

# The Law and Norms of File Sharing

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This Article examines how law influences social norms. It seeks to understand the characteristics of law that influence opinions about the social acceptability of regulated behavior. To this end, the Authors examined the practice of sharing digital files of copyrighted material, file sharing, by conducting an experiment to identify the characteristics of copyright law that influence perceptions of social norms about unlawful file sharing. Even though college students surveyed believe that peer-to-peer file sharing is common practice, they thought the practice would become less socially acceptable if violators were subject to shaming penalties. They also expressed less willingness personally to engage in file sharing if violators were subject to revocation of university

network privileges. These results suggest that both formal and informal sanctions associated with copyright regulations influenced perceptions of file sharing norms. At the same time, law did not influence perceptions of file sharing norms in the absence of sanctions, nor did making salient the moral justifications for refraining from unlawful file sharing. This Article discusses the implications of these results both for the theoretical debate about the expressive function of the law and the policy debate over unlawful file sharing.

## I. INTRODUCTION

In certain areas of life, there are many easy opportunities to violate the law where the resulting harm is apparently minimal; the presence of ready opportunity and absence of serious harm make such violations common. In extreme cases, violating the law is the norm. In these situations, it is very difficult for law to influence behavior. People see no moral obstacle, and they notice that most other people do not hesitate to engage in the behavior. Aside from the law, every relevant source signals that the behavior in question is permissible. Examples of laws that are widely ignored include traffic laws,<sup>1</sup> tax laws,<sup>2</sup> and more recently, laws governing peer-to-peer sharing of copyrighted material.

Is it possible for law to influence behavior in these situations? There is no doubt that dramatically increasing penalties for violating these widely ignored laws would eventually result in deterrent effects—one can imagine the widespread caution on the road if the penalty for speeding were one year in prison for every one mile per hour over the speed limit. But such measures are both extreme and beside the point. In this Article, we address the question of whether law can shift the existing social norm so that people change their views of the social

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1. See Edward Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 681-93 (2006); Margaret Raymond, *Penumbral Crimes*, 39 AM. CRIM. L. REV. 1395, 1399 (2002).

2. See, e.g., Valerie Braithwaite, *Dancing with Tax Authorities: Motivational Postures and Non-compliant Actions*, in TAXING DEMOCRACY 15, 15-39 (Valerie Braithwaite ed., 2003) (estimating that a substantial portion of the population is resistant to paying income taxes). In addition to income tax resistance, the problem of sales tax evasion has become more widespread, as witnessed by the popularity of Internet commerce sites that do not collect sales tax, such as Amazon.com. See Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q.J. ECON. 561, 561 n.1 (2000) (“Every state requires consumers to pay a use tax (at the sales tax rate) for any out-of-state catalog or Internet purchases. . . . Noncompliance is widespread so the transactions are, effectively, tax-free.”).

acceptability of the act in question. If law can do this, even in domains where the prohibited behavior was once widespread, then the more interesting question is *how* law is able to shift existing social norms in these situations. A central idea in the literature on law and social norms is that law can influence behavior expressively—simply by what it says—and independently of sanctions it threatens.<sup>3</sup> Several accounts of expressive law assume that law influences social norms by changing perceptions about others’ attitudes about the behavior in question.<sup>4</sup> That is, when a law comes to the attention of a citizen, that citizen changes her perceptions of the extent to which others will engage in and approve of the behavior that law seeks to regulate. This Article reports the results of an original experiment designed to test the questions: What is it about law that causes people to perceive changes in the relevant social norm? Do formal sanctions cause the citizen to believe that others will no longer approve of or engage in the regulated behavior? Do informal sanctions associated with violating law, such as shame, stigma, and social disapproval cause the citizen to believe that others will no longer approve of or engage in the regulated behavior? Does violation of the law imply a moral violation that the citizen believes will change the prevailing social norms? Finally, does the citizen believe that others believe that law ought to be obeyed, and that the legitimacy inherent in law will change the perception of the prevailing social norms? These questions are fundamental to an understanding of how law works, yet, somewhat surprisingly, they remain unaddressed in the rapidly growing literature on law and social norms.<sup>5</sup>

This Article addresses these questions in the context of one of the most controversial types of prohibited yet common activities—peer-to-peer file sharing. This Article reports an experiment conducted to examine whether law can shift existing file sharing norms toward compliance and, if so, what mechanisms are likely to cause this. The results are surprising: even though peer-to-peer file sharing is perceived as a pervasive practice, the threat of divulging and publicizing the names of file sharers causes the social norm to shift, and the practice becomes less socially acceptable. The threat of publicizing offenders also led our respondents to report being less likely to engage in file sharing themselves. Thus, even though the practice of peer-to-peer file sharing is prevalent—especially among a college student sample—people are less willing to engage in the practice under a spotlight.

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3. *See infra* Part III.

4. *See infra* Part III.

5. *See infra* Part III.

This Article addresses the features of law that are thought to cause shifts in social norms and contributes much needed data to help shed light on how these features operate. Identification and understanding of these mechanisms will help policymakers construct legislation and enforcement mechanisms that carry the greatest promise of shifting existing social norms in the desired direction. Until now, much of the discussion on the relationship between law and norms has been framed in the abstract. By framing the discussion around a set of specific norms about file sharing and employing a rich body of theory about the mechanisms through which law can change social norms, this Article presents a set of claims and recommendations that aspire to be both theoretically sound and practically relevant.

The next Part provides background about the law governing file sharing and the evolving social norms regarding such practices. Part III offers a general review of the existing literature on expressive law and the interaction of law and social norms. Part IV describes the experimental methodology and results. Finally, Part V examines the meaning of the results and their implications for file sharing policy.

## II. FILE SHARING: LAW ON THE BOOKS AND LAW IN ACTION<sup>6</sup>

### *A. Law on the Books*

Federal copyright law includes both criminal and civil provisions that target copyright infringement. Traditionally, federal criminal law targeted only infringement by competitors of copyright holders, but recent criminal provisions also target those who infringe for personal use.<sup>7</sup> The No Electronic Theft Act of 1997 (NET) criminalizes noncompetitive infringement, such as downloading and uploading with no profit motive, and imposes penalties including substantial imprisonment.<sup>8</sup> The NET

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6. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910), for one of the earliest accounts of this distinction.

7. See Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 747-52 (2003) (discussing the theoretical justification for viewing personal use infringement as a criminal act).

8. See 17 U.S.C. § 506(a)(2) (2000). The maximum penalties differ depending on the type of infringement and the number of prior offenses. For example, 18 U.S.C. § 2319(b) deals with infringement for commercial advantage or financial gain and provides for imprisonment for up to ten years for a second offense. 18 U.S.C. § 2319(b) (2000). 18 U.S.C. § 2319(c) deals with infringement involving a total retail value of

prohibits copying or distributing copyrighted work with a value of over \$1000 within a 180 day period.<sup>9</sup> This threshold is easily reached by those who engage in unauthorized downloading or uploading of music and video files on the Internet.<sup>10</sup> A copyright infringer may also be civilly liable for either actual damages to the copyright holder plus disgorgement of profits or, alternatively, statutory damages—up to \$30,000 per work for innocent infringement or, at the court’s discretion, up to \$150,000<sup>11</sup> per work plus attorney’s fees<sup>12</sup> in cases of willful infringement. Thus, a college student caught with 100 infringing songs on her computer could be liable for between \$3 million and \$15 million, depending on whether the infringement was innocent or willful.<sup>13</sup> Clearly Congress views copyright infringement as a serious matter. Hence, the law on the books regarding file sharing carries with it powerful means of enforcement.

## B. Law in Action

### 1. Extent of Unlawful File Sharing

In sharp contrast to the severity of the law, file sharing practices are extremely prevalent. The music industry contends that more than 2.6 billion infringing music files are downloaded every month.<sup>14</sup> According to surveys conducted in July 2003 by the Pew Internet and American Life Project,<sup>15</sup> about half of all Americans ages twelve to twenty-two with access to the Internet have downloaded music from file sharing networks like KaZaA and Morpheus. Despite the popular belief that file

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over \$1000 in a six month period and provides for imprisonment for up to six years in certain cases. 18 U.S.C. § 2319(c) (2000).

9. Another provision, The Digital Millennium Copyright Act of 1998 (DMCA), criminalizes the circumvention of encryption codes that protect copyrighted material. See 17 U.S.C. §§ 1201-1205 (2000).

10. The *Napster* court rejected the argument that such activities were protected by fair use. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001). Although the *Napster* case was a civil action, the Ninth Circuit’s rejection of the fair use defense implicated criminal prosecutions by construing 17 U.S.C. § 106, which defines the subject matter and scope of copyright generally.

11. See 17 U.S.C. § 504 (2000).

12. See 17 U.S.C. § 505 (2000).

13. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1396 n.204 (2004). Lemley and Reese raise awareness of the harm to innovation that could be created if legal rules found innovators liable for copyright infringement committed by users of their innovations. See generally *id.*

14. See Brief for Motion Picture Studio and Recording Co. Petitioners at 12, *MGM Studios Inc. v. Grokster, Ltd.*, 125B S. Ct. 2764 (2005) (No. 04-480).

15. See Amy Harmon & John Schwartz, *Despite Suits, Music File Sharers Shrug Off Guilt and Keep Sharing*, N.Y. TIMES, Sept. 19, 2003, at C2.

sharing is limited only to teenagers, 27% of Internet users between the ages of thirty and forty-nine and 12% of those over fifty engage in file sharing. Furthermore, the Pew study also found that among the 35 million adults in its survey who download music, 23 million said they did not care much about the copyright on the files they copied. Among the 26 million people who made files available for others to copy, 17 million did not care much whether they were copyrighted. Another research firm estimates that between 2003 and 2005, the number of users on peer-to-peer networks like Grokster and Limewire had more than doubled from 3.8 million to 8.7 million users.<sup>16</sup>

## 2. Harms Associated with Unlawful File Sharing

The harms associated with copyright infringement are often difficult to measure.<sup>17</sup> The music industry has blamed the recent decline in CD sales on the widespread practice of file sharing, but estimating how much of this decline, if any, is attributable to file sharing remains a challenge.<sup>18</sup> Potential exists for harm to community interests if the unauthorized use of copyrighted material removes artists' incentives to create new works.<sup>19</sup> Some courts and commentators treat the copyright holder's rights as equivalent to rights that attach to physical property, so that infringement is viewed straightforwardly as theft.<sup>20</sup> On the other hand, some economists have recently questioned the extent of actual harm associated with file sharing. For example, Peter Alexander has

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16. See Roben Farzad, *File Swappers Get Creative as Wheels of Justice Turn*, N.Y. TIMES, June 18, 2005, at C13.

