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Injury-in-Fact, Justice-in-Fiction: Toward a More Realistic Definition of Injury in the Context of Unenforced Criminal Laws

Jason R. LaFond

INJURY-IN-FACT, JUSTICE-IN-FICTION: TOWARD A MORE REALISTIC DEFINITION OF "INJURY" IN THE CONTEXT OF UNENFORCED CRIMINAL LAWS

Jason R. LaFond[*]

"The law hath not been dead, though it hath slept...."[1]

I. INTRODUCTION

Contrary to popular belief, the courthouse door is not open to all. Article III, Section 2, Clause 1 of the United States Constitution—the Case or Controversy Clause[2]—puts a lock on the federal courthouse door. Federal courts are only empowered to hear cases and controversies; among the necessary ingredients for a case or controversy, and in turn, a key to the courthouse door, is an injured plaintiff.[3] Without an adequate injury, one lacks "standing" to bring an action into court.[4] This requirement has received some much-needed attention recently due to the mini-controversies involving President Obama and his birthplace and Hillary Clinton and the Emoluments Clause.[5] In the context of challenging allegedly unconstitutional criminal laws, the Supreme Court of the United States has held that the necessary injury to confer standing to sue in federal court is prosecution or the credible threat of prosecution based on the challenged criminal

* J.D., *magna cum laude*, University of Michigan Law School, December 2009; M.A., American University, 2005; B.A., *cum laude*, University of Maryland, 2003. Mr. LaFond will be clerking for the United States District Court for the Southern District of New York during the 2010–2011 term.

1. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2, l. 93 (Brian Gibbons ed., Cambridge Univ. Press 1991).

2. U.S. CONST. art. III, § 2, cl. 1.

3. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Others ingredients include ripeness, redressability, and adverse parties. *See* 15 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE §§ 101.01–101.02 (3d ed. 2009).

4. *Lujan*, 504 U.S. at 560 ("Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' . . . .").

5. *See, e.g.*, Jess Bravin, *Why Some Constitutional Suits Don't Stand a Chance in Court*, WALL ST. J., Feb. 12, 2009, at A10.

law.[6] In the case of unenforced criminal laws, such an injury is obviously impossible. This is not to say that unenforced laws do not injure, but only that the door to the federal courthouse is closed to those who wish to challenge such laws.

This article argues that the "prosecution or the credible threat of prosecution" standard endorsed by the Supreme Court of the United States[7] to analyze standing in challenges to criminal laws is too narrow. Part I seeks to counter the notion of unenforced criminal laws as "dead words" and "harmless empty shadows" by reviewing recent research from multiple disciplines, including psychology, sociology, and economics, which shows that unenforced laws have as strong an effect on individuals and society as prosecution or the threat of prosecution. Part II traces the history and rationale of the notion of standing and the requirement of injury and examines recent standing cases, arguing that there is room in Article III standing for a wider definition of injury caused by criminal laws.

II. HOW LAW WORKS IN THE ABSENCE OF PROSECUTION

The traditional explanation—the explanation that arguably underlies the current injury-in-fact requirement of prosecution or the credible threat of prosecution—given in criminal law casebooks and by those making the law as to why people obey the law is that people do so because they fear the legal consequences of noncompliance.[8] While this traditional line of thought has great explanatory value, it has been challenged in areas as varied as drug use and tax evasion.[9] Even laws with no penalties or little chance of enforcement have been shown to induce compliance.[10] An enormous amount of literature has been devoted over the past two decades to exploring alternative explanations

6. Younger v. Harris, 401 U.S. 37, 42 (1971).

7. *Id.*

8. *See, e.g.*, SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 92–97 (8th ed. 2007).

9. *See, e.g.*, Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497, 498 (1993) (arguing that a more comprehensive and plausible perspective on drug-use compliance is needed over the classical deterrence theory); Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274, 299 (1967) (arguing that "conscience appeals are more effective than sanction threats" in garnering tax compliance).

10. *See, e.g.*, Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135, 138 (2007) (arguing that a law with "negligible" penalties influenced behavior); Elizabeth McLoughlin et al., *Smoke Detector Legislation: Its Effect on Owner-Occupied Homes*, 75 AM. J. PUB. HEALTH 858, 861 (1985) (arguing that an unenforced law produced compliance).

for compliance, and although a unified theory has yet to emerge, the main thrust of the varying explanations is that the threat of legal sanctions is only one method in which laws affect citizens.[11] Law can injure in concrete ways by inhibiting behavior, even without a credible threat of prosecution, by influencing the use of social sanctions—which can be just as powerful as legal sanctions—and through social engineering, achieved through the creation, modification and destruction of social norms and the changing of individual preferences.[12]

A. Social Engineering

Criminal law, with or without prosecution, is a powerful tool for social engineering. To label an act criminal is to make a powerful statement about the views and values of the country.[13] This communication may create, change, and destroy social norms—powerful movers of behavior discussed more in depth below[14]—and even change individual preferences by changing what people see as moral and modifying a person's taste for engaging in a particular activity.[15]

1. Informational Effects

Scholars have shown that law can act as an information transmitter, much like a community newsletter, informing individuals on the views of their fellow community members, updating beliefs, solving coordination problems, and thereby reweaving the social fabric without threat of legal sanctions.[16] Law is more powerful than a newsletter, however, because of the legitimacy given by law.[17] A public pronouncement that potential offenders could avoid unpleasant encounters by adjusting

11. *See, e.g.*, Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1605 (2000) ("Of course, no one believes that the only way the state ever influences the behavior of its citizens is through the incentive effects of legal rules.").

12. *See, e.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2029–30 (1996) (arguing that compliance is usually reached through social sanctions and norms).

13. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 363 (1997).

14. *See infra* notes 34–41 and accompanying text.

15. *See infra* notes 42–55 and accompanying text.

16. *See, e.g.*, 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, 2–3 (2003) (arguing that law is able to have this effect in part because the aggregation of information that occurs during the legislative process allows law to be a teaching mechanism); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1651–52 (2000) (arguing that law acts as a traffic cop helping to solve coordination problems).

17. *See* Shulamit Almog, *From Sterne and Gorges to Lost Storytellers: Cyberspace, Narrative, and Law*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 23 (2002).

behavior does not have the same deterrent effect as an unenforced law. Without a legal pronouncement, potential offenders see the community members as not having a right to shame them, and, under these conditions, potential offenders would be perfectly willing to defend themselves even if the interactions were uncomfortable.[18]

Laws are also infused with meaning and often reflect important debates about values and priorities. Sometimes a law has very little to do with providing punishment for an activity and much to do with broadcasting a particular message.[19] This message can affect the social meaning of actions by "creat[ing] and shap[ing] information about the kinds of behavior that members of the public hope for and value, as well as the kinds they expect and fear."[20] This take on law is nothing new. Policymakers have long acknowledged the importance of the "meaning" of laws, even if enforcement is unlikely or impossible.[21]

2. Social Norms

Social norms have been the subject of much discussion in the legal community since Robert Ellickson's classic study of California ranchers' resolution of disputes outside of the legal system.[22] Norms are believed by many to be the key to explaining compliance with the law in the absence of legal sanction or enforcement.[23] Eric Posner defined norms as:

> the labels that we attach to the behavioral regularities that emerge and persist in the absence of organized, conscious direction by individuals. These behavioral regularities result from the interactions of individuals

18. *See* Scott, *supra* note 11, at 1613–14.

