

## THE RATIONAL UNDERENFORCEMENT OF VICE LAWS

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*Governments tend to enforce vice laws—i.e., criminal laws targeting consensual but morally disreputable conduct—sporadically. Existing scholarship generally attributes this underenforcement strategy to a variety of case-specific factors, such as budgetary constraints, fluctuating public support, and interest-group pressures. The Author argues that governments generally underenforce vice laws because, excluding draconian enforcement strategies unlikely to pass a social cost-benefit test, this enforcement strategy is likely to minimize participation in vice offenses. Specifically, the Author argues that “strong” (but less than draconian) enforcement strategies—i.e., regularly applying criminal sanctions to vice offenses—are likely to generate more vice offenses than “weak” enforcement strategies—i.e., infrequently applying criminal sanctions combined with public education campaigns. This result, which runs counter to the standard economic prediction that increasing the cost of an activity reduces its incidence, is likely to occur because regularly attaching a formal “price” to a vice offense reduces marginal offenders’ expected informal penalties for relaxing a principled commitment to the underlying moral norm. If strong enforcement cannot compensate for the lost deterrent effect of these extralegal penalties, then it may perversely increase the offense rate. At the same time, symbolically maintaining (but usually neglecting to enforce) criminal penalties for a vice activity, coupled with intensive public education, reinforces marginal offenders’ intrinsic commitment to the relevant moral norm, thereby lowering the offense rate as desired. Given the foregoing, governments that wish to minimize participation in a particular vice activity (without violating the cost-benefit test) will rationally select weak enforcement over the alternative strategies of draconian enforcement, strong enforcement, and zero enforcement. This argument relies in part on established findings in the social psychological literature and more recent findings in the experimental economics literature. It also is weighed against, and finds support in, empirical evidence concerning historical and contemporary enforcement policies and results in several major vice industries.*

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The criminal law generally assigns the state a strict obligation to do precisely as it says.<sup>1</sup> This instruction stands behind well-established legal principles barring vaguely formulated or retrospectively enacted criminal statutes that do not provide any reasonable opportunity to conform to the law.<sup>2</sup> Vice laws<sup>3</sup> persistently have belied the criminal law's commitment to transparency. In this area of the criminal law, the state almost never does exactly as it says. Existing federal, state, and municipal vice laws in the United States cover a diverse range of vice activities, including, among other things, prostitution<sup>4</sup>, the sale and possession of certain recreational drugs,<sup>5</sup> certain forms of gambling,<sup>6</sup> smoking in certain public places,<sup>7</sup>

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1. See generally RICHARD J. BONNIE ET AL., CRIMINAL LAW 35-43 (1997) (stating that the criminal law generally discourages arbitrary and unexpected enforcement and conviction practices by strictly requiring that criminalized activities be precisely described and publicly announced in advance of any effort to detect and punish such activities).

2. The principle of legality requires advance legislative specification of criminal conduct and the void-for-vagueness doctrine allows courts to strike down statutes that are excessively imprecise. On the legality doctrine, see BONNIE ET AL., *supra* note 1, at 35-43. On the void-for-vagueness doctrine, see *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (striking down an anti-loitering statute as unconstitutionally vague on the ground that it gave the police almost complete discretion to determine whether suspects had violated the statute); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (striking down anti-vagrancy ordinance as unconstitutionally vague on the ground that it defined the offense imprecisely and placed no limits on the discretion of the arresting officer).

3. For the purposes of this Article, the term "vice laws" (also known as morals laws or morality laws) refers to criminal laws prohibiting consensual conduct involving one or more parties, lacking a direct victim, and being widely subject to moral disapproval within the relevant jurisdiction.

4. All states, with the exception of Nevada, currently prohibit prostitution, although thinly disguised forms of this industry are generally tolerated. See Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1208-09 (1996). For a detailed description of current U.S. laws in this area, see generally RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 155-87 (1996). For some discussion of enforcement practices in this vice sector, see *infra* note 56 and accompanying text.

5. As is well known, the U.S. federal and state governments are in the midst of a long-standing and vigorous enforcement effort to eradicate the consumption and distribution of certain recreational drugs. For an extensive discussion of current and past U.S. enforcement practices in this area, see *infra* Part III.B.2.

6. Although certain forms of gambling are now legal in various venues and jurisdictions (including certain Indian reservations, on-track and off-track betting on horse races, and government-sponsored lotteries), other forms of gambling or "bookmaking" remain illegal (although often widely tolerated and, since the advent of the Internet, more easily circumvented). For a description of current U.S. and international laws and enforcement practices in the gambling area, see generally GAMBLING & PUBLIC POLICY: INTERNATIONAL PERSPECTIVES (William P. Eadington & Judy A. Cornelius, eds., 1991).

7. Many municipalities have enacted in recent years statutes that prohibit or re-

certain kinds of sexual activity,<sup>8</sup> polygamy,<sup>9</sup> euthanasia,<sup>10</sup> and organ-selling<sup>11</sup>. With the notable exception of the drug laws, most federal, state, and municipal enforcement agencies tend to monitor and punish these consensual crimes in a lax and inconsistent manner that supplies little reliable indication as to the effective legal standard.<sup>12</sup> Although a vice law usually pronounces an unambiguous standard of illegal conduct, government authorities usually enforce that standard sporadically and generally tolerate certain types of violations.<sup>13</sup> As a result, most people may be unsure whether the proscribed conduct or close substitutes are strictly illegal, *de facto* legal, always legal under certain circumstances, or sometimes legal under certain circumstances.<sup>14</sup> This legal ambiguity triggers either black markets where parties clandestinely exchange the formally proscribed goods and services or gray markets where parties execute substitute transactions that technically fall outside the prohibition but patently frustrate its purpose.<sup>15</sup>

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strict smoking in public places. For a review of current federal, state, and local anti-tobacco ordinances and other anti-tobacco enforcement measures, see PETER D. JACOBSON & JEFFREY WASSERMAN, TOBACCO CONTROL LAWS: IMPLEMENTATION AND ENFORCEMENT 8-16 (1997). For an extensive discussion of these laws, and the associated enforcement practices, see *infra* Part III.B.3.

8. Many U.S. states still have not repealed sodomy laws that prohibit certain types of sexual activity among consenting adults. For a description of these laws and their enforcement, see POSNER & SILBAUGH, *supra* note 4, at 65-71.

9. Polygamy is prohibited in all U.S. states and prosecutions are occasionally undertaken in jurisdictions where polygamy is sometimes practiced. See RICHARD A. POSNER, SEX AND REASON 208 (1992) [hereinafter, POSNER, SEX AND REASON].

10. Euthanasia, also known as "assisted suicide" or "mercy killing", is not permitted in any U.S. state except for Oregon, where physician-assisted suicide is permitted under certain circumstances. VT. LEGISLATIVE RESEARCH SHOP, UNIV. OF VT., *Assisted Suicide in the Several States*, available at [http://www.uvm.edu/~vlrs/doc/assisted\\_suicide.htm](http://www.uvm.edu/~vlrs/doc/assisted_suicide.htm) (Apr. 25, 2001). For an update on the Oregon law and its implementation, as well as the recent federal statute that potentially challenges that law by authorizing the prosecution of doctors who assist patients to commit suicide by administering medication, see Sam Howe Verhovek, *Move by U.S. on Suicide Law Draws Suit in Oregon*, N.Y. TIMES, Nov. 8, 2001, at A14.

11. U.S. federal law prohibits the sale of certain specified bodily organs for sale for use in transplantation or otherwise. See National Organ Transplant Act, Pub. L. No. 98-507 (codified as 42 U.S.C. § 274e (1994)).

12. For specific discussions of the lax nature of historical and contemporary vice-law enforcement practices, see *infra* Parts I and III.

13. See *id.*

14. See PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 13 (1995) (presenting survey findings showing that there is often a lack of consensus on the level of enforcement of laws against victimless crimes).

15. Black markets and gray markets fall under the rubric of the underground economy, a subject that has elicited some academic discussion. See, e.g., Richard A. Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103 YALE

Standard explanations for various historical instances of this underenforcement strategy rely on political-economic factors such as limited enforcement resources, interest-group bargaining, and regulatory capture.<sup>16</sup> In this Article, I offer a novel explanation for the chronic underenforcement of vice laws. I argue that governments generally underenforce these laws because, within the set of enforcement strategies likely to pass a social cost-benefit test, underenforcement is the most effective strategy for deterring consensual conduct that violates a widely shared moral norm. If true, this thesis violates a basic expectation of most economic analysis of crime: all else being equal, smaller criminal sanctions<sup>17</sup> will generate more crime and larger criminal sanctions will generate less crime. This commonsensical assumption drives the basic deterrence model in which legal sanctions deter criminal conduct by increasing the offender's expected cost of (and consequently decreasing the offender's expected net return from) engaging in such conduct.<sup>18</sup> In this Article, I show

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L.J. 2157, 2160-61 (1994); Bruno S. Frey & Hannelore Weck-Hanneman, *The Hidden Economy as an Unobserved Variable*, 26 EUR. ECON. REV. 33 (1984); George L. Priest, *The Ambiguous Moral Foundations of the Underground Economy*, 103 YALE L. J. 2259, 2270-82 (1994).

16. For an extensive discussion, see *infra* Part I.B.

17. Note that "smaller" or "larger" sanction size does not simply refer to the amount of the fine or the length of imprisonment. Sanction size is a product of (1) the severity (or magnitude) of the sanction and (2) the probability of apprehension and punishment by the relevant authorities. Depending on the level of analytical detail, the second element may be broken down into two separate terms to reflect the fact that authorities may invest large resources in apprehension but either devote few resources to or face institutional barriers in obtaining convictions and/or maximal sentences.

18. For the classic statement of this position, see Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 1, 14 (Gary S. Becker & William M. Landes eds., 1974), reprinted in 76 J. POL. ECON. 169 (1968). Scholars have long recognized three major qualifications to the standard inverse correlation between sanction size and offense rate. First, the deterrent effect may depend on whether the enforcement agent adjusts the probability or severity of the criminal sanction: adjusting probability has a greater deterrent effect if the offender is a risk preferrer while adjusting severity has a greater deterrent effect if the offender is a risk avoider. See *id.* at 9-12. For a more in-depth exploration of this problem, see A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979). Second, the marginal deterrent effect of severe punishments could be very small (or even negative) if minor crimes and major crimes trigger the same heavy punishment, in which case offenders may rationally choose to commit the major crime. George J. Stigler, *The Optimum Enforcement of Laws*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT*, *supra* note 18, at 57. Third, the criminal law's deterrent effect may be sensitive to the kind (rather than just the degree) of punishment. Specifically, imprisonment sanctions may have a stronger deterrent effect than quantitatively equivalent monetary sanctions. See Kenneth Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 30-32. For a fuller discussion of this argument, see *infra* note 125 and accompanying text.

that the normally inverse correlation between sanction size and offense rate is unlikely to hold for vice laws. Within a significant range of sanction values, smaller criminal sanctions are likely to deter *more* moral offenses than larger criminal sanctions. At the same time, smaller criminal sanctions still behave “normally” insofar as they will always deter more moral offenses than no criminal sanctions. These two claims correctly predict that rational policymakers will ultimately select “weak” enforcement strategies for vice laws. This is because a state will deter more moral offenses by tolerating *some* vice activity than if it (1) seeks to suppress *all* vice activity by strictly enforcing the moral norm or (2) chooses to suppress *no* vice activity by not enforcing the moral norm at all.

Other commentators have identified a miscellany of factors, including selective enforcement<sup>19</sup>, highly risk-preferring offenders<sup>20</sup>, cognitive dissonance<sup>21</sup>, the “forbidden fruit” effect<sup>22</sup>, and unusually harsh sanctions<sup>23</sup>, that may lead criminal sanctions inadvertently to encourage participation in a prohibited activity. I reach this counter-intuitive result through a set of claims regarding the likely interaction of formal and informal sanctioning mechanisms—in short, “law and norms”—in the enforcement of underlying social conventions

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19. See William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1874-80 (2000) [hereinafter Stuntz, *Self-Defeating Crimes*] (stating that vice laws tend to be counterproductive because such laws are inevitably prone to selective enforcement, which generates resentment against the law and reluctance to comply).

20. See Isaac Ehrlich, *Participation in Illegitimate Activities: An Economic Analysis*, in ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT, *supra* note 18, at 77-78 (noting that the inverse correlation between sanction size and offense rate might not hold in the case of highly risk-preferring offenders, with respect to whom a small increase in the marginal or average criminal sanction might increase the offense rate).

21. See George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. No. 3, June 1982, at 307, 317-18 (applying the psychological theory of cognitive dissonance to an economic model); William T. Dickens, *Crime and Punishment Again: The Economic Approach with a Psychological Twist*, 30 J. PUB. ECON. 97 (1986) (arguing that the psychological effect of cognitive dissonance, which drives individuals to reconcile two conflicting ideas or perceptions, may reverse the normal sanction size/offense rate relation because high sanction sizes do not allow individuals to attribute law-abiding behavior to extralegal, moral considerations).

22. See JEFFREY A. MIRON, THE EFFECT OF ALCOHOL PROHIBITION ON ALCOHOL CONSUMPTION 22 (Nat'l Bureau of Econ. Research, Working Paper No. 7130, 1999) available at <http://papers.nber.org/papers/W7130> [hereinafter MIRON, ALCOHOL PROHIBITION] (noting that some people hypothesize that Prohibition may have had a counterproductive “forbidden fruit effect,” resulting in an increase in the forbidden activity because of increased glamorization of the activity).

23. See Becker, *supra* note 18, at 17-18 (stating that disproportionately high penalties can decrease formal enforcement (and thereby encourage offenses) because a high rate of enforcement and conviction expends too many “public and private resources in the form of more policeman, judges, juries, and so forth”).

that stigmatize and discourage participation in consensual crime. In examining the interaction between law and norms in the vice law context, this Article's underenforcement model draws on well-established findings in social psychology and more recent findings in experimental economics. These empirical findings suggest that there are constitutive differences between regulatory devices that rely on appeals to monetary and other material incentives and regulatory devices that rely on appeals to moral and other "intrinsic" motivations.<sup>24</sup> Specifically, this literature shows that certain rewards or penalties can *discourage* desired behavior by displacing moral and other intrinsic motivations and certain rewards or penalties can *encourage* undesired behavior by strengthening intrinsic motivations.<sup>25</sup> Extending this insight to the criminal-law context, I set forth a rational-choice model of offender decision-making that takes into account the powerful deterrent force of intrinsic moral motivations and, consequently, identifies circumstances under which criminal penalties may perversely encourage participation in vice activities by displacing these important extralegal restraints on socially undesirable behavior.<sup>26</sup>

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24. For a full discussion of this literature and its implications for vice law enforcement, see *infra* Part II.B.

25. See *id.*

26. Generally speaking, this Article's analysis contributes to a developing line of inquiry that qualifies rational-choice decision-making models by emphasizing moral and other non-instrumentalist motivations. Three scholars in particular have produced much of the valuable foundational work in this area. Robert Frank has argued for amending the traditional model of the self-interested economic actor to reflect the widespread role of moral sentiments and non-opportunistic normative commitments in most individuals' behavioral decisions. See ROBERT FRANK, *PASSIONS WITHIN REASON* 258-59 (1988). Robert D. Cooter has explored the failure of the classic model of utility-maximizing behavior to incorporate the influence of internalized moral preferences as well as the implications of this analytical failure for the design of legal rules. See Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1583, 1597-1600 (2000) [hereinafter Cooter, *Economic Analysis of Internalized Norms*]; Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 606-607 (1998) [hereinafter Cooter, *Expressive Law*]; Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the "Bad Man" of Holmes*, 78 B.U. L. REV. 903, 921 (1998) [hereinafter Cooter, *Models of Morality*]; Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947 (1997) [hereinafter Cooter, *Normative Failure Theory*]. In an approach closely allied to the social psychological literature on the "crowding-out" effect of formal penalties, Bruno Frey has *argued for and* provided evidence of the counterproductive effect of strictly enforcing legal rules under certain circumstances. See BRUNO S. FREY, *NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION* (1997) [hereinafter FREY, *NOT JUST FOR THE MONEY*]; Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 AM. ECON. REV. 746 (1997) [hereinafter Frey & Oberholzer-Gee, *The Cost of Price Incentives*]; Bruno S. Frey, et al., *The Old Lady Visits Your Backyard: A Tale of Morals and Markets*, 104 J. POL. ECON. 1297 (1996) [hereinafter Frey, et al., *The Old Lady Visits*

This analysis starts from the basic proposition that most individuals inhabit a “social-capital” network, which, without any help from the law, sustains powerful norms of mutual trust, reciprocity, and cooperation.<sup>27</sup> Through the allocation of informal rewards and penalties (both self-imposed and third-party-imposed), these norms successfully induce most people to cultivate a strong “internalized” commitment to prevailing moral norms, thereby deterring contemplation of and participation in morally controversial conduct.<sup>28</sup> Crucially, however, this informal enforcement regime does not exert a uniform deterrent effect on all individuals. This is because individuals do not hold equal amounts of social capital. Individuals who are less integrated into the conventional network do not have very much social capital to lose and thus, expect to incur a lower informal penalty for relaxing or abandoning a moral commitment and ultimately engaging in disreputable conduct.<sup>29</sup> Although there is a continuous spectrum of degrees of social integration (that is, a continuous distribution of social capital), I simplify the analysis by distinguishing three rough categories of norm-regulated actors.<sup>30</sup> “Mainstream” types, who are well-integrated socially and have a strong commitment to prevailing moral conventions, expect to “pay” a lot for violating the norm.<sup>31</sup> “Fringe” types, who stand outside the mainstream and have little or no commitment to prevailing conventions, expect to pay very little (or to be paid under the alternative norms of a deviant subculture).<sup>32</sup> “Marginal” types, who are fairly well-integrated individuals but are subject to financial pressures or personal crises that favor violating certain moral conventions, expect to pay a significant penalty but are not sure just how significant.<sup>33</sup>

This is where the law comes in. When the state imposes criminal sanctions, it rationally seeks to enhance the informal sanctions that

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*Your Backyard*]; IRIS BOHNET, ET AL., MORE ORDER WITH LESS LAW: ON CONTRACT ENFORCEMENT, TRUST AND CROWDING (Kennedy Sch. of Gov't Faculty Research, Working Paper No. 00-009, 2000), available at [http://www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=236476#paper](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=236476#paper) download; Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory: A Survey of Empirical Evidence* (CESIFO, Working Paper No. 245, 2000), available at [http://www.ssrn.com/sol3/papers.cfm?abstract\\_id=203330#paper](http://www.ssrn.com/sol3/papers.cfm?abstract_id=203330#paper) download [hereinafter Frey & Jegen, *Motivation Crowding Theory*].

