Survival Labor

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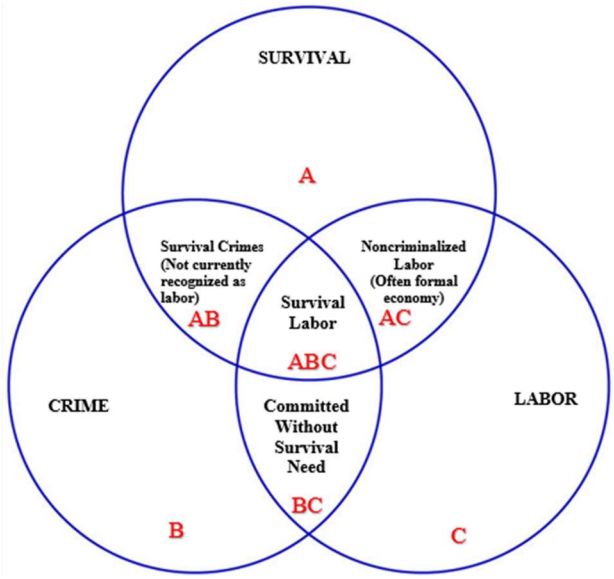

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This Article makes one simple, novel claim: crime is labor when it generates income, allows individuals to pursue self-sufficiency, or allows them to fulfill societal expectations of providing for or caring for dependents. When individuals engage in survival crimes, instead of seeing them as criminals, we should see them as workers engaged in survival labor.

The carceral system continues to disproportionately harm racial minorities and people living in poverty. The foundations of many laws regulating and policing racialized bodies have created a culture where Blackness, in particular, is equivalent to criminality. While a penal abolitionist framework is helpful in getting rid of the harmful criminal and civil consequences of criminal penalties, a labor framework shifts the narrative in a way required to transform the perception of crime to one of labor. This shift is particularly important given the renewed attention to penal abolitionist logic and conservative and libertarian attempts to resurrect greater protection for economic liberty through the "right to earn a living."

In what will become a series of several pieces, this first Article proposes a narrative shift that allows us to critique and reimagine our conceptions of work. People engaged in survival crimes are often subject to the criticism that they should pursue "real work." After reading this Article, I hope the legal community will question the continued criminalization of poverty, reconsider our understanding of work, and invest in this transformative project to protect the victims of state-sponsored oppression.

INTRODUCTION

Murder on my street, death on my block
Cops that be more criminal than cop
Daddy a King Pin, mama a hustler
What am I gon' be? Who is it up to?
Me and just me, doing it my way
'Til I see sunrays, hey
The sun will always shine, sun will always shine
Sun will always shine on me
So even if it's crime, I'm taking care of mine[1]

In the 2015 FOX Network hit musical drama, *Empire*, Cookie Lyon,[2] a Black woman living in Philadelphia, is part of a drug-dealing operation. She participates in this illicit transaction in an effort to provide for her three children, while her husband, Lucious Lyon,[3] tends to a hopeful music career by writing raps and producing music anywhere he can find the space. Unfortunately for Cookie, one of her buyers is an undercover federal law enforcement officer. Cookie gets busted and spends seventeen years in prison. The show centers around both Cookie's pain of being locked away from her children and her experience of being incarcerated with other women who similarly engaged in illegal activity to provide for their families.

While this is a fictional example, it nevertheless rings true to the experiences of many who engage in criminalized activity to provide for themselves and their loved ones. There are people who engage in criminalized activity, not for power or riches, but just to get by.[4]

Unfortunately, under our criminal system, the penalty for a crime of survival can be death. Eric Garner's and Alton Sterling's cases represent two

1. Empire Cast featuring Bre-Z & Jussie Smollett, *Shine On Me*, *on* EMPIRE: THE COMPLETE SEASON 2 (Twentieth Century Fox Film Corporation / Distributed by Columbia Records, a Division of Sony Music Entertainment 2016), lyrics available at https://genius.com/Empire-cast-shine-on-me-lyrics [https://perma.cc/954Q-LTEA].
2. Played by Taraji P. Henson.
3. Played by Terrence Howard.
4. *See infra* Section II.C.

tragic examples. Garner died during a police encounter on July 17, 2014.[5] He was one of many who sold loose cigarettes in violation of New York's cigarette tax law.[6] People selling "loosies"[7] would purchase cheaper cigarettes from a nearby state and then sell the cigarettes at a profit.[8] The community living near the site of Garner's death was mostly poor and working-class.[9] Garner used the money to support his wife and children.[10]

When people like Garner die at the hands of police, the lasting scars of that trauma can lead to questioning the utility of police. The site of Garner's death was the same location where many people gathered to sell criminalized substances.[11] Gjafer Gjeshbitraj, one of the landlords in the area, complained to the municipal hotline "only after physically fighting with the men on the block who sold drugs."[12] Yet, that same spot was the site "of at least 98 arrests, 100 criminal court summonses, 646 calls to 911 and nine complaints to 311."[13] Even though Gjeshbitraj wanted the disorder near his building to stop, Garner's death unveiled the reality of enforcing criminal laws. Gjeshbitraj stopped calling the police, stating, "The last time I called the cops, someone got choked to death. . . . Eric got killed because I called."[14]

Alton Sterling is another example of an individual killed by police while engaged in criminalized activity for survival. On July 5, 2016, Sterling was fatally shot by police while selling CDs to provide for his family.[15] The police were responding to a call that a man wearing a red shirt and selling CDs was holding someone at gunpoint outside of a convenience store.[16] When the police arrived at the scene, they spotted Sterling, who was wearing a red shirt and selling CDs.[17] The police, suspecting Sterling to be the offender, shot him while pinning him to the ground.[18] It remains unclear whether Sterling was the actual

5. Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html [https://perma.cc/4DFN-YJBC].

6. *Id.*

7. Joseph Goldstein, *A Cigarette for 75 Cents, 2 for $1: The Brisk, Shady Sale of 'Loosies'*, N.Y. TIMES (Apr. 4, 2011), https://www.nytimes.com/2011/04/05/nyregion/05loosie.html [https://perma.cc/9YZN-THPX] ("loosies" are the term for single cigarettes).

8. Baker et al., *supra* note 5.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *DA Recuses Himself from Alton Sterling Case Over Cop Link*, CBS NEWS (July 11, 2016), https://www.cbsnews.com/news/alton-sterling-case-da-hillar-moore-recuses-himself-from-the-investigation [https://perma.cc/ES77-U3XM].

16. *Federal Officials Close Investigation Into Death of Alton Sterling*, U.S. DEP'T OF JUST. (May 3, 2017), https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-alton-sterling [https://perma.cc/R333-DNUL].

17. *Id.*

18. *Id.*

offender.[19] While Sterling may have had a gun, he reportedly used it to protect himself against robberies.[20] Importantly, his gun was not in his hands when police shot him.[21]

Even when outcomes are not fatal, criminalized survival activity is devalued. In the Washington, D.C., metropolitan area, for example, sex workers and others operate under the radar, weaving a living through a patchwork of activities that are legal, quasi-legal, and illegal. Some look at these activities, particularly criminalized activities, and say that what "those criminals" do "is not work" or "is not *real* work."[22] Devaluation also appears in music, which, in my view, can be an excellent mirror of the society in which we live. For example, musical artist Cardi B raps, "[P]eople be like '[y]ou stupid b——ch, stripping ain't a real job!' So how the f——k we buy our weaves then?"[23] Or, as my uncle used to joke, "Get a haircut, get a job!"[24] In real life, there is still a struggle to have one's "hustle" recognized as work.

Courts have stated that crime is not a form of work. They have upheld this sentiment in criminal cases considering (and rejecting) the economic necessity defense, as well as in cases asserting a "right to earn a living."[25] The economic necessity defense is typically asserted as a justification for the commission of a criminalized act due to extreme financial hardship. So far, it does not appear that any court has accepted this defense.[26] For example, the right to earn a living "forbids the government from arbitrarily depriving persons of liberty, including the liberty to earn a living and keep the fruits of one's labor."[27] However, that

19. German Lopez, *Alton Sterling Shooting: Video from Baton Rouge Police's Cameras Released*, VOX (Mar. 30, 2018), https://www.vox.com/2016/7/6/12105380/alton-sterling-police-shooting-baton-rouge-louisiana [https://perma.cc/D8Y5-PXSB].

20. Gabe Gutierrez & Corky Siemaszko, '*Full of Joy': Family Mourns Alton Sterling, Louisiana Man Killed by Cops,* NBC NEWS (July 6, 2016), https://www.nbcnews.com/news/us-news/alton-sterling-louisiana-man-killed-cops-mourned-family-n604781 [https://perma.cc/DK9F-679D].

21. U.S. DEP'T OF JUST., *supra* note 16.

22. However, *The Sims* franchise of video games has always recognized crime as labor. One's character can join the "Criminal Career Track," which, depending upon which generation of the game one plays, includes jobs like "tough guy/gal," "getaway driver," "smuggler," "number runner," "petty thief," "bank robber," "minor crime lord," and "con artist." With such a career track, your Sim can find the job online or in the newspaper and bring home a regular salary at the end of every workday. *See*, *e.g.*, The Sims Wiki, *Criminal*, https://sims.fandom.com/wiki/Criminal [https://perma.cc/BN94-SFN7] (last visited Oct. 28, 2023).

23. CARDI B, *Washpoppin*, *on* GANGSTA B——CH MUSIC, VOL. 1 (KSR Group 2016), lyrics available at https://www.musixmatch.com/lyrics/Cardi-B/Washpoppin [https://perma.cc/89WM-9E2H] (expletive redacted).

24. GEORGE THOROGOOD & THE DESTROYERS, *Get a Haircut*, *on* HAIRCUT (2000), lyrics available at https://genius.com/George-thorogood-and-the-destroyers-get-a-haircut-lyrics [https://perma.cc/U39C-9CBS] ("Get a haircut and get a real job. Clean your act up and don't be a slob. Get it together like your big brother Bob. Why don't you? Get a haircut and get a real job.").

25. *See infra* Section II.B.1.

26. *See infra* Section III.A.

27. Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon, 880 F.3d 450, 459 (9th Cir. 2018), *amended by*, Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon, 881 F.3d 792 (9th Cir. 2018) ("It is undoubtedly the right of every citizen of the United States to follow any lawful calling,

right to earn a living has been affirmatively interpreted by at least one court to exclude criminalized labor.[28] In a similar vein, other courts have noted that it has been a "long tradition in our nation" that individuals generally have "the right to engage in . . . any of the common occupations of life" with people who wish to do business with them as long as they are "not affirmatively restricted by reasonable laws or regulations of general application."[29] Several courts considered this right in terms of vagrancy laws.[30] Judges expressed a sentiment that seems to resonate today: one must engage in an "honest livelihood" as opposed to living an "idle" and "immoral" life.[31]

One major goal of this piece is to identify what exactly work *is*. Even if one says that work is anything that is not criminal, that is not very helpful. Crimes are only crimes because legislatures say they are.[32] The average drug dealer is not considered to be engaged in *real* work, but with the recent successes decriminalizing and even legalizing marijuana around the nation, one now gets paid to deal drugs as a "budtender."[33]

Some cities are working to acknowledge that people living in poverty are driven to engage in criminalized survival strategies because they lack other options to meet their basic needs and, importantly, that the criminal system is not designed to end poverty-driven crime. Cities like Seattle, Washington, have decided to reduce survival crime enforcement through "progressive prosecutors,"[34] reduced penalties for engaging in survival crimes, or even the decriminalization of survival crimes altogether.[35]

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business, or profession he may choose.") (citations omitted). The right to earn a living has also been interpreted as a derivative of the right to property, but that will be explored further in my next article in this series. *See* Dent v. West Virginia, 129 U.S. 114, 121–22 (1889) ("All [vocations] may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the 'estate,' acquired in them—that is, the right to continue their prosecution—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.").

28. *Erotic Serv. Provider*, 880 F.3d at 459 ("We therefore hold there is no constitutional right to engage in illegal employment, namely, prostitution."); *see also* Greer v. Herbert, No. 2:16-CV-01067, 2018 WL 2122856, at *14 (D. Utah May 8, 2018), *aff'd*, 768 F. App'x 787, 790 (10th Cir. 2019) (following the ruling in *Erotic Serv. Provider*).

29. Blackburn v. City of Marshall, 42 F.3d 925, 941 (5th Cir. 1995).

30. *See infra* Section II.B.1.

31. Hartman v. State, 46 S.E. 628, 628 (Ga. 1904).

32. This is not to overlook the rich literature regarding whether legislatures should criminalize activities that are morally wrong (*malum in se*) or whether activities are morally wrong because they are criminalized (*malum prohibitum*). *See, e.g.*, Dan Priel, *Criminalization, Legitimacy, and Welfare*, 12 CRIM. L. & PHIL. 657 (2018). My point is much more practical: an activity is not criminal unless prohibited by the appropriate government entity.

33. University of California Riverside, University Extension Whitepaper: 500 Hottest Cannabis Jobs 3, https://library.fgcu.edu/ld.php?content_id=65927603 [https://perma.cc/6CBP-JDUY].

34. *See, e.g.*, Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. 1, 1 (2018) (noting that progressive prosecutors seek "to reduce the use of incarceration, eliminate racial disparities, and provide second chances").

35. *See, e.g.*, Sabra Boyd, *Seattle's Stalled 'Poverty Defense Law' Could Reform Policies for Hunger-Related Crimes*, SEATTLE EATER (Nov. 2, 2021),

But decriminalization and decarceration are only part of the solution. Survival crimes will continue to occur if more social supports are not put into place to address poverty. Perhaps recognizing crime as labor could force legislatures to engage in the hard work of addressing poverty. In other words, instead of relying on the criminal system, legislatures could adopt policies like universal basic income, regulate the cost of basic necessities, invest in ignored cities,[36] and generally ensure that social supports are adequately funded and readily available. The purpose of thinking about crime as labor then becomes a question of "what if": What if using conservative or libertarian strategies to strengthen economic liberty through a claimed "right to earn a living" could further liberatory ends, as opposed to exacerbating inequality? What if there was no distinction between crime and labor?

The goal is to ask what the world could look like if we recognized crime as labor. What would happen if we took an honest look at the harm that stems from both legal[37] and illegal labor, as opposed to assuming that whatever is illegal is harmful and deserving of its criminalized status? And is there a way to force legislatures and courts to tackle these difficult, complex problems, instead of relying on an ineffective criminal system to arrest our way out of poverty?

Given existing pushback against the decriminalization of nonviolent offenses, it is difficult to conceptualize how the legislature might embrace survival crimes as labor. Even when a suggested legislative response to survival crimes is to decrease (but still maintain) the criminal penalty for activities like theft, negative responses may include the following arguments. First, everyone will be less safe if petty crimes are decriminalized.[38] Second, the justice system should not be so focused on "group affiliation and socioeconomic status," because that offends notions of fairness. Everyone is supposed to be treated as equal under the law, but only certain people receive the benefit of being "let off

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https://seattle.eater.com/2021/11/2/22757842/seattle-poverty-defense-law-restaurants-markets-unhoused-community) [https://perma.cc/P5EA-S37D].

36. Jackson, Mississippi, is one example of a majority Black city with a long history of control and neglect by (White) state leadership. *See* Press Release, NAACP Files Discrimination Complaint for Mishandling of Jackson Water Crisis, NAACP (Sept. 27, 2022), https://naacp.org/articles/naacp-files-discrimination-complaint-mishandling-jackson-water-crisis [https://perma.cc/5JKN-ZYQC].

37. For example, this includes decisions made by leaders of corporations that contaminate air, water, and soil, which leads to actual or drastically increased risk of sickness and death for countless people over generations. There are a number of environmental justice lawsuits one can look to. *See, e.g.*, Oliver Laughland, *US Justice Department Sues Two Companies Over Pollution in Louisiana's 'Cancer Alley,'* GUARDIAN (Feb. 28, 2023), https://www.theguardian.com/us-news/2023/feb/28/us-justice-department-lawsuit-cancer-alley-louisiana-dupont-denka#:~:text=The%20US%20justice%20department%20has,substantially%20curb%20the%20plant's%20emissions [https://perma.cc/3QP2-AAF5].

38. *See*, *e.g.*, Steve Pomper, *The Decriminalization of 'Survival Crimes' By Progressive Prosecutors Makes Everyone Less Safe*, NAT'L POLICE ASS'N, https://nationalpolice.org/the-decriminalization-of-survival-crimes-by-progressive-prosecutors-makes-everyone-less-safe [https://perma.cc/4AKW-R44K].

the hook" for their crimes.[39] Third, the commission of survival crimes is immoral.[40]

Treating survival crimes as labor may be counterintuitive, but the idea is grounded in philosophies that address the above concerns for safety, fairness, and morality. These concerns will be addressed more thoroughly throughout this Article. In sum, transformative justice requires long-term vision where we build a world in which individual needs are met without the need to engage in harmful or criminalized behavior. Penal abolition and transformative justice *always* include accountability for harm. There is no such thing as just letting people "get away" with the injustices they inflict on others.[41] The question is how to shift from carceral punishment, which further entrenches conditions of criminalized work for survival, to a form of accountability that secures our collective ability to thrive.

In the short term, I view the narrative shift of crime to labor as a tool to influence legislators to engage in work that transforms society.[42] In the same way that criminalization results in counterintuitive results—i.e., a failure to prevent crime—viewing certain crimes as labor could result in counterintuitive results. Perhaps viewing certain crimes as labor could redirect our attention to the circumstances that encourage individuals to participate in harmful criminalized activities. People do not fear city centers or racial minorities because either are inherently violent. States have purposefully underfunded, defunded, segregated,

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39. *Id.*

40. Christopher F. Rufo, *Crimes of Survival*, CITY JOURNAL (Jan. 2, 2019), https://www.city-journal.org/article/crimes-of-survival#:~:text=Crimes%20of%20Survival,criminal%2Djustice%20reform%20rationalizes%20stealing.&text=The%20latest%20fad%20in%20criminal,to%20secure%20their%20basic%20survival [https://perma.cc/42YP-PH9D]. Christopher Rufo is the conservative advocate credited with disclosing via Twitter the anti-Critical Race Theory strategy. *See, e.g.*, Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, NEW YORKER (June 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory [https://perma.cc/P7TD-LWAE]. I included his commentary on this issue, in part because of his influence on national policy.

41. *See infra* Part II.D.

