup> Rightsholders want to disseminate a moral rule against infringement. That makes them, in Becker's terms, rule creators.<sup>5</sup>

Rule creators need not be, and often are not, legislators. A "rule" in this sense is a social norm, rather than law. At the same time, the law remains the classic Beckerian tool of moral entrepreneurship. Rule creators spread norms by convincing lawmakers to adopt legal commands that express those norms.<sup>6</sup>

According to Becker, these rule creators are not the only participants in moral entrepreneurship. Those who succeed in translating norms into formal prohibitions typically require a set of enforcers to administer those prohibitions, an executive branch of moral enterprise.<sup>7</sup> Thus, for example, early Prohibitionists depended on local police forces following the passage of the Eighteenth Amendment, and anti-drug crusaders relied on the Federal Bureau of Narcotics ("FBN") after the

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1. HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 145, 147 (1973). Richard Posner used the term "moral entrepreneur" somewhat differently in his *Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1664–67 (1998), referring to a particular subset of legal academics. Posner does not reference Becker's work, though the concepts are similar. See David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283, 311–13 (2008) (discussing the potential relationship between Posner and Becker).

2. See e.g., Majid Yar, *Teenage Kicks or Virtual Villainy? Internet Piracy, Moral Entrepreneurship and the Social Construction of a Crime Problem*, in CRIME ONLINE 95 (Yvonne Jewkes ed., 2007) [hereinafter Yar, *Teenage Kicks*]; Majid Yar, *The Rhetorics and Myths of Anti-Piracy Campaigns: Criminalization, Moral Pedagogy and Capitalist Property Relations in the Classroom*, 10 NEW MEDIA & SOC. 605 (2008) [hereinafter Yar, *Rhetorics and Myths*].

3. See, e.g., WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* (2009); Peter K. Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VAND. J. ENT. & TECH. L. 881, 883–84 (2011) (observing that the entertainment industry "emphasizes moral high grounds while noting the wrongfulness of online file sharing and the resulting economic damage").

4. Lawrence B. Solum, *The Future of Copyright*, 83 TEX. L. REV. 1137, 1139 (2005) (book review).

5. See BECKER, *supra* note 1, at 147–48.

6. To be sure, norms frequently develop without interference from law. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991) (examining how rules develop in the cattle industry in Shasta County). Becker's focus, however, is on the development of norms through legal reform. See BECKER, *supra* note 1, at 155.

7. See BECKER, *supra* note 1, at 155 ("With the creation of a new set of rules we often find that a new set of enforcement agencies and officials is established.").

agency's inception in the 1930s.<sup>8</sup>

In a limited sense, U.S. copyright law hews to this scheme. Federal prosecutors have enforced copyright law since 1897, when Congress first criminalized willful infringement for profit.<sup>9</sup> The scope of copyright's substantive criminal law has since steadily expanded, particularly over the last two decades.<sup>10</sup> Legislation such as the No Electronic Theft Act of 1997 ("NET Act")<sup>11</sup> and the Artists' Rights and Theft Prevention Act of 2005 ("ART Act")<sup>12</sup> has tasked the federal government with an increasing role in defining intellectual-property deviance. Through criminal prosecution under § 506 of the Copyright Act, prosecutors in the Department of Justice ("DOJ") exercise discretion as the rightsholders' agents in moral entrepreneurship.

At the same time, however, the civil enforcement scheme under § 501 of the Copyright Act elides this separation of powers.<sup>13</sup> Private causes of action against infringers allow the rule creators to serve as their own enforcers.<sup>14</sup> Whether anti-piracy advocates are lobbying Congress for new civil penalties<sup>15</sup> or pressing for more widespread adherence to existing law, they are empowered to police that law themselves, as the RIAA and MPAA have done through thousands of lawsuits against individual file-sharers. The creator need not depend on the enforcer because creator and enforcer are one and the same.

Between its criminal and civil remedial schemes, the Copyright Act allows two different paradigms of moral entrepreneurship to operate in parallel: one entrusts legal enforceability to the original crusaders while the other assigns it to the state. The result is that both the original rule creators and their conscripts in the DOJ can use infringement litigation to try to map out copyright's moral boundaries.

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8. *Id.* We now know the Federal Bureau of Narcotics as the Drug Enforcement Administration.

9. See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.

10. For a recent historical survey of the criminalization of copyright violations, see Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 481–85 (2011).

11. Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified at 17 U.S.C. § 506(a)(1)(B) (2012)).

12. Pub. L. No. 109-9, § 103, 119 Stat. 218, 220–21 (2005) (codified at 17 U.S.C. § 506(a)(1)(C) (2012)).

13. See 17 U.S.C. § 501 (2012).

14. See *id.* Of course, quite apart from their value as tools of moral entrepreneurship, private infringement actions also serve their traditional purpose of making the infringed party whole and, if appropriate, enjoining future acts of infringement. Most private copyright infringement actions (like private actions of any kind) seek nothing more than redress for the particular injury alleged in the complaint. As discussed below in Part II.A, suits against end users are unusual insofar as they are driven less by the promise of compensation from the individual defendants than by rule enforcement against the public. This fact distinguishes them from lawsuits against intermediaries such as the makers of file-sharing platforms. Rightsholders' actions against intermediaries seek not so much to sway hearts and minds as simply to eliminate the product that enables the infringement altogether. See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Arista Records, LLC v. Lime Group, LLC*, 715 F. Supp. 2d 481 (S.D.N.Y. 2010); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000). This Article is therefore concerned primarily with actions against end users.

15. See, e.g., Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 5, 17, 28, and 35 U.S.C.).

In this Article, I examine which of these distributions of power has proven more effective at instilling a norm against copyright infringement. It has by now become a relatively uncontroversial proposition that private lawsuits against individual file-sharers have been a self-defeating exercise for plaintiffs.<sup>16</sup> Perhaps unsurprisingly, many feared that criminalizing a greater variety of infringements would only magnify the missteps of private civil litigation.<sup>17</sup> Industry insiders' confidence that infringers would face criminal prosecution was matched by onlookers' confidence that backlash would follow.<sup>18</sup> Yet in the years since, prosecutors' judicious deployment of state resources is proving both of those early forecasts wrong. Contrary to these predictions, the DOJ has been a more productive enforcer than the rightsholders whose interests it represents. Despite an apparent mandate from Congress and the moral entrepreneurs in the entertainment industries, federal prosecutors are not targeting individual downloaders, even ones with prolific amounts of infringing content on their hard drives. Instead, they have pursued commercial pirates and "warez" traders, large-scale syndicates that operate clandestinely and specialize in the distribution of pre-release material. By selectively focusing on unsympathetic defendants engaged in activities foreign to the casual peer-to-peer downloader, prosecutors are—consciously or not—defining deviance while avoiding the backlash that has greeted civil plaintiffs. They have avoided the mistake of spreading opprobrium too thin.<sup>19</sup>

This story offers a lesson concerning what I call the separated powers of moral entrepreneurship. In making the descriptive point that moral entrepreneurs often depend on a professional class of enforcers, Becker never reflects on what qualities

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16. See *infra* Part II.A.

17. See, e.g., Eric Goldman, *The Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 OR. L. REV. 369, 392–96 (2003) (summarizing early fears over the NET Act, including abuse of prosecutorial discretion, overdeterrence, and disproportionate burdens on juveniles and universities); Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1109 (2001) (expressing doubt about the efficacy of merely "prosecuting crime as it happens," and arguing that true prevention of cybercrime will only come with "realspace monitoring and inculcation provided by parents, peers, and others"); Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783 (2005); Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 224 (1996) ("[S]eeking to control public behavior by threatening punishment is insufficient to gain widespread public compliance with the law. Unfortunately, authorities in the area of intellectual property use this strategy widely.").

18. See, e.g., Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 545 (2003) (observing that "[w]hile large-scale file-sharers might be prosecuted, it is widely believed that the public could not stomach widespread prosecutions of individual computer users who had illicitly downloaded copyrighted content"); Richard Barry, *Jail Term for MP3 Pirates Predicted*, ZDNET (May 16, 2000, 12:50 PM), <http://www.zdnet.com/jail-term-for-mp3-pirates-predicted-3002078982> (quoting a music industry executive's claim that students downloading MP3s illegally would be prosecuted "as a clear signal that piracy will not be tolerated in the US" and a music journalist's claim that such prosecutions, while inevitable, would "backfire" and create "such an outcry").

19. A notable exception to this trend is the widely criticized Aaron Swartz prosecution. As I discuss below, the enforcement choices in that case may very well have had more to do with a perceived affront to the rule of law than with the normative content of the underlying law being violated. See *infra* Part IV.D.

predict effective enforcement.<sup>20</sup> Nor, for that matter, have the successive generations of sociologists who have drawn on his work<sup>21</sup> or legal scholars interested in law's expressive function.<sup>22</sup> Copyright's different remedial schemes provide a case study whose results may help fill that gap. Those results suggest that Becker's descriptive division between rule creators and rule enforcers may turn out to be prescriptively desirable. Inhibiting the original moral crusaders from pursuing every case that offends them may prevent their message from becoming too radical for society to bear. It allows a moral rule to filter through the views of others who, while committed to upholding it, possess a more tempered view of the moral content underlying it. This separation of powers provides a check on the sometimes-unrealistic desires of rule creators—and, in doing so, may prevent those creators from running in reverse.

Separating legislative and executive functions is thus a positive structural design not only for governing through law, but also for governing through norms. A division between legislature and executive has traditionally been justified on the theory that otherwise onerous laws can be neutralized at the enforcement stage. By exercising its institutional discretion over enforcement decisions, an independent executive ensures that the law is not dominated by the legislature's sometimes ill-advised agendas. Moral entrepreneurship can work much the same way. Rule creators' crusades, even if history eventually judges them as laudable, may race too far ahead of contemporary norms and result in self-defeat. Ceding the executive role to another counteracts this tendency.

This Article proceeds in four parts. Part I briefly summarizes the literature on the role of social norms in shaping individuals' decisions to comply with or violate the law. Part II outlines how current efforts to curb online copyright infringement represent a form of Beckerian moral entrepreneurship. Part III discusses two potential distributions of power over rule enforcement and an example of each: (A) aggregating it within the institutions that fought for new rules in the first place, represented by the RIAA's litigation campaign against individual file-sharers; and (B) assigning it to the discretion of the state, represented by federal criminal prosecutions. Of these options, I argue that the former has been counterproductive in trying to entrench a broad social norm against infringement, while the latter has made headway in trying to articulate a narrower one. Part IV asks what preliminary takeaways the moral crusade over copyright infringement might offer for future moral entrepreneurs when social norms are in flux. I contend that, because professional enforcers tend to lack the moral fervor of the rule creators, they are

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20. See BECKER, *supra* note 1.

21. See Pozen, *supra* note 1, at 311 n.139 (noting that subsequent scholars who have applied Becker's concept of moral entrepreneurship seem almost always to have in mind the rule creators rather than the rule enforcers).

22. See Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. Rev. (forthcoming 2014). The expressivist literature, to which Eisenberg's study of hate crime prosecutions is a notable exception, typically focuses on legislative enactment but overlooks enforcement practices.

better equipped to foresee backlash when particular enforcement activities are out of step with widely held social norms. I argue that this theory of separated moral entrepreneurship powers is further corroborated by other historical examples of selective enforcement. Finally, I discuss circumstances in which a separation of powers between rule creator and rule enforcer is likely to have little effect on whether self-defeating rule enforcement occurs.

# I. THE CHALLENGE OF SOCIAL NORMS TO DETERRENCE-BASED ENFORCEMENT REGIMES

The traditional economic theory of deterrence, most often expressed in the context of criminal sanctions, states that rational actors who are otherwise predisposed to violate a rule will adjust their behavior to comply with the rule in response to an expected penalty.<sup>23</sup> A penalty, even an incarceratory one, is nothing more than a cost to be incurred by the rule breaker. So long as the benefits from breaking a rule outweigh the costs, a rational actor will break the rule. Raise the cost, however, and the incentives to break the rule diminish. As a result, an enforcer need only ratchet up the probability or severity of that penalty to some optimal level in order to deter noncompliance. On the basis of this theory, some have argued that increasing the certainty of punishment could effectively contain peer-to-peer copyright infringement.<sup>24</sup>

Yet this standard cost-benefit account is complicated by the effect that social norms play in shaping individuals' attitudes toward rule breaking. Social psychology has shown that an individual is most likely to comply with a rule if he perceives that other community members comply with it as well.<sup>25</sup> Fear of disapproval from peers, it turns out, is a far more potent determinant of compliance than fear of punishment at the hands of law enforcement.<sup>26</sup> As a result, the economic cost of breaking a rule cannot be measured without reference to the level of stigma that a particular community attaches to it. For any given rate and severity of punishment, an individual will be more likely to obey the rule if he belongs to a group that values adherence to it.<sup>27</sup> Dan Kahan has therefore cautioned that "an account of deterrence that abstracts from meaning—by, say, considering only how

23. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 1, 9–12 (Gary S. Becker & William M. Landes eds., 1974); Isaac Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUD. 259, 265 (1972).

24. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1391–93 (2004).

25. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354–56 (1997) [hereinafter Kahan, *Social Influence*]; Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 611 (1998) [hereinafter Kahan, *Social Meaning and Crime*]; Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in *THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW* (Eyal Zamir & Doron Teichman eds.) (forthcoming).

26. Kahan, *Social Influence*, *supra* note 25, at 354.

27. For the canonical statement of the theory that people obey laws because of perceived normative legitimacy rather than because of fear of punishment, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006). See also Tyler,



particular policies affect the expected penalty for wrongdoing—is bound to prove unreliable and perhaps even self-defeating.”<sup>28</sup>

Thus, for example, there is a wide body of literature attributing the existence of tax evasion to permissive social norms.<sup>29</sup> When taxpayers are honest on their tax returns, it is because they believe it is the moral thing to do. And they are more likely to believe it is the moral thing to do if they perceive that their peers are likeminded.<sup>30</sup> Efforts to deter dishonesty on tax returns therefore have weak effects when existing social norms approve of such behavior, and strong effects when existing social norms disapprove of it. In sum, the threat of sanctions deters best when the imposition of sanctions is widely viewed as legitimate.<sup>31</sup>

Indeed, as discussed in greater detail below, a deterrence regime that races too far ahead of prevailing social norms may even have the self-defeating effect of increasing non-compliance in unexpected ways.<sup>32</sup> Imposing sanctions that are perceived to be unjust may mobilize opposition and foment backlash, further strengthening the norm that tolerated noncompliance in the first place. A prohibition that deviates far from a normative consensus risks alienating not only the subjects of that prohibition, but also those who have discretion over how to enforce it. As Paul Robinson and John Darley have explained in the criminal law context:

The criminal justice system depends on those involved in it (offenders, judges, jurors, witnesses, prosecutors, police, and others) for its operation. For the system to function effectively, these people must cooperate or, at least, acquiesce to the system’s demands. Otherwise, if the system is regarded as being in conflict with justice or simply failing to do justice, this critical cooperation or acquiescence may diminish or cease to exist at all. Moreover, to the degree that these deviations from justice are frequent and morally consequential, active forces of subversion and resistance are generated in the community.<sup>33</sup>

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*supra* note 17, at 224; Tom R. Tyler, *Reducing Corporate Criminality: The Role of Values*, 51 AM. CRIM. L. REV. 267, 269 (2014).

28. Kahan, *Social Meaning and Crime*, *supra* note 25.

29. See, e.g., Michael Wenzel, *The Social Side of Sanctions: Personal and Social Norms as Moderators of Deterrence*, 28 L. & HUM. BEHAV. 547 (2004); Steven M. Sheffrin & Robert K. Triest, *Can Brute Deterrence Backfire? Perceptions and Attitudes in Taxpayer Compliance*, in WHY PEOPLE PAY TAXES 193, 212–13 (Joel Slemrod ed., 1992).

30. See Kahan, *Social Influence*, *supra* note 25, at 354; Marco R. Steenbergen et al., *Taxpayer Adaptation to the 1986 Tax Reform Act: Do New Tax Laws Affect the Way Taxpayers Think About Taxes?*, in WHY PEOPLE PAY TAXES, *supra* note 29, at 9, 29–30.

31. Wenzel, *supra* note 29, at 561–64. A similar phenomenon has been observed in the punishment of common law crimes. See Kahan, *Social Influence*, *supra* note 25, at 354.