19. *See, e.g.*, Sunstein, *supra* note 12, at 2023 (arguing that proponents of a constitutional amendment criminalizing flag burning are not concerned with deterring flag burning, but instead "want to make a statement about the venality of the act of flag burning").

20. Kahan, *supra* note 13, at 351.

21. *See* THURMOND W. ARNOLD, THE SYMBOLS OF GOVERNMENT 160 (1935) ("Most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct."); *see also* Hadley Arkes, *Sodomy and the Law: The Forgotten for Laws Left Unenforced*, NAT'L REV. ONLINE, July 2, 2003, http://www.nationalreview.com/comment/comment-arkes070203.asp (last visited Nov. 1, 2009) (stating that such laws are often used in custody and divorce cases).

22. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 1 (1991).

23. *See, e.g.*, ERIC A. POSNER, LAW AND SOCIAL NORMS 4 (2000) ("Most people refrain most of the time from antisocial behavior even when the law is absent or has no force. They conform to social norms."); Sunstein, *supra* note 19, at 2029–30 ("Norms solve [collective action] problems by imposing social sanctions on defectors. When defection violates norms, defectors will probably feel *shame*, an important motivational force . . . . The expectation of shame—a kind of social 'tax,' sometimes a very high one—is usually enough to produce compliance.") (emphasis in original).

> acting in their rational self-interest, broadly understood (to include
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> altruism and other forms of interdependent utility), a self-interest that drives people to cooperate across all areas of life.[24]

These behavioral regularities play an important role in determining which activities will result in social sanctions,[25] and the decision to follow a particular norm has been incorporated into traditional cost-benefit analyses of decision-making.[26] They can also have a strong social influence, meaning that "individuals' perceptions of each others' values, beliefs, and behavior affect their conduct, including their decisions to engage in crime."[27]

Empirical studies have examined the effect of norms in diverse areas such as recycling[28] and fisheries regulation.[29] A survey of citizens in Australia found that "[p]ersonal, internalized norms of tax honesty were negatively related to tax evasion and moderated the effects of deterrence variables (i.e., sanction severity), suggesting deterrence [i.e., threat of legal sanction] effects only when individual ethics were weak."[30]

Many legal scholars believe that law plays an important role in the creation, evolution, and destruction of these norms.[31] Some call this phenomenon the "expressive" effect of the law.[32] "[A]n 'expressive'

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24. POSNER, *supra* note 23, at 8.

25. *See* Stephen Knack & Martha E. Kropf, *For Shame! The Effect of Community Cooperative Context on the Probability of Voting*, 19 POL. PSYCHOL. 585, 587 (1998) ("Norms may be enforced internally (e.g., guilt) or externally by a person's social network (e.g., shame, ostracism, or approval). Individuals often internalize cooperative norms; even when they do not, behavior may still be influenced by norms, if others apply sanctions for conforming with (or violating) norms.").

26. *See, e.g.*, Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1584 (2000) (describing the formula as "*net cost = direct cost – reputational benefit – avoided sanction*") (emphasis in original).

27. Kahan, *supra* note 20, at 350.

28. Ann E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231, 1232 (2001).

29. Aaron Hatcher et al., *Normative and Social Influences Affecting Compliance with Fishery Regulations*, 76 LAND ECON. 448, 448–49 (2000).

30. Michael Wenzel, *The Social Side of Sanctions: Personal and Social Norms as Moderators of Deterrence*, 28 LAW & HUM. BEHAV. 547, 547 (2004). "The more strongly opposed to tax evasion respondents' personal ethics were, the more they complied with the tax laws." *Id.* at 558–59.

31. *See, e.g.*, POSNER, *supra* note 23, at 8 ("[M]any legal rules are best understood as efforts to harness the independent regulatory power of social norms."); Sunstein, *supra* note 12, at 2026 (describing norms as "a product of a complex set of social forces, possibly including law").

32. Scott, *supra* note 11, at 1614.

theorist would argue that the law... by expressing the sentiment of the community,... modifies or stimulates the creation of an underlying norm in some way."[33]

Law may affect norms in a variety of ways. First, law can create norms by labeling a certain behavior "criminal" and, thus, providing a signal people use to determine "good" types and "bad" types; as more and more people come to rely on this signal, avoiding the activity and sanctioning those who do not avoid the activity may be transformed into a "behavioral regularity," i.e., a norm.[34]

> In many localities [some] laws are rarely enforced through the criminal law, but they have an important effect in signalling [sic] appropriate behavior and in inculcating the expectation of social opprobrium and, hence, shame in those who deviate from the announced norm. With or without enforcement activity, such laws can help reconstruct norms and the social meaning of action.[35]

Second, as law can give life to norms, it can also lead to their destruction.[36]

> Once we recognize the interdependence of law and norms, it is tempting to see only one direction of influence, and to seek to use law to shape social norms. But law can also undermine social norms and destroy social capital, and those of us concerned with emphasizing the mutually shaping role of law and norms must be equally attentive to this destructive capacity of the state.[37]

Finally, law can reconstruct norms.[38] To borrow a parallel from

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33. *Id.* at 1615.

34. *See* POSNER, *supra* note 23, at 76 ("Just as potential mates signal to each other their reliability as cooperative partners, so do members of the community signal to other members their reliability as cooperative partners. One signal of reliability is participation in (costly) nonlegal punishment of deviants who threaten or appear to threaten the community.").

35. Sunstein, *supra* note 12, at 2032.

36. Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2057 (1996).

37. *Id.* at 2077.

38. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 621 (1996) (arguing that reducing punishment from jail time to a fine "prices" an activity, thereby removing it from condemnation and changing the norm).

Lawrence Lessig's examples,[39] if few people use seatbelts, then buckling up in your friend's car means that you distrust his driving. Because people wish to avoid giving offense, a norm develops against wearing a seatbelt.[40] If, however, a law mandates seatbelt use, the meaning of buckling up becomes more ambiguous, decreasing the costs of the behavior and setting the norm on the road to change.[41] Thus, norms provide the law with enormous social-engineering power without the need for formal legal sanctions.