42. This idea is not just my personal fever dream. *See*, *e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 722 (1995) ("If the rich cannot rely on criminal law for the protection of their property and the law prevents more direct self-help measures, ***perhaps they will focus on correcting the conditions that make others want to steal from them***. This view may be naive, but arguably no more so than that of the [B]lack people who thought that if they refused to ride the bus, they could end legally enforced segregation in the South." [Additionally, if White people start nullifying cases against White defendants, then,] "[f]or pragmatic political purposes, that would be excellent. Attention would then be ***focused on alternative methods of correcting antisocial conduct much sooner than it would if only African-Americans raised the issue***.") (emphasis added). Additionally, making the discriminatory status quo too expensive to maintain was a strategy considered in challenging school segregation. *See, e.g.*, SCOTT MICHELMAN, CIVIL RIGHTS ENFORCEMENT 5–6 (2d ed. 2020) (strategizing also included weighing the dangers of too much cost at the risk of inciting White violence against Blacks).

and isolated communities that are in "high crime" areas.[43] In this paper, I aim to take advantage of the racial justice energy of the moment (or, what is left of it) and the long-game strategies employed by conservative and libertarian groups to resurrect economic liberty.

Part I of this Article defines survival crimes. As it explains, it defines survival by referencing Maslow's Hierarchy of Needs[44] as a guidepost to help focus on needs most related to basic survival. The two most baseline categories in the hierarchy are physiological needs (breathing, food, water, shelter, clothing, sleep, and excretion) and safety (health, employment, property, family, and social stability). Some would argue, rightfully so, that all of us are trying to survive.[45] Aside from the independently wealthy, anyone attempting to get by in a world in which we need money to pay for basic necessities would be unable to survive if they were to stop working. Even if it is not immediate, at some point, the bank account will run dry. This Article takes a narrower view of survival as it focuses on more immediate, extreme financial hardship that impacts one's ability to provide necessities for themself, any dependents, or both. Thus, survival crimes, as Part I explains, are (1) criminalized acts; (2) the commission of which is made necessary by (3) extreme financial hardship; and (4) the goal of which is typically to meet a basic need, such as food or shelter.

Part II builds off my work in a parallel project exploring penal abolition and transformative justice in the language of epistemology.[46] Epistemology is the theory of knowledge.[47] Within this branch of philosophy, scholars interrogate what it is to know, how one comes to know whether or not what we know is credible, and why.[48] Personal narratives, often referred to as testimony, are a form of knowledge.[49] However, prejudice and systemic barriers prevent certain narratives from contributing to the creation and interpretation of the law. As such, some narratives are subjugated within the law, particularly when those who voice them are pathologized and dismissed.[50] Philosophers discuss

43. *See, e.g.*, Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 710–16 (2020) (providing a thorough analysis of the persistence of racial segregation in the United States and how some neighborhoods became constructed as "high-crime").

44. *See infra* Part I.

45. *Id.*

46. Yvette Butler, *Silencing the Sex Worker*, 71 UCLA L. REV. (forthcoming 2024) (on file with author).

47. *See generally* Matthias Steup & Ram Neta, *Epistemology*, *in* STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., Fall 2020), https://plato.stanford.edu/archives/fall2020/entries/epistemology [https://perma.cc/XV48-H64W].

48. *Id.*

49. *See generally* MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 1 (2007); PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT (2000); GAYATRI CHAKRAVORTY SPIVAK, CAN THE SUBALTERN SPEAK? (Rosalind C. Morris ed., 1988).

50. *See, e.g.*, Butler, *supra* note 46 (manuscript at 44–58) (arguing that the personal experiences of sex workers are pathologized and dismissed in law making); Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007 (2022) (discussing community knowledge subjugation within penal knowledge production); S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation*

"hermeneutical resources," which are techniques that assist people in interpreting lived experiences.[51] These resources are the language, vocabulary, and other tools that allow individuals to understand their own experiences and make those experiences intelligible to others.[52] For example, shared understandings of sexual harassment make it possible for victims to communicate that exposing one's genitalia in the workplace is not "just a joke" for the victim to laugh off.[53] Penal-abolitionist scholars, activists, educators, and individuals with lived experience have developed tools to communicate the prejudices baked into our criminal system.[54] These resources explain the flawed foundations of our carceral system and explain how our society will not be free of violence until our carceral system, as it currently stands, is dismantled.

Part III articulates the need for survival by shifting the narrative of survival crimes away from something engaged in by people who are pathologized as degenerates and towards the epistemic reframing from Part II to examine who engages in criminalized activities and why. It explains the desire for self-preservation, self-sufficiency, and support of dependents—all things that are valued in work. This Part is grounded in both a history of and a continuation of racial subjugation, in addition to other present forms of subjugation. Frequently, people who engage in survival crimes are thought to be selfish lawbreakers, as opposed to good parents and community members. While it is important not to essentialize or place people into a binary, it is also vital to be attentive to the subjugated narrative that tells an enlightening story about the values that dominant society applauds: hard work, independence, and self-sufficiency, among others.

Furthermore, Part III argues that survival labor should be protected like other forms of labor, as illustrated by Part ABC of the Venn Diagram in the beginning of this Article. Technically, this Part ABC would be "criminalized survival labor" because, while I argue that survival crimes should be seen as labor, they are currently still criminalized. Thus, noncriminalized survival labor (Part AC of the Venn Diagram above) is the aspiration in this piece.[55]

System, 122 COLUM. L. REV. 1097, 1097 (2022) (explaining coercive knowledge production and dismissal of testimony of mothers within the family regulation system); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017) (explaining the way criminal legal actors dismiss the credibility of sexual violence victims).

51. Gaile Pohlhaus Jr., *Relational Knowing and Epistemic Injustice: Toward a Theory of "Willful Hermeneutical Ignorance,"* 27 HYPATIA 715, 718 (2012).

52. *Id.*

53. *See infra* Part II.A.

54. *See infra* notes 254–85 and accompanying text.

55. My intention here is not to make arguments that could be used to further entrench an association of work as a prerequisite to one's worth or citizenship. Antiwork theorists will likely take issue with labor as aspirational as well. That too, is a question for another article. This Article is not meant to strengthen the U.S. "right to work," which is focused on antiunionization, as opposed to a focus on the "right to work" in a liberatory, human rights context. *See, e.g.*, SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 115–32 (2014) (discussing the development of the "right to work" litigation strategy in the United States). *See generally* Jeremy Sarkin & Mark

Ultimately, this piece argues that survival crimes meet the definition of labor. This in turn defines survival labor. What we do to incentivize or disincentivize this labor, and whether we do it in a way that acknowledges and addresses harm caused by the state and harm to other individuals, is a separate question addressed in a future paper in this series.

I.
SURVIVAL CRIME

The scenarios described in the introduction (drug dealing, selling bootleg CDs, and selling loose cigarettes) are all a part of the underground economy and are forms of survival crime. The underground economy[56] includes both criminalized activities that are patently illegal and activities that are legal but done in an illegal way, such as failing to report certain transactions as income on taxes.[57] It also includes "work or income-conditioned government transfer payment" like unemployment, welfare benefits, or any other program that requires a worker to limit their earned income.[58] "Hence, the underground economy comprises all economic activities that would generally be taxable were they reported to the tax authorities."[59] It can include the sale of unregulated food,[60] the sale of illegal substances,[61] "braiding hair or cleaning houses on the side,"[62] the exchange of sexual services for compensation,[63] and many more activities described below as survival crimes. Of note, lawyers are using cases

Koenig, *Developing the Right to Work: Intersecting the Dialoguing Human Rights and Economic Policy*, 33 HUM. RTS. Q. 1, 3–4 (2011) (discussing the importance of work to survival; the multifaceted nature of the right to work, including fair wages and dignified work; and critiques that "right to work" is too narrowly focused on wage labor, as opposed to a basic income or other strategies to ensure that individuals can access basic necessities).

56. Also referred to as the informal, shadow, illicit, or parallel economy.

57. Friedrich Schneider & Dominik Enste, *Hiding in the Shadows*: *The Growth of the Underground Economy*, INT'L MONETARY FUND (Apr. 16, 2002), https://www.imf.org/external/pubs/ft/issues/issues30/index.htm [https://perma.cc/JSW7-QXFH].

58. Morton Paglin, *Underground Economy: New Estimates from Household Income and Expenditure Surveys*, 103 YALE L.J. 2239, 2246, n.16 (1994).

59. Schneider & Enste, *supra* note 57.

60. *See* Elizabeth Kregor, *How Do You Formalize a Tamale?: How to Ease Street Vendors' Transition Out of the Shadow Economy*, 7 UC IRVINE L. REV. 453, 454 (2017). Legalizing an activity may not always free the activity because the legal requirements of something like street vending (such as licensing fees) could present too high a barrier for people who are street vending without meeting the legal requirements.

61. *See, e.g.*, SUDHIR ALLADI VENKATESH, OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR (2006).

62. Daniel Denvir, *Criminalizing the Hustle: Policing Poor People's Survival Strategies from Eric Garner to Alton Sterling*, SALON (July 8, 2016), https://www.salon.com/control/2016/07/08/criminalizing_the_hustle_policing_poor_peoples_survival_strategies_from_erin_garner_to_alton_sterling/?utm_source=t%E2%80%A6 [https://perma.cc/B724-WQVQ].

63. *See* Yvette Butler, *Aligned: Sex Workers' Lessons for the Gig Economy*, 26 MICH. J. RACE & L. 337 (2021).

concerning hair-braiding work to bring back the "right to earn a living" argument.[64]

Despite using the phrase "survival crime," it does not appear that any legal scholar has fully defined what a "survival crime" is. Likely due to the expansive and potentially limitless nature of survival crimes, they are often described rather than defined.[65] As described below, survival crimes appear to be (1) criminalized acts; (2) the commission of which is made necessary by (3) extreme financial hardship; and (4) the goal of which is typically to meet a basic need, such as food or shelter. While some scholars discuss survival crimes in the context of abuse and coping mechanisms,[66] this Article focuses on the commission of survival crimes to subsist.

In reference to survival crimes, at least one scholar uses the phrasing "perceived survival need,"[67] which could include drug use when someone has an addiction. This Article uses Maslow's Hierarchy of Needs[68] as a guidepost to

64. Several of these cases have been filed over the years. One of the most well-known is Niang v. Carroll, 879 F.3d 870, 875 (8th Cir. 2018), where the Eighth Circuit upheld the occupational licensing law at issue using rational basis review. In *Niang v. Tomblinson*, the Institute for Justice appealed to the U.S. Supreme Court (Brittany Tomblinson replaced Emily Carroll as Executive Director of the Missouri Board of Cosmetology). Ultimately, Missouri changed its law, creating a new license and exempting braiders from the cosmetology license. The Supreme Court vacated the decision below and remanded to the district court to dismiss as moot. SUP. CT. U.S., ORDER LIST PUBLISHED OCT. 9, 2018 (2018), https://www.supremecourt.gov/orders/courtorders/100918zor_p8k0.pdf [https://perma.cc/BP4Z-UN3K] (summarizing the disposition of *Niang* as "vacated" and "remanded" to the trial court).

65. Carrie L. Buist, *LGBTQ Rights in the Fields of Criminal Law and Law Enforcement*, 54 U. RICH. L. REV. 877, 881–82 (2020) ("Similar to all people experiencing homelessness, many LGBTQ+ folks, youth and adult alike, will commit survival crimes that can vary from prostitution to minor theft and everything in between that one might commit to survive on the streets.").

66. Marjory Anne Henderson Marquardt, *Fallacious Reasoning: Revisiting the* Roper *Trilogy in Light of the Sexual-Abuse-to-Prison Pipeline*, 72 STAN. L. REV. 749, 785 (2020) (running away, a "survival crime[]" and "'maladaptive' coping mechanism," is a status offense "for which one may praise adult women but instead punish underage girls"); *see also* Natália Otto, *'I Did What I Had To Do': Loyalty and Sacrifice in Girls' Narratives of Homicide in Southern Brazil*, 60 BRIT. J. OF CRIMINOL. 703, 712 (2020) (describing "what feminist criminology calls 'survival crimes' . . . crimes committed as a response to abuse and/or after cumulated victimization").

67. Brittney Lynn Boyer, *Foster Care, Homelessness, Crimes of Survival, and Independent Living Progress: Some Recommendations*, SIMON FRASER UNIV. SUMMIT RSCH. REPOSITORY 1, 9 (2010), https://summit.sfu.ca/_flysystem/fedora/sfu_migrate/11290/etd6043_BBoyer.pdf [https://perma.cc/2CS4-X72Q].

68. While there is much to be said about selecting a hierarchy taught in management studies, this hierarchy of needs is both familiar to many and (for the purposes of this Article) intuitive. It is used here despite the problematic origins of this hierarchy, as it was (mis)adapted without due credit to the Indigenous Blackfoot (Siksika) Nation. *See, e.g.*, Karen Lincoln Michel, *Maslow's Hierarchy Connected To Blackfoot Beliefs* (Apr. 19, 2014), https://lincolnmichel.wordpress.com/2014/04/19/maslows-hierarchy-connected-to-blackfoot-beliefs [https://perma.cc/64U7-L8XX]. *See generally* Todd Bridgman, Stephen Cummings & John Ballard, *Who Built Maslow's Pyramid? A History of the Creation of Management Studies' Most Famous Symbol and its Implications for Management Education*, 18(1) ACADEMY OF MGMT. LEARNING AND EDUC. 81 (2019) (discussing the hierarchy of needs and how aspects have been oversimplified and misattributed). There is certainly room to question whether "self-actualization" should be the proper foundation or whether there are other needs that are just as, if not more important, than the physiological needs, but that discussion is beyond the scope of this Article.

help focus on needs most related to basic survival. The two baseline categories in the hierarchy are physiological (breathing, food, water, shelter, clothing, sleep, and excretion) and safety (health, employment, property, family, and social stability) needs.

Survival crimes are often like what others deem "quality of life crimes"[69] or "social order offenses,"[70] which typically refer to the disruption or reduction in one's enjoyment of life because of the activities of others.[71] For example, urinating in public because one cannot access a restroom impacts another's ability to walk through the area without seeing or smelling urine. Though, what is a mild inconvenience to one is often an act of survival by another.

Many scholars and practitioners refer to "survival crimes" in the context of other issues faced by sexual minorities and gender-nonconforming people. This is particularly true for those who are youth, immigrants, Black, Indigenous, or People of Color (BIPOC) who "engage in criminalized work in order to meet their basic needs"[72] or the needs of their families.[73] However, survival crimes are not limited to young, immigrant, BIPOC, and LGBTQ+ communities. They are crimes "poor people commit so that they can eat, have shelter, attain healthcare,

69. Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RIGHTS L. REP. 315, 322 n.31 (2009).

70. Dina Kopansky, *Locked Out: How the Disproportionate Criminalization of Trans People Thwarts Equal Access to Federally Subsidized Housing*, 87 TEMP. L. REV. 115, 129 n.129 (2014) ("Such acts include petty offenses and misdemeanors like 'aggressive panhandling, street prostitution, drunkenness and public drinking, menacing behavior, harassment, obstruction of streets and public spaces, vandalism and graffiti, public urination and defecation, unlicensed vending and peddling . . . and other such acts.'"); *see also* GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 15 (1996).

71. *See, e.g.*, Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1686–87 (2021) (summarizing arguments related to order maintenance policing, which regard disruption as a harm for the criminal law to address).

72. Pooja Gehi, *Gendered (In)Security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357, 367 (2012); *see also* Stephanie Saran Rudolph, *A Comparative Analysis of the Treatment of Transgender Prisoners: What the United States Can Learn from Canada and the United Kingdom*, 35 EMORY INT'L L. REV. 95, 101 n.49 (2021) ("Survival crimes are illegal acts often associated with homelessness. The concept of survival crimes is that people who are homeless 'commit survival crimes in order to provide for themselves while living on the street.'") (cleaned up) (citation omitted); Gehi, *Struggles from the Margins*, *supra* note 69, at 324–25 (discussing how transgender immigrants are "more likely to be poor, and as a result, are likely to commit survival crimes in order to meet their basic needs" because they lack employment eligibility, public benefits, legal status, and are subject to systemic discrimination).

73. CT Turney, *Give Me Your Tired, Your Poor, and Your Queer: The Need and Potential for Advocacy for LGBTQ Immigrant Detainees*, 58 UCLA L. REV. 1343, 1352–53 (2011) ("Higher rates of poverty often compel people to engage in 'survival crimes' in order to meet their basic needs or those of their family—activity that is criminalized, but which individuals are essentially forced to engage in due to extreme poverty and unemployment."); *see also* Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 89 (2011) ("Mothers, in particular, may find themselves in prison for committing 'survival crimes'—acts made necessary by poverty. In fact, according to researchers, the crimes women commit may be related to their status as single mothers and their efforts to provide for their families. Thus, mothers are in prison primarily for drug violations and financial misdeeds and are less likely to have committed a violent crime than either male prisoners or non-mothers.").

ride public transportation,"[74] and more. Survival crimes "are often poverty-related"[75] and include "turnstile jumping, dealing[76] and/or possession of drugs[77] (or prescription-controlled substances), welfare-related crimes, petty theft, and loitering."[78] The phrase has also been used to include commercial sexual exchange,[79] pimping,[80] pandering,[81] theft of food from grocery stores,[82] loitering,[83] sleeping outside,[84] sleeping in public,[85] trespassing, property

74. Gehi, *Struggles from the Margins*, *supra* note 69, at 322 n.31.

75. Gehi, *Gendered (In)Security*, *supra* note 72, at 367; *see also* Jane Bambauer & Andrea Roth, *From Damage Caps to Decarceration: Extending Tort Law Safeguards to Criminal Sentencing*, 101 B.U. L. REV. 1667, 1704 (2021) (explaining that "survival crimes [are] committed by economically desperate people").

76. Nekima Levy-Pounds, *Par for the Course: Exploring the Impacts of Incarceration and Marginalization on Poor Black Men in the U.S.*, 14 J.L. SOC'Y 29, 49 (2013) ("It is not difficult to imagine that experiencing higher rates of generational poverty, chronic unemployment, marginalization, and being in a perpetual state of stress, could play a role in a young man's decision to commit survival crimes, such as low-level drug trafficking.").

77. Turney, *supra* note 73, at 1353 ("Activities most often associated with survival crimes include prostitution, theft, and drug offenses.").

78. Gehi, *Gendered (In)Security*, *supra* note 72, at 367.

79. Saran Rudolph, *supra* note 72, at 101 ("Most survival crimes associated with LGBTQ youth are non-violent and include prostitution, pimping, and theft.") (citation omitted).

80. *Id.*

81. Heather Squatriglia, *Lesbian, Gay, Bisexual and Transgender Youth in the Juvenile Justice System: Incorporating Sexual Orientation and Gender Identity into the Rehabilitative Process*, 14 CARDOZO J.L. & GENDER 793, 806 (2008) ("Homeless LGBT youth are at greater risk for involvement in the juvenile justice system. These youth often commit 'survival crimes' such as prostitution, pandering and theft to support themselves on the streets.").