17. For a comparison of the various methods used to measure the impact of file sharing on copyright owners, see Stan J. Liebowitz, *Pitfalls in Measuring the Impact of File-Sharing on the Sound Recording Market*, 51 CESIFO ECON. STUD. 435 (2005), although his own conclusion is that in most cases file sharing harms copyrights owners.

18. It is also not clear how much of the sales decline is attributable to market factors such as pricing and saturation. In addition, some lost sales may have been offset by consumers who purchase a CD only because they decided to do so after downloading it unlawfully.

19. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989) (arguing that strong rights could harm innovation leading to fewer works at higher costs).

20. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001) (“[T]aking what is not yours and not freely offered to you is stealing.”). This view arguably glosses over the fact that copyright owners only own the copyright itself, not the work—which survives copyright expiration—or embodiments of the work. 17 U.S.C. § 202 (2000); see also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263-64 (11th Cir. 2001); Moohr, *supra* note 7, at 766.

drawn attention to the harms associated with the music industry being a highly concentrated five firm oligopoly.<sup>21</sup> Others have focused on network effects of file sharing that might actually increase the willingness of people to purchase CDs.<sup>22</sup> Recently, Oberholzer and Strumpf have argued even more forcefully against the negative impact of file sharing. Using an innovative and methodical approach with real time data, they argue that there is no proven detrimental effect from file sharing.<sup>23</sup> On balance, however, if there is an emerging consensus, it points toward the conclusion that file sharing does indeed impose negative economic consequences on the music industry.<sup>24</sup>

### C. Moral Acceptability of Unlawful File Sharing

Despite the fact that copyright policy is intended to prevent harm to artists' property interests and provide incentives for creative expression, copyright law does not enjoy widespread popular support in the context of file sharing. There is ample evidence that many people view unauthorized file sharing for personal use as morally acceptable.<sup>25</sup> The moral acceptability of sharing copyrighted music is especially strong among young people.<sup>26</sup> The following sections discuss several related explanations that might account for this.

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21. See Peter J. Alexander, *Peer-to-Peer File Sharing: The Case of the Music Recording Industry*, 20 REV. INDUS. ORG. 151 (2002).

22. See, e.g., Lisa N. Takeyama, *The Welfare Implications of Unauthorized Reproduction of Intellectual Property in the Presence of Demand Network Externalities*, 42 J. INDUS. ECON. 155 (1994) (arguing that when demand network externalities are considered, copying can lead to both greater profits and social welfare).

23. See Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis* (2004), [http://www.unc.edu/~cigar/papers/FileSharing\\_March2004.pdf](http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf).

24. See Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 736-44 (2005) (arguing that the current empirical evidence points to a link between downloading and reduced music sales); 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) (concluding that every ten downloads result in one or two lost CD sales); Alejandro Zentner, *Measuring the Effect of File Sharing on Music Purchases*, 49 J. L. & ECON. 63, 79 (2006) (estimating that file sharing reduces the probability of buying music by 30 percent); see also Daniel Gross, *Does a Free Download Equal a Lost Sale?*, N.Y. TIMES, Nov. 21, 2004, § 3, at 4.

25. See Moohr, *supra* note 7, at 767 n.165 (citing a survey of 1000 people by Taylor Nelson Sofres Intersearch which found that "59% did not think it is wrong to download free music online, 11% thought it was wrong but said they would probably do it, and only 18% thought it was wrong and would not do it").

26. See Harmon & Schwartz, *supra* note 15, at C2 (discussing the Pew Internet and American Life Project of July 2003).

### 1. *Intangible as Free*

Many people have difficulty seeing the wrong of “stealing” intangible assets.<sup>27</sup> In fact, 78% of Internet users who download music do not consider it stealing.<sup>28</sup> Among the general public, opinion was evenly split in a 2002 survey: half said downloading is morally permissible, and half said it is not.<sup>29</sup> In this sense, the sharing of digital music files might be viewed in the same way as speeding—morally acceptable if done in moderation.<sup>30</sup> The ease with which files are unlawfully shared might itself promote a lack of respect for copyright law.<sup>31</sup>

### 2. *The Internet as Free*

The Internet sprang from a research culture where information of all kinds was freely shared.<sup>32</sup> That outlook still resonates with millions of users who routinely download music onto their computers.<sup>33</sup> By heritage and design, the Internet represents a particularly distributive technology. It permits every user in every living room to function as a mass distributor of just about anything that can be digitized including film, photography, the written word, and, of course, music. With music file sharing, the technological possibilities have driven development of the cultural norm. College students, in particular, have grown up viewing the Internet as a way of accessing things for free.<sup>34</sup>

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27. See Yuval Feldman, *The Behavioral Foundations of Trade Secrets: Tangibility, Authorship and Legality*, 3 J. EMPIRICAL LEGAL STUD. 197 (2006) (demonstrating that employees had difficulty grasping the wrongdoing associated with using intangible confidential information).

28. See Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 542-43 (2003) (citing data from a Pew Internet and American Life Project poll in 2000).

29. *Id.* at 543-44 (citing a 2002 poll by Edison Media Research).

30. See Cheng, *supra* note 1 (examining the regulation of tax evasion, speeding, and music piracy); Raymond, *supra* note 1 (arguing that penumbral crimes—those with a high level of noncompliance—exist in many areas of life and encourage undesirable behavior, endangering the law obedience norm).

31. See Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 724-26 (2003).

32. See Steve Lohr, *Ideas & Trends: The Sharing Society; In the Age of the Internet, Whatever Will Be Will Be Free*, N.Y. TIMES, Sept. 14, 2003, § 4, at 1.

33. *Id.*

34. See Amy Harmon, *Recording Industry Goes After Students over Music Sharing*, N.Y. TIMES, Apr. 23, 2003, at A1.

### 3. *Privacy, Convenience, and Lack of Alternatives*

For many, downloading files from the Internet is the easiest and most comfortable way to obtain music and other media products. Music consumers maintain that this “convenience factor” is especially important given the lack of satisfactory online alternatives.<sup>35</sup> They perceive the alternatives presented by the music industry as very limited, especially when compared to the wide selection of music styles offered by file sharing software. This is changing rapidly, however, with the advent of digital music sales in which users pay fees to music services like iTunes to download music.

### 4. *Experimentation*

Many consumers feel that downloading and sharing music files allows them to make wiser decisions about whether to purchase specific CDs. For some listeners, file sharing has become a way to experiment by trying new music without paying first. This is consistent with research that claims that the decline in CD sales is attributable not to the extensive use of file sharing software,<sup>36</sup> but to other factors including a long economic recession.<sup>37</sup> According to this line of argument, if a consumer likes a particular artist, he or she will actually buy the CD, so the number of those who download music *instead* of buying the CD is small.

### 5. *Perceptions of Legality*

Surveys of file sharing network users show that people do not think their own file sharing activities constitute a violation of copyright laws.<sup>38</sup> Prior to the recent wave of industry lawsuits against individuals engaged in file sharing, the assumption prevailed that file sharing is both socially acceptable and legal. People reasoned that Napster—the company that drove the original wave of online music piracy—had been shut down after the record companies sued and that the file sharing networks that survived must be operating within the law—otherwise, they would already have been shut down.<sup>39</sup> The advent of highly publicized industry lawsuits against individuals may have dispelled the notion that

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35. See Harmon & Schwartz, *supra* note 15, at C2.

36. See Oberholzer & Strumpf, *supra* note 23, at 24.

37. John Schwartz, *A Heretical View of File Sharing*, N.Y. TIMES, Apr. 5, 2004, at C1; see also Gross, *supra* note 24, § 3, at 4.

38. See Lohr, *supra* note 32.

39. See Amy Harmon, *Subpoenas Sent to File-Sharers Prompt Anger and Remorse*, N.Y. TIMES, July 28, 2003, at C1.

file sharing is always lawful. Recent survey data suggests, however, that despite the recent crackdowns by the industry, many people believe that individual file sharers should not be held responsible for pirating, and that government efforts to reduce file sharing are unlikely to be effective.<sup>40</sup>

### 6. *Perceptions of Recording Industry Greed*

One popular argument for the legitimacy of file sharing focuses on the high price of CDs. Many believe that the record companies charge too much for CDs and that therefore music sharing is justified, even if it is stealing.<sup>41</sup> This view is aggravated by the fact that music consumers believe the recording industry exploits artists. The following quote from a twenty-one-year-old college student is representative: “They’re a bunch of greed heads . . . . They’ve been really fat on what I think of as huge profits and now they are trying to maintain the status quo.”<sup>42</sup> This perception is accompanied by the accusation that recording artists do not get a worthy percentage of profits. Statements like the following are common: “If the money went into the artist’s pocket, I’d have more of a dilemma. But the companies make enough money.”<sup>43</sup>

Indeed, artists themselves seem to play a crucial role in shaping young people’s views toward file sharing. People who engage in unlawful file sharing often point to high-profile musicians who acknowledge that file sharing has provided them with valuable exposure.<sup>44</sup> It is important to emphasize that artists differ in their attitudes toward the Recording Industry Association of America’s (RIAA) legal actions and its general perspective on file sharing. Metallica, for instance, has spoken strongly and repeatedly in favor of the recording industry’s crackdown. At the same time, other influential musicians like Moby, System of a Down, and Public Enemy contend that the recording industry’s efforts are

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40. Mary Madden & Lee Rainie, Pew Internet Project Data Memo, Pew Internet & Am. Life Project (Mar. 2005), [http://www.pewtrusts.com/pdf/PIP\\_Filesharing\\_March05.pdf](http://www.pewtrusts.com/pdf/PIP_Filesharing_March05.pdf).

