LOW SANCTIONS, HIGH COSTS: THE RISK TO DEMOCRATIC LIBERTY

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Professor Irina Manta deftly combines insights from behavioral economics, political theory, and legal analysis in her piece *The High Cost of Low Sanctions*.[1] Her central argument is that a seemingly reasonable political compromise can backfire in troubling ways. Specifically, the decision to enact a framework of low or minimal sanctions to discourage unwanted (but not universally condemned) behavior can lead over time to a gradual increase in sanctions and a growing disconnect from citizens' political preferences.[2] This progression creates a risk of unjust application of the law and a fundamentally anti-democratic outcome that is resistant to repeal through the political process.[3]

Professor Manta applies this construction to intellectual property law. She analyzes the evolution of sanctions for copyright enforcement, and explains how the seeming lightness of penalties and unlikelihood of enforcement allowed the public to become complacent about the existence of laws prohibiting the type of file-sharing that a significant percentage (and quite possibly a majority) of Americans routinely engaged in.[4] This disconnect allowed sanctions to be increased without a great deal of political attention. It took several high-profile cases that attracted media attention to "put heft behind calls for legislative change" and begin a national dialogue about alternative policies.[5]

The article offers a compelling warning about the risk of overcriminalizing intellectual property. Its impact is not limited to the field of intellectual property, however. One of the article's strengths is its broad applicability to other areas in which low sanctions and inconsistent enforcement can lead to a combination of unjust application of the law and a lack of political will to overcome that injustice. Essentially, it posits a type of political market failure where citizens' preferences become disconnected from the policies enacted by their elected representatives.[6] Manta's article examines sanctions both as they are formally adopted (such as low statutory penalties) and as they are informally enforced (such as

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

2. *Id.* at 158–60.

3. *Id.*

4. *See id.* at 185 (noting that one study suggested such file sharing was a high as 70% among young adults).

5. *Id.* at 197–98.

6. *See* Adam Badawi, Comment, *Unceasing Animosities and the Public Tranquility: Political Market Failure and the Scope of the Commerce Power*, 91 CAL. L. REV. 1331, 1358 (2003) (developing the theory of political market failure).

administrative decisions to avoid prosecution). Notably, the framework helps to explain why the country as a whole has been so slow to change marijuana laws even when a solid majority of the population supports liberalization, and why sodomy laws still remain on the books in spite of the fact that public opinion is solidly in favor of individual autonomy.[7]

In the case of sodomy laws, constitutional litigation ultimately proved more effective than political repeal.[8] The success of litigation in this realm—and in the related fight for marriage equality—demonstrates the importance of a constitutional backstop for civil liberties. It also suggests troubling facts about the political process, however. Judicial review, after all, was thought to be a countermajoritarian remedy needed to protect vulnerable minorities against the will of the majority.[9] One of the lessons to take from Manta's article, then, may be that judicial review can also function as a majoritarian remedy when the political system fails due to apathy caused by a failure to fully enforce unjust laws.

This construct suggests some intriguing possibilities. First, it highlights the risk that a system of informal low sanctions, brought about through selective non-enforcement, will undermine the will for political change.[10] When people are equally likely to be subjected to sanctions, they may be motivated to protest the law and seek its repeal. But when the transgressions of the more powerful are ignored, those individuals may instead remain quiescent, reluctant to draw attention for fear of attracting prosecutorial attention. Selective non-enforcement, by itself, is unlikely to be a constitutional violation.[11] Nonetheless, where selective non-enforcement can be shown, it may indicate a deeper injustice stemming from a belief that full enforcement would be inconsistent with public

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7. Manta, *supra* note 1, at 167, 169 n. 38 (noting that 58% of Americans in a recent poll supported legalization of marijuana, 85% supported authorizing marijuana for therapeutic use, and that court decisions recognizing a right to same-sex conduct generally followed a shift in public opinion supporting such a recognition).

8. *Id.* at 167 n. 28 (citing Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 45 (2003)).

9. Alexander M. Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards*," 57 UCLA L. REV. 365, 417 (2009) ("The whole point of having an unelected judiciary is its ability to serve as a check on majority rule . . . .").

10. John Sahl, *Behind Closed Doors: Shedding Light on Lawyer Self-Regulation*—What Lawyers Do When Nobody's Watching, 48 SAN DIEGO L. REV. 447, 473 (2011) (explaining that selective non-enforcement of rules against the unauthorized practice of law could be based on a belief by bar regulators that "the ethical standards are wrong or unrealistic" or alternatively could simply reflect "inadequate enforcement resources").

11. United States v. Armstrong, 517 U.S. 456, 463(1996) ("A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.").

values.[12] The article's logic therefore also suggests that political solutions may not be a viable remedy when selective non-enforcement has co-opted those who would otherwise be motivated to seek the repeal of an unjust law. Thus, when constitutional challenges to legislation are raised, courts should be allowed to consider evidence that suggests such a pattern of selective or informal failure to enforce the law.

A formal system of small penalties is more likely to align with political preferences. Even here, however, Manta's article persuasively argues that we should hesitate before rushing to enact new penalties in an effort to deter undesirable behavior. A formal system of low sanctions may ultimately slide into a system of much more severe penalties. Even when sanctions remain low, the mere existence of a prescribed set of sanctions may nevertheless change public attitudes by transforming prior social norms into economic transactions. The article cites to recent empirical work finding that parents arrived late to pick up their children from daycare more often *after* the daycare instituted monetary penalties for late pick-ups.[13] The imposition of a monetary penalty transformed the transaction from a social one—where parents apparently worked hard to avoid inconveniencing the daycare workers—to an economic one, where parents apparently viewed the penalty as the price for extended services. Interestingly, however, that mindset-shift was a permanent one—"the new higher level was not reduced when the fine was removed," leading the researchers to hypothesize "[o]nce a commodity, always a commodity."[14] This result suggests that Manta's warning to react cautiously in the face of new legislative proposals enacting penalties—however small those penalties are—is an important one. Adopting a legal regime that punishes unwanted conduct may run the risk of undermining existing social norms. Unless the disfavored conduct poses a truly significant danger to life, health, or economic well-being, we may be better off avoiding formal prohibition and relying instead on informal social norms to enforce desirable behavior.

Ultimately, Manta's article serves both as a warning against complacency and a tribute to the importance of the democratic process. It reminds us to be wary of overcriminalization, pointing out that even relatively small penalties can significantly restrict individual rights in ways that run counter to public preferences. The article suggests that we should be especially careful when unjust laws are subject to non-enforcement or selective enforcement, as such tactics may neutralize political opposition

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12. Some have in fact advocated dismissing cases when there are racial disparities in enforcement decisions. *See, e.g.*, Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 653–66 (1998).

13. Manta, *supra*, note 1, at 204 (citing Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 13–15 (2000).

14. Gneezy & Rustichini, *supra* note 13, at 15–16.

that would otherwise gain momentum. It persuasively makes the case that low sanctions can come with high costs to our system of democratic liberty.[15]

15. *See* J. Harvie Wilkinson III, *The Lost Arts of Judicial Restraint*, 16 GREEN BAG 2d 51, 52 (2012) ("To see liberty purely in terms of individual rights is too cramped a view. Democratic liberty is no less real for reflecting a collective view.").