32. See *infra* Part IV.A.

33. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 23 (2007); see also Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 482 (1997) (describing the process through which expanding criminal law to cover socially accepted conduct first “weakens the stigmatizing effect that that expansion seeks to enlist” and then “destroys the stigmatizing effect” as “criminal penalties for non-condemnable conduct cause the public to

It follows that the best way to alter society's conduct is to alter society's norms. How individuals and institutions might undertake that project is the focus of the following Part.

## II. COPYRIGHT CRUSADERS<sup>34</sup> AS MORAL ENTREPRENEURS

Becker's central thesis is that "*social groups create deviance by making the rules whose infraction constitutes deviance*, and by applying those rules to particular people and labeling them as outsiders."<sup>35</sup> The initial perception of deviance, what Stanley Cohen would later coin a "moral panic,"<sup>36</sup> does not bubble up organically on its own. It requires a concerted initiative. And the groups that take this initiative are Becker's moral entrepreneurs.

Although contemporary legal scholars seldom trace the concept of moral entrepreneurship to Becker, it should nonetheless be familiar to them. Becker's theory of deviance anticipates the "law and social norms" movement that emerged in the 1990s.<sup>37</sup> Becker's concept of "rule" is what legal scholars recognize as a social norm. In 1996, when Cass Sunstein wrote that "[e]xisting social conditions are often more fragile than might be supposed" and identified the "norm entrepreneur" as the agent interested in changing the norms that enable those social

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sympathize with the person charged, and to despise the legal system that brings the charge"); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 985–89 (2003) (positing same thesis). For an application of these general principles to copyright law, see Moohr, *supra* note 17.

34. While I use the term "copyright crusader" for its Beckerian overtones, the Business Software Alliance has actually created a cartoon character known as The Copyright Crusader, who traverses cyberspace teaching kids that infringement is distinctly uncool. For reasons not entirely clear to me, our masked vigilante is a ferret. BUSINESS SOFTWARE ALLIANCE, COPYRIGHT CRUSADER TO THE RESCUE, *available at* <https://public.rcas.org/hs/hs/staffwebsites/reynodeb/ICT%202/Shared%20Documents/Unit%203%20Digital%20Citizenship/Cybersafety/TG-CopyrightCrusader-2005.pdf>.

35. BECKER, *supra* note 1, at 9.

36. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (2002). Cohen's formulation is now canonical in the field of criminology:

Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight.

*Id.* at 1. For more on Cohen's distinctive contributions to the study of deviance, see Nachman Ben-Yehuda, Foreword, *Moral Panics—36 Years On*, 49 BRIT. J. CRIMINOLOGY 1 (2009).

37. See, e.g., ELLICKSON, *supra* note 6; ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Dan M. Kahan *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000) [hereinafter Kahan, *Gentle Nudges*]; Kahan, *Social Influence*, *supra* note 25; Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

conditions, he was essentially identifying the Beckerian moral entrepreneur by a different name.<sup>38</sup>

Becker distinguishes between two “related species”: rule creators and rule enforcers.<sup>39</sup> This Part discusses how each fits into the current controversies over copyright infringement.

### A. Rule Creators

The rule creator is the sparkplug of moral enterprise, a “crusading reformer” bent on changing the normative convictions of society:

He is interested in the content of rules. The existing rules do not satisfy him because there is some evil which profoundly disturbs him. He feels that nothing can be right in the world until rules are made to correct it. He operates with an absolute ethic; what he sees is truly and totally evil with no qualification. Any means is justified to do away with it. The crusader is fervent and righteous, often self-righteous.<sup>40</sup>

There is no ethical valence to the act of rule creation. Rule creators have catalyzed both our greatest strides forward and our greatest failed social experiments, from Abolitionism to Prohibitionism. A rule creator might be a “meddling busybody” or a high-minded humanitarian.<sup>41</sup> Rule creation simply represents an enterprising commitment to changing society—for better or for worse.

It is unclear how much room exists for financial self-interest in Becker’s framework. He distinguishes the profit-driven industrialists who backed Prohibition from the Prohibitionists themselves. Only the latter, he argues, are true rule creators; the former are merely their accomplices.<sup>42</sup> Today, however, many sociologists of deviance concede that while rule creators may argue their case to society with the force of a moral imperative, they are inevitably motivated to some extent by sociopolitical and financial factors.<sup>43</sup> As Becker himself puts it, any practice may be “harmful in an objective sense to the group in which it occurs”; the moral crusade lies in getting people to “be made to feel that something ought to be done about it.”<sup>44</sup>

The content industries’ effort to recalibrate society’s moral compass concerning infringement is a good example of a financially motivated moral crusade. Rights-holders allege that piracy impoverishes artists whose ability to earn a livelihood

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38. Sunstein, *supra* note 37, at 909, 929.

39. BECKER, *supra* note 1, at 147.

40. *Id.* at 147–48.

41. *Id.* at 148.

42. *Id.* at 148–50.

43. See, e.g., COHEN, *supra* note 36, at 104 (arguing that even the “genuine crusader” is “moved by righteous indignation as well as self-interest”); ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS 81 (1994); Yar, *Teenage Kicks*, *supra* note 2, at 95.

44. BECKER, *supra* note 1, at 162.

ought to be protected.<sup>45</sup> At the same time, rightsholders are appealing to society's broader notions of justice and fair play.<sup>46</sup> Majid Yar has documented the process by which trade associations have attempted to use advocacy and rhetoric that would elicit broad moral opprobrium against piracy.<sup>47</sup> Yar catalogs a wide list of entrepreneurial efforts, including recoding infringement as a form of thievery and parasitism,<sup>48</sup> linking it with terrorism and the Mafia,<sup>49</sup> playing on the audience's sense of guilt,<sup>50</sup> and making parents feel responsibility as moral pedagogues.<sup>51</sup> The master of such tactics was Jack Valenti, the longtime chief lobbyist of the MPAA. Best remembered for his less-than-prescient testimony to Congress in 1982 that "the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone,"<sup>52</sup> Valenti set the rhetorical standard for the moral panics of copyright.<sup>53</sup>

One powerful device that these rule creators deployed early on is the word "piracy," which, like the word "espionage" in the trade secrecy context,<sup>54</sup> has been a rhetorical coup for rightsholders. As Peter Drahos and John Brathwaite have

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45. See, e.g., David Lieberman, *How Dangerous Are Pirates?: Music Industry Blames Dying Sales on Copying*, USA TODAY, Apr. 5, 2002, at B1; *Who Music Theft Hurts*, RIAA, <http://riaa.com/physicalpiracy.php> (last visited Feb. 3, 2014) (highlighting a "credible study by the Institute for Policy Innovation" that "pegs the annual harm at \$12.5 billion dollars in losses to the U.S. economy as well as more than 70,000 lost jobs and \$2 billion in lost wages to American workers"); *Frequently Asked Questions*, MPAA, <http://www.mpa.org/contentprotection/faq> (last visited Feb. 3, 2014) (identifying the movie industry as one of the main victims of piracy); John Healey et al., *Song Swappers Face the Music*, L.A. TIMES (Sept. 9, 2003), <http://articles.latimes.com/print/2003/sep/09/business/fi-riaa9> (quoting RIAA executive's statement that "when you are being victimized by illegal activity, there comes a time when you have to stand up and take appropriate action").

I take no position here on the disputed allegation that file-sharing has significantly undercut revenue. Compare Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 754–55 (2003) (describing the difficulty in measuring the extent to which piracy actually hurts sales), and Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 1 (2007) (arguing that downloads have an effect on sales which is statistically indistinguishable from zero), with Stan J. Liebowitz, *File-Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1, 3 n.5 (2006) (disagreeing with Oberholzer-Gee and Strumpf analysis), and Rafael Rob & Joel Waldfogel, *Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, 49 J.L. & ECON. 29 (2006) (finding that illegal downloading among students at American universities between 2003 and 2004 reduced individuals' legitimate purchases by approximately 20%).

46. See Yar, *Rhetorics and Myths*, *supra* note 2, at 608 (describing the creative content industries' repeated citations of financial loss as "discursive strategies for attempting to construct a political and public consensus about the immorality of piracy").

47. Yar, *Teenage Kicks*, *supra* note 2, at 100–04; Yar, *Rhetorics and Myths*, *supra* note 2, 610–19.

48. Yar, *Teenage Kicks*, *supra* note 2, at 101–03.

49. *Id.*

50. *Id.*

51. *Id.* at 103–04; Yar, *Rhetorics and Myths*, *supra* note 2, at 618–19.

52. *Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 8 (1982) (statement of Jack Valenti).

53. See PATRY, *supra* note 3, at 139–58 (explaining how Jack Valenti successfully employed folk devils and moral panics before Congress in an effort to protect against copyright infringement).

54. See Economic Espionage Act of 1996, 18 U.S.C. §§ 1831–39 (2012) (as amended).

observed, “[t]o be called an intellectual property pirate is to be condemned. In a world where attention spans are divided by the media into ten-second sound bites it is the perfect word to use on TV, videocassettes, newspaper headlines and the radio.”<sup>55</sup> Today, one cannot address copyright infringement without encountering the piracy trope. It has saturated copyright discussions in the popular press,<sup>56</sup> policy debates,<sup>57</sup> academia,<sup>58</sup> legislation,<sup>59</sup> and court decisions.<sup>60</sup> Indeed, one court recently went so far as to conclude that “piracy” has become the only viable term for describing willful copyright infringement.<sup>61</sup>

The near-ubiquity with which this term has been adopted is an example of what Stanley Cohen refers to as “spurious attribution,” an initial stage of stigmatization through emotive symbols.<sup>62</sup> By branding infringers as pirates, a term that took on added salience in April 2009 when pirates of the nautical variety captured a U.S.

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55. PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM* 28 (2002); see also PATRY, *supra* note 3, at 91–96 (highlighting the appeal of the pirate metaphor); STEPHEN WADDAMS, *DIMENSIONS OF PRIVATE LAW* 175–76 (2003) (explaining that the choice of piracy rhetoric is significant because it shows “the persuasive power of proprietary concepts”); Jane C. Ginsburg, *How Copyright Law Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 63–64 (2002) (describing how rhetorical devices like piracy and sharing have played a strong role for both copyright owners and users); Patricia Loughlan, *Pirates, Parasites, Reapers, Sowers, Fruits, Foxes . . . The Metaphors of Intellectual Property*, 28 SYDNEY L. REV. 211, 217–220 (2006) (noting that the use of the piracy metaphor in intellectual property discourse extends beyond instances of unlawful copying by the pirate); Jessica Litman, Address at the Tenth Conference on Computers, Freedom and Privacy: The Demonization of Piracy (Apr. 6, 2000), available at <http://www-personal.umich.edu/~jdlitman/papers/demon.pdf> (arguing that content owners have been winning the battles of terminology and metaphors).

56. See, e.g., Editorial, *Moving Against Movie Piracy*, L.A. TIMES (Dec. 19, 2009), <http://articles.latimes.com/2009/dec/19/opinion/la-ed-piracy19-2009dec19>; Lawrence Lessig, *In Defense of Piracy*, WALL ST. J. (Oct. 11, 2008), <http://online.wsj.com/news/articles/SB122367645363324303>; *Strategies to Sink the Music Pirates*, THE AUSTRALIAN, July 18, 2003, at 10; *Thanks, Me Hearties: Media Firms Find That Statistics On Internet Piracy Can Be Rather Useful*, THE ECONOMIST (July 17, 2008), <http://www.economist.com/11751035/>.

57. See, e.g., David Kravets, *Recording Industry Decries AM-FM Broadcasting as “A Form of Piracy,”* WIRED (Jun. 23, 2008), <http://blog.wired.com/27bstroke6/2008/06/recording-indus.html> (quoting recording industry spokesperson’s statement that the statutory provision exempting terrestrial radio broadcasters from paying artist performance royalties is piracy).

58. See, e.g., Annemarie Bridy, *Why Pirates (Still) Won’t Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L.J. 565 (2009).

59. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); Piracy and Counterfeiting Amendments Act of 1982, Pub. L. 97-180, 96 Stat. 91, 93 (codified as amended in scattered sections of 18 U.S.C. and 17 U.S.C.).

60. See, e.g., *Goldstein v. California*, 412 U.S. 546, 549 (1973) (discussing defendants engaged in “what has commonly been called ‘record piracy’ or ‘tape piracy’—the unauthorized duplication of recordings of performances by major musical artists”); *Dish Network L.L.C. v. Hippius*, No. 1:08cv357, 2009 WL 2922865, at \*1 (W.D.N.C. Sep. 8, 2009) (“[T]his court deplores piracy of protected transmissions—which the court believes to be nothing less than pure theft . . .”); *Curb v. MCA Records, Inc.*, 898 F. Supp. 586, 595 (M.D. Tenn. 1995) (“[P]iracy has changed since the Barbary days. Today, the raider need not grab the bounty with his own hands; he need only transmit his go-ahead by wire or telefax to start the presses in a distant land.”).

61. *United States v. Cassim*, 693 F. Supp. 2d 697, 701–02 (S.D. Tex. 2010) (reasoning that “because this term was and is commonly used to refer to the conduct in question, it will be difficult for witnesses and lawyers to generate an adequate substitute during questioning,” and on that basis denying criminal defendant’s motion in limine to exclude any use of the term “music piracy” during a criminal copyright infringement trial).

62. See COHEN, *supra* note 36, at 39–42.

crew and kidnapped its captain,”<sup>63</sup> copyright’s moral entrepreneurs play on society’s pre-existing moral outrage against others already defined as criminals. It is not so much a descriptive move as a prescriptive one; spurious attribution helps secure widespread acceptance of moral propositions that are initially held by few besides the rule creators themselves.<sup>64</sup> To be sure, as pirates have become more glamorous in mainstream culture over the past decade, the stigmatizing potential of the trope has waned.<sup>65</sup> Whether still potent or not, however, copyright owners’ rhetorical emphasis on piracy is an attempt to mold social norms.

Such rhetorical warfare demonstrates that rule creation need not require the adoption of positive law. To be sure, successful campaigns often produce new legislation. But the rules that creators design may also operate at the level of social condemnation, ostracizing some whose behavior is nonetheless lawful (or, in the case of the millions of copyright infringers who have never faced legal action, unlawful though unpunished).<sup>66</sup> With or without written law, such social stigma is a powerful, even necessary mechanism for successful entrepreneurship.<sup>67</sup> Copyright crusaders recognize this. After all, unlike Becker’s iconic rule creators who

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63. Shortly after the kidnapping, a public-relations officer for the Business Software Alliance touted its new “Faces of Internet Piracy” campaign with the following statement:

We’ve all been following the events of the past week of the pirates off the Horn of Africa. Piracy takes many forms, some more violent than others. I wanted to let you know that the Business Software Alliance is launching a new campaign today “Faces of Internet Piracy” that shows the real-life impact of software piracy—from hundreds of thousands of dollars in fines to jail time. Click on the picture below to learn more about the campaign . . . let me know if you’re interested in writing about this.

Gordon Haff, *BSA Equates Software Pirates to Somali Pirates*, CNET NEWS (Apr. 13, 2009), [http://news.cnet.com/8301-13556\\_3-10217889-61.html](http://news.cnet.com/8301-13556_3-10217889-61.html). Seizing on the moral disparity between kidnappers and copyright infringers, several blogs and newspapers began to question the propriety of the metaphor. See Stephen J. Dubner, *Is It Time to Rename Digital Piracy?*, FREAKONOMICS BLOG (Apr. 13, 2009, 11:50 AM), <http://freakonomics.blogs.nytimes.com/2009/04/13/is-it-time-to-rename-digital-piracy/>; Bobbie Johnson, *Is It Time to Stop Using the Word ‘Piracy’?*, THE GUARDIAN (Apr. 16, 2009), <http://www.theguardian.com/technology/2009/apr/16/piracy>; Rob Pegoraro, *Who Are You Calling a Software Pirate?*, FASTER FORWARD (Apr. 14, 2009, 2:08 PM), [http://voices.washingtonpost.com/fasterforward/2009/04/who\\_are\\_you\\_calling\\_a\\_software.html](http://voices.washingtonpost.com/fasterforward/2009/04/who_are_you_calling_a_software.html). Nevertheless, the term has shown no signs of losing traction with the public.

64. See PATRY, *supra* note 3, at 88; Litman, *supra* note 55. Infringers engage in an equal but opposite rhetorical move when they identify peer-to-peer downloads as “sharing.” See Ginsburg, *supra* note 55, at 63 (describing how “Napster brought us a new kind of ‘sharing,’ one in which recipients could enjoy the giver’s munificence, while the giver never had to give anything up” and “[e]veryone benefited; everyone, that is, except the creators and owners of the copied works”).