41. See Amy Harmon, *In Fight Over Online Music, Industry Now Offers a Carrot*, N.Y. TIMES, June 8, 2003, at A1.

42. *Id.*

43. See John Leland, *Praise God and Pass the Music Files*, N.Y. TIMES, Apr. 25, 2004, § 4, at 4.

44. See Tom Zeller, Jr., *Pew File-Sharing Survey Gives a Voice to Artists*, N.Y. TIMES, Dec. 6, 2004, at E1.

misguided and that it must work with the new technology instead of against it.<sup>45</sup>

#### *D. Industry Response to Violations of Copyright Law*

The industry responded to widespread unlawful file sharing by targeting network operators. One popular early network, Napster, operated a centralized file server that directed traffic by collecting data about files available for sharing. The RIAA sued Napster in 1999 for contributory and vicarious copyright infringement, and a federal court ruled that its method of facilitating file sharing through a central server amounted to copyright infringement.<sup>46</sup> After a court ordered it to block access to infringing files, Napster shut down in 2001.<sup>47</sup>

After the demise of Napster, peer-to-peer (p2p) software that did not involve any central server emerged. Instead, these new p2p services facilitated file transfers by allowing users to search directly on other users' computers.<sup>48</sup> In 2003, the Seventh Circuit upheld a district court injunction against the p2p service Aimster, finding that plaintiffs were likely to prevail because the service had been used exclusively for infringement and the company had made no effort to limit infringement.<sup>49</sup> On the other hand, the Ninth Circuit found that two distributors that offer the Morpheus file sharing service, Grokster and Streamcast, were not liable for aiding copyright infringement because they could not monitor or control how their users exchanged files.<sup>50</sup> In 2005, however, the U.S. Supreme Court ruled that such distributors—whose software is used by millions of people—can be held liable for aiding copyright infringement because their business models depended on infringing file sharing.<sup>51</sup>

In the meantime, the industry also began suing individual users.<sup>52</sup> This was a turning point for the music industry, which had sought to avoid direct conflict with its potential consumers as it battled online piracy. To advance this strategy, the RIAA initially forced Verizon Internet Services to turn over the names of online subscribers accused of

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45. See Neil Strauss, *File-Sharing Battle Leaves Musicians Caught in Middle*, N.Y. TIMES, Sept. 14, 2003, at A1.

46. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

47. See Lawrence Iser & James Toma, *Battling Digital Piracy: Recording Industry Has Taken a Multipronged Response to Illegally Downloaded Music*, 25 NAT'L L.J. C1, at C1 (2003).

48. *Id.*

49. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

50. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *vacated and remanded*, 125 S. Ct. 2764 (2005).

51. *Metro-Goldwyn Mayer Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764 (2005).

52. See Iser & Toma, *supra* note 47.

illegal copying.<sup>53</sup> Verizon successfully appealed the lower court decision on statutory grounds, however, setting back the RIAA's strategy of unclocking suspected file sharers.<sup>54</sup>

### *E. The Gap Between Law and Norms*

It is now apparent that a considerable gap exists between the law, which prohibits the practice of file sharing and imposes ever increasing sanctions,<sup>55</sup> and social norms, which are permissive toward file sharing. Recent attempts by the music industry to reduce illegal downloading have focused mainly on deterrence. The RIAA has brought widely publicized civil actions against violators despite the public relations risk associated with suing one's customers.<sup>56</sup> Public opinion about this strategy has been mixed, and media attention has sometimes focused on cases involving particularly sympathetic defendants.<sup>57</sup> Although it is too early to estimate with certainty, the music industry's deterrence strategy seems to be leading to mixed results.<sup>58</sup> Interestingly, the music industry's

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53. *Recording Indus. Ass'n of Am. v. Verizon Internet Servs. (In re Verizon Internet Servs., Inc.)*, 240 F. Supp. 2d 24 (D.D.C. 2003) (requiring Verizon to disclose the name of a subscriber accused of downloading 600 songs in one day).

54. *Recording Indus. Ass'n of Am. v. Verizon Internet Servs. Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) (holding that the absence of express language in the DMCA regarding disclosure of names of suspected violators precludes ordering such disclosure). Currently, the RIAA is using "John Doe" proceedings to pursue those suspected of unlawful file sharing. This procedure is relatively cumbersome compared with the subpoena process that the RIAA attempted in the *Verizon* case. See David Gorski, Note, *The Future of the Digital Millennium Copyright Act (DMCA) Subpoena Power on the Internet in Light of the Verizon Cases*, 24 REV. LITIG. 149, 161-62 (2005) (discussing the relationship of John Doe proceedings to the DMCA).

55. See Moohr, *supra* note 7, at 736 (explaining that copyright infringement was traditionally only a misdemeanor). Only recently has it been categorized as a felony. In addition, criminal liability did not previously attach without a profit motive. Now infringement even for personal use is criminal. *Id.*; see also *supra* notes 7-13 and accompanying text.

56. See Alfred C. Yen, *What Federal Gun Control Can Teach Us About the DMCA's Anti-Trafficking Provisions*, 2003 WIS. L. REV. 649, 652 (discussing the failure of other solutions, like technological controls, to limit copyright infringement); see also Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2004).

57. See Sara Calabro, *RIAA Lawsuits—Music Industry Mistakes Its Lawsuits for a PR Maneuver*, PUB. REL. WK., Sept. 22, 2003, at 9 (describing the case of a twelve-year-old girl who was fined \$2000 and arguing that the RIAA's strategy has led to public relations problems).

58. A Pew Internet & American Life study estimated that in the months following publicity about the first round of RIAA's suits against end users, file sharing dropped substantially. Mary Madden & Lee Rainie, *Pew Internet Project Data Memo*, Pew Internet & Am. Life Project (March 2005), [http://www.pewinternet.org/pdfs/PIP\\_](http://www.pewinternet.org/pdfs/PIP_)

strategy has not focused heavily on changing existing social norms.<sup>59</sup> This is noteworthy given that a substantial gap between formal law and community norms can eventually undermine the legitimacy of the law.<sup>60</sup> If the law prohibits behaviors that are widely known to be common, it may lose legitimacy or credibility.<sup>61</sup> This lack of alignment is exacerbated

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Filesharing\_March05.pdf. Pew researchers conducted a series of telephone surveys of American Internet users during the years 2000 and 2005. The survey asked respondents whether they ever downloaded music onto their computers. The percentage answering “yes” to this question moved from 22% in mid 2000, up to 30% just before the RIAA lawsuits were publicized in summer 2003, and down to 14% in November, 2003. *Id.* at 10-11. The most recent result is 22% as of March 2005. Note that even though the wording of the question remained the same across time, the meaning of the question likely changed. In 2000, there were relatively few methods for downloading music in accordance with copyright restrictions, so that of the 22% who were downloading music in 2000, a large portion probably violated copyright restrictions. In contrast, the current availability of online music services like iTunes raises the possibility that music downloading in the most recent survey is lawful. On the other hand, there is probably more awareness today of the unlawfulness of peer-to-peer sharing of copyrighted files, introducing the possibility that the more recent surveys are biased downward. *See also* Hughes, *supra* note 24, at 743-44 (arguing that the RIAA lawsuits could have been responsible for the rise in record sales toward the end of 2003 and beginning of 2004); Matthew Sag, *Piracy: Twelve-Year-Olds, Grandmothers, and Other Good Targets for the Recording Industry’s File Sharing Litigation*, 4 NW. J. TECH. & INTELLECTUAL PROP. 133, 153-55 (2006) (providing a useful chart of the Pew Survey results and arguing that unlawful file sharing has probably decreased as a result of the RIAA lawsuits); *cf.* David Opperbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Regulation*, 20 BERKELEY TECH. L.J. 1685, 1715-16 (2005) (arguing that file sharing is increasing because the RIAA litigation has fueled a technological arms race); John Reinan, *4 Minnesotans Are Sued in War on ‘Songlifting,’* STAR TRIBUNE., Apr. 26, 2006, § B, at 1 (discussing estimates that the number of file sharers has increased 115% (to over 9 million people) since the RIAA lawsuits in September 2003).

59. It did, however, trot out artists like Metallica to try to convince people to stop copying music. *See* Strauss, *supra* note 45; *see also* Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 742 (2005) (urging policymakers to focus on social norms in crafting a solution to the problem of unauthorized file sharing).

60. Both economists and psychologists recognize that credibility and legitimacy are important for encouraging self-regulation and compliance. *See* IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 49 (1992) (showing how unreasonable OSHA regulations discourage plant managers from complying); *see also* EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982).

61. *See* Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005) (demonstrating empirically that perceived legal injustice can lead to decreased compliance with unrelated laws). This idea also has been investigated in the context of the “acceptable” ratio between a crime and its punishment, *see* V. Lee Hamilton & Steve Rytina, *Social Consensus on Norms of Justice: Should the Punishment Fit the Crime?*, 85 AM. J. SOC. 1117 (1980); *see also* A. Michell Polinsky & Steven Shavell, *The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy*, 2 AM. L. & ECON. REV. 223 (2000) (arguing, similarly, that criminal sanctions should be proportionate to the gravity of the act committed). Moreover, it should be noted that the negative effects of over enforcement are not related only to legitimacy; overenforcement can sometimes lead to changes in incentives that will, in turn, lead to an undesired outcome for the regulation at issue. *See*,

with file sharing because its social approval is perceived as so prevalent that many otherwise law abiding people simply do not care whether the activity is legally prohibited.

### III. EFFECT OF LAWS ON SOCIAL NORMS

Existing work on the expressive function of the law explores how the law might help shape social norms and increase legal compliance. From a policy perspective, the unique approach of law and economics, in contrast to that of the sociology of law, derives from its focus on what norms scholars call “norms management.”<sup>62</sup> Law and economics of norms (LEN) scholars focusing on norms management have emphasized the proactive role that the law must take to shape social norms and optimize behavior with a minimum of costly intervention. The extent and nature of the influence of law on social norms, however, is the subject of debate within the current literature. In fact, LEN scholarship may be divided into three camps with regard to the relationship between formal laws and norms. Those in the first category argue that using law to shape social norms is likely to disrupt the desirable functions of those norms. The second group argues that law is unlikely to lead to any change in the functioning of norms. Finally, the third camp views law as an important tool that could move social norms in the direction desired by policymakers.

#### *A. The Destructive Impact of Formal Laws on the Function and Nature of Norms*

Many LEN scholars have argued that formal laws can have devastating effects on the content and function of desirable or efficient norms, including Bernstein,<sup>63</sup> Posner,<sup>64</sup> Brown,<sup>65</sup> Kagan, and others.<sup>66</sup> This section

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*e.g.*, W. Kip Viscusi, *The Impact of Occupational Safety and Health Regulation*, 10 BELL J. ECON. 117 (1979) (discussing the idea that severe penalties will be counterproductive).