82. Buist, *supra* note 65, at 882 (2020); Christina Victoria Tusan, *Homeless Families From 1980–1996: Casualties of Declining Support for the War on Poverty*, 70 S. CAL. L. REV. 1141, 1165 (1997) ("While it has been assumed that bad personal choices, including criminal activity, have prevented the homeless from becoming self-sufficient, in reality many commit crimes only to survive . . . '[m]uch of the criminal activity of homeless people can be explained as 'survival crimes,' such as breaking into an abandoned building in search of shelter, performing personal functions in public, or shoplifting food.'").

83. Sydney Scott, *One is Not Born, but Becomes a Woman: A Fourteenth Amendment Argument in Support of Housing Male-to-Female Transgender Inmates in Female Facilities*, 15 U. PA. J. CONST. L. 1259, 1261 (2013).

84. *Id.*

85. Ash Olli Kulak, *Locked Away in SEG "For Their Own Protection": How Congress Gave Federal Corrections the Discretion to House Transgender (Trans) Inmates in Gender-Inappropriate Facilities and Solitary Confinement*, 6 IND. J.L. & SOC. EQUAL. 300, 321 (2018) ("Trans people are also much more likely to commit crimes associated with poverty like loitering, sleeping in public, and panhandling.").

crimes,[86] "disturbing the peace . . . [and] panhandling,"[87] and "din[ing] and dash[ing] from a restaurant."[88]

There are some vulnerable groups who engage in survival crimes for different resources or rationales than others. While this act is not always labeled a survival crime, transgender people who are unable to pursue gender-affirming healthcare may "use the black market to obtain gender affirming hormones and surgeries."[89] This is also called "healthcare supply theft."[90] Failure to obtain appropriate gender-affirming care can lead to mutilation or death. Additionally, people in abusive partnerships may also commit "property or drug offenses" due to coercion into crime by partners or from economic pressure to "support themselves and their children with stolen items . . . [or through] welfare fraud, or they may steal or forge checks to escape from abuse."[91]

86. Levy-Pounds, *supra* note 76, at 56 ("Limited opportunities for gainful employment result in diminished ability to care for one's family as well as a higher probability of dependence upon government and other community-based programs for survival. Lower levels of employment could also open the door to involvement in illicit activities such as drug-related crimes and property crimes."); *see also* Patricia Hughes & Mary Jane Mossman, *Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses*, 13 WINDSOR REV. LEGAL & SOC. ISSUES 1, 65 (2002) (arguing that social inequality and power dynamics differ between "property offenses and other kinds of economic survival crimes"); Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 377 n.78 (2007) (identifying "car theft" as one example of a property crime that counts as a survival offense).

87. Megan Testa, *Imprisonment of The Mentally Ill: A Call for Diversion to the Community Mental Health System*, 8 ALB. GOV'T L. REV. 405, 412 (2015) ("A study citing data from two states on opposite sides of the country showed that the majority of offenses for which persons with mental illness were arrested were minor offenses; offenses such as disturbing the peace, aggressive panhandling, minor thefts and other survival crimes made up more than 65% of the crimes the individuals studied committed, and less than 25% of their crimes could be described as violent crimes."); *see also* E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 560 (2012) ("A second category of offenders with mental illnesses includes 'individuals whose offenses could be characterized as indirectly attributable to their illness.' This group would include offenders whose mental illnesses contributed to their job loss, decline into poverty, and/or movement into environments rife with antisocial influences, all generic risk factors for criminal justice involvement. The offenses of these individuals will often include misdemeanor offenses and the manifestation of so-called 'survival behavior.'").

88. E. Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders with Serious Mental Illness*, 71 FLA. L. REV. 515, 532 (2019).

89. Carolyn Calhoun, "*Bullseye on Their Back": Police Profiling and Abuse of Trans and Non-Binary Individuals and Solutions Beyond the Department of Justice Guidelines*, 8 ALA. C.R. & C.L. L. REV. 127, 130 (2017).

90. Richael Faithful, *Transitioning our Prisons Toward Affirmative Law: Examining the Impact of Gender Classification Policies on U.S. Transgender Prisoners*, 5 MOD. AM. 3, 8 (2009); *see also Developments in the Law—Sexual Orientation & Gender Identity: Chapter Three*, 127 HARV. L. REV. 1746, 1750 (2014) (discussing the incarceration of transgender individuals for minor offenses, such as the "distribution of black market hormone therapy").

91. Haegyung Cho, *Incarcerated Women and Abuse: The Crime Connection and the Lack of Treatment in Correctional Facilities*, 14 S. CAL. REV. L. & WOMEN'S STUD. 137, 141 (2004); *see also* Beth Richie, *Understanding the Links Between Violence Against Women and Women's Participation in Illegal Activity*, *Final Report* 20 (July 23, 2002) (unpublished research report, available from THE NAT'L CRIM. JUST. REFERENCE SERV.) (finding that 34 percent of respondents in a survey of women who

Crimes that contain elements of violence are also included in the definition of survival crimes.[92] As described above, survival crimes are typically presented as nonviolent.[93] However, if someone is experiencing severe economic hardship and commits a crime like robbery or burglary to provide for their basic needs, then such conduct would be an act of survival. Any criminalized conduct that affirmatively answers the question "does this action help me not to die?" could be a survival crime.[94] As scholars and those with lived experience note, homelessness can be dangerous and violent crimes may be committed in furtherance of self-preservation.[95]

Thus, given the description of survival crimes above, this Article uses the following definition of survival crimes: (1) criminalized acts; (2) the commission of which is made necessary by (3) extreme financial hardship; and (4) the goal of which is typically to meet a basic need, such as food or shelter. While the question "does this action help me not to die?" is a handy formulation, it is broader than my definition of survival crimes. My formulation of survival crimes argues that extreme financial hardship, combined with the necessity of meeting basic needs, is key to the analysis. So, a rich person would be unable to engage in a survival crime because they have the economic means to meet their basic needs.[96] A rich sex worker would no longer be engaged in a survival crime because they are no longer facing extreme financial hardship.[97]

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experienced physical, sexual, or both types of abuse felt that such abuse was "a factor in their illegal activity").

92. People often pose the question "what about hired killing?" or "what level of poverty legitimates the commission of a survival crime?" when engaging with me on this topic. Those questions relate to whether the commission of such a crime is justified or excusable. This Article merely contemplates whether the act was a survival crime—not whether it was a justified or excusable survival crime.

93. *See* Beth E. Richie, *The Social Impact of Mass Incarceration on Women*, *in* INVISIBLE PUNISHMENT 136, 138 (2002) ("[D]rug sales and other nonviolent crimes are 'survival crimes' committed by women to earn money, to feed a drug-dependent life, and to escape both terrifying intimate relationships and brutal social conditions.").

94. Boyer, *supra* note 67, at 8.

95. *Id.* at 11–12 ("Living without a stable shelter can be a dangerous situation. There are no locks where there are no doors, and as a result, homeless citizens are frequently the victims of violent crimes. To survive in a violent culture (in this case, homelessness) one must be prepared to use a level of violence that is greater than the threat.").

96. Thanks to Mihailis Diamantis and Charlotte Alexander for this pointed question about who would be "eligible" to benefit from this survival crime framework.

97. Thanks again to Charlotte Alexander for this pointed question. In my view, due to the way I define labor as the pursuit of self-sufficiency, self-determination, and fulfilling one's social obligation to provide, sex work would almost always be a form of labor. In this scenario, it would no longer be "survival labor" but would, in a sense, graduate to "criminalized labor" that should then be decriminalized so it could just be "labor."

II.
QUESTIONING CARCERAL LOGIC WITH HERMENEUTICAL RESOURCES OF ABOLITION, TRANSFORMATION, SURVIVAL, AND RESISTANCE

In my recent article discussing epistemic oppression in the sex trades,[98] I argue that a cycle of epistemic oppression takes place through the passage of laws by legislatures and the maintenance of laws by courts, which address prostitution through the carceral system. Sex workers are dismissed as "non-credible" due to societal prejudices held against them. They are perceived as broken, dirty, and vectors of disease. This in turn means they are not to be trusted.[99] That prejudice is not just a result of misogyny engrained in dominant society[100] but is perpetuated, in part, by a narrative created by Prostitution-Abolitionist Radical Feminists ("PARFs"). Through their advocacy, PARFs have reinforced the idea that only those too traumatized by past violence or those who are opposed to the Violence Against Women Movement would argue for the full decriminalization of the sex trades.[101] Either way, the PARF argument goes, sex workers are not valuable sources of knowledge and cannot be trusted.[102]

Not only are individual sex workers valuable sources of knowledge about their own experiences, but there are also a variety of existing resources for understanding why people in the sex trades might want to fully decriminalize prostitution. These resources, known as "hermeneutical resources," are the deep wells of existing work from feminists of color committed to transformative justice and penal-abolitionist projects.[103] These articles, essays, speeches, and other materials have been available for dominant groups to draw upon to better understand the issues affecting marginalized communities. In the sex work context, those resources detail state-sponsored violence and subordination on top of interpersonal violence that are only exacerbated by criminalizing the sex trades.[104]

While my former piece focused on testimonies by sex workers that are ignored, dismissed, and minimized, this piece is concerned with challenging the dominant hermeneutical resources that continue to perpetuate the idea that people who engage in criminalized work are inherently dangerous, antisocial, undeserving of mercy or assistance, and not engaged in "real" work.

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98. Butler, *supra* note 46.

99. *See id.* (manuscript at 3–6).

100. *See, e.g.*, Maybell Romero, *Ruined*, 111 GEO. L.J. 237, 244–53 (2022) (describing the legal history that helped to solidify misogynistic conceptions of women's sexuality).

101. *See* Butler, *supra* note 46 (manuscript at 9, 22).

102. *See id.*

103. *See id.* (manuscript at 25–28).

104. *See id.*

A. Epistemic Oppression and Hermeneutical Resources

The exclusion of terminology, imagery, narratives, court opinions, and more that could influence the way we understand labor can be understood through work done in epistemology. To understand hermeneutical resources in the survival labor context, it is important to grasp how it is currently used in the legal and philosophical literature. Ultimately, I argue that dominant understandings of work and crime are arbitrary at best and discriminatory at worst. Those understandings are not properly attentive to two epistemic resources that exist: histories of systemic racial exclusion and narratives from criminalized people.

The following example illustrates the creation of hermeneutical resources. Imagine that you are a woman in the workplace. You have had a terrible day. Today, like most days, your male supervisor calls you "sweetie" and "hun." When you vent to people close to you, they tell you that your supervisor means well or is from a region of the country where those words are compliments or just standard terms of endearment. Despite your best efforts to focus on the work, upon your walk to the file room, a male colleague jumps out from around a corner with his fly down, exposing himself. You cringe and speed walk around him hearing him and others laughing raucously, "It's just a joke! Don't be so sensitive!"

We now associate these gestures with sexual harassment. But they were not always recognized as such, not by the law and not by general society. Whether one interprets the words as complimentary or belittling, or whether genital exposure is seen as a joke or offensive, interpretation itself is connected to the tools society has developed to process those experiences. These tools are part of a collective body of knowledge we all use to make our experiences intelligible to ourselves and others.[105] This body of social knowledge is known as "hermeneutical resources."

Hermeneutical resources help us interpret experiences by calling upon language, grammar, vocabulary, and other tools to make sense of those experiences.[106] These are the tools we use to communicate "experiencing and feeling wrongs or rights, misdeeds, affection, compassion, pain, anguish, etc."[107] Without these tools, a person who lacks the understanding of their own experience unjustly suffers.[108] If a speaker lacks hermeneutical resources to make their experience intelligible to others, then the audience's inability to understand what is being communicated can also cause an injustice. Both could also be true at the same time. Without a robust interpretive well of resources,

105. *See* B. Lee Aultman, *Epistemic Injustice and the Construction of Transgender Legal Subjects*, 15 WAGADU: J. TRANSNAT'L WOMEN'S & GENDER STUD. 11, 14 (2016).

106. *Id.* at 14, 17.

107. *Id.* at 14.

108. *Id.*

someone could struggle to understand their own experiences and communicate to others about their experiences.[109]

Sexual harassment is a classic example used by philosophers discussing epistemic injustices.[110] If dominant society does not have the conceptual tools required to interpret certain actions as sexual harassment, then when victims share their experiences, members of dominant society understand harassing actions as complimentary or humorous as opposed to distressing, harassing, or even actionable.[111]

Multiple sets of hermeneutical resources often exist at once, which means there are alternate resources to choose from in any given situation.[112] Communities, particularly marginalized communities, have their own set of hermeneutical resources.[113] Since marginalized communities create, maintain, and use their own hermeneutical resources, multiple hermeneutical resources are available.[114] Thus, there are dominant and alternative hermeneutical resources.

Dominant and alternative resources are easy to identify in everyday life. Some victims may have their own hermeneutical resources to understand what is happening to them, while others may not. For example, women harassed in the workplace have long shared stories, terminology, and more to understand and share their experiences.[115] When they attempt to share their experiences, they are labeled liars, too sensitive, and unable to take a joke.[116] As such, they are a subjugated community using resources alternative to those used by the dominant community.

Philosophers identified a variety of injustices wrapped up in the discussion above. Importantly, epistemic injustices are at the heart of both how hermeneutical resources are produced and how society uses (or fails to use) them. Kristie Dotson describes epistemic oppression as "a persistent and unwarranted inability to utilize persuasively shared epistemic resources that hinder one's contributions to knowledge production."[117] Different individuals and groups can

109. *See id.*

110. *See* FRICKER, *supra* note 49, at 153.

111. *Id.*

112. *See* Kristie Dotson, *A Cautionary Tale: On Limiting Epistemic Oppression*, 33 FRONTIERS: J. WOMEN STUD. 24, 31 (2012); Rebecca Mason, *Two Kinds of Unknowing*, 26 HYPATIA 294, 299–300 (2011); COLLINS, *supra* note 49, at 108.

113. *See* Dotson, *supra* note 112, at 31.

114. *See id.* at 32.

115. *See, e.g.*, Jamillah Bowman Williams, Lisa Singh & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 22 U. CHI. LEGAL F. 371 (2019) (discussing the rise in use of social media as a way for women to share their experiences with sexual harassment).

116. *See, e.g.*, Tuerkheimer, *supra* note 50, at 43 (explaining "recurring tropes of disbelief" used to diminish the credibility of sexual violence victims).

117. Kristie Dotson, *Conceptualizing Epistemic Oppression*, 28 SOC. EPISTEMOLOGY 115, 122 (2014). Dotson's version of epistemic oppression (at least when applied to instances of individual and structural prejudice) can be limited through a number of techniques, many of which were developed in multicultural feminist method, such as "world traveling" and using a loving eye, as opposed to arrogant perception. The original draft of this work focused on frameworks by authors like María Lugones,

be excluded from contributing to our collective hermeneutical resources typically because there are power structures at play that impact the privileging or subjugation of their experiences.[118] Under Dotson's definition of epistemic oppression, social or political subjugation is not required, as there can be privileged and nonprivileged vantage points.[119] These points give rise to different experiences on which one might testify that are not related to prejudice.[120] Ultimately, what matters is that there are such gaps in hermeneutical resources such that the nonprivileged group is unable to communicate their experience with the rest of the epistemic community.[121] Essentially, the nonprivileged group's attempts to communicate their experiences are rendered unintelligible due to this gap in the resources available to understand what is being communicated.[122]

Hermeneutical injustice, according to Miranda Fricker, is "the injustice of having some significant area of one's social experience obscured from collective understanding."[123] It is obscured because there is some structural prejudice within our collective hermeneutical resources against a particular identity.[124] Unlike with Dotson's definition of epistemic oppression, here, prejudice against a social group is required. Hermeneutical injustice is rooted in "socioepistemic structures"[125] that get in the way of making sense of our world.[126] Thus, the ability to make sense of the world and the knowledge that is produced can be limited through structural prejudice made up of the bias of the powerful group, which undermines the contributions of the marginalized group.[127]

Moreover, the decision to use a set of hermeneutical resources that is structurally prejudiced (due to the exclusion of a marginalized group in developing it) is unjust.[128] Dotson refers to the use of structurally prejudiced hermeneutical resources as "contributory injustice."[129] Hermeneutical resources can be structurally prejudiced when they interpret a marginalized group's social

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Mariana Ortega, Isabelle R. Gunning, and more addressing the concept of arrogant perception by Marilyn Frye.

118. For example, physicians are often considered much more credible than their patients. *See* Rena Beatrice Goldstein, *Epistemic Disadvantage*, 50 PHILOSOPHIA 1861, 1871–73 (2022). This could be due to bias (for example, the now well documented bias embedded in the medical field that leads to disproportionate Black maternal mortality rates), but it can also be attributed to the privileged status that physicians have in our society.

119. *See* Dotson, *Conceptualizing Epistemic Oppression*, *supra* note 117, at 122.

120. *See id.*

121. *See* Dotson, *A Cautionary Tale*, *supra* note 112, at 31.

122. *Id.*

123. FRICKER, *supra* note 49, at 155.

124. *Id.*

125. The field of social epistemology is concerned how people pursue truth in relation to others. *See, e.g.*, Alvin Goldman & Cailin O'Connor, *Social Epistemology*, *in* STAN. ENCYCLOPEDIA OF PHIL., (Edward N. Zalta & Uri Nodelman eds., Winter 2023), https://plato.stanford.edu/entries/epistemology-social/ [https://perma.cc/M3DS-TQJN].

126. Dotson, *A Cautionary Tale*, *supra* note 112, at 30.

127. *Id.* at 31.

128. *Id.* at 32.

129. *Id.*

experience, and the interpretation is insufficient because of the bias and undue influence of the more powerful group.[130] In other words, a community has the language to articulate their experiences, but those experiences are not utilized because of the biased resources used by the dominant group.[131] This is particularly important in the law. The more powerful groups' knowledge production is privileged and rooted deep in the law. The subordinated groups' knowledge production is suppressed and does not inform the law.[132] Consequently, statutes, controlling case law, and other sources of law maintain the dominance of the privileged group, endorsing their perception of the way the world works.

By way of example, as previewed above, Prostitution-Abolitionist Radical Feminists and Sex Work as Work Radical Feminists offer competing narratives of life in the sex trades. Prostitution abolitionists argue that people (primarily women) are "prostituted" and cannot voluntarily choose to sell sexual services.[133] Feminists who see sex work as a form of work argue that *people* (cisgender or transgender women and men, gender-nonconforming people, and

130. *See id.* at 29; Miranda Fricker & Katharine Jenkins, *Epistemic Injustice, Ignorance, and Trans Experience*, *in* ROUTLEDGE COMPANION TO FEMINIST PHIL. 268, 272 (2017) ("[T]he positioning of trans people as by definition experiencing a psychiatric disorder—'gender identity disorder'—made them vulnerable to having their reports of their own experience dismissed on the spurious grounds that mental health problems made them unreliable or even deceptive [citation omitted].").