65. See Yu, *supra* note 3, at 927–28 (contrasting the negative connotation of piracy among policymakers with its positive connotation among children and teenagers).

66. See GOODE & BEN-YEHUDA, *supra* note 43, at 81–82 (cataloging various extra-legal tools used by rule creators). Becker’s case study on extra-legal constructions of deviance concerns dance musicians, whose way of life was “sufficiently bizarre and unconventional for them to be labeled as outsiders by more conventional members of the community.” BECKER, *supra* note 1, at 79. For examples of attempts to stigmatize lawful activity in the copyright sphere, see Kravets, *supra* note 57; Loughlan, *supra* note 55, at 218.

67. See Tyler, *supra* note 17, at 226–27 (arguing that without a “public feeling that breaking intellectual property laws is wrong . . . there is little reason for people to follow intellectual property laws”).

waged war against marijuana and alcohol, copyright's rule creators had the law on their side from the start. The illegality of infringement was already on the books when A&M Records sued Napster in 1999, jumpstarting the modern campaign against file-sharing.<sup>68</sup> The content industries' moral enterprise ultimately aims to instill values that make compliance voluntary.<sup>69</sup>

All this notwithstanding, passing new law remains the primary mechanism by which moral entrepreneurs attempt to sew these rules into society's moral fabric. Goode and Ben-Yehuda put it bluntly: "[w]henever the question 'What is to be done?' is asked concerning behavior deemed threatening, someone puts forth the suggestion, 'There ought to be a law.'"<sup>70</sup> The law, especially the criminal law, is often the first tool in the moral entrepreneur's kit because nothing else so clearly draws a line between good and evil.<sup>71</sup> Law can be educative in ways that advocacy alone cannot. This power to communicate blameworthiness marks not only enforcement, discussed in more detail below, but also enactment. Laws themselves can be expressive symbols of an underlying norm.<sup>72</sup> Even statutes' titles can convey a message.<sup>73</sup>

So the content industries did what any sensible moral entrepreneur would do—they lobbied for more law.<sup>74</sup> And they succeeded. In 1997, Congress passed the NET Act, which for the first time exposed non-commercial infringers to

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68. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001). Though the case presented novel issues concerning a file-sharing network's secondary liability for its users' infringing conduct, there was never any question that unauthorized copying and distribution of a copyrighted musical work are core violations. To the extent that individual users' direct infringement was an unsettled question prior to the Napster litigation, it was only unsettled as to whether their activities were protected as fair use. The district court, followed by the Ninth Circuit, clarified that they were not. See 239 F.3d at 1012–19. Even before the Napster decision, the leading case in the field had held that file-sharing was an obvious case of infringement. See *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000) ("The complex marvels of cyberspatial communication may create difficult legal issues; but not in this case. Defendant's infringement of plaintiffs' copyrights is clear.").

69. Cf. Tyler, *supra* note 17, at 224 (explaining that "seeking to control public behavior by threatening punishment is insufficient to gain widespread public compliance with the law" and suggesting that instead, "[f]or an effective strategy to deal with public compliance, we need to have a situation in which citizens voluntarily obey the law").

70. GOODE & BEN-YEHUDA, *supra* note 43, at 82.

71. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 200 (1991); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1891 (2000) ("Criminal law tends to be the first place groups turn when they want the legal system's blessing, because that blessing tends often to take the form of condemning those on the other side.").

72. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531–32 (2001) (describing the phenomenon of symbolic criminalization).

73. See Susan N. Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67, 69 (2006) (noting that the statute's title "often seems like a trope—words conveying a symbolic meaning, in this case engaging a set of political attitudes, rather than a literal reference to a piece of legislation").

74. See Goldman, *supra* note 17, at 373.

criminal penalties for large-scale activity.<sup>75</sup> One year later, Congress passed the Digital Millennium Copyright Act, outlawing the sale and dissemination of technology that could be used to circumvent digital rights management, regardless of whether a user might have a legal right to copy the underlying work.<sup>76</sup> In 2005, it passed the ART Act, which targets online infringement of pre-release works by strengthening the existing criminal penalties and eliminating the NET Act's monetary and numeric minimum thresholds for any pre-release works distributed on a computer network.<sup>77</sup> And in 2008, Congress passed the Prioritizing Resources and Organization for Intellectual Property Act, which increased the government's forfeiture powers in copyright cases.<sup>78</sup>

With the development of this criminal-law arsenal to supplement copyright's traditional private remedies for infringement under § 501, the rule creators further embedded their desired rules into the law of the land. Still remaining was the concrete application of these rules to particular violators in order to actually police the borders that had been drawn. That task would fall to the rule enforcers.

### B. Rule Enforcers

Becker conceives of the rule enforcer as a separate figure from the rule creator. The enforcer, typically a policeman or public prosecutor, is the authority that allows "the abstract class of outsiders created by the rule [to] be peopled."<sup>79</sup> By branding specific actors as beyond the pale, he signals what behavior ought to be stigmatized and punished.

The enforcer's objectives remain distinct from the rule creator's in that:

He is not so much concerned with the content of any particular rule as he is with the fact that it is his job to enforce the rule . . . . The enforcer, then, may not be interested in the content as such, but only in the fact that the existence of the rule provides him with a job, profession, a *raison d'être*.<sup>80</sup>

This disjunction between the interests of the creator and the enforcer produces agency costs, as the enforcer develops an independent agenda:

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75. See 17 U.S.C. § 506(a)(1)(B) (2012) (criminalizing infringement "by the reproduction or distribution, including electronic means, during any 180-period, of one or more copies or phonorecords of one or more copyrighted works, which have a total retail value of more than \$1,000"). Previously, infringement had only risen to the level of a criminal violation if it had been undertaken for commercial advantage or financial gain. See *United States v. LaMacchia*, 871 F. Supp. 535, 540 n.8 (D. Mass. 1994).

76. 17 U.S.C. §§ 1201(a)–(b), 1202, 1204 (2012).

77. *Id.* § 506(a)(1)(C).

78. Pub. L. No. 110-403, 122 Stat. 4256 (2008).

79. BECKER, *supra* note 1, at 163. One commentator describes the rule enforcer as "work[ing] not to promulgate new moral standards but to administer those standards once in place." Pozen, *supra* note 1, at 311 n.139.

80. BECKER, *supra* note 1, at 156.



Ordinarily, the rule enforcer has a great deal of discretion in many areas, if only because his resources are not sufficient to cope with the volume of rule-breaking he is supposed to deal with. This means that he cannot tackle everything at once and to this extent must temporize with evil. He cannot do the whole job and knows it. He takes his time, on the assumption that the problems he deals with will be around for a long while. He establishes priorities, dealing with things in their turn, handling the most pressing problems immediately and leaving others for later. His attitude toward his work, in short, is professional. He lacks the naïve moral fervor characteristic of the rule creator.<sup>81</sup>

Lacking a stake in the content of particular rules, and charged only with ensuring that others abide by them, enforcers attach their own weight to the rules. Rule enforcers shape the ultimate content of the rule by defining a set of core violators.<sup>82</sup> Core violators are distinguishable from technical violators, who are less worthy (or even entirely unworthy) of stigmatization. Enforcement itself thereby becomes an act of moral entrepreneurship in its own right.

Imperfect enforcement of the legislated rule can result from various factors, each of which affects federal prosecution of copyright infringement. One obvious factor, as Becker identifies, is resource constraints.<sup>83</sup> For example, police forces today cannot feasibly ticket each motorist driving above the posted speed limit on the highway, so some range above that limit becomes the *de facto* limit in its place.<sup>84</sup> Prosecutors of intellectual property offenses must perform a similar triage.<sup>85</sup> A second factor may be tension between the rule and the enforcers' professional ambition. Prosecutors who have the option of pursuing felonies have

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81. *Id.* at 159. Cohen notes, however, that in some instances the enforcers may be sufficiently sensitized to the crusade that the gap between them and the rule creators begins to fade. See COHEN, *supra* note 36, at 59–65.

82. BECKER, *supra* note 1, at 161–62.

83. *Cf.* Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (quoting Robert H. Jackson, U.S. Attorney General, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)) (“One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints.”).

84. See Margaret Raymond, *Penumbra Crimes*, 39 AM. CRIM. L. REV. 1395, 1404–05 (2002). Raymond quotes one police chief’s incredulity at a website suggesting that seven miles above the speed limit is a ticketable offense: “Seven over? No . . . If I wrote tickets for seven over, we’d write 10,000 tickets a year . . . I’d be happy if anybody didn’t go faster than seven over.” *Id.* at 1405 n.39.

85. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, INTELLECTUAL PROPERTY: FEDERAL ENFORCEMENT HAS GENERALLY INCREASED, BUT ASSESSING PERFORMANCE COULD STRENGTHEN LAW ENFORCEMENT EFFORTS 18, 20 (2008) (reporting that the size of the FBI’s intellectual property enforcement effort is small relative to other FBI efforts and has limited resources. Also reporting that, according to Justice Department field officials, local U.S. Attorney’s Offices set minimum value thresholds for taking intellectual property cases, in part because U.S. Attorney’s Offices have limited resources); VICTORIA A. ESPINEL, U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, 2010 U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR ANNUAL REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT 6 (2011) (explaining that law enforcement cannot serve as the sole enforcer because “the sheer volume of infringing content online calls for private sector involvement”); David F. Luckenbill & Susan L. Miller, *Defending Intellectual Property: State Efforts to Protect Creative Works*, 15 JUSTICE Q. 93, 114 (1998).

historically shown reluctance to expend energy and resources toward securing misdemeanor convictions.<sup>86</sup> In June 2011, the Acting Register of Copyrights appeared before Congress to testify in favor of felonizing unauthorized streaming of copyrighted content, which is currently criminalized as a misdemeanor. She explained that increasing the severity of the crime was necessary because “as a practical matter, prosecutors have little incentive to file charges for a mere misdemeanor . . . . This means that . . . streaming is not only a lesser crime on the books, it is a crime that may never be punished at all.”<sup>87</sup> This is a familiar trope in copyright infringement prosecution. The same problem necessitated the felonization of software piracy in the 1990s and of audio recording and motion picture piracy in the 1980s.<sup>88</sup> A third reason for imperfect enforcement may be the enforcer’s normative disinterest in the rule itself. This phenomenon has been observed in numerous subject areas of criminal law, among them domestic violence,<sup>89</sup> public intoxication,<sup>90</sup> and, perhaps most famously, Prohibition.<sup>91</sup> As I argue below, this phenomenon is also shaping copyright infringement prosecutions. The critical point for now is that, for any or all of these reasons, delegating enforcement responsibility results in the development of a rule-as-enforced that cannot be deduced purely from the rule-as-created.<sup>92</sup>

Of all the creative content industries, the music industry has been the vanguard of using civil litigation as a moral entrepreneurial tool against infringement.<sup>93</sup> When the RIAA sued Napster in 1999, its stated intent was not only to enjoin the network’s facilitation of copyright infringement, but also to generate public outcry against copyright infringement.<sup>94</sup> This latter goal proved more elusive than the

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86. See, e.g., Daniel D. Polsby, *Suppressing Domestic Violence with Law Reforms*, 83 J. CRIM. L. & CRIMINOLOGY 250, 251 (1992) (domestic violence); Margit Livingston, *Desecrating The Ark: Animal Abuse and the Law’s Role in Prevention*, 87 IOWA L. REV. 1, 5 (2001) (animal cruelty).

87. *Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 21 (2011) (statement of Maria A. Pallante, Acting Register of Copyrights).

88. S. REP. NO. 102-268, at 2 (1992); see also *The Piracy and Counterfeiting Amendments Act of 1981: Hearing on S. 691 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 97th Cong. 27 (1981) (joint statement of the MPAA and RIAA) (arguing for felonization of infringement offenses due to federal prosecutors’ disinterest in pursuing misdemeanor cases).

89. See Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 65 (1992).

90. See Raymond, *supra* note 84, at 1411–12.

91. See Kahan, *Gentle Nudges*, *supra* note 37, at 632.

92. See BECKER, *supra* note 1, at 133.

93. See Steven A. Hetcher, *The Music Industry’s Failed Attempt to Influence File Sharing Norms*, 7 VAND. J. ENT. L. & PRAC. 10, 12 (2004). Groups within the film industry have carried on similar campaigns on a smaller scale. See Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127, 1133–35 (2005); David Kravets, *Indie Filmmakers Sue Thousands of BitTorrent Users*, WIRED (Mar. 31, 2010, 12:16 PM), <http://www.wired.com/threatlevel/2010/03/bittorrent-legal-attack/>.

94. As one industry representative put it: “There is a segment of society that does not understand that file copying or shifting or sharing, or whatever they like to call it, is wrong. We need to continue to work to get the message out there that it’s illegal, which is why we bring cases the way we do.” Hetcher, *supra* note 93, at 22.

former. The Ninth Circuit Court of Appeals affirmed an injunction that essentially closed down Napster's operations, but a dozen other new file-sharing platforms sprung up in its place.<sup>95</sup> Despite well-publicized lawsuits against these networks, users continued to engage in illegal file-sharing.<sup>96</sup> Numerous studies revealed that a significant proportion of the population did not see anything terribly wrong with unauthorized downloading.<sup>97</sup> Indeed, even a U.S. Senator casually confessed to having used Napster.<sup>98</sup> Those who did disapprove of the conduct did so too weakly to enforce an anti-file-swapping norm through informal reprimand.<sup>99</sup>

Faced with this discouraging state of affairs, and emphasizing its previous efforts to warn the public about the immorality and illegality of infringement,<sup>100</sup> the RIAA turned to a measure it had previously avoided: suing individual file-sharers. The RIAA seeded news outlets with reports that file-sharers were risking lawsuits.<sup>101</sup> On September 8, 2003, it followed through, suing 261 users and subpoenaing another 1,600.<sup>102</sup>

The campaign gained immediate notoriety.<sup>103</sup> Early returns suggested that the lawsuits were paying off, as the number of individuals engaged in peer-to-peer file-sharing decreased significantly.<sup>104</sup> Some observed that in order to stamp out all peer-to-peer infringement, rightsholders simply needed to escalate the number of

95. See JOHN ALDERMAN, *SONIC BOOM: NAPSTER, MP3, AND THE NEW PIONEERS OF MUSIC* 131–49 (2001).

96. See Press Release, RIAA, Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online (Sept. 8, 2003), available at <http://www.riaa.org/newsitem.php?id=85183A9C-28F4-19CE-BDE6-F48E206CE8A1>.

97. See, e.g., IPSOS, *Professionals Know Software Piracy is Risky and Wrong; Workplace Policies Appear to Curb Violations, Increase Compliance* (Nov. 12, 2004), <http://www.ipsos-na.com/news/pressrelease.cfm?id=2452>; Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 238 (2002) (citing various surveys concluding that "a large portion of the public apparently believes that violating intellectual property laws of various sorts is not wrong").

98. See Katie Dean, *Senator Wants Answers From RIAA*, WIRE (Aug. 1, 2003), <http://www.wired.com/politics/law/news/2003/08/59862>.

99. See Strahilevitz, *supra* note 18, at 545.

100. See RIAA Press Release, *supra* note 96.

101. See, e.g., N.Y. TIMES, June 26, 2003, at A29 (full-page ad); Ryan Naraine, *RIAA Targets File-Sharing in the Workplace*, INTERNETNEWS.COM (Mar. 18, 2003), <http://www.internetnews.com/bus-news/article.php/2112521> (describing warning letters sent to 300 U.S. companies, including specific instances of file-sharing from corresponding IP addresses).

102. Katie Dean, *RIAA Landslide Begins*, WIRE (Sep. 8, 2003), <http://www.wired.com/entertainment/music/news/2003/09/60345>.

103. See Brett Lunceford & Shane Lunceford, *Meh. The Irrelevance of Copyright in the Public Mind*, 7 NW. J. TECH. & INTELL. PROP. 33, 34 (2008).

