COPYRIGHT INFRINGEMENT AND THE SEPARATED POWERS OF MORAL ENTREPRENEURSHIP

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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.[1] Criminologists[2] and copyright scholars[3] 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."[4] Rightsholders want to disseminate a moral rule against infringement. That makes them, in Becker's terms, rule creators.[5]

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.[6]

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.[7] 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.[8]

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.[9] The scope of copyright's substantive criminal law has since steadily expanded, particularly over the last two decades.[10] Legislation such as the No Electronic Theft Act of 1997 ("NET Act")[11] and the Artists' Rights and Theft Prevention Act of 2005 ("ART Act")[12] 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.[13] Private causes of action against infringers allow the rule creators to serve as their own enforcers.[14] Whether anti-piracy advocates are lobbying Congress for new civil penalties[15] 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.[16] Perhaps unsurprisingly, many feared that criminalizing a greater variety of infringements would only magnify the missteps of private civil litigation.[17] Industry insiders' confidence that infringers would face criminal prosecution was matched by onlookers' confidence that backlash would follow.[18] 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.[19]

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.[20] Nor, for that matter, have the successive generations of sociologists who have drawn on his work[21] or legal scholars interested in law's expressive function.[22] 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.[23] 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.[24]

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.[25] 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.[26] 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.[27] Dan Kahan has therefore cautioned that "an account of deterrence that abstracts from meaning—by, say, considering only how

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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*]; Kenworthey 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."[28]

Thus, for example, there is a wide body of literature attributing the existence of tax evasion to permissive social norms.[29] 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.[30] 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.[31]

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.[32] 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.[33]

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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[34] 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."[35] The initial perception of deviance, what Stanley Cohen would later coin a "moral panic,"[36] 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.[37] 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/shs/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).