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India Thusi

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## HARM, SEX, AND CONSEQUENCES

### I. India Thusi\*

#### *Abstract*

*At a moment in history when this country incarcerates far too many people, criminal legal theory should set forth a framework for reexamining the current logic of the criminal legal system. This Article is the first to argue that “distributive consequentialism,” which centers the experiences of directly impacted communities, can address the harms of mass incarceration and mass criminalization. Distributive consequentialism is a framework for assessing whether criminalization is justified. It focuses on the outcomes of criminalization rather than relying on indeterminate moral judgments about blameworthiness, or “desert,” which are often infected by the judges’ own implicit biases. Distributive consequentialism allows for consideration of both the harms of the conduct and the harms of criminalization itself. It brings an intersectional approach to criminal legal theory by examining the distribution of harm, centering the experience of populations that face intersectional forms of subordination, and viewing the criminal legal system suspiciously. This Article adopts a distributive consequentialist analysis to examine the continued criminalization of sex work as just one example of how the theory can be applied. This application demonstrates how engaging in a distributive consequentialist analysis is a step toward reining in a system that seems to be ever-expanding and reframing a criminal legal theory that has grown ambivalent about this expansion.*

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\* © 2019 I. India Thusi. Assistant Professor of Law, California Western School of Law. For generous feedback and helpful suggestions, I thank I. Bennett Capers, Brad Colbert, Catherine Hardee, Alexis Karteron, Kenneth Klein, Anna Roberts, and Daniel Yeager. I also thank Cathi Albertyn and Julia Hornberger for consistent support and insight. This work benefitted from discussions at Brooklyn Law School, California Western School of Law, University of Michigan Law School, and University of Wisconsin Law School. I am especially grateful for generative commentary and support from participants in the Law & Society Association Annual Meeting, the Lutie Lytle Conference, the AALS Criminal Justice Section Mid-Year Meeting, and the AALS-ABA Criminal Justice Section Scholars Workshop. I gratefully acknowledge funding from the Andrew W. Mellon Humanities and Social Science Research Council Next Generation African Scholars Program.

## INTRODUCTION

There is a growing consensus that the “War on Drugs” was a failure that contributed to the massive expansion of the United States penal state.<sup>1</sup> However, the consequences of this drug war extend far beyond the context of increased penalties for drug offenses.<sup>2</sup> This War fostered a culture of punitiveness, which is apparent in the influence of retribution and the abstract concept of “desert” within the U.S. criminal legal system.<sup>3</sup> This punitiveness has normalized the use of punishment as a

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<sup>1</sup> “Most criminal justice scholars agree that our current prison population is too large. They also agree that the impact of imprisonment on the crime rate is modest and that the speed at which people are released from prison bears little relation to the likelihood that they will remain crime free.” Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 296 (2013) (citations omitted). The failure of the War on Drugs is often described as the failure of punitive policies to effectively control the use and sale of narcotics in this country, which have remained consistent. See STEVEN WISOTSKY, BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY 64 (1990). The failure is also represented by the resultant expansion of the criminal legal system that followed years of punitive policies. See Carol S. Steiker, *Mass Incarceration: Causes, Consequences, and Exit Strategies*, 9 OHIO ST. J. CRIM. L. 1, 3 (2011) (“[T]he fall in the rate of violent crimes and the acknowledged failure of the War on Drugs has cast doubt on the necessity of imprisoning so many.”). The awareness about “mass incarceration” was amplified following the release of Michelle Alexander’s influential book *The New Jim Crow*. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (exploring how ostensibly “colorblind” drug laws and law enforcement policies have resulted in the mass incarceration of people of color). The proliferation of the term “mass incarceration” has become shorthand for the United States’ dramatic increase in incarceration since the 1970s. During the same period of time, there was a dramatic decrease in the violent crime rate. *Id.*

<sup>2</sup> John Pfaff recently challenged the “stock story” that the War on Drugs led to mass incarceration. See generally JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION — AND HOW TO ACHIEVE REAL REFORM (2017) (challenging the “stock story” that incarceration increased as a result of punitive drug policies, and arguing that criminal reformers should view the criminal legal system holistically and address the punishment of violent crime). However, his argument does not properly consider the cultural effects that a War on Drugs produces beyond the realm of drug enforcement. Politicians adopted the language of punishment to address societal ills, including violence. *Id.* Policies that might have actually addressed violence, such as restorative justice practices, were made politically undesirable due to this tough-on-crime language. The War on Drugs promoted a culture of punishment that instructed how we think about the work that the criminal legal system should be doing. It legitimated an expanded role for prosecutors and signaled that locking people up promotes public safety.

<sup>3</sup> See Timothy Edwards, *The Theory and Practice of Compulsory Drug Treatment in the Criminal Justice System: The Wisconsin Experiment*, 2000 WIS. L. REV. 283, 290 (2000) (“Anchored by retributive ideals that insist on moral accountability, the once-fashionable goal of rehabilitation has been supplanted by an ideological shift that emphasizes incapacitation as a core value.”). The prominence of retribution in criminal legal theory occurred at the same moment as the increase in incarceration in the United States:

response to even minor social problems.<sup>4</sup> It has had a devastating impact on women and girls, fostering policies that use the punishment apparatus to “help” fallen women, including sex workers.<sup>5</sup>

The legitimization of punishment as a tool for promoting social welfare is evident in the criminalization and policing of prostitution.<sup>6</sup> Policies that were developed as part of the War on Drugs, such as “broken windows policing,” a policing strategy that includes the use of stop and frisks and tickets for minor infractions, validated the profiling and policing of *cis* and transgender women of color as sex workers.<sup>7</sup>

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Notably, the renewed attention to desert in Anglo-American sentencing theory coincided with the explosion of the United States prison population and the imposition of increasingly severe sentences. Correlation is not causation, of course, and desert theorists take pains to explain why they are not to blame for the more severe sentences. But the coincidence of the resurgence in desert theory with the rapid increase in sentence severity does suggest that, at the very least, desert has failed as a limiting principle.

Alice G. Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 742 (2009).

<sup>4</sup> See Darryl K. Brown, *Decriminalization, Regulation, Privatization: A Response to Professor Natapoff*, 69 VAND. L. REV. EN BANC 1, 14 (2016) (describing criminal enforcement incentives that encourage “courts to punish rather than to warn, seek voluntary cooperation, change norms, or address social problems and undesirable conduct in other nonpunitive ways”).

<sup>5</sup> Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1337, 1394 (2016) (describing “penal welfare” as “states’ growing practice of providing social benefits through criminal court,” and warning that it “becomes an add-on to a massive criminal system that has been legitimized precisely because it reflects individualist ethics of responsibility instead of principles of distributive justice. The danger, then, is that the more states and localities invest in penal welfare, the less that welfare, services, and aid bound not to arrest and prosecution—but redistribution—can gain legitimacy and secure funding.”).

<sup>6</sup> See Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1313–14 (2015) (describing how the criminalization of prostitution for minors with a protectionist rationale is pretextual moralism).

<sup>7</sup> Andrea Ritchie describes the connection between broken windows policing and the policing of sex and gender:

This racialized policing of gender and sexuality is facilitated by the current dominant “broken windows” policing paradigm, which posits that any perceived social “disorder”—from a broken window to a group of young people hanging out on a corner, to manifestations of racialized gender disorder like street-based prostitution—must immediately be stamped out before it inevitably leads to anarchy and chaos. Rooted in Black Codes and vagrancy laws, repackaged and redeployed as “order maintenance” policing, implementation of “broken windows” theory is characterized by aggressive and discriminatory enforcement of so-called “quality of life” regulations which criminalize an ever expanding range of public activities.

Women of color in cities like New York, New Orleans, and Las Vegas report that police profile them as prostitutes, and many have been arrested and processed through the system.<sup>8</sup> These women have been deemed “blameworthy” by the enforcers of the criminal legal system.<sup>9</sup> Women have become the fastest growing prison population,<sup>10</sup> and one study has noted that 30 percent of incarcerated women have prostitution-related convictions.<sup>11</sup> Women’s experiences of mass incarceration occur in these everyday interactions with the criminal legal system that are often ignored.<sup>12</sup>

Despite discriminatory policing and criminalization, the theory on punishment and criminalization is often ambivalent about the harms of criminalization itself and has ignored how our approach to criminalization uniquely impacts women.<sup>13</sup> Some

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Andrea J. Ritchie, *Crimes Against Nature: Challenging Criminalization of Queerness and Black Women’s Sexuality*, 14 LOY. J. PUB. IN’T L. 355, 369 (2013) (citations omitted); see also Rima Vesely-Flad, *New York City Under Siege: The Moral Politics of Policing Practices, 1993-2013*, 49 WAKE FOREST L. REV. 889, 898 & n.56 (2014) (describing how profiling by police has led to humiliating experiences and sexual harassment, particularly for transgender women).

<sup>8</sup> See, e.g., HUMAN RIGHTS WATCH, IN HARM’S WAY: STATE RESPONSE TO SEX WORKERS, DRUG USERS, AND HIV IN NEW ORLEANS 43–45 (2013) (describing the profiling and harassment experience by transgender women in New Orleans).

<sup>9</sup> See Godsoe, *supra* note 6, at 1360.

<sup>10</sup> Stephen J. Tripodi & Carrie Pettus-Davis, *Histories of Childhood Victimization and Subsequent Mental Health Problems, Substance Use, and Sexual Victimization for a Sample of Incarcerated Women in the US*, 36 INT’L J.L. & PSYCHIATRY 30, 30 (2013).

<sup>11</sup> See generally DOROTHY WOOD, NAT’L COAL. FOR JAIL REFORM, WOMEN IN JAIL 9 (1982) (reviewing literature on women in jail to assess demographic data). Another study found that approximately 26% of mothers whose children were placed in foster care in New York in 1991 had prostitution convictions. MIRIAM EHRENSAFT ET AL., VERA INSTITUTE OF JUSTICE, PATTERNS OF CRIMINAL CONVICTION AND INCARCERATION AMONG MOTHERS OF CHILDREN IN FOSTER CARE IN NEW YORK CITY 11 (2003).

<sup>12</sup> See generally KIMBERLÉ WILLIAMS CRENSHAW & ANDREA J. RITCHIE, AFR. AM. POL’Y F., SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (2015), [http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/55a810d7e4b058f342f55873/1437077719984/AAPF\\_SMN\\_B](http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/55a810d7e4b058f342f55873/1437077719984/AAPF_SMN_B) [<https://perma.cc/4VBS-ZLBX>] (responding to the lack of action about police violence toward black women through a campaign centered on black women’s experience of police violence).

<sup>13</sup> Robert Weisberg has argued that criminal legal theorists have failed to rigorously address the connection between theories of punishment, and related theories of criminalization and mass incarceration:

Over the past decade, the humanities and social sciences have yielded substantial literature examining the rise of mass incarceration from various perspectives, ranging from econometric analyses of contributory factors to cultural critiques of American exceptionalism in penal policy. At the same time, in an oddly parallel but disconnected universe, legal and academic commentators have continued their long engagement in jurisprudential debates about the purposes of punishment (retribution, general and specific deterrence,

scholars claim we are in a retributivists' moment in criminal legal theory, examining different aspects of retribution as a justification for punishment.<sup>14</sup> These scholars argue that morality-based justifications for punishment should continue to play a role in justifying criminalization, analyzing the meaning of “just desert.”<sup>15</sup> While many criminal legal scholars have discussed the issue of “overcriminalization,”<sup>16</sup> arguing that we have “too many crimes” or too much power vested in prosecutorial offices,<sup>17</sup> few argue that we should reexamine our theories of punishment and criminalization to address the mass incarceration and mass criminalization<sup>18</sup> crisis.<sup>19</sup>

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incapacitation, and rehabilitation). *But mass incarceration has barely registered in these debates.* Perhaps the key irony about this disconnected parallelism is that the dominant theme in these jurisprudential debates in the academic world has been a robust revival of retributivism, the very rationale for punishment most associated with the specific legal changes of recent decades that are the most obvious causes of the great increase in incarceration. Indeed, even the many new robust *critiques* of modern retributivism have only barely addressed the social costs created by U.S. penal policy over the past four decades.

Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1203–04 (2012) (first emphasis added) (citations omitted).

<sup>14</sup> *Id.*

<sup>15</sup> Just desert refers to the extent to which a defendant “deserves” to be punished. See MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 754 (1997) (arguing that “all and only moral wrongs should be prohibited by the criminal law”). “For a retributivist, the moral responsibility of an offender . . . gives society the duty to punish.” *Id.*

<sup>16</sup> See, e.g., HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 249–364 (1968); Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L. Q. 17, 17 (1968); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) (“American criminal law, federal and state, is very broad; it covers far more conduct than any jurisdiction could possibly punish. The federal code alone has thousands of criminal prohibitions covering an enormous range of behavior, from the heinous to the trivial. State codes are a little narrower, but not much. And federal and state codes alike are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions.”).

<sup>17</sup> See, e.g., William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2568 (2004).

<sup>18</sup> Devon Carbado has defined “mass criminalization” as the “criminalization of relatively nonserious behavior or activities and the multiple ways in which criminal justice actors, norms, and strategies shape welfare state processes and policies.” Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1487 (2016).

<sup>19</sup> William J. Stuntz, *Reply: Criminal Law's Pathology*, 101 MICH. L. REV. 828, 829 (2002) [hereinafter Stuntz, *Reply*] (“Theories of punishment matter, but their largest effect is on sentencing practices, not on criminal liability rules.”). Stuntz noted that the theories of punishment have been constant, but the incarceration has not. *Id.* at 835–56. The incarceration rate dramatically increased during the 1970s and 1980s, and Stuntz suggested that this illustrates the lack of connection between a theory of punishment and incarceration. *Id.* However, he failed to examine the relationship between the rise of retributivism and the social and political backlash to the expansion of civil rights for African Americans during

Even fewer argue that we should completely reimagine how we think about the related issues of what conduct is worthy of being treated as a crime and whether punishment is justified for that conduct, let alone how these theories impact distinct communities. By contrast, other disciplines have not only internalized mass incarceration, but they have also set forth various strategies for addressing it.<sup>20</sup>

At a moment in history when this country incarcerates far too many people,<sup>21</sup> criminal legal theory should set forth a framework for examining the current logic and justifications of the criminal legal system. This Article argues that distributive

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the same period of time. *Id.* Critical race theorists have posited that the Reagan era and focus on mass criminalization was an effort to control black and brown people. *See* Anthony Cook, *The Ghosts of 1964: Race, Reagan, and the Neo-Conservative Backlash to the Civil Rights Movement*, 6 ALA. C.R. & C.L. L. REV. 81, 82 (2015) (“With the election of Ronald Reagan in 1980, the forces that would shape a sustained backlash against the gains of the civil rights movement were already in play: party realignment and the re-emergence of the religious right in American politics; the rise of a ‘law and order’ movement that would morph into a ‘war on drugs’ movement fueling the mass incarceration of Black and Hispanic men, women, and children . . . . Taken together, these converging forces not only undermined the dream of racial equality promised by America’s Second Reconstruction but threatened democracy itself . . . .”).

<sup>20</sup> Political scientist Marie Gottschalk has argued that legal education can be blamed for the recent rise in incarceration in the United States, arguing that “[d]ifferences in the legal training, professional norms, and career paths of prosecutors, judges, and other judicial administrators are another reason why the U.S. criminal justice system has been more vulnerable to political winds whipped up by politicians and social movements . . . .” MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 98 (2006).

<sup>21</sup>

Radical changes in crime control and sentencing policies led to an unprecedented buildup of the United States prison population over the last thirty years. By the end of 2002, the number of inmates in the nation’s jails and prisons exceeded two million. Today’s imprisonment rate is five times as high as in 1972 and surpasses that of all other nations. The sheer scale and acceleration of U.S. prison growth has no parallel in western societies. As David Garland put it, ‘This is an unprecedented event in the history of the USA and, more generally, in the history of liberal democracy.’

Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004) (citations omitted). And, mass incarceration has disproportionately impacted black and brown communities:

A host of empirical studies conducted in the last decade explore the nature of these effects on the African American survivors of mass imprisonment. They find that incarceration has become a systemic aspect of community members’ family affairs, economic prospects, political engagement, social norms, and childhood expectations for the future.

*Id.* at 1277.

consequentialism is a theoretical framework for analyzing whether minor crimes should be criminalized and justifying the decriminalization of many of these crimes. Instead of abstract notions of “desert” and retribution, the criminal legal system should focus on improving actual outcomes, especially where there is no obvious victim of the would-be crime. The implicit biases of criminal justice actors have a way of creeping into the process when such actors must make determinations based on the blameworthiness and morality of the offenders. Criminal legal theorists should embrace a form of consequentialism, a utilitarian theory focused on the results of conduct that cares about actual outcomes but distributive in analyzing whether the outcomes are fairly distributed.<sup>22</sup> Distributive consequentialism avoids moral judgments and assesses criminalization and punishment by evaluating the harms of the conduct as well as the troubles of criminalization.<sup>23</sup> It is a step toward reining in a system that seems to be ever-expanding, and reframing the criminal legal theory that has grown ambivalent about this expansion.<sup>24</sup>

This Article applies the distributive consequentialist framework to examine whether prostitution should remain criminalized. While both abolitionist and pro-sex-work feminist scholars have debated sex work extensively, distributive consequentialism provides a normative framework for examining crimes, even outside the prostitution context.<sup>25</sup> There are also serious gaps in the feminist literature in this area. In the areas of rape law and employment discrimination, feminist theory has successfully improved the outcomes for the women it seeks to protect.<sup>26</sup> However, in the peculiar area of vice crimes, feminist theory has the

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<sup>22</sup> See generally Vincent Chiao, *Mass Incarceration and the Theory of Punishment*, 11 CRIM. L. & PHIL. 431 (2017) (discussing the flaws of a retributivist theory in light of the collective social harms that stem from mass incarceration).