104. Lee Rainie & Mary Madden, *The Impact of Recording Industry Suits Against Music File Swappers*, PEW INTERNET & AMERICAN LIFE PROJECT (2004), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Society\\_and\\_the\\_Internet/pew\\_internet\\_music\\_downloads\\_010504.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Society_and_the_Internet/pew_internet_music_downloads_010504.pdf). See also Benny Evangelista, *Millions Deleted Downloads*, SFGATE.COM (Nov. 5, 2003, 4:00 AM), <http://www.sfgate.com/business/article/Millions-deleted-downloads-2550735.php> (citing study finding that over two million households deleted downloaded files out of fear of legal sanction).

individuals sued.<sup>105</sup> Over the next five years, the RIAA would file another 30,000 lawsuits, almost always settling out of court for several thousand dollars in damages.<sup>106</sup>

This multiyear effort, during which attorneys' fees far outstripped the monetary value of the settlements,<sup>107</sup> was not designed to make rightsholders financially whole. Instead, it was an exercise in rule enforcement. According to the RIAA's website, "[t]he program was designed to educate fans about the law, the consequences of breaking the law, and raise awareness about all the great legal sites in the music marketplace."<sup>108</sup> The RIAA was attempting to use civil litigation, as its outside counsel put it in 2008, to "send a message that copyright infringement is wrong."<sup>109</sup>

Yet in the long run, these lawsuits did not make much of a dent in permissive infringement norms. Surveys have shown that the litigation's deterrent effect was short-lived and that few have heeded the RIAA's message that unauthorized downloading is morally wrong.<sup>110</sup> Despite the creative content industries' insistence that infringement is no different than theft,<sup>111</sup> many still regard the theft of intangibles as less blameworthy.<sup>112</sup> In fact, overall levels of file-sharing have increased.<sup>113</sup> Even at the U.S. Military Academy at West Point, cadets were still regularly infringing as of 2006.<sup>114</sup> Around that time, the former Chairman and CEO of the RIAA conceded her concern that "the lawsuits have outlived most of

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105. See Lemley & Reese, *supra* note 24, at 1398 (arguing that the reason that "the already substantial civil and criminal penalties have only begun to have a deterrent effect is that for the most part they have not yet seriously been pursued against alleged direct infringers on p2p networks").

106. The 30,000 figure includes both named and Doe suits. The total number of unique individuals sued was 18,000. See Nate Anderson, *Has the RIAA sued 18,000 People . . . or 35,000?*, ARS TECHNICA (Jul. 8, 2009, 2:50 PM), <http://arstechnica.com/tech-policy/2009/07/has-the-riaa-sued-18000-people-or-35000/>. For a comprehensive, if slanted, overview of the RIAA litigation process, see Ray Beckerman, *How the RIAA Litigation Process Works*, BECKERMANLEGAL.COM (Apr. 9, 2008), <http://beckermanlegal.com/pdf/?file=/howriaa.htm> (last visited Feb. 3, 2014).

107. Manta, *supra* note 10, at 514 (noting that over three years, the RIAA paid \$64 million in legal and other expenses and recouped only \$1.36 million).

108. *For Students Doing Reports*, RIAA, <http://www.riaa.com/faq.php> (last visited Feb. 3, 2014).

109. Heather Green, *Does She Look Like a Music Pirate?*, BUSINESSWEEK (Apr. 23, 2008), <http://www.businessweek.com/stories/2008-04-23/does-she-look-like-a-music-pirate>.

110. Michael Bachmann, *Lesson Spurned? Reactions of Online Music Pirates to Legal Prosecutions by the RIAA*, 1 INT'L J. CYBER CRIMINOLOGY 213, 224–25 (2007); see also Ville Oksanen & Mikko Välimäki, *Theory of Deterrence and Individual Behavior: Can Lawsuits Control File Sharing on the Internet?*, 3 REV. L. & ECON. 693, 709–10 (2007) (finding that litigation cannot be used to establish any social norm with a long lasting effect on individual behavior as long as the peer pressure pushes in the opposite direction).

111. See, e.g., Press Release, Recording Indus. Ass'n Am., *Film and Music Industries File Suit Against Scour.com* (July 20, 2000), available at <http://riaa.com/print.php?id=CF90BF73-D27E-DE11-7D43-71CF88230C1E> ("This is about stealing, plain and simple.").

112. See Stuart P. Green & Matthew B. Kugler, *Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation*, 7 J. EMPIRICAL LEGAL STUD. 511, 534–35 (2010).

113. Depoorter & Vanneste, *supra* note 93, at 1135.

114. See Oliver R. Goodenough & Gregory Decker, *Why Do Good People Steal Intellectual Property?*, in *LAW, MIND AND BRAIN* 345, 360 (Michael Freeman & Oliver R. Goodenough eds., 2009).

their usefulness and that the record companies need to work harder to implement a strategy that legitimizes more [peer-to-peer] sites and expands the download and subscription pool by working harder with the tech community to get devices and music services to work better together.”<sup>115</sup>

John Palfrey and others have found that acceptance of peer-to-peer sharing of copyrighted content has persisted particularly among young people.<sup>116</sup> Joel Tenenbaum, now perhaps the most famous defendant in the RIAA’s litigation campaign thanks to a well publicized jury trial, is one such young person. Tenenbaum infringed despite warnings from his family and college, and then continued to infringe even in the midst of the infringement suit.<sup>117</sup> As the district court noted in his case, “[h]e was not someone who stumbled onto a peer-to-peer network and unknowingly found himself in trouble. He knew file-sharing was illegal, yet persisted.”<sup>118</sup>

The RIAA announced in December 2008 that it was officially abandoning its campaign.<sup>119</sup> By that point, its rule enforcement efforts had become not only unproductive, but very likely counterproductive. As one recent experimental study found, such punitive enforcement actually tends to strengthen a permissive infringement norm among frequent infringers.<sup>120</sup> As a result, frequent infringers tend to download unauthorized files more—not less—if previously punished for infringement.<sup>121</sup> The study authors posited that as infringers “begin to identify with the anti-copyright sub-culture, a targeted campaign against file-sharers might generate a defensive reaction and have the counterproductive effect of strengthening the community bond and support among file sharers.”<sup>122</sup> Another study found that permissive file-sharing norms were so entrenched that enforcement may have the self-defeating effect of encouraging users to “make up for lost time” whenever they sensed that litigation had been temporarily suspended.<sup>123</sup>

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115. Hilary Rosen, *For the Record, for What It's Worth*, HUFFINGTON POST (June 4, 2006), <http://archive.is/dNYnQ>.

116. John Palfrey et al., *Youth, Creativity, and Copyright in the Digital Age*, 1 INT’L J. LEARNING & MEDIA 79, 87–89 (2009) (discussing the prevalence and impact of an everybody’s-doing-it mentality among young people); JOHN PALFREY & URS GASSER, BORN DIGITAL 138 (2008) (citing focus group studies showing that youth perceived “no direct link between copying something and causing a loss to someone”).

117. See *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 495 (1st Cir. 2011) (noting that Tenenbaum “continued the illegal downloading and distribution of copyrighted materials until at least 2007,” two years after receiving a cease and desist letter); *Sony BMG Music Entm’t v. Tenenbaum*, 719 F.3d 67, 71 (1st Cir. 2013) (“Tenenbaum carried on his activities for years in spite of numerous warnings . . .”).

118. *Sony BMG Music Entm’t v. Tenenbaum*, 672 F. Supp. 2d 217, 237 (D. Mass. 2009) (citation omitted).

119. Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. (Dec. 19, 2008), <http://online.wsj.com/news/articles/SB122966038836021137>.

120. See Ben Depoorter et al., *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1283–88 (2011).

121. *Id.*

122. *Id.* at 1286; see also Irina D. Manta, *The High Cost of Low Sanctions*, 66 FLA. L. REV. (forthcoming 2014) (“[H]arsh enforcement tactics can encourage distaste against copyright altogether and prove counterproductive . . . to decreas[ing] infringement.”).

123. Depoorter & Vanneste, *supra* note 93, at 1157.

The attack on potential customers has also proved to be a public-relations quagmire.<sup>124</sup> Newspapers have profiled particularly sympathetic defendants, including invalids, single mothers, and twelve-year-old honors students downloading nursery rhymes, all the while portraying the recording industry as bullying, draconian, and pitiless.<sup>125</sup> Some musicians, whose interests the RIAA professes to advocate, have proceeded to rally in support of infringers, arguing that peer-to-peer distribution could not possibly be less remunerative than signing away rights to record companies.<sup>126</sup> One judge publicly lamented that “potentially meritorious legal and factual defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants.”<sup>127</sup>

In short, the copyright crusaders have generated their own resistance.<sup>128</sup> The recording industry has by now become a cautionary tale for other content owners facing their own piracy threats.<sup>129</sup> Do not lightly assume the enforcer’s mantle, the lesson goes, lest you amplify the deviance you are trying to suppress.

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124. See, e.g., PALFREY & GASSIER, *supra* note 116, at 141 (calling the campaign against peer-to-peer downloaders a “disaster from the standpoint of public relations”); McBride & Smith, *supra* note 119 (reporting that it “created a public-relations disaster for the industry, whose lawsuits targeted, among others, several single mothers, a dead person and a 13-year-old girl”). One defendant told a Senate committee that “until the RIAA stops targeting unwitting victims, I am not going to buy any more CDs and I know many consumers feel the same.” *Privacy and Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Permanent Subcomm. Of Investigations of the S. Comm. on Governmental Affairs*, 108th Cong. 51 (2003) (statement of Lorraine Sullivan).

125. See, e.g., Frank Ahrens, *RIAA’s Lawsuits Meet Surprised Targets: Single Mother in Calif., 12-Year-Old Girl in N.Y. Among Defendants*, WASH. POST, Sept. 10, 2003, at E1; Soni Sangha & Phyllis Furman, *Sued for a Song: N.Y.C. 12-yr-old Among 261 Cited as Sharers*, N.Y. DAILY NEWS, Sept. 9, 2003; Jefferson Graham, *RIAA Lawsuits Bring Consternation, Chaos*, USA TODAY (Sept. 10, 2003), [http://usatoday30.usatoday.com/tech/news/techpolicy/2003-09-10-riaa-suit-reax\\_x.htm](http://usatoday30.usatoday.com/tech/news/techpolicy/2003-09-10-riaa-suit-reax_x.htm). Graham’s piece concluded by quoting a social psychology professor’s assessment that “the image is out there of the bully ganging up on people with the least amount of money, the rich taking from the poor.” *Id.*

126. See, e.g., Yar, *Rhetorics and Myths*, *supra* note 2, at 617 (quoting musician Ignacio Escolar’s comment: “Like all musicians, I know that 100,000 pirate fans coming to my shows are more profitable than 10,000 original ones”); Nate Anderson, *Richard Marx (!) Attacks RIAA After \$1.92M Thomas Verdict*, ARS TECHNICA (Jun. 24, 2009, 7:29 AM), <http://arstechnica.com/tech-policy/news/2009/06/richard-marx-attacks-riaa-after-19m-thomas-verdict.ars>; Ani DiFranco in Conversation, FORA.TV, [http://fora.tv/2008/04/09/Ani\\_DiFranco\\_in\\_Conversation#Ani\\_DiFranco\\_on\\_Illegal\\_File\\_Sharing](http://fora.tv/2008/04/09/Ani_DiFranco_in_Conversation#Ani_DiFranco_on_Illegal_File_Sharing) (last visited Feb. 3, 2014); Courtney Love, *Love Manifesto*, REZNOR.COM, [https://www.reznor.com/commentary/loves\\_manifesto1.html](https://www.reznor.com/commentary/loves_manifesto1.html) (last visited Feb. 3, 2013).

127. Order to Show Cause re First Amended Complaint, *Elektra Entm’t Grp. v. Brien*, No. 2:06-cv-5289 (C.D. Cal. Mar. 2, 2007).

128. Stanley Cohen observes a similar phenomenon at work in local police efforts to regulate British youth culture in the 1960s: “The more sustained effects of police action . . . were to increase the deviance by unwittingly solidifying the amorphous crowd forces into more viable groups for engaging in violence and by further polarizing the deviants against the community.” COHEN, *supra* note 36, at 142.

129. See, e.g., Motoko Rich, *Print Books are Targets of Pirates on the Web*, N.Y. TIMES (May 11, 2009), <http://www.nytimes.com/2009/05/12/technology/internet/12digital.html>; *To RIAA or Not to RIAA, That Was the Question*, THE AUTHOR’S GUILD (Feb. 5, 2010), <http://www.authorsguild.org/advocacy/articles/riaa.html>.

### C. Federal Prosecution

In September 2009, twenty-two-year-old Richard Humphrey pleaded guilty to one count of criminal copyright infringement for selling pirated movies prior to their commercial release through an Internet website that he operated. He offered paid subscription services, and also solicited donations for access to hundreds of illegal copies of movies and software on his website. Humphrey was later sentenced to twenty-nine months' imprisonment.<sup>130</sup>

Humphrey's punishment was possible only because federal prosecutors decided that his conviction was worth the expenditure of government resources. Justice Jackson once observed that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."<sup>131</sup> In criminalizing an increasing swath of copyright infringement, Congress entrusts the fate of hundreds of thousands of copyright infringers to that discretion. This is the archetypical arrangement envisioned by Becker. Unlike in civil litigation, the putative rule enforcers here are a professional class whose own judgment acts as a check on that of the rule creators.

At the time of the NET Act's passage, both rightsholders and the public had legitimate reason to have been troubled by this delegation of copyright enforcement power to criminal prosecutors. From the standpoint of the rightsholders, criminal enforcement comes with agency costs that predict lower levels of prosecution. Assigning the task to less morally fervent enforcers tends to yield less morally fervent enforcement.<sup>132</sup> Consistent with that tendency, prosecutors shied away from charging infringers under the NET Act. So while the rule creators succeeded in securing harsher sanctions, those sanctions were not imposed in every instance that they saw fit. This prompted several members of Congress to urge the DOJ to make better use of the new prosecutorial tools that it had been given.<sup>133</sup>

From the standpoint of the public, the concern was not too little enforcement but rather too much. At the time the legislation was passed, peer-to-peer copyright infringement was widespread and, according to prevailing social norms, unobjectionable. Because criminal law maximizes credibility when its rules track prevailing social norms, many predicted that the new criminal laws were destined for

130. Press Release, U.S. Dep't of Justice, Ohio Man Sentenced to 29 Months in Prison for Selling Pirated Copies of Movies (Apr. 20, 2010), available at <http://www.justice.gov/opa/pr/2010/April/10-crm-447.html>.

131. Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

132. See BECKER, *supra* note 1, at 161; Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 411 (2012) (arguing that rules that assign decisionmaking authority to self-interested or biased actors forego impartiality in return for greater institutional energy).

133. See Letter from Sen. Joseph Biden, Rep. Lamar Smith, and seventeen other members of Congress, to John Ashcroft, Attorney General (July 25, 2002), available at <http://www.politechbot.com/docs/congress.p2p.letter.081002.pdf>.

backlash.<sup>134</sup> Widespread and well publicized civil lawsuits had shown little deterrent effect and may very well have fomented opposition to both the anti-piracy message and its messenger. Expanding criminal enforcement seemed to flout the ostensible lesson of this history.

Yet the expected backlash against the government never occurred. There has been no significant opposition to criminal prosecutions of individual copyright infringers, which have received supportive portrayals in the media.<sup>135</sup> This is because federal prosecutors have exercised more selectivity in enforcing copyright law than have rightsholders themselves. Of course, selectivity in itself is not surprising; the government will necessarily have fewer resources and more responsibilities than the private sector.<sup>136</sup> But resource constraints alone cannot account for the government's selective enforcement. Prosecutors are gravitating almost exclusively toward a particular subset of infringers, a tiny fraction of what is likely millions of culpable file-sharers.<sup>137</sup> This subset comprises two groups: (1) commercial pirates, i.e., those actually selling the infringing material,<sup>138</sup> and (2) "warez" traders, sophisticated file-trading syndicates whose members compete to be the first to upload an infringing work to the web, often before its commercial release.<sup>139</sup>

Commercial piracy, which includes both online and brick-and-mortar sales, poses a significant threat to rightsholders. For the film industry, predicted losses from commercial piracy outpace those from illegal file-sharing by nearly a

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134. See sources cited *supra* note 18. For a concise example of this argument, see Declan McCullagh, *Perspective: An End of an Era for File-Sharing Chic?*, CNET NEWS (Aug. 25, 2003), [http://news.cnet.com/End-of-an-era-for-file-sharing-chic/2010-1071\\_3-5067473.html](http://news.cnet.com/End-of-an-era-for-file-sharing-chic/2010-1071_3-5067473.html) (predicting that the backlash to the RIAA lawsuits would "pale by comparison to what happens if the Justice Department uses the 1997 No Electronic Theft Act to prosecute P2P users for criminal violations of copyright law").