131. *See* Dotson, *A Cautionary Tale*, *supra* note 112, at 32 (summarizing an exchange between a theorist and a grassroots intellectual where the intellectual's critiques of the theorist were disregarded due to the intellectual's "academic approach to [B]lack feminist thought").

132. *See* Butler, *supra* note 46 (manuscript at 11–23) (discussing how the PARF theoretical framework has shaped the current understanding of commercial sexual exchange in the law).

133. While many disagreements between PARFs and Sex Work as Work Radical Feminists are situated around the meaning and feasibility of consent to engage in the sex trades, this Article does not rehash old arguments, except as necessary to help situate the reader within several decades' worth of discussions. Readers who are unfamiliar with the tensions, particularly arguments around whether one can "voluntarily" or "consensually" engage in the commercial sex industry, are encouraged to engage with other scholarship in tackling those questions. *See, e.g.*, Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV., 304 (1995); Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L.J. 47 (1995); Lacey Sloan, *Who Owns Prostitution—and Why? Why Decriminalizing Prostitution is the Right Thing to Do*, FREE INQUIRY 18 (1997); Carole J. Petersen, *Sex Work, Migration, and the United States Trafficking in Persons Report: Promoting Rights or Missing Opportunities for Advocacy?*, 25 IND. INT'L & COMP. L. REV. 115, 121 (2015); Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 5 CALIF. L. REV. 1195, 1201 (2015) (discussing the article's purpose in evolving the arguments within the "pro-sex-work" camp while sidestepping the "intractable fight" between abolitionists and advocates for sex work and breaking free from the "stalled feminist debates"). I have no interest in tackling those questions here.

LGBTQ+ people) can and do engage in sex work[134] voluntarily.[135] They argue that because of violence from the state, the entirety of a sexual transaction must be fully decriminalized. The prostitution-abolitionist narrative maintains an "essentialist" narrative of life in the sex trades.[136] Prostitution abolitionists credit arguments for the full decriminalization of prostitution to a "pimp lobby," pathologize sex workers, and overlook the efforts of critical theorists, and particularly women of color, who resist reliance on the state to solve instances of interpersonal and state violence.[137] In other words, these alternate, relevant hermeneutical resources could be used to understand and critique carceral approaches, potentially resulting in transformative alternatives. Instead, they are overlooked, erased, and misunderstood.

Another particularly illustrative example of dominant and subjugated hermeneutical resources is the transgender experience in America. Dominant hermeneutical resources for understanding what it is to be transgender are particularly "intertwined with self-hatred" due to negative stereotypes, pathologized language, and policed narratives that prevent other experiences of transgender identity from making their way into the dominant resources.[138] Dominant culture "denies, denigrates and pathologizes" gender nonconformity.[139] The culturally available resources "privilege narratives of temporal and situational stability while ignoring, discounting, or even pathologizing experiences of gender that change over time."[140] The medical framework "does not leave room for fluid conceptions of identity."[141] Thus, the dominant narrative of the transgender experience subjugates alternative conceptualizations, often from transgender people themselves.

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134. Sex work as a general term takes many forms. In prostitution, money is exchanged for sexual acts. Individuals can participate in consensual sex work by choice or circumstance. "[C]hoice recognizes the agency of individuals who decide to participate in the sex industry while acknowledging the 'limited and oppressive power structures of race, class, gender, and sexuality' within it." Circumstance recognizes that life is messy, and someone may not be clearly making a choice or clearly being coerced. Perhaps it is one of few options to earn money and the individual is engaging in "survival sex work," where they consider it less of an employment option and more of a way to get a roof over their head and some food in their stomach. Perhaps because of their marginalized status they face significant discrimination in mainstream employment. Yvette Butler, *Aligned: Sex Workers' Lessons for the Gig Economy*, 26 MICH. J. RACE & L. 337, 345 (2020–2021); Meg Panichelli, Moshoula Capous-Desyllas & Yvette Butler, *From Fallen Women to the Tumblr Ban: Representing the Landscape of Sex Work From a Historical and Legal Perspective*, *in* THE ROUTLEDGE INT'L HANDBOOK OF SOC. WORK & SEXUALITIES (SJ Dodd ed., 2021); *see* ERIN FITZGERALD, SARAH ELSPETH PATTERSON, DARBY HICKEY & CHERNO BIKO, MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE 5 (2015).

135. For more on this perspective, see Panichelli et al., *supra* note 134.

136. *See* Butler, *supra* note 46 (manuscript at 24–25).

137. *Id.* at 24.

138. Morgan Taylor Coyle, *Hermeneutical Resources Beyond the Male/Female Binary: Epistemic Injustice and the Advent of a Third Categorical Gender* 18 (2020) (Honors Thesis, Appalachian State University).

139. Aultman, *supra* note 105, at 21.

140. Coyle, *supra* note 138, at 22.

141. *Id.*

There used to be (and to some extent, still is) a script that gender-nonconforming people must meet in order to receive medical assistance for their transition.[142] Historically, "the positioning of trans people as . . . experiencing a psychiatric disorder—gender identity disorder—made them vulnerable to having their reports of their own experience dismissed on the spurious grounds that mental health problems made them unreliable or even deceptive."[143] Cisgender healthcare workers' statements were credited above the lived experiences of trans people due to "prejudicial pathologization."[144]

Transgender litigants have also faced epistemic injustices in the courts, which describe the "right way" to experience gender. For instance, marginalized litigants face "preconceived notions of gender [by] the judges. They must also run their claims against the precedent that has already disclosed how gender will be adjudicated."[145] Their experiences of gender fluidity are made only partially intelligible through precedent on sex stereotyping.[146] Courts use their institutional power to "create the conditions for hermeneutical injustice" by establishing "what it means to be a man or woman."[147] While this has provided legal protections for transgender litigants, most courts have made no effort to "arrive at any meaningful transgender experience of womanhood or manhood."[148] Litigants must stretch and bend to describe their experiences of discrimination through gendered lenses instead of the unique ways that discrimination occurs against those who do not conform to the gender binary. Courts erase "the particular difficulties that transgender employees face in their lived experiences as being transgender."[149]

Thus, the dominant set of hermeneutical resources used by the legal system is structurally flawed. The concept of contributory injustice is particularly relevant here, as it furthers the understanding of epistemic oppression in the law. Because court opinions use hermeneutical resources structurally tainted by prejudice to interpret a marginalized group's social experience, these opinions are insufficient and harmful. These structural failings lead to the exclusion of terminology, imagery, narratives, court opinions, and more that could provide proper legitimacy, respect, and inclusion of perspectives meant to remedy the treatment of those engaged in criminalized survival strategies.

142. *See, e.g.*, Fricker & Jenkins, *supra* note 130, at 272.

143. *Id.* (describing "prejudicial pathologization" as the combination of prejudice against transgender people and stigma against people with mental illness).

144. *Id.*

145. Aultman, *supra* note 105, at 13.

146. *See id.* at 20–22 (discussing Supreme Court holdings that anchor the body as experiencing sex stereotyping as either a man or woman, draw analogy between gender transition and religious conversion, and are organized around cisgenderism).

147. *Id.* at 21–22.

148. *Id.* at 22.

149. *Id.* at 24.

B. Dominant Hermeneutical Resources Discussing and Defining Work

This Section explores dominant hermeneutical resources that define work and uncovers whether survival crimes can be considered work. This Section also uncovers prejudices, inconsistencies, and gray areas within our understandings of work. In the United States, since the industrial revolution, work has been understood as wage labor.[150] Work means being employed by someone else or being self-employed.[151] Work means access to insurance and benefits in case of illness or inevitable aging.[152] Work is tied to values, including "respect, dignity, self-realization, and self-respect."[153] Work means access to full citizenship, as citizens "contribute to the country through waged work."[154] Unsurprisingly, society places great weight on the cultural standards associated with work and makes value judgments about those who are seen as failing to meet those cultural standards.

Kenneth Karst has depicted access or lack of access to work as a set of binaries: independence/dependence, achievement/failure, advancement/stagnation, security/insecurity, and esteem/shame.[155] Meaning, if one doesn't work, one is doomed to the negatively connotated binary. These dichotomies culminate in court opinions, one of the most visible dominant hermeneutical resources. This Section will first discuss how courts visualize work by discussing the "right to earn a living." Then, it will explore other conceptualizations of work.

1. Work in the Courts: Right to Earn a Living

[Fates] The deal is signed?
About time.
Get on the line.
[Eurydice] I did what I had to do
[Fates] That's what they did too . . .
Mr. Hades set you free
To work yourself into the ground
Free to spend eternity
In the factory
And the warehouse

150. This paper may look much different pre-industrial revolution. As such, it does not tackle questions other than wage labor.

151. *See* Marion Crain, *Work Matters*, 19 KAN. J.L & PUB. POL'Y 365, 371 (2010).

152. *See id.*

153. R. George Wright, *Toward a Federal Constitutional Right to Employment*, 38 SEATTLE U. L. REV. 63, 88 (2014); *see also* Crain, *supra* note 151, at 371 (positing that work also means "dignity, standing in society, and membership in the social structure").

154. Crain, *supra* note 151, at 371.

155. *See* Kenneth Karst, *1996 Robert S. Stevens Lecture: The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 530–34 (1997).

Where the whistles scream
And the foreman shouts
And you're punchin' in
And punchin' in
And punchin' in
And you can't punch out[156]

In the Broadway musical *Hadestown*, people are struggling to survive largely because of climate change. On the verge of starving to death in the cold, Eurydice, a "poor young girl," meets Hades. Hades promises Eurydice food and warmth if she works on his wall down in Hadestown.[157] She agrees. Instead of food and a "soft place to land," she is met with an eternity of hard labor. But she is not cold or hungry anymore.

Like in *Hadestown*, many people are left without a workable survival alternative to work. This Section reviews relevant case law claiming the right to earn a living to understand what activities constitute work. The effort to recognize this right is an attempt to resurrect greater judicial scrutiny for legislative actions that impose upon individual economic freedom, prompt courts to elevate economic liberty to a fundamental right, or both. Put simply, progressives widely disfavored the *Lochner* Era for overlooking power inequality between employers and employees. During that era, courts overturned legislation that would have increased worker power. The judicial solution was to replace more searching scrutiny of economic and social legislation with "rational basis review," which wouldn't replace the legislature's wisdom with that of the courts. Ever since then, however, people across the political spectrum have questioned whether rational basis review is sufficient[158] and whether and how to strengthen judicial review of nonfundamental rights.

Recent challenges to occupational licensing laws have urged courts to recognize a "right to earn a living"[159] and shed some light around the status of

156. ANAÏS MITCHELL, *Way Down Hadestown (Reprise)*, *on* HADESTOWN (Righteous Babe Records 2010).

157. ANAÏS MITCHELL, *Way Down Hadestown (Why We Build The Wall)*, *on* HADESTOWN (Righteous Babe Records 2010). In the song "Why We Build The Wall," we find out that Hadestown is surrounded by a massive wall. "Why do we build the wall?" Hades asks. The chorus responds, "to keep us free" as the wall "keeps out the enemy." Who is this enemy? "The enemy is poverty" and "because we have and they have not," and "because they want what we have got," the wall "keeps out the enemy."

158. *See The Notorious RBT*, Institute for Justice, https://ij.org/center-for-judicial-engagement/programs/the-notorious-rbt-rational-basis-test [https://perma.cc/S88B-YJPB]; Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 80 (2018).

159. Groups, such as the Institute for Justice and Cato Institute, are bringing these challenges. As I mentioned, these cases are particularly interesting because people across the political spectrum take issue with occupational licensing laws. Some groups argue primarily that occupational licensing laws inhibit economic freedom. *See, e.g.*, Clark Neily, Trevor Burrus & Gregory Mill, *Tiwari v. Friedlander* (Amicus Brief) (Aug. 15, 2022), Cato Institute, https://www.cato.org/legal-briefs/427iwari-v-friedlander [https://perma.cc/2RH8-BPDM]. Some argue primarily that occupational licensing laws harm marginalized communities. *See, e.g.*, Press Release, Center for American Progress, Removing

criminalized labor as a protectable form of work. This is because such cases must contend with courts' definitions of what activities can be classified as work in the first place. In occupational licensing cases, plaintiffs are prevented from engaging in a type of work, like hair braiding,[160] because they cannot afford to undergo the statutorily prescribed requirements for the license, cannot devote the time to a training program, or face some other barrier. The groups challenging those statutes, particularly conservative and libertarian groups, have claimed the right to earn a living within the Fourteenth Amendment. These challenges primarily focus on individual economic liberty. Notably, many moderates and progressives would typically support the conclusion that there are too many barriers, including occupational licensing laws, for people with criminal records to make a living.[161]

This right "forbids the government from arbitrarily depriving persons of liberty, including the liberty to earn a living and keep the fruits of one's labor."[162] However, at least one court has affirmatively interpreted that "right to earn a living" to exclude criminalized labor.[163] Other courts have noted that by "long tradition in our nation," individuals generally have "the right to engage in . . .

Barriers to Economic Opportunity for Americans with Criminal Records is Focus of New Multistate Initiative (Sept. 12, 2017), https://www.americanprogress.org/press/release-removing-barriers-economic-opportunity-americans-criminal-records-focus-new-multistate-initiative-cap-nelp-cls/ [https://perma.cc/9R4M-5TRH]; Michelle Natividad Rodriguez & Beth Avery, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records*, NAT'L EMP. L. PROJECT (Apr. 26, 2016), https://www.nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses/ [https://perma.cc/M8YV-EE46]. Others argue that both are true. *See, e.g.*, Nick Sibilla, *Barred from Working: A Nationwide Study of Occupational Licensing Barrers for Ex-Offenders*, INST. FOR JUST. (Aug. 2020), https://ij.org/report/barred-from-working/ [https://perma.cc/56S5-ZL76]. The difference between progressive groups and libertarian or conservative groups in addressing occupational licensing is, I think, the end goal. Progressives would not want to return to the *Lochner* Era, but more conservatives would. Progressive groups seem to be advocating policy change, while more conservative groups are filing lawsuits across the nation attempting to change the standard of review that courts apply to economic liberty.

160. *See, e.g.*, Niang v. Tomblinson, 139 S. Ct. 319 (2018) (vacating the judgement in Niang v. Carroll, 879 F.3d 870 (8th Cir. 2018), due to the Missouri legislature's removal of hair braiding from the list of occupations requiring a cosmetology license).

161. For perspectives on the barriers for people with criminal records, see *supra* note 159 and accompanying text.

162. Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon, 880 F.3d 450, 459 (9th Cir. 2018), *amended by*, Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon, 881 F.3d 792 (9th Cir. 2018) ("'It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose.'") (citations omitted). The right to earn a living has also been interpreted as a derivative of the right to property, but that will not be explored in this Article. *See* Dent v. West Virginia, 129 U.S. 114, 121–22 (1889) ("All [vocations] may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the 'estate,' acquired in them—that is, the right to continue their prosecution—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.").

163. *See Erotic Serv. Provider*, 880 F.3d at 459 ("We therefore hold there is no constitutional right to engage in illegal employment, namely, prostitution."); *see also* Greer v. Herbert, No. 2:16-CV-01067, 2018 WL 2122856, at *14 (D. Utah May 8, 2018), *aff'd,* 768 F. App'x 787 (10th Cir. 2019) (following the ruling in Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon).

any of the common occupations of life" with people who wish to do business with them as long as they are "not affirmatively restricted by reasonable laws or regulations of general application."[164] Thus, when a state passes a law restricting individuals from engaging in specifically defined activities, it also restricts individuals from engaging in certain types of occupations. Additionally, the laws are usually considered rational because unless a fundamental right is implicated, courts will resist applying a level of scrutiny higher than rational basis.[165] Thus, overturning laws, particularly criminal laws, is extremely difficult.

Courts essentially define the right to earn a living as the right to "follow any lawful calling, business, or profession" an individual may choose.[166] Whether recognized as a liberty right or a property right, "sources of livelihood,"[167] or the "common occupations of life," courts have recognized that individuals generally may do business with people who wish to do business with them as long as they are "not affirmatively restricted by reasonable laws or regulations of general application."[168] It seems that the affirmative restrictions include criminal laws.

Despite this restriction to "lawful" work, courts have not defined what counts as a lawful calling with any specificity. Courts have addressed what is ***not*** a lawful calling. Courts have also attempted to define whether someone has engaged in honest or dishonest work through their interpretations of vagrancy laws, which criminalized individuals who appeared to lack sufficient employment.

Where vagrancy laws required that one be engaged in an honest livelihood, the court in *Glover v. State* found that showing "enough specific instances in which [one] had received pay for legitimate labor" was sufficient to show one's engagement in an honest livelihood.[169] In *Wallace v. State*, the defendant ran a "soft drink stand and . . . bootblack stand" and also employed several people, which undercut the claim that he lacked the "means of a[n] . . . honest, and reputable livelihood."[170]

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164. Blackburn v. City of Marshall, 42 F.3d 925, 941 (5th Cir. 1995).

165. *See* Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." The court then went on to find that the legislation regulating which licensed professions could fit lenses or duplicate "optical appliances" was rationally related to the health and safety of the public, such that it could withstand constitutional scrutiny.).

166. *Erotic Serv. Provider*, 880 F.3d at 459.

167. *See* Dent v. West Virginia, 129 U.S. 114, 122 (1889) ("All [vocations] may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the 'estate,' acquired in them—that is, the right to continue their prosecution—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.").

168. *Blackburn*, 42 F.3d at 941.

169. 135 S.E. 512, 512 (Ga. App. 1926). It is unclear from the opinion whether this garage was regulated in any way.

170. 75 So. 633, 633–34 (Ala. App. 1917).

Just as courts have described but never defined honest or common occupations, they also have never specifically defined a dishonest or uncommon occupation. A variety of cases demonstrate the flip side of a so-called "honest livelihood." *Portland v. Bangor* identified prostitution as a type of work that is not an "honest livelihood."[171] Betsey Brown and her daughter, Almedia Brown, were suspected of residing in a house of "ill-fame" and engaging in prostitution.[172] As such, they would not have been engaging in honest work.[173] The court did not give an explanation as to why that would not be honest.

This rationale, that prostitution is not honest work, is supported by another case, *Hartman v. State*,[174] in which Angelina Hartman challenged her conviction for vagrancy. Hartman allegedly lived an "idle, immoral, and profligate life" in which she supported herself by "stealing and by trading and bartering stolen property." She lived in a house with a "reputation of being a lewd house." While Hartman's conviction was set aside because the prosecution failed to prove she had committed vagrancy as opposed to merely engaging in "immoral conduct alone,"[175] the court's description of the purpose of the vagrancy statute is instructive. "[The statute was] enacted to prevent men, able to work, from idling and wandering about the community, and becoming drones or thieves or charges upon the public."