27. On the concept of social capital and related concepts of social networks, see JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 300-21 (1990); ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 163-185 (1993).

28. For a full discussion, see *infra* Part II.A.1.

29. For a full discussion, see *infra* Part II.A.3.

30. For a full discussion and a detailed derivation of these categories based on available empirical evidence on offender characteristics, see *infra* Part II.A.2.

31. *See id.*

32. *See id.*

33. *See id.*

prospective offenders—especially, marginal types—already expect to incur for violating the underlying moral norm. In this Article, I identify formal sanctioning regimes that are likely to enhance the expected informal sanction and tilt marginal violators back toward a strong internalized commitment to the underlying moral norm. Strong enforcement of a criminal prohibition, which requires intrusive detection and punishment efforts, is a poor candidate because it is likely to reduce the social-capital penalty that marginal types expect will attend relaxing their commitment to the relevant moral norm. If criminal sanctions do not make up the lost deterrent effect of these extra-legal sanctions, they will lower the indifference point at which marginal types are willing to violate the norm. By contrast, weak enforcement of criminal sanctions is a good candidate because a mild or infrequently applied criminal sanction may enhance the deterrent effect of existing informal sanctions with respect to marginal types. A largely formal prohibition may operate as an authoritative declaration of community values that can strengthen wavering individuals' commitment to the underlying moral norm.<sup>34</sup> Even (or, as we shall see, *only*) when enforced occasionally, a criminal prohibition performs an informational function that may induce marginal violators to readopt and cultivate a stable moral commitment.

The state possibly could make up for even a sharp decline in informal sanctions by increasing criminal sanctions to draconian levels. This would be a form of "super-strong" enforcement. But this possibility is practically irrelevant because it probably falls outside the set of enforcement strategies likely to pass a social cost-benefit test. There are two reasons. Both reasons derive from the fact that moral offenses, unlike crimes against property or person, are consensual interactions that lack a complaining victim. This peculiarity means that it is unusually costly to detect consensual crime.<sup>35</sup> To apply consistently a super-strong level of expected sanctions for consensual crime, the state must incur enormous social costs in the form of diverted resources and widespread privacy violations.<sup>36</sup> As a consequence, the marginal social cost of elevating criminal penalties to super-strong levels probably would outweigh the marginal social benefit from a decline in the number of violations. Furthermore, even if enforcement were costless, the state probably would not want to deter any more violators than it can deter under a weak enforcement policy. Victimless crimes often

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34. See Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CAL. L. REV. 54, 59 (1968) [hereinafter Gusfield, *On Legislating Morals*] (arguing that a criminal prohibition can exert symbolic force as an authoritative statement of community values even if not regularly enforced); see also *infra* note 139 and accompanying text.

35. See *infra* note 74 and accompanying text.

36. See *id.*



policy. Victimless crimes often result in significant benefits for participating parties and, unlike non-consensual crimes, often may impose low costs on direct and indirect third-party observers.<sup>37</sup> This fact means that the state is likely to maximize net social benefits by permitting a non-zero level of vice transactions.

This Article's deterrence model does not simply represent an alternative explanation for the underenforcement of vice laws. Standard accounts of particular historical instances of vice-law underenforcement imply generally that governments would choose strong enforcement strategies if enforcement resources were more plentiful, municipal authorities were less vulnerable to capture by special interests, or public opinion was more intense or more uniform. A nuanced application of deterrence theory<sup>38</sup>, coupled with an appreciation of both the strength and fragility of informal sanctioning regimes, suggests that this prediction is false. Excluding the practically irrelevant possibility of super-strong sanctions, governments probably cannot do any better than the rate of compliance that exists under a weakly enforced criminal prohibition. Assuming that the relevant enforcement agent (1) seeks to minimize participation in a particular vice activity and (2) excludes enforcement strategies unlikely to pass a social cost-benefit test, it rationally would elect to underenforce vice laws even if enforcement resources were plentiful and a strong consensus of opinion favored these laws. This claim may account for the historical fact that even morally fervent governments tend to adopt (at least, ultimately) a weak enforcement policy towards vice activities.<sup>39</sup> While questions of historical causation probably are undecidable in any particular instance, this Article's theoretical insight still stands. Even if there is a broad and intense consensus that the state should minimize violations of a certain moral convention and the state is willing to devote substantial resources to that task, the state is still better off choosing a strategy of lax enforcement.

## I. THE POLITICAL LOGIC OF VICE LAWS

Political economy might plausibly devise (and has actually devised) several possible explanations for specific instances in which

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37. For further discussion of this point, see *infra* note 150 and accompanying text.

38. The literature on "deterrence theory" (i.e., the deterrent function of criminal penalties) is enormous and any summary citation list will be severely incomplete. Subject to this caveat, for a useful recent analysis of the literature, see Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2416-17 (1997), for a classic overview of the general topics of inquiry in the deterrence literature, see JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE (1974), and for an older but lengthy bibliography, see DERYCK BEYLEVELD, A BIBLIOGRAPHY ON GENERAL DETERRENCE (1985).

39. See *infra* notes 49-54 and 67-70 and accompanying text.

governments have underenforced vice laws.<sup>40</sup> In this Part, I test the explanatory breadth of these political-economic accounts and observe that they generally have a predictive failing that a deterrence-based theory may be able to correct.

A. *The Underenforcement Anomaly*

Historically, federal, state, and municipal governments in the United States have rarely enforced vice laws strictly for any significant period of time.<sup>41</sup> And similarly, neither have many governments in other countries, political systems, and historical periods.<sup>42</sup> There are numerous and varied examples for this proposition, including widely ignored Roman laws against drinking by women,<sup>43</sup> underenforcement by medieval ecclesiastical courts (as well as U.S. state courts) of laws against sodomy and fornication,<sup>44</sup> rapidly abandoned criminal punishments against tobacco use in many countries shortly after its introduction,<sup>45</sup> the semi-official red-light districts of nineteenth-century America,<sup>46</sup> the illicit abortion markets of the 1960s

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40. See *infra* note 64.

41. See Neuman, *supra* note 4, at 1208-09 (noting that the United States . . . “has a long history of informally tolerated vice zones,” despite the existence of strong formal proscriptions to the contrary); see also LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 324-57 (1993) (discussing the historical development of American criminal law consisting of the “Victorian compromise”, which accommodated disreputable practices, then social movements that led to strong enforcement of laws against moral offenses, then enforcement efforts that were largely unsuccessful, and then a culture of permissiveness that effectively decriminalized many of these offenses).

42. See Gusfield, *supra* note 34, at 58 (observing that, generally speaking, moral offenses such as prostitution and gambling regularly occur and go unpunished, despite the fact that the law officially prohibits these practices); Stuntz, *Self-Defeating Crimes*, *supra* note 19, at 1878 (noting that the legal system generally enforces sporadically criminal bans on consensual transactions); see also POSNER, *SEX AND REASON*, *supra* note 9, at 73 (noting that laws against consensual sexual offenses have generally been characterized by lax enforcement). For further specific examples for this proposition, see *infra* notes 43-48, 66-69 and accompanying text.

43. See Mark Keller, *Alcohol Problems and Policies in Historical Perspective*, in *LAW, ALCOHOL, AND ORDER: PERSPECTIVES ON NATIONAL PROHIBITION* 159, 161 (David E. Kyvig ed., 1985).

44. See POSNER, *SEX & REASON*, *supra* note 9, at 73-74.

45. Early sanctions against tobacco use ranged from the death penalty in the Ottoman Empire, to the “slitting of the nostrils” in Czarist Russia, and imprisonment and complete asset forfeiture in Japan, but none of these sanctions succeeded and all these countries ultimately repealed prohibition. See JACOB SULLUM, *FOR YOUR OWN GOOD: THE ANTI-SMOKING CRUSADE AND THE TYRANNY OF PUBLIC HEALTH* 15-23 (1998); STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* 23-24 (1993).

46. In the later decades of the nineteenth-century, most American cities operated under a policy of “proto-zoning” that, usually unofficially but sometimes officially, tolerated prostitution and gambling in red-light districts. See JOEL BEST, *CONTROLLING*

and 1970s in Europe and the United States,<sup>47</sup> and today's thinly disguised prostitution markets.<sup>48</sup> This chronic underenforcement strategy may largely be the result of trial and error. As exemplified by historical experiences in the U.S. and other countries in the enforcement of laws against prostitution<sup>49</sup> as well as against the consumption and sale of tobacco,<sup>50</sup> alcohol,<sup>51</sup> and certain recreational drugs,<sup>52</sup> governments that aggressively implement outright bans on vice activities generally find these enforcement efforts are costly and ineffective, and ultimately restore the *status quo*.<sup>53</sup> Thus, federal, state, and municipal regulation of moral offenses in the United States has tended to follow a generic pattern: a permitted practice becomes morally controversial, a political effort then takes place to ban it, the ban proves unpopular or unenforceable, and the state either relaxes enforcement or lifts the prohibition.<sup>54</sup>

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VICE: REGULATING BROTHEL PROSTITUTION IN ST. PAUL, 1865-1883, at 17-25 (1998); FRIEDMAN, *supra* note 41, at 325-32; Neuman, *supra* note 4, at 1208-10.

47. Prior to *Roe v. Wade* and the repeal of abortion bans or restrictions in most Western European countries, authorities infrequently enforced these abortion bans and generally tolerated large illicit markets. See ANDENAES, *supra* note 38, at 90 (noting that, in the early 1970s, the "abortion situation in most western countries is characterized by strict laws, weak enforcement, and a high rate of criminal abortions"); EDWIN M. SCHUR, CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY 35-39 (1965) (stating that the annual number of prosecutions and convictions for abortion generally has been "negligible," the police generally tolerate the practice, and there is a thriving illicit market); Stuntz, *Self-Defeating Crimes*, *supra* note 19, at 1886 (stating that in the 1960s, all states had laws against abortions but "enforcement was fairly slack" with about a million abortions performed annually).

48. See Eleanor M. Miller et al., *The United States*, in PROSTITUTION: AN INTERNATIONAL HANDBOOK ON TRENDS, PROBLEMS, AND POLICIES 303-09 (Nanette J. Davis ed. 1993) (detailing the lax enforcement of contemporary prostitution laws). For a detailed description of various forms of lax enforcement policies in Dallas, Nevada, and San Francisco, see HELEN REYNOLDS, THE ECONOMICS OF PROSTITUTION (1986). As of 1974, it was estimated that there are roughly 292,000 full-time female prostitutes and possibly a total of 500,000 part-time and full-time prostitutes in the United States. See Miller, *supra*, at 304; see also REYNOLDS, *supra*, at 5 (similar estimate).

49. See *infra* note 56.

50. See *supra* note 45. For a full discussion of the enforcement of anti-tobacco laws, see *infra* Part III.B.3.

51. See *infra* notes 61-63 and accompanying text and Part III.B.1.

52. See discussion *infra* Part III.B.2.

53. See FRIEDMAN, *supra* note 41, at 324-43; see also Neuman, *supra* note 4, at 1211-1212 (noting that City Commission of Houston, Texas in the early part of the twentieth century observed that, despite some short-lived enforcement successes, city governments have never been able successfully to eliminate prostitution and inevitably relaxed their enforcement efforts). A major exception to this proposition would be the continuing aggressive enforcement of the drug laws in the United States. But even in this sector there are recent signs that enforcement authorities may be making some movements away from strict enforcement policies. See *infra* Part III.B.2.

54. See FRIEDMAN, *supra* note 41, at 324-57 (describing several examples of this pattern including prohibitions against gambling, alcohol, prostitution, homosexuality,

The rise of the Progressive movement in American politics from the mid-nineteenth to the early twentieth centuries, and the resulting passage of numerous vice laws<sup>55</sup>, best exemplifies this phenomenon. This widely supported movement to reform public morals led to serious campaigns to enforce legal bans on prostitution<sup>56</sup>, tobacco<sup>57</sup>, alcohol<sup>58</sup>, and gambling<sup>59</sup>, but all of these efforts proved to be unsustainable and ineffective over the long term.<sup>60</sup> Prohibition, the culmination of these efforts, resulted in decidedly mixed results. Like other contemporary efforts to enforce vice laws rigorously, Prohibition imposed exorbitant social costs in the form of diverted resources, increased criminal violence, privacy intrusions, and government corruption.<sup>61</sup> At the same time, it was (and is still) unclear whether Prohibition resulted in any significant reduction in alcohol consumption

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and contraception). *See generally* ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* (1994) (noting that there are high fluctuations in the degree of concern over socially unpopular practices, where a threatening social tendency is "discovered", a "moral panic" ensues, and ultimately, concern subsides).

55. *See* Neuman, *supra* note 4, at 1208 (stating that much of American morality legislation is due to the moral reformist movements of the Progressive Era, which demanded more government intervention to stamp out morally offensive practices and often lobbied for strong federal morality legislation to detour around lax and reluctant local authorities); *see also* BEST, *supra* note 46, at 111 (stating that the Progressive movement led to the prohibition of prostitution in almost every U.S. municipality).

56. Prostitution offers a good example of the ineffectiveness of these turn-of-the-century vice prohibitions. In the late nineteenth and early twentieth centuries, widely supported social movements protested tolerant policies toward prostitution (among other vice activities) and legislatures began to enact criminal statutes. *See* BEST, *supra* note 46, at 109-14; Miller, *supra* note 48, at 303. This period of moral fervor resulted in passage of the federal Mann Act, which prohibited interstate transportation of women "for the purpose of prostitution or debauchery, or for any other immoral purpose." *Id.* at 327. *See* FRIEDMAN, *supra* note 41, at 327. Authorities were generally unsuccessful, however, in suppressing the prostitution industry and their efforts simply pushed streetwalkers "behind doors", moving from brothels to massage parlors and escort services. *See id.* at 325-32; BEST, *supra* note 46, at 111-14; *see also* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1829-30 (1998) (observing that vigorous enforcement of prostitution laws usually failed and authorities returned to targeting enforcement at streetwalkers and often instituted under-the-table public health regulation).

57. On Progressive Era attempts to prohibit tobacco use and the resulting criminal legislation in certain states, *see infra* notes 202-03 and accompanying text.

58. For a detailed discussion of the failures of the Prohibition experience during this period, *see infra* Part III.B.1.

59. *See* FRIEDMAN, *supra* note 41, at 132-34, 324-43.

60. *See id.* For a general account of the temperance movement and prohibitionist legislation during this period, *see generally* JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (2d ed. 1963) [hereinafter GUSFIELD, *SYMBOLIC CRUSADE*].

61. *See* FRIEDMAN, *supra* note 41, at 339-41.

relative to the generous allocation of enforcement resources.<sup>62</sup> These enormous enforcement and related social costs, accompanied by limited enforcement returns, brought home to Prohibition supporters the recurrent lesson of vice-law enforcement. Among other factors, the continued ineffectiveness of enforcement efforts, the strain on judicial and police resources, and the weakened credibility of the legal system ultimately persuaded political authorities and public opinion that strict enforcement of the liquor ban was not a viable strategy.<sup>63</sup>

### B. Preference Conflicts and Legal Mediation

There are a good number of historical and sociological explanations of various specific instances of the underenforcement anomaly in the United States and other countries.<sup>64</sup> These accounts generally start from the proposition that a state's decision to criminalize a morally improper practice, and the degree to which it enforces any such prohibition, indicates the degree to which certain constituencies exert influence over the relevant political actors.<sup>65</sup> Under this analy-

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62. For a full discussion of the empirical debate regarding alcohol consumption rates under Prohibition, see *infra* Part III.B.1.

63. See DUKE & GROSS, *supra* note 45, at 90; FRIEDMAN, *supra* note 41, at 324-43; Jeffrey A. Miron & Jeffrey Zwiebel, *Alcohol Consumption During Prohibition*, 81 AM. ECON. REV. No. 2, May 1991, at 242-43 [hereinafter Miron & Zwiebel, *Alcohol Consumption*].

64. See, e.g., FRIEDMAN, *supra* note 41, at 125-134 (reviewing historical trends in the criminal punishments of moral offenses); GUSFIELD, *SYMBOLIC CRUSADE*, *supra* note 60, at 98-110 (examining the temperance movement, dry laws, and Prohibition); K. AUSTIN KERR, *ORGANIZED FOR PROHIBITION: A NEW HISTORY OF THE ANTI-SALOON LEAGUE* (1985) (reviewing the temperance movement and the Prohibition experience); POSNER, *SEX AND REASON*, *supra* note 9, at 204-11 (reviewing historical trends in the regulation of sexual practices, including the use of the criminal law toward that end); REYNOLDS, *supra* note 48, at 60-181 (reviewing municipalities' policies toward prostitution); SCHUR, *supra* note 47, at 35-42, 107-14, 130-38 (reviewing the criminal law's regulation of abortion, homosexuality, and drug addiction); IAN R. TYRELL, *SOBERING UP: FROM TEMPERANCE TO PROHIBITION IN ANTEBELLUM AMERICA, 1800-1860*, at 290-97 (1979) (examining the nineteenth century temperance movement and state dry laws); Neuman, *supra* note 4, at 1208-09 (reviewing the regulation of prostitution and gambling and the establishment of red-light districts); ALSTON, ET AL., *SOCIAL REFORMERS AND REGULATIONS: THE PROHIBITION OF CIGARETTES IN THE U.S. AND CANADA* (Nat'l Bureau of Econ. Research Working, Paper No. H0131, 2000), available at <http://papers.nber.org/papers/H0131.pdf> (last visited Nov. 23, 2001) [hereinafter ALSTON, *SOCIAL REFORMERS*] (reviewing attempts to prohibit cigarettes in the early 20th century in the U.S. and Canada).