62. See Ann E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231 (2001) (illustrating the “norm management” approach in the context of recycling).

63. See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) (discussing the supremacy of norms over laws in business communities).

64. See Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996) (discussing the factors that influence the efficacy of groups’ enforcement mechanisms).

65. See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1303 (2001) (calling for a civil, regulatory alternative to street crime enforcement).

reviews some of the mechanisms suggested by LEN scholars to account for this destructive effect.

Frey is the leading economist to explore possible psychological mechanisms underlying the destructive potential of law on norms, marked by the crowding out of internal and non-calculative motivations that can occur when external motivation is introduced.<sup>67</sup> Frey conducted a study and found that residents were more likely to oppose a nuclear plant in their neighborhood if they were offered compensation.<sup>68</sup>

The related “fine is a price” mechanism describes a phenomenon that Gneezy and Rustichini documented in the context of daycare centers that assessed fines upon parents who were late in picking up their children at the end of the day.<sup>69</sup> Imposing a fine on late parents was counterproductive, resulting in an increased number of late pickups. Apparently, the fine led parents to feel licensed to arrive late. In this sense, law undermined the preexisting norm of arriving on time. In another study on the potentially disruptive effect of law, Stout and Blair focused on the negative impact of regulation on people’s sense of their own trustworthiness.<sup>70</sup> They suggest that regulating the duty of loyalty might be counterproductive and offer a mechanism like the crowding out mechanism discussed in the experimental studies, but they focus on the effect of formal requirements on interpersonal relationships rather than individual motivations.

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66. See Robert A. Kagan, Neil Gunnigham, & Dorothy Thornton, *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 LAW & SOC’Y REV. 51 (2003) (describing the existence of different compliance styles of managers).

67. For an early study, see Edward L. Deci, *Effects of Externally Mediated Rewards on Intrinsic Motivation*, 18 J. PERSONALITY & SOC. PSYCHOL. 105 (1971) (building the psychological foundations for the “crowding out” paradigm used by lawyer economists).

68. See Bruno S. Frey, *Institutions and Morale: The Crowding-Out Effect*, in ECONOMICS, VALUES, AND ORGANIZATION 437 (Avner Ben-Ner & Louis Putterman eds., Cambridge Univ. Press 1998) (demonstrating the decline in intrinsic motivation which is created by the existence of external rewards); Sandra H. Berry & David E. Kanouse, *Physician Response to a Mailed Survey: An Experiment in Timing of Payment*, 51 PUB. OPINION Q. 102 (1987) (presenting a real life illustration of the “crowding out” phenomenon); Ernst Fehr & Simon Gächter, *Do Incentive Contracts Crowd Out Voluntary Cooperation?* (Feb. 2001), <http://ssrn.com/abstract=229047> (arguing for the need of a more complex model to fully capture the crowding out effect). *But see* Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURVEYS 589 (2001) (acknowledging that this phenomenon is still questioned by mainstream economists despite its emergence across multiple experiments).

69. See Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000).

70. See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001).

Following a similar line of reasoning, Cohen discusses the negative impact of legality on social capital via the concept of the “Good Samaritan.”<sup>71</sup> On a motivational level, he argues, imposing a duty to help on people with special qualifications could disrupt volunteer activities because people will be less likely to acquire these skills. More generally, he argues that the reputation associated with being a Good Samaritan will disappear if helping becomes a legal requirement.

In a related vein, Dan Kahan argues that policies can be counterproductive when they assume that people are wealth maximizers who cannot be counted on to contribute to public goods and therefore introduce incentives that dissipate trust.<sup>72</sup> For example, a policy that assumes, on the one hand, that people will avoid paying taxes will provide an incentive to pay in the form of threatened punishment. On the other hand, such a policy overlooks the possibility that threatened punishment is perceived as a signal that tax evasion is widespread.<sup>73</sup> Because people resist being taken advantage of by being the only ones who contribute to a public good, tax compliance can therefore decrease in the presence of threatened punishment. In this way, incentives can crowd out altruism because they eliminate the opportunity to demonstrate altruism and good will by signaling to others that few people are contributing.

In a study on attitudes toward file sharing, DePoorter and Vanneste found mixed evidence for the proposition that formal law can have perverse effects on existing norms. Among those who already engage in unlawful file sharing, the practice was seen as more ethical under a severe punishment regime, compared to a light punishment regime.<sup>74</sup> On the other hand, among those who do not engage in file sharing, the severe punishment regime caused the practice to be viewed as less ethical than in the light punishment regime.

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71. See Mark A. Cohen, *Norms Versus Laws: Economic Theory and the Choice of Social Institutions*, in *SOCIAL NORMS AND ECONOMIC INSTITUTIONS* 95 (Kenneth J. Koford & Jeffrey B. Miller eds., 1991).

72. See Dan M. Kahan, *Trust, Collective Action, and Law*, 81 *B.U. L. REV.* 333 (2001).

73. A similar phenomenon has been confirmed recently in a study of attitudes toward file sharing, which found that increasing threatened punishment causes people who do not engage in unlawful file sharing to believe that the practice is widespread. Ben DePoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 *OR. L. REV.* 1127, 1157 (2005).

74. See *id.* at 1151-54.

### B. *The Lack of Impact of Formal Laws on Social Norms*

There is another, less well-known, body of scholarship which suggests that the effect of law on social norms is minimal because most existing norms exert such a strong influence on behavior. For example, in a study conducted in the context of environmental regulatory regimes, economic and normative influences were at least as important as formal regulation for the environmental performance of corporations.<sup>75</sup> In another example, Darley, Carlsmith, and Robinson<sup>76</sup> argue that most people do not know the specifics of the criminal law; instead, their preexisting moral intuitions—not the law itself—guide their perceptions of the law. In this sense, criminal law does not influence social norms; social norms and moral intuitions actually influence beliefs about what the law is.

### C. *The Constructive Impact of Formal Laws on the Function and Nature of Social Norms*

Another strand of legal scholarship focuses on the expressive function of the law and emphasizes the positive effect that laws could have on norms.<sup>77</sup> For example, McAdams argues that law has a positive effect on norms because citizens view law as information that helps them make decisions about whether to engage in particular behaviors. According to McAdams's attitudinal theory of expressive law, enacting law solves a pluralistic ignorance problem by signaling the underlying attitudes of a community or society.<sup>78</sup> Therefore, people are motivated to seek the approval—or avoid the disapproval—of others, and the information signaled by legislation provides a guide for engaging in socially approved behavior. In addition to signaling a community's attitudes, law can also serve as a credible signal about risky or beneficial behaviors—smoking or wearing seatbelts, for example.<sup>79</sup> According to this informational account of law's expressive function, the legislative process aggregates information to produce a decision that is superior to the opinion of any individual legislator.<sup>80</sup> As a result, if a legislative body prohibits public

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75. See Kagan et al., *supra* note 66, at 58-66.

76. See John M. Darley, Kevin M. Carlsmith, & Paul H. Robinson, *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165 (2001).

77. See Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1 (2000) (reviewing his earlier model and suggesting a three-fold model of the effect of legality on behavior).

78. See Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000).

79. See Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 AM. L. & ECON. REV. 1 (2003).

80. *Id.* at 6.

smoking, people might be less likely to smoke publicly and more likely to enforce the norm against others because the process of enacting the legislation leads people to update their beliefs.<sup>81</sup>

Similarly, Alex Geisinger argues that law leads to “belief change” about the behavior which law seeks to regulate, thus leading to changes in social norms and preferences.<sup>82</sup> Robert Cooter suggests that enacting law might move people from an inferior equilibrium to a superior equilibrium.<sup>83</sup> According to this model, the law might change the normative beliefs of enough people to lead to an actual change in their behavior. Under certain conditions, this change will decrease the costs<sup>84</sup> of compliance for many others, shifting even larger portions of the population into lawful behavior. Kagan and others demonstrated the informative role of law in an environmental context. They focused on the informative value of the law as the enforcer of the norms, as opposed to the targets, and showed how the law clarifies the boundary between activity which is harmful to the environment and activity which should be tolerated.<sup>85</sup>

Moving beyond the informative contribution that the declarative aspects of the law make to norms, numerous studies have demonstrated that the deterrence mechanism has had positive effects on the internalization of existing norms.<sup>86</sup> That is, the threat of sanctions is sometimes enough, in and of itself, to convince people that the regulated behavior is morally problematic. For example, in a correlational study, Paternoster and others showed that perceived punishment is a significant

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81. *Id.* at 7-11.

82. See Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 70 (2002).

83. See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996).

84. Here, cost is considered in terms of informal sanctions.

85. “The law on the books . . . is a benchmark for enforcers of both the social and economic license. Exposure of substantial legal noncompliance is taken by both community activists and professional investors as a justification for skepticism about the environmental good faith or the competence of mill managers.” Kagan et al., *supra* note 66, at 79.

86. See GEORGE H. MEAD, *MIND, SELF, AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* (1934); Matthew Silberman, *Toward a Theory of Criminal Deterrence*, 41 AM. SOC. REV. 442, 453 (1976); Franklin Zimring & Gordon Hawkins, *The Legal Threat as an Instrument of Social Change*, 27 J. SOC. ISSUES 33 (1971) (demonstrating empirically the effect of legal sanction on morality).

predictor of an act's perceived morality.<sup>87</sup> This suggests that formal deterrence is needed to maintain the credibility of informal sanctions. In an experimental setting, Schwartz and Orleans demonstrated in the context of tax compliance that people in a "fear-of-punishment" group were more likely to feel a *moral* duty to pay taxes than those in a control group.<sup>88</sup> Therefore, deterrence can actually enhance internal motivation rather than crowding it out.

Information and deterrence are not the only ways in which law can directly shape and encourage desirable social norms. Edward Cheng argues that laws can regulate behavior indirectly by subtly reshaping environmental conditions that give rise to the prohibited behavior.<sup>89</sup> By minimizing opportunities to engage in a prohibited behavior, law can force people to default to lawful behavior simply because the prohibited behavior is too inconvenient or complicated. The desired conduct then arises by default, and this in turn gives rise to social norms that further enforce the desired conduct. Law can influence social norms by "tak[ing] advantage of the natural inclination to follow routines and the tendency for social norms and institutions to form around them."<sup>90</sup> Therefore, the scholarship in this final category generally supports the view that the expressive function of the law can enhance personal and social norms, thus increasing the legal obedience of citizens.