While the courts have not been particularly specific in defining "honest" labor, key words suggest that courts are targeting behavior that could cause harm to other people, such as stealing another's property. This supports the inference that when courts discussed "honest" labor or a "common occupation," they meant, as the Ninth Circuit said in 2018, "a lawful calling."[176]

Through their interpretation of vagrancy laws, courts essentially defined work as something that was not illegal and provided sufficient pay, such that it excluded drones, thieves, or public charges.

Eventually, in a 1972 case out of Jacksonville, Florida, the U.S. Supreme Court acknowledged the vagueness[177] built into vagrancy statutes and the harm

171. Inhabitants of Portland v. Inhabitants of Bangor, 42 Me. 403, 410 (1856) (superseded by City of Portland v. City of Bangor, 65 Me. 120 (1876) (finding that the statute violated the Fourteenth Amendment because the statute did not provide adequate process before denying "alleged paupers" of their liberty)).

172. *Id*. at 404.

173. *Id*. at 410.

174. 46 S.E. 628, 628 (Ga. 1904).

175. *Id.* The prosecution also complained that she was a lewd woman who frequented saloons and drank beer in grocery stores.

176. Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon, 880 F.3d 450, 459 (9th Cir. 2018), amended by, Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon, 881 F.3d 792 (9th Cir. 2018). There are other ways to understand legitimacy. For example, stripping or erotic dancing or pornography can be legal forms of labor, but some would argue that they are illegitimate if they believe that sex work is inherently a form of violence against women.

177. The court recognized that the vagrancy law in question "fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute . . . [and] encourage[d] arbitrary and erratic arrests and convictions." Papachristou v. City of Jacksonville, 405 U.S. 156, 162

of having laws that made it easy to "clean up" disfavored people. The court commented on how dangerous it would be to permit such vague laws that would allow "men to be caught who are vaguely undesirable in the eyes of police and prosecution . . . ."[178] The laws appeared as if they were nipping crime "in the bud" but were actually "nets making easy the roundup of so-called undesirables."[179] This will be important later on, as one argument for decriminalizing survival labor and survival crimes is that these laws do not necessarily address actual problems but merely round up "undesireables."[180]

2. Defining Work Through Three Factors

In the courts, work seems to be only that which is legal. But that still does not tell us what work actually *is*. Work is associated with several traditional values. These values are our dominant epistemic resources. They include "respect, dignity, self-realization, and self-respect."[181] These values can certainly be disputed from a variety of critical perspectives, but this Article does not question those values as there is no telling "[h]ow many generations will" pass "before work can be severed" from those values.[182] This Section first outlines the dominant conceptions of work. It then addresses alternate hermeneutical resources that could be used to reconsider the definition of work, a critical step to arguing that survival crimes are work.

Noah Zatz addressed why the question "[w]hat is work?" is important. It is legally significant to know whether an activity is work or whether an individual is a worker.[183] In the welfare context, knowing what work is "illuminates the normative commitments undergirding work's structural role in contemporary antipoverty programs."[184] When welfare programs have a work mandate, one needs to know what "work" is in order to know whether the activity satisfies the mandate.[185] Most people start from an uncritical assumption that work means "paid employment, and . . . proceed[] from there."[186] Work is much more

(1972). By criminalizing "[n]ightwalking," the ordinance also criminalized innocent, "sleepless people" who "often walk at night, perhaps hopeful that sleep-inducing relaxation will result." *Id.* at 163. By criminalizing people who were "able to work but habitually [lived] upon the earnings of their wives or minor children," or those who "habitually [lived] 'without visible means of support,'" the legislation criminalized people who could have a wealthy spouse or who may be "out of the labor market, by reason of a recession or disemployed by reason of technological or so-called structural displacements." *Id.* Additionally, those "neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served' would literally embrace many members of golf clubs and city clubs." *Id.* at 164.

178. *Id.* at 166.
179. *Id.* at 171.
180. Jamelia Morgan, *Policing Marginality in Public Space*, 81 OHIO ST. L.J. 1045, 1049 (2020).
181. Wright, *supra* note 153, at 88.
182. *Id.*
183. Noah D. Zatz, *What Welfare Requires from Work*, 54 UCLA L. REV. 373, 374 (2006).
184. *Id.* at 375.
185. *Id.*
186. *Id.* at 376.

complex than just earning income from an employer. Work can be earning income through self-employment, criminal activity, or panhandling.[187]

Conceptions of labor are particularly elusive as there is no clear definition of work or what qualifies as work. As one scholar has argued, the purpose for which work is being defined impacts its definition,[188] as work does not have a set definition that operates well across all activities for all purposes. Defining work requires an exploration of hermeneutical resources—language, grammar, vocabulary, and other tools—to make sense of how society conceptualizes work.

An exploration of these resources results in three definitions of work: (1) activities engaged in for self-sufficiency, (2) transactional, market-based activities, and (3) activities that fulfill the societal role of providing for one's family.

a. Work as Self-Sufficiency

Today, work is primarily associated with wage labor. People work to earn money and sustain their needs. However, sometimes our needs are removed from the marketplace, such that earning money is not the only way to meet those needs.

In the welfare context, generating income reduces one's need for state funds.[189] This includes income from non-"work" sources, such as "child support collection from or marriage to another adult with income."[190] Moreover, income generation is not the only activity that reduces one's need for state funds. Subsistence farming or gardening and caring for one's children, instead of paying someone else to do it, are two examples of contributing to "self-sufficiency."[191]

Feminist and race scholars have also heavily shaped this literature by discussing work outside of the context of employment for wages. This conceptualization tackles a divide more generally between paid and unpaid work, which could be an arbitrary and discriminatory line that undervalues certain types of work or labor.[192] Again, in the welfare context, if the goal is self-sufficiency and less reliance on government assistance, "in kind income and the

187. *Id.* at 393–94.
188. *Id.* at 456.
189. *Id.* at 394.
190. *Id.*
191. *Id.* at 395.
192. *See, e.g.*, Nancy Folbre, *The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought*, 16 SIGNS 463, 465 (1991) ("Ironically, the moral elevation of the home was accompanied by the economic devaluation of the work performed there. The growth of wage labor . . . almost inevitably wrought new concepts of productive labor."); ANGELA Y. DAVIS, WOMEN, RACE & CLASS 32 (1981) ("[D]uring the pre-industrial era, the economy itself had been centered in the home and its surrounding farmland . . . [w]omen's place had indeed been in the home—but not simply because they bore and reared children or ministered to their husbands' needs. They had been productive workers within the home economy and their labor had been no less respected.").

activities that produce them," such as farming food to sell or eat, could be conceptualized as "work."

If work is equated with self-sufficiency, rather than income, that expands the language, concepts, and other interpretive tools we use to evaluate whether something is work. Such a definition would include various legal (or at least noncriminalized) activities, from working for wages at a fast-food establishment to raising chickens and tending to a garden. It could also extend to criminalized activities, such as paid sex work or theft.

One may argue that someone is not really "self-sufficient" if they are engaging in theft. If work is tied to self-sufficiency, which is understood as the ability "to maintain oneself . . . without outside aid; capable of providing for one's own needs,"[193] then someone engaged in such criminalized activity is not working. Instead, the person who steals someone else's things has done nothing to maintain themselves without outside aid. They are merely staying afloat by taking someone else's resources. However, if self-sufficiency is the end goal, perhaps these methods are working. There are a variety of jobs, particularly those that pay minimum wage or less, in the formal economy where people are not *currently* self-sufficient. They are living paycheck to paycheck and merely staying afloat, yet they are celebrated for working. However, those individuals in the formal economy are working *in pursuit of* self-sufficiency. Similarly, someone engaging in theft is also *in pursuit of* self-sufficiency. Thus, while one may have a moral objection to the work that person does, it seems like a stretch to say that what they do is not work.

b. Work as Transactional Market-Based Activity

Work can also be understood as commerce.[194] Employment and labor law are both primarily concerned with the rules of engagement between an employer and employee. Labor law is "the body of federal law that governs private sector workers' efforts to advance their own shared interests through self-organization and collective protest, pressure, negotiation, and agreement with employers."[195]

193. *Self-sufficient*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/self-sufficient [https://perma.cc/4LTL-24MD] (last visited Feb. 12, 2023).

194. Scholars like Marion Crain argue that work is far more than a transaction. Treating it like a transaction minimizes the weight of culture and values. Crain argues that there should be a "right to work" that is protected through "just cause" over "at-will" employment and support for "dislocated workers." Crain, *supra* note 151, at 374–76.

195. *See, e.g.*, Cynthia L. Estlund, *The Death of Labor Law?*, ANNU. REV. L. SOC. SCI. (2006); Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1539 (2006) (describing the four pillars of work law in the following: "Employment law, in most categorizations, studies the boundaries of the individual employment contract . . . . Labor law is the subject of collective bargaining between unions and employers, statutorily framed by the National Labor Relations Act ('NLRA'). Employment antidiscrimination law is the subject of status-based unequal treatment in the workplace, including on the basis of gender, race, national origin, disability, or religion. Lastly, the fourth category, employee-benefits law, involves the standards controlling the administration and taxation of social welfare attached to the work cycle.").

The substance of labor law focuses on the terms of a contract between a prospective employer and employee, rather than whether what they are bargaining for is seen as a type of "work."[196] Employment law is also concerned with the rules of engagement, rather than defining "work."[197] The substance of employment law covers everything from discrimination on the basis of protected classes to privacy rights of employees. However, no statute specifically states what kind of work qualifies as "employment," outside of whether one meets the criteria to be considered an independent contractor, for example.[198]

At the federal level, the connective tissue between labor, employment, and criminal law is commerce. Federal law regulates the terms of engagement for employers and employees but also includes a subtle definition of work. Congress exercised its commerce powers to regulate labor across the United States. The Fair Labor Standards Act (FLSA) provides "for the establishment of fair labor standards in employments in and affecting interstate commerce."[199] It regulates "industries engaged in commerce or in the production of goods for commerce," among other standards.[200] Commerce is defined as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."[201] The National Labor Relations Act (NLRA) is concerned with the burden or obstruction of commerce, particularly by labor disputes.[202]

The FLSA does not assess whether employees in need of a remedy are engaged in criminalized commerce. Just because an aspect of work happens to be criminalized does not mean that a worker will not be afforded federal protections. In *Kenney v. Helix TCS, Inc.*,[203] the Tenth Circuit Court of Appeals clarified that the illegal nature of an activity does not necessarily preclude the application of a "remedial scheme" for the protection of employees. In that case, a marijuana distributor misclassified a security guard as an employee exempt from overtime under the FLSA. The employer essentially argued that a federal remedy was unavailable to workers where the employer was selling cannabis, which is legal and regulated in the employer's state of Colorado but is prohibited by the federal government and through the Controlled Substances Act (CSA). The purpose of the CSA was to eliminate "commercial transactions of marijuana in the interstate market in their entirety."[204]

196. *See id.*; *Summary of the Major Laws of the Department of Labor*, U.S. DEP'T OF LAB., https://www.dol.gov/general/aboutdol/majorlaws [https://perma.cc/9QFY-YC2T] (last visited Nov. 3, 2023).

197. U.S. DEP'T OF LAB., *supra* note 196.

198. *See, e.g.*, Orly Lobel, *The Gig Economy & The Future of Employment and Labor Law*, 51 U. S.F. L. REV. 51, 61 (2017).

199. 29 U.S.C. § 201.

200. 29 U.S.C. § 202(a).

201. 29 U.S.C. § 203(b).

202. 29 U.S.C. §§ 151–169.

203. Kenney v. Helix TCS, Inc., 939 F.3d 1106, 1111 (10th Cir. 2019).

204. *Id.* at 1110 (citing Gonzales v. Raich, 545 U.S. 1, 15 (2005)).

In rejecting the employers' argument, the Tenth Circuit ruled that all that is necessary for an employee to recover for a violation of the FLSA is that they (1) worked more than forty hours per week and (2) were "engaged in commerce or in the production of goods for commerce" or "employed in an enterprise engaged in commerce or in the production of goods for commerce."[205] Moreover, Congress amended the FLSA since the CSA was enacted and did not exclude "employees working in the marijuana industry, despite specifically exempting other categories of workers."[206] As long as the individual was an employee working over forty hours per week, the sticking point for the court was not whether the activity was criminal, but whether the employee was engaged in commerce. Thus, in the context of protecting employees against exploitation from their employer, the criminality of the work was irrelevant.

Other areas of the law mirror the transactional nature of work that is not limited by its criminalized status, creating more of a gray area between crime and labor. For example, courts have recognized the imperative to obey tax laws, even for income from criminalized sources. Tax law recognizes "[i]llegal gains [as] gross income."[207] When filling out a tax return, individuals must report income "from illegal activities, such as money from dealing illegal drugs," prostitution, gambling, or any other criminalized activity.[208]

Individuals involved in criminalized labor are considered engaged in an occupation and earning income for the purpose of tax reporting. In the seminal case on reporting illegal income to the IRS, *United States v. Sullivan,*[209] a bootlegger argued that he should not have to report profits from the illegal sale of liquor because unlawful gains were not within the meaning of the tax code.[210] The court rejected that argument, concluding that "Congress did not intend to allow an individual unlawfully employed to avoid taxation and thereby increase the burdens of individuals lawfully employed."[211] Under tax law, such individuals are considered to be engaged in "work," so that the government does not lose out on tax dollars.

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205. *Id.* at 1109.

206. *Id.* at 1111.

207. *See* 26 C.F.R. § 1.61–14.

208. Internal Revenue Service, Tax Guide 2023, https://www.irs.gov/pub/irs-pdf/p17.pdf [https://perma.cc/S95V-ACR4]; *see also* ¶ J-1601 INCLUSION OF ILLEGAL INCOME IN GROSS INCOME., 1997 WL 500281, at *1–2 (listing transactions that must be included in gross income such as bribes, drugs, extortion, kickbacks, prostitution and massage, and swindling, among others). Tax scholars have written on the Fifth Amendment implications of disclosing one's criminalized labor and the dangers of opening oneself up to prosecution. *See, e.g.*, Richard B. Stanley, *Conflict Between the Internal Revenue Code and the Fifth Amendment Privilege Against Self-Incrimination*, 15 U. BALT. L. REV. 527, 550–51 (1986).

209. 274 U.S. 259, 263 (1927).

210. Christine Manolakas, *The Taxation of Thieves and Their Victims: Everyone Loses but Uncle Sam*, 13 HASTINGS BUS. L.J. 31, 33 (2016); United States v. Sullivan, 274 U.S. 259, 263 (1927) (also noting that "the word 'lawful' is omitted before 'business' in the passage just quoted").

211. Manolakas, *supra* note 210, at 33.

In federal criminal law, marijuana and human trafficking laws tend to view work as transactional. The CSA was upheld as lawfully criminalizing marijuana[212] and restricting state efforts to permit local cultivation and use.[213] Marijuana is "a fungible commodity for which there is an ***established, albeit illegal, interstate market***."[214] The Court concluded that Congress had the power to regulate a purely intrastate activity using its commerce power because of its place within the larger—illegal—interstate market.[215]

Laws prohibiting human trafficking expand on the definition of commerce. A "commercial sex act" is "any sex act" that is exchanged for "anything of value [a]s given to or received by any person."[216] This can include more than money, property,[217] or intangibles.[218] Courts use a liberal reading to determine whether something "of value" has been exchanged.[219] People who engage in commercial sexual exchange often talk about how it allows them to "exchange [their] sex or sexuality" for "money, gifts, safety, drugs, hormones or survival needs like housing, food, clothes, or immigration and documentation—whether [they] get to keep the money/goods/service or someone else profits from these acts."[220] This Article does not argue that human trafficking should be seen as moral or acceptable work,[221] but it does recognize that "commerce," within sexual commerce, is about labor in exchange for more than just money.

Thus, work could also be understood as commerce, or transactions for goods or services in exchange for something of value in the market-based economy. This Section also demonstrated how what is considered crime, work, or both is arguably an arbitrary, moving target.

c. Work as Meeting a Socially Defined Caretaking/Provider Role

Finally, work can be understood as meeting a societally defined role. While income or commerce are easy anchors for the concept of work, work is clearly

212. Gonzales v. Raich, 545 U.S. 1, 15 (2005) (noting that it is undisputed that "the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power").

213. *Id.* at 33.

214. *Id.* at 18 (emphasis added).

215. *Id.* at 22.

216. 22 U.S.C.A. § 7102(4) (2021).

217. *See, e.g.*, David v. Weinstein Co. LLC, 431 F. Supp. 3d 290, 298 (S.D.N.Y. 2019).

218. Noble v. Weinstein, 335 F. Supp. 3d 504, 521 (S.D.N.Y. 2018) ("For an aspiring actress, meeting a world-renowned film producer carries value, in and of itself. The opportunity . . . to sit down with that producer in a private meeting to review her film reel and discuss a promised film role carries value that is career making and life changing.") (citing to other cases' intangible things of value: "the opportunity for a sexual encounter," "receipt of sexual photographs," or sex acts).

219. *Id.*

220. YOUNG WOMEN'S EMPOWERMENT PROJECT, GIRLS DO WHAT THEY HAVE TO DO TO SURVIVE: ILLUMINATING METHODS USED BY GIRLS IN THE SEX TRADE AND STREET ECONOMY TO FIGHT BACK AND HEAL 7 (2009).

221. Though in a penal-abolitionist world, continuing to criminalize human trafficking is a question that will need to be grappled with.

not just about income or commerce. Dominant hermeneutical resources associate work with certain values, including "respect, dignity, self-realization, and self-respect."[222]

Defining work as something that meets a societally defined role may avoid some of the objections to tying work to income, which inherently devalues non-income-generating, caretaking labor. Feminists have illustrated the gendered assumptions behind the hierarchy of wage labor and unpaid, caregiving labor.[223] This understanding is bolstered in the welfare context where work is not restricted to income generation or self-sufficiency but can include other "substantial, continuous, and meaningful" activities like caring for one's family, pursuing education, and engaging in community service.[224]

Recently, COVID-19 highlighted the importance of uncompensated, caregiving labor that typically falls disproportionately on women and women of color.[225] The pandemic "generally worsened the gender gap in paid work and increased the 'second shift' burden on many women." Many households "bec[a]me more egalitarian" as men took on more household labor like cooking, doing laundry, and cleaning.[226] Thus, in leaving gendered assumptions unchallenged, for this Article, the COVID-19 pandemic provides an excellent example of how feminist critiques of labor are still necessary and "encourage a broader rethinking in society's approach to the value of care work."[227]

Other gendered assumptions of masculinity and femininity are also present in this Section,[228] but for the purposes of this Article, are left unchallenged. While I leave these gendered assumptions unchallenged, I want to note the dangers of these assumptions in maintaining the patriarchy. Under a theory of Collective Liberation, all systems of domination and subordination are

222. Wright, *supra* note 153, at 88.

223. *See, e.g.*, Maybell Romero, *Ruined*, 111 GEO L.J. 239, 247 (2022) (citing Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 35–36 (1996); MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 251 (2013); Rona Kaufman Kitchen, *Eradicating the Mothering Effect: Women as Workers and Mothers, Successfully and Simultaneously*, 26 WIS. J.L. GENDER & SOC'Y 167 (2011).