3. Preference-Shaping

Law need not act externally on an individual to affect his behavior. Studies have shown that, in addition to affecting the opportunities available to individuals and the potential costs of engaging in an activity, law may also affect behavior by shaping individual preferences.[42] These individual preferences can be simply described as a "person's taste" for engaging in a particular activity.[43] These preferences are powerful drivers of behavior, as they can generate "subsidies," such as pride, or "taxes," such as guilt.[44]

Law may accomplish this shaping of preferences through the individual internalization of the norm expressed by law, affecting for example what one sees as moral.[45] This change in preferences can be linked to a rational pursuit of self-interest:

> In many activities, people prefer partners who are willing to pay a lot to conform to moral norms. Internalizing a norm, consequently, increases a person's opportunities.... [I]nternalizing a norm is a moral commitment.... People have more trust in the morally committed person. Trust facilitates cooperation and makes the relationship more beneficial to both parties.[46]

However, this change of preference may also occur because of a

39. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1009–12 (1995).
40. *Cf. id.* at 1009.
41. *See id.* at 1010–12.
42. Scott, *supra* note 11.
43. *Id.*
44. *See* Sunstein, *supra* note 19, at 2030–31; *but see* POSNER, *supra* note 23, at 43 ("[N]o well-developed theory of guilt allows us to make predictions about when fear of guilt deters people from engaging in certain actions and when it does not, or what kinds of people feel guilt and what kinds of people do not.").
45. *See* Cooter, *supra* note 26, at 1593.
46. *Id.*

change in the social meaning of an outlawed activity "from the exercise of free choice to a demonstration of disrespect for others."[47] To affect this change in preferences:

> the person or group of people who are endeavoring to affect another's preferences have some legitimate claim to authority over the person, or at least have the confidence of the person.... The authority figure then characterizes a behavior as either "good" or "bad" and reinforces this characterization with rewards, punishment, and education as to why the behavior is good or bad. By characterizing a behavior as good or bad rather than just inexpensive or expensive, the authority figure indicates need for a fundamental change in the basis upon which the affected person makes decisions.[48]

Such a change in preferences is important because it makes it easier to affect compliance. If people internalize respect for the law, they will be willing to give something up to obey and enforce the law.[49] This eliminates much of the need for punishment and also builds an informal policing force because "internalizing a law involves [the] willingness to enforce it on others.... Internalization, consequently, contributes to the level of obedience in society mostly by causing people to enforce the legal obligation on others, not by causing them to obey the law themselves."[50]

One study, which used a laboratory experiment to observe cooperation relating to contract enforcement, found that having fewer legal rules creates a preference for trustworthiness.[51] Further, "[t]he

47. Scott, *supra* note 11, at 1624.

48. Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1 DUKE L.J. 1, 17–18 (1990); *see also* Robert Cooter, *The Intrinsic Value of Obeying a Law: Economic Analysis of the Internal Viewpoint*, 75 FORDHAM L. REV. 1275, 1281 (2006) ("Since internalization of respect for the law makes governing so much easier, the state tries to inculcate it through education and other means. The state also imposes sanctions with intentionality surcharges to punish people for viewing the law extrinsically. If courts detect that a wrongdoer took a purely instrumental viewpoint towards an illegal act, courts will often increase the sanction for disobedience. In this respect, law requires citizens intrinsically to value obeying it, and the internal viewpoint is a legal obligation.").

49. Cooter, *supra*, note 48, at 1283.

50. *Id.*

51. Iris Bohnet et al., *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AM. POL. SCI. REV. 131, 136, 140–41 (2001) ("With less law, first movers have to be extremely cautious. They have to think about their partners' trustworthiness, which makes honesty a successful preference . . . . In the low-enforcement regime 53.6% of all subjects changed their behavior, and 89.2% of these switched in the predicted direction. In other words, 33 second movers breached in the early phases of the experiment and then performed later, even though a money-maximizing strategy

results support the view that institutional changes affect behavior, but they also reveal that, by affecting behavior, institutions affect preferences."[52] Economic modeling of preference-shaping shows that such shaping takes place in an evolutionary context.[53] For example, as certain types (e.g., bad types) of actors are punished, this affects the relative performance of different types of actors, providing a benefit to types not punished.[54] This benefit increases the number of types that comply with the law and, in the long run, leads to more individuals with a preference for obeying the law.[55]

The current injury-in-fact requirements can allow this powerful tool of social engineering to go unchecked if there is no prosecution or credible threat of prosecution in challenges to criminal laws. Further, prosecution and the threat of prosecution play only a small role in giving criminal law such power.

B. Deterrence Without Formal Sanctions

The deterrent effect of legal sanctions is the keystone of our criminal justice system, and behavior is normally criminalized because someone wishes to reduce its incidence.[56] This instrumental view of criminal law goes back at least as far as Jeremy Bentham and the advent of utilitarianism.[57] The traditional view of deterrence has a distinctly economic flavor, seeing law as providing punishment that increases the risk and cost of crime, thereby making crime less lucrative and reducing its incidence.[58] Recent scholarship, however, has shown that legal

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favored the old behavior. None of these 33 subjects switched back to breaching. They became trustworthy, even though they started by breaching.").

52. *Id.* at 142.

53. Steffen Huck, *Trust, Treason, and Trials: An Example of How the Evolution of Preferences Can Be Driven by Legal Institutions*, 14 J.L. ECON. & ORG. 44, 45 (1998).

54. *Id.* at 45–46.

55. *Id.*

56. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165–66 (J. H. Burns & H. L. A. Hart eds., Clarendon Press 1996) (1789); *see* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 200 (1968) ("A variety of private as well as public actions also attempt to reduce the number and incidence of crimes: guards, doormen, and accountants are employed, locks and alarms installed, insurance coverage extended, parks and neighborhoods avoided, taxis used in place of walking or subways, and so on.").

57. F. Rosen, *Introduction* to BENTHAM, *supra* note 56, at xxi. Bentham stated, "The first object, it has been seen, is to prevent, in as far as it is worth while, all sorts of offenses; therefore, *The value of the punishment must not less in any case than what is sufficient to outweigh that of the profit of the offense.*" BENTHAM, *supra* note 56, at 166 (emphasis added).

58. Becker, *supra* note 56, at 177 ("This approach implies that there is a function relating the number of offenses by any person to his probability of conviction, to his punishment if convicted, and to other variables, such as the income available to him in legal and other illegal activities, the frequency of

sanctions are often not needed for law to produce a deterrent effect.[59] This second-

order deterrent effect is believed to come from the threat of social sanctions[60] and the systematic misperception of the incidence and severity of statutory penalties.[61]

1. Deterrence and Perception

Deterrence is a perceptual phenomenon. Studies have shown that people are deterred not by the punishment that awaits a criminal act, but by the punishment they *think* awaits a criminal act.[62] Individuals often do not know penalties from crimes, but instead perceive penalties based on a normative judgment of the prohibited activity; in other words, "analyses suggest that those perceptions reflect public preferences as to appropriate sanctions for crimes and not necessarily actual knowledge of statutory penalties."[63] In this way, if an individual believes an act is wrong and should be punished—a belief that can be generated by criminalization[64]—she may perceive a punishment that fits her belief and be deterred by this perceptual legal sanction rather than the actual legal sanction.[65] One study of a survey regarding the behavioral impact of drinking and driving laws found results suggesting "that the actual

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nuisance arrests, and his willingness to commit an illegal act.")