#### *D. Understanding the Effect of Law on Social Norms*

As this short review of LEN scholarship has demonstrated, there are many conflicting perspectives and approaches to the interaction between formal laws and norms. Even though the importance of norms is recognized, the relationship between law and norms remains largely unexplored. One key unanswered question is how formal law affects social norms at the outset. This question is central to creating a coherent view of the ability of law to change social norms in a desired direction. Without a clear account of the mechanism by which the announcement of a law can change the perception of norms, it is impossible to predict the influence of legality on norms. This Article seeks to develop an account of the behavioral mechanism responsible for the effect of law on

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87. See Raymond Paternoster et al., *Perceived Risk and Social Control: Do Sanctions Really Deter?*, 17 *LAW & SOC'Y REV.* 457 (1983).

88. See Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 *U. CHI. L. REV.* 274 (1967) (comparing experimentally the effect of morality and formal sanction on individuals' tax evasion behavior).

89. Cheng, *supra* note 1, at 662-65; see also Neal Kumar Katyal, *Architecture as Crime Control*, 111 *YALE L.J.* 1039 (2002) (arguing that architecture can be harnessed to control crime).

90. Cheng, *supra* note 1, at 665.

norms. By answering this question, we can better address policy questions about closing the gap between law and file sharing norms.

*E. Empirical Research on the Expressive Function of Law*

The following questions are embedded in attempts to define the expressive function of the law: What gives the law its expressive ability? Why would people care about the inoperative facets of the law? More specifically, why would people, upon hearing about a new law, think that it is likely to influence the social norms about the regulated behavior?

Bohnet and Cooter maintain that the expressive power of the law derives both from the state's credibility with citizens and from preexisting multiple equilibria in the underlying system of social interactions.<sup>91</sup> Credibility, as they examine it, is based not on any moral ground, but on the fact that citizens historically complied with the laws. Similarly, McAdams and Nadler argue that in coordination situations, the expressive power of law derives from law making one of several equilibria salient, thus allowing people to form expectations about what others are likely to do.<sup>92</sup>

McAdams's attitudinal theory of expressive law holds that because legislatures' actions generally represent the will of the majority, new legislation informs people about the majority view.<sup>93</sup> Geisinger builds on this view, and argues that a change in law can influence an individual's beliefs about the desirability of a behavior—drunk driving or seatbelt wearing, for example.<sup>94</sup> Both authors base these accounts on the idea that the expressive effect of the law works through its ability to change beliefs about what others will think about the regulated behavior. It is not clear, however, what aspect of the law causes people to believe that most others will adhere to it.

The meaning of consensus is not always clear in existing work on the expressive function of the law. A closer look at some of the expressive law studies shows that they differ not only in their assessments of the

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91. See Iris Bohnet & Robert D. Cooter, *Expressive Law: Framing and Equilibrium Selection* (Nov. 2003), <http://ssrn.com/abstract=452420>.

92. See Richard H. McAdams & Janice Nadler, *Testing the Focal Point Theory of Legal Compliance: The Effect of Third-Party Expression in an Experimental Hawk/Dove Game*, 2 J. EMPIRICAL LEGAL STUD. 87, 116-17 (2005).

93. See McAdams, *supra* note 78.

94. See Geisinger, *supra* note 82, at 70.

types of expressive processes that occur following the announcement of the law, but also in their definitions of consensus.

The expressive models that refer to coordination, focal points, and tipping points argue that the expressive function of law works through its capacity to inform people as to how others will behave when they hear about the law.<sup>95</sup> Other models, of the kind discussed by McAdams,<sup>96</sup> Scott,<sup>97</sup> and Cooter,<sup>98</sup> focus on the effect of law on the approval patterns of other people, such as assumptions that once a law has been passed it will increase their chances of facing social disapproval. The difference between what social psychologists refer to as “injunctive norms” and “descriptive norms” explains the difference between these accounts. Descriptive norms are how most people would behave in comparable situations. Injunctive norms refer to the extent to which most people would approve of the target behavior.<sup>99</sup>

#### F. The Current Study

What is it about law that would cause a citizen to believe that other people would change their behavior following announcement of that law? The social context in which most people operate limits their ability to confirm their beliefs about the relevant social norm. Therefore, people must rely on their perception of the social norm when they estimate the expected social and formal costs they will have to pay when engaging in socially undesirable activities. Under these conditions of

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95. See Bohnet & Cooter, *supra* note 91; Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000) (arguing that the law helps solve coordination problems by suggesting a focal point on which all parties can agree ex ante); McAdams & Nadler, *supra* note 92.

96. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 365 (1997) (discussing the role of esteem in social sanctioning).

97. Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1614 (2000):

Why might the Smiths revise their estimate of the probabilities of sanction without experiencing a change in their preferences or in the underlying norms? The Smiths, as all of us, recognize that statutes are enacted only if . . . a substantial majority of the community has at least a weak preference for the new rule . . . .

98. See Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 972-78 (1997) (arguing for certain conditions that should be fulfilled for the emergence of “perfect” informal sanctions).

99. See Robert B. Cialdini et al., *Normative Influences in Organizations*, in *SHARED COGNITION IN ORGANIZATIONS: THE MANAGEMENT OF KNOWLEDGE* 195 (Leigh L. Thompson et al. eds., 1999) (arguing that injunctive norms have a stronger effect on behavior than descriptive norms); see also Anders Biel et al., *Norm Perception and Cooperation in Large Scale Social Dilemmas*, in *RESOLVING SOCIAL DILEMMAS: DYNAMIC, STRUCTURAL, AND INTERGROUP ASPECTS* 245 (Margaret Foddy et al. eds., 1999) (discussing some of the pitfalls in the operation of norms in large scale contexts).

uncertainty, it is important to understand both how law affects norms and how people believe a particular law will affect norms.

Therefore, this Article focuses on the effect of law on beliefs about the social norm of the regulated behavior instead of the previous approaches of either: (1) exploring the effect of law on norms by measuring behavioral change across different times and different places, as in classical law and society studies;<sup>100</sup> or (2) examining the effect of laws on behavior in coordination game settings, as in certain law and economics studies.<sup>101</sup> This experiment examines *why* the law leads to changes in perceptions about social norms. Because people are unlikely to accurately attribute their reasons for changing their views about social norms upon learning that a given behavior is illegal, this study did not pose that question directly. Instead, it varied, one at a time, the salience of several features of law that might influence perceptions of the relevant social norm. Examining various perceptions of social norms associated with different features of law creates a better understanding of the mechanism by which law influences perceptions of the relevant social norms.

Following the widely recognized taxonomies of individual motivation to follow the law, as discussed in LEN scholarship,<sup>102</sup> psychology,<sup>103</sup> and political science,<sup>104</sup> and the leading models discussed in the expressive law scholarship, this study explores potential explanations for why, upon learning about a law, people would perceive others to be likely to obey it. It further examines which of the leading mechanisms will have the strongest effect in the context of copyright law insofar as it regulates file sharing.

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100. See, e.g., Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992) (analyzing the effect of the 1964 Civil Rights Act on organizational norms and describing how state laws have been converted into organizational norms).

101. See *supra* notes 89-90 and accompanying text.

102. See Cooter, *supra* note 77, at 20-21 (discussing the interaction of expression, deterrence, and internalization with promulgation of a law).

103. See John R. P. French, Jr. & Bertram Raven, *The Bases of Social Power*, in *STUDIES IN SOCIAL POWER* 150, 155-56 (Dorwin Cartwright ed., 1959) (suggesting a five-fold taxonomy of the factors that affect the ability of a social source to influence people); Herbert C. Kelman, *Processes of Opinion Change*, 25 PUB. OPINION Q. 57, 62-66 (1961) (suggesting a three-stage model of social influence); June Louin Tapp & Lawrence Kohlberg, *Developing Senses of Law and Legal Justice*, in *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 89, 91-92 (June Louin Tapp & Felice J. Levine eds., 1977) (suggesting a three-fold taxonomy of individuals based on their motivation to comply with the law).

104. See Kagan et al., *supra* note 66, at 53.

The fact that file sharing is so widespread allows us to examine questions about the effect of law on social norms that cannot be easily examined otherwise. Music file sharing is relevant and salient to the college student population that was the object of the study. Second, file sharing is a practice where one can expect meaningful variation in the responses of college students, unlike the crimes of homicide, robbery, or embezzlement. Also, unlike these crimes, file sharing is a practice where social desirability is less likely to prevent participants from giving honest answers. Finally, file sharing is a timely issue.

The experiment considered four possible mechanisms for the effect of law on perceptions of the social norm:

**Proposition I (The Citizenship Proposition):** Simply making the legal rule itself salient is sufficient to change views about file sharing norms. This could be true because people think that others believe the law should be obeyed.<sup>105</sup> In this account, people reason that others pay attention to and obey law simply because the law deserves obedience and deference. If a new law says that file sharing is prohibited, people will assume that others will defer to it simply because of its status as law.

**Proposition II (The Formal Sanctions Proposition):** Making the legal rule salient is sufficient to change views of file sharing norms to the extent that the formal sanctions associated with law are also made salient. This proposition is consistent with virtually all accounts of deterrence theory, such as Bentham,<sup>106</sup> Becker,<sup>107</sup> and Paternoster and others.<sup>108</sup> This proposition is also consistent with the view that people assume others obey the law because they are deterred by the risk of punishment.<sup>109</sup>

**Proposition III (The Informal Sanctions Proposition):** Making the legal rule salient is sufficient to change views of file sharing norms to the extent that the law can facilitate the imposition of social costs on transgressors. This is consistent with the work of scholars who emphasize the importance of law in facilitating esteem<sup>110</sup> and shame.<sup>111</sup>

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105. See Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427 (1977) (arguing that most Americans obey the law simply because they believe that the law should be obeyed).

106. See 1 THE WORKS OF JEREMY BENTHAM 86-91 (1962).

107. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968), for the classical model of deterrence.

108. See Paternoster et al., *supra* note 87.

109. See Catherine A. Sanderson & John M. Darley, "I Am Moral, but You Are Deterred": *Differential Attributions About Why People Obey the Law*, 32 J. APPL. SOC. PSYCHOL. 375 (2002).