135. For further analysis, see *infra* notes 142–45 and accompanying text.

136. See sources cited *supra* note 83.

137. One 2005 study estimated that 36 million file-sharers exist in the United States. Memorandum from Mary Madden & Lee Rainie, Pew Internet & Am. Life Project (Mar. 2005), available at [http://www.pewinternet.org/media/Files/Reports/2005/PIP\\_Filesharing\\_March05.pdf.pdf](http://www.pewinternet.org/media/Files/Reports/2005/PIP_Filesharing_March05.pdf.pdf). The proportion of them that would qualify for criminal liability may be quite large. Eric Goldman has noted that it would only require \$5.56 worth of infringement per day within a 180-day period to trigger criminal liability under the NET Act. Goldman, *supra* note 17, at 430. With individual songs now priced at \$1.29 on iTunes and movies at several dollars, this threshold is easily reached. See also John Leland, *Beyond File-Sharing: A Nation of Copiers*, N.Y. TIMES (Sept. 14, 2003), <http://www.nytimes.com/2003/09/14/style/beyond-file-sharing-a-nation-of-copiers.html>.

138. For a representative sample of defendants, see Press Release, U.S. Dep't of Justice, For-Profit Software Piracy Website Operator Sentenced to 87 Months in Prison (Sept. 8, 2006), available at <http://www.justice.gov/criminal/cybercrime/press-releases/2006/petersonSent.htm>; Press Release, U.S. Dep't of Justice, Operator of Massive For-Profit Software Piracy Website Sentenced to Six Years in Prison (Aug. 25, 2006), available at <http://www.justice.gov/criminal/cybercrime/press-releases/2006/ferrerSent.htm>; Press Release, U.S. Department of Justice, Ohio Man Pleads Guilty to Criminal Infringement (Feb. 20, 2004), available at <http://www.justice.gov/criminal/cybercrime/press-releases/2004/singhPlea.htm>.

139. For a representative sample of defendants, see the DOJ collection of materials assembled on its recent Operation Buccaneer. *Operation Buccaneer*, U.S. DEP'T OF JUSTICE, <http://web.archive.org/web/20110722172136/http://www.cybercrime.gov/ob/OBMain.htm> (accessed through Internet Archive index).



two-to-one margin.<sup>140</sup> Surveys suggest that there remains a strong social norm against engaging in piracy for profit.<sup>141</sup> Anecdotal evidence is in accord. For instance, media outlets traditionally critical of private lawsuits against file-sharers have been far more supportive of prosecutions of commercial players.<sup>142</sup> Larry Lessig's influential work on free culture simultaneously condemns for-profit infringement and praises peer-to-peer distribution for personal use.<sup>143</sup> Likewise, Trotter Hardy has described commercial pirates as "by almost anyone's standards 'bad guys'—wrongdoers, shady characters, fly-by-night con men, and so on."<sup>144</sup> One would be hard pressed to find so harsh a description applied to non-commercial file-sharers (except, perhaps, in the occasional rhetorical flourishes of the rule creators themselves). Indeed, negative attitudes toward for-profit infringement can even be found among those individuals who think that copyrighted works always ought to be free.<sup>145</sup>

A recent variation on the prosecution of commercial piracy is the currently ongoing case against popular online storage locker Megaupload and its founder, Kim Dotcom. Megaupload is a commercial site that allows users anonymously to exchange copyrighted materials over the Internet, earning revenue from advertisements and selling premium subscriptions.<sup>146</sup> In January 2012, Dotcom, along with several associates and the Megaupload corporate entity itself, was indicted in the

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140. See Lucille M. Ponte, *Coming Attractions: Opportunities and Challenges in Thwarting Global Movie Piracy*, 45 AM. BUS. L.J. 331, 339 (2008) (comparing predicted U.S. losses of \$864 million for commercial piracy to \$447 million for file-sharing).

141. See JESSICA LITMAN, *DIGITAL COPYRIGHT* 117 (2001); Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1885 (2009); Palfrey et al., *supra* note 116, at 90 (describing focus group responses of young people who intuited that "it was within ethical boundaries to use others' content—even without permission—in their own creations as long as they did not achieve financial gain from their creations").

142. See, e.g., Nate Anderson, *New Wave of Pirates Has Psoriasis, Frat Boy Hair; No Peglegs*, ARS TECHNICA (Oct. 12, 2009, 8:33 PM) <http://arstechnica.com/tech-policy/news/2009/10/who-are-commercial-software-pirates-anyway.ars> (commenting that commercial software piracy is "certainly fair game for the [Business Software Alliance] and the government, and it definitely beats going after noncommercial college P2P users in federal court").

143. LAWRENCE LESSIG, *FREE CULTURE* 62–63 (2004) ("Despite the many justifications that are offered in its defense, this taking is wrong. No one should condone it, and the law should stop it . . . This is piracy plain and simple. Nothing in the argument of this book, nor in the argument that most people make when talking about the subject of this book, should draw into doubt this simple point: This piracy is wrong.").

144. I. Trotter Hardy, *Criminal Copyright Infringement*, 11 WM. & MARY BILL RTS. J. 305, 327 (2002).

145. See, e.g., enigmax, *'Bad' BitTorrent and Ware Sites Raided By Police*, TORRENTFREAK (Apr. 28, 2009), <http://torrentfreak.com/bad-bittorrent-and-warez-sites-raided-by-police-090428/> ("[R]emember folks; paying for warez is like paying for oxygen, it's unnecessary and it gives decent pirates a bad name . . ."). The comments below the post reveal a similar mindset: "[It's] only piracy if you make money off of it. It is not piracy in the case you are just sharing files." Anonymous, Comment to *id.* For a direct link to the comment, follow <http://torrentfreak.com/bad-bittorrent-and-warez-sites-raided-by-police-090428/#comment-133658326>.

146. See Ben Sisario, *7 Charged As F.B.I. Closes a Top File-Sharing Site*, N.Y. TIMES (Jan. 20, 2012), <http://www.nytimes.com/2012/01/21/technology/megaupload-indictment-internet-piracy.html>.

largest criminal copyright case in history.<sup>147</sup> Megaupload is just one of many sites that offer this service, but to date, none of those other sites has been charged with a crime.

It is not difficult to see how Megaupload was low hanging fruit for prosecutors. Megaupload was by far the largest possible target, at one point ranking as the thirteenth most frequently visited website in the world and accounting for 4% of all Internet traffic.<sup>148</sup> In 2010 alone, Dotcom earned \$42 million in profit from the enterprise.<sup>149</sup> In order to make the site as attractive to users as it eventually became, Dotcom allegedly paid users to upload as many copyrighted works as possible.<sup>150</sup> User access to those works was the primary draw: 91% of users relied on the site only for downloading others' files, not for their own storage. The indictment cites numerous emails and texts among Megaupload employees that acknowledged the piracy that was central to their business model.<sup>151</sup> As one popular technology blog noted at the time of the indictment, "Megaupload wasn't just big; it was *brazen*."<sup>152</sup> On top of all this, Dotcom is not likely a candidate for popular sympathy. He has previously been convicted of insider trading and embezzlement, was living in a \$24 million estate at the time of his arrest, and lives a notoriously flamboyant lifestyle.<sup>153</sup> Among his possessions are twenty-five automobiles, three of which have vanity license plates reading "GUILTY," "EVIL," and "GOD."<sup>154</sup>

To be sure, the Megaupload case raises some novel legal issues that complicate the prosecution.<sup>155</sup> Nevertheless, regardless of how a court may rule on those questions of law, the defendants look culpable.<sup>156</sup> A jury would not likely

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147. See Indictment, *United States v. Dotcom*, No. 1:12-CR-3 (E.D. Va. Jan. 5, 2012). A superseding indictment added additional counts of copyright infringement and wire fraud. See Superseding Indictment, *United States v. Dotcom*, No. 1:12-CR-3 (E.D. Va. Feb. 16, 2012).

148. Superseding Indictment, *supra* note 147, at 2–3.

149. *Id.* at 14.

150. *Id.* at 28.

151. *Id.* at 34–60.

152. See Sam Biddle, *Why Did the Feds Target Megaupload? And Why Now?*, GIZMODO (Jan. 20, 2012 12:00 PM), <http://gizmodo.com/5877836/why-did-the-feds-choose-megaupload-and-why-now>.

153. Roger Parloff, *Megaupload and the Twilight of Copyright*, CNNMONEY (Jul. 11, 2012, 5:00 AM), <http://tech.fortune.cnn.com/2012/07/11/megaupload-cyberlocker-copyright/>.

154. *Id.*

155. To begin with, complex jurisdictional and extraterritoriality questions remain regarding how the U.S. criminal copyright provisions will apply to Dotcom, a resident of New Zealand, and Megaupload Ltd., a Hong Kong company. See *United States v. Dotcom*, No. 1:12-CR-3, 2012 WL 4788433 (E.D. Va. Oct. 5, 2012); Alison Frankel, *Megaupload, Meet Morrison*, REUTERS (Jan. 24, 2012), <http://blogs.reuters.com/alison-frankel/2012/01/24/megaupload-meet-morrison/>. On top of this, no court has yet embraced the theory that secondary infringement, a clearly established but judge-made doctrine in civil cases, suffices for criminal liability. See Jennifer Granick, *Megaupload: A Lot Less Guilty Than You Think*, CTR. FOR INTERNET & SOC'Y (Jan. 26, 2012, 11:47 AM), <http://cyberlaw.stanford.edu/node/6795>; cf. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (describing secondary infringement principles in a civil context).

156. See Timothy B. Lee, *Is Megaupload "A Lot Less Guilty Than You Think?"*, ARS TECHNICA (Feb. 16, 2012, 1:00 PM), <http://arstechnica.com/tech-policy/2012/02/is-megaupload-a-lot-less-guilty-than-you-think/> ("In theory,

experience much cognitive dissonance if asked to believe that Dotcom is a criminal. As a target of enforcing the rule that copyright infringement is wrong, Megaupload is an unextraordinary choice.

Unlike commercial pirates, warez traders shun profiteering from piracy—they infringe more for the sport of it.<sup>157</sup> And while they share this non-commerciality with peer-to-peer downloaders, the similarities end there. Warez traders operate in stealthy, hierarchical networks “similar to inner-city gang members, minus the violence.”<sup>158</sup> Their goal is simple: to beat the release date of a big-name album, videogame, or movie by as much time as possible.<sup>159</sup> In order to do so, they rely on sophisticated tactics that would be unfamiliar to the casual, armchair file-sharer—IP address encryption, continuously rotating usernames and passwords, and pseudonymous titles. It is, by all accounts, a “darknet,” a region of cyberspace hidden from view to the majority of its users.<sup>160</sup> These industrial-scale infringers are fully aware of the criminality of their actions and, as a result, pour considerable resources into maintaining secrecy.<sup>161</sup>

The two defendants in *United States v. Slater* are typical of those targeted in warez prosecutions.<sup>162</sup> They were members of a group called “Pirates with Attitude,” which operated thirteen FTP servers with the professed goal of making as much copyrighted software freely available as possible.<sup>163</sup> To accomplish this mission, the group worked in what the court described as “assembly line-like fashion”: suppliers, who had special access to the software files, provided the files to crackers; crackers removed the internal copy protections from the software code and passed them on to packagers; packagers tested the software, added descriptive information, and delivered the files to couriers; and the couriers finally uploaded the finished products to members-only websites maintained by the group, where they were available for download and onward distribution.<sup>164</sup>

The enterprise was shut down when FBI agents seized a server that fed the

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they should be interpreting this carefully, but the defendants look really guilty . . . . [T]hey look like they are running a criminal enterprise.”).

157. See Stephen Granade, *Warez, Abandonware, and the Software Industry*, BRASS LANTERN, <http://brasslantern.org/community/companies/warez.html> (last visited Feb. 3, 2014).

158. Timothy L. O'Brien, *King Kong vs. the Pirates of the Multiplex*, N.Y. TIMES (Aug. 28, 2005), <http://www.nytimes.com/2005/08/28/business/media/28movie.html>.

159. See Jeff Howe, *The Shadow Internet*, WIRED (Jan. 2005), <http://www.wired.com/wired/archive/13.01/topsite.html>.

160. *Id.*

161. See Michael M. DuBose, *Criminal Enforcement of Intellectual Property Laws in the Twenty-First Century*, 29 COLUM. J.L. & ARTS 481, 492 (2006) (providing prosecutor's first-hand accounts from proffer sessions); see also Jim Wagner, *The Hunt for Warez*, INTERNETNEWS.COM (Apr. 19, 2002), [http://www.internetnews.com/dev-news/print.php/10792\\_1012961\\_2](http://www.internetnews.com/dev-news/print.php/10792_1012961_2) (quoting warez trader's statement that people enjoy the activity for “the hint of doing something illegal”).

162. See 348 F.3d 666 (7th Cir. 2003).

163. *Id.* at 667; Goldman, *supra* note 17, at 384.

164. *Slater*, 348 F.3d at 667.

group's central website.<sup>165</sup> The server contained 5,000 different downloadable programs.<sup>166</sup> Over the two-year period charged in the indictment, group members had uploaded to the website more than 34,000 different programs, including popular applications from Microsoft, Adobe, Norton, IBM, and Oracle.<sup>167</sup> The two *Slater* defendants were among seventeen that were indicted for conspiracy to commit copyright infringement.<sup>168</sup> Twelve were members of Pirates with Attitude, each of whom operated under a pseudonym.<sup>169</sup> The other five had provided hardware in exchange for access to the group's warez library.<sup>170</sup> Except for two that remain fugitives, all defendants were convicted.<sup>171</sup>

These defendants, like the *Megaupload* defendants, don't look much like everyday infringers. The hierarchy, secrecy, sophistication, and mass-scale of their operation set them apart. Like most warez traders, the defendants are targets that members of the public can recognize as blameworthy without having to blame themselves.<sup>172</sup>

Together, commercial pirates and warez traders form the focus of criminal copyright enforcement in the United States.<sup>173</sup> But it did not have to be this way. Indeed, senior DOJ officials promised otherwise. In 2002, Deputy Assistant Attorney General John Malcolm told an audience at a technology summit that "[m]ost parents would be horrified if they walked into a child's room and found 100 stolen CDs . . . However, these same parents think nothing of having their children spend time online downloading hundreds of songs without paying a dime."<sup>174</sup> To rectify matters, Malcolm continued, the federal government would need to educate parent and child alike through criminal prosecution. "There does have to be some kind of a public message that stealing is stealing is stealing."<sup>175</sup> Malcolm would repeat this pledge before a congressional committee, stating:

With respect to those people who use peer-to-peer networks or, for that matter, any other mechanism to engage in copyright infringement, we will prosecute

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165. *Id.*; Goldman, *supra* note 17, at 385.

166. *Slater*, 348 F.3d at 667.

167. *Id.* at 668; U.S. Dep't of Justice, Press Release, *Leader of Software Piracy Ring Sentenced to 18 Months in Prison* (May 15, 2002), available at [http://www.justice.gov/criminal/cybercrime/press-releases/2002/rothbergSent\\_pirates.htm](http://www.justice.gov/criminal/cybercrime/press-releases/2002/rothbergSent_pirates.htm).

168. Goldman, *supra* note 17, at 385. For additional background on the investigation and indictment, see *United States v. Rothberg*, No. 00-CR-85, 2002 WL 171963 (N.D. Ill. Feb. 4, 2002).

169. Goldman, *supra* note 17, at 384 n.99.

170. *Id.* at 385.

171. *Id.* at 386.

172. See Eric Goldman, *Warez Trading and Criminal Copyright Infringement*, 51 J. COPYRIGHT SOC'Y U.S.A. 395, 426 (2004) (describing how "[u]nsympathetic warez traders" provide cases "that permit average Americans to distinguish the criminal's conduct from their own").

173. See Eric Goldman, *The Challenges of Regulating Warez Trading*, 23 SOC. SCI. COMPUTER REV. 24, 27 (2005) [hereinafter Goldman, *Challenges*]; Goldman, *supra* note 17, at 392.

174. Declan McCullagh, *DOJ to Swappers: Law's Not on Your Side*, CNET (Aug. 20, 2002, 2:27 PM), <http://news.cnet.com/2100-1023-954591.html>.