Theories of punishment that are at least open to considerations of social cost can appeal to a broader range of inputs in estimating  $n_{MAX}$  [an estimated maximum permissible rate of incarceration]. They can, for instance, consider the expected aggregate costs of incarceration—the harms imposed directly on those incarcerated, the collateral consequences on families and communities, and the opportunity costs to society of time wasted languishing in prison—as well as its expected benefits, such as the reduction in criminal offending and the vindication of the rights of victims.

*Id.* at 438.

<sup>23</sup> See *infra* Part III.

<sup>24</sup> See *id.*

<sup>25</sup> See generally I. India Thusi, *Radical Feminist Harms on Sex Workers*, 22 LEWIS & CLARK L. REV. 185 (2018) (discussing feminist debates regarding the legal treatment of sex work and arguing that the radical feminist approach to sex work is itself a form of subordination of women).

<sup>26</sup> There is scholarly debate about the use of effectiveness of punishment to promote a feminist agenda. See, e.g., Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism,”* 18 DIFFERENCES 128, 143 (2007) (defining “carceral feminism” as “the commitment of abolitionist feminist activists to a law and order agenda and, as Marie



unintended result of stigmatizing “fallen women” and illustrating the proverbial tension between the middle-class white feminists, who are often (albeit implicitly) idealized in feminist scholarship, and the demonized poor, colored women.<sup>27</sup> This tension is especially evident when considering the experiences of sex workers of color, whose victim status is selectively exploited by some feminist scholars, but whose voices are systemically silenced when it does not fit the narrative of sex worker as victim and trafficking survivor.<sup>28</sup> This Article considers the harms that this class of sex workers’ experiences from any form of criminalization, including partial criminalization, and begins to examine how intersectionality looks within the context of criminal legal theory.<sup>29</sup> Criminal justice reformers can easily adopt the

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Gottschalk has similarly described within the context of the U.S. antirape and battered women’s movements, a drift from the welfare state to the carceral state as the enforcement apparatus for feminist goals.”).

<sup>27</sup> Kamala Kempadoo, *Women of Color and the Global Sex Trade: Transnational Feminist Perspectives*, 1 *MERIDIANS* 28, 40 (2001) (noting that “insights, knowledges, and understandings of sex work have been largely obscured or dominated by white radical feminist, neo-Marxist, or Western socialist feminist inspired analyses that have been either incapable or unwilling to address the complexities of the lives of women of color.”).

<sup>28</sup> See, e.g., Catharine A. MacKinnon, *Rape Redefined*, 10 *HARV. L. & POL’Y REV.* 431, 448 (2016) (suggesting sex work is coercive while making several empirical claims about the nature of sex work, and stating “women are disproportionately bought and sold in prostitution by men as a cornerstone of combined economic, racial, age-based, and gendered inequality, in which money functions as a form of force in sex because the women are not permitted to survive any other way”).

<sup>29</sup> Some critical theorists who are concerned with intersectionality have convincingly identified the unique harms that women with intersectional identities experience within the criminal legal system. See, e.g., Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 *UCLA L. REV.* 1586, 1593 (2015) (discussing the “overpolicing and under protection of sexually exploited girls of color”).

During this formative period, social institutions function to protect children from adults who would seek to harm or misuse them. For many children, however, childhood is fraught with exploitation and sexual abuse. These children are often targeted by pimps, who exploit their bodies for commercial gain. Commonly decried as a modern form of slavery, children across the country are caught in this tragic cycle of sexual abuse and trauma. Far too often, however, sexually exploited children are not recognized as victims, despite their inability to consent to a sexual act, instead they are subject to prosecution for juvenile prostitution.

*Id.* at 1588. Where these theorists fall short is through their adoption of an over-generalized victim narrative that disempowers the very women they seek to empower, painting with broad brush strokes the experiences that women of color in the sex trade experience. This approach is understandable because they are trying to ensure that these women receive equal protection of the law. However, they often rely upon unreliable tropes about the experience of women in the sex trade; they often seek to expand the criminal legal apparatus, an instrument of the subordination of women of color; and they reinforce patriarchal views

framework in this Article to analyze the criminalization of other crimes, including the use and sale of heroin, sexual vices, or other offenses.

Part I of this Article argues that the retributivist approach that is dominant in criminal law produces inequality and inevitably reflects privileged understandings of morality and blameworthiness. Part II discusses how mass incarceration is an indicator of disfunction within the criminal legal system and how our retributivist approach to criminalization contributes to racially discriminatory outcomes. Part III discusses distributive consequentialism, which is a theory of criminalization that empowers the community most affected by criminal legal interventions and focuses on the actual consequences of criminalization in addition to the consequences of the underlying conduct. Part IV applies this approach to the criminalization of sex work and argues that this theory is particularly useful when evaluating the treatment of vice crimes although the theory is relevant to the project of decarceration more broadly.

### I. THE MOVE FROM UTILITARIANISM TO RETRIBUTION

The appropriateness of criminal punishment is central to understanding the role of the criminal legal system within society.<sup>30</sup> “As an arbiter of social conflict and a guarantor of civic status, criminal law is necessarily also a potentially powerful weapon of subordination.”<sup>31</sup> Often the purpose of the criminal legal system is presumed to be insignificant to the actual functioning of the system.<sup>32</sup> However, understanding the goals of punishment, and relatedly, criminalization, is critical to

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about women’s experiences with sex and the sex trade. See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1658–59 (2010) (discussing the “reductive” narrative of prostitutes as trafficking victims as an oversimplification that ignores other exploitive labor practices in the majority of trafficking cases and places ideology above empirical data). This Article seeks to make criminal legal theory more intersectional by recognizing these women’s experiences. But, it is realist in that criminal legal theory is more likely to inflict greater harms into these women’s lives that should be avoided at all costs.

<sup>30</sup> Punishment theory is central to the logic of criminalization. Much of the discourse about whether conduct should be criminalized focuses on the purposes of punishment, including general or specific deterrence as well as the blameworthiness of the offender, or desert. Accordingly, while this Article is concerned whether conduct should be criminalized at all, punishment theory remains a central consideration in making this evaluation. See Darryl K. Brown, *Criminal Law Theory and Criminal Justice Practice*, 49 AM. CRIM. L. REV. 73, 74–76 (2012) (highlighting how criminal law theory has been focused on the debates of retributivist and consequentialist justification for punishments, which encompass questions of criminalization and enforcement as well as punishment); see also Stuntz, *supra* note 16, at 506 (“[C]riminal law does not drive criminal punishment. It would be closer to the truth to say that criminal punishment drives criminal law.”).

<sup>31</sup> Guyora Binder & Robert Weisberg, *What Is Criminal Law About?*, 114 MICH. L. REV. 1173, 1175 (2016).

<sup>32</sup> See Stuntz, *Reply*, *supra* note 19, at 829 (“Theories of punishment matter, but their largest effect is on sentencing practices, not on criminal liability rules.”).

assessing whether the system is functioning as it should function.<sup>33</sup> How can one know whether the criminal legal system is meeting its goals if there is no real clarity on what those goals are? These mixed goals contributed to the cultural environment in which politicians adopted harsh criminal policies; they provided the rationale for expanding the criminal system; and they legitimized the incentives and disfunction that has led to mass incarceration.

### A. Theories of Criminalization

The purpose of criminalization has long been debated by scholars from Jeremy Bentham<sup>34</sup> and John Stuart Mill,<sup>35</sup> to Lord Devlin,<sup>36</sup> H. L. A. Hart,<sup>37</sup> Joel Feinberg,<sup>38</sup> and Paul Robinson.<sup>39</sup> These debates have explored the moral and legal justifications for criminalization and punishment. Debates about criminalization are closely connected to debates about punishment because punishment is central to understanding whether the State is justified in criminalizing certain conduct.<sup>40</sup> Criminalization asks—does a particular act warrant punishment to protect people

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<sup>33</sup> See Brown, *supra* note 30, at 74–76 (highlighting how criminal law theory has been focused on the debates of retributivist and consequentialist justification for punishments, which encompass questions of criminalization and enforcement as well as punishment).

<sup>34</sup> See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1–7 (Oxford, Clarendon Press 1879) (1789).

<sup>35</sup> See generally JOHN STUART MILL, ON LIBERTY 86–109 (The Floating Press 2009) (1859).

<sup>36</sup> Lord Devlin, *Law, Democracy, and Morality*, 110 U. PA. L. REV. 635, 639 (1962) (arguing that for the legislator, the “morals which he enforces are those ideas about right and wrong which are already accepted by the society for which he is legislating and which are necessary to preserve its integrity.”).

<sup>37</sup> H.L.A. Hart, *LAW, LIBERTY, AND MORALITY* 46 (1963) (“The fundamental objection [of legal moralists] is surely that a right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognizes individual liberty as a value.”); see also Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 994 (1966) (“[O]ur conventional moral practices are more complex and more structured than he takes them to be, and that he consequently misunderstands what it means to say that the criminal law should be drawn from public morality.”).

<sup>38</sup> JOEL FEINBERG, *The Expressive Function of Punishment, in A READER ON PUNISHMENT* 73, 75–76 (Anthony Duff & David Garland eds., 1994).

<sup>39</sup> Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1566 (2017).

<sup>40</sup> See, e.g., Vanessa E. Munro, Book Review, 12 NEW CRIM. L. REV. 314, 323–26 (2009) (reviewing DOUGLAS N. HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008)) (explaining Husak’s theory that overcriminalization and over-punishment have become widespread and arguing that individuals have a basic right not to be punished). In situations meeting a certain set of criteria, that right may be legitimately infringed by the state, but where the criteria is not met, punishment is unjustified and the right not to be punished is intolerably violated. *Id.*

and property given the purposes and limits of punishment?<sup>41</sup> While it is at times difficult to draw a bright line between punishment and criminalization because of their close relationship, this Article primarily focuses on the question of criminalization given the justifications for punishment.

One of the dominant approaches to punishment and criminalization is utilitarianism.<sup>42</sup> Jeremy Bentham provided the initial philosophical foundations for the utilitarian approach to criminal law.<sup>43</sup> Bentham was concerned with the “greatest happiness for the greatest number.”<sup>44</sup> Under this approach, punishment is justifiable where it increases net societal happiness.<sup>45</sup> John Stuart Mill refined Bentham’s utilitarianism and argued for a utilitarian approach to criminal law that is concerned with the common good, and originated the “harm principle,” which is a limiting principle that supports criminalization where there is “harm to others.”<sup>46</sup>

H. L. A. Hart repopularized the harm principle during his debate with Lord Devlin regarding the appropriateness of criminalizing “immoral” conduct, particularly sodomy and prostitution.<sup>47</sup> Hart argued that the harm principle provides a normative basis for excluding government intervention where there is no “harm to others.”<sup>48</sup> The harm principle is a limiting principle because it provides guidance for limiting government intervention into private affairs: Government intervention is limited to those situations where there is “harm to others.”<sup>49</sup> However, as Bernard Harcourt describes in great detail, H. L. A. Hart and Joel Feinberg reduced this principle to “harm to others,” which ultimately prevailed over legal moralistic arguments in the debates with Lord Devlin, but later ushered in a phase where harm was used to advocate for additional state regulation rather than limit state

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<sup>41</sup> *Id.*

<sup>42</sup> See generally Matthew Haist, *Deterrence in A Sea of “Just Deserts”: Are Utilitarian Goals Achievable in A World of “Limiting Retributivism”?*, 99 J. CRIM. L. & CRIMINOLOGY 789 (2009) (describing the continued relevance of utilitarianism).

<sup>43</sup> See BENTHAM, *supra* note 34; see also Martha C. Nussbaum, *Mill Between Aristotle & Bentham*, 133 DAEDALUS 60, 61–62, 65–66 (2004) (discussing Mill’s further development of Bentham’s theory and refinement of the concept of happiness).

<sup>44</sup> See generally Ruut Veenhoven, *Greater Happiness for a Greater Number: Is that Possible and Desirable?*, 11 J. HAPPINESS STUD. 605 (2010) (questioning whether Bentham’s principle of greatest happiness is achievable).

<sup>45</sup> See BENTHAM, *supra* note 34, at 3–4.

<sup>46</sup> See MILL, *supra* note 35, at 160 (“[T]here are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners, and coming thus within the category of offences against others, may rightly be prohibited. Of this kind are offences against decency; on which it is unnecessary to dwell, the rather as they are only connected indirectly with our subject, the objection to publicity being equally strong in the case of many actions not in themselves condemnable, nor supposed to be so.”).

<sup>47</sup> See Hart, *supra* note 37, at 13–17.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

interventions upon individual liberty.<sup>50</sup> Activists and advocates have adopted harm-based arguments to secure additional government intervention.<sup>51</sup> In other words, harm is no longer a shield; it is a sword.<sup>52</sup> The argument goes that the conduct in question should be criminalized because there is harm involved.<sup>53</sup> This is a different point of departure than prohibiting government intervention unless there is harm to others. It is premised on the utility of criminalization rather than a desire to limit additional government intervention.<sup>54</sup> Nevertheless, the tendency to use harm to advocate for the expansion of government intervention can be disrupted by adopting a presumption against criminalization.<sup>55</sup>

In general, a utilitarian approach to criminal punishment considers the goals of deterrence, incapacitation, and rehabilitation.<sup>56</sup> However, rehabilitation has become a distant third in the utilitarian equation. “After 1968, the liberal rehabilitative ideal, which dominated postwar penal and criminal justice theory and practice in the United States, was replaced increasingly by an ideology of crime prevention through incapacitation and retribution as a goal of criminal sentencing.”<sup>57</sup> Accordingly, the utilitarian calculus has been primarily focused on deterrence and incapacitation,

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<sup>50</sup> See generally Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 129–34 (1999) (arguing that the harm principle as a limiting principle of criminalization has effectively collapsed under the weight of arguments to employ “harm” as a justification for additional punishment).

<sup>51</sup> *Id.* at 139–40.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 113–14.

<sup>55</sup> See *infra* Part III.

<sup>56</sup> Federal law highlights several of the factors that are relevant in a utilitarian approach to punishment:

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

...

(2) the need for the sentence imposed—

...

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

...

(7) The need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2012).

<sup>57</sup> Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court’s Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1410 (2006).

which is a narrow conception of the utilitarian goals that could be beneficial to a community.

*B. Retribution Creates a Culture of Punishing*

While the language of the Model Penal Code and several sentencing guidelines adopt some utilitarian terms,<sup>58</sup> they also include decidedly retributivist language.<sup>59</sup> In fact, retributivism has become the leading approach to punishment and criminalization.<sup>60</sup> Retributivism was largely abandoned during much of the 1900s in favor of a utilitarian approach to criminalization.<sup>61</sup> However, the retributivist model enjoyed a resurgence starting in the early 1970s:

Retributivism is all the rage. Whether it is a “revival,” a “resurgence,” or a “renaissance,” retributivism’s rapid “rise” since the early 1970s has been remarkable. The U.S. Supreme Court, state courts, state legislatures, philosophers, and legal scholars alike are increasingly acknowledging retributivism as the dominant theory of punishment. Even its critics

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<sup>58</sup> See Press Release, Am. Law Inst., Model Penal Code: Sentencing Approved (May 24, 2017), <https://www.ali.org/news/articles/model-penal-code-sentencing-approved/> [<https://perma.cc/SD8E-LAYJ>] (explaining that the recently revised version of the Model Penal Code’s sentencing provisions includes language about the purpose of the criminal legal system.); see, e.g., MODEL PENAL CODE § 1.02(2) (AM. LAW INST., Proposed Final Draft 2017):

(2) The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are:

(a) in decisions affecting the sentencing of individual offenders:

(i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders;

(ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i);

(iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii) . . . .

<sup>59</sup> *Id.* The goal in § (2)(a)(ii) of the revised Model Penal Code adopts utilitarian terms, while the language in § (2)(a)(i) is retributivist. *Id.*

<sup>60</sup> Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 845–48 (2002).

<sup>61</sup> See Mark A. Michael, *Utilitarianism and Retributivism: What’s the Difference?*, 29 AM. PHIL. Q. 173, 173 (1992) (“During most of this century utilitarian considerations dominated the discussion of the justification of punishment.”); see also David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1623 nn.1–2 (1992).

acknowledge that retributivism “can fairly be regarded as the leading philosophical justification for the institution of criminal punishment.”

...  
[R]etributivism justifies punishment, or the suffering by the punished, not on any actual good consequences that might be attained, but solely because the punished deserve it.<sup>62</sup>

Public statements about the criminal legal system as incarceration increased, reflecting a turn toward retributivism and punishing people because they “deserved” to be punished.<sup>63</sup> Assigning blame and punishment for social ills is central to the logic of retributivism. “The idea of desert is central to retributive theory . . . . Desert is a moral concept, not a legal one.”<sup>64</sup> Retributivist theory has contributed to a culture of using punishment to remedy all that is wrong with society.<sup>65</sup> The expanding list of offenses between 1980 and 2010 and the increase in harsh sentencing laws suggest that the desire to punish for the sake of punishment explains, at least in part, the rapid increase in incarceration during this time period.<sup>66</sup> Political scientist Mark Ramirez employed an error-correction model to measure aggregate public support

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<sup>62</sup> Christopher, *supra* note 60 (citations omitted).

<sup>63</sup> See Craig Haney, *Politicizing Crime and Punishment: Redefining “Justice” to Fight the “War on Prisoners,”* 114 W. VA. L. REV. 373, 393–94 (2012) (“As politicians succeeded in raising the overall level of fear and anger over crime, and capitalizing on the ‘tough on crime’ policies they offered in response, there was increasingly hostile public reaction to any criminal justice policies that smacked of leniency or restraint (no matter how promising or effective).”); see also Amanda Kay, *The Agony of Ecstasy: Reconsidering the Punitive Approach to United States Drug Policy*, 29 FORDHAM URB. L.J. 2133, 2133–34 (2002):

Tom Campbell, a congressman from California, commented on this phenomenon: “The most common reaction I get from my colleagues is “You’re absolutely right, but, boy, I’m not going to take that risk.” While the public is decreasingly supportive of punitive laws, many still cling to the belief that such laws will reduce drug use because of fear—fear that drug use among children will increase and that less stringent drug laws will lead to moral decline and empower minority groups.