65. See, e.g., NACHMAN BEN-YEHUDA, *THE POLITICS AND MORALITY OF DEVIANCE: MORAL PANICS, DRUG ABUSE, DEVIANT SCIENCE, AND REVERSED STIGMATIZATION* 50-51 (1990) (stating that society's laws and punishments at any given time reflect complex negotiations between politically influential groups over the boundaries of morality); GUSFIELD, *SYMBOLIC CRUSADE*, *supra* note 60, at 1-35 (arguing that morality legislation, and the temperance movement in particular, is a form of "status politics" where opposing ethnic, cultural, or social groups vie to determine the dominant social

sis, the passage and enforcement of a vice law reflect a prevailing consensus that a particular consensual practice is morally improper and the state should take steps to suppress it. That sounds simple enough. Where we find a vice law outlawing activity *X*, we know that this is because most people or most of the influential people in that community at that time think that *X* is bad. But this line of inquiry immediately encounters an obstacle. For even where we find a vice law outlawing *X* and a strong consensus (or at least a strong current of public opinion) that *X* is bad, we generally do not find an enduring government policy of enforcing rigorously or consistently a criminal ban on *X*.<sup>66</sup> There are numerous examples for this proposition. The anti-alcohol, anti-tobacco and anti-prostitution reform efforts of the Progressive movement in late nineteenth-century America (culminating in Prohibition)<sup>67</sup>, Western European countries' early intensive efforts to enforce prohibitions on drug use<sup>68</sup>, various countries' early campaigns to prohibit tobacco use,<sup>69</sup> and generally have had little long-lasting effect and have fizzled into the standard policy of lax enforcement. Following the earlier proposition, this historical fact would seem to imply that, in all these particular historical instances, most people or most influential people thought that *X* is bad, but not *that* bad or not very bad at all.

This is precisely the implication that political-economic accounts of the underenforcement anomaly tend to advocate. Scholarly accounts of vice industries such as prostitution, gambling, and drinking generally explain underenforcement policies by claiming that any apparent moral consensus was not as strong as it may otherwise appear.<sup>70</sup> Thus, these accounts suggest that governments in any par-

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norms).

66. See *supra* notes 49-63 and *infra* notes 67-70, in each case including accompanying text.

67. See *supra* notes 55-63 and accompanying text. For detailed accounts of the Progressive movement, see GUSFIELD, *SYMBOLIC CRUSADE*, *supra* note 60; KERR, *supra* note 64. At the height of the popularity of the temperance movement, business, medical, scientific, and social science opinion generally favored Prohibition. See KERR, *supra* note 64, at 150-59. During the height of the campaign for Prohibition, popular magazine articles in favor of Prohibition outnumbered those opposed by a ratio of twenty to one. See Miron & Zwiebel, *Alcohol Consumption*, *supra* note 63, at 243. Ultimately, however, this initially fervent movement for the legal enforcement of public morality fizzled as most jurisdictions settled back into the standard pattern of lax enforcement. See FRIEDMAN, *supra* note 41, at 339-41; GUSFIELD, *SYMBOLIC CRUSADE*, *supra* note 60, at 111-38.

68. Several European countries have generally abandoned punitive policies that focus on imprisoning drug offenders in favor of preventive policies that focus on educating potential drug users and rehabilitating drug addicts. For a fuller discussion, see *infra* Part III.B.2.

69. See *supra* note 45 and *infra* Part III.B.3.

70. See *e.g.*, POSNER, *SEX AND REASON*, *supra* note 9, at 73 (arguing that ecclesias-

ticular instance deploy inadequate resources to enforce vice laws because there is inadequate political support for (or active opposition to) diverting significant resources to that task.<sup>71</sup> This claim generally can mean one of two things. First, this may mean that the consensus on a particular disagreeable practice was not strong enough to incur the substantial social costs that are generally required to detect consensual crime.<sup>72</sup> As the Prohibition and "Drug War" experiences demonstrate the detection of consensual crime imposes exceptional social costs due to (among other things) the necessary intrusiveness of any serious effort to enforce a criminal ban.<sup>73</sup> In communities where many people place a special value on personal autonomy, these privacy costs may be very high<sup>74</sup> and even constitutionally intolerable.<sup>75</sup> Sec-

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tical courts in medieval periods generally enforced laws against sodomy and fornication weakly because much of the rural population and the lower clergy believed the laws were unreasonably strict); TYRELL, *supra* note 64, at 290-97 (observing that local authorities in the 19th century were often unwilling to enforce prohibition laws due to significant opposition and that vigorous enforcement often prompted substantial hostility).

71. TYRELL, *supra* note 64, at 290-97.

72. See, e.g., BEST, *supra* note 46, at 100-107, 137 (stating that St. Paul municipal authorities at the turn of the century laxly enforced anti-prostitution laws because strict prohibition was thought to be impractical in light of the attendant enforcement costs as well as allied economic interests); REYNOLDS, *supra* note 48, at 184 (stating that cities adopt laissez-faire policies allowing moderate amounts of prostitution because they want to attract tourist dollars but do not want to offend conservative residents); Neuman, *supra* note 4, at 1208-09 (noting that in the nineteenth-century, local authorities were often reluctant to allocate resources to enforce morality legislation, such as anti-prostitution laws, because of competing enforcement priorities and strong political opposition).

73. See POSNER, SEX AND REASON, *supra* note 9, at 204 (stating that "the investigation and prosecution of victimless crimes may require an immense investment of investigatory and prosecutorial resources for distinctly limited returns."). On Prohibition, see FRIEDMAN, *supra* note 41, at 339-41 (observing that federal and state authorities made a serious effort to stamp out the manufacture and sale of liquor but faced enormous costs, largely in terms of diverted resources, the growth of organized crime, and public demoralization); on the Drug War, see Part III.B.2.

74. Some commentators believe that these privacy costs are so high that vice laws are almost never justified in a liberal democracy that places a special value on individual autonomy. This is roughly the position that H.L.A. Hart adopted in his famous debate with Lord Devlin over the justifiability of criminal laws that punish consensual but immoral conduct. See generally PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965); H.L.A. HART, LAW, LIBERTY AND MORALITY (1963). For commentary on this debate, see ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 48-82 (1993); Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479 (1989); Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, in MORALITY AND THE LAW 55-72 (Richard A. Wasserstrom ed., 1971); Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73 (1995).

75. The significant privacy costs of vice laws have generated constitutional challenges to many of these laws. Two successful challenges include *Roe v. Wade*, 410 U.S. 113 (1973), which invalidated a state law prohibiting abortion, and *Griswold v. Con-*

ond, this argument may mean that certain disreputable industries exert political influence and are able to capture (or literally “pay off”) some segment of the regulatory apparatus.<sup>76</sup> Many people may oppose a particular vice law (and the underlying moral norm) and even some people who support the law may assign some positive weight to the controversial activities that the law flatly proscribes. Thus, in many nineteenth-century U.S. municipalities, there apparently was significant support among certain segments of the population for a tolerant enforcement policy that unofficially suspended the criminal prohibition on prostitution within a confined red-light district rather than expending scarce government resources on vigorously applying that

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*necticut*, 381 U.S. 479 (1965), which invalidated a state law prohibiting the use of contraceptive devices or medications. The set of unsuccessful constitutional challenges to vice laws is much larger. Challenges to the anti-prostitution laws, either on grounds of vagueness or First Amendment rights of free expression, have not been successful, but a few courts have accepted these arguments in the case of statutes containing ambiguous language such as “immoral acts” without any clarifying definition. See POSNER & SILBAUGH, *supra* note 4, at 155-56. There also have been constitutional challenges to laws that criminalize the possession and use of addictive drugs, on Eighth Amendment grounds of cruel and unusual punishments. The Supreme Court flirted with but ultimately rejected the argument that addiction indicates lack of volition and thus, that states may not constitutionally impose criminal liability upon addicted users for the use or possession of drugs. Compare *Powell v. Texas*, 392 U.S. 514 (1968) (holding that a prosecution for drunkenness in a public place is constitutional, because the Eighth Amendment does not bar prosecution of acts that are committed as a result of an addictive condition), with *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (finding that, under the Eighth and Fourteenth Amendments, it is unconstitutional to convict someone for being addicted to the use of narcotics). There have also been unsuccessful constitutional challenges to the anti-bigamy laws, see *Reynolds v. United States*, 98 U.S. 145 (1878), to state laws prohibiting the sale of cigarettes, see *Austin v. Tennessee*, 179 U.S. 343 (1900), and, more recently, to a state sodomy law, see *Bowers v. Hardwick*, 478 U.S. 186 (1986). Several state courts, however, have found sodomy laws to be unconstitutional, see FRIEDMAN, *supra* note 41, at 347, and several state legislatures have repealed sodomy laws in the wake of *Hardwick*. See Stuntz, *Self-Defeating Crimes*, *supra* note 19, at 1871.

76. See, e.g., FRIEDMAN, *supra* note 41, at 133 (stating that lax enforcement of gambling laws in nineteenth-century America reflected the high demand for gambling entertainment and the cash payments corrupt officials received from gambling enterprises); GUSFIELD, *SYMBOLIC CRUSADE*, *supra* note 60, at 126-27 (stating that bootleggers during Prohibition may have pressured some local authorities to tolerate certain levels of illegal alcohol distribution and consumption); REYNOLDS, *supra* note 48, at 108 (stating that there is a convenient economic symbiosis between brothels and county governments in Nevada due to the large amount of licensing fees and tourist revenues); ALSTON, *SOCIAL REFORMERS*, *supra* note 64 (stating that early twentieth-century efforts to ban tobacco in the U.S. and Canada succeeded best in jurisdictions without many cigarette smokers or a cigarette industry because in those jurisdictions there were few groups with strong incentives to invest resources in opposing anti-smoking crusaders); see also Herbert Hovenkamp, *Law and Morals in Classical Legal Thought*, 82 IOWA L. REV. 1427, 1429-30 (1997) (stating that morals regulation is susceptible to the same type of political bargaining and coalition building that characterizes economic regulation).



prohibition throughout a city.<sup>77</sup>

Each of these related lines of reasoning suggests that weak enforcement strategies represent a prudential balance between competing political interests and competing enforcement priorities. Translated into the language of social welfare maximization, these accounts imply that political negotiation fashions a compromise solution that minimizes the emotional costs to norm-supporters and the privacy costs and economic costs to norm-violators. On the one hand, the government satisfies majoritarian preferences by enacting, at low cost, a formal prohibition against a morally offensive practice. On the other hand, the government satisfies minoritarian preferences by adopting a weak enforcement strategy that institutionalizes clandestine markets that satisfy demand for certain unsavory goods and services. This wavering enforcement strategy allows deviant actors to detour around the prohibition but reduces the visibility of these formally proscribed transactions and thus, appeases the moral indignation they may arouse in (that is, reduces the emotional costs they may inflict upon) many direct or indirect observers.

These political-economic accounts of morality legislation suggest that weak enforcement is a clever attempt to satisfy an apparently irreconcilable preference conflict between norm-supporters and norm-violators. Following these accounts, lax enforcement reflects a pragmatic solution that states adopt in light of political opposition or resource constraints that cannot sustain the enforcement costs, economic costs, and privacy costs that a strict enforcement policy would generate.<sup>78</sup> If these accounts were entirely adequate, however, we would expect that especially morally fervent communities would choose especially strong enforcement strategies. If the state encountered insubstantial political opposition to a vice law (that is, there *was* no significant preference conflict) and was willing to dedicate ample resources to enforcement activities, it should have every reason to adopt a strong enforcement policy to deter most violators. But historically this often does not seem to have been the case. Numerous morally fervent governments that were prepared to devote significant resources to deterring morally controversial activities ultimately abandoned strict enforcement strategies for weak enforcement (or

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77. See, e.g., BEST, *supra* note 46, at 101-107, 137-40 (stating that certain segments of the St. Paul population in the late nineteenth-century preferred a policy of symbolic enforcement that allowed brothel houses to operate within a limited geographic area); Neuman, *supra* note 4, at 1213-14 (stating that some residents of cities in turn-of-the-century America may have preferred to isolate and distance the prostitution industry in officially or unofficially designated red light districts rather than eliminate it entirely).

78. See *supra* notes 72-77 and accompanying text.

zero enforcement) strategies.<sup>79</sup> Of course, we could almost always reasonably attribute a particular relaxation of enforcement to budget constraints or a possible relaxation in political will or social attitudes.<sup>80</sup> In the following Part, however, I offer an alternative explanation for this phenomenon. I argue that policymakers opt for lax enforcement not because this strategy is the best the state can afford, but rather, because this is the best strategy the state would ever want to choose.

## II. THE DETERRENCE LOGIC OF VICE LAWS

Political-economic accounts attribute underenforcement strategies to historically contingent factors such as the relative weight of competing interest groups or enforcement priorities.<sup>81</sup> In this Part, I present a deterrence-based explanation that does not depend upon the existence of any case-specific political contingency (except for the prerequisite fact that at least a substantial majority opposes a particular disreputable practice). I show that the state's most effective strategy for deterring consensual forms of disreputable conduct is likely to consist of criminalizing this conduct and enforcing the criminal ban sporadically. Excluding the practically unfeasible option of super-strong sanctions, all alternative strategies (which include (1) enforcing the law strictly or (2) not enacting any law at all) are likely to deter fewer violators. If this is true, then, contrary to the implication of standard political-economic accounts, states rationally would select a lax enforcement strategy even if enforcement resources were abundant and public opinion was almost uniform.

### A. *Informal Governance, Offender Types, and Social-Capital Distribution*

An assessment of the deterrent effect of criminal sanctions for vice offenses requires an assessment of the deterrent effect of the pre-existing, extra-legal sanctions for these offenses. Provided that a vice law tracks a widely accepted moral norm, it targets an activity that is already subject to informal sanctions within a social-capital network that penalizes individuals who deviate from prevailing moral standards and rewards individuals who conform to those standards.<sup>82</sup> Within this network, individuals who sustain a strong com-

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79. See *supra* notes 86-89 and accompanying text.

80. See *supra* notes 126-32 and accompanying text.

81. See *id.*

82. See generally COLEMAN, *supra* note 27, at 300-21; PUTNAM, *supra* note 27, at 163-85. For a review of theories of social capital, see Michael Taylor, *Good Government: On Hierarchy, Social Capital, and the Limitations of Rational Choice Theory*, 4 J. POL. PHIL. 1 (1996). For a more general discussion of social networks and their relationship to norm-governance, see Sheldon Ekland-Olson, *Deviance, Social Control and*

mitment to conventional moral standards tend to acquire social capital that indicates their reliability to prospective co-venturers and enhances their ability to enter into mutually beneficial, cooperative endeavors.<sup>83</sup> Crucially, however, this informal incentive structure does not provide a perfect deterrence mechanism. This is because social capital is distributed unequally. Individuals who are less integrated into the social network and anticipate fewer cooperative ventures with other, more integrated individuals—that is, have (or expect to acquire) relatively less social capital—have a relatively lower incentive to commit and consistently adhere to prevailing moral norms. By contrast, individuals who are more integrated and anticipate a steady stream of future cooperative endeavors with other well-integrated individuals—that is, have (or expect to acquire) relatively more social capital—have a relatively higher incentive to commit and consistently adhere to prevailing moral norms. If less integrated individuals have less social capital to lose and fewer incentives to accumulate more social capital, they may not always be sufficiently motivated to sustain a strong commitment to the moral norm solely as the result of pre-existing informal sanctions. Criminal sanctions can help to correct this incentive deficit in the extra-legal system of informal sanctions.

### 1. Informal Sanctions and Rewards

An established moral norm, and the attendant social-capital network, induce compliance most of the time from most individuals even without the threat of criminal sanctions. In the sociological and criminological literatures, it is well-established that this outcome arises through two principal mechanisms: externally imposed reputational sanctions and internally imposed guilt sanctions.<sup>84</sup> The pro-

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*Social Networks*, in 4 RESEARCH IN LAW, DEVIANCE AND SOCIAL CONTROL 271-299 (Steven Spitzer & Rita S. Simon eds., 1982).

83. On the relationship between morally conformist behavior and reputational or status rewards and penalties, see *infra* notes 86-89 and accompanying text.

84. See BEYLEVELD, *supra* note 38, at xv (distinguishing between the “intrinsic” adverse consequences of criminal behavior, such as guilt feelings that follow from the inherent nature of a particular criminal act, and the “extrinsic” adverse consequences of such behavior, such as imprisonment, fines and social ostracism, which are determined by the legal and social environment in which the act takes place); PETER M. BLAU, EXCHANGE AND POWER IN SOCIAL LIFE 258 (1964) (stating that “[t]he guilt feelings and social disapproval experienced by an individual whose behavior deviates from moral standards constitute costs that are expected to outweigh the rewards this behavior could bring him.”); COLEMAN, *supra* note 27, at 10 (stating that social control outside state intervention relies on norms enforced by internalized sanctions and by informal external sanctions); Harold G. Grasmick & Robert J. Bursick, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 LAW & SOC’Y REV. 837, 837-40 (1990) (arguing that guilt and embarrassment operate as potential sources of punishments which, just like criminal sanctions, may be incorpo-

portional weight or "mix" of these two sanctioning devices is, however, less well-established.<sup>85</sup> Rational-choice explanations of morally conformist conduct typically enlist externally imposed reputational pressures as the principal mechanism by which self-interested individuals conform to moral norms even when doing so runs counter to their immediate self-interest.<sup>86</sup> These explanations generally claim that utility-maximizing individuals rationally conform to moral norms to avoid a reputational sanction in the form of embarrassment or ostracism and to garner reputational rewards in the form of social standing.<sup>87</sup> Reputational rewards are valuable to the extent that a strong "credit history" of visible moral commitment reduces the cost of credibly demonstrating reliability to potential partners in a future expected stream of cooperative transactions.<sup>88</sup> This reputation-dependent revenue stream explains why repeat-players (i.e., individuals who expect to engage in future cooperative endeavors) adhere to an established norm even when doing so is not the profit-

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rated into an expected utility model of offender decisionmaking).

85. For arguments that an unadulterated model of the narrowly self-interested economic actor cannot adequately account for widespread conformity to moral norms, see FRANK, *supra* note 26, at 157-58, 254; Cooter, *Normative Failure Theory*, *supra* note 26, at 958-59; Cooter, *Models of Morality*, *supra* note 26, at 908-09.