175. *Id.*

them. We can prosecute them under the criminal copyright laws, which generally carry up to 5 years. Felonies, we can prosecute them under the [NET act], which is a 3-year felony.<sup>176</sup>

Those prosecutions never happened. Though there was a change in the number of charges brought, there was no change in type. As the graph below shows, in the decade since the passage of the NET Act, the number of prosecutions for criminal copyright infringement increased from seventeen in 1998 to its highpoint of 110 in 2007.<sup>177</sup> The percentage of investigations that lead to prosecutions has also increased, rising from 29% in 1998 to 73% in 2009. But none of these cases has involved the sort of peer-to-peer downloading activity that the rule creators envisioned when they lobbied for passage of the NET Act.<sup>178</sup>

### Criminal Infringement of a Copyright: Matters Investigated and Prosecuted 1998–2012

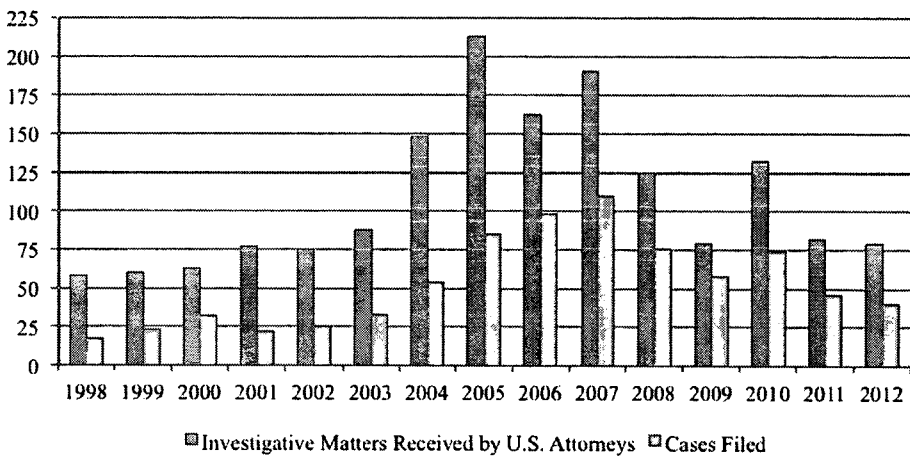


Figure 1. Data: Office of the Attorney General, Annual Performance and Accountability Reports<sup>179</sup>

176. *International Copyright Piracy: A Growing Problem with Links to Organized Crime and Terrorism: Hearing Before Subcomm. on Courts, the Internet and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 103 (2003) (statement of John Malcolm), available at [http://commdocs.house.gov/committees/judiciary/hju85643.000/hju85643\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju85643.000/hju85643_of.htm).

177. The total number of criminal cases in the federal court system in 2006 was 66,860. JAMES C. DUFF, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 15 (2007), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/front/completejudicialbusiness.pdf>.

178. See ORIN S. KERR, *COMPUTER CRIME LAW* 200 (3d ed. 2012) (“[T]he federal government has not brought any criminal prosecutions against individuals for using the Internet to obtain copyrighted materials without permission for their personal use.”).

179. The reports can be found at <http://www.justice.gov/about/bpp.htm>.

There is an acoustic separation between prosecutors' public statements and their enforcement activities. The DOJ has proudly asserted the upward numerical trend in prosecutions as evidence of its redoubled commitment to punishing copyright violations.<sup>180</sup> Moreover, its press releases regularly refer to warez traders as peer-to-peer pirates, an ambiguous title that could also be applied to garden-variety downloaders.<sup>181</sup> The message that prosecutors are sending with their words may be the same as the one that the copyright industries have been trying to send all along: infringers, even casual ones, are thieves. But the message they have been sending through their actions has been subtler. A 2001 manual for prosecutors of intellectual property crime specifically cautions against pursuing copyright infringers who are "young . . . , have no criminal record, or otherwise [are] sympathetic to a jury."<sup>182</sup> It further instructs prosecutors to focus on egregious violators rather than those "merely engaged in technical violations of the law."<sup>183</sup> The profile of federal copyright piracy defendants is the proof that the enforcers are listening. At no point have they gone the way of the RIAA—the way that John Malcolm promised they would go—and prosecuted individual peer-to-peer users.

#### IV. A SEPARATED POWERS OF MORAL ENTREPRENEURSHIP

Montesquieu wrote that the union of legislative and executive powers within the same institution creates a high likelihood that "tyrannical laws" will be enforced in a "tyrannical manner."<sup>184</sup> The U.S. Constitution's solution to this problem, famously advocated in *The Federalist* No. 47,<sup>185</sup> was to assign these different powers to different institutions.<sup>186</sup> As a result of these assignments, the

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180. See, e.g., NATIONAL INTELLECTUAL PROPERTY LAW ENFORCEMENT COORDINATION COUNCIL, REPORT TO THE PRESIDENT AND CONGRESS ON COORDINATION OF INTELLECTUAL PROPERTY ENFORCEMENT AND PROTECTION 33 (2008), available at [http://2001-2009.commerce.gov/s/groups/public/@doc/@os/@opa/documents/content/prod01\\_005189.pdf](http://2001-2009.commerce.gov/s/groups/public/@doc/@os/@opa/documents/content/prod01_005189.pdf); U.S. DEPARTMENT OF JUSTICE, PROGRESS REPORT OF THE DEPARTMENT OF JUSTICE'S TASK FORCE ON INTELLECTUAL PROPERTY 24–25 (2006), available at <http://www.justice.gov/criminal/cybercrime/press-releases/2006/2006IPTFProgressReport%286-19-06%29.pdf>.

181. See, e.g., Press Release, Dep't of Justice, Federal Jury Convicts High Ranking Web Site Administrator in Peer-to-Peer Piracy Crackdown (Jun. 27, 2008), available at <http://www.usdoj.gov/opa/pr/2008/June/08-crm-574.html> (referring to the conviction of a pre-release warez site administrator as the "first criminal conviction after jury trial for P2P copyright infringement").

182. COMPUTER CRIME & INTELLECTUAL PROPERTY SECTION, U.S. DEP'T OF JUSTICE, PROSECUTING INTELLECTUAL PROPERTY CRIMES MANUAL § III.E.4 (2001) [hereinafter IP CRIMES MANUAL]. The most recent edition of the manual has removed this provision, but the same language is still present in a memo to U.S. Attorneys made available on the DOJ's cybercrime website. See David Goldstone & Michael O'Leary, *Novel Criminal Copyright Issues Related to the Internet*, U.S. ATTORNEYS' BULL., May 2001, at 36, available at [http://www.justice.gov/usao/cousa/foia\\_reading\\_room/usab4903.pdf](http://www.justice.gov/usao/cousa/foia_reading_room/usab4903.pdf).

183. IP CRIMES MANUAL, *supra* note 182, § III.E.4.

184. 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* bk. XI (1748).

185. *THE FEDERALIST* No. 47 (James Madison).

186. See U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."); *id.* art. I, § 1 (vesting the legislative power in Congress); *id.* art. II, § 1 (vesting the executive power in the President); *id.* art. III, § 1 (vesting the judicial power in the Supreme Court and any inferior courts established by Congress).

executive branch can veto a bill, nominate and remove its officers from congressionally created positions, and, most significantly here, exercise prosecutorial discretion in determining how to enforce the law.<sup>187</sup>

In this Part, I argue that successful moral entrepreneurship efforts are marked by a similar institutional design: the separation of powers between those who create rules and those who apply them to rulebreakers. I draw this argument, whose theory I introduce in Section A, primarily from a side-by-side comparison of the civil and criminal enforcement efforts of copyright law. Section B presents this comparison along with a brief discussion of other corroboratory historical examples. In Section C, I discuss factors that may prevent this institutional design from yielding the benefits that I have posited.

### A. The Theory

Cass Sunstein once observed that “[i]f Nancy Reagan tells teenagers to ‘just say no’ to drugs, many teenagers may think that it is very good to say ‘yes.’”<sup>188</sup> Guarding against potential backlash ought to be of significant concern in the institutional design of moral entrepreneurship. One can find examples of self-defeating moral entrepreneurship efforts in the regulation of such diverse areas as domestic violence,<sup>189</sup> gun possession in inner-city public schools,<sup>190</sup> tax evasion,<sup>191</sup> lying to the government,<sup>192</sup> and date rape.<sup>193</sup> In each area, moral crusaders intended to change the consensus view yet instead reinforced it.

Dan Kahan’s theory of “gentle nudges” offers aspiring moral entrepreneurs a prescription for avoiding this fate: favor laws that condemn conduct only slightly, but not substantially, more severely than do the social norms that the laws seek to change.<sup>194</sup> When the law’s notion of deviance races out too far ahead of the typical decisionmaker’s, in what Kahan calls a “hard shove,” that decisionmaker is more likely to balk at enforcing the law. And the reluctance of one decisionmaker strengthens the resistance of other decisionmakers, creating a “self-reinforcing

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187. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 725 (1997) (“Every statute confers some degree of discretion on those who implement it. No legislator, however prescient, can predict all the twists and turns that lie ahead for his or her handiwork.”). This observation applies equally to criminal and civil enforcement by the executive branch. See *Marshall v. Jerrico*, 446 U.S. 238, 248 (1980) (asserting that the U.S. legal system has given wide discretion to criminal prosecutors).

188. Sunstein, *supra* note 37, at 919.

189. See Kahan, *Gentle Nudges*, *supra* note 37, at 628–31; Zorza, *supra* note 89, at 65 (asserting that harsh domestic violence laws deter prosecution and enforcement).

190. Kahan, *Social Influence*, *supra* note 25, at 363–64.

191. See *supra* notes 29–31 and accompanying text.

192. See Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CAL. L. REV. 1515, 1553–55 (2009) (claiming that prosecuting harmless lies does not deter more harmful lies).

193. See Kahan, *Gentle Nudges*, *supra* note 37, at 623–25 (asserting that harsher rape laws leads to decrease in enforcement).

194. See *generally id.* (asserting that severe laws undercut efforts to change social norms).

wave of resistance.”<sup>195</sup> On the other hand, when the law condemns only slightly more than does that typical decisionmaker, what Kahan calls a “gentle nudge,” she is more willing to discharge her duty and enforce the law. And willingness, like unwillingness, is contagious. Just as the hard shove generates a wave of resistance, the gentle nudge generates an equal but opposite “wave of condemnation.”<sup>196</sup> Small condemnatory increments over a long period of time can thus achieve normative change that large condemnatory increments over a short period of time cannot.

My argument in favor of separating moral entrepreneurship powers builds on Kahan’s thesis by identifying the kinds of enforcers who are most likely to opt for gentle nudges. The more distance between rule creators and enforcers, the less likely the rule enforcers will foment backlash. Rule creators therefore ought to prefer rule enforcers whose normative sensibilities align more closely with those of the general population than with the rule creators themselves.

It might be argued that non-enforcement inevitably contributes to permissive social norms. If a prosecutor knows that a jury is likely to nullify or otherwise find an excuse to acquit, he is unlikely to charge the crime in the first place. Never charging a crime perpetuates the public perception that the criminalized conduct is not morally wrong, which in turn further disincentivizes the prosecutor from pursuing the charge.<sup>197</sup> In this setup, the prosecutor is part of the feedback loop of opposition to the rule creator’s desired norm. By electing not to charge the crime, he fuels backlash to the rule creator’s desired norm.

But there is another way of looking at the prosecutor’s contribution: by electing not to charge the crime, he in fact *contains* backlash. Foregoing prosecution avoids nullification or convictions that could rally public protest. Bullishly forging ahead with the prosecution presents Kahan’s archetypical hard shove, only this time on the side of rule enforcement rather than rule creation. As Robinson and Darley have documented, an enforcer’s hard shove subjects that enforcer to a loss of moral credibility.<sup>198</sup> Thus, where the law condemns those whom society is not prepared to condemn, the moral entrepreneurship effort is better off if the enforcer holds rather than plays the hand that the rule creators and legislature have dealt him. The cautious prosecutor may not expand the borders of deviance, but at least he may prevent them from receding.

This is not to say, however, that prosecutors simply preserve a normative ceiling beyond which a rule can never be expanded. By avoiding further backlash, prosecutors preserve a foothold from which other moral entrepreneurs may attempt other, less drastic means (Kahan’s gentle nudges again) of generating a

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195. *Id.* at 608.

196. *Id.*

197. For examples, see *id.* at 623–25 (date rape); *id.* at 628–31 (domestic violence); *id.* at 632 (Prohibition); *id.* at 633–34 (drunk driving prior to the 1980s).

198. See *supra* note 33 and cited sources.



more robust rule than that which society currently embraces.<sup>199</sup> The desired attitudinal change may yet be attainable through the right forms of moral entrepreneurship, but a self-defeating enforcement effort leaves society even less receptive to that change than it was to begin with. Self-defeat, in short, creates more work for subsequent enforcers. This means that averting self-defeat does more than freeze a norm in an existing state; it also makes the eventual task of expanding that norm less Sisyphean.

What allows this productive non-action to occur is an institutional separation between rule enforcer and rule creator. Professional enforcers lack the rule creators' "naïve moral fervor,"<sup>200</sup> which allows them to forbear enforcement in situations where the rule creator, if given the opportunity, would forge ahead. Because Becker assumed that the enforcer would be a public prosecutor, he described rather than prescribed a separation of powers.<sup>201</sup> But once one considers the alternative—a rule creator who doubles as rule enforcer—one can better appreciate that separation as a strategic bulwark against backlash. A rule creator who enforces her own rule risks cannibalizing the favorable norms upon which she had intended to build. A rule creator who commits to let an outside enforcer decide, by contrast, averts that risk. As a result, where social norms are in flux, the agency cost of delegating enforcement to others is actually a benefit.

Professional enforcers can provide this benefit without even being aware of it. Delegating rule enforcement is successful not because the delegates are necessarily superior strategists, but because they face different institutional pressures. Prosecutors tend to choose targets whose punishment would please the public and, particularly in the case of federal enforcement, enhance the prosecutor's reputation.<sup>202</sup> That set of preferences gives prosecutors an incentive to pass over offenders who appear blameless. Thus, whether or not professional enforcers consciously play the long game on promoting compliance with a moral rule, their enforcement priorities will be less vulnerable to backlash than those of the rule creators.

Admittedly, there is an inherent challenge to applying this framework in practice. It will always be easier to identify existing backlash than to anticipate backlash before it occurs. This uncertainty might lead the risk averse to avoid enforcement altogether. That, however, would be a poor moral entrepreneurship strategy. In the face of adverse social norms, not every decision to forego enforcement action will necessarily be a boon to moral entrepreneurs. Perhaps non-action will indeed help rule creators by preserving space for more effective

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199. See Kahan, *Gentle Nudges*, *supra* note 37, at 609 (describing the process in which gentle nudges can "initiate a process that culminates in the near eradication of the contested norm and the associated types of behavior").

200. See *supra* note 81 and accompanying text (asserting the rule enforcer as more detached from the content of the rule compared to the rule creator).

201. BECKER, *supra* note 1, at 155–56.

202. Stuntz, *supra* note 72, at 533, 543.

measures to develop; then again, perhaps it will hurt them by publicly signaling normative disinterest in the rule.<sup>203</sup> The primary difficulty is in correctly distinguishing between productive and counterproductive non-action.

Adhering to two guiding principles may help ameliorate this difficulty. First, moral entrepreneurship cannot survive in an enforcement vacuum. Even where aggressive enforcement is prudently withheld, less aggressive enforcement must still step into the breach. So, for example, rule enforcers can limit serious sanctions to those well within societal margins of deviance. Targeting core offenders is a good way to avoid projecting apathy that feeds the development of permissive norms. Second, because backlash is less likely to greet bark than bite, rule enforcers can use rhetoric that covers a wider class of conduct than that covered by their legal actions. This acoustic separation between word and action harnesses the popular appeal of easy cases to build support for the hard cases.<sup>204</sup>

### *B. Theory Applied*

The moral crusade over copyright infringement, which involves both paradigms of rule enforcement, is evidence of the tactical benefit of separating moral entrepreneurship powers. As described in Part III, while federal prosecutors have vocally supported the same broad rule that the rule creators convinced Congress to legislate, they have selectively implemented it. The selectivity is working. By targeting defendants whose activities are entirely alien to the experience of most file-sharers, prosecutors have incurred no significant public backlash. The average Internet user has never heard of warez traders, even though they are the ones who usually provide the original “Adam and Eve” file that eventually spawns the thousands of copies floating around the web. And those who have heard of warez can readily distinguish their own downloading from leaking pre-release material to the world on an industrial scale.<sup>205</sup> One recent study found that high school-age file-sharers tend to draw a normative line between themselves and the seeders, whether warez groups or commercial pirates, who make pirated content available for the first time.<sup>206</sup> Similarly, mainstream media coverage of convictions has not challenged the law’s legitimacy as it had during the RIAA campaign, despite the potential for prison sentences. Instead, it has portrayed the enforcement as a necessary response to the activity of surreptitious outlaws.<sup>207</sup>

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203. See *supra* note 197 and accompanying text (arguing that enforcers’ unwillingness to charge individuals signals that the crime is not morally wrong, which further increases prosecutors’ unwillingness).