*Id.* (citations omitted).

<sup>64</sup> Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 U. KAN. L. REV. 269, 290 (2007).

<sup>65</sup> See Kay, *supra* note 63, at 2138.

<sup>66</sup> See Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1142 (2014) (“With President Reagan’s official declaration of the war on drugs in 1982, America began an unprecedented experiment with mass incarceration.” (citations omitted)).

for punitive criminal justice policies from 1951 to 2006.<sup>67</sup> He found that the punitive sentiment spiked in the 1970s, and again in the 1990s.<sup>68</sup>

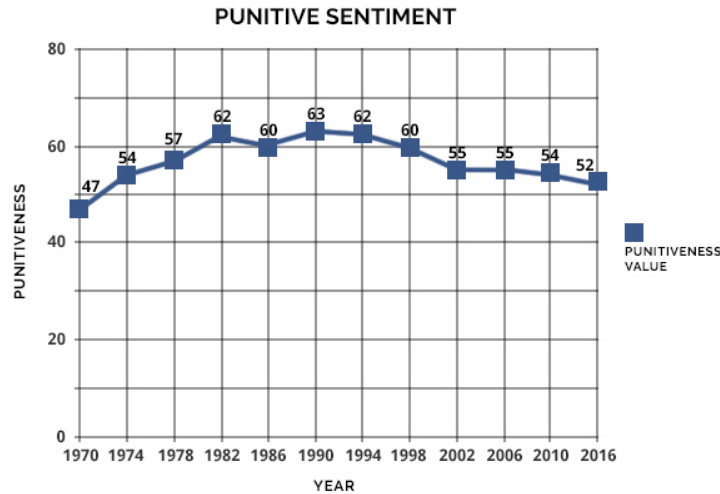


Figure 2. Source: Data based on e-mail from Mark Ramirez, March 10, 2016.

Figure 1. Punitiveness Sentiment<sup>69</sup>

At the same time, the United States penal population increased by six times.<sup>70</sup> Between 1925 and 1975, the prison incarceration rate remained constant at 100 per 100,000 of the resident population.<sup>71</sup> That rate increased to 472 per 100,000 by 2001.<sup>72</sup> This expansion of the criminal legal system is not restricted to the number of people sitting in prisons and jails. It has been an expansion of the entire criminal legal system, including expansive policing practices as reflected in increased arrests, more citations for low-level offenses, and an increased number of people under surveillance through entry into gang databases, predictive crime strategies, and

<sup>67</sup> See Mark D. Ramirez, *Punitive Sentiment*, 51 CRIMINOLOGY 329 (2013).

<sup>68</sup> *Id.* at 337–38; see also Matthew B. Kugler et al., *Differences in Punitiveness Across Three Cultures: A Test of American Exceptionalism in Justice Attitudes*, 103 J. CRIM. L. & CRIMINOLOGY 1071, 1104 (2013) (“The large differences between American and Canadian approaches to justice issues do not appear to be solely or even primarily rooted in the attitudes of their citizenry.”).

<sup>69</sup> LOREN SIEGEL, TRANSFORMING THE SYSTEM, A NEW SENSIBILITY: AN ANALYSIS OF PUBLIC OPINION RESEARCH ON ATTITUDES TOWARDS CRIME AND CRIMINAL JUSTICE POLICY 10 (2016), <https://transformingthesystem.org/criminal-justice-policy-solutions/public-opinion-report-a-new-sensibility/findings-americans-are-becoming-less-punitive/> [<https://perma.cc/AAB6-XQ6Y>].

<sup>70</sup> Bruce Western & Becky Pettit, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOCIOLOGICAL REV. 151, 151 (2004).

<sup>71</sup> *Id.* at 152.

<sup>72</sup> *Id.*



sorting through the misdemeanor court system.<sup>73</sup> The incarcerated population grew to 2.2 million people with the total correctional population at 7.1 million people by 2005.<sup>74</sup> By 2008, the U.S. incarceration rate was 762 per 100,000 nearly eight times its historic average.<sup>75</sup>

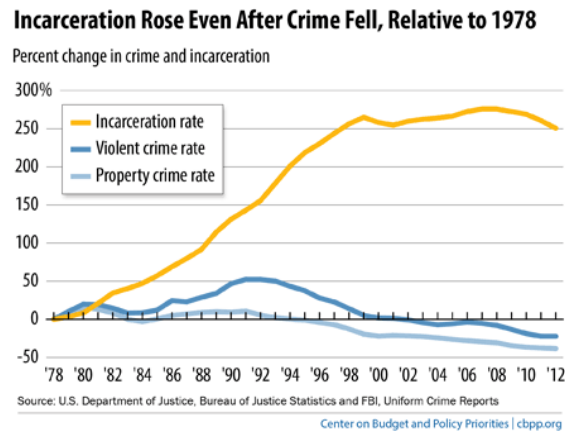


Figure 2. Incarceration Rate<sup>76</sup>

The rise in incarceration and criminalization reflects a dramatic shift in policy.<sup>77</sup> The rhetoric of retributivism focuses on punishment for the sake of punishment.<sup>78</sup> While some scholars argue that drug crimes only amount to a small number of individuals currently incarcerated in prisons and jails throughout the country, the narrative during the “War on Drugs” era fueled a penchant for punitiveness that is

<sup>73</sup> *Id.* at 153.

<sup>74</sup> Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 858–59 (2009).

<sup>75</sup> Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 8, 9 (2010).

<sup>76</sup> Michael Mitchell, *The Causes and Costs of High Incarceration Rates*, CTR. ON BUDGET AND POLICY PRIORITIES: OFF THE CHARTS (Oct. 29, 2014, 1:12 PM), <https://www.cbpp.org/blog/the-causes-and-costs-of-high-incarceration-rates> [<https://perma.cc/7PBP-VKQK>].

<sup>77</sup> *Id.* (“Incarceration rates have risen mainly because states are sending a much larger share of offenders to prison and keeping them there longer — two factors under policymakers’ direct control. Reforms to reduce prison populations will need to target these two areas.”).

<sup>78</sup> Haist, *supra* note 42, at 793–94 (“Retributivism posits that punishment is necessary because society must engage in some form of retribution against those who violate its laws. Its central tenet defines *punishment* as society’s response to a criminal action that has occurred in the past. The value of the punishment of the crime is in the punishment itself; when someone has committed a crime, they simply deserve to be punished.” (citations omitted)).

reflected in other parts of the criminal legal system.<sup>79</sup> It created a culture of punishment.<sup>80</sup> The turn to retributivism has resulted in absurd outcomes where systemic actors are working to preserve and expand their roles with the dysfunctional system, to the detriment of economic interests and well-being of the community. After all, incarceration is costly and is the least efficient manner to encourage community safety.<sup>81</sup> It costs an average of \$31,286 to incarcerate one person per year,<sup>82</sup> yet only \$9,410 for one year of in-state college tuition at a public four-year college.<sup>83</sup>

The incarceration punishment is largely motivated by retributivist goals. The utilitarian aims of incapacitation and deterrence cannot justify this increase in incarceration. The research shows that incarceration cannot explain the decrease in violent crime, and “high levels of incarceration provide scant public safety benefit.”<sup>84</sup> Mass incarceration does not meet the utilitarian goals of deterrence or incapacitation. Young people are the most likely offenders for violent crimes, yet they are the least likely to be deterred from engaging in crime due to lengthy prison sentences.<sup>85</sup> Access to quality education and economic opportunity is more effective at decreasing the violent crime rate.<sup>86</sup> Punishing people for being bad or doing bad—retribution—is a more probable explanation for the expansion of the surveillance and incarceration that followed the War on Drugs. The chart below illustrates that increased incarceration and changes in policing strategies played only a minor role in decreasing crime.

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<sup>79</sup> See, e.g., Scott Holmes, *Resisting Arrest and Racism — The Crime of “Disrespect”*, 85 UMKC L. Rev. 625, 627–28 (2017) (discussing how charges of disrespect and resisting arrest are an extension of the War on Drugs and racial control).

<sup>80</sup> *Id.*

<sup>81</sup> CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* 9–13 (2012) (“A growing body of research suggests . . . that beyond a certain point, further increases in incarceration have significantly diminishing returns as a means of making communities safer.”).

<sup>82</sup> *Id.* at 9.

<sup>83</sup> *College Costs: FAQs*, BIG FUTURE, <https://bigfuture.collegeboard.org/pay-for-college/college-costs/college-costs-faqs> [<https://perma.cc/HBU2-ES4F>]. This figure does not include room and board.

<sup>84</sup> OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUSTICE, *WHAT CAUSED THE CRIME DECLINE?* 2 (2015).

<sup>85</sup> See Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 45 (2009) (“If adolescents tend to act impulsively or with little thought, they can be seen as both less deterrable and less culpable.”).

<sup>86</sup> See Shristi Devu, Comment, *Trapped in the Shackles of America’s Criminal Justice System*, 20 SCHOLAR: ST. MARY’S L. REV. RACE & SOC. JUST. 217, 236 (2017).

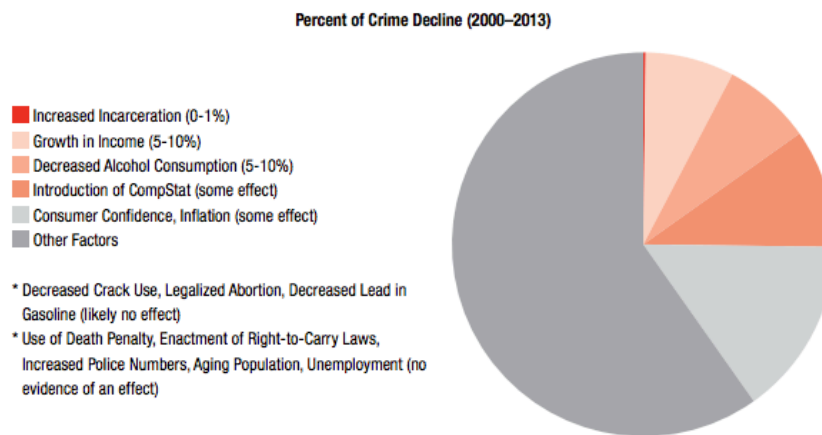


Figure 3. Factors Contributing to the Decrease in Crime<sup>87</sup>

Yet, the focus on assessing blameworthiness and desert has legitimized the use of punishment against the “bad guys.” The increased focus on retribution was presumably a response to a drug epidemic, intended to reduce the harms of the crimes associated with crack cocaine. Drug dealers were deemed worthy of punishment as a matter of morality. However, mass criminalization has exacerbated those harms. It has created an entire caste of citizens who are denied the full rights of citizenship but are expected to meet the full obligations of being a citizen, such as paying taxes and paying child support.<sup>88</sup> It was seemingly driven by a thirst to crack down on the criminal drug dealer and put him in his place.<sup>89</sup> It reflects a turn

<sup>87</sup> See OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE 6 (2015).

<sup>88</sup> See Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349, 354 (2012) (“Interestingly, child support debt has recently emerged as a specific obstacle to re-enfranchisement, as is demonstrated in *Johnson v. Bredesen*, wherein the Sixth Circuit upheld a Tennessee statute that authorizes an exception to re-enfranchisement when petitioners are not current in child support obligations.” (citations omitted)).

<sup>89</sup> See Doug Bandow, *War on Drugs or War on America?*, 3 STAN. L. & POL’Y REV. 242, 252 (1991):

In 1971 President Richard Nixon called drug traffic “public enemy number one.” Around the same time New York, under Governor Nelson Rockefeller, adopted a set of draconian laws, including life imprisonment for possession of a pound of cocaine or heroin, and a minimum of fifteen years for possession of two ounces of any illegal drug. In one poll, Americans said by a margin of three to one that it was more important to “take any step necessary” to stop drug use than to “protect

toward retribution as an end goal of the criminal legal system in and of itself.<sup>90</sup> It always has created unique consequences for women of color.<sup>91</sup> Women with prostitution convictions may lose custody of their children and suffer from the collateral consequences of a criminal legal system focused on assigning blame on those whom society perceives as blameworthy.<sup>92</sup> Retributivism is highly problematic because expanding the offenses that could be treated as criminal only leads to the breakdown of communities and families.<sup>93</sup>

### C. Retribution Promotes a Power Grab and Racial Disparities

While mass incarceration and criminalization were fueled by public anxiety and anger toward drug dealers, it was also motivated by the system actors' own desires to expand their jurisdiction and exercise control over the population.<sup>94</sup> It contributed to the legitimization of the criminal legal system as an institution for addressing societal harms.<sup>95</sup> Punishment itself was deemed an appropriate State action for

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civil liberties.” America’s leaders are happy to oblige. President Bush wants to execute drug “kingpins,” and more than one state legislator has proposed executing those who sell to children.

*Id.* (citations omitted).

<sup>90</sup> For example, the 1988 Republican Platform reflects retributivist ideals in declaring that Republicans “pushed a historic reform of toughened sentencing procedures for federal courts to make the punishment fit the crime” and that Republicans “must never allow the presidency and the Department of Justice to fall into the hands of those who coddle hardened criminals.” *Republican Party Platform of 1988*, AM. PRESIDENCY PROJECT (Aug. 16, 1988), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1988> [<https://perma.cc/8G28-JYUP>]. These statements are premised on the notion that punishment is a worthy cause in and of itself and that characteristics of offenders justify punishment. *See id.*

<sup>91</sup> *See, e.g., Ritchie, supra* note 7, at 369.

<sup>92</sup> *See* Alyssa M. Barnard, “*The Second Chance They Deserve*”: *Vacating Convictions of Sex Trafficking Victims*, 114 COLUM. L. REV. 1463, 1472 (2014) (describing how prostitution-related convictions can be detrimental during custody disputes).

<sup>93</sup> Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 161 (2010) (“There seems to be a growing sense that ‘the revolving door’ in and out of prison results in the breakdown of families, collapse of local economies, and destruction of entire communities.”).

<sup>94</sup> *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1303–04 (2001) (suggesting that “three-strikes-and-you’re-out” policies “seem to be fueled by concerns about retribution . . .”).

<sup>95</sup> Robert J. Cottrol, *Hard Choices and Shifted Burdens: American Crime and American Justice at the End of the Century* (reviewing MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995)), 65 GEO. WASH. L. REV. 506, 507–08 (1997):

This harsher mood has been accompanied by a new public, legislative, and judicial enthusiasm for punishment. Where once, in the not too distant past, revenge, even state sanctioned and administered revenge, was considered a hardly respectable rationale for administering a criminal justice system, since the mid-

coercing desirable behavior.<sup>96</sup> It legitimized the expansive powers of certain actors within the criminal legal system. William Stuntz has discussed how the expansive powers of prosecutors contributed to the passage of unnecessary criminal laws.<sup>97</sup> By expanding the menu of crimes and punishments that prosecutors can select in each case, legislators have anointed prosecutors as quasi-legislators.<sup>98</sup> For any given case, criminal law is not a limit on prosecutors' power, requiring that they merely execute the law.<sup>99</sup> Rather, it is a tool that prosecutors can use to legislate and manipulate by criminalizing actions that are not obviously criminal, relying on overly broad legislation, and manipulating defendants into plea agreements that are not proportional to their factual conduct.<sup>100</sup> Jeannine Bell has discussed the role increased police discretion plays in contributing to mass incarceration.<sup>101</sup> Like prosecutors, the broad legislation and menu of sanctions have emboldened police officers to control and regulate communities of color.<sup>102</sup> Offenses such as disorderly conduct, which require subjective determinations by police officers, can be used to displace elements of the community they deem undesirable.<sup>103</sup> The police and prosecutors held (and continue to hold) nearly unrestrained power to deem

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seventies retribution has come back with a vengeance, enjoying today a greater prominence in public discourse over crime and punishment than at any other time in post-war America.

*Id.* (citations omitted); Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 117 (2000) (noting that, according to retributivists, “[p]unishment could only be justified—and limited—by the moral desert of offenders. Retributivists participated in public debates over criminal justice policy, attacking probation, parole, indeterminate sentencing, rehabilitative programs, and determinist accounts of crime, whether invoked to excuse individuals or to justify ameliorative social programs.” (citations omitted)).

<sup>96</sup> See Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 429 (2005) (“When the state credibly threatens to use coercion through retributive practices, that threat suffices to express the norm that our actions and our interests matter to the state.”).

<sup>97</sup> Stuntz, *supra* note 16, at 534.

<sup>98</sup> *Id.* at 538. (“Likewise, broadening criminal liability makes it easier, across a range of cases, to induce a guilty plea—precisely because the prosecution is so likely to win if the case goes to trial. And more prosecutorial victories at lower cost advances not only prosecutors’ welfare, but legislators’ as well.”).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 537.

<sup>101</sup> See Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 449 (1997) (“While discretion creates flexibility, in environments with few controls, inadequate resources, and indeterminate objectives, how police officers manage conflicting goals is also political.”).

<sup>102</sup> *Id.* at 448.

<sup>103</sup> See Carbado, *supra* note 18, at 1486 (“[A] police officer is more likely to view three black teenagers on a street corner as a sign of disorder than he is to so view three white teenagers on a street corner. The attribution of disorder to African-Americans occurs at the community level as well.” (citation omitted)).

individuals worthy of forgiveness, or not.<sup>104</sup> Law enforcement officers can exercise their discretion to pursue a limited number of cases and often do so to the detriment of communities of color.<sup>105</sup> There is substantial research that shows that implicit racial biases inform how we interact with the world and helps to explain the persistent racial disparities in the criminal legal system.<sup>106</sup> Retributivism facilitates racial disparities by building implicit bias into the system:

Despite their objective to eliminate invidious racial bias, policies such as just deserts and sentencing guidelines have increased racial disparities in the American criminal legal system.