86. Numerous scholars have sought to account for the emergence of moral norms within a model of rationally self-interested behavior. See, e.g., COLEMAN, *supra* note 27; RUSSELL HARDIN, *MORALITY WITHIN THE LIMITS OF REASON* 75-160 (1988); ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE* 122-44 (1986); Robert Sugden, *Normative Expectations: The Simultaneous Evolution of Institutions and Norms*, in *ECONOMICS, VALUES, AND ORGANIZATION* 73-100 (Avner Ben-Ner & Louis Putterman eds., 1998); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 376-91 (1997). Some economists have produced formal models of norm compliance within a rational-choice context. See generally George A. Akerlof, *A Theory of Social Custom, of Which Unemployment May Be One Consequence*, 94 Q. J. ECON. 749 (1980) [hereinafter Akerlof, *Social Custom*]; B. Douglas Bernheim, *A Theory of Conformity*, 102 J. POL. ECON. 841 (1994).

87. See, e.g., Akerlof, *Social Custom*, *supra* note 86, at 772-73 (arguing that communities punish deviations from social custom through reputational penalties and that this reputational effect ensures compliance with social customs, even if noncompliance with these customs may be privately beneficial to an individual in a certain specific instance); Bernheim, *supra* note 86 at 864-75 (arguing that reputational effects generate social conformity, despite heterogeneous individual preferences, and presenting a formal model that derives those reputational effects endogenously).

88. BLAU, *supra* note 84, at 259 ("Status can be considered as capital, which an individual can draw on to obtain benefits . . . [G]ood reputation in the community is like a high credit rating . . . which enables a person to obtain benefits that are not available to others."); James S. Coleman, *Prologue: Constructed Social Organization*, in *SOCIAL THEORY FOR A CHANGING SOCIETY* 9 (Pierre Bourdieu & James S. Coleman eds., 1991) (stating that informal norms induce compliance because individuals are repeat-players and thus, the threat of future retribution makes conformity a rational strategy and discourages free-riding).

maximizing course of action in the short term.<sup>89</sup>

This standard thesis compellingly derives “self-denying” behavior from self-interested incentives to accumulate social capital and thereby maximize anticipated future revenues. There is good reason, however, to argue that this familiar model misidentifies or at least relies excessively on reputational pressures as the principal enforcement mechanism driving widespread compliance with established norms. A primarily reputation-based (or, more generally speaking, instrumentalist) model unsatisfactorily accounts for moral behavior since it is at best applicable to a small minority of transactional environments.<sup>90</sup> Even if reputational pressures can plausibly account for the maintenance of self-denying norms among small groups of repeat-playing self-interested agents, they cannot plausibly explain how norms sustain compliance in large groups in which individuals are relatively anonymous and routinely engaged in non-repeat-player transactions.<sup>91</sup> It would be implausible to claim that a one-time diner in a restaurant adheres to the widely observed “tipping” norm by applying a metric that weighs opportunity costs against reputational costs and evaluates the total net utility of compliance on each individual occasion.<sup>92</sup> That metric would almost certainly counsel *against* tipping in the one-shot example, a result incompatible with everyday behavior. A primarily reputation-based account of moral behavior fails to anticipate the remarkably consistent and strongly emotionalized character of moral commitment and, as a result, seriously underestimates the broad range of instances (e.g., one-time restaurant visits) where individuals generally comply with prevailing moral requirements (e.g., adequately tipping).<sup>93</sup>

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89. *See id.*

90. For arguments tending in a similar direction, see FRANK, *supra* note 26, at 5-15 (stating that an unqualified model of rationally self-interested behavior cannot account for empirical evidence that individuals generally do not cheat in one-shot, non-repeat-player transactions and arguing that this behavioral model must be modified to account for individuals’ deeply rooted normative commitments); Cooter, *Models of Morality*, *supra* note 26, at 908-09 (suggesting that while utilitarian considerations can explain the development and maintenance of behavioral norms among repeat-playing members of small groups, it cannot explain the development and maintenance of such norms among groups of individuals that interact infrequently).

91. *See* Cooter, *Models of Morality*, *supra* note 26, at 908-09.

92. For an exploration of this example, see FRANK, *supra* note 26, at 17-18.

93. *See* FRANK, *supra* note 26, at 157-58, 254. Interestingly, just as a strictly reputation-based model of moral behavior underestimates the range of instances where individuals will comply with moral requirements, a strictly sanction-based model of criminal behavior underestimates the range of instances where individuals will comply with legal requirements. Thus, it is widely observed that models of tax compliance based solely on the probability and magnitude of expected criminal or civil sanctions vastly underestimate the percentage of the general population that complies with the tax reporting laws. For a fuller discussion of this point, see *infra* note 107.

Contrary to the standard rational-choice account, it is intuitively more appropriate to assert that most individuals generally comply with a prevailing moral norm as a matter of general disposition, buttressed by self-imposed sanctions such as guilt and remorse, rather than as a rebuttable protocol, enforced by third-party-imposed reputational sanctions.<sup>94</sup> Assuming a long-term utility function, this observation does *not* mean that moral behavior and moral commitment cannot be accounted for within a model of rational-choice decision-making.<sup>95</sup> The model must simply derive morally conformist behavior from an alternative decision rule. Morally committed actors maximize long-term utility by rationally electing *not* to apply a cost-benefit analysis to every opportunity to depart from moral norms.<sup>96</sup> Individuals adopt this behavioral disposition by “internalizing” the relevant moral norm and emotionally penalizing themselves if they deviate from the norm or, depending on the degree of moral commitment, even contemplate deviating from the norm.<sup>97</sup> In the idealized case where an individual fully internalizes the moral norm, the original decision rule largely fades away and the morally committed individual adheres to the norm on an intrinsic basis—that is, for the sake of the norm itself rather than by reference to a profit-

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94. For similar sentiments, see Cooter, *Models of Morality*, *supra* note 26, at 910-12 (stating that a non-instrumental, principled commitment to social and moral norms better explains individuals' conformity to such norms than attributing such conformity to individuals' instrumentalist desire to avoid social or legal punishment).

95. On the tension between the traditional model of the self-interested economic actor and the fact that individuals commonly adhere to altruistic behavioral norms, and the resulting need to amend the traditional model, see FRANK, *supra* note 26, at 258-59.

96. On this point, see Cooter, *Normative Failure Theory*, *supra* note 26, at 958-59 (arguing that morally committed actors who internalize a norm earn higher returns over the long term than morally uncommitted actors through frequent cooperative transactions with other agents while uncommitted actors must incur high search costs in locating uninformed actors); see also FRANK, *supra* note 26, at 51-56, 255-56 (stating that moral sentiments (e.g., guilt or remorse) enforcing adherence to moral norms, rather than a rationally calculative commitment justifying adherence to such norms, best enable individuals consistently and credibly to signal moral commitment to prospective coventurers).

97. Cooter, *Normative Failure Theory*, *supra* note 26, at 953-57 (arguing that individuals adhere to a norm on the basis of an internalization device that imposes guilt sanctions on individuals who deviate from the norm); McAdams, *supra* note 86, at 382-86 (stating that internalization of norms based upon self-imposed guilt sanctions frequently follows norm creation through externally imposed reputational sanctions); see also Shalom H. Schwartz, *Moral Decision Making and Behavior*, in ALTRUISM AND HELPING BEHAVIOR: SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES 131 (J. Macaulay & L. Berkowitz eds., 1970) (observing that individuals are likely to feel guilt or shame even if they just plan to violate certain moral norms and that these emotions are likely to inhibit norm-violative behavior).

maximizing rule of thumb.<sup>98</sup>

Relative to a moral calculus, which is largely grounded in reputational sanctions that appeal to self-interested incentives, this moral disposition, which is largely grounded in guilt sanctions that appeal to non-self-interested motivations, is a superior long-term strategy.<sup>99</sup> A non-instrumentalist commitment to a moral norm protects individuals against likely calculation errors as to (or simply against the failure to calculate) the expected costs or benefits of any particular opportunity to engage in morally controversial activity.<sup>100</sup> Over the long term, individuals who cultivate an internalized commitment to moral norms are better off than morally calculative actors who can easily mar an unbroken history of apparent moral rectitude with a single calculation error.<sup>101</sup> This is not to deny that reputational sanc-

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98. See McAdams, *supra* note 86, at 382-86; see also FRANK, *supra* note 26, at 69 (defining an honest individual as one who values trustworthiness for its own sake rather than for an expected material payoff).

99. On this point, see FRANK, *supra* note 26, at 18-19, 134-135 (arguing that an individual who internalizes the honesty norm, as opposed to an "opportunist" who maintains only a visible adherence to the honesty norm, may be better off in the long term to the extent that maintaining an appearance of honest behavior generally requires adopting an internalized, non-instrumental commitment to the honesty norm).

100. For an excellent exposition of this point, see Jon Elster, *Alchemies of the Mind: Transmutation and Misrepresentation*, 3 LEGAL THEORY 133, 143-44 (1997). Under Elster's theory, individuals enhance their ability to send consistently a credible signal by constructing a "multiple self", where a higher-order self imposes internal reputational (i.e., guilt) sanctions that induce the lower-order self to comply with the general disposition of non-self-interested conduct. *Id.* This "multiple self" (and the moral disposition that results) ensures that higher-order preferences almost always trump any momentary preferences that point in the other direction. See *id.* at 133. For a similar argument, see FRANK, *supra* note 26, at 82-88 (stating that moral sentiments act as self-control devices that protect individuals against their tendency to excessively value the immediate rewards of dishonest behavior relative to the future reputational costs of such actions).

101. Robert Cooter reaches a similar result but on different grounds—namely, by adopting the controversial claim that individuals prefer to enter into cooperative ventures with individuals that have an internalized moral commitment (rather than the uncontroversial claim that individuals prefer to enter into cooperative ventures with individuals that have exhibited moral commitment by refraining from visible deviations from established moral standards). See Cooter, *Economic Analysis of Internalized Norms*, *supra* note 26, at 1593; Cooter, *Expressive Law*, *supra* note 26, at 606-607. Cooter's line of argument is problematic because it assumes that individuals can confidently assess the degree of internal moral commitment among a substantial group of potential co-venturers. But this seems implausible: individuals necessarily select co-venturers based on an external pattern of moral (or immoral) behavior rather than an internal moral commitment because the latter is not easily observable (or, put another way, is easily disguised). For a similar objection, see Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1634-35 (2000). For a discussion of empirical evidence concerning the discernibility of trustworthy and non-trustworthy character traits, see FRANK, *supra* note 26, at 135-144. A rational-choice account that anticipates calculation errors or failures shows that Cooter's problematic

tions are an important supplementary deterrent. But a largely reputation-based model cannot satisfactorily account for most individuals' consistent conformity to moral standards within a large community characterized by relatively anonymous agents and frequent non-repeat-player transactions.<sup>102</sup> Because the opportunities for profitable and difficult-to-detect norm violations are rampant in large communities, reputational pressures cannot plausibly be doing all or even most of the work.<sup>103</sup> An emotionalized commitment to prevailing moral standards, and the accompanying set of self-imposed guilt and remorse sanctions, fills this gap.

## 2. Mainstream, Fringe, and Marginal Types

The dispositional model of norm compliance set forth in the foregoing section appears to leave little room for the possibility of moral misconduct. As discussed above, guilt sanctions (and, to a significantly lesser extent, supplementary reputational sanctions) apparently deter almost all individuals almost all of the time from even contemplating violating such norms. But that can't be right: morally disreputable behavior is clearly a commonplace event. With an important refinement, the dispositional model of norm compliance accounts for this result. The key is to observe that social capital is *unequally* distributed. As a result, although the social-capital network induces a fairly high degree of compliance with established moral norms, it cannot induce even near-perfect compliance from all individuals. Individuals' smaller or greater social-capital holdings mean that they have correspondingly weaker or stronger incentives to preserve or expand their social-capital account by adopting and sustaining a strong internalized commitment to prevailing moral norms. Several sociological theories of deviant and criminal behavior hold that norm-conformist tendencies generally correlate positively with the degree of attachment to conventional values, institutions, and individuals.<sup>104</sup> Abundant empirical studies confirm these claims, show-

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assumption is not needed to sustain a rational-choice account of internalized moral commitment.

102. See *supra* notes 91-95 and accompanying text.

103. See *id.*

104. This is a central thesis of the "social control" theory of deviant behavior. See generally MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME (1990). A closely related theory is the "social learning" theory of deviant behavior, which attributes such behavior to association with deviant groups and the learning of deviant skills within those groups. See generally RONALD L. AKERS, SOCIAL LEARNING AND SOCIAL STRUCTURE: A GENERAL THEORY OF CRIME AND DEVIANCE (1998). "Stress" theory, another related theory of deviance, also lends some support to this proposed correlation between deviant behavior and social alienation, since it views deviant behavior as an adaptation to social dislocation, traumatic life-events, or financial distress. See generally FRANCIS T. CULLEN, RETHINKING CRIME AND DEVIANCE THEORY:



ing that individuals are significantly more inclined to deviate from prevailing norms the less they are constrained by social ties of family, friendship, community, and work.<sup>105</sup> This observation comfortably fits into the dispositional model. If individuals have a high degree of attachment to the conventional social network, this means that they have accumulated a large reserve of social capital and are reluctant to deplete that reserve by relaxing their intrinsic commitment to, and potentially deviating from, established moral standards. The greater individuals' existing social-capital investment, the more social capital they stand to lose consequent to a norm violation. Conversely, individuals with low or delinquent social-capital accounts have little to lose and little incentive to sustain an internalized moral commitment.

The unequal distribution of social capital generates three principal categories of potential offenders: mainstream, fringe, and marginal types. This three-group offender model has a strong basis in empirical studies of offender characteristics<sup>106</sup> as well as some close

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THE EMERGENCE OF A STRUCTURING TRADITION 55-73 (1984).

105. John H. Laub & Robert J. Sampson, *Turning Points in the Life Course: Why Change Matters to the Study of Crime*, in THE CRIMINOLOGY THEORY READER 493, 505-07 (Stuart Henry & Werner Einstadter eds., 1998) (stating that propensities to commit crime are tied closely to the degree to which an individual is embedded in a network of social capital, such as familial and community institutions, since these bonds restrain opportunities for criminal conduct); Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325, 334 (1980) (presenting empirical findings that supply some confirmation for arguments that an individual's inclination to violate the law, and thus, the deterrent effect of legal (as opposed to informal) punishment increases when individuals have weaker conventional ties and face a lower threat of social disapproval); Katyal, *supra* note 38, at 2416-17 (stating that the social price of criminal conviction and punishment may vary greatly depending on the preexisting social status, profession, or economic class of the offender); Robert J. Sampson & W. Byron Groves, *Community Structure and Crime: Testing Social-Disorganization Theory*, 94 AM. J. SOC. 774, 778-80 (1989) (presenting empirical data providing some support for the hypothesis that communities with high rates of participation in committees, clubs, and local institutions will have lower rates of juvenile delinquency and adult criminal behavior).

106. Tax compliance research has found some evidence for a three-group model of criminal behavior. Dick J. Hessing et al., *Does Deterrence Deter? Measuring the Effect of Deterrence on Tax Compliance in Field Studies and Experimental Studies*, in WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 304 (Joel Slemrod ed., 1992) (showing that empirical studies of the deterrence effect of tax audits suggest that there are three groups of taxpayers: 1) taxpayers who never evade, 2) taxpayers who always evade, and 3) taxpayers who occasionally evade). Sociological studies support the plausibility of a three-group model (although they justifiably suggest that it is oversimplified) since they generally plot deviant and conformist types along a continuous spectrum that includes complete social alienation, complete social immersion, and a number of hybrid types in between those two poles. See, e.g., John M. Hagedorn, *Homeboys, Dope Fiends, Legits, and New Jacks*, in THE CRIMINOLOGY THEORY READER 212 (Stuart Henry & Werner Einstadter eds., 1998) (noting that studies had found that some

forerunners in the theoretical deterrence and criminological literature<sup>107</sup> and, to a somewhat lesser extent, in formal models of norm compliance.<sup>108</sup> Each potential offender category expects to suffer a different level of informal penalties corresponding to its level of social-capital holdings. Application of this three-group model shows that informal sanctions are a highly effective but incomplete deterrence mechanism. For mainstream types, the expected social-capital penalty for norm-violative conduct is clearly a sufficient deterrent while for fringe types, it is clearly an insufficient deterrent. For marginal types, it is often unclear whether the social-capital penalty will exceed the expected benefits of relaxing their moral commitment and potentially engaging in deviant conduct. As a result, marginal types represent the only offender category that is likely to make calculation errors as to whether the expected social penalty for abandoning society's moral commitment (and potentially engaging in deviant behavior) will exceed the expected benefits. This observation suggests that the criminal law could play a valuable role by supplementing existing

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underclass gang members had forsaken conventional society, while others sought to maintain some connection to conventional values); Earl Rubington, *Deviant Subcultures*, in *THE SOCIOLOGY OF DEVIANCE* 64 (M. Michael Rosenberg et al. eds., 1982) (stating that "there can be complete immersion in conventional culture at one extreme, complete immersion in deviant subculture at the other extreme, and a range of possibilities in between").

107. One of the pioneering deterrence theorists, Johannes Andenaes, devises a similar three-group schema to classify the class of potential law-breakers. Andenaes divides the population into:

- (a) the law-abiding man, who does not need the threat of the law to keep him on the right path; (b) the potential criminal, who would have broken the law if it had not been for the threat of punishment; and (c) the criminal, who may well fear the law but not enough to keep him from breaking it.

ANDENAES, *supra* note 38, at 111-12.

Other criminologists have adopted a similar three-group schema of the reliable law-abider, the inveterate criminal and the marginal offender. See BEYLEVELD, *supra* note 38, at xxxii. Ehrlich conceives of a demographic distribution of potential offenders based on ethical values, which would determine the rate of net return from criminal behavior and the market supply of offenses across the general population of potential offenders. Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 47 (1996).

108. Most economic models of norm compliance tend to employ *two-group* models of norm-violators and norm-conformists. This modeling choice is based on the claim that communities sanction deviations from the norm discontinuously, so that even small deviations give rise to the inference that actors belong to the extreme type that rejects the norm. See, e.g., Akerlof, *Social Custom*, *supra* note 86; Bernheim, *supra* note 86. This assumption may, however, partly serve purposes of analytical tractability at some cost of distorting empirical conditions. Bernheim recognizes this potential lacuna and models the possibility of a more nuanced three-group distribution of population subgroups, ranging from extremists who follow the norm religiously, centrists who follow the norm moderately, and "fringe" types who do not follow the norm at all. See Bernheim, *supra* note 86, at 862-63.

informal sanctions and inducing these error-prone offenders to re-adopt a strong commitment to the governing moral norm.