224. Noah D. Zatz, *What Welfare Requires from Work*, 54 UCLA L. REV. 373, 424 (2006).

225. Rosalind Dixon & Amelia Loughland, *Gender Disruption, Amelioration, and Transformation: A Comparative Perspective*, *in* THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES 139 (Deborah Brake, Martha Chamallas & Verna L. Williams eds., 2021).

226. *Id.* at 140–41.

227. *Id.* at 141.

228. For example, much has been said about how "traditional" spheres of provider, caregiver, and houseworker have not held as true for Black families since Black women have often labored outside of the home. *See, e.g.*, DAVIS, *supra* note 192, at 5 ("[T]he slave woman was first a full-time worker for her owner, and only incidentally a wife, mother and homemaker."); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 98–99 (1st ed. 1984) (describing a disconnect between the movement for women's liberation, White women's focus on work outside of the home, and the reality that Black women already worked outside of the home and did not find that work liberating); COLLIN, *supra* note 49, at 54 (describing Black women as "aspiring to a model of womanhood that was inappropriate to them" when they focused on the domestic sphere of their own homes, instead of the homes or fields of others).

interdependent.[229] Consequently, a theory that worsens one type of domination while lessening another is not appropriately liberatory.[230] However, the societal gender norms embedded in caretaking and providing are still prevalent. Gender inequality is exacerbated by buying into gender roles, particularly by embedding them into the law, which is believed and accepted by many as true.[231] Therefore, this Article addresses gender norms as a persuasive strategy to meet some readers where they are. Essentially, some people argue that men and women have societal roles to fulfill. If those people are considering whether crime is labor, it seems that as long as men and women are fulfilling their societal duties, even by committing a crime, those actions may be more epistemically intelligible. If these arguments are more epistemically intelligible, navigating the difficult questions of crime and work becomes easier. For example, if fulfilling a provider role is a requirement of being a "man," then men who successfully provide for their dependents through survival crimes are working. If fulfilling a caretaking role is a requirement of being a "woman," then women engaged in survival crimes are working.

As previously outlined, work can be one or more of the following: (1) activities engaged in for self-sufficiency, (2) transactional, market-based activities, or (3) activities that fulfill the societal role of providing for one's family. Survival labor often meets all three of these factors.

C. Alternate Resources: Work, Crime, Survival, and Resistance

We now know that work can be conceptualized as conduct that one engages in to accomplish various necessary pursuits. To understand criminalized activity as work, we must engage with hermeneutical resources challenging the dominant interpretations that separate work from crime.

As mentioned previously, Karst depicted access or lack of access to work as a set of binaries: independence/dependence, achievement/failure, advancement/stagnation (or decline), security/insecurity, and esteem/shame.[232] If one doesn't work, it means that one is doomed to the stigmatized binary. Dominant epistemic resources are quick to label people engaged in survival crimes with the "negative" binary term. However, with the three factors used in this Article to conceptualize work, vilification is not necessary.

The ability to work and earn enough to make ends meet suggests good, responsible choices were made, while the inability to do so suggests poor decision-making and blameworthiness. This is the connection to the previously

229. BELL HOOKS, OUTLAW CULTURE 244 (1994); *see also* Yvette Butler, *In Pursuit of Collective Liberation in Feminist Constitutionalism*, 122(6) MICH. L. REV. (forthcoming Apr. 2024) (manuscript at 8–12) (on file with author) (describing a theory of collective liberation).

230. *Id.*

231. *Id.*

232. Karst, *supra* note 155, at 530–34.

mentioned concerns about individuality and personal responsibility.[233] But the "deserving" versus "undeserving" calculus is familiar in welfare policy debates. Critical scholars have argued that the racialized and gendered conceptions of welfare policy are grounded in loaded conceptions of who is considered worthy of assistance.[234] Historically, once assistance is provided, a narrative of responsibility takes hold: work, act morally, be deserving [of rights, of citizenship, of respect].[235] While an individual responsibility framework sounds good, it overlooks alternate hermeneutical resources that tell a more complicated story.

Prejudice and structural barriers are important factors complicating the individual responsibility narrative for marginalized people. There is a prejudiced idea that personal failings affect Black people more than their White counterparts. Scholars have demonstrated a checkered history of blaming Black people for their circumstances in an incomparable way to White people. "[T]he reason [B]lack people aren't as successful as their [W]hite counterparts is because of a lack of hustle, [because] they don't quite have the work ethic necessary to succeed in the modern moment."[236] This critique came from both White and Black leaders and commentators.[237]

Moreover, research has demonstrated that when men, especially Black men, struggle to find well-paying labor, they feel emasculated and exploited.[238] Being a man includes "taking care of your family, paying your bills, having a decent job," and having your life together.[239] While there is the "absentee Black father"[240] stereotype, that stereotype is at least partially tied to fulfilling the provider role. Fathers are seen as absent when they are working multiple shifts or various jobs to make sure their children have the "stuff [they] really need," like "clothes on [their] backs and a roof over [their] head, food in [their] stomachs."[241] Counter to the perception of Black fathers as failing to meet their

233. *See infra* Introduction.

234. *See generally* MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS of ANTIPOVERTY POLICY 133–34 (1999) (pointing to mass media as a major culprit).

235. Holloway Sparks, *Queens, Teens, and Model Mothers: Race, Gender, and the Discourse of Welfare Reform*, *in* RACE AND THE POLITICS OF WELFARE REFORM 171, 177 (Sanford F. Schram, Joe Soss & Richard C. Fording eds., 2003).

236. LESTER K. SPENCE, KNOCKING THE HUSTLE: AGAINST THE NEOLIBERAL TURN IN BLACK POLITICS 25 (2015).

237. *Id.*

238. *See* Jason M. Williams, Sean K. Wilson & Carrie Bergeson, *It's Hard Out Here if You're a Black Felon: A Critical Examination of Black Male Reentry*, 99 THE PRISON J., 437, 448–51 (2019).

239. Steven Quam, *Racial Identity, Masculinities, and Violence Exposure: Perspectives from Male Adolescents in Marginalized Neighborhoods*, 67 J. ADOLESC. HEALTH 638, 640 (2020).

240. *Id.* at 641.

241. *Id.* Absenteeism was less common for Black fathers with professional careers, as they had the benefit of paid time off and workplace flexibility to spend more quality time with their families.

societally prescribed provider role, they are actually fulfilling it, just not in a societally preferred way.[242]

Maintaining the penal system contributes to feelings of emasculation, as well as to the barriers that maintain economic hardship. Being labeled a criminal "amount[s] to a metaphoric castration, as they cannot provide for their families."[243] Other research has engaged Black men on questions of the disproportionate singledom among Black women. That research echoes some of these concerns about the role of the criminal system in tainting Black men as ineligible for marriage, including feelings of emasculation.[244] In one study, 49 percent of study participants cited the incarceration of Black men as a key reason for their lack of marriageability.[245] One participant expanded on this:

> Everybody that's in prison don't deserve to be in prison. I can personally tell you that 'cause I've been around them. Drugs, stealing, most Black men trying to make a quick dollar to provide for their family and they just make mistakes doing that. It's a lot of good men—young men and older men—are in prison and if they don't come up with a plan to help rehabilitate them, they won't be no good when they get out.[246]

Black women also have societal expectations to meet. As women, they are expected to be caregivers, but as Black people they are expected to labor.[247] Similar to today, Black women in the early twentieth century sought out and engaged in a variety of categories of informal labor ("illegal, quasi-legal, disreputable, and dangerous" jobs), including "hostesses, dancers, and waitresses at nightclubs and speakeasies; became unlicensed street peddlers, number runners, and narcotics saleswomen and bootleggers; and established home-and

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242. Again, this is sure to raise some red flags from a feminist theorist perspective that are outside the scope of this Article. For example, bell hooks has argued that the key to dismantling the patriarchy is to acknowledge that patriarchal masculinity denies "males access to full emotional well-being, which is not the same as feeling rewarded, successful, or powerful" as a result of asserting "control over others." BELL HOOKS, THE WILL TO CHANGE: MEN, MASCULINITY, AND LOVE 31 (2004). Men are pushed to engage in market-based work and fulfill their provider role in a way that leaves "little or no time left for emotional labor, for doing the work of love." *Id.* at 94. Work ends up being an "excuse for emotional estrangement." *Id.* at 97. Wage labor, in its current form, leaves no room for recognition or compensation of emotional labor, self-development, seeking interpersonal connection, or for men to see "work as part of life, not their whole existence." *Id.* at 103. Work can be life enhancing, even if not liberating, and can play a role in breaking down the patriarchy.

243. Williams et al., *supra* note 238, at 451.

244. *See, e.g.*, Tera R. Hurt, Stacey E. McElroy, Kameron J. Sheats, Antoinette M. Landor & Chalandra M. Bryant, *Married Black Men's Opinions as to Why Black Women Are Disproportionately Single: A Qualitative Study*, 21 PERS. RELATSH. 98 (2013) (noting that imprisonment affected men psychologically and impacted their rehabilitation, which in turn impacted their ability to be provide for their families upon release).

245. *Id.*

246. *Id.*

247. *See* Nina Banks, *Black Women's Labor Market History Reveals Deep-Seated Race and Gender Discrimination*, ECON. POL'Y INST. (Feb. 19, 2019), https://www.epi.org/blog/black-womens-labor-market-history-reveals-deep-seated-race-and-gender-discrimination [https://perma.cc/XQ7B-4KDW].

street-based gambling, psychic, and sex-related businesses."[248] Engaging in this kind of labor allowed Black women access to greater "occupational autonomy," where they could avoid "menial labor such as household work,"[249] avoid entering domestic work as "maids, cooks, or laundresses,"[250] or combine their informal labor with formal labor. This flexibility opened a door to greater balance, as they had "multifaceted roles as workers, wives and mothers, and amusement seekers."[251] Black women were expected to juggle numerous responsibilities and manage "their households, [take] care of their families, and [maintain] grueling work schedules."[252] Informal work provided more flexibility to meet these responsibilities than formal options such as household or industrial workers.[253]

Like the type of work explained above, people who engage in criminalized activities are seen as "offenders" and those on the receiving end of their behavior as "victims." In challenging dominant hermeneutical resources, we must explore alternate and subjugated hermeneutical resources, such as acknowledging the state's key role as an offender. In doing so, the state's role as "offender" becomes a key part of the analysis. The ways in which minorities have been purposefully excluded from economic security and political self-determination in the United States come into focus. Critical theorists have explained how the state is responsible for designing neighborhoods in a way that concentrates poverty in minority communities[254] and keeps minorities out of White spaces.[255] They also detail how the criminal system operates in a way that subjugates, or is designed to subjugate, those same communities.[256] These are just two of the interlocking systems that keep Black people, and other minorities, out of employment in the

248. LASHAWN HARRIS, SEX WORKERS, PSYCHICS, AND NUMBER RUNNERS: BLACK WOMEN IN NEW YORK CITY'S UNDERGROUND ECONOMY 25 (2016).

249. *Id.*

250. *Id.* at 138.

251. *Id.* at 25.

252. *Id.* at 39.

253. *Id.*

254. *See, e.g.*, BELL, *supra* note 43 (arguing that "housing law and policy" created "high-poverty neighborhoods" and this "concentrated disadvantage" remains due to "disinvestment, exploitation, and paradoxical state neglect and social control").

255. *See, e.g.*, Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1119 (2017) (arguing that policing strategies, practices, and tactics to protect Whiteness include regulating the presence and movement of Black people in "[W]hite spaces").

256. *See, e.g.*, Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2054 (2017) (discussing the theory of "[l]egal estrangement," which is a "theory of detachment and eventual alienation from the law's enforcers, and it reflects the intuition among many people in poor communities of color that the law operates to exclude them from society"); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (Carbado points to the structural nature of police violence against Black people. There are several factors, including their frequent surveillance and police contact, exposing Black people to the possibility of harm. Multiple legal actors in the civil and criminal process translate this harm and violence into justifiable force). *See generally* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019(1) FREEDOM CTR. J. 75 (2020) (arguing that the criminal system is not malfunctioning when it subjugates minorities).

formal economy and make participation in the underground economy necessary for survival.

The "controlling images"[257] developed under this socially constructed racial hierarchy remain relevant to who is seen as a criminal, what activities are perceived as crimes, and whether one is seen to be engaged in work. It is this foundation of prejudice that some argue separates an "entrepreneur" from a "criminal."[258]

As explained above, people use hermeneutical resources to make sense of their experiences. Interpretive capacities are aided by reference to concepts, language, grammar, vocabulary, and other tools to make sense of an experience.[259] These tools help communicate an experience to others, and communicate "experiencing and feeling wrongs or rights, misdeeds, affection, compassion, pain, anguish, etc."[260] Labels help individuals and communities understand social experiences. Without these labels, concepts, vocabulary, grammar, and other tools, we cannot make our experiences intelligible to others.

Much has been written about the connection between language and the consequential dehumanization and mistreatment of people who are classified as "other." Many are familiar with the shift in mainstream language between "convict" to a "person with a conviction" or "disabled" to "person with a disability." This shift in language has been intentional about referencing "criminalized survival strategies" or "criminalized work" or "people who engage in criminalized labor" and similar phrases as opposed to "crimes" or "criminals."

Not only is there a false dichotomy between labeling individuals as either a victim or a criminal,[261] but also "'[c]rime,' and thus 'criminals,' can exist due to the perception of a violation of a desired societal norm."[262] In other words, crimes only exist because society devalues certain behaviors and then passes a law recognizing such behavior as criminal. The problem is that the devaluation of behaviors is not equitable and has often targeted the behaviors of "others."

In a system that criminalizes to punish behaviors that harm others, what legislatures decide to criminalize, ideally, would be tailored to the problem they

257. Collins, *supra* note 49, at 69.

258. *See, e.g.*, LESTER K. SPENCE, KNOCKING THE HUSTLE 139 (2015) (arguing that the "hustles" engaged in by poor and working-class people are frowned upon "because [that type of entrepreneurship] doesn't generate tax revenue and doesn't shunt people into acceptable forms of income-generating employment").

259. *See, e.g.*, Aultman, *supra* note 105, at 17 (discussing how trans-led publications were meant to spread information and create "a language, a sub-cultural grammar and vocabulary of transgender being, a grammar that is often missed in contemporary legal discourse").

260. *Id.* at 14.

261. *See, e.g.*, Butler, *supra* note 46 (arguing that people who engage in commercial sex can be victims of private and state violence, as well as labeled "criminals" for engaging in prostitution, a criminalized activity).

262. Michael J. Coyle & Stephen T. Young, *The Rhetoric of Dehumanization: Japanese American Concentration Camps and the US Criminalizing System*, *in* CONTESTING CARCERAL LOGIC: TOWARD ABOLITIONIST FUTURES 135, 139 (Michael J. Coyle & Mechthild Nagel eds., 2022).

are attempting to solve. However, criminalization can be arbitrary at best and intentionally discriminatory at worst. Legislatures are not required to criminalize only those activities that are morally wrong. Instead, activities may be criminalized because they are morally wrong (*malum in se*), or actions are considered morally wrong because they are criminalized (*malum prohibitum*).[263] Scholars have questioned the objectivity of which activities are criminalized and why.[264] Quality of life crimes are a popular example of low-level offenses, such as panhandling, loitering, and graffiti, which do not seem to be objective moral wrongs in the way that rape, burglary, and murder are.[265]

Moreover, what is morally wrong assumes an objective standard. Whether such a standard exists is not easily proven. As some have argued, there are activities, primarily quality of life crimes, that are criminalized because of racism,[266] classism,[267] ableism,[268] and a society's general desire to be free of those considered undesirable. These arguments demonstrate that societies in search of "order" often criminalize activities for political, as opposed to morally objective reasons. As one says, "disorder is . . . in the eye of the beholder."[269]

Othering terminology, like "criminal," communicates something about that person: it "homogenize[s] the 'self' or the dominant group opposed to the 'enemy', and [it] present[s] the radical difference of the enemy as inferior to the dominant."[270] "This radical difference making allows for the 'destruction' of the 'enemy' as they represent dangerous, threatening or 'criminal' behavior."[271] This language places an "implicit value [or] hidden assumptions in words and/or

263. *See generally* Priel, *supra* note 32 (discussing the difference between these two types of wrongs).

264. *See supra* notes 257–61 and accompanying text; *infra* notes 266–67 and accompanying text.

265. *See* Josh Bowers, *What if Nothing Works? On Crime Licenses, Recidivism, and Quality of Life,* 107(5) VA. L. REV. 959, 972–77 (2021) (describing the critical legal scholars' contributions to interpreting order maintenance policing as a demonstration of power as well as social science research indicating that there is widespread agreement on serious offenses as being morally wrong, but not lower-level offenses).

266. *See, e.g.*, Regina Austin, *"Not Just for the Fun of It!": Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667, 693 (1998). Extremely recent examples of such criminalization exist. For example, in Washington, D.C., "go-go" music was only recently recognized as D.C.'s "official sound" after attempts to literally silence the music in rapidly gentrifying areas. *See, e.g.*, Rob Walker, *Washington DC's Go-Go Music Hits Back in Fight Gentrification*, GUARDIAN (Dec. 14, 2019), https://www.theguardian.com/us-news/2019/dec/14/washington-dc-go-go-music-hits-back-gentrification-sould-of-a-city [https://perma.cc/C9KS-SDFL] (describing the history of associating go-go with violence and repeated attempts to stop go-go playing on the streets of D.C.).

267. *See, e.g.*, Bowers, *supra* note 265, at 983–84, 1005–06.

268. *See, e.g.*, Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 530–31 (2022) (discussing the ways in which disability profiling is facilitated by the Fourth Amendment). *See generally* Jamelia Morgan, *Policing Marginality in Public Space*, 81 OHIO ST. L.J. 1045 (2020) (discussing the history and continued policing of marginality based on race, class, disability, and other statuses).

269. Bowers, *supra* note 265, at 972.

270. Coyle & Young, *supra* note 262, at 135.

271. *Id.*

phrases' used to express the attitudes and judgements of the individual or institution."[272] As such, a word like "criminal" means an "'evil,' [which] must be feared, controlled and thusly punished."[273] As critical theorists have explained, marginalized groups are cast as the "them" in an "us" versus "them" dichotomy. Black men, in particular, are viewed as "other," as "them," and as "they" who are dangerous criminals, not victims.[274] But past and enduring efforts by states to separate, concentrate, subordinate, and dominate certain groups are victimization.[275] Black men, often viewed as the most criminal, are also victims of state violence.