. . . .  
Racial disparities in the criminal legal system have worsened in the past 15 years. African Americans make up larger proportions of people admitted to jails and prisons, and of jail and prison inmates, than ever before. Moreover, those proportions are steadily increasing.<sup>107</sup>

Black and brown people face racial profiling by police, discriminatory prosecutorial charging practices, and harsher sentences by judges, who must all make the subjective determination about whether they are worthy of punishment or forgiveness.<sup>108</sup> By policing black communities more intensely, system actors avoided much of the negative consequences of mass criminalization because much of the harms of mass criminalization were experienced by outgroups.<sup>109</sup> The criminal legal system has demonized black people—black men as predators and drug traffickers, and black women as prostitutes, welfare queens, and baby mamas who abuse entitlement programs.<sup>110</sup>

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<sup>104</sup> Stuntz, *supra* note 16, at 534.

<sup>105</sup> See Bell, *supra* note 101, at 449.

<sup>106</sup> See Ariela Rutbeck-Goldman & L. Song Richardson, *Race and Objective Reasonableness in Use of Force Cases: An Introduction to Some Relevant Social Science*, 8 ALA. C.R. & C.L.L. REV. 145, 149 (2017) (“Social science research over the last few decades suggests that we unconsciously associate Black men with danger, criminality, and violence. This is because ‘violence and criminality have typified the stereotype of Black Americans for well over half a century.’”) (quoting Jenessa Shairo, *Following in the Wake of Anger: When Not Discriminating Is Discriminating*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 1356, 1357 (2009)).

<sup>107</sup> Michael Tonry, *Sentencing Reforms and Racial Disparities*, 78 JUDICATURE 118, 118 (1994).

<sup>108</sup> See generally Roberts, *supra* note 21 (describing the social costs of mass incarceration).

<sup>109</sup> See Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 747 (2011) (describing the rise of the term “juvenile super-predators,” who were predestined for careers as violent criminals, as an excuse for excessively punitive policies).

<sup>110</sup> *Id.*

The tendency to view black women as more blameworthy since the turn to retributivism is illustrated in the case of Cyntoia Denise Brown.<sup>111</sup> Cyntoia Brown was an underage prostitute who had been raped on multiple occasions.<sup>112</sup> She experienced violence at the hands of her pimp and clients, and she had been forced to meet with a new client. After experiencing previous rapes, she shot her new client and was charged with premeditated murder.<sup>113</sup> When the prosecutor was assessing whether Cyntoia was a blameworthy murderer or an underage sex trafficking victim, the prosecutor chose the former.<sup>114</sup> The jury agreed, and she is currently serving a life term in prison.<sup>115</sup> There was no self-defense for Cyntoia Brown. While the terms of her punishment are expressed in racially neutral terms, the reliance on blame and popular perceptions of black women ensured that Cyntoia would be treated like another wrongdoer who was worthy of blame. By contrast, George Zimmerman successfully argued that he was acting in self-defense when he shot an unarmed black teen, Trayvon Martin, in an encounter Zimmerman initiated.<sup>116</sup> The jury determined that he was not worthy of blame because he reasonably acted in self-defense.<sup>117</sup>

While an underage girl forced to work in prostitution is conceivably less “blameworthy” than a middle-aged man seeking an altercation with a teenager, dominant morality about who is blameworthy in the United States suggests otherwise.<sup>118</sup> These two cases illustrate how racial bias can infect judgments about blameworthiness, forgiveness, and desert. Retributivism is a vehicle for legitimizing racial bias by indicating that certain people deserve to be punished, while presenting the veneer of neutrality.<sup>119</sup>

The criminal legal system also manages and sorts individuals, which is consistent with the retributivist aim of assigning blameworthiness.<sup>120</sup> Issa Kohler-Hausmann has provided evidence that complicates how we think about the purposes

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<sup>111</sup> See *State v. Brown*, No. M2007–00427–CCA–R3–CD, 2009 WL 1038275, at \*30 (Tenn. Crim. App. Apr. 20, 2009), *perm. app. denied* (Tenn. Sept. 28, 2009).

<sup>112</sup> *Id.* at \*4.

<sup>113</sup> *Id.* at \*1.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at \*10.

<sup>116</sup> See Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women’s Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099, 1117 (2014).

<sup>117</sup> *Id.*

<sup>118</sup> Compare *State v. Brown*, No. M2007–00427–CCA–R3–CD, 2009 WL 1038275, at \*30 (Tenn. Crim. App. Apr. 20, 2009), *perm. app. denied* (Tenn. Sept. 28, 2009) with Franks, *supra* note 116.

<sup>119</sup> See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 680 (1995) (“Punishing black people for the fruits of racism is wrong if that punishment is premised on the idea that it is the black criminal’s ‘just desserts.’”).

<sup>120</sup> See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1367 (2012).

of punishment.<sup>121</sup> She suggests that the criminal legal system also plays a sorting and managerial role and thus is a vehicle for social control as a larger project that is broader than the criminal legal system itself.<sup>122</sup> Those individuals with multiple contacts with the system, even for minor and misdemeanor charges, demonstrate an added level of blameworthiness that can be used to justify harsh sentences if they face additional charges at a future date. It is not retributivist in the traditional sense in that it assigns guilt without regard for blameworthiness in the particular case.<sup>123</sup> However, it is retributivist on a systemic level by providing data that may serve as justification for future determinations about blameworthiness.

#### *D. Retribution Leads to Systemic Dysfunction*

Several scholars have expressed their concerns about the disfunction mass criminalization creates. Sanford Kadish worried about the expanding role of the federal criminal system and the harms of overcriminalization.<sup>124</sup> William Stuntz discussed extensively the role of expansive prosecutorial discretion in increasing rates of incarceration.<sup>125</sup> Critical race theorists have discussed the racially discriminatory impact of drug crime enforcement, policing, and prosecutorial practices. Angela Harris has argued that there is a need for transformative justice processes to address the harms of mass incarceration.<sup>126</sup> Devon Carbado has discussed how black people's vulnerability to police surveillance and police interactions contribute to their mass incarceration.<sup>127</sup> Monica Bell recently argued that racially biased policing practices contribute to a culture of legal cynicism within communities of color that make them less likely to cooperate with law enforcement officials, whom they view as illegitimate.<sup>128</sup> This body of scholarship highlights that criminal law scholars are concerned about how the criminal system has been operating and expanding.

These scholars share a concern that the criminal legal system is not doing what it is intended to do. In fact, it is expanding to the detriment of society and is entrenched in discriminatory practices that only serve to exacerbate and encourage

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* (“A system that punishes without bothering to check whether a particular defendant actually ‘did it’ is one that does not care much about fault. This is, to say the least, an odd model of criminal justice. It is not retributive, since retributivism keys punishment to individual desert.”).

<sup>124</sup> *See generally* Kadish, *supra* note 16 (arguing that there was evidence of overcriminalization because of the breadth of the criminal law and extensive list of conduct that was criminalized).

<sup>125</sup> *See* Stuntz, *Reply*, *supra* note 19, at 832–34.

<sup>126</sup> *See* Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL’Y 13, 57–59 (2011).

<sup>127</sup> *See* Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 548 (2017).

<sup>128</sup> *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2059 (2017).



lawless behaviors.<sup>129</sup> Mass incarceration and mass criminalization should be viewed as indicators of disfunction within the system if the purpose of criminal law is to improve societal outcomes.<sup>130</sup> Despite the acknowledgment of the problems of the criminal legal system, there have been few attempts to theorize about its purposes and reimagine what the criminal legal system should be doing.<sup>131</sup> If the purpose is to control undesirable communities, then the criminal legal system reflects a well-functioning institution that is controlling black and poor communities and ensuring that individuals within those communities are disqualified from full citizenship once they return from terms of incarceration.<sup>132</sup> However, for scholars who want to ensure that the criminal legal system is not used as a tool for subordinating entire communities, mass incarceration should be viewed as a form of systemic disfunction insofar as it prevents the system from reflecting democratic ideals that protect the entire populace.<sup>133</sup>

The very act of assessing the blameworthiness and morality of vice conduct, without considering the consequences of behaviors, makes these moral judgments susceptible to the premises and biases that exist in a racist or patriarchal society. It relies upon a shared understanding of appropriate social conduct that itself prejudices outsiders.<sup>134</sup> One of the primary critiques of retributivism is its inability

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<sup>129</sup> Cf. Tom R. Tyler, *Can the Police Enhance Their Popular Legitimacy Through Their Conduct?: Using Empirical Research to Inform Law*, 2017 U. ILL. L. REV. 1971, 1980 (2017) (describing how distrust in the police institution can undermine police legitimacy, impacting the public's willingness to comply with the police and prevent escalated interactions).

<sup>130</sup> See *infra* Part III.

<sup>131</sup> See Weisberg, *supra* note 13, at 1203–04.

<sup>132</sup> Cf. Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 681 (2017) (reviewing MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015)) (describing the abolitionist movement as a response to the conception of the criminal legal system as a tool for social control and marginalization).

<sup>133</sup> See, e.g., Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 302–03 (2017) (“In the last decade, scholars, lawyers, government officials, and policymakers have come to recognize that our criminal justice system is seriously dysfunctional.”). There are many symptoms of this dysfunction:

[T]he disproportionate punishment of indigent people of color; the lack of meaningful public defense funding; the continuing identification of wrongful convictions; the detention of defendants who do not have money to satisfy bail conditions; internationally unprecedented, severe sentences, including the mandatory minimums that may result in questionable guilty pleas and often require judges to impose excessively harsh sentences; the “plea mill” system in misdemeanor courts; and the destructive social impact of collateral consequences.

*Id.* (citations omitted).

<sup>134</sup> See Reginald C. Oh, *Mapping A Materialist Latcrit Discourse on Racism*, 52 CLEV. ST. L. REV. 243, 246 (2005) (arguing that “dominant legal narratives that rationalize existing

to provide substantial content to its primary aim of deserved punishment.<sup>135</sup> Does deserved punishment mean “an eye for an eye,” meaning the offender is punished in ways similar to how they harmed? Does it mean retribution to the community affected? Is there a meaningful way to outline the limits of deserved punishment, particularly when dealing with crimes that have no obvious victim? What does it mean to say a sex worker is morally worthy of punishment? If the sex worker’s community is better served by allowing her to continue her work while providing for her children, is it morally acceptable to punish her? Does the perception of blame depend upon the sex worker’s race or socioeconomic status? The proportionality question faces a similar challenge. How is proportionality measured and who assesses what is deserved?

The harms of the retributive approach are evident by the failures of a punishment-driven approach in mass incarceration.<sup>136</sup> And the type of utilitarianism that is reflected in criminal jurisprudence really is a very limited utilitarianism that focuses on deterrence and incapacitation as its primary aims, with rehabilitation falling to a distant third. These aims of punishment are worthy, but in considering the aims of criminalization, utilitarianism should adopt a much broader definition. Distributive consequentialism addresses these limitations by providing a framework for a criminal legal theory that is community-centered and deliberately nonmoralizing.<sup>137</sup>

## II. CREATING A PRESUMPTION AGAINST CRIMINALIZATION: THE CRIMINAL LEGAL SYSTEM AS A STRUCTURAL HARM

Given the negative externalities of mass incarceration and mass criminalization, criminalization in the United States should be viewed suspiciously, and the criminal legal system itself should be treated as relevant a harm for communities that face intersectional forms of discrimination.<sup>138</sup> Intersectionality goes beyond acknowledging that there are multiple systems of oppression; it acknowledges that these systems may intersect with each other and result in

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racial inequality tend to be structured as coherent narratives that distort and obscure the concrete, material realities of racial subordination and inequality”); *see also* Claire Chiamulera, *Race Affects Perceptions About Sentencing and Culpability of Juvenile Offenders*, 31 CHILD. L. PRAC. 125, 125 (2012) (finding that race impacts perceptions of blameworthiness and culpability for juvenile defendants, and the “role of race in perceptions of juveniles’ sentencing and blameworthiness was the same for liberal and more conservative participants.”).

<sup>135</sup> *See* Christopher, *supra* note 60, at 849–50 (“[R]etributivism falls victim to its own withering critique of other theories of punishment, retributivism succumbs to its own ‘Ishmael effect.’ That is, retributivism is incoherent.” (citations omitted)).

<sup>136</sup> Binder & Smith, *supra* note 95, at 117.

<sup>137</sup> *See infra* Part III.

<sup>138</sup> *See id.*

overlapping and reinforcing barriers to opportunity.<sup>139</sup> These overlapping systems result in unique forms of oppression that only impact those in that particular, marginalized group.<sup>140</sup> An intersectional approach includes focusing on the unique challenges that people who sit at the intersections of overlapping systems of oppression, such as black immigrants (who face both racial discrimination and discrimination because of their immigration status); or homeless transgender young people (who face discrimination because of their gender identity, age, and their housing status).<sup>141</sup> For example, in the context of sex work, much of the rationale for punishment has been expressed in terms of protecting the community, including sex workers themselves, from the dangers of commercialized sex and sex trafficking.<sup>142</sup> However, it may be more harmful to allow criminal intervention where the sex worker might face immigration proceedings as a result of any criminal legal intervention because she is also an immigrant.<sup>143</sup> A distributive consequentialist approach would consider this as a relevant harm in assessing whether criminalization is appropriate.

The very intervention of the criminal justice apparatus may be a harm that affects women who sell sex, especially sex workers of color. Punishment will of course create some harm to those who are punished, in the form of incarceration or incapacitation.<sup>144</sup> A distributive consequentialist approach to criminalization is unique in that it argues that this harm is a relevant consideration in assessing whether the criminal legal system is the most appropriate intervention.<sup>145</sup> The history of the criminalization of sexual vices provides some insights into the connection between moral judgments, retribution, and criminalization.

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<sup>139</sup> See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991).

<sup>140</sup> *Id.*

<sup>141</sup> See generally *Ten Tips for Putting Intersectionality into Practice*, OPPORTUNITY AGENDA, <https://opportunityagenda.org/explore/resources-publications/ten-tips-putting-intersectionality-practice> [<https://perma.cc/7B8Q-F6EE>] (outlining how intersectionality can be incorporated into legal practice and advocacy and providing several examples of groups facing intersectional discrimination).

<sup>142</sup> See *infra* Part IV.

<sup>143</sup> See John Christman, *Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves*, 117 PHIL. STUD. 143, 143 (2004) (refining the concept of relational autonomy, which is defined as recognizing the individual as an “agent who is also socially constituted and who possibly defines her basic value commitments in terms of interpersonal relations and mutual dependencies. Relational views of the autonomous person, then, valuably underscore the social embeddedness of selves while not forsaking the basic value commitments of (for the most part, liberal) justice.” (citations omitted)).

<sup>144</sup> Youngjae Lee, *What Is Philosophy of Criminal Law?* 8 CRIM. L. & PHIL. 671, 683 (2014) (reviewing THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW (John Deigh & David Dolinko eds., 2011)).

<sup>145</sup> See *infra* Part III.

*A. The Criminalization of Sexual Vices*

The criminalization of sex work has been increased since the early nineteenth century.<sup>146</sup> However, in other areas of the law, there has been success in decriminalizing conduct that was criminalized to enforce particular moral norms. Interracial marriage,<sup>147</sup> sodomy,<sup>148</sup> the use of birth control,<sup>149</sup> and abortion<sup>150</sup> were all criminalized primarily to enforce societal expectations on differing aspects of sexuality. The criminalization of each of these activities seems almost primitive now.<sup>151</sup> Today, it is taken as a given that individuals should be able to exercise autonomy with what they do in their bedrooms during consensual activities.<sup>152</sup> Yet,

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<sup>146</sup> Prostitution was only criminalized during the late 1800s and early 1900s during the Progressive Era in the United States.

[T]he nineteenth-century campaign to criminalize prostitution was part of a sometimes desperate attempt to enforce norms of marriage, chastity, and propriety on women—to keep women in the private sphere of home and family, to prevent them from supporting themselves independently of men, to encourage them to marry. This was partly an effort to protect women, who were seen as innocent, vulnerable, and pure. But a contradictory set of beliefs and impulses was also at work, portraying women—particularly working-class women, women of color, and immigrant women, but potentially all women—as capable of destroying the social order.

Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L.J. 47, 50 (1995) (emphasis omitted); see also Noah Berlatsky, *The Law's Tougher on Sex Workers Today Than It Was in the 19th Century*, PACIFIC STANDARD (OCT 5, 2015) <https://psmag.com/social-justice/what-is-up-with-that> [<https://perma.cc/JR5W-X4WM>].

<sup>147</sup> See *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

<sup>148</sup> See *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

<sup>149</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

<sup>150</sup> See *Roe v. Wade*, 410 U.S. 113, 116 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>151</sup> See Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 391–93 (2001) (describing the role public opinion has played in the Supreme Court's jurisprudence on morality legislation).

<sup>152</sup> Justice Kennedy wrote the majority opinion in *Lawrence v. Texas* and noted the following:

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

*Lawrence* 539 U.S. at 578; see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015) (discussing the Court's historical views of privacy in the bedroom).

the criminalization of the commercialization of these activities seems so natural, that even the most progressive feminists, who have no problem exposing their bodies for commercial gain in television or movies, are suddenly prudish about the idea that women might extend the commercialization of their bodies into the actual bedrooms not just television and movie screens.<sup>153</sup> The criminalization of other forms of “immoral” sexual behaviors provides insights on the continued criminalization of sex work.