110. See McAdams, *supra* note 96; see also Chaim Fershtman & Yoram Weiss,

**Proposition IV (The Morality Proposition):** Making the legal rule salient is sufficient to change views of file sharing norms, so long as the law represents values that correspond to moral values, and those moral values are made salient. This proposition is consistent with the work of Schwartz and Orleans,<sup>112</sup> and Tyler.<sup>113</sup>

#### IV. METHODOLOGY

General theoretical questions regarding the expressive function of the law and specific questions regarding the effect of law on file sharing norms are both ripe for empirical investigation. This Article reports the results of an original experimental survey. This method has the advantage of permitting strong causal inferences about the relationship between law and social norms that are the subject of the inquiry. Specifically, by varying the salience of various legal characteristics—such as underlying moral justifications, sanctions imposed on violators, and perceived legitimacy—while keeping other information constant, the study facilitates strong causal claims about how different characteristics of law influence social norms. After presenting the legal frame, we measured the effect of variation on both perceived social norms about file sharing and the subjects' own intention to share files. This methodology also benefits from its focus on unlawful music file sharing. Unlike many experiments that use abstract questions or stylized games, it uses detailed vignettes about a subject with which our sample of college students was very familiar.<sup>114</sup>

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*Why Do We Care What Others Think About Us?*, in *ECONOMICS, VALUES, AND ORGANIZATION*, *supra* note 67, at 133 (formal analysis of personal quests for status); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

111. See Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (advocating shaming penalties in some circumstances to reduce criminal activity).

112. Schwartz & Orleans, *supra* note 88.

113. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3-7 (1990) (arguing that care for procedural fairness is one of the main motivations underlying lawful behavior).

114. Scenario methods, like this one, are limited because they do not measure actual behavior. Of course, measuring unlawful behavior is difficult in any context. To the extent that one can measure it using existing datasets, such as estimates of the numbers of files unlawfully shared during a given time period, one necessarily sacrifices the ability to make strong causal inferences.

### *A. Procedure*

Two hundred and forty undergraduate students at a large public university in the United States participated in the study. Students completed questionnaires in class and received a small bag of candy for their participation. At the top of the first page of the questionnaire, students were explicitly told that their responses would remain strictly anonymous. Names of students were not collected; the questionnaire was administered in a large classroom, and participation was voluntary; no record was kept of who participated and who did not. Given the dominance of this age group in unlawful file sharing, the use of college students is natural. The Authors do not claim, however, that this sample is representative of the general population.

The legal frame was varied by randomly dividing the sample into five equal subgroups and making controlled changes to the descriptions of the scenario presented to the participants. Specifically, the experiment contrasted two minimal frames in which law is either: (1) not mentioned at all (Control); or (2) mentioned only in the abstract (Law Only), with three different frames which presented a specific set of formal sanctions, informal sanctions, or moral justifications associated with the law. Each participant read only one of the versions described below.

**1. Control Group:** The Control group received the following instructions:

We are interested in examining students' attitudes regarding file-sharing and downloading the creative work of others (e.g., music) without permission. You might be asked to answer questions about future behavior of other students, that you do not have personal knowledge about, and we would like you to take your best guess. Because we are collecting data from many students, we are simply interested in your overall estimations.

**2. Law Only Group:** In addition to the instructions given to the Control group, the Law Only group received the following instructions:

You are told that the following statement will be sent via email and snail mail to all registered students, staff members, and faculty members at UC Berkeley, prior to January 1, 2004:

The University of California, as part of the higher-education community, must strike a balance between the interests of the academic community in using the full capabilities of technology for lawful purposes, and the interests of creators and licensors of intellectual property in protecting their works from unauthorized use, copying, and distribution. The University of California requires everyone in its community to abide by the network use policies and COMPLY WITH COPYRIGHT LAW. Copying or sharing music or other copyrighted material, including software, without a permissible copyright defense, such as Fair Use, or a valid license, IS A VIOLATION OF COPYRIGHT LAW AS WELL AS UNIVERSITY REGULATIONS.

**3. Formal Sanctions Group:** In addition to the instructions given to the Law Only group, the Formal Sanctions group was instructed as follows:

As of spring 2004, any member of the University community who copies or shares music or other copyrighted material without a valid license or permission, shall be subject to the following:

1. First offense: warning only
2. Second offense: 30 day suspension of all University Network privileges, including email
3. Third offense:
  - a. For students, one semester leave of absence, during which all University privileges are suspended, and no course credit can be earned
  - b. For faculty and staff, one semester leave of absence without pay, during which all University privileges are suspended
4. Fourth offense: permanent separation from the University.

Violators shall be served with formal notice of each violation observed

**4. Informal Sanctions Group:** In addition to the instructions given to the Law Only group, the Informal Sanctions group received the following instructions:

As of Spring 2004, any member of the University community who copies or shares music or other copyrighted material without a valid license or permission, shall be subject to the following:

1. Violators shall be served with formal notice of each violation observed.
2. Each week, the University will publish on its website the names of community members who were found to be in violation of University regulations regarding the use of copyrighted work.
3. The Web page containing names of violators will be **accessible to the public**.

**5. Moral Duty Group:** In addition to the instructions given to the Law Only group, the moral duty group received the following instructions:

It is important to recognize that the activities of community members who violate the University's copyright regulations harm the University community at large. The University networks at times have been slowed to a crawl by the high volume of music and other large files constantly downloaded. This crippling of our networks directly compromises the University's ability to maintain excellence in teaching and research.

Moreover, file-sharing and downloading of creative work of others without valid license undermines the abilities of artists to enjoy the fruits of their labor. It is the university position that such practice is as morally problematic as walking into a music store and walking out with a CD without paying.

Community members are therefore urged to refrain from engaging in unlawful file sharing activity that compromises the University's networks and harms talented young artists.

Following the presentation of the scenario, the study measured the participants' responses as discussed below.

### *B. Measures*<sup>115</sup>

After reading one of the legal frames discussed above, participants answered a questionnaire. All questions about future attitudes and behavior were framed according to the likelihood of the event in question occurring anytime within the next calendar year. The questions covered five categories.

1. *Descriptive norm* (Perception That Others Share Files) measured the extent to which the specific legal frame influenced the perception of the prevalence of file sharing among other students, both in terms of the estimated proportion of students who engage in file sharing and the estimated number of songs that other students download from the Internet.<sup>116</sup>

2. *Injunctive norm* (Perception That Others Approve) measured the extent to which the specific legal frame influenced perceptions that other students would think file sharing was appropriate and that parents and professors would approve of the participant's own file sharing behavior.<sup>117</sup>

3. *Willingness to express disapproval toward violators* measured the extent to which the specific legal frame influenced participants' willingness to express disapproval directly to other students who download music and the extent to which they would engage in such forms of social sanctioning.<sup>118</sup>

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115. Excerpts from the questionnaires with the full text of the items appear in the Appendix.

116. This variable was constructed by computing the mean of responses to the three questions appearing under the Descriptive Norm section in the Appendix. These three questions appeared to reliably measure the underlying construct of "descriptive norm" Cronbach's Alpha = .80. Cronbach's Alpha measures the internal consistency of a set of items, and ranges between 0 and 1, with higher numbers indicating higher consistency. See RICK H. HOYLE, ET AL., RESEARCH METHODS IN SOCIAL RELATIONS 83-84 (7th ed. 2002).

117. This variable was constructed by computing the mean of responses to the five questions appearing under the Injunctive Norm section in the Appendix. Cronbach's Alpha = .62. Note that questions two through five were reverse coded to remain consistent with the Descriptive Norm variable, where more file sharing corresponds to a higher score; similarly here, more approval for file sharing corresponds to a higher score.

118. This variable was constructed by computing the mean of responses to the two questions appearing under the Willingness to Punish section in the Appendix. Cronbach's Alpha = .81.

4. *Own intention to share files* measured the extent to which the specific legal frame influenced participants' perceptions about the likelihood that they would share music files with their friends, the likelihood they would download music themselves, and the number of songs they would download.<sup>119</sup>

5. *Moral norm* measured the extent to which the specific legal frame influenced participants' perceptions about how guilty they would feel about sharing files, their moral obligation to abstain from downloading music, and their sense of the wrongfulness of file sharing.<sup>120</sup>

### C. Results

The experiment tested whether the legal frame presented (Control, Law Only, Formal Sanctions, Informal Sanctions, or Morality) influenced participants' perceptions of various file sharing norms and behavioral intentions, measured by the five variables just discussed. Overall, the legal frame had a statistically significant effect on these five dependent measures as a group.<sup>121</sup> Table 1 reports descriptive statistics for each group, and the following section discusses the results for each measured variable.

#### 1. *The Effect of the Legal Frame on the Descriptive Norm (Perception That Others will Share Files)*

We first examined whether the legal frame changed perceptions of the extent to which other students will share files, and found that the legal frame did in fact have an overall effect on the descriptive norm.<sup>122</sup> On the one hand, presenting a legal frame (Law Only, Formal Sanctions,

119. This variable was constructed by computing the mean of responses to the three questions appearing under the Intention section in the Appendix. Cronbach's Alpha = .84.

120. This variable was constructed by computing the mean of responses to the three questions appearing under the Morality section in the Appendix. Question 1 was reverse coded. Cronbach's Alpha = .77.

121.  $F(20, 904) = 2.11; p < .01, \eta^2 = .045$ . The analysis used a multivariate analysis of variance (MANOVA), a statistical technique for assessing the simultaneous effect of an independent variable on two or more dependent criterion variables. See JAMES H. BRAY & SCOTT E. MAXWELL, MULTIVARIATE ANALYSIS OF VARIANCE 7-8 (1985). Throughout this Article "p" refers to the probability of finding a difference or relationship between groups as large as that observed if there were, in fact, no difference or relationship between them. " $\eta^2$ " is a measure of the difference between groups.

122.  $F(4, 227) = 2.75; p < .05; \eta^2 = .046$ .

Informal Sanctions, or Morality) did not change the descriptive norm relative to presenting no legal frame at all (Control). On the other hand, presenting the Formal Sanctions or Informal Sanctions frames decreased the perception that others would engage in file sharing, relative to presenting the Law Only frame. In other words, compared to simply stating that file sharing is against the law, announcing the prospect of concrete punishment, such as losing network privileges, or being publicly shamed, such as having one's name posted on a website, led to perceptions that unlawful file sharing behavior would decrease.