59. The threat of punishment alone does not account for rates of compliance. *See* MacCoun, *supra* note 9, at 498, 501 (arguing that a more comprehensive and plausible perspective on drug-use compliance is needed over the classical deterrence theory); Raymond Paternoster, *The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues*, 4 JUST. Q. 173, 174–75 (1987) (generally questioning the effect of deterrence); Schwartz & Orleans, *supra* note 9 (arguing that "conscience appeals are more effective than sanction threats" in garnering tax compliance).

60. *See* Kahan, *supra* note 13, at 350–52.

61. Kirk R. Williams et al., *Public Knowledge of Statutory Penalties: The Extent and Basis of Accurate Perception*, 23 PAC. SOC. REV. 105, 106–07 (1980).

62. Paternoster, *supra* note 59, at 174.

63. Williams et al., *supra* note 61, at 105; *see also* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 44 (2006) (finding "[c]itizens generally thought that the likelihood of being arrested or cited for law breaking was high"); MacCoun, *supra* note 9, at 500 ("[T]he general public often exaggerates the risks of arrest and punishment for many crimes."); Robert MacCoun et al., *Do Citizens Know Whether Their State Has Decriminalized Marijuana? Accessing the Perceptual Component of Deterrence Theory*, 5 REV. L. & ECON. 347, 362 (2009) ("[N]early 30% of people living in a so-called [marijuana] decriminalized state still report jail as the maximum penalty imposed [for marijuana possession offenses].").

64. *See supra* notes 34–35 and accompanying text.

65. *See* Paternoster, *supra* note 59, at 174.

level of enforcement in the respondent's state has no statistically significant effect on behavior for any level of the propensity [to drink and drive] score.... Respondents' perceptions of the likelihood of being stopped by the police significantly reduce the propensity to drink and drive...."[66]

2. Social Sanctions

Many people never even reach the point of considering possible legal sanctions. As described by one commentator:

> I have refrained from criminal involvement not from any fear of a large fine (the one that could be imposed would be affordable) nor by the fear of incarceration (which is unlikely), but because of the close affiliational ties and material commitments I have established. Because the social and occupational costs are so high, I (and many like me) do not even take the *next step* and evaluate the threat posed by formal legal sanctions.[67]

Such is the deterrent power of social sanctions. Several studies have shown that the threat of social sanctions, such as shaming and ostracism from members of an individual's social group, can have a powerful effect on behavior, with or without accompanying legal sanctions.[68] A study of mandatory voting laws in Switzerland found that "the legal statement that citizens should vote apparently caused certain citizens to follow, most likely out of civic duty or fear from social sanctions."[69] Another survey found that the threat of social disapproval had three-times as strong an effect on inhibiting illegal behavior when compared to the threat of legal punishment.[70]

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66. Anthony M. Bertelli & Lilliard E. Richardson Jr., *The Behavioral Impact of Drinking and Driving Laws*, 36 POL'Y STUD. J. 545, 559 (2008).

67. Paternoster, *supra* note 59, at 211 (emphasis in original).

68. TYLER, *supra* note 63, at 24 ("[D]eterrence literature has recently documented that law breaking is strongly related to people's judgments about the sanctions or rewards their behavior elicits from members of their social group. People are reluctant to commit criminal acts for which their family and friends would sanction them."); Kahan, *supra* note 20, at 354 ("[T]he perception that one's peers will or will not disapprove exerts a much stronger influence than does the threat of a formal sanction on whether a person decides to engage in a range of common offenses . . . ."); *cf.* POSNER, *supra* note 23, at 91 ("[I]nformal systems of social control always coexist with formal criminal justice systems, because the criminal justice system does not deter criminal behavior that is difficult for authorities to detect or punish, or that occurs within subcommunities that have little political influence.").

69. Funk, *supra* note 10.

70. Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325, 334 (1980).

Law can injure through social sanctions in a number of different ways. First, it can establish what will be sanctioned in community by influencing signals.[71] Sanctioning criminalized action is an easy way for an individual to demonstrate loyalty to a community.[72] Second, a law making an action criminal can provide cover for those already wishing to sanction an activity; "[b]y empowering neighbors and other citizens to use public ridicule as an enforcement technique, these laws can influence behavior by imposing informal... sanctions, such as shaming."[73] Law can also create a sanction that one imposes on himself, namely guilt that comes along with the failure to honor a civic obligation.[74]

Finally, law can injure without prosecution through social sanctions injuring one's reputation and hurting one's livelihood.[75] In a market economy, individuals must interact with others to maximize wealth, whether it is getting an employer to hire you or finding someone to buy or supply you with goods. When making these types of decisions, people often look to deal with someone who is honest and avoid someone who has shown himself to be dishonest.[76] This is turn induces people to signal their cooperativeness and honesty and to avoid signals of dishonesty that can harm their reputation.[77] One study, examining tax compliance rates too high to be explained by fear of government punishment, found:

> [T]he average U.S. taxpayer is willing to pay around 650 dollars or 1.44% of its annual income in taxes that could have been evaded. This extra payment is interpreted as an effort of the taxpayer to invest in her reputation in order to maximize future compensation. These purchases are found to be differentiated across professions, depending on the relative value that the

71. *See supra* notes 34–35 and accompanying text.

72. *See* POSNER, *supra* note 23, at 77 ("[I]ndividuals interested in showing their loyalty to the community will sanction anyone who can plausibly, or even just momentarily, be thought a threat to the community.").

73. Scott, *supra* note 11, at 1603–04; *see also* Cooter, *supra* note 26, at 1585–86 ("With group pressures, an increase in an act's popularity lowers its cost. Imposing a nonlegal sanction on someone often involves a risk of retaliation, which decreases as more people obey . . . .").

74. Robert Bernstein et al., *Overreporting Voting: Why It Happens and Why It Matters*, 65 PUB. OPINION Q. 22, 25 (2001) (arguing that the systematic over-reporting of voting results in part from the guilt felt by nonvoters for failing to meet their civic obligation).

75. *See* POSNER, *supra* note 23.

76. *See* Bohnet et al., *supra* note 51, at 131.

77. *See* POSNER, *supra* note 23, at 18–19.

profession poses on the value of honesty.[78]

The previously discussed laboratory experiment, involving contract enforcement and cooperation, found that cooperation breaks down as the game nears an end, and "the 'shadow of the future' loses its power and reputation no longer plays a role."[79]

Integrity can be seen as an asset used to produce income. This asset grows and shrinks depending on how others see us, and because we are self-interested and seek to maximize wealth, we will invest in this asset by complying with the law even at a cost to us because the long-term gain of being seen as "good type" rather than a "bad type" is worth the investment.[80] The law is a natural mechanism to allow for such investment because it allows for easy signaling; complying with the law signals a good type (especially if a cost is associated with that compliance), and disobeying signals a bad type. [81]

Thus, the law can inhibit behavior, lay the foundation for sanctions, and cause economic harms without the involvement of formal enforcement mechanisms.