For most of American history, the consensual marriage of members of different races was criminalized in the majority of states.<sup>154</sup> Until the year 2000, states were still removing state constitutional language that explicitly prohibited interracial marriage.<sup>155</sup> This criminalization was intended to advance a racialized moral agenda focused on the preservation of the white race as a superior race and aimed to maintain its purity by criminalizing the intermingling of races.<sup>156</sup> Black people were thought to be less civilized than whites, threatening white racial purity.<sup>157</sup> The threat of black male sexuality was of particular concern.<sup>158</sup> The Scottsboro Boys are a famous example of the criminalization of black men because they were suspected of

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<sup>153</sup> Popular artists have come out against decriminalization of sex work, while ironically portraying characters, which are decidedly sexually liberal and have the choice to frame their own sexualities. There is a profound sense of irony in their moral outrage about the scourge of prostitution. Many of them have been sexualized on screen, played objectified characters, and work in an environment where sexual predation and rape is far from uncommon. Yet, they are able to exercise the autonomy to engage in this work despite the risk while condemning less privileged women from managing similar risks. *See* Letter from Coal. Against Trafficking in Women to Amnesty Int’l Bd. of Dis. (July 17, 2015) <http://catwinternational.org/Content/Images/Article/621/attachment.pdf> [<https://perma.cc/B4N2-24CR>].

<sup>154</sup> *See, e.g.*, ALA. CODE 14:360 (1940) (stating that a person is prohibited from marrying whites if they are a negro or a person with one drop of negro blood); *Pace v. Alabama*, 106 U.S. 583 (1883) (holding that states which bar interracial marriage do not violate the Fourteenth Amendment of the United States Constitution); Cable Act, ch. 411, 42 Stat. 1021 (1922) (repealed 1936) (enacted by Congress to retroactively strip the citizenship of any United States citizen who married an alien ineligible for citizenship); Irving G. Tragen, *Statutory Prohibitions against Interracial Marriage*, 32 CAL. L. REV. 269 (1944) (discussing California’s history of anti-miscegenation statutes). *But see* *Loving v. Virginia*, 388 U.S. 1 (1967) (a landmark civil rights case in which the Supreme Court struck down all state laws banning interracial marriage in the United States). Most states in the United States prohibited interracial marriages at some point, and this “historical prohibition of interracial relationships exemplifies the state’s regulation of intimate life. Anti-miscegenation laws prohibiting interracial sex and marriage predate the Declaration of Independence by more than a century. At one time or other 41 of the 50 states have enacted such legislation . . . .” Debra Thompson, *Racial Ideas and Gendered Intimacies: The Regulation of Interracial Relationships in North America*, 18 SOC. & LEGAL STUD. 353, 354 (2009).

<sup>155</sup> Thompson, *supra* note 154, at 368 n.4.

<sup>156</sup> *Id.* at 361.

<sup>157</sup> *Id.* at 362–63.

<sup>158</sup> *Id.*

morally corrupting and raping white women.<sup>159</sup> In many respects, the policing of the sexual relationships between white women and black men reflects the threat that black masculinity posed to white masculinity.<sup>160</sup>

The racialized sexual agenda served a rational purpose and reflected a particular brand of morality that aimed to protect society from social evils.<sup>161</sup> Nevertheless, the Supreme Court held that it is unconstitutional for states to outlaw interracial marriages and relationships.<sup>162</sup> The Court stated, “[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations” and rejected the lower court’s assertion that this law was necessary to further “the State’s legitimate purposes . . . ‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride.’”<sup>163</sup>

Likewise, the criminalization of sodomy was a tool for suppressing homosexuality which presumably served the expressive function of indicating society’s disdain toward same-sex relationships.<sup>164</sup> In *Lawrence v. Texas*,<sup>165</sup> the Supreme Court held that there is a substantive due process right that prohibits the

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[T]he “trial” of the Scottsboro boys illustrated that gendered racism had tarnished the racial landscape of the South. In the Scottsboro case, nine black boys faced accusations of a “most foul and revolting crime” — the raping of “two defenseless white girls.” The legal proceedings, however, constituted little more than a “legal lynching.”

Marques P. Richeson, *Sex, Drugs, and . . . Race-to-Castrate: A Black Box Warning of Chemical Castration’s Potential Racial Side Effects*, 25 HARV. BLACKLETTER L.J. 95, 111 (2009) (citations omitted); see also Kevin R. Johnson, *Taking the “Garbage” Out in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling in the “War on Drugs,”* 2007 WIS. L. REV. 283, 302–04 (2007) (describing the Tulia case in Texas, where 20% of the black population was rounded up following a sting by a racist sheriff and many of the targeted black people had been in interracial relationships with white people, connecting to criminalization to a racialized sexual morality).

<sup>160</sup>

In the immediate postwar years, and for some time thereafter, southern white men as a body underwent a crisis in masculinity that is essential to comprehending the seemingly irrepressible violence of Reconstruction. This crisis, marked by a profound sense of unease around issues of status and identity, was rooted as much in the peculiar conditions of southern history as it was in the deeply fraught nature of the military conflict that they did so much to engender.

Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 813 (2002).

<sup>161</sup> *Id.*

<sup>162</sup> *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

<sup>163</sup> *Id.* at 7, 12.

<sup>164</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986).

<sup>165</sup> 539 U.S. 558 (2003).

criminalization of sodomy.<sup>166</sup> The Court recognized the morality claims that Texas argued supported this criminalization:

For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.<sup>167</sup>

The Court's holding rendered state laws that criminalized sodomy unconstitutional.<sup>168</sup>

Despite the changes in legal norms regarding sexually "immoral" conduct, prostitution remains criminalized in all fifty states in the United States and is legal only in a few counties in Nevada.<sup>169</sup> While the criminalization of prostitution precedes the rise of retributivism, retributivism provides a basis for assigning blame on a moral basis and legitimizes the continued criminalization of prostitution.

### *B. Retributivism and Vice Crimes*

Retributivism provides a theoretical tool for assigning blame and using popular morality as a sword against sexual deviants. Who "deserves" to be punished more than those who corrupt our morality? As such, it is particularly problematic when considering the criminalization of vice crimes. These crimes do not have victims in the traditional sense.<sup>170</sup> For example, when a habitual marijuana user purchases marijuana and consumes it in her private residence, the only person offended by the conduct is the user herself, if you believe the consumption of marijuana is an

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<sup>166</sup> *Id.* at 578.

<sup>167</sup> *Id.* at 571.

<sup>168</sup> *Id.* Despite these cases, by 2005, twenty-six states criminalized adultery, and it remains a felony in many of those states. See Tucker Culbertson, *Arguments Against Marriage Equality: Commemorating & Reconstructing Loving v. Virginia*, 85 WASH. U. L. REV. 575, 601 n.88 (2007).

<sup>169</sup> See Daria Snadowsky, *The Best Little Whorehouse Is Not in Texas: How Nevada's Prostitution Laws Serve Public Policy, and How Those Laws May Be Improved*, 6 NEV. L.J. 217 (2005) ("[I]n 1959 the United Nations itself declared that prostitution should not be considered a criminal offense. Yet it remains a troublesome and divisive legal issue in the United States, where prostitution is punishable everywhere except for a few counties in Nevada." (citations omitted)).

<sup>170</sup> Michal Buchhandler-Raphael, *Drugs, Dignity, and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 291, 291 (2013) ("One area where overcriminalization is most notable concerns victimless crimes, namely, those where individual adults engage in conduct that inflicts only harm to self or to other consenting adults, but not on third parties. These victimless crimes include prostitution, pornography, sadomasochism, gambling, and most notably, drug crimes.").

inherent type of harm.<sup>171</sup> But she has not taken another person's property as in theft, nor has she violated another person's body as with assault. She has only committed the act against herself. There is considerable literature about the victimless crime and debate about whether these crimes are in fact so victimless.<sup>172</sup>

The problem with adopting a retributivist approach, particularly with conduct that has historically been viewed as a vice, is that it privileges and re-entrenches white supremacy and patriarchy. It does this because it presumes there is a standard measure by which all conduct that does not directly harm another individual can objectively be evaluated and considered. There is a "baseline" for morality that is informed by culture and societal expectations.<sup>173</sup> This moral code is often the same code that has been used to support white male social dominance, rationalize slavery, and often presupposes black criminality.<sup>174</sup> This morality assumes that there are universal truths, which are in fact merely the reflection of a complex grammar used to protect the interests of the powerful.<sup>175</sup> It presupposes that there is an objective baseline upon which moral conduct, particularly moral conduct that has no direct physical, psychic, or financial harm to others, can be regulated according to abstract understandings of morality.<sup>176</sup> This baseline inevitably reflects the privileges and

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<sup>171</sup> *But see* Harcourt, *supra* note 50, at 172 ("The early progressive argument that the use of marijuana was a 'victimless crime' was countered in the late 1970s and 1980s by a campaign against drug use that emphasized the *harms to society*, and justified an all-out war on drugs.").

<sup>172</sup> For example, some scholars argue that recreational drug use should be prohibited because it could lead to consumption of other more harmful drugs because marijuana is a gateway drug. *See, e.g.*, Murat C. Mungan, *Gateway Crimes*, 68 ALA. L. REV. 671, 699–700 (2017) ("[A]s one scholar notes, 'the original proposer of the gateway hypothesis, Denise Kandel, concludes that the existing evidence for the gateway effect is at best mixed, because of the lack of a clear neurological mechanism.'" (citations omitted)). Other scholars might argue that criminalization of marijuana serves an expressive purpose and signals to society that it is morally reprehensible to engage in the criminalized conduct. Thus, criminalizing marijuana would signify to others, including young children, that such conduct is socially undesirable. Criminalization of the vice conduct is also a signal of what society considers to be immoral.

<sup>173</sup> For example, when the Supreme Court initially held that laws that criminalized sodomy were constitutional in *Bowers*, some Justices were concerned with preserving the baseline morals of the community. *See Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (reasoning that millennia of moral teachings against homosexuality indicates that it is not a fundamental right).

<sup>174</sup> *See* S.I. Strong, *Romer v. Evans and the Permissibility of Morality Legislation*, 39 ARIZ. L. REV. 1259, 1288 (1997) ("[H]istory suggests that choosing one moral code over another based only on majoritarian beliefs is not perhaps the wisest course of action. For example, popular morality adamantly resisted women's suffrage, miscegenation, and racial integration . . .").

<sup>175</sup> *Id.*

<sup>176</sup> *See* Don Welch, *The State as a Purveyor of Morality*, 56 GEO. WASH. L. REV. 540, 546 (1988) ("Implicit in the statement that laws are not necessarily moral is the view that there is some kind of objective morality by which laws could theoretically be judged to be moral or immoral.").



assumptions of those individuals making these moral assessments.<sup>177</sup> It provides the veneer of ethical objectivity when it is in fact a reflection of all the flaws of the structures that allow for moral judgments.

The backdrop to any evaluation of whether conduct is moral or immoral is precipitated by these discriminatory systems that are the very building blocks upon which understandings of morals are interpreted.<sup>178</sup> For example, it is difficult to state objectively that sex work in the abstract is immoral unless you accept popularly accepted values about sex and sexuality. Popular views about sex are intertwined with assumptions about monogamy, marriage, and sexuality that are connected to the Judeo-Christian tradition.<sup>179</sup> It is a vice if you believe sex is something not to be commercialized by the person who owns the body commercializing it. It presumes that there is something universally unique about sex. Sex work becomes inherently

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<sup>177</sup> Culture is constructed relative to the society wherein one lives. *See* Alison Dundes Renteln, *Corporate Punishment and the Cultural Defense*, 73 L. & CONTEMP. PROBS. 253, 256 (2010) (“Cultural relativism is a theory in anthropology that calls attention to the moral code each society possesses. According to relativism, morality is socially constructed within a given cultural community.”).

<sup>178</sup> *Id.*

<sup>179</sup> *See* Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 200–01 (1996) (discussing the Judeo-Christian emphasis on abstinence and sex for procreation). Valdes states:

Judeo-Christian leaders, like their Greco-Roman counterparts, continued this patriarchal construction and regulation of sex, gender, and sexuality as key tools for cultural organization, but they introduced a new overriding objective: abstinence. This objective, reflective of Christianity’s socio-sexual asceticism, recognized only one potential exception: procreational sexual activity in the context of marriage. Over time, this emphasis on sexual renunciation, and its toleration only of marital procreational sexuality, reversed the Greek ideal of non-procreational sexual intimacy: Under Christian sex/gender ideology, non-procreational sensuality was no longer sublime, it was “sin.”

*Id.* (citations omitted).

different from boxing,<sup>180</sup> coal mining,<sup>181</sup> domestic work, or other forms of dangerous or at times demeaning labor, only if you accept that sexual labor is different.<sup>182</sup> Declaring that “sex is different” is essentialist and informed by our culture, but it is not self-evident as part of the nature of things. It is a socially constructed view about the uniqueness of sex. There are other ways to view sex.<sup>183</sup> Margaret Mead famously argued that gender and sexuality are socially constructed, not biologically determined.<sup>184</sup> She observed other expressions of female sexuality in other cultures.<sup>185</sup> While our cultural values may seem self-evident, they are conditioned upon and maintain the power relations within a society.<sup>186</sup> Retributivism presumes universal truths and knowledge, when in fact such moral knowledge is often constructed within the very systems that oppress marginalized communities.<sup>187</sup> We only understand the role of sex and other vices from the perspective of morality, in the abstract, through our own subordination and marginalization within the system.

Thus, critical theorists should be skeptical of attempts to rely upon “morality” as the basis for criminalizing “vice” in the abstract. Retributivism may also be used as a tool to impose majoritarian values and morals upon minority groups.<sup>188</sup> It can be an instrument for separating the bad from the good, sending a message that alternative morals or understandings of appropriate conduct should be punished.<sup>189</sup>

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<sup>180</sup> See Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 711 (1998). Nussbaum states:

There is a stronger case for paternalistic regulation of boxing than of prostitution, and externalities (the glorification of violence as example to the young) make boxing at least as morally problematic, probably more so. And yet I would not defend the criminalization of boxing, and I doubt that very many Americans would either. Sensible regulation of both prostitution and boxing, by contrast, seems reasonable and compatible with personal liberty.

*Id.*

<sup>181</sup> See Adrienne D. David, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CALIF. L. REV. 1195, 1226 n.112 (2015) (“Coal mining and railroads topped the list for workplace accidents, followed by logging, bricklaying, and masonry. These industrial accidents devastated not only workers, but also their families.”).

<sup>182</sup> See James S. Fishkin, *Defending Equality: A View From the Cave*, 82 MICH. L. REV. 755, 756 (1984) (reviewing MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND QUALITY* (1983)) (discussing how prostitution “perverts” shared understandings about money and sex).

<sup>183</sup> See generally MARGARET MEAD, *SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES* (1963) (discussing that the author discovered more evidence of temperamental differences than differences between the sexes).

<sup>184</sup> *Id.* at ix–xi.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Strong, *supra* note 174, at 1288.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

This is the case with sex workers who may be portrayed as human trafficking victims, or still perceived as an object that must be cajoled out of the sex work profession in order to achieve full womanhood and liberty.<sup>190</sup> Retributivism is also premised on the notion of goodness existing as a separate object from the individuals who interpret it. While there may be some grounding for deontological arguments pertaining to other types of conduct, deontological arguments are particularly unpersuasive when you consider “vice” conduct.<sup>191</sup> Criminalizing a victim for being blameworthy because that victim has harmed themselves is troubling.

### C. *Creating a Presumption Against Criminalization*

When the criminal law is being used to protect “vulnerable” groups, we should be especially skeptical of it.<sup>192</sup> As Bentham recognized, “all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”<sup>193</sup> In examining whether criminalization is justified, it is important to adopt an approach that recognizes how different segments of the community experience and interpret harm.<sup>194</sup> In light of the harms of mass incarceration and penal expansion we see in the United States, resorting to the criminal law to regulate the “harms” of sex work only contributes to the current state of mass incarceration.<sup>195</sup>

As William Stuntz recognized, the criminal legal system has expanded and has become “a one-way ratchet that makes an ever larger slice of the population felons, and that turns real felons into felons several times over[.]”<sup>196</sup> This expansion has largely come to the detriment of communities of color.<sup>197</sup> The criminal justice apparatus has inflicted violence upon marginalized communities worldwide, from

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<sup>190</sup> See, e.g., Mary Graw Leary, *Dear John, You Are a Human Trafficker*, 68 S.C. L. REV. 415, 416 (2017) (misapplying empirical data to make universal claims about the victim status of women engaged in prostitution).

<sup>191</sup> See Ristroph, *supra* note 3, at 728 (“[A]t their worst, the claims of limiting retributivism can display all the vices of punishment theory: unsupportable and unverifiable claims to punitive power, divorced from a broader political theory and indifferent to the real-world implications of its claims.”).

<sup>192</sup> See generally Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327 (2017) [hereinafter Roberts, *Dismissals as Justice*] (arguing that criminal courts should use dismissals for justice to address inequities in the criminal legal system).

<sup>193</sup> JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES AND MORALS OF LEGISLATION 170 (Oxford, Clarendon Press 1879) (1789).

<sup>194</sup> See Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 10 (2010) (“[A] distributive theory of criminal law exposes that society’s distributionist sentiments have not evaporated in the face of seemingly neutral arguments regarding rights, economics, and limited government. Rather, society retains alternating instincts about individual rights, efficiency, and distributive fairness.”).

<sup>195</sup> See *infra* Sections II & IV.

<sup>196</sup> Stuntz, *supra* note 16, at 509.