The criminal system has played a large role in limiting formal employment opportunities for Black people. Studies routinely show that formal employment opportunities are limited once one has contact with the criminal system. While formal employment becomes limited regardless of race, studies suggest that disparities in employment and poverty upon reentry after incarceration are racialized.[276] Black people, particularly Black men, face the greatest stigma after incarceration.[277] This stigma directly impacts their ability to obtain employment and livable wages. While White people also make poverty wages after incarceration, Black people face some of the "most severe" economic hardship upon reentry.[278] In other words, not only do criminal penalties limit formal employment, but they also limit one's wages in the formal economy.

Despite this longstanding research, dominant hermeneutical resources remain committed to the state's imposition of criminal penalties on offenders. One justification for continuing to pursue criminal penalties is to prevent future crime. However, research on recidivism calls this justification into question, as steady employment and living wages are linked to a reduction in potential recidivism.[279] Employment enhances economic security. If criminal penalties jeopardize economic security, then the penal system is merely increasing the likelihood of future crime.

Dominant hermeneutical resources get in the way of remedying past subjugation. Examples of this are clear in efforts to remedy the racial disparities

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272. *Id.*

273. *Id.* at 135–36.

274. *See* Carbado, *supra* note 256 (explaining the creation of the assumption of Black criminality and the existence of structural police violence against Black people).

275. See Bell, *supra* note 43 (describing the four categories of enduring housing segregation).

276. *See, e.g.*, Bruce Western & Catherine Sirois, *Racialized Re-entry: Labor Market Inequality After Incarceration*, 97 SOC. FORCES 1517, 1523 (2019). "The stigma and social network accounts for the economic disadvantage of [B]lacks and Hispanics after incarceration together suggest that reentry is racialized: even among very disadvantaged job seekers who have just left prison, [B]lacks and Hispanics are relatively disadvantaged in the labor market." *Id.* at 1521. As compared to Whites, Black people are incarcerated at rates five to eight times higher, and Hispanics are incarcerated at rates two times higher. *Id*. at 1518.

277. *Id.* at 1521.

278. *Id.* at 1537.

279. *See* Williams et al., *supra* note 238, at 447.

of reentry. Once released from incarceration, Black returning citizens are less likely to be hired than White returning citizens.[280] Common stereotypes of Black criminality lead employers to assume that Black people are "unreliable, dishonest, and lazy."[281] While many advocates and progressive states have attempted to help curb employment discrimination against people with criminal system involvement through the use of ban-the-box policies,[282] such policies may actually exacerbate discrimination.[283] Antidiscrimination policies are not enough to overcome patterns of discrimination that are driven by racial bias in employer behavior and structural racism.[284] Employers use race as a proxy for criminality and default to racial stereotypes when they do not have evidence to the contrary.[285]

Harmful racial stereotypes are particularly salient in studies about Black fathers. Research suggests that the bias against Black fathers is so great in states that are most protective of those with criminal records that Black fathers "were less likely to find work than either their counterparts in less regulated states or those without records."[286]

The effects of past neighborhood discrimination and disparities in generational wealth also have a disproportionate impact. Whereas White returning citizens may be able to utilize their networks to find secure and well-paying jobs upon release, Black and Hispanic returning citizens are less likely to be able to do the same. They are less likely to have "social and family contacts who could connect them to high-paying jobs" upon release.[287] Instead, disproportionate numbers of minority (particularly Black) returning citizens *return* to neighborhoods with high poverty rates and "concentrated disadvantage."[288]

One aspect the dominant crime narrative overlooks is the "fear of having to return to the streets to make money to provide for their families because they had difficulty finding steady and meaningful employment."[289] This is a real fear because "incarceration reduces nonresident fathers' formal cash, informal cash,

280. Lin Liu, *Racialized Employment Outcomes During Reentry: A Test of Competing Explanations*, 70 CRIME & DELINQ. 1, 3 (2022).

281. *Id.*

282. *Ban the Box*, NAT'L CONF. OF STATE LEGISLATURES (June 29, 2021), https://www.ncsl.org/civil-and-criminal-justice/ban-the-box ("'Ban the box' policies arose from a belief that employers should consider a job candidate's qualifications first—without the stigma of a conviction or arrest record. Many ban the box policies provide applicants a fair chance at employment by removing conviction and arrest history questions from job applications and delaying background checks until later in the hiring process.").

283. Allison Dwyer Emory, *Protective State Policies and the Employment of Fathers with Criminal Records*, SOC. PROBLEMS 1, 17 (2021).

284. *Id.*

285. *Id.*

286. *Id.*

287. Liu, *supra* note 280, at 4.

288. *Id.* (emphasis added).

289. *Id.* at 7.

and in-kind (noncash) contributions, and increases their accrual of child support arrears."[290] Fathers who do not reside with children, particularly Black fathers, tended to provide less formal monetary support but provided in-kind and informal support, such as clothing, food, school supplies, diapers, medicine, entertainment items, and other material items.[291] In-kind and informal support is linked to symbolic and emotional significance.[292] Fathers who are unable to get jobs in the formal economy contribute less formal support and provide more informal cash support when working in the informal economy.[293]

The dominant crime narrative, which paints people as selfish criminals, fails to account for a desire to get a "regular" job that does not skirt the law. In other words, returning citizens have a desire to follow the law (or at least, not run afoul of it) in providing for themselves and their families. They want to meet their financial obligations, provide a good home for their children, and do more than just scrape by and live in fear of further arrest and incarceration. But, in a bizarre way, the stereotype of Black and poor criminality has turned into a prophecy that the state ensures is fulfilled. With hurdles placed in the way of success, people will do what they can to survive.

As stated previously, Black men with criminal records have greater trouble obtaining employment after incarceration than White men with criminal records. For Black men, the reasons for engaging in criminalized labor upon reentry are primarily focused on making ends meet. Rather than "a display of persistent criminal character," criminalized labor is "a resilient response to systemic racism and blocked opportunities."[294] There is reason to believe that this is also true for individuals living in poverty: a lack of gainful employment (as a proxy for access to material resources for subsistence and thriving) can result in engagement in criminalized activity as a survival and resistance strategy. Due to oversurveillance, overpolicing, underinvestment, and formal employment barriers, communities of color are disproportionately punished for the same behavior committed by Whites.[295]

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290. Allison Dwyer Emory, Lenna Nepomnyaschy, Maureen R. Waller, Daniel P. Miller & Alexandra Haralampoudis, *Providing after Prison: Nonresident Fathers' Informal Contributions to Children*, 6 RUSSELL SAGE FOUND. J. SOC. SCI. 84, 102 (2020).

291. *Id.* at 86.

292. *Id.*

293. *Id.* at 104.

294. Abigail Henson, *Desistance, Persistence, Resilience and Qualitative Exploration of How Black Fathers with Criminal Records Navigate Employer Discrimination*, 24 PUNISHMENT & SOC'Y 262, 262 (2022). This article makes the additional point—one that I hope carries throughout my Article—that Black fathers are not passive. Instead, they make active choices to resist under the circumstances they face.

295. This has been studied extensively with regard to drug possession and sentencing as well as the school-to-prison pipeline and quality of life crimes. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (discussing sentencing); Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH .U. L. REV. 919 (2016) (discussing the "school-to-prison pipeline"); Jamelia Morgan, *Policing Marginality in Public Space*, 81 OHIO STATE L.J. 1045, 1048, 1054 (2020) (discussing quality of life crimes).

Alternate and subjugated hermeneutical resources provide a basis upon which the dominant vision of work is legal, and the stereotypes that make up whom we refer to as "criminal" are appropriately questioned.

D. Abolitionist Logics as Alternate Hermeneutical Resources

In 2018, I was engaged in criminal system reform work for a nonprofit in Washington, D.C. We had received a government grant to develop an arrest diversion program for individuals engaged in commercial sexual exchange. Working in coalition with others in the city who were interested in alternatives to incarceration, I sought a meeting at the Department of Behavioral Health to discuss the development of a prearrest diversion program with city leadership.

Since I was driving into the city from staying the night at my partner's home in the suburbs, I had several things in my car: an irreplaceable canvas bag my grandmother had given me, a small backpack with a variety of personal items, and a workbag that (I thought) contained my laptop. It turned out that my laptop was in my small backpack along with the personal items.

I learned the meaning of irony that day when I returned to my car from the meeting where I had just been discussing the importance of not arresting folks who engage in low-level, nonviolent offenses (like theft) to find that my back window had been smashed open. Someone had stolen my canvas bag and the small backpack containing my laptop. Not only had someone stolen my things, but they had also stolen my sense of safety.

Ever since that day, I am particularly on edge when I leave my car unattended. It doesn't matter whether I am parked in a city or a rural area. It doesn't matter how clean or cluttered my car is. It doesn't matter whether there is anything to steal. Some days I recall what my father taught me: sometimes, it's better to leave your car door unlocked, so if someone wants to investigate whether there's something to steal, they don't break your window and leave you with the mess and an expensive repair. Some days, I'll inconvenience myself by leaving any valuables at home instead of carrying them on me. Some days, if I'm riding with someone with a nice car, I worry that they're making us a target. Other days, I don't want to take my car because maybe my light blue[296] Prius makes me look like an easy target.

When I make strategic choices about my mode of transportation and whether I choose to lock my car that day, I'm right back on the streets of D.C. feeling my heart pounding in my chest, the ice in my veins, and the blinding panic at my missing items. What bothers me most is that an irreplaceable item was taken from me and there's no system through which to get it back.

Some people seem to find it unintelligible how others could want to decriminalize everything, defund the police, and close all sites of incarceration. Some may find it hard to see how an abolitionist perspective can protect victims

296. The technical color is "Sea Foam."

of crime. Safety is important to first-time victims, repeat victims, and community members who would like to remain unvictimized.[297] Surely safety is secured through policing, prosecution, and the penal system.

However, a victim's perspective is not monolithic. The victim's presented perspective often centers on select victims' voices.[298] While participation in the legal system can be beneficial and "allow[s] [victims] to experience improvement in depression and quality of life, provide[s] a sense of safety and protection, and validate[s] the harm done by the offender,"[299] research done on the effect of victim participation in the legal system shows its impact is often negative. Interaction with the system can actually lead to more harm, otherwise known as "secondary victimization."[300] This revictimization is "associated with post-traumatic stress disorder; physical, mental, and sexual distress; and negative impacts on self-esteem and trust in the legal system."[301]

I called the police that day in 2018. But I did so reluctantly. I knew I needed a report to give to my insurance so that I wouldn't be on the hook for the window.[302] I also knew that the police were my best bet at recovering my items. When they arrived, I explained the situation, and the irony. I explained that I didn't want them to arrest anyone. I described what was taken and resigned myself to the fact that the laptop was probably gone for good. But I imagined the bag my grandmother had given me. It would probably be ditched somewhere because it had no significant monetary value. "I just want my things back," I told them.[303] It was never recovered.

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297. *See* Antony Pemberton & Inge Vanfraechem, *Victims' Victimization Experiences and Their Need for Justice*, *in* VICTIMS AND RESTORATIVE JUSTICE 17 (Inge Vanfraechem, Daniela Bolivar & Ivo Aertsen eds., 2015).

298. *See also* Caterina G. Roman, Courtney S. Harding, Hannah J. Klein, Leah Hamilton & Josh Koehnlein, *The Victim-Offender Overlap: Examining Police and Service System Networks of Response among Violent Street Conflicts*, NAT'L INST. OF JUST. (2020) (the "victim-offender overlap" demonstrates how victims of violence are often perpetrators of violence, and vice versa). *See generally* DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2019) (discussing the ways in which victims can be disappointed in the results of the criminal system and made less safe by the current system and how those perspectives are sidelined).

299. Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67, 70 (2015).

300. *Id.*

301. *Id.*

302. This is an important point for business owners as well. *See, e.g.*, Boyd, *supra* note 35 ("Calling the police on someone who is desperate to feed themselves or their children is a moral dilemma for many local restaurant employees and national grocery store chain employees—many of whom struggle with poverty themselves. It's easy to forget that one of the most common and helpful public services that the police provide is bureaucratic record-keeping—not arresting and punishing people in crisis. When there is a theft or vandalism, restaurant owners and grocers explained, they usually need a police report to file a claim with their insurance company. Insurance reimbursement creates a catch-22 for employees and business owners who would rather not call the police.").

303. There is much more to be said about how best to weigh the victim's needs against those of someone who harmed them. I will pick up on this thread in a later article.

I would wager that much of the unintelligibility around abolition is due to the dominant hermeneutical resources that tell an incomplete story of who engages in criminalized activities, why they engage in criminalized activities, and assumptions about the efficacy of arrest and incarceration.[304] Perhaps the ample work done by critical theorists, combined with the testimonies of people engaged in survival strategies, can generate the necessary epistemic resources to better the interpretive methods for survival labor.

As stated earlier, the concept of contributory injustice[305] is important here. If dominant hermeneutical resources are structurally prejudiced (as so many critical theorists have demonstrated), then to use those prejudiced resources only reproduces injustices. Hermeneutical resources are structurally prejudiced when they interpret a marginalized group's social experience, and the interpretation is insufficient because of the bias and undue influence of the more powerful group.[306] This Article has already described the role of structural prejudice and the way it shapes language and imagery used to talk about and describe the experiences of racial and gender minorities. Penal-abolitionist scholarship has the tools to articulate the experiences differently and chart a path toward a more equitable society that uses terminology, imagery, narratives, court opinions, and more that could provide proper legitimacy, respect, and inclusion of perspectives that would remedy the treatment of those engaged in criminalized survival strategies.

Scholars tie modern-day penal-abolitionist thought to the abolition of slavery.[307] Today, abolitionist thinking has made a strong resurgence in response to the murder of George Floyd. Leading activists called for the defunding of police. This time, the abolitionist calls appear to be breaking through to mainstream audiences.[308] The work of generations has made conversations about racism and colonialism more intelligible to the public and, through the availability of technology, impossible to ignore.[309]

Penal abolition shifts the focus from punishment for wrongdoing to other forms of accountability. Prison abolition is concerned with the "abolition of a

304. I have been incredibly amused at the January 6th insurrectionists who have been appalled at the condition of some of our nation's jails. *See* Jaclyn Diaz, *Jan. 6 Detainees Say a D.C. Jail is So Awful that They'd Like a Transfer to Guantanamo*, NPR (Oct. 7, 2022), https://www.npr.org/2022/10/07/1127481476/capitol-riot-detainees-request-guantanamo-transfer-dc-jail-conditions [https://perma.cc/4MT2-2V5U]. It makes me wonder what more people would have to say about incarceration if they had personal experience with it.

305. *See infra* Part II.A.

306. *Id.*

307. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 10 (2019) (discussing how the Prison Industrial Complex is rooted in chattel slavery).

308. *See, e.g.*, Gabriella Paiella, *How Would Prison Abolition Actually Work?*, GQ (June 11, 2020), https://www.gq.com/story/what-is-prison-abolition [https://perma.cc/2FSR-GVLZ] (suggesting protests and conversations after the murder of George Floyd are reigniting conversations about penal abolition).

309. *Id.*

society that could have prisons, that could have slavery."[310] Prison abolitionists generally desire to create a society where sexual violence, racism, classism, and ableism, among others, do not exist and are not reproduced in our systems of justice and accountability.[311]

A prison-abolitionist framework entails, more specifically, developing and implementing other positive substitutive social projects, institutions, and conceptions of regulating our collective social lives and redressing shared problems—interventions that might over the longer term render imprisonment and criminal law enforcement peripheral to ensuring relative peace and security. Efforts of prison-abolitionist organizations, such as Critical Resistance and the Prison Moratorium Project, to both oppose imprisonment and enable access to food, shelter, community-based mediation, public safety, and well-being without penal intervention exemplify this orientation towards positive abolition. Conceived of as such, abolition is a matter both of decarceration and substitutive social—not penal—regulation.[312]

These foundations are the bedrock of transformative justice. Transformative justice is "a community process developed by anti-violence activists of color, in particular,"[313] who developed ways to respond to violence that are not accomplished by the criminal system, "build support and more safety for the person harmed, figure out how the broader context was set up for this harm to happen, and [determine] how the context can be changed so that this harm is less likely to happen again."[314] Transformative justice means "challeng[ing] our punitive impulses, while prioritizing healing, repair, and accountability."[315] Transformative justice often seeks to pivot from punishment through incarceration, which, in the eyes of many women of color activists and scholars, reproduces patriarchy[316] and White supremacy.[317] It requires asking questions: "Why did this happen? Why does it keep happening? And is there something we could change that would make [any number of tragedies] unthinkable in the first place?"[318]

Aside from prisons, penal abolitionists also question the logic of other arms of the penal state, such as police,[319] alternatives to incarceration using methods

310. MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 29 (2021).

311. *Id.*

312. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1163 (2015).

313. KABA, *supra* note 310, at 59.

314. *Id.*

315. *Id.*

316. *Id.*

317. *See, e.g.*, ADRIENNE MAREE BROWN, WE WILL NOT CANCEL US: AND OTHER DREAMS OF TRANSFORMATIVE JUSTICE 17–29 (2020) (discussing the ways in which punishment often follows an oppressive script that does nothing to stop the cycle of harm long-term).

318. *Id.* at 21.

319. *See, e.g.*, India Thusi, *Policing is Not a Good*, 110 GEO. L.J. ONLINE 226, 243 (2022).

of surveillance,[320] and noncriminal sites of penal-adjacent oppression like the "family regulation system."[321] This Article joins this effort to question the penal impulses strengthened by dominant hermeneutical resources in pursuit of an abolitionist future built on the foundations of collective liberation.

III.
SURVIVAL LABOR

In earlier Sections, this Article defined survival crimes as: (1) criminalized acts; (2) the commission of which is made necessary by (3) extreme financial hardship; and (4) the goal of which is typically to meet a basic need, such as food or shelter. It then defined work as any activity that is one or more of the following: (1) one an individual engages in during the pursuit of self-sufficiency, (2) a transactional, market-based activity, or (3) an activity that fulfills the societal role of providing for one's family. Thus, it seems the definition of survival labor would be:

(1) A criminalized act (whether market-based or not) one engages in,

(2) To:

a. Meet a basic need for oneself or their dependents or

b. Pursue self-sufficiency, or both.

(3) Such acts are made necessary by,

(4) Extreme financial hardship.

There are several possible rationales for understanding the concept of survival labor. This Article arguably chooses the simplest one: survival crimes are survival labor.

A labor lens goes further than decriminalization. Recognizing survival crimes as labor acknowledges the arbitrariness of what society considers work, the political nature of distinguishing between labor and crime, and the discriminatory ordering of society that pushes minority communities toward survival strategies.