204. For the canonical statement that the law may use one set of rules to prescribe individuals’ conduct and a different set of rules to govern how public officials should treat that conduct, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

205. See Goldman, *Challenges*, *supra* note 173, at 26 (noting the difference between peer-to-peer file trading and downloading rare files such as prerelease movies).

206. Palfrey et al., *supra* note 116, at 86.

207. See, e.g., O’Brien, *supra* note 158; *Moving Against Movie Piracy*, *supra* note 56 (describing downloaders as stealing revenue from the movie industry).

By selectively focusing on core violators, prosecutors have diluted a broad prohibition down to something that aligns better with existing popular sentiment. Commercial pirates and warez traders are sufficiently removed from the day-to-day activities of most Americans that prosecutors have effectively drawn a line around them as deviants. Whether this prosecutorial discretion is actually deterring these actors is still debated,<sup>208</sup> but it at least circumscribes them, preventing American citizens from embracing them the way they have embraced the file-shoppers next door.

Moreover, by avoiding further backlash, prosecutors have preserved others' capacity to propagate a stronger norm against infringement. For instance, under a White House-brokered partnership between the creative content industries and Internet service providers, Internet service providers are beginning to implement "mitigation measures" to discourage infringement without enforcing an unqualified prohibition.<sup>209</sup> These include email alerts, educational messages, and, after repeat infractions, reduction in Internet speed and redirection to a landing page discussing the effects of copyright infringement. Whether this strategy will strengthen norms against infringement remains to be seen. But had prosecutors enforced the NET Act as stringently as rightsholders intended, the mitigation measures experiment would likely have confronted an even more permissive norm regarding infringement.

This theory of separated powers may also help to explain the success of other moral entrepreneurship efforts beyond the copyright sphere. The remainder of this Part briefly discusses three representative examples: smoking, drunk driving, and underage drinking.

### 1. Smoking

Smoking in the United States today is marginalized as a self-destructive vice.<sup>210</sup> Fifty years ago, however, smoking in the United States was accepted as a mark of sophistication.<sup>211</sup> Between then and now, many state and local governments passed laws that prohibit smoking in public places and use of tobacco by minors.<sup>212</sup> Yet enforcement of these prohibitions does not appear to have driven the change in the social meaning of smoking. On the contrary, it was likely aided by non-enforcement. Enforcers have exhibited disinterest in administering these

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208. See Miriam Bitton, *Rethinking the Anti-Counterfeiting Trade Agreement's Criminal Copyright Enforcement Measures*, 102 J. CRIM. L. & CRIMINOLOGY 67, 90–91 (2012) (citing studies that show that piracy is still common, and possibly has increased since the passage of the NET Act). See generally Goldman, *supra* note 17.

209. Dara Kerr, 'Copyright Alert System' Rolls Out to Catch Illegal Downloaders, CNET (Feb. 25, 2013, 5:36 PM), [http://news.cnet.com/8301-1009\\_3-57571237-83/copyright-alert-system-rolls-out-to-catch-illegal-downloaders](http://news.cnet.com/8301-1009_3-57571237-83/copyright-alert-system-rolls-out-to-catch-illegal-downloaders). See generally Annemarie Bridy, *Graduated Response American Style: "Six Strikes" Measured Against Five Norms*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2012).

210. See Kahan, *Gentle Nudges*, *supra* note 37, at 625–28.

211. *Id.*

212. PETER D. JACOBSON & JEFFREY WASSERMAN, TOBACCO CONTROL LAWS 10–15 (1997).

prohibitions due to both resource constraints and their own normative apathy over the moral rule.<sup>213</sup> This weak enforcement level has sidestepped the presumptive tobacco industry-driven backlash that would have generated sympathy for smokers and antipathy toward government heavy-handedness. As one study found based on qualitative survey data from a number of states and municipalities,

If the tobacco industry's fabricated image of a brown-shirted "smoking police force" were in some sense to bear resemblance to reality, then we could reasonably expect them to redouble their efforts at the state level either to enact legislation overturning or seriously weakening the statewide law or to pass a law that preempts local ordinances. As one of our respondents summed up this point of view, "If you get greedy, you'll lose."<sup>214</sup>

Enforcers' refusal to impose formal legal sanctions on violators has left room for communities to develop informal social sanctions as a more successful alternative. Enacting mild "zoning" restrictions on smoking gave nonsmokers a legal footing on which to express moral condemnation of their smoking peers.<sup>215</sup> This informal condemnation, rather than legal punishment, has proven to be the engine of rule enforcement.<sup>216</sup> Police inaction has thus helped the long-term incubation of an anti-smoking norm.

## 2. *Drunk Driving*

Before the formation of advocacy groups such as Mothers Against Drunk Driving in the 1980s, police and prosecutors regularly refused to enforce drunk driving prohibitions. Until that time, driving under the influence was treated as a traffic offense rather than the moral wrong that Americans have increasingly come to define it as in recent years.<sup>217</sup> Then advocacy groups altered the narrative through stigmatizing educational campaigns.<sup>218</sup> Informal sanctions provided the missing ingredient that allowed formal sanctions to succeed.

The initial refusal of actors within the criminal justice system to enforce laws

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213. See *id.* at 127–28 (describing police officers' reluctance to enforce a youth access ordinance that they believed to be overly punitive); *id.* at 129 (quoting one survey respondent's statement that "[i]t is difficult to imagine that one of our local police officers is going to spend an afternoon in the bushes waiting to bust some kids for smoking cigarettes"); *id.* at 131 (quoting another survey respondent's statement that "[s]moking is not handguns," making it "often difficult to mobilize people to action").

214. *Id.* at 77; see also *id.* at 108 (stating that proponents of tobacco control have a tough time enforcing the existing laws in the face of tobacco industry influence).

215. See *id.* at 81 (finding that "the enactment of tobacco control laws helps shift the balance of power in favor of nonsmokers, which may lead them to speak out in instances where they believe the laws are being violated"); Kahan, *Gentle Nudges*, *supra* note 37, at 627–28 ("[E]ven individuals who might not otherwise have found exposure to smoke unpleasant were more likely to object to public smoking, which against the background of public smoking bans began to express contemptuous disregard for the interests of nonsmokers.").

216. JACOBSON & WASSERMAN, *supra* note 212, at 49 (noting high level of voluntary compliance with clean indoor air laws, obviating the need for enforcing legal prohibitions).

217. See Kahan, *Gentle Nudges*, *supra* note 37, at 633.

218. *Id.* at 634.

against drunk driving could be seen as a failure in moral entrepreneurship. But in the long run it may be more accurate to call it a success. Had these actors maintained a vigorous enforcement strategy before social norms were ready to bear it, they may well have triggered a backlash that hardened attitudes condoning drunk driving. Instead, their non-action left those norms alone until the arrival of private actors savvy enough to use softer enforcement mechanisms.

### 3. *Underage Drinking*

If enforced literally, the national minimum drinking age would require scores of arrests of young people. Notwithstanding legal prohibitions, underage drinking is commonplace and relatively unstigmatized among youth in many communities, particularly on college campuses.<sup>219</sup> In an effort to change these permissive norms, some college administrators have elected to forego strong-arm tactics in favor of information campaigns. These campaigns inform undergraduates that fewer of their underage peers are drinking than they probably suspect.<sup>220</sup> This so-called “social norms approach,” which redefines students’ sense of what normative conformity requires, has proven successful at reducing binge drinking on a number of campuses.<sup>221</sup> The enforcers who have gone this route have avoided the backlash that typically results from the literal enforcement policy preferred by crusaders for these prohibitions.<sup>222</sup> This allows them to maintain moral credibility to enforce a core norm against excessive drinking even as they permit less egregious infractions to go unpunished.

Margaret Raymond recounts a similar phenomenon at work in the enforcement of a public intoxication statute in a university town where public intoxication is

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219. See John R. Knight et al., *Alcohol Abuse and Dependence Among U.S. College Students*, 63 J. STUD. ON ALCOHOL 263, 263–69 (2002) (observing high levels of alcohol abuse among college students); Andrew Stuttaford, *De-Demonizing Rum: What's Wrong with 'Underage' Drinking?*, NAT'L REV., June 25, 2001, at 32 (describing the lack of respect for the minimum drinking age); *Teenagers Favor Curbs, But Drinking Remains Rife*, N.Y. TIMES (July 6, 2001), <http://www.nytimes.com/2001/07/06/us/teenagers-favor-curbs-but-drinking-remains-rife.html> (referencing a 1999 survey that found that half of all high school students had consumed alcohol within the past month); Henry Wechsler et al., *Underage College Students' Drinking Behavior, Access to Alcohol, and the Influence of Deterrence Policies*, 50 J. AM. C. HEALTH 223, 233 (2002) (“Despite the national prohibition on alcohol use by people under the age of 21 years, significant numbers of college students in the United States drink and drink heavily.”).

220. Jeffrey Kluger, *How to Manage Teen Drinking (The Smart Way)*, TIME (June 18, 2001), <http://content.time.com/time/magazine/article/0,9171,1000115,00.html>.

221. *Id.*; MICHAEL P. HAINES, A SOCIAL NORMS APPROACH TO PREVENTING BINGE DRINKING AT COLLEGES AND UNIVERSITIES 4 (1996) (reporting that, after traditional alcohol abuse interventions had failed, a social norms campaign on campus led to a thirty-five percent reduction in binge drinking).

222. See Steve Kolowich, *Crackdown on Campus Drinking Draws Backlash*, USA TODAY (Apr. 13, 2010, 2:15 PM), [http://usatoday30.usatoday.com/news/education/2010-04-13-IHE-crackdown-campus-drinking-UW-Stout13\\_ST\\_N.htm](http://usatoday30.usatoday.com/news/education/2010-04-13-IHE-crackdown-campus-drinking-UW-Stout13_ST_N.htm); see also LINDA C. LEDERMAN ET AL., CHANGING THE CULTURE OF COLLEGE DRINKING: THE STUDENT VOICES PROJECT 21–22 (2005), available at <http://humancommunication.clas.asu.edu/files/SVPprojectfinal.pdf> (presenting focus group study that found that zero-tolerance policies on campus perversely encouraged more drinking).

normatively permissible.<sup>223</sup> While the legislated prohibition covers all public intoxication, police only arrest core violators: those whose alcohol consumption leads to health risks, disorderliness, or belligerence.<sup>224</sup> When students perceived that they had been targeted for “mere” public drunkenness—in other words, the very conduct proscribed by the moral rule—they protested.<sup>225</sup> For this prohibition, as for the prohibition on underage drinking, selective punishment of core violators preserves a narrow norm that would be lost by broad punishment of all violators.<sup>226</sup>

### C. *Some Limitations*

Although assigning rule creation and rule enforcement to different personnel increases the likelihood of a separation of entrepreneurial agendas, it does not guarantee it. Under certain circumstances, the professional rule enforcer will tend to apply a normatively unpopular prohibition as strictly as the rule creator would have. In these instances, the separation of moral entrepreneurship powers will not reduce backlash. This Section lists some common examples.

#### 1. *Enforcement of Norms that Affect the Enforcers’ Institutional Authority*

Rule enforcers are more likely to internalize norms that they perceive to affect their professional prerogatives directly. Enforcing these norms is not simply the fulfillment of a duty to ensure compliance, but also a defense of enforcers’ institutional authority. In such scenarios, the content of the moral rule matters greatly. The rule enforcer is his own rule creator.

One example of this phenomenon at work can be found in the federal government’s enforcement of a norm against lying to law enforcement agents. Federal law prohibits making a “materially false, fictitious, or fraudulent statement or representation” to a federal official.<sup>227</sup> The government frequently prosecutes cases of defensive false statements that arise solely as a result of interviews with government agents.<sup>228</sup> Defendants in these cases are typically punished for nothing more than an exculpatory “no” in response to government questioning regarding an underlying prohibited act. Prosecutors charge these cases, notwithstanding the absence of a social norm condemning the defendants’ behavior, in part because they present a “symbolic assertion of government power, or of government entitlement to information as property.”<sup>229</sup> Yet the urge to assert government

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223. Raymond, *supra* note 84, at 1411–12.

224. See Heather Woodward, *Harsh Arrest Trends Lead to Crowded Jail*, IOWA CITY PRESS-CITIZEN, Oct. 22, 2000, at 1A, 4A.

225. Raymond, *supra* note 84, at 1412 & n.77.

226. For an example of a self-defeating pursuit of a strict public intoxication enforcement policy, see *Lawmakers to Review Bar Busts*, DALLAS MORNING NEWS (Mar. 25, 2006 12:00 AM), [http://www.myplainview.com/article\\_2fcb2dd9-006d-50d6-949f-df9dd8efb21d.html](http://www.myplainview.com/article_2fcb2dd9-006d-50d6-949f-df9dd8efb21d.html).

227. 18 U.S.C. § 1001 (2012).

228. Griffin, *supra* note 192, at 1516.

229. *Id.* at 1536.

authority has led to an overreaching that has failed to stigmatize the prosecuted conduct and may be contributing to a loss of moral credibility.<sup>230</sup>

Such overreaching more likely occurs where the enforcer recognizes an institutional stake in the breadth of the moral rule being enforced. In these cases, the enforcer is not applying someone else's moral rule, but rather one of his own design.<sup>231</sup> Just as the history of civil copyright infringement teaches that a rule creator may become her own rule enforcer, so the history of false statement prosecutions teaches that a rule enforcer may become her own rule creator.<sup>232</sup> In either case, the conflation of the two powers of moral entrepreneurship leads to enforcement decisions more susceptible to backlash.

A similar example may be found in the prosecution of civil disobedience. Targeting those who violate the law on ideological grounds enforces not only the substantive norm underlying the particular violated law, but also the general norm for fidelity to the rule of law.<sup>233</sup> While rule enforcers have an institutional interest in promoting a rule-of-law norm, cultivating that norm may generate opposition if the conduct underlying the civil disobedience is perceived to be innocuous. Take, for instance, the recent prosecution of Internet activist Aaron Swartz. Swartz allegedly downloaded nearly five million documents from JSTOR, a proprietary repository of academic journal articles, after executing a computer program that circumvented various protection measures meant to prevent bulk downloading.<sup>234</sup> By the time of his indictment in 2011, he had earned notoriety as an advocate for "liberating" information kept within such password-protected databases. In 2008, he published an essay entitled "Guerilla Open Access Manifesto" in which he proclaimed that, in the "grand tradition of civil disobedience," the time had come to "declare our opposition to this private theft of public culture. We need to take information, wherever it is stored, make our copies and share them with the world . . . . We need to download scientific journals and upload them to file sharing networks."<sup>235</sup> The same year, Swartz developed a computer script designed to download every document from PACER, the federal judiciary's electronic storing

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230. *Id.* at 1547–54. Griffin notes that Martha Stewart's brand has endured her conviction, President Clinton survived impeachment with high approval ratings, and baseball fans have displayed little interest in the false statement prosecutions of former stars who denied steroid use. *See id.* at 1526–28.

231. *See id.* at 1538 (arguing that "exculpatory no" prosecutions function as process offenses for disobeying investigators); Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1449–52 (2009) (describing a class of "obstinacy" offenses that punish affronts to state authority).

232. *See generally* Brogan v. United States, 522 U.S. 398 (1998) (finding no exception to liability under 18 U.S.C. § 1001 for an "exculpatory no").

233. *Cf.* BECKER, *supra* note 1, at 161 (noting that "whether the misbehavior shows proper deference to the enforcer" will likely guide enforcers' selective application of rules).

234. *See generally* Justin Peters, *The Idealist*, SLATE (Feb. 7, 2013), [http://www.slate.com/articles/technology/technology/2013/02/aaron\\_swartz\\_he\\_wanted\\_to\\_save\\_the\\_world\\_why\\_couldn\\_t\\_he\\_save\\_himself.html](http://www.slate.com/articles/technology/technology/2013/02/aaron_swartz_he_wanted_to_save_the_world_why_couldn_t_he_save_himself.html).