<sup>197</sup> See generally Roberts, *supra* note 21 (describing the disproportionate impact the era of mass imprisonment in America has had on racial minorities).

coercive interrogations during apartheid<sup>198</sup> and police soliciting bribes during traffic stops in Johannesburg,<sup>199</sup> to police shooting unarmed civilians in Baton Rouge<sup>200</sup> and Ferguson<sup>201</sup> and incarceration for the inability to pay fines or fees.<sup>202</sup> The criminal legal system has subordinated and controlled people of color from Johannesburg to Los Angeles.<sup>203</sup> Attempts to use it to vindicate people of color from social “harm,” even the presumed harms of patriarchy, must be viewed suspiciously.<sup>204</sup>

Moreover, there remains a legacy of white supremacy and patriarchy in the United States.<sup>205</sup> Sex workers of color who interact with the criminal legal system must confront discrimination, which expresses itself in manners unique to sex workers of color.<sup>206</sup> “For example, officers often perceive sex workers of color and those who identify as transgender as ‘highly sexualized and sexually available,’ and thus target them for detention and arrest.”<sup>207</sup> Officers also often request sexual favors

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<sup>198</sup> For example, during a public TRC hearing, Zanele Zingxindo testified that she experienced sexual torture during a police interrogation. Ayumi Kusafuka, *Truth Commissions and Gender: A South African Case Study*, 9 AFR. J. OF CONFLICT RESOL. 45, 57 (2010).

<sup>199</sup> ANDREW FAULL, INST. FOR SEC. STUDIES, CITY BLUES: CORRUPTION AND CORRUPTION MANAGEMENT IN SOUTH AFRICA’S METROPOLITAN POLICE DEPARTMENTS 2 (2008).

<sup>200</sup> Richard Fausset & Alan Blinder, *Baton Rouge Officers Will Not Be Charged in Alton Sterling’s Killing*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/us/alton-sterling-baton-rouge.html> [<https://perma.cc/PKL2-6C8Y>].

<sup>201</sup> Larry Buchanan et al., *What Happened in Ferguson*, N.Y. TIMES, <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> [<https://perma.cc/5MD6-AZA5>] (last updated Aug. 10, 2015).

<sup>202</sup> U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 56 (2015).

<sup>203</sup> See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1186–87 (2015) (“As recently as the 1990s, some Los Angeles police officers referred to cases involving young African American men as ‘N.H.I.’ cases, standing for ‘no humans involved.’” (citations omitted)).

<sup>204</sup> See Roberts, *supra* note 21, at 1272 (describing the many social harms that have stemmed from mass incarceration).

<sup>205</sup> See Francisco Valdes & Sumi Cho, *Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberalism*, 43 CONN. L. REV. 1513, 1547–48 (2011) (“[T]he legacies of *de jure* white supremacy continue to litter the landscape of the United States . . .”). “[C]olorblindness and post-racialism can only mean, in practice, a self-deluding commitment to *not* seeing racially stratified social realities. And, of course, this blindness to racialized realities leaves the neocolonial legacies of racialized injustice in place.” *Id.*

<sup>206</sup> See Krishna de la Cruz, Comment, *Exploring the Conflicts Within Carceral Feminism: A Call to Revocalize the Women Who Continue to Suffer*, 19 SCHOLAR: ST. MARY’S L. REV. RACE & SOC. JUST. 79, 90 (2017).

<sup>207</sup> *Id.*; see also Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1426–27 (2012) (“Intersectionality also points to the relationships between established

from them to avoid arrest.<sup>208</sup> The issue of whether prostitution should be criminalized should consider this fact.<sup>209</sup> A criminal legal theory that is intersectional in approach should address how racial, gender, and LGBTQ and other forms of discrimination exacerbate biases within the criminal legal system. Kimberlé Crenshaw has discussed the need for a more intersectional approach in criminal law:

[S]ome of the dominant frames pertaining to mass incarceration reveal little about how women are situated as objects of social control and are not analytically attentive to the dynamics that contribute to this particular population's vulnerability to incarceration. For example, although race has become a central feature in the growing understanding of mass incarceration as a contemporary manifestation of racial ordering, women are rarely if ever a focal point of this frame.<sup>210</sup>

Sex workers of color are often profiled and labeled as less worthy.<sup>211</sup> A criminal legal theory motivated by assessing "blameworthiness" will inevitably prejudice them and continue the disparities they experience within the criminal legal system.<sup>212</sup> Consequently, an intersectional approach to questions of criminalization and punishment requires placing suspicion of the criminal legal system to the forefront.<sup>213</sup> This approach begins by asking how we can *reduce* interactions with the criminal legal system to lessen the harms it inflicts upon these communities.<sup>214</sup> It is a different departure point in that it is not premised on the notion that the

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hierarchies that structure the relative vulnerability of subjects to the public and private exercises of social power.").

<sup>208</sup> de la Cruz, *supra* note 206, at 90.

<sup>209</sup> See Deborah M. Weissman, *Rethinking a New Domestic Violence Pedagogy*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 635, 646 (2015) ("Women, especially transgender women and sex workers are frequent targets of stop and frisk practices, and often suffer sexual and physical assault by police deploying these tactics.").

<sup>210</sup> Crenshaw, *supra* note 207, at 1422.

<sup>211</sup> See de la Cruz, *supra* note 206, at 90.

<sup>212</sup> See Jonathan D. Glater, *Race Gap: Crime vs. Punishment*, N.Y. TIMES (Oct. 7, 2007), <https://www.nytimes.com/2007/10/07/weekinreview/07glater.html> [<https://perma.cc/MKH7-VL3Y>].

<sup>213</sup> See *infra* Part IV.

<sup>214</sup> Crenshaw, *supra* note 139, at 1246.

Where systems of race, gender, and class domination converge, as they do in the experiences of battered women of color, intervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles.

*Id.*

criminal legal system is legitimate.<sup>215</sup> Rather, the criminal legal system is viewed as likely illegitimate with a negative influence that must be minimized and mitigated.<sup>216</sup> Accordingly, punishment and criminalization are tools that should be used rarely, and cautiously.<sup>217</sup> The placement of women who have been convicted of prostitution on sex registries is only one example of the harms of the criminal justice apparatus.<sup>218</sup> Accordingly, the primary focus in an intersectional approach to criminal legal theory is preventing, not justifying, interaction with the criminal legal system.<sup>219</sup>

### III. DISTRIBUTIVE CONSEQUENTIALISM

We need a new approach to criminal law theory ready to address the negative externalities of mass criminalization and mass incarceration.<sup>220</sup> As discussed in the previous section, mass incarceration is an indicator of systemic malfunction. Lawyers—including prosecutors, judges, and defense attorneys—are the primary guardians and architects of the criminal legal system, and thus criminal legal theory should be concerned with addressing this malfunction.<sup>221</sup> Distributive consequentialism is a theory about criminalization that is rooted in the notion that the actual consequences of conduct should be carefully evaluated in determining whether that conduct should be criminalized.<sup>222</sup> It is a “grounded”<sup>223</sup> criminal legal

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<sup>215</sup> *But see* Walter Benjamin, *The Critique of Violence*, in REFLECTIONS 277, 284 (1978) (discussing how violence is a critical component of how law-making occurs and the very goal of the law is to exercise domination and exact violence to preserve itself).

<sup>216</sup> *Cf.* Crenshaw, *supra* note 207, at 1471 (discussing the under-protection and over-policing of women of color who experience intersectional forms of discrimination).

<sup>217</sup> *See* discussion *supra* Part II.

<sup>218</sup> *See, e.g.,* Susan Dewey & Tonia P. St. Germain, *Sex Workers/Sex Offenders: Exclusionary Criminal Justice Practices in New Orleans*, 10 FEMINIST CRIMINOLOGY 211, 211 (2015) (discussing how individuals convicted of prostitution were forced to register as sex offenders in Louisiana up until 2012).

<sup>219</sup> Pending decriminalization of appropriate crimes, there are other remedies available for minimizing the impact of the criminal legal system. *See, e.g.,* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679–80 (1995) (arguing that jury nullification is a tool for reducing the harms of the criminal system); Roberts, *Dismissals as Justice*, *supra* note 192, at 329–32 (arguing that criminal courts should use dismissals to prevent injustices in the criminal legal system).

<sup>220</sup> *See* Weisberg, *supra* note 13, at 1203–04.

<sup>221</sup> GOTTSCHALK, *supra* note 20, at 98.

<sup>222</sup> This approach has been described as a distributional approach to utilitarianism, which is concerned with how “happiness” is distributed. *See* Gruber, *supra* note 194, at 10.

<sup>223</sup>

A grounded theory is one that is inductively derived from the study of the phenomenon it represents. That is, it is discovered, developed, and provisionally verified through systematic data collection and analysis of data pertaining to that phenomenon. Therefore, data collection, analysis, and theory stand in reciprocal relationship with each other. One does not begin with a theory, then prove it.

theory for considering whether criminalization is appropriate. It is a consequentialist, or utilitarian, approach because it concerned with the actual outcomes of the conduct.<sup>224</sup> Unlike retributivist approaches, it is not concerned with blameworthiness or morality in the abstract. Rather, it is a decidedly empirical approach to criminalization because there is such a focus on what works.<sup>225</sup>

The distributive consequentialist framework allows for a careful consideration of all the harms associated with the conduct, and a determination of what will be best for society. The purpose is enhancing overall happiness. It disavows itself from judgments about what is moral and immoral and is instead concerned with outcomes. In this way, it is an empirical analysis that considers facts, data, outcomes, and can sometimes be quantified. This is not to say that data cannot be easily manipulated, nor that data does not also embed and reflect structural biases. Rather, some data on the outcomes of the conduct will allow us to be driven by the results of criminalization not the moral judgments of a few privileged souls about who is worthy of punishment.

#### *A. Examining the Harms of Criminalization*

Distributive consequentialism is concerned with the negative externalities of criminalization itself.<sup>226</sup> Scholars and lawmakers should consider the actual harms of the criminal legal system when evaluating whether criminalization is appropriate. Joel Feinberg argued that criminalization is always harmful to the offender and thus the harms of criminalization need not be factored in when considering the appropriateness of punishment.<sup>227</sup> However, the harms of the criminal legal system might work to undermine the very goals of the system. For example, if criminalization will make a community less safe and drive the community into poverty when the goal of the criminal legal system is to deter crime, then it would be foolish not to consider the harms that the system might inflict upon that community.

The harms of criminalization do not just fall on the person who is accused of committing a crime. The harms of criminalization fall on the entire community

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Rather, one begins with an area of study and what is relevant to that area is allowed to emerge.

ANSELM STRAUSS & JULIET CORBIN, *BASICS OF QUALITATIVE RESEARCH: GROUNDED THEORY PROCEDURES AND TECHNIQUES* 23 (1990).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 23–25. It is worth noting that blind commitment to empiricism and data is also problematic. Knowledge is always constructed within a particular context, and the limitations of a particular research study or methodology should always be made clear.

<sup>226</sup> See *supra* notes 222–225 and accompanying text.

<sup>227</sup> See, e.g., FEINBERG, *supra* note 38, at 75–76.

where that individual resides.<sup>228</sup> Law enforcement agencies are increasingly adopting predictive models to aid in crime fighting.<sup>229</sup> Predictive models use algorithms to predict future crime patterns and may designate particular areas as “hot spots” that are susceptible to crime and even calculate an individual’s likelihood to commit crime.<sup>230</sup> This trend toward predictive law enforcement is problematic when coupled with an expansive list of conduct that can reasonably be considered criminal.<sup>231</sup> If more conduct is criminalized, then the models may be more expansive in targeting particular communities, even where the offenses are not very serious.<sup>232</sup> This becomes problematic because the community where the suspected offenses are occurring will be targeted along with the individuals officers anticipate will engage in the future crime.<sup>233</sup> Thus, the harms of criminalization are not narrowly confined to the individual who may face punishment. The entire community wherein the individual resides experiences the harm. After reviewing data that reveals that a minor crime is likely to occur in one community, the local police may decide to increase patrols and visibility in that community.<sup>234</sup> In some areas, the increased police presence may be welcomed.<sup>235</sup> In others, it may be proof to most of the residents that they are viewed as potential suspects by the police, who constantly surveil them.<sup>236</sup>

Furthermore, many police departments have adopted the broken windows policing strategy, which presumes that police can deter violent crime by targeting individuals for less serious public order offenses.<sup>237</sup> George L. Kelling and James Q. Wilson popularized the controversial strategy known as “broken windows policing” in a 1982 piece in the *Atlantic Monthly*, where they theorized that the policing of “public disorders,” such as loitering and nuisance offenses, reduces the incidence of

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<sup>228</sup> See Woodrow Hartzog, *The Inadequate, Invaluable Fair Information Practices*, 76 MD. L. REV. 952, 971 (2017) (discussing how the use of historical data can lead to over policing of marginalized communities).

<sup>229</sup> See Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV. 35, 42–43 (2014).

<sup>230</sup> See *id.* at 44–46.

<sup>231</sup> See *id.* at 42–43.

<sup>232</sup> See *id.*

<sup>233</sup> See *id.*

<sup>234</sup> See *id.* at 42–43 (describing how “predictive policing permits the police to harness thousands of data points to forecast where crime is likely to happen. The most basic models rely on past crimes, but data sources can include factors as variable as payday schedules, seasonal variation, liquor store locations, and potential escape routes.”).

<sup>235</sup> But see Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 501 (2000) (acknowledging that even though “some citizens were law-abiding and welcomed police presence, the broad reach of stop and frisk policing risked placing many law-abiders under suspicion.”).

<sup>236</sup> See Bell, *supra* note 128, at 2058–59.

<sup>237</sup> George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/Y25V-T62H>].



serious and violent crimes.<sup>238</sup> Broken windows policing approaches range from highly aggressive order maintenance strategies, including misdemeanor arrests and stop-question-frisks,<sup>239</sup> to problem-oriented and community-coordination strategies. This style of policing has been widely adopted although the data on its efficacy is mixed. The entire community experiences the results of this form of profiling, which brings additional police intrusion into their daily lives.<sup>240</sup> Criminalization of additional offenses impacts this community directly because the more conduct police target, the more excuses they have to interfere with the daily lives of these community members.<sup>241</sup> While the originators of this strategy claim to have proven its effectiveness, the social science research on its effectiveness is mixed at best.<sup>242</sup> In fact, the National Research Council was unable to conclude that it is an effective strategy for reducing crime.<sup>243</sup>

### B. Factors in Analysis

When conducting a distributive consequentialism analysis, there should be an explicit recognition of the harms that criminalization aims to address: (1) What is the harm<sup>244</sup> that occurs from the conduct in question; (2) who is most affected by the harm; and (3) what harm would result from leaving the conduct decriminalized? These are empirical questions that should have clear answers prior to calling for criminalization. To be fair, these questions are often implicitly addressed in public debates and in legislative sessions, but they are not always made explicit. Clearly stating the alleged harm and engaging in a careful evaluation of criminalization should happen before conduct is criminalized. A legitimate harm should amount to more than regulating the morality of society.<sup>245</sup> It should be a clear injury that can be traced to the conduct in question.

The second set of questions should turn to the harms associated with criminalization of the particular conduct in question: (1) What results are likely to

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<sup>238</sup> *Id.*

<sup>239</sup> N.Y.C. DEP'T OF INVESTIGATION, OFFICE OF INSPECTOR GEN. FOR THE NYPD, AN ANALYSIS OF QUALITY-OF-LIFE SUMMONSES, QUALITY-OF-LIFE MISDEMEANOR ARRESTS, AND FELONY CRIME IN NEW YORK CITY, 2010–2015, at 2 (2016).

<sup>240</sup> See Fagan & Davies, *supra* note 235, at 501.

<sup>241</sup> See Carolyn Calhoun, Note, *Bullseye on Their Back: Police Profiling and Abuse of Trans and Gender Non-Conforming Individuals and Solutions Beyond the Department of Justice Guidelines*, 8 ALA. C.R. & C.L. L. REV. 127, 135 (2017) (“[S]tatistics show that local law enforcement nonetheless profiles trans women and others perceived to not conform to gender stereotypes because of the stereotypical belief that they participate in sex work.”).

<sup>242</sup> Anthony A. Braga et al., *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-analysis*, 52 J. RES. CRIME & DELINQ. 567, 568 (2015).

<sup>243</sup> *Id.*

<sup>244</sup> Harm must require “conventional causation with provable harm tied directly to the practice as a whole.” Jonathan Turley, *The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions*, 64 EMORY L.J. 1905, 1938 n.138 (2015).

<sup>245</sup> *Id.*

occur if the conduct is criminalized; (2) will criminalization address the harm we seek to address; (3) what are the likely collateral consequences of criminalizing this conduct; (4) who will experience these consequences; (5) are the harms of criminalization primarily experienced by the offender; (6) are other community members likely bear the consequences of criminalization; (7) is it appropriate for the state to criminalize this conduct; and (8) are there are noncriminal options for addressing the behavior available?

This analysis allows for consideration of the various outcomes that may result from criminalization. It does not presume that criminalization is the best path for addressing undesirable, or even harmful, conduct. It is consequentialist, in that it is concerned with the outcome of the conduct and deliberately utilitarian in its focus on community effects and outcomes.<sup>246</sup> It is also empirical by expecting that we apply what we already know about criminalization into the analysis about whether conduct should be criminalized. It provides the foundation for a criminal legal theory rooted in the experience of communities and deliberately concerned with how marginalized communities experience criminalization. The experience of these communities should be a factor in considering whether the harms of criminalization outweigh the harms of the conduct itself.<sup>247</sup> For example, community surveys, ethnographic research, and public opinion polling can all serve as relevant evidence in assessing whether the conduct should be or remain criminalized.

The third step in a distributive consequentialist model is evaluating how the harms of the conduct and how the harms of criminalization are distributed throughout society, focusing particularly on the community most directly impacted by the conduct and criminalization. This approach would eliminate absurd outcomes that may result from a purely consequentialist approach that is solely concerned with wealth maximization with little concern for how that wealth is distributed.<sup>248</sup> A distributive analysis ensures that the harms of either the conduct or the criminalization are not disproportionately borne by a small segment of the community.<sup>249</sup>

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<sup>246</sup> See Eldar Haber, *The Meaning of Life in Criminal Law*, 68 RUTGERS U. L. REV. 763, 784–85 (2016) (Explaining that under consequentialist theory, “criminal liability and punishment are justified when they are the most effective method to deter future crime”).