III. RECONCILING THIS WIDER DEFINITION OF "INJURY" WITH THE COURT'S MODERN STANDING JURISPRUDENCE

Standing doctrine is not a settled matter. For at least the past forty years, as the United States Supreme Court's concern with standing has increased, the pendulum has swung from a very relaxed view of standing in the Warren Court,[82] to a tighter view under the Burger Court,[83] to a very tight view under the influence of Justice Scalia in the early

78. Oscar E. Vela, Social Values, Reputation and Tax Compliance 3–4 (Nov. 2007) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

79. Bohnet et al., *supra* note 51, at 138. "[C]ooperation drops from 100% to 0% in the last round." *Id.*

80. *See* POSNER, *supra* note 23, at 15 ("An explanation for *nonlegal* cooperation begins with the observation that people who defect suffer injury to their reputations. If a person develops a bad reputation, then people will not cooperate with him in the future. Since cooperation is valuable, if a person cares enough about the future he will not defect in the present.") (emphasis in original).

81. *See id.* at 19 ("Signals reveal type if only the good types, and not the bad types, can afford to send them, and everyone knows this. Because a good type is a person who values future returns more than a bad type does, one signal is to incur large, observable costs prior to entering a relationship.")

82. *See, e.g.*, Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152–53, 158 (1970) (rejecting a "legal interest" requirement for standing and finding standing based on an injury-in-fact).

83. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 757, 766 (1984) (denying standing because the injury-in-fact was "not fairly traceable" to the challenged conduct).

Rehnquist Court,[84] back to a more relaxed view under the influence of Justice Kennedy in the later days of the Rehnquist Court,[85] and finally to confusion in the early Roberts Court decisions.[86] Given the limited Supreme Court precedent on standing to challenge unenforced criminal laws[87] and the uncertainty of modern standing doctrine in the Roberts Court,[88] it is helpful to trace the history, rationale, and criticism of standing doctrine to determine whether a basis exists for a wider definition of injury by criminal law. Following that summary, this comment attempts to show, through an analysis of modern standing decisions, that there is room for this wider definition under any of the competing standing doctrines.

A. The History of and Rationale Behind Standing and the Injury Requirement

1. History

The issue of justiciability in the federal courts, which subsumes standing, is not new. Justiciability was debated at the Constitutional Convention,[89] and standing made its way into the landmark case *Marbury v. Madison*, which established the power of judicial review.[90] Standing was rarely an issue in nineteenth century cases and did not

84. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 557, 562, 578 (1992) (denying standing because no cognizable injury or redressability was shown).

85. *See, e.g.*, FEC v. Akins, 524 U.S. 11, 24, 26 (1998) (finding standing even though based on a "widely shared" injury-in-fact); *Lujan*, 504 U.S. at 579–81 (Kennedy, J., concurring) (narrowing his agreement with the Court's opinion to the record in the case).

86. *Compare* Massachusetts v. EPA, 549 U.S. 497, 521–26 (2007) (broadly interpreting redressability and granting standing even though based on a widely shared injury), *with* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 599–602 (2007) (plurality opinion) (denying standing because the alleged injury was widely shared).

87. The facts in *Younger* did not involve an unenforced law. Younger v. Harris, 401 U.S. 37, 41–42 (1971). The only case on point is *Poe v. Ullman*, where the court denied standing and declared, infamously, that Connecticut's birth control laws were "harmless, empty shadows." Poe v. Ullman, 367 U.S. 497, 508 (1961). *Poe* was the predecessor to *Griswold*, where the Court found that a doctor charged with violating Connecticut's birth control laws had standing to challenge the law and held the law unconstitutional. Griswold v. Connecticut, 381 U.S. 479, 481, 485–86 (1965).

88. *See supra* note 86.

89. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911) ("The motion of Docr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature . . . .").

90. *See* Marbury v. Madison, 5 U.S. 137, 170 (1803) ("The province of the court is, folely [sic], to decide on the rights of individuals . . . ."). Chief Justice Marshall framed Marbury's commission as a property right in order to give the Court standing to resolve the issue. *Id.* at 155; James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 85 (2001).

reenter the Court's consciousness until the 1920s.[91] Later, Justice Frankfurter attempted to add teeth to the standing requirement "to protect New Deal programs from judicial interference through such devices as substantive due process challenges."[92] Following the Court's acquiescence to President Roosevelt's programs, standing again fell into the shadows.

Standing burst back onto to the scene during the Warren Court with the growth of the administrative state.[93] Traditionally, standing to sue was equated with the question of whether the plaintiff could demonstrate an injury to a legally protected interest.[94] This traditional view was unworkable with the changing objectives of litigation before the Warren Court.[95] Litigation was no longer simply a method of resolving disputes between private parties.[96] It became a vehicle for participating in the governance of the nation.[97] This is especially true of suits challenging government behavior.[98] The importance of vindicating constitutional rights caused a rethinking and expansion of standing—no longer did a plaintiff need to show a legal interest.[99] As Chief Justice Warren stated, "[t]he first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.... [T]he existence or non-existence of a 'legal interest' is a matter quite distinct from the problem of standing."[100]

While the introduction of the "injury-in-fact" analysis meant to liberalize access to courts,[101] in the hands of more conservative courts it has been used to restrict access. The later courts feared a potential explosion of litigation against the government by a nation of plaintiffs who could use a policy disagreement as the basis for a lawsuit.[102] In

91. *See* Massachusetts v. Mellon, 262 U.S. 447, 456, 488 (1923) (denying taxpayer standing).

92. Leonard & Brant, *supra* note 90, at 10.

93. Michael C. Miller, *Standing in the Wake of the Terrorist Surveillance Program: A Modified Standard for Challenges to Secret Government Surveillance*, 60 RUTGERS L. REV. 1039, 1045 (2008).

94. Leonard & Brant, *supra* note 90, 15–16.

95. *Id.* at 16–17 ("The legal interest test had the effect of allowing plaintiffs to protect only rights that were essentially private in nature. Yet, the signal characteristic of Twentieth Century American law was the development, beginning with the New Deal, of a public rights model and the creation of obligations that are intended to protect the public as a whole without necessarily vesting rights in individuals.").

96. Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5 (1982).

97. *Id.*

98. *Id.*

99. *See* Leonard & Brant, *supra* note 90, at 19.

100. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152–53 & n.1 (1970).

101. Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 73–74 (1984).

102. PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE

Allen v. Wright, the Burger Court repudiated a relaxed notion of standing and sought to eliminate the potential nation of plaintiffs by raising the bar for entry into federal court.[103] The Burger Court redefined the required injury-in-fact in a more narrow sense:

> When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the government has traditionally been granted the widest latitude in the dispatch of its own internal affairs. When transported into the Art. III context, that principle, grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to take Care that the Laws be faithfully executed.[104]

The Rehnquist Court at first continued narrowing this the definition of injury, reaching an apex of skepticism in *Lujan v. Defenders of Wildlife*, where the Court rejected Congress's attempt to create a general injury and combined language of previous decisions to create its most restrictive definition yet.[105] The *Lujan* Court stated:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to

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RELATIONS 377 (6th ed. 2008) ("By the 1960s a new style of lawsuit—often called 'public law' or 'structural reform'—had developed. Such lawsuits attempted to coerce systemic reform or curtailment of government actions, and they created a potential nation of plaintiffs. It therefore became increasingly important to decide who had the power to bring such suits."); *see also* Leonard & Brant, *supra* note 90, at 4 ("The Burger and Rehnquist Courts, recognizing its potential to confer standing on vast numbers of potential litigants, retained the rule in form but began a slow process of restrictive interpretations that has transformed injury-in-fact from a tool of inclusion to an exclusionary device.").