When I started this project, I started from the perspective that we should be giving a certain amount of respect to survival labor, just as we do other forms of labor. However, I decided this wasn't quite right. It's not that we should respect all forms of survival labor—some of it can do serious harm. Consequently, respect isn't the right sentiment. But it's not just that. We don't respect all labor equally. There exists a hierarchy of jobs with a corresponding level of respect given to the people who engage in them:[322]

320. *Id.* at 248 n.119 and accompanying text.

321. Washington, *supra* note 50, at 1097 (She describes this as the term to "more accurately describe the surveillance apparatus commonly known as the 'child welfare system.'").

322. *See, e.g.*, Angela Garbes, *The Devaluation of Care Work Is by Design*, ATLANTIC (May 13, 2022), https://www.theatlantic.com/family/archive/2022/05/unpaid-domestic-labor-essential-work/629839/ [https://perma.cc/P97P-WNVD] (describing how care work is often devalued through placing

> So often we overlook the work and the significance of those who are not in professional jobs, of those who are not in the so-called big jobs. But let me say to you tonight, that whenever you are engaged in work that serves humanity and is for the building of humanity, it has dignity, and it has worth. One day our society must come to see this. One day our society will come to respect the sanitation worker if it is to survive, for the person who picks up our garbage, in the final analysis, is as significant as the physician, for if he doesn't do his job, diseases are rampant. All labor has dignity.[323]

Instead, I wrote this piece in terms of values. Survival labor is labor because it generates income through the marketplace or offsets the need for income outside of the marketplace. It is labor because people can fulfill their roles as providers. Just because survival labor is societally disfavored does not mean it is not labor. Instead, seeing it as labor allows us to be more critical of *all* labor. Rather than playing with arbitrary designations between crime and labor, recognizing crime as labor allows us to think critically about poverty, harm, subjugation, resistance, and repair.

Unfortunately, courts have already rejected arguments based around economic necessity.[324] As opposed to the "right to earn a living," which is being used with some success to challenge legislation regulating occupational licensing, courts have rejected economic necessity defenses in instances that could rightfully be conceptualized as survival labor. That is a mistake.

This final Section considers these rejections of economic necessity defenses within the categories laid out in the Venn Diagram at the very beginning of this Article. It then returns to address the counterarguments from the introduction.

A. Rejection of the Economic Necessity Defense

The cases that follow consider the helpfulness of a labor framework alongside penal abolition and transformative justice. Recall that labor eludes precise definition, and this Article defines it in reference to certain values. If the activity meets those values, then it is labor. The penal-abolitionist framework is key to understanding the flaws in traditional carceral logic. If we are trying to stop people from committing crimes, the cyclic nature of incarceration is not getting the job done. Shifting the narrative to depathologize criminalized people

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it outside of the market); Alexandra Finley, *Women's Household Labor is Essential. Why Valued?*, WASH. POST (May 29, 2020), https://www.washingtonpost.com/outlook/2020/05/29/womens-household-labor-is-essential-why-isnt-it-valued/ [https://perma.cc/TAD8-Y5NB] (emphasizing that "[d]espite the many gains of the feminist movement in the second half of the 20th century, Americans' entrenched view of socially reproductive labor as unimportant, unskilled and solely feminine has proved to be particularly difficult to dislodge").

323. MARTIN LUTHER KING JR., "ALL LABOR HAS DIGNITY" (Michael K. Honey ed., 2011). It could certainly be disputed whether MLK would think that survival labor has dignity, particularly if it has a harmful effect on one's neighbor, but that is a question for another paper.

324. *See infra* Section III.A.

gets society one step closer to truly addressing harm in a meaningful way, instead of addressing harm through cycles of arrest and incarceration.

1. Welfare Theft as Survival Labor

In 1991, Edith Ratliff appealed an Ohio trial court's decision not to allow her to present jury instructions on the defense of economic necessity.[325] She was charged with theft of welfare benefits.[326] Edith Ratliff was the ex-wife of Perry Ratliff and had custody of their three children. Ms. Ratliff was supposed to receive child support and cover medical and dental expenses until the children reached the age of majority.[327] Mr. Ratliff owed her approximately $30,000 in child-support payments.[328] Ms. Ratliff visited four attorneys seeking representation to recover the tardy child-support payments, but she could not afford the retainer agreements. She also had not mailed the paperwork seeking assistance collecting child-support payments to the child-support enforcement agency.

This was not Ms. Ratliff's first offense. She had already been convicted and sentenced three times: once for writing a bad check and twice for "stealing" welfare benefits.[329] This petty theft occurred because she was working while receiving benefits, which she was not supposed to do. Ms. Ratliff also owed over $9,000 to the welfare department for overpayment due to working while receiving benefits.[330]

After setting out the common law elements of necessity,[331] the court ruled that economic necessity is not generally "a justification for a positive criminal act, such as larceny."[332] Most pertinent to this discussion is the court reasoning that allowing the economic necessity defense would encourage "all people who reasonably believed they were in a 'tight spot' financially to steal." This would put the victims of theft, "e.g., the prospective recipients of welfare benefits who would have" otherwise received the funds that were paid to Ms. Ratliff, in harm's way, harm equal to or greater than what Ms. Ratliff suffered.[333]

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325. *See* State v. Ratliff, No. 1873, 1991 WL 110257, at *1 (Ohio Ct. App. June 20, 1991).
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.* at *4 (citations omitted). The common law elements of necessity are: (1) the harm must be committed under the pressure of physical or natural force, rather than human force; (2) the harm sought to be avoided is greater than, or at least equal to that sought to be prevented by the law defining the offense charged; (3) the actor reasonably believes at the moment that his act is necessary and is designed to avoid the greater harm; (4) the actor must be without fault in bringing about the situation; and (5) the harm threatened must be imminent, leaving no alternative by which to avoid the greater harm.
332. *Id.*
333. *Id.*

Furthermore, the court found that Ms. Ratliff had an alternative to theft—she could have mailed the paperwork to the child-support enforcement agency to collect the $30,000 that was owed to her before she committed the crime. She also testified that taking the money "'made it easier for [her] family.'" That statement, the court found, meant that harm was not imminent.[334]

Under my conceptualization, this would likely be survival labor. Ms. Ratliff was in dire financial straits. She engaged in criminalized acts that were clearly poverty driven: writing bad checks and working while receiving welfare. While one would have to dive deeper to figure out exactly who she was and how extreme her financial hardship was, Ms. Ratliff's goals were designed to meet the basic needs of herself and her children—a fact acknowledged by the court. While the court does not want to "encourage" people in financial distress to steal, it is not clear whether under this dominant hermeneutical narrative (don't encourage "them," "they'll" only do more of it) she *could* stop engaging in criminalized behaviors without sacrificing her life or those of her children.

2. Forgery and Theft as Survival Labor

In 2003, Jesus Bernardo Fontes appealed a conviction for forgery, criminal impersonation, and misdemeanor theft for presenting a false identification card and forged payroll check. His wife testified that he was planning on using the money to buy food for their three children. Mr. Fontes testified that his children suffered from serious health problems, had not eaten in over twenty-four hours, and were turned away by three food banks. He worried that the lack of food would "exacerbate [his children's] health problems and lead to malnutrition and death."[335] The court denied a "choice of evils" instruction and did not let him present evidence of his "concern for his children's welfare."[336]

Despite the court's "sympathy for the downtrodden," it ruled that Mr. Fontes did not establish that there was an imminent threat of injury to the children or that he had no legal alternatives.[337] The court also reinforced the idea that economic necessity is only available for mitigation in sentencing.[338]

Again, under my conceptualization, this would also be survival labor. Mr. Fontes engaged in a criminalized act that was clearly poverty driven to meet a

334. *Id.* at *5. This is an interesting point worth interrogation. One is left to wonder why Ms. Ratliff may not have sought help collecting child support. Some people avoid seeking assistance from the state because—the way it currently operates—bringing surveillance into their lives is unhelpful and destructive. *See, e.g.*, KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017) (explaining the ways that poor mothers have been deprived of the right to privacy); *see also* HARRIS, *supra* note 248, at 42 (Reasons ranging from pride to disrespect and surveillance explain the reluctance of Black families to seek government assistance. Welfare and low-income housing were "a 'mixed bag of opportunity and discrimination, possibilities and restriction, freedoms and surveillance.").

335. People v. Fontes, 89 P.3d 484, 485 (Colo. App. 2003).

336. *Id.* at 486.

337. *Id.*

338. *Id.*

basic need for his dependents. He engaged in the criminalized act because of extreme financial need. The court's sympathy rings hollow and fails to fill Mr. Fontes's children's stomachs.

3. Harder Case: Exposing Children to the Elements as Survival Crime, not Survival Labor

In 1993, the Turners appealed their conviction for "unnecessarily expos[ing]" their children to inclement weather.[339] The two had left their kids in the car in freezing weather to go to work.[340] The parents were unemployed and homeless just four years earlier, until they secured their jobs at the Tribune where they worked inserting sections into newspapers. They worked irregular hours most of the week and often worked from the afternoon to the next morning. Unfortunately, all their childcare options had fallen through on the day they left their children in the car. Both parents testified that they had unclear instructions on whether they were permitted, and whether it was safe, to bring their children into their workplace. They feared that if they did not leave their children in the car, they could lose their jobs and become homeless once again.

The court acknowledged the "difficult decision" the parents were in, but the "more immediate priority" was to protect the children "from an imminent threat to their health and safety."[341] The court also noted that economic necessity "such as the theft of food" has never been a recognized defense to criminalized conduct. Thus, it was unreasonable and unnecessary to leave the children in the car. In drawing this analogy to "theft of food," the court communicated that the pressure to do something "criminal" in connection to provide for one's family would not be protected. [342]

This is a particularly challenging example to my framework of survival labor. Ultimately, while the criminalized act was leaving the children in the car, it seems that the actual labor was the formal employment. The necessity is clear: show up to work or lose your job and, consequently, your shelter. What makes this case so tricky is that it seems cursory to say that leaving the children in the car was solely a crime. The survival element is present in the Turners' decision to leave their children in the car, choosing to work to guarantee the shelter necessary for their survival. Arguably, this was an action that would assist the Turners in pursuing self-sufficiency, as they would be unable to be self-sufficient without work.

It is possible that the criminalized action is too attenuated to the values of labor laid out above, which means that leaving the children in the car would not qualify as survival labor. Ultimately, even if leaving the children in the car is not survival labor, the act would still be a survival crime, worthy of

339. People v. Turner, 619 N.E.2d 781, 784 (1993).
340. *Id.* at 783.
341. *Id.* at 786–87.
342. *Id.*

decriminalization under penal-abolitionist logic. When people resort to risky behaviors that will help them "not to die," criminalization does nothing to prevent future instances of childcare falling through.[343]

B. Counterarguments

Not only will this specific proposal be incredibly controversial, but many attempts to reduce incarceration rates and address root causes of criminalized activity have already faced pushback. When cities elect to stop arresting or prosecuting survival crimes, or when there is discussion of introducing legislation that would lessen penalties for survival crimes, the arguments against those actions usually center around one of several concerns.

(1) A common concern is that everyone will be less safe because crime will increase, and communities will be destroyed.[344]

(2) When the system is not focused on the nature of the crime but on the social circumstances surrounding the commission of a crime, then equal justice is not being pursued. Such a strategy "disrespects the individual"[345] because it focuses on "group affiliation and socioeconomic status."[346] This is also unfair because the "politically-favored identity groups" change depending upon the political winds of the time.[347] It is concerning that the question is not "what is the crime" but "who is the criminal." Two separate legal systems are at play depending upon who is in court: a system for those facing extreme financial hardship and a system for everyone else.[348]

(3) There is no moral argument for committing survival crimes in the United States, as opposed to "people living in a slum in Caracas, Peshawar, or Khartoum," because the U.S. government already spends ample amounts of money on antipoverty programs during "record-low unemployment."[349] Additionally, in places experimenting with reducing penalties for certain survival crimes or nonenforcement of survival crimes like San Francisco, New York, and Seattle there are "record-high minimum wages."[350]

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343. Boyer, *supra* note 67, at 8 (quoting J.T. FEST, STREET CULTURE: AN EPISTEMOLOGY OF STREET-DEPENDENT YOUTH (1998)).

344. Pomper, *supra* note 38.

345. *Id.*

346. *Id.*

347. Rufo, *supra* note 40 (He also makes an argument about this being a radical reversal of the original meaning of equal protection, but there is a lot more to unpack here than is relevant to this Article.).

348. This is an interesting conclusion to reach, particularly because, given my arguments above, one could draw the conclusion that our system is already stacked against those facing extreme financial hardship. *See generally* PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA (2017) (describing the ways that the legal system effectively criminalizes and exploits people living in poverty).

349. Rufo, *supra* note 40.

350. *Id.*

The first counterargument is based in abolitionist and transformative justice logic. Essentially, we cannot arrest or incarcerate ourselves out of crimes that are motivated by poverty. "[I]ncarceration is an inadequate and often counterproductive tool to transform those who have committed violence or protect those who have been harmed."[351] Dominant epistemic resources view violence and crime as issues of "individual pathology," as opposed to things that are created by poverty, inequity, lack of opportunity, or shame and isolation.[352] It overlooks the fact that there are "communities that [have been] destroyed"[353] already. The difference is that communities have been destroyed by state action, lack of state investment, and racial violence.[354]

While not worded in these terms above, this is also a question concerning the social contract. If we all have rights and duties under the law, why should some people be exempt from those duties, while the rest of us should remain subject to punishment for running afoul of the law? To some, this sounds like a violation of our basic principles of fairness.[355]

This Article does not spend much time debating the social contract. However, there are plenty of other works that address this argument.[356] By maintaining a society with significant structural oppression, the state seems to undermine any claims it would have that a transgressor should follow the law based on a social contract. The state has already failed to uphold its end of the bargain in which all can achieve a certain level of economic attainment in a just society.

Finally, the third counterargument is really a question: if social supports exist right now, why is there crime? Perhaps the social supports that currently exist are insufficient. Consider the story of Robert Ibarra.

One day, Robert Ibarra, a New York City resident, stole a sandwich.[357] Government assistance—a stipend and food stamps—allowed him to cover his basic expenses from month to month. However, due to an unexpected expense he was "down to zero."[358] Luckily, he was able to avoid jail time for the offense. When asked what the city should do about minor shoplifting cases, he indicated that he did not know. Some people might take advantage of the system if they

351. Danielle Sered, *Transforming our Responses to Violence*, *in* DECARCERATING AMERICA 157 (Ernest Drucker ed., 2018).

352. *Id.* at 158.

353. Pomper, *supra* note 38.

354. *See infra* Part II.C.

355. Pomper, *supra* note 38.

356. *See, e.g.*, CHARLES W. MILLS, THE RACIAL CONTRACT (1999) (arguing against the presentation of a colorblind social contract).

357. Rosa Goldensohn, *New York's Most Desperate Caught Up in 'Crimes of Poverty,'* THE CITY (Oct. 14, 2019), https://www.thecity.nyc/justice/2019/10/14/21210757/new-york-s-most-desperate-caught-up-in-crimes-of-poverty [https://perma.cc/8U9G-VAHX].

358. *Id.*

get away with stealing, maybe they will do it regularly.[359] "But I really needed it, that's why I did it. I really try to stay out of trouble, because it's very bad."[360]

While Mr. Ibarra may attempt to "stay out of trouble," it is unclear how he is to avoid trouble in the future. What are his options next time? He was already on government assistance. He was already in such a financially precarious place that an unexpected expense knocked him right over the edge. Studies show that approximately 56 percent of Americans do not have the savings to cover a $1,000 emergency expense.[361] Instead, they go into debt by borrowing money from friends or family, taking out a loan from a bank, or charging a credit card.[362] Thirty-two percent would be unable to cover a $400 expense without going into debt.[363] "Black [40 percent] and Hispanic [35 percent] adults were much more likely than White [19 percent] or Asian [11 percent] adults to face difficulty paying bills, and these differences were present at all income levels."[364]

Instructions to "stay out of trouble" and fears that people will "get away with" stealing demonstrate a commitment to a narrative of individual responsibility. If one worked harder, they would have the resources. If one managed their life better, they wouldn't be out of money. It approaches poverty and the people suffering from poverty as "other": "they" are untrustworthy and out to take advantage of the rest of "us" law-abiding, responsible individuals. If "they" ordered their lives like "we" do, then "they" would be just fine.

Of course, most people know someone who *is* irresponsible. There are some people who, for some reason, cannot seem to get it together. They are given all the opportunities in the world yet seem to throw them away. This is where things can get tricky—how are we supposed to know who is attempting to game the system[365] and who is not, particularly when there are so many variables like mental and behavioral health, generational poverty, and discrimination at play?

Perhaps this is the wrong question. Instead of presuming that "they" are always trying to take advantage of "us," the focus should be on making society hospitable enough that there is no reason to take advantage. What if there is no system to game? Why steal if the need is not there?

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359. *Id.*

360. *Id.*

361. Carmen Reinicke, *56% of Americans Can't Cover a $1,000 Emergency Expense with Savings*, CNBC (Jan. 19, 2022), https://www.cnbc.com/2022/01/19/56percent-of-americans-cant-cover-a-1000-emergency-expense-with-savings.html [https://perma.cc/4H9W-8FQ7].

362. *Id.*

363. *Economic Well-Being of U.S. Households: Dealing with Unexpected Expenses*, FED. RSRV. (May 2022), https://www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-dealing-with-unexpected-expenses.htm [https://perma.cc/4H9W-8FQ7] (Though credit cards are also used in this scenario—unlike the $1000 expense, those who used a credit card to cover the $400 expense are not "in debt" as they were able to pay off the credit card by the next month.).

364. *Id.*

365. This echoes the concern of courts in economic necessity defense cases. *See* State v. Ratliff, No. 1873, 1991 WL 110257, at *4 (Ohio Ct. App. June 20, 1991).

CONCLUSION

The reignited focus on defunding the police and penal abolition after the high-profile deaths of Black people at the hands of the police provides an opportunity for change. While some of the steam from 2020 may be dwindling, there is another opportunity: recognizing survival crimes as survival labor, potentially eligible for recognition under the "right to earn a living."

The importance of decriminalization is clear: reducing encounters with law enforcement reduces the likelihood of death by police. A history of systemic subjugation is a vital part of the analysis. But the charge that this is tailored to the "politically favored identity group" of the time is off base. Anyone seeking survival would benefit. And decriminalization could lead to real investments that stop cycles of crime.

The importance of labor may be harder for some to grasp. Put simply, creative change comes from changing the status quo. When legislatures can rely on criminalization of survival strategies, such as labor, to appease their constituents, a "tough on crime" narrative that perpetuates race and class inequities through prejudicial hermeneutical resources is maintained. Future work will engage more in depth on the "right to earn a living" and whether it is wise to adjust the level of review courts use to assess legislation. But this kind of creativity is needed first to upend the status quo.