<sup>247</sup> *Kuban v. McGimsey*, 605 P.2d 623, 626 (Nev. 1980) (“It is proper that the community most affected, either beneficially or adversely, have control over the area sought to be regulated.”).

<sup>248</sup> See Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 206 (2003) (“Part of the problem is the use of dubious arguments by punishment theorists and critics, employing surreal hypotheticals that have little resonance in perceived reality or hurling criticisms at particular theories that could easily apply to every approach to criminal sanctioning.”).

<sup>249</sup> See Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3213 (2015) (“Distributional analysis is . . . meticulous and deliberate contemplation of the many interests affected by the existing criminal law regime and evidence-informed predictions about how law reform might redistribute harms and benefits, not just imminently but over time.”).

Finally, after considering the harms of the conduct, and then considering the harms of criminalization, we must weigh how these harms are distributed throughout society and conclude whether criminalization is appropriate. Policymakers should consider whether there are noncriminal alternatives available for addressing the conduct in question.<sup>250</sup> If there are noncriminal alternatives, lawmakers should consider the evidence in support of or against the alternatives before resorting to criminal sanctions. The chart that follows summarizes the approach.

Relevant Community	Conduct	Criminalization	Collateral Consequences
Who is most affected by this harm?	What are the <b>harms</b> of the conduct?	Is there a direct link of <b>causation</b> between the harm and the conduct in question?	What would happen if the conduct is decriminalized?
Who will experience these consequences?	Will criminalization <b>address the harm</b> we seek to address?	What are the <b>likely results</b> from criminalizing this conduct?	Are the <b>harms of criminalization</b> only experienced by the offender?
Does this community have <b>unique concerns</b> ?	Is it <b>feasible</b> to criminalize the conduct?	Are there are non-criminal options available?	What are the <b>likely collateral consequences</b> of criminalizing this conduct?

Figure 4. Summary of Distributive Consequentialist Analysis

This analysis would also encourage outcomes that are more rational from a systemic perspective.<sup>251</sup> It would force system actors to be deliberate rather than reactionary when calling for criminalization.<sup>252</sup> It also provides a platform for

<sup>250</sup> *But see* Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 321 (2009) (highlighting the limitations of alternatives to incarceration in substantially reducing incarceration).

<sup>251</sup> Jonathan Simon, *The New Gaol: Seeing Incarceration like a City*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 280, 281 (2016) (“During the massive build-up of the prison population since the 1970s, all aspects of criminal justice were transformed into instruments designed to move people as rapidly as possible and for as long as possible into prisons . . . . [T]hat policy [is] now increasingly condemned as irrational, racially marked, and inhumane . . . .” (citations omitted)).

<sup>252</sup> *Cf.* Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1136 (2017) (“Reactionary criminal laws based on a certain high-profile event should also involve a criminal code review to ensure that existing legislation cannot adequately punish individuals for the particular harm caused.”).

beginning a project toward decarceration and provides theoretical support for decriminalizing conduct that is best addressed outside the criminal legal system. This approach does not presuppose the legitimacy of the criminal system as an avenue to address all undesirable conduct. Rather, it acknowledges that the criminal legal system has been used to expand the powers of its actors and those who benefit from increasing social control of marginalized communities.<sup>253</sup> In the criminalization of sex work, sex workers themselves should be the primary community considered. This is especially the case where the policy rationale for criminalization is to protect sex workers from the harms of the sex trade.<sup>254</sup> Thus, the distributive consequentialist inquiry is whether the structural harms of sex work outweigh the harms of criminalization for sex workers.

#### IV. ANALYZING THE CRIMINALIZATION OF SEX WORK

In determining whether sex work should be criminalized under a distributive consequentialist analysis, one must first consider which community is harmed by the conduct in question.<sup>255</sup> The primary focus should be on those who are most impacted by the conduct and criminalization itself. Specifically identifying “the harmed” allows the analysis to move from theoretical to more empirical considerations in assessing whether conduct should be criminalized. It also allows for normative judgments about the criminalized conduct that are sensitive to the experiences of the affected community.

In the case of prostitution, the relevant community is composed of sex workers, their clients, and those in the communities in which they work.<sup>256</sup> The romantic

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<sup>253</sup> Stuntz, *supra* note 16, at 506–10.

<sup>254</sup> For an overview of the various debates concerning the decriminalization of sex work, compare Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 328–29 (1995), and Carole S. Vance, *More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference*, in PLEASE AND DANGER: EXPLORING FEMALE SEXUALITY xvi, xvii (Carole S. Vance ed., 1992) (critiquing radical feminist approaches to sex work that view women as victims), with KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 9 (1979), and ANDREA DWORKIN & CATHERINE MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN’S EQUALITY 24–30 (1988) (treating sex work as inherently problematic and violent for women).

<sup>255</sup> See *supra* Part III.

<sup>256</sup> The relevant may also include the children of sex workers. Kempadoo criticizes radical feminists for failing to recognize that “the global sex trade cannot be simply reduced to one monolithic explanation of violence to women”:

The agency of Brown and Black women in prostitution has been avoided or overlooked and the perspectives arising from these experiences marginalized in dominant theoretical discourse on the global sex trade and prostitution. Our insights, knowledges, and understanding of sex work have been largely obscured or dominated by white radical feminist, neo-Marxist or Western socialist feminist inspired analyses that have been either incapable or unwilling to address the complexities of the lives of women of color.

partners of those directly involved in sex work transactions may be considered as affected constituencies, but they have a lesser claim than those directly impacted by the transaction itself.<sup>257</sup> Some have argued that society at large is impacted by the occurrence of sex work transactions through the influence of social norms and morals.<sup>258</sup> This interest may be one factor; however, it should not be the sole or even a primary factor in the analysis. Popular morality often produces social hierarchies that subordinate women, people of color, the poor, and others.<sup>259</sup> If we are to make legal decisions that impact these constituencies greatly, then we should consider the unique vulnerabilities they experience because of the criminal legal system. Popular morality should be a consideration only after determining that the harms of criminalization do not greatly burden directly impacted communities.

Unlike pro-choice, LGBTQ rights, and civil rights advocates, pro-sex work advocates have never been able to obtain similar successes.<sup>260</sup> There is no Supreme Court decision holding that the right to privacy extends to the right to commercialize one's private encounters.<sup>261</sup> Pro-sex work advocates frequently, but unsuccessfully, adopt liberal arguments about prostitutes' right to choose work.<sup>262</sup> One of the primary reasons for this failure was the lack of consensus amongst feminists on the issue of prostitution.<sup>263</sup> Radical feminists argued that prostitution was a form of

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Kempadoo, *supra* note 27, at 28, 40.

<sup>257</sup> See Chaz Arnett, *Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts*, 108 J. CRIM. L. & CRIMINOLOGY 399, 448 (2018) (describing the importance of "community-informed" models of justice).

<sup>258</sup> DWORKIN & MACKINNON, *supra* note 254, at 24–25.

<sup>259</sup> See Strong, *supra* note 174, at 1288 (arguing that "history suggests that choosing one moral code over another based only on majoritarian beliefs" has harmful consequences on individuals not in the majority).

<sup>260</sup> See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (reaffirming *Roe v. Wade* and holding that states are prohibited from banning most abortions); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that women have the right to have access to safe and legal abortions); *Romer v. Evans*, 517 U.S. 620 (1996) (holding that Colorado's Amendment Two, which denied LGBTQ people protections against discrimination, violated the Equal Protection Clause of the United States Constitution); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that "the State cannot demean [gays'] existence or control their destiny by making their private sexual conduct a crime"); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that bans on same-sex marriage are unconstitutional).

<sup>261</sup> See *Lawrence*, 539 U.S. at 578 (noting that the case "does not involve . . . prostitution"); see also *Erotic Serv. Provider Legal Educ. & Research v. Gascon*, 880 F.3d 450, 456–57 (9th Cir. 2018) (holding that *Lawrence* does not support a constitutional right to sell sex for work).

<sup>262</sup> Much of "traditional liberal theory . . . is committed to autonomy, individualism, and minimal state interference in private choice. Liberal theory is premised on an assumption that individuals are atomistic, pre-social beings who exist independent of their community." Jody Freeman, *The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 BERKELEY WOMEN'S L.J. 75, 86 (1990).

<sup>263</sup> The feminist legal scholarship on the criminalization of sex work has been divisive, leading some scholars to take a break from feminists and others to rely upon rhetoric and

oppression and violence against women.<sup>264</sup> Eventually, prostitution was conflated with human trafficking, and feminists who opposed prostitution were able to successfully obtain reforms based on a narrative of sex workers as victims and victims of trafficking rings.<sup>265</sup> While relying mostly on anecdote and selective representations, they told the story of the singular prostitute who entered the profession as a child and who experienced horrific abuses at the hands of her clients, pimps, and police.<sup>266</sup> This narrative has become predominant, particularly in the United States.<sup>267</sup>

Accordingly, sex workers are often perceived as the primary “victims” in the crime of prostitution.<sup>268</sup> This approach is reflected in popular culture, the media, and in feminist legal scholarship.<sup>269</sup> So, if sex workers are indeed victims within these transactions, then the harm analysis should focus on what harms criminalization seeks to address, what harms sex workers experience through the criminalization of sex work, and whether criminalization is the most appropriate avenue for addressing the relevant harms.<sup>270</sup> Sex work itself has been discussed as a form of human trafficking because many sex workers are presumed to have entered the profession by force, coercion, or at a young age.<sup>271</sup> Criminalization partially aims to address the harms that sex workers experience by entering this risky and dangerous

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inflammation over legal reasoning or empirical analysis. *See* JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 8–9 (2006) (highlighting the importance of taking a “break” from feminist theory to develop alternative insights into power relations and social theory).

<sup>264</sup> Ronald Weitzer has criticized the methodology of the radical feminist approach:

Violating the canons of scientific inquiry, the radical feminist literature on prostitution and other types of sex work is filled with “sloppy definitions, unsupported assertions, and outlandish claims”; such writers select the “worst available examples” of sex work and treat them as representative. Anecdotes are generalized and presented as conclusive evidence, sampling is selective, and counterevidence is routinely ignored. Such research cannot help but produce questionable findings and spurious conclusions.

Ronald Weitzer, *New Directions in Research on Prostitution*, 43 *CRIME L. & SOC. CHANGE* 211, 214 (2005) (citations omitted).

<sup>265</sup> *Id.* at 213.

<sup>266</sup> *Id.* at 214.

<sup>267</sup> *See* Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 *U. PA. L. REV.* 1655, 1658 (2010) (“[N]eo-abolitionists have shaped common understandings of the problem of human trafficking by deploying a reductive narrative of trafficking that simplistically depicts trafficking as involving women and girls forced into ‘sexual slavery’ by social deviants.”).

<sup>268</sup> Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 *IND. L.J.* 1409, 1411 (2011).

<sup>269</sup> *See* Chuang, *supra* note 267, at 1658.

<sup>270</sup> *See generally id.* (discussing the driving questions behind the diverse ideologies of anti-trafficking laws).

<sup>271</sup> *See id.* at 1694–95.

profession.<sup>272</sup> In order to examine the validity of criminalizing sex work to address these harms, we must review demographic data on those who enter the profession.

*A. Demographics of Sex Workers*

Reliable data on the contours of the profession are notoriously difficult to find.<sup>273</sup> There are multiple barriers that make obtaining this information challenging. First, because sex work is criminalized and sex workers often face multiple forms of discrimination, they are an exceptionally difficult population to study.<sup>274</sup> They may be hesitant to trust researchers, obtaining a sufficiently large and “representative” population of sex workers is difficult due to the transient nature of the work and the population, and the secrecy involved in this type of work.<sup>275</sup> Nevertheless, several studies capture some basic demographic information about sex workers.<sup>276</sup> While there are methodological issues in describing a generalizable age of entry into prostitution, one study found that indoor sex workers,—who are sex workers who do not solicit clients from street-based locations—typically enter the profession at age 23.<sup>277</sup> The mean age for sex workers was 33.<sup>278</sup> Anywhere from 70 to 90 percent of sex workers work indoors.<sup>279</sup> Yet, much of the mythology and policy

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<sup>272</sup> See *id.* at 1668–69.

<sup>273</sup> Aziza Ahmed, *Trafficked? AIDS, Criminal Law and the Politics of Measurement*, 70 U. MIAMI L. REV. 96, 139–40 (2015) (describing the difficulty in measuring sex work and trafficking).

<sup>274</sup> Frances M. Shaver, *Sex Work Research: Methodological and Ethical Challenges*, 20 J. INTERPERSONAL VIOLENCE 296, 297 (2005).

<sup>275</sup> *Id.* at 296.

<sup>276</sup> See, e.g., Lauren Martin et al., *Meaningful Differences: Comparison of Adult Women Who First Traded Sex as a Juvenile Versus as an Adult*, 16 VIOLENCE AGAINST WOMEN 1252, 1254 (2010).

<sup>277</sup> Teela Sanders, *A Continuum of Risk? The Management of Health, Physical and Emotional Risks by Female Sex Workers*, 26 SOC. HEALTH & ILLNESS 557, 561 (2004). There are serious methodological issues with broad pronouncements about the average age of entry for people who enter prostitution:

The average age of first sex trade described in any study is dependent on the age range of people included in each particular sample. For example, a study of sex trading among adolescents will by virtue of the sample produce an average age of first sex trade in the teens. This may or may not be generalizable to older populations of people who trade sex.

Martin et al., *supra* note 276, at 1254.

<sup>278</sup> Sanders, *supra* note 277, at 561.

<sup>279</sup> Weitzer, *supra* note 264, at 214.

around sex work is driven by perceptions about what street-based sex workers encounter.<sup>280</sup> Many sex workers are the primary income earners for their families.<sup>281</sup>

One study found that only 10 percent of sex workers in New York City have an intermediary or pimp.<sup>282</sup> While they do not comprise the majority of sex workers, street-based workers do face some of the greatest scrutiny for engaging in their work in public settings.<sup>283</sup> Street-based sex workers experience violence at a much higher rate than indoor sex workers:

A British study, for instance,[sic] of 115 prostitutes who worked on the streets and 125 who worked in saunas or as call girls found that the street prostitutes were more likely than the indoor workers to report that they had ever been robbed (37 vs. 10%), beaten (27 vs. 1%),

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<sup>280</sup> See *id.* (“Much academic writing seems to equate prostitution with street prostitution. In the United States, Britain, The Netherlands, and many other countries, however, only a minority of prostitutes work on the streets (10–30%). Yet they receive the lion’s share of attention, and findings on street prostitution are ‘often presented as a feature of sex work per se.’” (citations omitted)).

<sup>281</sup> See Kamala Kempadoo, *Globalizing Sex Workers’ Rights*, 22 CANADIAN WOMAN STUD. 143, 145 (2003).

[W]ith disruptions to traditional household and family structures, women are increasingly becoming heads of households, providing and nurturing the family. With dwindling family resources and the Western emphasis on the independent nuclear family, women must also increasingly rely on the state for provisions such as maternity leave and childcare, yet fewer funds are allocated by governments for social welfare programs. Informal sector work and “moonlighting” is growing and engagement in the booming sex industries fills a gap created by globalization.

*Id.* (citations omitted).

<sup>282</sup>

Overall, our findings suggest that stereotypical pimps are far less common and important to street sex markets than would be expected, given the popular discourse and the priorities of contemporary antitrafficking institutions. In the New York CSEC Study, only 10 percent of our sample of minors (n = 249) had a pimp at the time of research (14 percent for women, 6 percent for men) and 1.6 percent lived with a pimp. In addition, 47 percent (34.7 percent of women, 61 percent of men, 66.7 percent of transgender) said that they did not know a single pimp, suggesting low pimp prevalence. Pimps were responsible for initiating into sex work 16 percent of the females, 1 percent of the males, and none of those who were transgendered. At 8.1 percent overall, pimp initiation was far less common than peer initiation . . . .

Anthony Marcus et al., *Conflict and Agency Among Sex Workers and Pimps: A Closer Look at Domestic Minor Sex Trafficking*, 653 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 225, 231 (2014) (citations omitted).

<sup>283</sup> See Weitzer, *supra* note 264, at 216.



slapped/punched/kicked (47 vs. 14%), raped (22 vs. 2%), threatened with a weapon (24 vs. 6%), or kidnapped (20 vs. 2%).<sup>284</sup>

Because of continued criminalization, police frequently profile and arrest sex workers.<sup>285</sup> Sex worker health has been compromised because police officers have been allowed to use condoms as proof of prostitution.<sup>286</sup>

Most sex workers do not enter the profession through sex trafficking rings or through force or coercion, but rather through peer recruitment.<sup>287</sup> Most knowingly enter the profession.<sup>288</sup> The prevalence of sex work amongst women is suggestive of the limited economic opportunities women generally face. For example, even when women experience professional success, they often experience “gender sidelining,”<sup>289</sup> or outright sexual harassment that limits work opportunities or makes the conditions of work hostile or undesirable.<sup>290</sup> Consequently, women always face constrained opportunities and must negotiate different risks in choosing work.

### B. Harms of Criminalization

The next step of the inquiry is to examine the nature of the harm that stems from criminalization itself. Criminalization has been shown to contribute to sex workers’ experience of violence.<sup>291</sup> By forcing them underground and creating an

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<sup>284</sup> *Id.*

<sup>285</sup> Stacie Reimer Smith & Antonio Villaamil, *Prostitution and Sex Work*, 13 GEO. J. GENDER & L. 333, 334 (2012).