103. *See* Allen v. Wright, 468 U.S. 737, 761 (1984).

104. *Id.* at 761 (internal quotations and citations omitted).

105. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 571–74 (1992).

> be fairly... trace[able] to the challenged action of the defendant, and not... the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[106]

This tight formulation quickly unraveled, however, and six years later, in *FEC v. Akins*, the Court allowed a challenge against the Federal Election Commission in the plaintiff's role as a voter, who was injured by "their inability to obtain information—lists of... donors...."[107] The majority acknowledged that such an injury was "widely shared," but nevertheless held that the injury was sufficient to support standing. [108] This basically eliminated *Lujan*'s "particularized" requirement, and the *Akins* majority held that only "abstract" injuries do not meet the Article III standing requirements.[109] This left the exact contours of standing doctrine uncertain as the Court entered into the Roberts era.

These contours were even less clear after the Roberts Court's October 2006 Term, in which the Court considered two cases where standing was a major issue. In *Hein v. Freedom from Religion Foundation*, the Court channeled its pre-*Akins* doctrine and denied taxpayer standing to a group challenging President Bush's faith-based programs because the group's injury was not particularized.[110] The group's interests were "in essence, the interests of the public at large...."[111] In a much more heralded case, *Massachusetts v. EPA*, the Court granted standing where the injury was in the form of projected future rising sea levels that would injure a state in its capacity as a landowner due to the Environmental Protection Agency's failure to regulate greenhouse gases,[112] an injury suffered not just by the entire nation, but the entire world.[113] This injury not only lacked particularity but also concreteness and imminence.[114] Justice

106. *Id.* at 560–61 (internal quotations and citations omitted) (alterations in original). Although this comment will not be discussing the other Article III standing requirements—causation and redressability—with a wider definition of injury based on earlier cases, the other requirements should not be a problem to satisfy. *Cf.* Jonathan H. Adler, *God, Gaia, the Taxpayer, and the Lorax: Standing, Justiciability, and Separation of Powers After* Massachusetts *and* Hein, 20 REGENT U. L. REV. 175, 192 (2008) ("*[A]ny* contribution of *any* size to a cognizable injury is sufficient for causation, and *any* step, no matter how small, is sufficient to provide the necessary redress.").

107. FEC v. Akins, 524 U.S. 11, 21 (1998).

108. *Id.* at 24–25.

109. *Id.*

110. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 599 (2007) (plurality opinion).

111. *Id.* at 600.

112. Massachusetts v. EPA, 549 U.S. 497, 517–21 (2007).

113. *Id.* at 541 (Roberts, C.J., dissenting).

114. *Id.* at 541–42. The dissent noted:

Kennedy served as the swing vote in both of these conflicting decisions.[115]

This brings us to the present, a time of uncertainty for standing doctrine. Despite the uncertainty, a strong case can be made for a wider definition of injury under any view of standing.

2. Rationale

The danger of an unelected judiciary with the power to void laws and frustrate the will of the majority was as much of a concern during the formation of the republic as it is today. As Luther Martin noted during the Federal Convention, "[i]t is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating [against] popular measures of the Legislature."[116] This problem was lessened by explicitly limiting the judiciary's jurisdiction.[117] Chief Justice Roberts echoed these views when he wrote, prior to joining the Court, "[t]he legitimacy of an unelected, life-tenured judiciary in our democratic republic is bolstered by the constitutional limitation of that judiciary's power in Article III to actual 'cases' and 'controversies.'"[118]

Standing is primarily a means of limiting the courts to their proper function. "Limitations on standing thus translate into limitations on the power of the courts, or at least on the occasions for its exercise."[119] Behind this limitation is the age-old notion of separation of powers.[120]

[C]omputer modeling . . . has a conceded average error of about 30 centimeters and a maximum observed error of 70 centimeters. As an initial matter, if it is possible that the model underrepresents the elevation of coastal land to an extent equal to or in excess of the projected sea level rise, it is difficult to put much stock in the predicted loss of land. But even placing that problem to the side, accepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless.

Id. at 542 (internal citations omitted).

115. *Compare Hein*, 551 U.S. at 591 (plurality opinion) (showing that the plurality consisted of Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas, while the dissent consisted of Justices Souter, Stevens, Ginsburg, and Breyer), *with Massachusetts*, 549 U.S. at 501 (showing that the majority consisted of Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer, while the dissent consisted of Chief Justice Roberts and Justices Thomas, Scalia, and Alito); *see generally* Adler, *supra* note 106 (providing an in-depth comparison of and commentary on the two cases).

116. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 89, at 76–77.

117. U.S. CONST. art. III, § 2; *see* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 89, at 430 ("[T]he jurisdiction given was constructively limited to cases of a Judiciary nature.").

118. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1993).

119. Chayes, *supra* note 9698, at 9–10.

120. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983). An interesting alternative basis for the requirement comes from the law and economics field:

As Justice Scalia wrote, prior to joining the Court, "the judicial doctrine of standing is a crucial and inseparable element of [separation of powers], whose disregard will inevitably produce... an overjudicialization of the processes of self-governance."[121] The ultimate concern is that courts will dictate the methods used by the executive to give affect to laws, thereby interfering with the President's responsibility to "take Care that the Laws be faithfully executed."[122] Justice Scalia would formulate this a bit differently, arguing that the judiciary's proper role is to protect individuals and minorities from the majority, not to fulfill the wishes of the majority, which is the proper role of the legislative and executive branches.[123]

The injury requirement helps standing serve these purposes,[124] but also serves its own function. The injury requirement allows courts to, theoretically at least, hear from the best possible plaintiff.[125] If a suit is going to be filed, it is in the adversarial system's interest to have two well-prepared sides battling with the best legal arguments so that the

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> [E]conomic analysis [shows] that standing restrictions prevent the inefficient disposition of constitutional entitlements that can result when many people's rights are affected by a single government policy. Standing also protects individuals' choices in how their rights should be exercised and thus promotes the autonomy of rights-holders . . . . [W]hen a single person gets injunctive relief he unilaterally determines how everyone in the affected class exercises their rights . . . . This veto power makes strategic holdout likely. Massive social welfare losses can result in such circumstances. Standing allows courts to bypass the problems of high transaction costs and strategic behavior by attempting to replicate the outcome of the bargaining that would have taken place in a low transaction-cost environment.

Eugene Kontorovich, *What Standing Is Good for*, 93 VA. L. REV. 1663, 1664, 1666–67 (2007).

121. Scalia, *supra* note 120.

122. U.S. CONST. art. II, § 3, cl. 4; *see* Allen v. Wright, 468 U.S. 737, 761 (1984) ("When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the government has traditionally been granted the widest latitude in the dispatch of its own internal affairs. When transported into the Art. III context, that principle, grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. *The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to take Care that the Laws be faithfully executed.*") (internal quotations and citations omitted) (emphasis added).