An established moral norm induces widespread compliance by threatening to impose a heavy informal sanction—primarily in the form of guilt sanctions and secondarily in the form of reputational sanctions—upon individuals who contemplate relaxing or abandoning their commitment to, and ultimately deviating from, the norm.<sup>109</sup> Just like a fine that the criminal law applies to an offender's monetary assets, these informal sanctions apply a fine to an offender's social-capital assets. The problem is that a fine's deterrent effect varies with an offender's holdings in the relevant asset class. Some commentators justify the use of imprisonment as a criminal sanction (rather than fines, which would generate far lower enforcement costs) because the exclusive use of fines would have little or no deterrent effect on poor, empty-pocket offenders.<sup>110</sup> Just as there is an unequal distribution of monetary assets, there is an unequal distribution of social-capital assets. Some individuals are very well integrated into the conventional network (that is, have a lot of social capital), while some individuals are not integrated at all (that is, have little or no social capital). Because informal sanctioning regimes lack the imprisonment option, however, there remains significant variation in the marginal informal sanction that individuals expect to pay for relaxing their moral commitment and potentially engaging in norm-violative conduct. As a general matter, individuals who have small amounts of social capital are effectively judgment-proof against informal deterrence regimes, especially if they have little expectation of entering into cooperative endeavors within the conventional social network.<sup>111</sup> By contrast, law-abiders are deep-pocket offenders who

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109. See *supra* Part II.A.1.

110. Becker, *supra* note 18, at 31-32. As Becker observes, this line of argument raises the question of why there should be imprisonment at all for the wealthy. *Id.* Setting aside the possibility that certain communities may have a taste for a certain degree of distributive equity (or that distributive equity has a normative value independent of efficiency concerns), there seems to be an efficiency argument that the wealthy always should be able to buy their way out of a prison term. Note that although this argument would mean that wealthier offenders would not go to jail, it also means that the wealthy would always pay higher fines than poorer offenders. These questions, however, are beyond the scope of this Article. For full discussions of these questions, see David D. Friedman, *Reflections on Optimal Punishment, or: Should the Rich Pay Higher Fines?* in 3 RES. IN LAW AND ECON. 185-205 (1981); A. MITCHELL POLINSKY & STEVEN SHAPELL, THE OPTIMAL USE OF FINES AND IMPRISONMENT (Nat'l Bureau of Econ. Research, Working Paper No. 932, 1982) available at <http://www.nber.org/papers/W0932.pdf>.

111. Sociological writings generally support this claim. See Harold G. Grasmick & Lynn Appleton, *Legal Punishment and Social Stigma: A Comparison of Two Deterrence Models*, 58 SOC. SCI. Q. 15, 16-17 (1977) (stating that the threat of arrest and conviction poses a much greater stigmatization (and thus, deterrent) effect on a

have a great deal at stake since the loss of social capital could sharply elevate the costs of credibly indicating trustworthiness to future co-venturers (and therefore, sharply reduce the net return from the expected stream of future cooperative endeavors).

Figure 1 illustrates this argument. This figure shows a declining marginal cost (that is, marginal sanction) curve for norm-violative behavior that tracks a range of declining social-capital holdings. Figure 1 divides this social-capital distribution into mainstream, fringe, and marginal zones. The mainstream zone encompasses socially well-integrated individuals who value highly their good standing and have internalized deeply the prevailing norm. Mainstream types identify closely with prevailing social conventions, have large amounts of social capital, expect high informal sanctions, and thus almost never would contemplate violating the moral norm. The marginal zone covers fairly well-integrated individuals who experience a reduced but still significant level of informal sanctions. These individuals may be experiencing financial or other pressures that undermine their internalized commitment to prevailing norms, may be young and have not yet accumulated large amounts of social capital, but may hold or expect to accumulate significant amounts of social capital, and therefore may be unsure whether deviant conduct will generate benefits in excess of expected social-capital losses. The fringe zone covers individuals who fall outside mainstream society, have small or no amounts of social capital, and may have strong preferences for violating the moral norm. As Figure 1 illustrates by noting the possibility of negative sanctions (that is, rewards), these alienated individuals may even acquire reputational benefits within a fringe subculture by violating the prevailing norm. This category encompasses people who have idiosyncratic tastes for certain unsavory activities, alienated individuals who have little interaction with mainstream society, and moral activists who seek to modify or eliminate the prevailing norm.

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wealthy businessman than a "skid row drunk"); Laub & Sampson, *supra* note 105, at 500-01 (stating that the lack of social capital or investment in social bonds characterizes individuals who incur relatively low costs for engaging in criminal activities). The unequal distribution of social capital also may explain why the young tend to commit more crime than the old. Because they have not yet accumulated a large amount of social capital, there are less severe consequences to violating a community norm and risking stigmatization. For an analogous argument in terms of financial capital, see generally Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519 (1996) (arguing that young people are less likely to be employed and thus risk lower economic sanctions, in the form of lower wages, as a consequence to arrest and conviction for a criminal offense); see also GOTTFREDSON & HIRSCHI, *supra* note 104, at 21 (stating that the control theory of deviant behavior—namely, the idea that individuals generally refrain from deviant behavior because the reputational and social costs are too great—correctly predicts that the young would engage more frequently in deviant conduct).

### 3. Heterogeneous Sanctions and Rewards

The systematic variation in expected marginal sanctions means that each social-capital bracket displays different indifference points in choosing between morally disreputable and morally acceptable types of conduct. To estimate this indifference point for each bracket, we need to estimate: (1) each bracket's expected marginal sanction for norm-violative conduct, and (2) each bracket's expected *differential* marginal benefits for norm-violative conduct relative to norm-compliant conduct. Let the marginal informal sanction,  $MS_i$ , for norm-violative conduct equal the sum of marginal guilt sanctions,  $MS_g$ , and marginal reputational sanctions,  $MS_r$ , where each type of sanction is multiplied by the probability that the violator will be detected and the sanction will be imposed. Let  $p_1$  = the probability of detection and the imposition of guilt sanctions, and  $p_2$  = the probability of detection and the imposition of reputational sanctions.<sup>112</sup> Thus,  $MS_i = p_1(MS_g) + p_2(MS_r)$ . Let the differential marginal benefit,  $MB_d$ , equal the expected marginal benefit of norm-violative activity,  $MB_v$ , minus the expected marginal benefit of norm-compliant activity,  $MB_c$ , where each benefits term, net of overhead costs (e.g., equipment and health costs), is multiplied by the probability of successfully procuring those benefits. Let  $p_3$  = the probability of successfully procuring the expected benefits of norm-violation, and  $p_4$  = the probability of successfully procuring the expected benefits of norm-compliance. Thus,  $MB_d = p_3(MB_v) - p_4(MB_c)$ . The expected utility of norm-violative conduct can be rendered as follows:  $E(u) = MB_d - MS_i$ . Let each social-capital bracket violate the moral norm if  $E(u) > 0$ ; that is, if  $MB_d > MS_i$ . Let any individual violate the moral norm if the expected differential marginal benefits of disreputable conduct ( $MB_d$ ) exceed the expected marginal informal sanction for such conduct ( $MS_i$ ).

On the basis of these assumptions, Figure 1 illustrates two claims.

First, I propose an *inverse* relationship between potential violators' social-capital holdings and the expected marginal benefits of norm-violative conduct. Recall that social-capital holdings indicate an individual's degree of social integration.<sup>113</sup> In the case of a commercial vice supplier (let's say a drug dealer), each individual vice transaction (e.g., each drug sale), will tend to yield far higher differ-

112. These two probabilities may differ because an individual may commit a moral offense without being detected, and thus, suffer a high guilt sanction but no reputational sanction. Note that  $p_1$  (the probability of detection and imposition of guilt sanctions) is always equal to 1 because an individual only has to detect himself engaging in the disreputable activity (provided he does not have a serious tendency toward self-deception).

113. See *supra* notes 83-84 and accompanying text.

ential marginal benefits for less integrated sellers who have limited access to the conventional social network and thus, probably tend to have limited reputable sources of income. For potential fringe and marginal sellers who tend to have limited or no reputable sources of income, the differential marginal benefits ( $MB_v - MB_c$ ) of violating the relevant norm sometimes or often may be a *positive* term. For potential mainstream sellers who have abundant reputable sources of income, the marginal differential benefits are likely to be a *negative* term.

Second, I propose a *positive* relationship between potential violators' social-capital holdings and the marginal informal sanction they can expect to incur for morally disreputable conduct. Each vice transaction (e.g., each drug sale) will generate far higher marginal sanctions (e.g., loss of ties to conventional life, loss of suitability for conventional employment) for mainstream types (who have a large social-capital reserve), relative to marginal types (who may have already lost social capital through other disreputable transactions) or fringe types (who have almost no social capital). A marginal type who has already engaged in vice transactions has less social capital to lose than someone who has never engaged in those activities. Similarly, a mainstream type who has ceased engaging or has never engaged in vice transactions and has begun to accumulate social capital expects a higher marginal sanction than a fringe type or a marginal type who is still involved in the vice sector. This suggests that engaging in disreputable conduct may be a type of "inferior good." That is, individuals will tend to "consume" (or at least, visibly consume) less disreputable conduct as they accumulate (or reasonably expect to accumulate) social capital and conversely, will consume more disreputable conduct as they lose (or do not reasonably expect to accumulate) social capital.<sup>114</sup>

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114. This claim is not exactly precise, since I am positing an inverse correlation between consumption and social capital, rather than consumption and cash income. See WALTER E. NICHOLSON, INTERMEDIATE MICROECONOMICS: INTERMEDIATE AND ITS APPLICATIONS 77, 79 (7th ed. 1997) (defining an inferior good as a good that an individual chooses to consume less of as his or her income increases). Contrary to the standard definition of an inferior good in terms of income, many individuals may have low incomes but a high social capital account if they are well-integrated within a network of social institutions. Conversely, some individuals may have high incomes but a low social capital account.

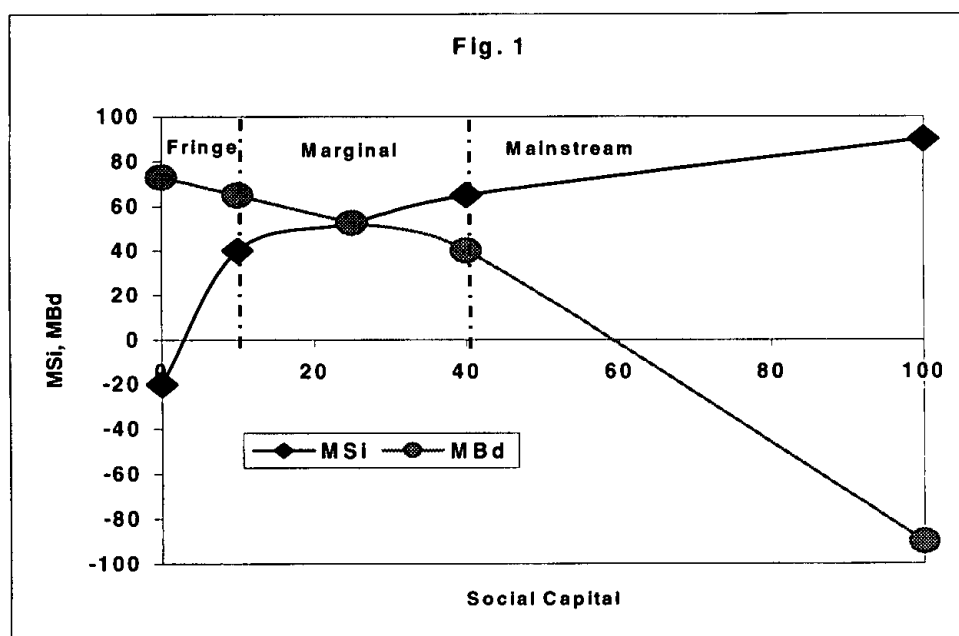


Figure 1 demonstrates the important point that only marginal types face a debatable cost-benefit choice between sustaining or relaxing their moral commitment and ultimately, engaging in or refraining from morally disreputable conduct.<sup>115</sup> Assume that the differential marginal benefits curve in Figure 1 depicts the mean of each individual's most and least favorable estimates of the differential marginal benefits of engaging in norm-violative conduct. Each individual's estimation of marginal benefits and marginal costs may be fairly rough and cover a certain range of values and thus, may not identify accurately the point at which norm-violative behavior will result in net benefits. Figure 1 shows, however, that this estimation problem is only relevant in the case of marginal types. For mainstream types, the marginal sanction stands well above any expected differential marginal benefit (that is,  $MB_d < MS_i$ ); for all fringe types, the marginal sanction stands well below any expected differential marginal benefit (that is,  $MB_d > MS_i$ ). For these types, there is no conceivable chance of calculation error. By contrast, marginal types inhabit a gray area where it is unclear whether expected differential marginal benefits just exceed or just fall short of expected marginal sanctions.

Because a marginal violator's expected benefits from norm-

115. For a related claim, see Ehrlich, *supra* note 107, at 57 (suggesting that whereas active offenders do not react to either positive or negative incentives above their critical threshold levels of expected net return from criminal activity, marginal offenders' "market supply curve" may be more sensitive to changes in the actual net return from crime insofar as such changes can more easily push these offenders' expected net return below threshold levels).

conformist behavior may only slightly exceed the expected opportunity costs of such behavior, it may be difficult for this offender type to assess whether it is utility-maximizing to maintain a strong commitment to and thereby continue to adhere to the relevant moral norm. As a result, this offender type may be prone to judgment errors, underestimate the social-capital (and, where applicable, health) costs of taking part in norm-violative activities, and later regret a decision to depart from the conventional network.<sup>116</sup> Relevant empirical findings bear out this claim. Numerous studies show that individuals tend to underestimate deferred costs or benefits relative to immediate ones and misjudge the probability that a future risk will materialize.<sup>117</sup> These cognitive biases may induce participation in disreputable transactions such as recreational drugs or prostitution, since these activities consist of an immediate benefit (pleasure for the consumer, cash for the supplier) and deferred costs (reputational, psychological, or physical injury).<sup>118</sup> In certain vice industries, there is evidence that many offenders “drift” into these criminal activities without giving serious thought to the long-term costs of that decision.<sup>119</sup> Moreover, vice activities tend to attract younger offenders, who are especially likely to miscalculate the long-term health and so-

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116. Many scholars construe the conflict between internal “guilt” sanctions and current impulsive preferences for violating a moral commitment in terms of a conflict between an individual’s short-term (or first-order) and long-term (or second-order) preferences. Thus, individuals may regret hasty decisions that satisfy short-term preferences at the expense of long-term preferences. See HARRY G. FRANKFURT, *THE IMPORTANCE OF WHAT WE CARE ABOUT* 80-94 (1988) (defining second-order preferences); Cooter, *Models of Morality*, *supra* note 26, at 921 (stating that “regret occurs when a choice produces a better result from the viewpoint of the initial preferences and a worse result from the viewpoint of final preferences”).

117. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477-78 (1998) (reviewing research showing that people are myopic decisionmakers in many respects, including the inability to predict accurately their future preferences and incorrect evaluation of past experiences); see Daniel Kahneman, *New Challenges to the Rationality Assumption*, 3 LEGAL THEORY 105 (1997) (same).

118. GOTTFREDSON & HIRSCHI, *supra* note 104, at 89-91 (stating that criminal offenders often exhibit low self-control and observing that criminal activities are characterized by immediate benefits, low short-term costs due to few required skills, and high long-term costs due to the possibility of imprisonment and interference with conventional occupational pursuits); see also Cooter, *Models of Morality*, *supra* note 26, at 904 (observing that “[w]rongdoing often yields an immediate benefit and risks future punishment” and noting that people who lack self-control may apply inappropriately low “discount rates” to expected future losses from present wrongdoing).

119. See Ekland-Olson, *supra* note 82, at 280 (reviewing study showing that many persons drift into drug dealing, do not calculate carefully the “rewards and potential costs” of doing so, and then get “locked into” a criminal network and normative commitments to that network); see also REYNOLDS, *supra* note 48, at 18 (stating that the largest cost to prostitutes may be the long-term psychological effects, including their relationship to “straight” society and “their attitudes about themselves”).



cial-capital losses attendant to certain vice activities.<sup>120</sup> Severe financial pressures, combined with the tendency (especially pronounced among youth) to underestimate the probability of remote contingencies, may override the checking function played by internal guilt sanctions and induce marginal types to underestimate the future costs of participating in morally disreputable transactions. The criminal law may have a valuable role to play in inducing marginal types to discount appropriately the expected gross benefits of norm-violative conduct.<sup>121</sup> A well-designed criminal regime that complements informal sanctioning devices may minimize “regretful” transactions where individuals misjudge long-term social-capital costs relative to short-term material benefits.

### *B. The Hidden Costs of Rewards and Punishments*

The interaction between the formal and informal enforcement of vice norms may intuitively appear to be an uninteresting exercise of summing the absolute values of legal and social sanctions. But a well-established finding in the social psychological literature concerning the counterproductive effects of certain types of rewards or punishments suggests that this is not always a simple additive relationship. Numerous experimental findings show that certain rewards or penalties depress individuals’ “intrinsic motivation”<sup>122</sup> to engage in a particular activity (the “crowding-out effect”) whereas other types of rewards or penalties enhance this intrinsic motivation (the “crowding-in effect”).<sup>123</sup> In light of this evidence, I argue in this Part that whether or not formal sanctions support or detract from informal sanctions depends closely on the extent to which formal sanctions strengthen or undermine potential offenders’ internalized commitment to the relevant moral norm. Whereas regularly enforced vice laws are likely to diminish this internalized commitment and thereby

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120. See MARK A. R. KLEIMAN, *AGAINST EXCESS: DRUG POLICY FOR RESULTS* 95-96 (1992). For a discussion on the relationships between age and norm-violative propensities, see *supra* note 107 and accompanying text.