235. Aaron Swartz, *Guerilla Open Access Manifesto* (July 2008), available at [http://archive.org/stream/GuerillaOpenAccessManifesto/Goamjuly2008\\_djvu.txt](http://archive.org/stream/GuerillaOpenAccessManifesto/Goamjuly2008_djvu.txt).

house for court filings.<sup>236</sup> Swartz sought to provide free public access to this universe of documents, which were public records but cost eight cents per page to access through PACER. He succeeded in downloading nearly twenty million pages, which he then distributed to a non-profit organization devoted to increasing access to public domain materials.<sup>237</sup>

In prosecutors' eyes, Swartz was a vigilante.<sup>238</sup> They considered Swartz's Manifesto to be evidence of a deliberate scheme to defy the law.<sup>239</sup> After the JSTOR episode, the federal government filed a thirteen-count indictment against him and refused to agree to any plea deal that did not include jail time.<sup>240</sup> In a press release, Massachusetts U.S. Attorney Carmen Ortiz stated that "[s]tealing is stealing whether you use a computer command or a crowbar, and whether you take documents, data or dollars."<sup>241</sup> But the prosecution's opportunity to define the narrative concerning Swartz's conduct was abruptly preempted when Swartz committed suicide while awaiting trial.<sup>242</sup> Backlash against the U.S. Attorney's office prosecuting the case was swift. Media outlets swarmed around the theme of prosecutorial overreaching and dangerously expansive computer crime laws.<sup>243</sup> Members of Congress, calling Swartz's behavior harmless, condemned the punishment.<sup>244</sup> In a matter of days, Swartz had become a martyr.

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236. Peters, *supra* note 234.

237. *Id.*

238. *Id.*

239. Ryan J. Reilly, *Aaron Swartz Prosecutors Weighed 'Guerilla' Manifesto, Justice Official Tells Congressional Committee*, HUFFINGTON POST (Feb. 22, 2013, 12:01 AM), [http://www.huffingtonpost.com/2013/02/22/aaron-swartz-prosecutors\\_n\\_2735675.html](http://www.huffingtonpost.com/2013/02/22/aaron-swartz-prosecutors_n_2735675.html); see also Government's Consolidated Response to Defendant's Motions to Suppress, *United States v. Swartz*, Case No. 11-CR-10260 (D. Mass. Nov. 16, 2012).

240. See Reilly, *supra* note 239.

241. Press Release, U.S. Attorney's Office for the Dist. of Mass., *Alleged Hacker Charged with Stealing Over Four Million Documents from MIT Network* (July 19, 2011), available at <http://www.justice.gov/usao/ma/news/2011/July/SwartzAaronPR.html>.

242. Peters, *supra* note 234.

243. See, e.g., 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>; Lincoln Caplan, *Aaron Swartz and Prosecutorial Discretion*, TAKING NOTE (Jan. 18, 2013, 10:06 AM), <http://takingnote.blogs.nytimes.com/2013/01/18/aaron-swartz-and-prosecutorial-discretion/>; Scott Horton, *Carmen Ortiz Strikes Out*, HARPER'S MAGAZINE (Jan. 18, 2013), <http://harpers.org/blog/2013/01/carmen-ortiz-strikes-out/>; Charles P. Pierce, *Carmen Ortiz's Very Bad, Awful Month*, ESQUIRE (Jan. 25, 2013), [http://www.esquire.com/blogs/politics/More\\_bad\\_News\\_For\\_Carmen\\_Ortiz](http://www.esquire.com/blogs/politics/More_bad_News_For_Carmen_Ortiz); Will Wrigley, *Darrell Issa Praises Aaron Swartz, Internet Freedom at Memorial*, HUFFINGTON POST (Feb. 7, 2013, 12:26 PM), [http://www.huffingtonpost.com/2013/02/07/darrell-issa-internet-freedom\\_n\\_2633197.html](http://www.huffingtonpost.com/2013/02/07/darrell-issa-internet-freedom_n_2633197.html); Wesley Yang, *The Life and Afterlife of Aaron Swartz*, NEW YORK MAG. (Feb. 8, 2013), <http://nymag.com/news/features/aaron-swartz-2013-2/>.

244. See, e.g., Wrigley, *supra* note 243 (quoting congressman Darrell Issa's rebuke of federal prosecutors for targetting Swartz's "harmless acts"); Matt Pearce, *Aaron Swartz's Suicide Continues to Ripple Through Congress*, L.A. TIMES (Feb. 5, 2013), <http://articles.latimes.com/2013/feb/05/nation/la-na-nn-aaron-swartz-washington-memorial-20130205> (quoting congressman Jared Polis's description of the Swartz prosecution as "a perversity of justice"); Brendan Sasso & Jennifer Martinez, *Lawmakers Slam DOJ Prosecution of Swartz as 'Ridiculous, Absurd'*, THE HILL (Jan. 15, 2013, 10:52 PM), <http://thehill.com/blogs/hillcon-valley/technology/277353-lawmakers-blast-trumped-up-doj-prosecution-of-internet-activist> (quoting Polis's description of the prosecution



The Aaron Swartz prosecution was supposed to demonstrate the importance of respect for property rights in information. Instead, its most lasting legacy may be as a lightning rod for deepening opposition to those rights. While the events are still too recent to draw firm conclusions, the immediate aftermath of the prosecution indicates that seeking to incarcerate Swartz for his civil disobedience has been self-defeating.

## 2. *Tactical Enforcement Designed to Achieve Desired Litigation Outcomes*

The separation of moral entrepreneurship powers is also less significant where an enforcer elects to focus on litigation outcomes rather than on upholding a moral rule. Prosecutors began using pretextual charges as a tool to clear the streets of particularly undesirable criminals around the time that organized crime syndicates emerged in America in the mid-twentieth century.<sup>245</sup> In the process, prohibitions on vices became less about defining the crime and more about punishing particular criminals.<sup>246</sup> When prosecutors could not convict a defendant for the conduct they were actually targeting, usually violent felonies, they filed less serious but more easily provable substitute charges. Al Capone was famously prosecuted and convicted not for his Volstead Act violations or the hits that he had ordered on his rivals, but for failing to pay his income taxes.<sup>247</sup> In 2001, then-Attorney General John Ashcroft praised the Justice Department under Robert Kennedy for prosecuting mob kingpins on such obscure offenses as lying on a federal home loan application and violating the Migratory Bird Act.<sup>248</sup> Today, charges for drug offenses often act as substitutes for violent felonies.<sup>249</sup>

Known criminals are not the only subjects of pretextual enforcement. Tactical arrests for small offenses also afford police an opportunity to investigate for evidence of larger ones. In New York City, transit police are unexpectedly rigid in their enforcement of subway rules against putting feet up on the seats, walking between subway cars, and occupying more than one seat at a time. The reason, they say, is that enforcing these minor prohibitions often ensnares wanted fel-

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as “ridiculous and trumped-up” and congresswoman Zoe Lofgren’s statements that the DOJ was “way out of line” and the handling of the case had been “outrageous”).

245. See Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005); David A. Skeel Jr. & William Stuntz, *The Criminal Law of Gambling: A Puzzling History*, in *GAMBLING: MAPPING THE AMERICAN MORAL LANDSCAPE* 257, 278–80 (Alan Wolfe & Erik C. Owens eds., 2009).

246. Skeel & Stuntz, *supra* note 245, at 276.

247. See Richman & Stuntz, *supra* note 245, at 583.

248. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 301 (2011).

249. See *id.*

ons.<sup>250</sup> Similarly, police enforce the traffic code as a means to perform drug searches incident to a traffic stop, a strategy that has been blessed by the Supreme Court.<sup>251</sup>

A separation between creators and enforcers matters less when the enforcers prioritize the identity of the criminal over the substance of the crime. Because these enforcers are not endeavoring to enforce a prohibition, they are less likely to respond to communal social norms regarding the prohibited conduct. As a result, they are more likely to pursue enforcement strategies that undermine the moral entrepreneurship effort.<sup>252</sup>

Less opportunity for pretextual prosecution therefore means less opportunity to fall into the backlash trap. The absence of federal prosecutions of peer-to-peer copyright infringers may be partly explained by the absence of other offenses that could be caught in the enforcement net. Because most users of peer-to-peer downloading services tend to be otherwise law-abiding, there will rarely be a serious offense for which copyright infringement could be a pretext for prosecution. The conduct motivating punishment is the same as the conduct actually punished. The identity between the two ensures that prosecutors remain focused on enforcement of a moral rule. And the better they maintain that focus, the better they internalize communal social norms.

### 3. *Identity between Creators' and Enforcers' Normative Sensibilities*

The division of rule creation and enforcement among different actors is only meaningful to the extent that those actors' normative sensibilities differ. Recall that in the classic mold, a rule enforcer is "not so much concerned with the content of any particular rule as he is with the fact that it is his job to enforce the rule."<sup>253</sup> That concern translates to an interest in not only maximizing compliance but also minimizing public hostility to enforcement.<sup>254</sup> And that interest, in turn, leads enforcers to tailor their activities to prevailing norms (in economic terms, enforcement may be said to be norm-elastic).<sup>255</sup> So long as this idealized characterization holds true, the enforcer provides a check on the creator's excessive moral entrepreneurial ambition.

By contrast, an enforcer who shares the rule creator's zeal for eradicating the prohibited conduct is separate in form only—not in substance. Because this enforcer bears more social fidelity with the rule creators than with the community

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250. See Joseph Goldstein & Christine Haughney, *Relax, if You Want, but Don't Put Your Feet Up*, N.Y. TIMES (Jan. 7, 2012), <http://www.nytimes.com/2012/01/07/nyregion/minor-offense-on-ny-subway-can-bring-ticket-or-handcuffs.html>.

251. *Whren v. United States*, 517 U.S. 806 (1996).

252. See Skeel & Stuntz, *supra* note 245, at 279–80. See generally Richman & Stuntz, *supra* note 245.

253. BECKER, *supra* note 1, at 156; see also *supra* note 80 and accompanying text.

254. See TYLER, *supra* note 27, at 24–25.

255. See *id.*

subject to the rule, she is wont to ignore existing norms and enforce the rule broadly (here, enforcement may be said to be norm-inelastic).<sup>256</sup>

Such an identity between the normative sensibilities of rule creators and of rule enforcers can occur for a variety of reasons. First, it can emerge from racial or class differences between enforcers and the community that they police.<sup>257</sup> Second, it can occur when formally distinct enforcement institutions are staffed with personnel who are rule creators themselves. One of Becker's archetypical rule creators was Harry Anslinger, the first commissioner of the FBN. According to Becker, he was the primary entrepreneur behind the moral panic over marijuana that took hold in the late 1930s. He also happened to be the head of the agency that enforced federal drug prohibitions.<sup>258</sup> As the FBN was predisposed to consider marijuana a moral vice, it continued to escalate penalties against marijuana use even as the drug became normatively acceptable among white middle-class youth.<sup>259</sup> That harsh enforcement led to dissent against the prohibition and rallied the movement for decriminalization.<sup>260</sup>

Third, clustering specialists together may produce an echo chamber that reinforces support for the rule creators' cause. The professional dynamic of specialized units often pushes members toward a strict norm that justifies the unit's existence, even if a more permissive norm enjoys popular support.<sup>261</sup> This echo chamber effect presents a dilemma for moral entrepreneurs. On the one hand, driving a wedge between society's norms and enforcers' norms lowers the safeguard against backlash that separation of moral entrepreneurship powers generally provides. On the other hand, the institutional design responsible for that wedge also raises the enforcers' level of expertise. Therefore, specialization would be costly to discard.<sup>262</sup>

Although prosecutors of copyright infringement have not expanded the universe

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256. The notion of "social fidelity" comes from Mark A. Edwards, *Law and the Parameters of Acceptable Deviance*, 97 J. CRIM. L. & CRIMINOLOGY 49, 73-74 (2006).

257. See STUNTZ, *supra* note 248, at 29-32 (discussing the effect of communal self-rule on the administration of criminal justice).

258. See BECKER, *supra* note 1, at 135-46; JEROME L. HIMMELSTEIN, *THE STRANGE CAREER OF MARIHUANA* 25-30 (1983) (listing followers of Becker's theory).

259. See HIMMELSTEIN, *supra* note 258, at 100-03.

260. See *id.* at 103-05.

261. See Kahan, *Gentle Nudges*, *supra* note 37, at 629-30 (describing the Bureau of Alcohol, Tobacco and Firearms as an example of how grouping specialists exclusively with one another causes their "collective propensity to enforce [to] feed on itself through the mechanisms of social influence").

262. See Vermeule, *supra* note 132, at 411. A full consideration of how to retain specialists' expertise while insulating them from self-defeating enforcement policy is outside the scope of this Article. But one potential arrangement worth further consideration is allowing specialized units to perform their traditional investigatory and advocacy functions while assigning generalist prosecutors the charging decision. Cf. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009) (proposing separation of investigatory and adjudicative functions within the prosecutor's office). This would let enforcers continue to reap the benefits of the specialists' subject matter expertise while entrusting enforcement policy to those with norms closer to the societal mean.

of defendants beyond core violators, the echo chamber dilemma is one that copyright crusaders ought to take seriously going forward. Institutions dedicated to reducing intellectual property infringement have recently begun to proliferate within the federal government, including the Office of the U.S. Intellectual Property Enforcement Coordinator (better known as the “IP Czar”) within the White House,<sup>263</sup> the National Intellectual Property Rights Coordination Center within U.S. Immigration and Customs Enforcement,<sup>264</sup> the Task Force on Intellectual Property within the DOJ,<sup>265</sup> and over two dozen Computer Hacking and Intellectual Property units within U.S. Attorneys’ Offices nationwide.<sup>266</sup> As public enforcement of copyright law becomes more specialized, the moral entrepreneurship benefit of that public enforcement becomes more fragile.<sup>267</sup>

### CONCLUSION

Moral entrepreneurs can learn much from the American political ideal of separation of powers. This is because moral entrepreneurship at its best relies on the exercise of independent judgment by different institutional actors. When creators over-create, it is up to the enforcers to rein in. Expansive entrepreneurship in the law on the books thus finds a healthy complement in narrow entrepreneurship in the law on the ground.

From 2003 to 2008, the RIAA chose to play its own enforcer. That attempt to strong-arm social norms may have rallied more support around the opposition than existed to begin with. The federal government, by contrast, has avoided this fate. Through exercising selectivity and exclusively targeting suspects alien to the average file-sharer’s daily life, it has been able to define a boundary between deviance and normalcy. While that boundary remains less exclusive than some rightsholders would prefer, the selective approach has proven more effective.

This history is evidence that those reasonably divorced from the passions of a moral crusade are better equipped to focus on the easy targets. And though those targets may not be the ones that rule creators are most bent on marginalizing, they are still the ones that society is most willing to accept as marginal. The dispassion-

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263. See 15 U.S.C. § 8111 (2012).

264. See Press Release, U.S. Immigration & Customs Enforcement, New National Intellectual Property Rights Coordination Center Opens in Virginia (Jul. 10, 2008), available at <http://www.ice.gov/news/releases/0807/080710washington.htm>.

265. See Press Release, Dep’t of Justice, Justice Department Announces New Intellectual Property Task Force as Part of Broad IP Enforcement Initiative (Feb. 12, 2010), available at <http://www.justice.gov/opa/pr/2010/February/10-ag-137.html>.

266. Offices of the United States Attorneys, *Districts with Specialized CHIP Units*, U.S. DEP’T OF JUSTICE, [http://www.justice.gov/usao/briefing\\_room/cc/graphics.html](http://www.justice.gov/usao/briefing_room/cc/graphics.html) (last visited Feb. 3, 2014).

267. See Yochai Benkler, *Seven Lessons from SOPA/PIPA/Megaupload and Four Proposals on Where We Go From Here*, TECHPRESIDENT (Jan. 25, 2012), <http://techpresident.com/news/21680/seven-lessons-sopapipamegaupload-and-four-proposals-where-we-go-here> (noting that the “professional success” of specialized units responsible for prosecuting copyright infringement is “measured by (a) how threatening we think Piracy is, and (b) how many large prosecutions they are able to bring”).

ate enforcer can maintain moral capital by picking on the weak, the individuals whose behavior already prepackages them for stigmatization. The easy cases may be something of a straw man, but the clever enforcer recognizes that straw men can put up much less of a fight than real ones. It is through such “gestures of indignation,” as sociologist Albert Cohen once remarked, that “one aligns oneself symbolically with the angels without having to take up cudgels against the devil.”<sup>268</sup>

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268. Albert K. Cohen, *The Study of Social Disorganization and Deviant Behavior*, in *SOCIOLOGY TODAY* 461, 465 n.4 (Robert K. Merton et al. eds., 1959).