123. Scalia, *supra* note 120, at 894 ("[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interests *of the majority itself*.") (emphasis in original).

124. Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996) ("[The standing] doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches . . . . That is where the 'actual injury' requirement comes from.").

125. *See* Kontorovich, *supra* note 120, at 1672.

fact-finder can make a sound decision.[126] It is believed that the person with the strongest interest to present a good case is that person who was actually injured.[127] Additionally, "[t]he 'abstract' injury shunned by standing doctrine may lead to an 'abstract' presentation of the issues involved, while courts are better suited to make incremental, fact-specific determinations."[128] As the Court in *Schlesinger v. Reservists Committee to Stop the War* stated:

> Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute
>
> by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful.[129]

Justice Scalia has argued that the injury requirement furthers the goal of standing to maintain separation of powers, claiming a "concrete injury" is one "that can separate the plaintiff from all the rest of us who also claim benefit of the social contract, and can thus entitle him to some special protection from the democratic manner in which we ordinarily run our social-contractual affairs."[130] In his *Lujan* concurrence, Justice Kennedy claimed the injury requirement is also intended to give the public confidence in judicial pronouncements:

> [I]t is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement

126. *See id.*

127. *Id.* ("[A] plaintiff without a true Article III 'injury in fact' may not have enough at stake to invest the right amount of resources in the litigation and thus fail to properly play his role in the adversary system.").

128. *Id.*

129. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–21 (1974).

130. Scalia, *supra* note 120, at 895; *see also* Leonard & Brant, *supra* note 90, at 106–07 ("The Court has stated that the plaintiff must demonstrate an injury that is 'actual or threatened,' 'direct,' 'distinct and palpable,' 'concrete and particularized,' 'real and immediate, not conjectural or hypothetical,' and not 'too abstract, or . . . too speculative.' These verbal formulae suggest that standing is a matter of sizing up a plaintiff for an adequate level of pain. This approach, however, misses the ultimate point of Article III: that the federal courts are open to those whose grievances are sufficiently different from those of others to justify diverting them from the political branches to a judicial forum. Standing is a comparative concept.") (internal citations omitted).

> helps assure that there can be an answer to these questions; and, as the Court's opinion is careful to show, that is part of the constitutional design.[131]

As this comment will attempt to explain below, a wider definition of injury encompassing unenforced laws is supported by all of these various rationales.

B. How Modern Standing Decisions Support a Wider Definition of Injury

The major cases that have shaped the modern law of standing have not only left room for a wider definition of injury, they have also provided implicit support for it. The major concern voiced in modern standing cases is the freedom of the executive branch[132] and the potential creation of a nation of undifferentiated plaintiffs.[133] These concerns are not present in the case of unenforced criminal laws, which are overwhelmingly state laws. In addition, the range of potential plaintiffs is confined geographically to the state in question, and the injured persons are confined to those who can show that they engage or wish to engage in the proscribed conduct and would be among the class likely to suffer the required injury. This is especially true if the challenges are made on equal protection grounds, for example, homosexuals challenging criminal sodomy statutes:

> [T]he gist of the equal protection claim is that the basis by which the class of affected people was defined was in itself illegitimate. So it would be odd to deny standing on injury-in-fact grounds for an equal protection claim. Equal protection violations involve singling out a particular class for inferior treatment;... such a class is presumably limited and defined.[134]

The first step in widening the definition of injury is to distinguish the case of unenforced criminal laws from the United States Supreme Court case that established the "prosecution or credible threat of prosecution" standard, *Younger v. Harris*.[135] The *Younger* case involved plaintiffs who were not charged with a crime, but were attempting to join a suit to

131. Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring).

132. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 598, 609 (2007) (plurality opinion); Allen v. Wright, 468 U.S. 737, 761 (1984).

133. *See, e.g.*, *Lujan*, 504 U.S. at 560–61; *Allen*, 468 U.S. 751–52.

134. Kontorovich, *supra* note 120, at 1690.

135. 401 U.S. 37, 42 (1971).

enjoin a state prosecution of another.[136] The Court was concerned with the prospect of granting standing to those who were not charged, thus allowing them to interfere with an ongoing prosecution.[137] As the Court stated, "[a] federal lawsuit to stop a prosecution in a state court is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases."[138] Federalism concerns also weighed on the Justices' minds: "[plaintiffs] claim the right to bring this suit solely because... they 'feel inhibited.' We do not think this allegation even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution."[139] Both these concerns are not present in a challenge to an unenforced law by the very fact that the law is unenforced. There is no proceeding, such as a prosecution, where rights can be vindicated, and leaving an unconstitutional law on the books to serve as a moral statement is not a legitimate state activity.[140] "'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'"[141] Even arch-conservative Robert Bork agrees on this point, writing, "[i]t is quite arguable that [the refusal to repeal unenforced laws] is an improper use of law, most particularly of criminal law, that statutes should not be on the books if no one intends to enforce them."[142] Unenforced laws are thorns specifically because the state can make a moral statement and engage norm entrepreneurs without worrying about judicial oversight.

Another common concern of the Court in standing cases is the interference with the political process.[143] A potential argument could go, "if these unenforced laws are so objectionable, have your representatives repeal them." But the political process is much harder to engage because of the very fact that these laws are unenforced. Because these laws are unenforced, there is little political will to spend

136. *Id.* at 39, 42.

137. *Id.* at 42.

138. *Id.*

139. *Id.*

140. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992) ("Our obligation is to define the liberty of all, not to mandate our own moral code."); ARNOLD, *supra* note 21 ("Most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct.").

141. Lawrence v. Texas, 539 U.S. 558, 599 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

142. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 96 (1990).

143. *See supra* note 123 and accompanying text.

capital on their repeal.[144] In addition, no one wants to be seen as condoning the activity prohibited by these unenforced criminal laws. As the President's Commission on Law Enforcement and Administration of Justice noted:

> Despite this nonenforcement and the costs the presence of these laws on the books can impose, there is understandable and deeply felt reluctance to repeal them. This stems from a fear that the affirmative act of repeal might be mistaken as an abandonment of social disapproval for the prohibited acts and an invitation to license. Opponents of repeal emphasize the symbolic effect of unenforced laws....[145]

When the benefits of the political process are denied, the Court should not deny a set of injured plaintiffs redress.

Beyond the absence of any separation of powers concerns when challenging unenforced state criminal laws, there is evidence that the founders saw a strong need for a check on state laws that violated the Constitution. It is doubtful that the founders would be concerned with the details of enforcement. James Madison, feeling that a judicial check was not enough, argued strenuously for a federal veto on state laws and even for a council of revision to comb through state codes and eliminate offending statutes.[146] In the end, the Convention was convinced that the federal judiciary would have enough power to keep states in check.[147]

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144. Utah, for example, still has on its books a law criminalizing sodomy despite its unconstitutionality under *Lawrence*. *See* UTAH CODE ANN. § 76-5-403(3) (2008); *Lawrence*, 539 U.S. at 562, 578.

145. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 104 (1967); *see also* Erik Encarnación, *Desuetude-Based Severability: A New Approach to Old Morals Legislation*, 39 COLUM. J.L. & SOC. PROBS. 149, 169 (2005) ("[P]olitics prevent[s] legislatures from repealing unenforced morals legislation. The legislation goes unenforced because various political actors do not deem it important enough to merit robust enforcement. The citizens, however, do not push for the repeal of the legislation (or even actively oppose its repeal) because repealing it may be misunderstood as endorsing the conduct it proscribes.").

146. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 89, at 134–35 ("It may be said that the Judicial authority, under our new system will keep the States within their proper limits, and supply the place of a negative on their laws. The answer is, that it is more convenient to prevent the passage of a law than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals, who may be unable to support an appeal agst. a State to the supreme Judiciary; that a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them, and that a recurrence to force, which, in the event of disobedience would be necessary, is an evil which the new Constitution meant to exclude as far as possible . . . . A constitutional negative on the laws of the States seems equally necessary to secure individuals agst. encroachments on their rights . . . .").

147. *Id.* at 516 ("The obvious necessity of a controul on the laws of the States, so far as they might

The Fourteenth Amendment and incorporation of the Bill of Rights made this argument even stronger.[148] State laws should receive close scrutiny and should not escape such scrutiny based on a narrow reading of jurisdictional doctrine.

Importantly, the seeming abstractness of an injury not involving prosecution falls away when compared to other injuries the Court has found adequate. The Court in *Allen* maintained, "the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition. The injury alleged must be, for example, distinct and palpable, and not abstract or conjectural or hypothetical."[149] But if imprecise computer modeling of temperatures, [150] the effects of those temperatures on sea levels, and the estimates of the effects of those sea levels on a single landowner 100 years into the future, are precise enough to take an injury out of the abstract,[151] the wealth of social research noted in this comment should be more than enough for the Court to allow a case to go forward.[152]

Furthermore, the Court has been very forgiving on injury definition in recent equal protection cases. In one case, stigmatization caused by racial discrimination was found to be concrete enough to confer

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violate the Constn. & laws of the U. S. left no option but as to the mode. The modes presenting themselves, were 1. a Veto on the passage of the State laws. 2. a Congressional repeal of them, 3 a Judicial annulment of them. The first tho extensively favord, at the outset, was found on discussion, liable to insuperable objections, arising from the extent of Country, and the multiplicity of State laws. The second was not free from such as gave a preference to the *third* as now provided by the Constitution.") (emphasis in original); *see also* THE FEDERALIST No. 80, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("TO JUDGE with accuracy of the proper extent of the federal judicature it will be necessary to consider, in the first place, what are its proper objects. It seems scarcely to admit of controversy that the judicary authority of the Union ought to extend to these several descriptions of cases: 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation . . . . The first point depends upon this obvious consideration, that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union and others with the principles of good government.").

148. U.S. CONST. amend. XIV.

149. Allen v. Wright, 468 U.S. 737, 751 (1984) (internal citations and quotations omitted).

150. *See* Christopher Booker, *The World Has Never Seen Such Freezing Heat*, TELEGRAPH.CO.UK, Nov. 16, 2008, http://www.telegraph.co.uk/opinion/main.jhtml?MLC=/opinion/columnists/christopher_booker&xml=/opinion/2008/11/16/do1610.xml (last visited Nov. 14, 2009) (discussing the recent "blunder" by NASA where a modeling mistake caused this past October to erroneously be labeled the hottest October on record).

151. *See* Massachusetts v. EPA, 549 U.S. 497, 541–42 (2007) (Roberts, C.J., dissenting).

152. *See supra* Part I.

standing.[153] In affirmative action cases, a plaintiff need not even show that she would be denied a certain benefit, only that she was denied the ability to compete on equal footing—an even less concrete injury.[154] Similarly, in Establishment Clause cases, several circuits have held that psychological injury caused by observing offensive religious conduct or displays is sufficient injury for standing.[155] These numerous cases show that despite often-tough language

on the issue of standing and injury, there is room for a more generous interpretation of injury in the case of unenforced criminal laws.

IV. CONCLUSION

This may, at first glance, appear to be a solution in need of a problem, as the only time such laws acquire widespread notice is either when they are dusted off and enforced or repealed. Those who suffer from the effects of unenforced laws, however, do so in the shadows; many who suffer may not even realize where the responsibility lies.[156]

153. Heckler v. Mathews, 465 U.S. 728, 739–40 (1984).

154. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 718–19 (2007) ("The fact that it is possible that children of group members will not be denied admission to a school based on their race—because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage—does not eliminate the injury claimed . . . . [O]ne form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff."); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995) ("Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.' The aggrieved party 'need not allege that he would have obtained the benefit but for the barrier in order to establish standing.'" (quoting Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666–67 (1993))); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280–81 n.14 (1978) ("[E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Hence the constitutional requirements of Art. III were met. The question of Bakke's admission *vel non* is merely one of relief." (citations omitted)).

155. *See, e.g.*, Suhre v. Haywood County, 131 F.3d 1083, 1084, 1087 (4th Cir. 1997) (finding standing for county resident to challenge Ten Commandments display in county courthouse); Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679, 681, 682–83 (6th Cir. 1994) (finding standing for former student to challenge religious portrait displayed at public school); Saladin v. City of Milledgeville, 812 F.2d 687, 692–93 (11th Cir. 1987) (finding standing for residents to challenge religious symbols on city seal).

156. This is, fortunately, not the case when it comes to the deleterious affect on homosexuals of unenforced sodomy laws. *See, e.g.*, Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 104–05 (2000).

Luckily, there has been some progress on this front. Following the United States Supreme Court's declaration that a Texas statute criminalizing sodomy was unconstitutional,[157] the Virginia Supreme Court struck down the state's fornication law,[158] and many localities have begun to rescind "Blue Laws."[159] But many unenforced laws still remain, including sodomy laws declared unconstitutional by the Supreme Court of the United States.[160] These unenforced laws are still promoted by some commentators as necessary beacons of morality.[161] It is time for the judiciary to begin thinking outside the current standing box and examine unenforced criminal laws to determine whether they hold up to constitutional scrutiny.

157. Lawrence v. Texas, 539 U.S. 558, 562, 578 (2003).

158. Martin v. Ziherl, 269 Va. 35, 42, 607 S.E.2d 367, 370 (2005).

159. Jonathan Finer, *Old Blue Laws Are Hitting Red Lights*, WASH. POST, Dec. 4, 2004, at A3.

160. D.L.S. v. Utah, 374 F.3d 971, 974 (10th Cir. 2004) (denying standing to challenge sodomy law because of failure to show sufficient likelihood of future prosecution); Berg v. State, 100 P.3d 261, 265–67 (Utah Ct. App. 2004) (denying standing to challenge sodomy law because of failure to show that prosecution was possible or likely).

161. Arkes, *supra* note 21.