### *2. The Effect of the Legal Frame on the Injunctive Norm (Perception That Others Will Approve of Sharing Files)*

The legal frame did in fact have an overall effect on the injunctive norm—the perception that others will approve of sharing files.<sup>123</sup> As with the descriptive norm results just discussed, presenting any legal frame did not change the injunctive norm relative to the Control. At the same time, presentation of the Informal Sanctions legal frame, in which violators face publication of their names, seemed to influence the injunctive norm most distinctly. Relative to the Law Only frame, the Informal Sanctions frame decreased perceptions that other students would approve of file sharing.

### *3. The Effect of the Legal Frame on Willingness to Express Disapproval Toward Violators*

The legal frame caused an overall change in the extent to which students report that they would be willing to express disapproval toward others who share files unlawfully.<sup>124</sup> It is first worth observing that respondents were generally unwilling to confront a fellow student about file sharing—the mean response in all groups was less than three out of ten, where ten represents “very likely.” A clear pattern of differences between groups emerges, however, where students presented with the Informal Sanctions legal frame reported being more willing to express disapproval toward violators than students in any other group. Thus, it appears that awareness of possible publication of violators' names increases the reported willingness to confront violators directly and express disapproval.

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123.  $F(4, 227) = 3.16; p < .05; \eta^2 = .053$ .

124.  $F(4, 227) = 3.67; p < .01; \eta^2 = .061$ .

#### 4. The Effect of the Legal Frame on Intention to Share Files

The legal frame changed overall self-reported intentions to share files.<sup>125</sup> Specifically, Formal Sanctions had a deterrent effect that decreased students' own willingness to share files relative to the Control frame or the Law Only frame.

#### 5. The Effect of the Legal Frame on Moral Norms Against File Sharing

There was no overall effect of the Law Only frame on moral norms against file sharing.<sup>126</sup>

TABLE 1. ATTITUDES TOWARD FILE SHARING: DESCRIPTIVE STATISTICS

Perception	Others File Share (Descriptive Norm)	Others Approve of File Sharing (Injunctive Norm)	Own Willingness to Express Disapproval	Own Intention to File Share	Moral Norm to Not File Share
Treatment	Mean (SD)	Mean (SD)	Mean (SD)	Mean (SD)	Mean (SD)
<b>Control Group</b>	7.19 <sub>a,b</sub> (2.05)	7.24 <sub>a,b</sub> (1.50)	2.11 <sub>a</sub> (1.74)	6.61 <sub>a</sub> (2.27)	3.90 (2.55)
<b>Law Only Group</b>	7.50 <sub>a</sub> (1.73)	7.76 <sub>b</sub> (1.23)	1.95 <sub>a</sub> (1.40)	6.57 <sub>a</sub> (2.45)	3.64 (2.22)
<b>Formal Sanctions Group</b>	6.59 <sub>b</sub> (1.80)	7.54 <sub>b</sub> (1.40)	1.90 <sub>a</sub> (1.22)	5.20 <sub>b</sub> (2.82)	4.39 (2.47)
<b>Informal Sanctions Group</b>	6.57 <sub>b</sub> (2.29)	6.78 <sub>a</sub> (1.64)	2.88 <sub>b</sub> (2.11)	5.50 <sub>a,b</sub> (2.67)	4.28 (2.33)
<b>Morality Group</b>	7.55 <sub>a</sub> (1.70)	7.29 <sub>a,b</sub> (1.31)	1.87 <sub>a</sub> (1.03)	5.99 <sub>a,b</sub> (3.16)	4.46 (2.32)

Means without shared subscripts denote differences within a column at  $p < .05$ . That is, within a column, numbers with different subscripts are statistically different from one another; those with identical subscripts are statistically indistinguishable. All column heading constructs were measured on ten point scales with a higher value indicating stronger endorsement of the construct. SD refers to standard deviation.

125.  $F(4, 227) = 2.54; p < .05; \eta^2 = .043$ .

126.  $F(4, 227) = 1.01; p = .41$ .

## V. DISCUSSION

### A. *No Observed Effect of Law Alone*

The experiment showed no evidence of an effect of expressive law on any of the dependent measures. That is, relative to the Control frame, simply reminding people that file sharing is a violation of both copyright law and university regulations had no measurable effect on the perceived prevalence of file sharing, the perceived approval for file sharing, people's own intention to file share or express disapproval toward file sharers, or moral attitudes toward file sharing. Simply announcing the law was not enough to shift either perceptions of norms or intentions. Note, however, that the experiment did not test theories of expressive law based on the idea that law works by announcing something other than the status quo. Many theories of expressive law posit that a new law might have the effect of changing the norm precisely because the law announces a change from the status quo. This announced change in law in turn changes beliefs about the likelihood that others would approve of the prohibited conduct. The study, on the other hand, did not announce the passage of a new law—merely new university regulations that prohibited already illegal behavior. It is possible that many accounts of expressive law would not predict any change in perceived norms—either descriptive or prescriptive—in our experimental situation because the announced regulations were simply reinforcing existing law and would not give rise to a reassessment of social pressure to refrain.

In addition, the experiment tested one specific law that is atypical—file sharing, where prohibitions are notoriously disobeyed. Nonetheless, the results suggest that in the context of file sharing, the salience of existing copyright law by itself cannot lead to any expressive change when people are not reminded of its ability to impose cost and internalization functions.

In some sense, the overall pattern of these findings is quite consistent with theories of expressive law that posit the influence of an announced change in law on norms and behavior. Note that the two legal frames that exerted the most consistent effects on norms and intentions were Formal Sanctions and Informal Sanctions. These were also the only two frames that announced a *change* in law. The other legal frames—Law Only and Morality—simply highlighted existing law. Of course, the Formal and Informal Sanctions frames also introduced new sanctions, so it is impossible to separate the effects of deterrence from the effects of legal expression. The more important point, however, is that simply highlighting an already existing law, as in the Law Only frame, did not appear to change perceived norms or behavioral intentions.

## *B. The Effect of Sanctions*

### *1. The Effect of Sanctions on the Descriptive Norm*

The two most influential legal frames for both norms and behavioral intentions were the threats of Formal Sanctions and Informal Sanctions. Compared to highlighting the law alone, the perceived prevalence of file sharing decreased only when the threat of formal punishment, such as expulsion from the university, or informal punishment through shaming, such as publicizing names on a website, loomed large. This finding implies that law might have the ability to shift or strengthen existing descriptive norms by imposing costs.<sup>127</sup> A demonstrated relationship between threatened sanctions and perceived prevalence would support accounts of expressive law that emphasize the ability to increase the price of noncompliance.<sup>128</sup>

### *2. The Effect of Sanctions on the Injunctive Norm*

Besides effects on descriptive norms, the study showed that the threat of informal sanctions influenced the injunctive norm by enhancing perception that other students view file sharing as unacceptable. This finding is consistent with accounts of expressive law which specify a central role for informal sanctions.<sup>129</sup> In our study, the explicit informal sanction—publicizing on a public website the name of each person caught violating the law—led to the perception of increased social disapproval for file sharing itself. In other words, announcing that names of copyright violators would be publicized led people to expect both that the consensus about file sharing would change and that social approval of the practice would decline. The announcement of this sanction may have carried an implicit message that the underlying behavior is socially inappropriate which led to a change in the perceived social approval of file sharing.

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127. Other scholars argue, however, that when the costs become too severe, there can be a backlash where the perceived prevalence of file sharing begins to increase, at least among law abiders. See Depoorter & Vanneste, *supra* note 73, at 1147.

128. See *supra* notes 100-01 and accompanying text.

129. See Cooter, *supra* note 98; McAdams, *supra* note 96 (arguing for a model of social norms based on competition for esteem).

### 3. *The Effect of Sanctions on the Willingness to Express Disapproval of Violators*

According to scholars such as Cooter<sup>130</sup> and Axelrod,<sup>131</sup> the willingness of people to enforce norms is the only mechanism that can ensure a stable decentralized system of governance.<sup>132</sup> In our experiment, the Informal Sanctions legal frame increased the likelihood that people would be willing to express disapproval directly to others who share files; neither Morality, Formal Sanctions, nor Law Only increased participants' willingness to punish others who share files. Therefore, publicizing the names of copyright violators made people more willing both to openly disapprove of file sharing practices and to impose sanctions against violators. Assuming that our participants perceived the publication as associated with shame, these findings support the idea that, in some situations, shaming sanctions are likely to deter behavior, which is consistent with legal scholars who argue that shaming can complement other sanctions for purposes of enforcement.<sup>133</sup>

### 4. *The Effect of Sanctions on Intention to Share Files*

The Formal Sanctions legal frame led to a significant decrease in the individual's self-reported intention to share files. The ability of formal sanctions—such as expulsion from the university—to effect compliance with the law is consistent, of course, with any standard account of deterrence. The Informal Sanctions legal frame did not have an observable effect on intentions to comply with the law, contrary to other studies that emphasize the importance of social approval on compliance.<sup>134</sup> Note, however, that unlike prior studies, the social sanctions in this experiment were not decentralized. Prior studies have examined the effect of preexisting, naturally occurring social sanctions and their relationship to self-reported compliance with the law. This experiment attempted to

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130. See Cooter, *supra* note 98, at 969 (“Effective sanctions lead to successful social norms, whereas ineffective sanctions cause norms to fail.”).

131. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984) (demonstrating the efficacy of “TIT FOR TAT” strategy).

132. This refers to norms that govern behavior without state intervention. See Kahan & Posner, *supra* note 111 (discussing the efficiency of non-legal sanctions); see also Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 *NATURE* 137 (2002) (examining willingness to engage in costly punishing behavior).

133. See Katharine K. Baker, *Sex, Rape, and Shame*, 79 *B.U. L. REV.* 663 (1999) (demonstrating, through the phenomenon of “date rape,” the need for shaming sanctions to define the border between sex and rape).