121. See generally Cooter, *Models of Morality*, *supra* note 26, at 924-25 (stating that a legal sanction for wrongdoing can induce a change in preferences from high discounting to low discounting of future negative consequences of wrongful behavior); Robert E. Goodin, *Laundering Preferences*, in *FOUNDATIONS OF SOCIAL CHOICE THEORY* 86-96 (Jon Elster & Aanund Hylland eds., 1986) (arguing that policymakers can aid individuals in ensuring that individuals’ choices match their higher-order preferences, regardless of actual preferences at any particular point in time).

122. For a definition of intrinsic motivation, see *infra* note 128 and accompanying text.

123. See generally Frey & Jegen, *Motivation Crowding Theory*, *supra* note 26 (stating that there is now compelling empirical evidence for the claim that an external intervention via monetary incentives or punishments may undermine (and under different conditions strengthen) intrinsic motivation). For further discussion, see *infra* note 126-32 and accompanying text.

diminish the informal sanctions potential vice offenders expect to incur, sporadically enforced vice laws are likely to strength this internalized commitment and thereby enhance those informal sanctions.

### 1. The Crowding-Out Effect

Several scholars have argued that certain forms of criminal punishment exert a “preference-shaping” effect that can induce individuals to adopt a normative attitude (or adopt a stronger normative attitude) against engaging in certain socially harmful practices, irrespective of the price of engaging in such practices.<sup>124</sup> Applied to the criminal context, the experimental evidence concerning the crowding-out effects of rewards and punishments suggests that certain levels of criminal punishment can exert a *reverse* preference-shaping effect. Specifically, the consistent application of criminal sanctions to a particular practice may have a “crowding out” effect that leads potential offenders to abandon a normative attitude against a disreputable practice that is otherwise normally subject to social sanctions. This undesirable outcome may occur to the extent that state-imposed criminal sanctions displace self-imposed guilt sanctions that usually induce compliance with the underlying moral norm even without the threat of formal punishment. Recall that guilt sanctions are incurred by individuals who comply with a moral norm on the basis of a principled commitment rather than a fine calculation of the expected net reputational benefits of norm-compliant behavior.<sup>125</sup> By attaching a formal price to detectable violations of that norm, the criminal law

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124. There are several useful (and slightly different) articulations of this approach. *See generally*

ANDENAES, *supra* note 38; Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984); Dau-Schmidt, *supra* note 18; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) [hereinafter Kahan, *Social Influence*]. The “preference-shaping” argument states that, although it is true that criminal sanctions increase the expected price of engaging in certain activities (assuming that potential offenders are aware of the sanction), it is also true that they can modify individuals’ preferences for engaging in those activities. Thus, the criminal law regulates both the price and the “social meaning” of proscribed activities. In the first case, the criminal law modifies an individual’s opportunity set of utility-maximizing activities, as defined by individual preferences, budget constraints, and the cost of each alternative activity. In the second case, the criminal law modifies the individual preferences that define partially that opportunity set. Criminal sanctions shape an individual’s preferences because certain forms of punishment contain an expressive element that signals normative disapproval of the proscribed activity. For this reason, exclusive concern with the frequency and magnitude of criminal penalties sometimes may underestimate or overestimate the deterrent effect of certain penalties. Because certain forms of criminal sanctions may institute social meanings that change an individual’s preference orderings, imprisonment and a fine, for example, may not exert comparable deterrent effects even if they are comparable when translated into monetary or other quantitative terms.

125. *See supra* notes 95-103 and accompanying text.

can undermine this principled (that is, “price-indifferent”) commitment. Just as the threat of imprisonment exerts an expressive force that can transform a normatively neutral practice into a normatively undesirable practice, it can transform a normatively undesirable practice into a normatively neutral practice. When the state strictly applies criminal sanctions for engaging in a morally disreputable practice, it may induce individuals to abandon a noncalculative commitment to the underlying moral norm.

Social psychological research explains how this outcome may arise. An abundant experimental literature demonstrates that attempts to induce or discourage certain behavior through “externally” imposed material rewards or penalties reduces individuals’ intrinsic motivation, respectively, to engage in or refrain from such behavior in the absence of any such expected rewards or penalties.<sup>126</sup> Intrinsic-

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126. In these experiments, rewards include either positive rewards in the form of monetary payments or symbolic awards in the case of child subjects. The activities studied in these experiments often take place in a school or university setting and include solving puzzles, playing computer games, solving chess problems, problem-solving games, solving anagrams, art activities and playing musical instruments. Some of these experiments have examined the effect of punishments on subjects’ intrinsic motivation, treating a punishment as a negative reward (the avoidance of punishment) and finding that introducing the threat of punishment similarly leads subjects to engage in a particular activity largely to avoid the expected punishment. For reviews of the literature, see EDWARD L. DECI & RICHARD FLASTE, *WHY WE DO WHAT WE DO: THE DYNAMICS OF PERSONAL AUTONOMY* (1995) 36-42; EDWARD L. DECI & RICHARD M. RYAN, *INTRINSIC MOTIVATION AND SELF-DETERMINATION IN HUMAN BEHAVIOR* (1985); FREY, *NOT JUST FOR THE MONEY*, *supra* note 26; Ziva Kunda & Shalom H. Schwartz, *Undermining Intrinsic Moral Motivation: External Reward and Self-Presentation*, 45 J. PERSONALITY & SOC. PSYCHOL. 763 (1983); Richard M. Ryan et al., *Relation of Reward Contingency and Interpersonal Context to Intrinsic Motivation: A Review and Test Using Cognitive Evaluation Theory*, 45 J. PERSONALITY & SOC. PSYCHOL. 736 (1983); see also ALFIE KOHN, *PUNISHED BY REWARDS* 86 (1993) (stating that the psychological research literature indicates that, under certain circumstances, task-contingent rewards undermine subjects’ intrinsic motivation to perform the task in question); Edward L. Deci, *Cognitive Evaluation Theory and the Study of Human Motivation*, in MARK R. LEPPER & DAVID GREENE, *THE HIDDEN COSTS OF REWARD: NEW PERSPECTIVES ON THE PSYCHOLOGY OF HUMAN MOTIVATION* 157 (1978) [hereinafter Deci, *Cognitive Evaluation*] (stating that “clear evidence exists attesting to the debilitating effects of extrinsic monetary rewards on intrinsic motivation”). A related strand in the psychological literature, applying the theory of cognitive dissonance, suggests that severe rewards and penalties may not only erode normative commitment but may prevent young people from acquiring that normative commitment in the first place. See, e.g., Elliot Aronson & J. Merrill Carlsmith, *Effect of the Severity of Threat on the Devaluation of Forbidden Behavior*, 66 J. ABNORMAL & SOC. PSYCHOL. 584, 587 (1966) (finding that, relative to severe threats, milder threats can enhance subjects’ normative devaluation of forbidden acts); Jonathan L. Freedman, *Long-Term Behavioral Effects of Cognitive Dissonance*, in READINGS ABOUT THE SOCIAL ANIMAL 148-59 (Elliot Aronson ed., 1977) (finding that a severe threat to children not to play with a desirable toy only yielded compliance while the threat still existed, whereas a mild threat triggered a long-term commitment to the no-toy directive). For an application of cognitive

cally motivated activities are activities that individuals engage in without any (or with little) regard for expected material rewards and with great regard for the non-material rewards (e.g., moral or other personal satisfaction) derived from engaging in such activities.<sup>127</sup> Introducing monetary and other material rewards commonly induces experimental subjects to engage in the desired behavior (or avoid the undesired behavior) solely or primarily in response to such expected rewards.<sup>128</sup> Subjects' pre-existing intrinsic or non-instrumentalist motivations, which value the relevant activity for its own sake and are therefore not contingent on any expected material rewards, are crowded out.<sup>129</sup> Testing this thesis in the realm of morally governed behavior, psychologists have shown that monetary rewards can reduce individuals' interest in engaging in activities for which they have an intrinsic moral motivation, such as altruistic or sharing behavior.<sup>130</sup> Following the psychologists' lead, experimental economists

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dissonance theory to criminal-law enforcement, see Akerlof & Dickens, *supra* note 21; Dickens, *supra* note 21.

127. Edward Deci states that "[o]ne is said to be intrinsically motivated . . . when [one] receives no apparent rewards except the activity itself." Edward L. Deci, *Effects of Externally Mediated Rewards on Intrinsic Motivation*, 18 J. PERSONALITY & SOC. PSYCHOL. 105 (1971). For a discussion of the historical and conceptual development of the notion of intrinsic motivation within the psychological literature, see DECI & RYAN, *supra* note 126, at 32-40; Deci, *Cognitive Evaluation*, *supra* note 126, at 149-54. For an application of the concept of intrinsic motivation to morally governed settings, see Kunda & Schwartz, *supra* note 126, at 763-64. It is possible to argue that intrinsic motivations can be reduced within a rational-choice model to simply another type of expected extrinsic rewards by monetizing the value of, for example, educational interest or personal satisfaction. Although this is a plausible argument (assuming, perhaps *implausibly*, the feasibility of such a monetizing procedure), it does not undermine drawing a distinction, at least for descriptive purposes, between activities that are engaged in primarily for externally supplied reasons (material or reputational gain) and activities that are engaged in primarily for internally supplied reasons (personal or moral satisfaction). On this point, see FREY, NOT JUST FOR THE MONEY, *supra* note 26, at 14-15.

128. See *supra* note 127 and accompanying text.

129. *Id.*

130. Kunda & Schwartz, *supra* note 126, at 763-64 (performing experiment where payment for helping others undermined subjects' sense of moral obligation and intrinsic motivation to perform the altruistic act and attributing this result to the self-perception that one's behavior is under external rather than internal control). It should be noted, however, that several studies examining the effect of external rewards on intrinsic moral motivation have not found evidence of the undermining effect found in studies that examine non-moral intrinsic motivation. For a review of these studies' findings as well as a discussion of their limitations (especially, the problem of misleading answers as the result of subjects' tendencies to engage in socially desirable false self-representation in morally relevant experimental situations), FREY, NOT JUST FOR THE MONEY, *supra* note 26, at 16-17; Kunda & Schwartz, *supra* note 126, at 763-764.

have begun to test for similar crowding-out effects<sup>131</sup> and have reached similarly counterintuitive results in measuring compliance with sharing and other altruistic norms in response to the introduction of monetary rewards or penalties.<sup>132</sup>

Evidence concerning the crowding-out effect of material rewards and penalties suggests that regularly imposing formal sanctions—that is, a criminal “price”—for a vice activity sometimes may have the perverse effect of making the proscribed activity *less* shameful and *more* desirable. An internalized moral commitment leads a socially integrated individual almost always to adhere to the relevant norm and to avoid strenuously subjecting that moral commitment to any sort of cost-benefit analysis.<sup>133</sup> By contrast, a sanction-based commitment leads that individual to cease adhering to a moral norm the moment the police officer’s back is turned (that is, the moment the expected probability of detection and punishment inclines toward zero). Guilt and remorse sanctions are crowded out. Strong enforcement strategies effectively encourage potential offenders to adopt the prudential attitude of Holmes’ calculating “bad man”<sup>134</sup>, who only obeys the law because it is economically rationally for him to do so or, in Holmes’ words, as a result of “the material consequences” rather than “the vaguer sanctions of conscience.”<sup>135</sup> The problem is that this prudential attitude is only prudential in the short-term. By displacing the guilt sanctions that normally support an internalized commitment to

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131. This chronology is not an entirely fair characterization. Richard Titmuss already argued in 1972 (albeit using different terminology) that monetary incentives can have counterproductive effects, claiming that permitting cash payments for blood donations may decrease the total amount of blood donated by undermining the positive moral status ascribed to blood donation and thereby discouraging voluntary donors from donating blood as a morally laudatory act. RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971).

132. Bruno Frey has been a pioneer in this line of inquiry among economists. In experimental studies, Frey and others have shown that introducing compensation to obtain communities’ approval for siting “NIMBY” (“not in my backyard”) projects in their communities decreases the willingness of individuals in those communities altruistically to consent to the proposed siting of the project. Frey & Oberholzer-Gee, *The Cost of Price Incentives*, *supra* note 26, at 753-54. Another study examined the effect of introducing a small monetary fine for parents who arrived late to pick up their children at a day care center. See Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1, 2 (2000). Prior to the introduction of this fine, day-care center workers told parents the official hours of operation and parents sometimes violated this punctuality norm by arriving after operating hours. *Id.* at 3. The number of parents arriving late increased significantly after introduction of the fine. *Id.*

133. See *supra* notes 95-103 and accompanying text.

134. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in 78 B.U. L. REV. 699, 701 (1998); see also Cooter, *Models of Morality*, *supra* note 26, at 903-04 (arguing that Holmes’ model of the “bad man” gives an incomplete account of people’s motivations to obey legal rules).

135. Holmes, *supra* note 134, at 701.

moral norms, regularly applied criminal sanctions that tell offenders that “crime doesn’t pay” expose individuals to their systematic tendency to underestimate the social-capital losses that may result from morally disreputable conduct. Recall that a long-term dispositional strategy requires that individuals obey moral norms *even when* it is not in their immediate self-interest to do so. Vigorous forms of criminal enforcement may encourage individuals to follow moral norms *only* when it is in their immediate self-interest to do so.

### 3. The Crowding-In Effect

The foregoing analysis should not be taken to imply that vice laws can have no complementary effect on existing informal sanctions for moral offenses. The social psychological literature suggests that “informational” interventions can play a powerful role in enhancing individuals’ intrinsic motivation to comply with a particular behavioral norm.<sup>136</sup> In experimental settings, informational interventions consist of positive verbal feedback that acknowledges individuals’ sense of self-esteem and self-determination.<sup>137</sup> A sporadically enforced criminal law against a vice offense may play such a role. Whereas a strong enforcement policy may crowd out a moral commitment by using the law principally as a punitive medium that appeals to potential offenders’ self-interested incentives, a formal and largely unenforced prohibition may crowd in moral motivations by using the law principally as an informational medium that fosters an intrinsic commitment to the underlying norm.<sup>138</sup>

The social psychological literature details the mechanism by which this outcome may arise. Researchers consistently observe a positive correlation between experimental subjects’ loss of intrinsic motivation and their perception that external forms of intervention

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136. See Ryan et al., *supra* note 126, at 740. For a review of some of the relevant studies, see DECI & RYAN, *supra* note 126, 59-60.

137. An example might be “good job!” or “well done, that’s the best drawing in the class.”

138. FREY, NOT JUST FOR THE MONEY, *supra* note 26, at 32 (distinguishing between soft or nonenforceable regulatory directives and hard regulatory directives and reviewing empirical evidence showing that soft regulation can induce crowding-in effect that can even lead regulated actors to go beyond the minimum required by law); *id.* at 443-46 (arguing that external interventions can crowd in intrinsic motivations if individuals believe that such intervention acknowledges, rather than attempts to control, intrinsic motivations); see also Gusfield, *On Legislating Morals*, *supra* note 34, at 59 (distinguishing between the “instrumental” and “symbolic” functions of the law, arguing that the law can exert a strong symbolic function even if it tolerates a significant amount of illegal activity, and claiming that supporters of Prohibition gained great satisfaction simply from the passage of prohibitionist legislation, regardless of the degree of enforcement).

are “controlling”<sup>139</sup> and designed to override their decision-making or “self-determination” capacities.<sup>140</sup> Importantly, however, not all forms of intervention tend to have counterproductive effects. Informational forms of external intervention tend to sustain experimental subjects’ intrinsic motivation and consequently induce higher compliance rates with the relevant behavioral norm relative to either controlling rewards or no rewards.<sup>141</sup> Based on these results, researchers infer that imposing controlling penalties or rewards leads subjects to conclude that their compliant behavior was motivated by an instrumentalist desire to satisfy external pressures—that is, to obtain the reward or avoid the penalty—rather than by the wish to satisfy certain intrinsic values or interests.<sup>142</sup> By contrast, subjects tend to perceive informational interventions as acknowledging their ability independently to make behavioral choices and therefore, these verbal rewards can preserve and even enhance their intrinsic motivation to adhere to the relevant behavioral norm.<sup>143</sup>

This crowding-in effect may be especially likely to arise regarding certain vice activities with respect to which many individuals may expect that they have some room for individual judgment in determining the application of the prevailing moral norm in any particular instance.<sup>144</sup> When the criminal law rigorously enforces a moral

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139. Controlling forms of intervention usually assign rewards for subjects who complete a required task, impose penalties upon those who do not do so, and provide subjects with little informational feedback on the quality of their performance. See Kunda & Schwartz, *supra* note 126, at 763; Ryan et al., *supra* note 126, at 738.

140. Ryan et al., *supra* note 126, at 738 (stating that research has shown that external rewards undermine intrinsic motivation when subjects perceive that the reward is controlling and makes “People Do Something”); see also *id.* at 740 (“When one must complete a task to get a reward, the task is more likely to be seen as instrumental to the reward. The task is something one *must* do to get the reward”).

141. See DECI & RYAN, *supra* note 126, 59-60; Ryan et al., *supra* note 126, at 740.

142. DECI & RYAN, *supra* note 126, at 204. In psychological terms, individuals subject to controlling monetary rewards feel “overjustified” if they continue to maintain their intrinsic motivation to engage in the relevant activity once there are sufficient extrinsic factors driving them to do so. For a critical review and discussion of this “self-attributional” theory, see DECI & RYAN, *supra* note 126, at 204-205. Bruno Frey has translated this psychological mechanism into economic terms. Viewing the pool of possible extrinsic and intrinsic motivating factors as a scarce resource, Frey argues that individuals reduce their consumption of intrinsic motivations if there are already sufficiently compelling extrinsic motivations to comply with the relevant behavioral norm. See Frey et al., *The Old Lady Visits Your Backyard*, *supra* note 26, at 1301.