<sup>286</sup> See Sandra Ka Hon Chu & Rebecca Glass, *Sex Work Law Reform in Canada: Considering Problems with the Nordic Model*, 51 ALTA. L. REV. 101, 107 (2013).

<sup>287</sup> See, e.g., Brendan M. Connor, *In Loco Aequitatis: The Dangers of Safe Harbor Laws for Youth in the Sex Trade*, 12 STAN. J. C.R. & C.L. 43, 51 (2016) (“[T]he best available demographic evidence from the United States, as well as other high or middle-income countries, shows that adolescents are typically introduced to trading sex by supportive peers of other runaway, homeless, unstably housed, or systems-involved youth rather than by third party coercion.”).

<sup>288</sup> See Weitzer, *supra* note 264, at 213–14.

<sup>289</sup> See Jessica Fink, *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 STAN. L. & POL’Y REV. 57, 57 (2018) (describing “the various ways in which women across a wide range of employment settings may find themselves sidelined, upstaged or otherwise marginalized in ways not reached by traditional anti-discrimination laws”).

<sup>290</sup> See Mary E. Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel and Lazear*, 53 U. CHI. L. REV. 934, 944 (1986) (describing the numerous structural barriers to economic equity that women experience in the workplace).

<sup>291</sup> In Sweden, the criminalization of client activities has resulted in a host of negative outcomes for sex workers:

Since the passage of the law prohibiting the purchase of sexual services in Sweden, sex workers who work on the street have reported increased risks and

air of secrecy in their conduct, they are less able to seek the remedies that are traditionally available to others.<sup>292</sup> They are not free to solicit clients openly, in a bar or online, without fearing the potential of arrest.<sup>293</sup> Criminalization forces sex workers to work with clients they may otherwise reject, to hesitate when considering whether to inform police officers about a violent encounter, or to refuse medical treatment for fear of judgment by medical professionals for engaging in illegal activities.<sup>294</sup> This increases the amount of violence that occurs in the community because the sex workers cannot seek assistance when they have violent encounters.<sup>295</sup>

The social harms from prostitution largely stem from its criminalization. The fear of criminalization does not result in decreased entry into the trade.<sup>296</sup> Instead, criminalization often results in stigma, social marginalization, and isolation that further increase the harms that sex workers experience.<sup>297</sup> The stigma resulting from the criminalization of sex work has been shown to result in sex workers being less willing to consult police officers.<sup>298</sup> Sex workers have similarly been less willing to seek medical treatment or engage in preventative services because they fear the risk

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experiences of violence, in part because regular clients have avoided them for fear of police harassment and arrest, turning instead to the internet and indoor venues for sex. Sex workers have reported fewer clients on strolls, and those that remain are more likely to be drunk, violent, and to request unprotected sex. The phenomenon of increasing violence against sex workers following anti-client measures has also been noted in other jurisdictions. In Sweden, the decline in client numbers on strolls has also meant greater competition for clients and lower prices . . . .

Chu & Glass, *supra* note 286, at 106 (citations omitted).

<sup>292</sup> *Id.*

Sweden's mainstreaming of radical feminism appears, therefore, to be used to justify a law that has resulted in the policing and moralizing of public space, ridding Sweden of the perceived aesthetic and social blight of prostitution by displacing visible prostitution, while Sweden postures as a progressive state that recognizes prostitution as a form of violence [when it has merely displaced sex work] . . . .

Jay Levy & Pye Jakobsson, *Sweden's Abolitionist Discourse and Law: Effects on the Dynamics of Swedish Sex Work and on the Lives of Sweden's Sex Workers*, 14 *CRIMINOLOGY & CRIM. JUST.* 593, 598 (2014).

<sup>293</sup> *See* Chu & Glass, *supra* note 286, at 106.

<sup>294</sup> *Id.* at 107.

<sup>295</sup> *Id.* at 106.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 105–07 (describing the social harms sex workers experience from the criminalization of prostitution).

<sup>298</sup> *See* Chu & Glass, *supra* note 286, at 106.

associated with being honest about their work.<sup>299</sup> Research shows that sex workers experience an incredible degree of social marginalization because of the criminalization of sex work.<sup>300</sup> “The ability to operate legally, even with restrictions, means prostitution is less covert and less motivated to seek ‘protection’ through corrupt or illegal associations. Sex workers can seek redress against exploitation or poor work conditions without exposing themselves to criminal charges, or to criminal pay-back.”<sup>301</sup>

In addition, sex workers often face collateral consequences for criminal records associated with prostitution. They wear their prior convictions as an unending consequence of criminalization, much like others who experience the harms of mass incarceration.<sup>302</sup> They are often cycled in and out of prison and are targeted through police profiling and broken windows policing strategies.<sup>303</sup> Much of the current rationales for continued criminalization of sex work are connected to the presumed victim status of sex workers. The retributivist turn in criminal law has legitimized the system as a proper forum for meting out benevolent forms of punishment where victims obtain social goods through criminalization. Yet, these presumed victims are the primary victims of the very criminal legal system that is intended to be serving their interests.<sup>304</sup> These victims are usually from marginalized groups that have historically been the subjects of mass incarceration.<sup>305</sup> If we have moved beyond the criminalization of sexual conduct merely because it is unsavory or out of alignment with our social mores in other arenas, what is the true rationale for criminalizing consensual sex that ends with the signing of a check? The only plausible answer is the adherence to use the criminal legal system as a forum for assigning blame, even for minor offenses.

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<sup>299</sup> See Christine Harcourt et al., *The Decriminalisation of Prostitution is Associated with Better Coverage of Health Promotion Programs for Sex Workers*, 34 AUSTRALIAN & N.Z. J. PUB. HEALTH 482 (2010) (finding that the decriminalization of sex work was associated with better health programs for sex workers).

<sup>300</sup> *Id.*

<sup>301</sup> Christine Harcourt et al., *Sex Work and the Law*, 2 SEXUAL HEALTH 121, 126 (2005).

<sup>302</sup> See Sienna Baskin et al., *Criminal Laws on Sex Work and HIV Transmission: Mapping the Laws, Considering the Consequences*, 93 DENV. L. REV. 355, 360 (2016) (“These consequences include limitations on employment options, discrimination by employers, loss of access to public benefits—including public housing—and loss of the right to sue the police if they are victims of police violence. In some states, sex workers who have prior convictions of prostitution and are arrested again are subject to felony charges and mandatory jail time.” (citations omitted)).

<sup>303</sup> See generally Frankie Herrmann, *Building a Fair and Just New York: Decriminalize Transactional Sex*, 15 HASTINGS RACE & POVERTY L.J. 51 (2018) (discussing the role of broken windows theory in demonizing sex workers).

<sup>304</sup> See generally Brendan M. Conner, *In Loco Aequitatis: The Dangers of “Safe Harbor” Laws for Youth in the Sex Trades*, 12 STAN. J. C.R. & C.L. 43 (2016) (describing the ways in which “safe harbor” laws intended to protect trafficking victims can lead to a net-widening effect that increases arrests and harassment for prostitution).

<sup>305</sup> See generally *id.*

The criminalization of sex work does not appear to serve a legitimate purpose insofar as it is intended to protect sex workers from themselves.<sup>306</sup> As centuries of failed regulation show, nothing has successfully eliminated entry into the profession. Moreover, in jurisdictions where sex work has been decriminalized, sex workers have experienced greater positive outcomes.<sup>307</sup> In New Zealand, sex workers have experienced decreased levels of violence, improved health, and better relationships with the police following decriminalization.<sup>308</sup> Even the criminalization of the sex work client has been shown to have a marginalization effect on sex workers.<sup>309</sup> The hope was that criminalizing the actions of the sex work client while decriminalizing the actions of the sex worker would improve outcomes for the sex worker while signaling that sex work was not tolerated.<sup>310</sup> However, in Sweden, sex workers report experiencing increased social isolation, violence, and damaged relationships with the police once the government decided to criminalize the conduct of their clients.<sup>311</sup> Once part of the sex work transaction is criminalized, the entire transaction is impacted.

Criminalization is a powerful tool for deeming an act undesirable.<sup>312</sup> Joel Feinberg has argued that criminal law serves an expressive function, in establishing moral conduct and what society is willing to accept.<sup>313</sup> This is certainly the case with prostitution.<sup>314</sup> Society is expressing disapproval of those who are willing to entertain the commodification of sex even where only part of the transaction is

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<sup>306</sup> Mary Joe Frug has described the ways that discriminatory law enforcement practices demonstrate the harms of criminalization:

Anti-prostitution rules terrorize the female body. The regulation of prostitution is accomplished not only by rules that expressly repress or prohibit commercialized sex. Prostitution regulation also occurs through a network of cultural practices that endanger sex workers' lives and make their work terrifying. These practices include the random, demeaning, and sometimes brutal character of anti-prostitution law enforcement.

Mary Joe Frug, Commentary, *A Postmodern Feminist Legal Manifesto (an Unfinished Draft)*, 105 HARV. L. REV. 1045, 1054 (1992).

<sup>307</sup> See, e.g., Harcourt et al., *supra* note 301; Gillian M. Abel, *A Decade of Decriminalization: Sex Work 'Down Under' But Not Underground*, 14 CRIMINOLOGY & CRIM. JUST. 580, 581 (2014) ("Decriminalization in New Zealand has seen many positive changes for sex workers with robust evidence to suggest that it is a regulatory environment that should be seriously considered in other parts of the world." (citations omitted)).

<sup>308</sup> See Abel, *supra* note 307, at 583–87 (discussing a wide range of positive outcomes due to the decriminalization of prostitution in New Zealand).

<sup>309</sup> Chu & Glass, *supra* note 286, at 113.

<sup>310</sup> *Id.* at 111.

<sup>311</sup> *Id.* at 105–06.

<sup>312</sup> See Feinberg, *supra* note 38, at 75–76.

<sup>313</sup> *Id.* at 75.

<sup>314</sup> See Chu & Glass, *supra* 286, at 111–12.

criminalized.<sup>315</sup> Criminalization allows for the quiet and not-so-quiet judgment of those who dare to deviate from the dominant societal sexual mores.<sup>316</sup> There is considerable research showing that sex workers experienced heightened marginalization and stigma from their activities.<sup>317</sup> It is counterproductive to contribute to this stigma by making their conduct criminal when the intent is to save them from themselves or the social harms of trafficking.<sup>318</sup> The expressive function of the criminal law should aim to empower victims, not to further marginalize them or punish them for being outsiders. The question then becomes whether this disapproval is permissible and whether the criminal legal system should be the primary system for expressing societal disapproval.

After all, the decision to crackdown on particular forms of moral conduct is not driven by a calculated risk of what is most harmful to the community.<sup>319</sup> It is often driven by the whims of an executive officer who has exercised discretion in a manner that dictates social norms as that person sees fit.<sup>320</sup> A stricter analysis before the passage of a new law allows the legislature to put a check on executive discretion and better ensure that the criminal legal system is functioning without unduly harming society.<sup>321</sup>

Decriminalization may also improve public health.<sup>322</sup> Research shows that decriminalization is better able to serve public health goals.<sup>323</sup> Those communities that have decriminalized sex work have improved sex worker public health outcomes.<sup>324</sup> Sex workers feel more comfortable going to health providers about

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 102

<sup>317</sup> *See generally id.* (exploring how criminalization of sex workers and their clients in Sweden has contributed to anti-prostitution stigma and marginalization that dissuades sex workers from seeking health care and reporting violence).

<sup>318</sup> *See* Gruber et al., *supra* note 5, at 1336 (stating that both sides of argument agree that sex workers “are often victims of oppressive labor conditions . . . and therefore deserve safe and remunerative conditions of work”).

<sup>319</sup> *See* Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 33 (2017) (describing how enforcement of the law is driven by executive discretion and defining crackdowns as “an executive decision to intensify the severity of enforcement of existing regulations or laws as to a selected class of offenders or a selected set of offenses”).

<sup>320</sup> *Id.*

<sup>321</sup> *Cf.* Stuntz, *supra* note 16, at 511–12 (discussing how broad discretion has given members of the executive branch, prosecutors, the ability to act as mini-legislators).

<sup>322</sup> *But see* I. India Thusi, *Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa*, 38 FORDHAM INT’L L.J. 205, 206–07 (2015); Priscilla Alexander, *Prostitution: Still a Difficult Issue for Feminists*, in *SEX WORK: WRITING BY WOMEN IN THE INDUSTRY* 184, 211 (Frédérique Delacoste & Priscilla Alexander eds., 2d ed. 1998) (noting that “although some epidemiologists like to claim that prostitutes are a ‘reservoir of contagion’ or a ‘core group of high frequency transmitters,’ in the United States, less than 5% of STDs are associated with prostitution . . .”).

<sup>323</sup> Harcourt et al., *supra* note 301, at 482.

<sup>324</sup> *Id.* at 485.

their concerns.<sup>325</sup> They also do not face the threat of having condoms seized as evidence of prostitution<sup>326</sup> nor do they feel compelled to take undesirable clients out of desperation.<sup>327</sup>

### C. Community Distribution

The next question is how the harms of criminalization and sex work are distributed amongst various community members. The community may experience some harms in the form of public nuisance violations in the case of street-based sex work. The criminalization of sex work is a rather recent invention and sex work was only a concern to the extent it resulted in a public nuisance violation.<sup>328</sup> The government only sought to intervene to maintain public order and to discourage nuisance.<sup>329</sup> This is a legitimate community interest, but public nuisances may be addressed without criminalization.<sup>330</sup> There is the possibility of regulation in some communities, with particular protections to ensure that other interests are considered. There may be time, place, and manner restrictions or regulation that dictates the manners in which it may occur. There are many government tools available that may address this community concern, including zoning restrictions, licenses, and public nuisance regulations.<sup>331</sup>

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<sup>325</sup> *Id.*

<sup>326</sup> Meghan Newcomer, *Can Condoms Be Compelling? Examining the State Interest in Confiscating Condoms from Suspected Sex Workers*, 82 *FORDHAM L. REV.* 1053, 1064 (2013) (asserting that “[s]ex workers reported that not only were they stopped and searched by police officers, because of the low threshold necessary for initiating a stop and search, police officers frequently took their condoms and commented on the number of contraceptives they had on their person.” (citations omitted)).

<sup>327</sup> A. Krüsi et al., *Criminalization of Clients: Reproducing Vulnerabilities for Violence and Poor Health Among Street-based Sex Workers in Canada – A Qualitative Study*, *BMJ OPEN* (June 2, 2014), <https://bmjopen.bmj.com/content/bmjopen/4/6/e005191.full.pdf> [<https://perma.cc/DWR2-ZL7L>].)

<sup>328</sup> Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 *BERKELEY WOMEN’S L.J.* 47, 50 (1995).

<sup>329</sup> *Id.* at 49–51.

<sup>330</sup> Bill McCarthy et al., *Regulating Sex Work: Heterogeneity in Legal Strategies*, 8 *ANN. REV. L. & SOC. SCI.* 255, 262–63 (2012) (noting that “[f]or example, in 2000, the Netherlands legalized the selling of sexual services but imposed limits on both where selling can occur and who can sell. Cities are permitted to use zoning laws to create tippelzones, areas where people can sell sex from some, but not all, streets.” (citations omitted)).

<sup>331</sup> *Id.*

The distribution of the harm from sex work and criminalization is heavily weighted toward the sex workers. However, in the case of other less serious crimes, the distributive analysis would require careful examination of the various public health goals, an analysis of the various communities involved, and a careful balancing of the competing interests. In the case of prostitution, after considering the various harms at stake as well as the empirical evidence, it is clear that criminalization is unable to improve sex worker well-being or community health and safety.

### CONCLUSION

Our criminal legal system is causing more harm than good. The United States is incarcerating people at an unprecedented rate, racial disparities abound at every level of the system, and there is little sign we can return to more reasonable incarceration levels without serious interventions. Retributivist arguments about punishment for the sake of punishment have been the normative fuel for justifying this massive expansion of the criminal legal system. Retributivism has facilitated the incorporation of implicit biases in the system by relying on abstract determinations about blameworthiness that are infected with the judges' own biases. Women of color are often perceived as more blameworthy, and their bodies and communities are policed because of the blame that has been assigned to them.

This Article seeks to improve the system by providing an alternative approach for examining whether conduct should be criminalized. Distributive consequentialism provides a normative framework for empowering those most affected by the criminalization of conduct and creates a presumption against criminalization. Rather than relying on indeterminate judgments about individuals' blameworthiness, it engages in an empirical analysis of what criminalization actually does. The harm of criminalization is a relevant consideration in examining whether criminalization is the most appropriate government intervention for addressing undesirable conduct. It considers the experiences of people with intersectional identities and presumes that criminal intervention is to be avoided, not expanded.

In the case of prostitution, criminalization has been largely ineffective in addressing the harms of the sex trade, and the distributive consequentialist approach considers this fact relevant.<sup>332</sup> Sex workers often turn to their work because of

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<sup>332</sup> Chi Adanna Mgbako et al., *The Case for Decriminalization of Sex Work in South Africa*, 44 GEO. J. INT'L L. 1423, 1434 (2013).

Because all other actors in the sex work industry are criminalized, sex workers remain "guilty by association" and vulnerable to police harassment. For example, in order to gather evidence against clients, police subject sex workers to questioning and intrusive searches. Sex workers can also be forced to testify against clients at trial.

*Id.*

limited economic potential in other forms of labor. And the harms of criminalization include increased violence, negative health outcomes, and stigmatization. The retributivist impulse does not consider these facts as relevant and instead focuses on abstract notions of morality. We should abandon the retributivist impulse, which assigns blame and judgment, for an approach that actually improves the lives of the people we hope to protect. By proposing a theory of criminalization that can prevent the creation of new unnecessary criminal laws and assist the decriminalization of current existing laws, this Article provides a normative tool for addressing the current crisis in the criminal legal system.