134. See Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 *LAW & SOC'Y REV.* 837 (1990), for caveats in the traditional deterrence model.

facilitate the imposition of social costs by announcing sanctions that would publicize the names of violators. Presumably, people perceive identification of a person as a violator as generating social costs like shame.<sup>135</sup> Although both this experiment<sup>136</sup> and prior studies report that the file sharing norm is deeply entrenched, shaming nonetheless seems effective for changing the perception of the norm and increasing willingness to socially sanction violators.<sup>137</sup> Thus, even when violating the law seems to be a very common practice, people still did not want their identity exposed and were willing to socially sanction others when the authorities stigmatized such behavior.

The law influenced perceptions of the file sharing norm when sanctions were made salient but not when law alone was made salient. This reinforces that, to some degree, the law derives its ability to change perceptions of social norms from its ability to impose costs, either formal or informal. These findings are consistent with previous empirical work showing that the influence of law on moral beliefs is sometimes moderated by the perceived likelihood of formal sanctions.<sup>138</sup> Citizens see laws that impose neither formal nor informal sanctions as lacking credibility, and their enactment might lead to unanticipated results. Therefore, the expressive function of the law does not always function as an independent mechanism.

### *C. The Unique Context of File Sharing*

Using a specific law helps illuminate how citizens respond to regulation of specific forms of intellectual property—an important problem for those industries that hope to protect their intellectual property rights. On the other hand, caution is warranted in the extent to which one should generalize from file sharing to other practices that law seeks to regulate. File sharing restrictions are unusual due to the degree

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135. Note that the specter of having one's name publicized might also lead one to estimate that the chances of being caught and punished formally will increase because publication would assist authorities in identifying violators, leading people to be less likely to share copyrighted files.

136. In this study, the students sampled believed that a majority of students shared files.

137. See Alon Harel & Alon Klement, *The Economics of Shame: Why More Shaming May Deter Less* (2005), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=789244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=789244) (demonstrating, using formal modeling, that policymakers should not shame too many individuals to avoid a reduction in the effectiveness of that shaming penalty).

138. See Paternoster et al., *supra* note 87.

that people violate them. In this case, the law does not enjoy much legitimacy, does not seem to widely represent moral values, and does not seem to enjoy much credibility or compliance. It is therefore possible that the attempts to measure the effects of expressive law in the Law Only or Morality legal frames did not succeed because the law in question does not enjoy widespread legitimacy. Therefore, these results should not suggest that expressive law in general is largely based on the ability of the law to impose social and formal sanctions.<sup>139</sup> These conclusions are limited to file sharing.

In this study, making the moral justifications of the law salient had no measurable effect on perceptions of the social norm, willingness to enforce the norm, or intention to share files. Economists who discuss social norms have debated whether there is a need for moral resentment for people to be willing to enforce norms. Scholars such as Mansbridge,<sup>140</sup> and to some extent even Cooter,<sup>141</sup> have argued that without internalization of values and moral resentment, people will not be willing to enforce social norms. Others scholars, notably Sugden,<sup>142</sup> have argued the contrary: any violation of expectation would be seen as a justifiable reason for social disapproval, regardless of the moral appeal of the law. The findings reported in this Article seem to weigh in favor of those who argue that morality is not required for social sanctioning. The Informal Sanction legal frame had a much stronger effect on perceived social approval, suggesting that moral resentment is not required. Furthermore, morality had no effect on people's willingness to sanction others.

#### *D. Policy Implications*

These results demonstrate the importance of costs—and especially informal sanctions—in copyright law's ability to change perceptions of the prevalence and social desirability of file sharing. They support the view that attaching costs to the announcement of the law enhances the law's ability to change perceptions of the consensus; simply announcing the law did not change the prevalence or social desirability of the law.

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139. For example, Feldman has shown that morality accounted most for the effect of trade secret law on the prevalence of knowledge sharing by high tech employees. See Yuval Feldman, *The Behavioral Foundations of the Expressive Function of Trade-Secret Laws: Legality, Cost, Intrinsic Motivation and Consensus* (Bar-Ilan Univ., Working Paper No. 1-04, 2004), <http://ssrn.com/abstract=56224>.

140. See Jane Mansbridge, *Starting with Nothing: On the Impossibility of Grounding Norms Solely in Self-Interest*, in *ECONOMICS, VALUES, AND ORGANIZATION*, *supra* note 67, at 151 (discussing that it is impossible to base social norms enforcement only on self-interest and that considerations of justice are necessary to understand the maintenance of norms).

141. See Cooter, *supra* note 98.

142. See Robert Sugden, *Spontaneous Order*, 3 J. ECON. PERSP. 85 (1989).

Furthermore, there was no evidence of either a crowding out phenomenon, in which the salience of deterrence led to some resistance, or a reduction of the importance of internal motivation.<sup>143</sup> Even if we recognize the existence of a separate influence of law on behavior that is not mediated by cost, we must not underestimate the importance of costs in the expressive function of the law.

Moving away from the broader discussion of the expressive function of the law, the results highlight three implications for file sharing policy. First, contrary to the view that pervasive file sharing is explained by poor awareness of its illegality, these findings suggest that neither lack of awareness nor lack of thought about the law explain the pervasiveness of file sharing. If ignorance of the law explains its prevalence, we would expect that simply reminding people about the law would lead to a decrease in intention to share files. Instead, simply informing participants about the illegality of file sharing did not influence their intention. It is more plausible that many people are already aware of the unlawful nature of sharing copyrighted works, especially given the intense media focus on this issue in recent years.

Second, the results suggest that the private and relatively anonymous nature of file sharing is one reason for its popularity.<sup>144</sup> Assertions that violators' identities would be exposed influenced both intentions to share files and perceptions of file sharing norms most strongly. The prospect of formal punishment also had some effect,<sup>145</sup> but the music industry may be able to reap deterrent effects simply by threatening to publicize the names of especially flagrant violators. This strategy has

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143. See Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 AM. ECON. REV. 746 (1997), for an additional illustration of the crowding out effect.

144. In fact, Attorney General John Ashcroft discussed this anonymity as the main reason for the need for criminal sanction in a statement made on August 25, 2004.

The execution of today's warrants disrupted an extensive peer-to-peer network suspected of enabling users to traffic illegally in music, films, software and published works. The Department of Justice is committed to enforcing intellectual property laws, and we will pursue those who steal copyrighted materials even when they try to hide behind the false anonymity of peer-to-peer networks.

*Department of Justice Brings First Criminal Enforcement Action Against Peer-to-Peer Copyright Piracy*, 21 COMPUTER & INTERNET LAW. 33 (2004) (emphasis added).

145. See Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869 (1999) (discussing various factors repeat players could consider when deciding whether to litigate against individuals).

practical advantages as well, given the cost inefficiencies of bringing lawsuits against individuals with limited resources. First, the RIAA has targeted individuals who engage in a large volume of file sharing, but a substantial portion of these heavy users are minors. As a result, the parents of these defendants end up paying for their children's behavior. Another inefficiency is the lawsuits' divisive nature; because some see these lawsuits as a large wealthy industry pursuing hapless young file sharers, the industry bears a public relations cost, although the extent of the cost is debatable.<sup>146</sup> A third inefficiency relates to the pervasiveness of the practice. Individuals may reason that it is worthwhile to continue sharing files because the likelihood of being targeted is very low. Individuals know that lawsuits are expensive and that the RIAA must limit their targets to a very small fraction of the entire population of file sharers. Finally, a vast majority of the lawsuits have ended with settlements, resulting in less publicity for the RIAA than if they were able to take any given case to trial.

This study indicates the effectiveness of threatening to publicize violators' names. Even in a widely shared practice like file sharing, the potential effect of shaming seems especially promising. This is contrary to some scholars who study shaming<sup>147</sup> and argue that it cannot work when the practice is prevalent. These results suggest that people are hesitant to be branded as engaging in an illegal activity, even when it seems that many others participate. This approach has obvious limitations from both privacy and deterrence perspectives, but when a change in norms is required for legal compliance, shaming could be more cost effective than litigation.

Third, it is worth examining the RIAA's strategy of appealing to morality in the form of advertising where popular artists try to explain why violating copyright is morally unjustified. In this experiment, the attempt to make morality salient was not effective at either enhancing compliance with copyright laws or changing perceptions of others' file sharing behavior and attitudes toward file sharing. Furthermore, there was some suggestion that making morality salient might lead to the perception that others are *more* likely to approve of file sharing.<sup>148</sup> This somewhat surprising effect, while theoretically supported,<sup>149</sup> is troubling

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146. See Hughes, *supra* note 24, at 731 (arguing that the public relations downside of suing individual users was overestimated).

147. See Harel & Klement, *supra* note 137.

148. Note, however, that this difference did not reach conventional levels of statistical significance.

149. See Sanderson & Darley, *supra* note 109. Significantly, Sanderson and Darley's findings are more complex, taking into account both the type of the offense and the type of individual.

from a policy perspective. Circumstances might exist in which appeals to morality have an inadvertent effect on the perception of norms. Of course, this experiment's attempt to make moral considerations salient may have simply been too weak to have a measurable effect. A stronger attempt, like using a popular artist to explain how copyright violation affects them directly, may have the desired effects.



4. In 2004, how likely is it that a typical professor would disapprove upon hearing that you have downloaded music files using the university network?

Unlikely=1    2    3    4    5    6    7    8    9    Likely=10

5. In 2004, what proportion of students would disapprove upon hearing that you have downloaded music files using the university network?

%0-10   20-30   30-40   40-50   50-60   60-70   70-80   80-90   90-100%

[WILLINGNESS TO PUNISH OTHERS]

1. How likely would you be to make a remark to a fellow student to convey your disapproval upon hearing that she has downloaded music files using the university network?

Unlikely=1    2    3    4    5    6    7    8    9    Likely=10

2. How likely would you be to make a remark to another student to convey your disapproval upon hearing that she has shared music files using the university network?

Unlikely=1    2    3    4    5    6    7    8    9    Likely=10

[INTENTION]

1. In 2004, how likely is it that you will share one music file with your fellow students using the university network?

Unlikely=1    2    3    4    5    6    7    8    9    Likely=10

2. It is now 2004. Suppose that your favorite artist has just released a new CD. You heard a few cuts for the first time on the radio and there is one song in particular that you really like. You would really like to have the song so you can play it whenever you want, but your budget is tight and you can't justify spending the money on buying the CD. Just then, your friend emails you to say that the song is available unofficially online, and sends you the link to a site where an anonymous music fan has posted the song. How likely is it that you would download the song, using the university network?

Unlikely=1    2    3    4    5    6    7    8    9    Likely=10