143. See *supra* notes 139-142 and accompanying text.

144. By negative implication, this argument also suggests why strong enforcement is *unlikely* to have a crowding-out effect with respect to existing guilt sanctions regarding classic nonconsensual criminal offenses. This is because regularly applied criminal sanctions for offenses against property or persons are unlikely to be seen as “controlling” by prospective offenders. Unlike vice activities, these conventional offenses are universally and uncontroversially subject to moral proscriptions. Thus, whereas most

norm that governs consensual but controversial conduct, many individuals may feel that the state is controlling independent decision-making as to whether or not to obey the norm in certain situations. To the extent that an unenforced prohibition implicitly acknowledges individuals' discretion to conform to or deviate from the underlying moral norm, it may maintain or even strengthen individuals' commitment to the norm.<sup>145</sup> For this reason, an "empty" prohibition can be surprisingly effective to the extent that it reconverts Holmes' calculative "bad man", who carefully weighs costs against benefits, into the morally disposed "good man", who places a value on the norm that is immune to price-based consideration. Strong enforcement seeks to deter violations of the moral norm by explicitly inflating the expected price of violating the norm and inducing actors to "do the math"—that is, to weigh the expected costs of any contemplated norm violation against the expected benefits. Weak enforcement seeks to maintain (or reawaken) individuals' noncalculative attitude by placing the expressive force of the law behind the underlying moral norm and thereby encouraging individuals *not* "to do the math"—that is, *not* to weigh the expected costs of any contemplated norm violation against the expected benefits.

### C. *The Economic Case for Weak Enforcement*

Evidence concerning the crowding-out effect raises the possibility that a policy of strong enforcement may surprisingly deter fewer moral offenders than a world that lacks any criminal sanction at all. *This counterproductive enforcement outcome will obtain if criminal sanctions reduce expected informal sanctions by a magnitude greater than that by which they increase the total expected sanction (formal plus informal sanctions) for potential offenders.* If that condition is met, strong enforcement of a moral norm will lead potential offenders

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people may oppose selling their bodies in prostitution but feel that it is acceptable to meet a dire financial need, few people would assign any such qualification to the moral prohibition against murder. Therefore, a vigorously applied criminal sanction to theft or murder may not appear to constrain individuals' decisionmaking regarding the bounds of the underlying moral norm and therefore, strong enforcement is unlikely to diminish individuals' intrinsic commitment to the corresponding norm.

145. See FREY, NOT JUST FOR THE MONEY, *supra* note 26, at 32 (stating that "soft regulation" comprises non-enforceable directives and is unlikely to reduce self-determination and therefore, may maintain or even bolster intrinsic motivation). One experimenter has shown that limits placed on children's behavior can serve an informational purpose without being perceived as controlling. See Koestner et al., *Setting Limits on Children's Behavior: The Differential Effects of Controlling vs. Informational Styles on Intrinsic Motivation and Creativity*, 52 J. PERSONALITY 233 (1984) (performing study with child subjects and showing that behavioral limits can be set with informational (rather than controlling) effects by maximizing the children's possible choice and acknowledging the children's decisionmaking capacities and therefore, sustaining the children's sense of self-determination).



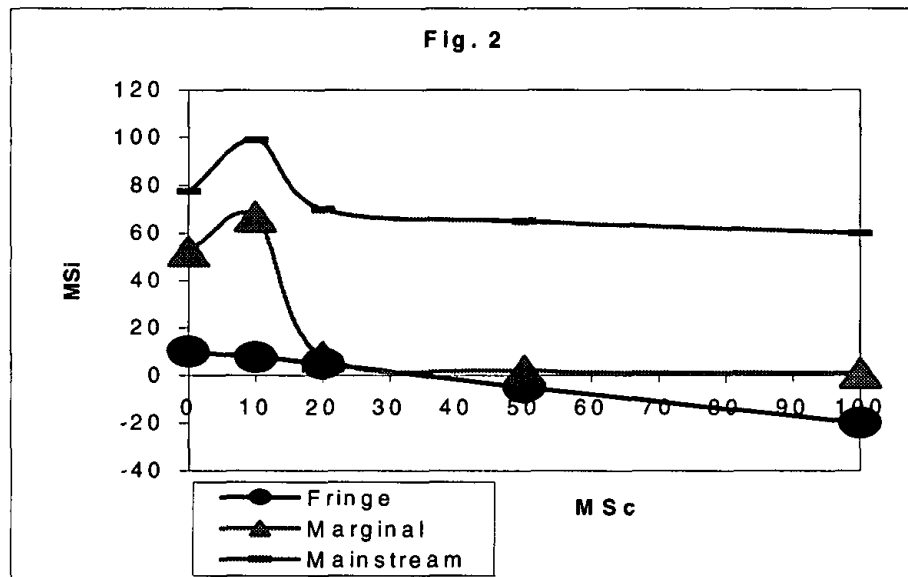
to expect a lower total sanction for norm-violative conduct and the offense rate will consequently rise. This result can only plausibly hold within a limited range of values: the state almost certainly could compensate for reduced informal sanctions by imposing super-strong criminal sanctions. But the state has no rational reason to do so if it can induce a comparable compliance rate by adopting a far less expensive strategy of weak enforcement that preserves much or all of the deterrent force of moral norms. A weak enforcement strategy, consisting primarily of the passage of a criminal prohibition, occasional enforcement and regular public awareness campaigns, may exert a crowding-in effect that enhances potential offenders' intrinsic moral commitments. Surprisingly, the state probably can induce comparable compliance rates with a moral norm either through expensive and intrusive systems of super-strong enforcement or inexpensive and unobtrusive systems of weak enforcement.<sup>146</sup> As a matter of basic cost-benefit analysis, weak enforcement is the preferable policy option.

#### 1. Expected Informal Sanction

Figure 2 illustrates two cases: (1) a reduction in expected informal sanctions as the result of a strong enforcement policy and (2) an increase in expected informal sanctions as the result of a weak enforcement policy.

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146. Other commentators have recently made claims for the effectiveness of weak enforcement strategies under certain circumstances given the presence of preexisting moral sanctions. See Peter H. Huang, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L., ECON. & ORG. 390, 403 (1994) (arguing that incorporating the role of morally inspired emotions such as remorse (as the result of moral deviation) and pride (as the result of moral conformity) into game-theory models of norm compliance can explain why the law can maintain order even at low levels of formal enforcement); Steffen Huck, *Trust, Treason and Trials: An Example of How the Evolution of Preferences Can Be Driven by Legal Institutions*, 14 J.L., ECON. & ORG. 44, 45-47 (1998) (arguing that low legal penalties can match the long-term deterrent effects of heavy legal penalties because light penalties generate an evolutionary equilibrium in which individuals are materially rewarded for cultivating moral preferences whereas heavy penalties create an evolutionary equilibrium in which individuals are materially punished for cultivating moral preferences).



a. Strong Enforcement

Case (1) depicts the crowding-out effect of a strongly enforced criminal prohibition. As criminal sanctions rise to the level of strong enforcement, mainstream and especially marginal types lose much of their internalized commitment to the underlying norm and expect diminished guilt sanctions for norm violations. For mainstream types, informal sanctions fall considerably more gently because they have a large social-capital reserve to protect and face stiff reputational penalties for norm violations within the mainstream community. For marginal types, informal sanctions fall sharply because they have little social capital at stake and expect only mild reputational sanctions for norm-violative behavior. For fringe types, introducing criminal sanctions even generates negative sanctions (that is, reputational rewards) within the fringe subculture for violating the newly imposed criminal prohibition.

b. Weak Enforcement

Case (2) depicts the crowding-in effect of a mildly enforced criminal prohibition. Relative to a world without any criminal sanction, a weak enforcement strategy can increase or at least preserve existing informal sanctions against the relevant vice activity. The legislature or municipality's "informational" condemnation of a certain practice, coupled with a mild degree of enforcement and an active public education campaign, acknowledge and enhance mainstream and marginal types' internalized commitment to the underlying norm. For fringe types, the formal prohibition has no crowding-in effect since they lack any pre-existing commitment to, or inclination

to commit to, the underlying norm.

## 2. Expected Total Sanction

Figures 3 and 4 add up the marginal criminal sanctions<sup>147</sup> ( $MS_c$ ) and marginal informal sanctions ( $MS_i$ ) to determine the total marginal sanction ( $MS_t = MS_c + MS_i$ ) to which each offender category is subject as enforcement authorities introduce and progressively increase criminal sanctions for a vice activity. This exercise shows that, relative to a world without any criminal sanction, (1) weak and super-strong criminal sanctions increase the total marginal sanction for all offender types and (2) strong criminal sanctions decrease the total marginal sanction for marginal types.

### a. Mainstream and Fringe Types

As Figure 3 shows, for mainstream types, the criminal sanction either (1) in the case of weak enforcement, enhances the informal sanction or (2) in the case of strong enforcement, fully compensates for the decline in informal sanctions. This is why the total marginal sanction ( $MS_t$ ) behaves “normally” for mainstream types and always increases from the point at which criminal sanctions are imposed. The marginal deterrent effect of criminal penalties is also “normal” in the case of fringe types since they expect no informal penalty and introducing the criminal penalty therefore simply has an additive ef-

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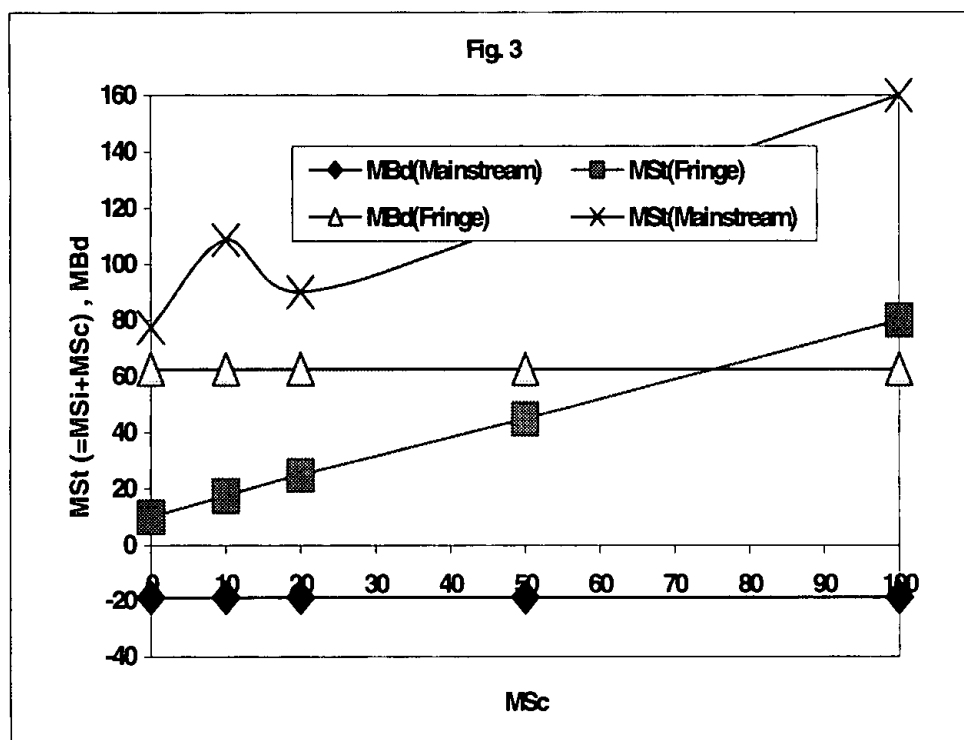
147. Note that, unlike the case with respect to expected informal sanctions, I assume that the marginal expected criminal sanction does not vary systematically relative to the social-capital holdings of the potential offender. This is largely because any alternative assumption, which would posit a positive or inverse correlation between the marginal criminal sanction and an offender's social-capital holdings, is highly uncertain. To argue plausibly that the marginal criminal penalty varies systematically relative to social-capital holdings, it would be necessary to assume a significant correlation between social-capital holdings and income (that is, less integrated offenders tend to be poorer offenders). But even granting this assumption, whether the marginal criminal penalty then moves inversely or positively relative to the social-capital bracket remains ambiguous, depending closely on whether the sanction is in the form of a fine or imprisonment. Assuming (1) social-capital brackets correspond roughly to income brackets and (2) the sanction is a fine, the marginal criminal penalty would move inversely relative to social-capital holdings (that is, poorer and less integrated offenders would suffer a larger marginal criminal sanction). Assuming (1) social-capital brackets correspond roughly to income brackets and (2) the sanction is imprisonment, then the result is ambiguous. There would be a *positive* correlation assuming that wealthier inmates tend to incur a higher opportunity cost for imprisonment time than poorer inmates. Alternatively, there would be an inverse correlation assuming that wealthier arrestees tend to receive lower sentences as the result of superior legal representation. Interestingly, both possibilities may be true and the two countervailing tendencies would then cancel each other out (i.e., wealthier arrestees serve less time in an absolute sense but incur roughly the same disutility amount in a relative sense because their opportunity cost per day spent imprisoned is higher compared to that of poorer arrestees).

fect (adjusted for the possibility that the criminal penalty may generate reputational benefits for violators within a fringe subculture). These results are not practically significant, however, because for these offender categories strong enforcement has not resulted in *any* increase in the rate of compliance. This is because the increase in the total sanction has no marginal deterrent effect on mainstream types and virtually no marginal deterrent effect on fringe types. As Figure 3 shows, prior to the imposition of criminal sanctions, informal sanctions already stand far above the expected marginal differential benefits for mainstream types and far below the expected marginal differential benefit for fringe types.<sup>148</sup> Thus, any extra sanctioning power never makes any difference (except that it wastes social resources) for mainstream types and usually makes no difference for fringe types. Although Figure 3 proposes that criminal sanctions may deter fringe types at super-strong levels, this caveat is largely irrelevant assuming that (1) super-strong penalties for moral offenses probably impose social costs (privacy intrusions and detection expenses) that outweigh the social benefits of reducing norm-violations among fringe offenders and (2) tolerating consensual crime among fringe types may *promote* social welfare to the extent that low levels of morally offensive activity generate private benefits in excess of the emotional costs for third-party observers.<sup>149</sup>

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148. Note that in Figure 3, I have simplified the analysis by assuming that all members of a single offender category expect the same level of differential marginal benefits and the same level of marginal informal sanctions. For each category, the level of differential marginal benefits represents the mean of the range of differential marginal benefits for each offender category as shown in Figure 1. Similarly, the starting point on the y-axis for each category's total marginal sanction curve represents the mean of that category's range of marginal informal sanctions as shown in Figure 1.

149. Note that this argument against super-strong enforcement strategies in the vice-law context suggests by negative implication that weak enforcement strategies would probably *not* be the state's preferable deterrence strategy for offenses other than vice crimes—that is, for the conventional class of nonconsensual criminal offenses against person and property having a direct victim. Unlike the case with respect to vice offenses, applying super-strong criminal penalties for nonconsensual crimes is likely to fall within the set of social cost-beneficial enforcement strategies and therefore, is not a practically irrelevant policy option. There are two reasons. First, the *social costs* of sustaining a super-strong level of enforcement are far lower with respect to nonconsensual offenses than with respect to vice offenses since the direct investigation costs and indirect privacy costs of detecting nonconsensual crimes are far lower than in the case of consensual crimes that lack a direct victim. Second, the *social benefits* of super-strong enforcement with respect to conventional offenses are likely to exceed the benefits of super-strong enforcement with respect to vice offenses. This is a function of the fact that, unlike the case for such consensual offenses, the socially optimal level of non-consensual offenses is zero because nonconsensual offenses almost always generate social costs that exceed the criminal's private benefits. This claim is true assuming that a crime's social costs include (1) the direct injury to the *actual* victim, and (2) the defensive response of *potential* victims, which includes costly precautionary measures and the diversion of resources to the production of goods not easily



### b. Marginal Types

As Figure 4 shows, prior to the imposition of criminal sanctions, marginal types expect relatively high differential marginal benefits from norm-violative behavior that just exceed or just fall short of the expected marginal informal sanctions for engaging in such conduct. Unlike mainstream types, marginal types have small social-capital holdings and may be highly sensitive to a decline in the informal sanctions that determine the expected net return on norm-violative conduct. If the state consistently imposes criminal sanctions for norm-violative conduct and drives down the informal sanctions that still restrain some marginal types, a strong enforcement strategy may not cover the lost deterrent effect. This is because criminal sanctions have some very big shoes to fill. As sociologists increasingly believe, the deterrent effect of extralegal variables, such as moral be-

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susceptible to theft. Over time, these allocative side-effects are likely to cancel out criminals' private benefits and consequently, no positive social product results from these nonconsensual criminal activities. See Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies and Theft*, 5 W. ECON. J. 224, 224 (1967). By contrast, moral offenses that lack an immediate victim do not lead third parties to incur precautionary costs that could cancel out the offending parties' mutual benefits. Although consensual offenses impose emotional costs upon some direct and indirect observers, it may not always be true or certain that these costs outweigh the participants' private benefits and therefore, the socially optimal level of moral offenses may be significantly greater than zero.

liefs, family support, and social attachments to peers and community, probably far exceeds the deterrent effect of legal sanctions.<sup>150</sup> Tax compliance research corroborates the crucial deterrent function of informal sanctions, showing that the low penalties and probability of detection for tax evasion cannot explain the relatively high compliance rates.<sup>151</sup> Supplying additional support, numerous studies of drug users show that legal sanctions exert a relatively insignificant deterrent effect relative to the persuasive force of the expected reactions of friends and family.<sup>152</sup>

If criminal sanctions even partially displace the powerful extra-legal mechanisms that normally constrain many marginal types,

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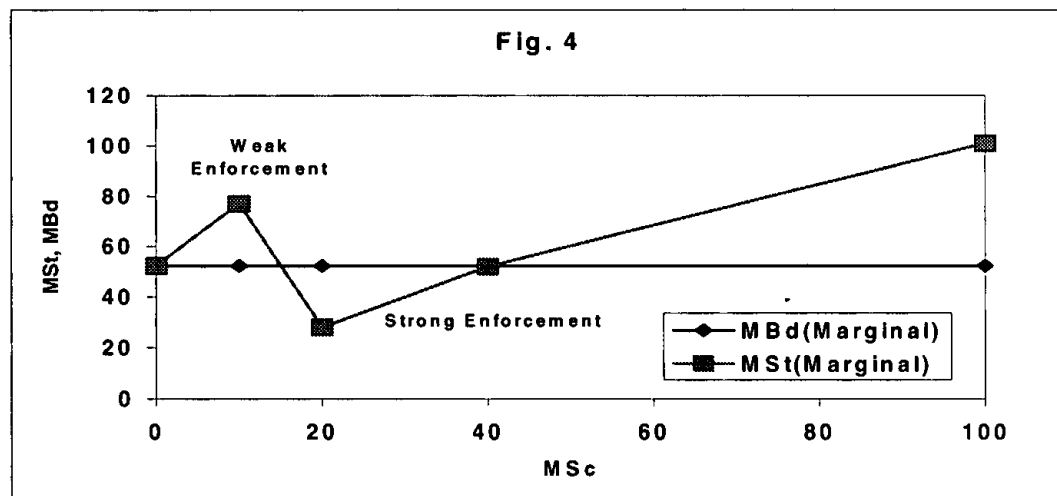
150. Grasmick & Bursick, *supra* note 84, at 838; *see also* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468-469 (1997) (stating that there is little empirical evidence showing that people are cognizant of the deterrent effect imposed by criminal sanctions and that people generally obey the law because they fear peer disapproval and because they view themselves as morally upright individuals who "want to do the right thing"); Grasmick & Appleton, *supra* note 111, at 15 (observing that some theorists argue that the primary function of legal punishment is to trigger social stigmatization and thus, without that threat of stigmatization, legal punishment would have little deterrent effect).

151. Given an expected utility model of criminal behavior, the low probability of detection and low penalties for tax evasion would predict that most people would rationally choose *not* to pay their taxes. However, most people *do* pay their taxes, which indicates that extralegal variables must be the primary factors inducing compliance. *See* James Alm et al., *Deterrence and Beyond: Toward a Kinder, Gentler IRS*, in *WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT* 313; Hessing et al., *supra* note 107, at 292; Steven M. Sheffrin & Robert K. Triest, *Can Brute Deterrence Backfire? Perceptions and Attitudes in Taxpayer Compliance*, in *WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT* 193 (Joel Slemrod ed., 1992). Researchers have backed up this intuition by survey findings that shows that tax compliance is related to a variety of noneconomic factors, including individual attitudes toward the tax system, individual perceptions of the fairness of the tax system, and individuals' beliefs as to other taxpayers' compliance tendencies. *See* Sheffrin & Triest, *supra*, at 193-94.

152. *See, e.g.*, Linda S. Anderson, et al., *Formal and Informal Sanctions: A Comparison of Deterrent Effects*, 25 SOC. PROBLEMS 103, 108-13 (1977) (presenting empirical findings relating to marijuana users and showing that cumulative deterrent effect of formal sanctions and informal sanctions (such as family's and friends' attitudes) exceeds that of either type of sanction separately); Robert F. Meier & Weldon T. Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 AM. SOC. REV. 292 (1977) (designing a deterrence model rooted in the social control literature, presenting data obtained from sample of marijuana users and nonusers, and finding that legal threats are a relatively insignificant source of compliance with marijuana statutes and that extralegal influences (such as pressure from family and friends), as predicted by the social control literature, exert a much stronger controlling threat). For reviews of this empirical literature, *see* EVA BERTRAM ET AL., *DRUG WAR POLITICS: THE PRICE OF DENIAL* 32-54 (1996) (stating that numerous commentators argue that social context, such as religious, ethnic, and social ties, are far stronger determinants of drug abuse than the threat of criminal sanctions); Robert MacCoun & Peter Reuter, *Drug Control*, in *THE HANDBOOK OF CRIME & PUNISHMENT* 214-215 (Michael Tonry ed., 1998) (stating that empirical studies show that informal social controls are just as important as legal controls in determining an individual's drug use).

anything less than super-strong penalties, thereby requiring immense investments in detection and incarceration, are unlikely to make up the difference. Because a strong enforcement strategy (short of super-strong sanctions) will not cover the lost deterrent effect, it will reduce marginal offenders' total expected sanction and consequently, increase the offense rate relative to a world without any criminal sanction. Figure 4 illustrates this argument. Following the imposition of criminal penalties, marginal types expect a total marginal sanction that lies below (1) the marginal informal sanction that existed prior to the imposition of criminal penalties and (2) the current level of expected differential marginal benefits. Criminal sanctions make a real difference in the total expected marginal sanction for this offender category: they *reduce* it. Because informal sanctions fall so steeply, low to moderate criminal sanctions cannot cover the lost deterrent effect. When criminal penalties reach a super-strong level, however, the total sanction increases and surpasses the force of the initial informal sanction.

But the criminal law can enhance, as well as reduce, existing informal sanctions. If a mildly enforced criminal prohibition exerts a crowding-in effect and increases the informal sanction, then a weak criminal sanction can decrease the offense rate relative to a world without any criminal sanction. Within a certain range of sanction values (identified in Figure 4 as "weak enforcement"), marginal types who are considering violating an established moral norm experience a *positive* correlation between informal and criminal sanctions. As a result, weak enforcement can increase the expected total sanction for marginal violators and thereby bring down the offense rate.



## III. THE PRACTICAL LOGIC OF VICE LAWS

In the previous Part, I set forth a deterrence logic that may plausibly lie behind the persistent underenforcement of vice laws. In doing so, I identified a set of circumstances under which a state might find that (1) weak enforcement of a criminal law is likely to deter more moral offenders than strong enforcement and (2) super-strong enforcement is likely to deter the most moral offenders but is unlikely to pass a social cost-benefit test. This result is consistent with empirical findings recently reached by scholars who have examined the effects of weak, strong, and very strong enforcement policies on honest behavior among contractual actors<sup>153</sup> and smoking participation among teenage students.<sup>154</sup> This Article's weak enforcement thesis remains vulnerable, however, to the reasonable objection that it imagines an idealized set of circumstances or relies on experimental settings, which, while theoretically reasonable, are unlikely to have a real-world counterpart in some or most vice industries. Thus, it is fair to argue that informal sanctions may never fall at such a steep rate subsequent to the imposition of criminal penalties that the state could not make up the difference by anything less than super-strong sanctions. This Part represents a sustained response to this important objection. I seek to provide an empirical grounding for the underenforcement model by returning to the data set this model sought to explain: namely, the enforcement practices of government authorities charged with enforcing vice laws. This exercise consists of two components. First, I articulate some key practical considerations that policymakers must take into account in considering how to apply a weak enforcement approach to a particular vice sector. Specifically,

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153. See Bohnet, et al., *supra* note 26. The authors test the relationship between formal enforcement, preferences for honesty, and contractual performance and find that mild formal enforcement of contractual obligations ensures contractual performance in the long term by crowding in preferences to demonstrate trustworthiness, moderate formal enforcement in the long term prevents contractual performance by crowding out these "honesty preferences", and strict formal enforcement in the long term crowds out honesty preferences but ensures contractual performance due to high expected penalties for breach.

154. KENT SMETTERS & JENNIFER GRAVELLE, THE EXCHANGE THEORY OF TEENAGE SMOKING AND THE COUNTERPRODUCTIVENESS OF MODERATE REGULATION (Nat'l Bureau of Econ. Research, Working Paper No. 8262, 2001), *available at* <http://papers.nber.org/papers/W8262.pdf>. The authors study the effects of school administrators' moderate and strict enforcement policies on teenage students' level of smoking participation. *Id.* at 1. The authors find that smoking participation tends to increase as schools ban smoking and then increase enforcement levels, except at very high levels of enforcement that effectively impose a draconian price on smoking participants. *Id.* at 2. This result is explained on the basis of an "exchange theory" according to which strongly enforced smoking bans create an exchange opportunity whereby less popular students reduce the risk of harm to existing teenage smokers who, in exchange, provide social acceptance to the novice smokers. *Id.* at 3-5.



I argue that policymakers executing a weak enforcement policy must anticipate the potentially significant “legitimacy costs” generated by lax enforcement and take measures that can eliminate or reduce this unwelcome side-effect. Second, I examine three principal vice markets—alcohol, drugs, and tobacco—and set forth available evidence concerning the relationship between enforcement practices and consumption patterns in these markets. Taken as a whole, available evidence suggests that in these vice markets, (1) super-strong enforcement generates socially unaffordable enforcement costs, (2) strong enforcement (albeit with less consistent support) perversely increases the number of vice offenses, and (3) weak enforcement offers a highly effective, alternative deterrence mechanism.

#### A. *Gray Markets and Legitimacy Costs*

In practical terms, the hallmark of the weak enforcement strategies that characterize vice laws is the state’s unofficial toleration of quasi-illegal markets that detour around an official ban on the exchange of certain unsavory goods and services.<sup>155</sup> This weak enforcement strategy introduces a discrepancy between the positive law, which strictly bans a certain disreputable trade, and enforcement practice, which permits that trade to proceed in certain confined districts and/or under certain conditions. In the previous Part, I concluded that, excluding super-strong sanctions, this strategy of lax enforcement is likely to deter more moral offenses than a policy of regular enforcement. By preserving the legal prohibition and enforcing it sporadically, the state fosters among certain offender types a noncalculative commitment to the underlying norm that is insensitive to moderate increases in the opportunity costs of compliance.

But this enforcement policy has an important potential defect that states must be sure to remedy. Although the state can minimize moral offenses by tolerating certain levels of deviant activity, it must be careful not to allow too much of certain kinds of such activity. Substantial levels of visibly unpunished deviance may reduce or eliminate incentives for mainstream and marginal actors to comply with a particular legal ban and, ultimately, with the legal system in general.<sup>156</sup> Therefore, *very* weak prohibitions that tolerate blatant vio-

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155. For a full discussion, see *supra* notes 38-45 and accompanying text.

156. This possible outcome of inconsistent vice-law enforcement has led William Stuntz to argue that strict enforcement of vice laws tends to be “self-defeating” (i.e., tends to encourage vice) because, inherently, vice laws must be selectively enforced and selective enforcement generates resentment against the law and the underlying norm, thereby ultimately encouraging either violations of or opposition to the norm. See Stuntz, *Self-Defeating Crimes*, *supra* note 19, at 1897-99. Note that, although Stuntz and I share the view that rigorous enforcement of vice laws is inevitably counterproductive, my thesis differs from that of Stuntz insofar as I argue that mild enforcement of vice laws can generate highly productive enforcement outcomes.

lations of a criminal prohibition may have an ineffective admonitory effect and thus, are likely to underdeter marginal types. If blatant violations are highly visible, then the formal prohibition loses its informative effect and either (1) marginal types will misjudge the expected social-capital losses attendant to engaging in vice transactions and/or (2) the expected social-capital benefits of complying with the norm will fall. Sustaining a strong moral commitment imposes opportunity costs and individuals will only rationally incur these costs if they believe that most actors adhere to the norm and assign social-capital penalties to those who deviate from the norm.<sup>157</sup> If people believe that many individuals are violating the norm and escaping punishment, they may believe the prevailing convention has shifted and cease to assign reputational penalties for engaging in a particular offense. As a result, most or many potential offenders will no longer expect to incur any significant social-capital penalty for abandoning their moral commitment and ultimately violating the ban.

These "legitimacy costs" of a weak enforcement policy may, at a certain level, be so great that a weak enforcement policy results in no net deterrent benefits. To preclude this eventuality, the state can pursue three complementary strategies. First, the state may engage occasionally in highly visible but short-lived enforcement activities—show trials and occasional "street sweeps" are a common example.<sup>158</sup> This is a low-cost enforcement strategy that indicates that the state is committed to enforcing the prohibition and threatens vice offenders with the possibility of random detection. Second, the state may fine-tune the degree of enforcement and suppress black markets that patently violate the law but tolerate the formation of gray markets in which vice transactions proceed under disguised forms. Prostitution offers a good example. Today state and city authorities generally tolerate relatively discreet forms of prostitution and discourage undisguised streetwalking.<sup>159</sup> As a result, buyers and sellers in off-street prostitution transactions rarely suffer prosecution while participants in on-street transactions face a significantly higher risk of arrest.<sup>160</sup>

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157. See Kahan, *Social Influence*, *supra* note 124, at 378-79 (arguing that the perception that criminality is rampant may reduce or invert the reputational costs of criminality by leading potential lawbreakers to believe that crime may be profitable on net).

158. See Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 436 (1998); Miller, et al., *supra* note 48, at 313.

159. See DeCou, *supra* note 158, at 436 (stating that police mainly arrest streetwalking prostitutes).

160. REYNOLDS, *supra* note 48, at 15-16 (showing risk of arrest for various categories of prostitutes); see also Miller, et al., *supra* note 48, at 313 (observing that police lock up prostitutes for streetwalking but phone books openly carry ads for escort services).

By openly tolerating vice activity in a particular area or openly tolerating vice activity of a particular kind, authorities send signals to vice offenders that define the scope of the gray market and shift demand from more to less visible market venues, thereby keeping down the legitimacy costs of a weak enforcement strategy.<sup>161</sup> Third, the state can strengthen individuals' commitments to, and confirm the community's support for, the underlying moral standard by diverting resources saved on reduced enforcement to intensive public education campaigns.<sup>162</sup> By preserving the formal prohibition against these vice offenses and coupling that prohibition with public education campaigns, the state preserves incentives for potential offenders to accumulate social capital by maintaining a strong commitment to the underlying norm.

### B. *Specific Applications*

To test the empirical relevance of this Article's underenforcement thesis, in this Section I examine the application of weak enforcement strategies in three real-world vice markets: alcohol, illegal drugs, and tobacco. With respect to each market, I show that the theoretical claims and predictions set forth in this Article are, at the very least, not incompatible with available historical evidence regarding consumption rates and enforcement patterns in these markets. In particular, evidence concerning consumption patterns under Prohibition and recent regulation of cigarette smoking provides affirmative empirical support for the virtues of weak enforcement policies.<sup>163</sup> The alcohol and tobacco markets provide evidence of (1) in the case of Prohibition, the counterproductive effects of costly strong enforcement strategies and (2) in the case of recently enacted smoking laws, the highly effective deterrent force of inexpensive weak enforcement strategies. Further confirming this Article's predictive claims, the illegal drug market shows that federal and state governments have failed to produce enforcement gains on a scale proportional to the enormous sums expended on, in addition to the collat-

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161. Put another way, a weak enforcement strategy can minimize legitimacy costs by essentially concealing the true extent of a tolerated (but disguised) vice market. On this point, see REYNOLDS, *supra* note 48, at 41 (noting that disguised prostitution markets give the police few incentives to enforce the prostitution laws, because citizens that take offense at prostitution generally are not very aware of the extent of this underground market).

162. On this point, see Kahan, *Social Influence*, *supra* note 124, at 353-358 (arguing that the criminal law deters undesirable behavior not only through the fear of punishment (i.e., by increasing the "price" of criminal conduct) but also by altering individuals' perception as to the prevailing consensus regarding the social stigma attached to participation in particular types of behavior).

163. On Prohibition, see *infra* notes 169-172 and accompanying text; on cigarette smoking, see *infra* notes 217-222 and accompanying text.

eral social costs arising from, their intensive efforts to enforce the drug prohibition.

### 1. Alcohol Prohibition

There is no definitive scholarly consensus over trends in alcohol consumption rates during Prohibition, which lasted from 1920 to 1933.<sup>164</sup> After the Drug War, however, this is the most well-studied instance of vice-law enforcement and therefore offers valuable evidence against which to assess this Article's thesis. The lack of definitive scholarly agreement derives largely from the fact that there is little reliable historical data on consumption rates and thus, researchers are forced to make estimates in terms of independent indicators or "proxies", such as alcohol-related deaths and disorders, public drunkenness, and production of materials used primarily in the production of alcoholic beverages.<sup>165</sup> Notwithstanding this methodological limitation, studies using proxy data (most notably, data concerning cirrhosis rates) have reached the following roughly similar conclusions regarding probable consumption patterns. A recent study measures consumption rates in terms of these proxies (primarily in terms of cirrhosis rates) and estimates that consumption rates fell roughly 30% in the early years of Prohibition, rose to 60-70% of pre-Prohibition levels in the later years of Prohibition, remained at those levels immediately after repeal, and then returned to pre-Prohibition rates within a decade after repeal.<sup>166</sup> An earlier statistical study, produced shortly before the end of Prohibition, found that, relative to the years 1911-1914, (1) during the early years of Prohibition, per capita consumption of spirits was reduced by 60% and per capita beer consumption by 85%, but (2) in the later years of Prohibition, per capita beer consumption declined by 70%, per capita wine consumption increased by 65% and per capita spirits consumption increased by 10%.<sup>167</sup>

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164. The period of alcohol prohibition in the United States extended beyond this period in certain states, which either enacted prohibitions prior to the federal constitutional ban and/or retained prohibition subsequent to the repeal of the constitutional ban. MIRON, *ALCOHOL PROHIBITION*, *supra* note 22, at 17-18. For a list of the states that enacted such bans in 1914 and 1915, see CLARK WARBURTON, *THE ECONOMIC RESULTS OF PROHIBITION* 25 n.2 (1932).

165. DUKE & GROSS, *supra* note 45, at 90 (stating that empirical claims arguing that Prohibition decreased alcohol consumption are highly debatable due to distorting factors, such as the economic situation during the Depression and that, at best, total alcohol consumption during this period declined insignificantly although enforcement costs rose enormously).

166. Miron & Zwiebel, *Alcohol Consumption*, *supra* note 63, at 242.

167. WARBURTON, *supra* note 164, at 107-08, 114-15. The early Prohibition period refers to the years 1921-1922 and the later Prohibition period refers to the years 1927-1930. The years 1911-1914 represent the years immediately before the outbreak of

Despite the fairly well-evidenced and agreed-upon decline in total consumption rates (at least in certain periods of Prohibition), many studies examining Prohibition ascribe little independent deterrent effect to legal penalties during the Prohibition period and emphasize the determinant role of changes in social attitudes and demographics.<sup>168</sup> Other researchers go further, however, and suggest that Prohibition may have had a counterproductive effect and actually *encouraged* alcohol consumption. Aside from the substitution effect described above (whereby Prohibition apparently *increased* the consumption of alcoholic substitutes for beer due to these substitutes' lower production and distribution costs<sup>169</sup>), two findings in particular suggest that, closely in line with this Article's thesis, even *total* alcohol consumption rates during Prohibition may have varied *positively* with the level of enforcement expenditures. First, it is fairly clear that alcohol consumption rates declined sharply during the early years of Prohibition, when enforcement expenditures were low, and rose during the later years, when enforcement expenditures were high.<sup>170</sup> Although demographics, social attitudes, and the development of illegal distribution networks could explain this counterproductive enforcement outcome, this Article's thesis provides a plausible account. Second, a recent study that controls for other factors that could influence alcohol consumption, including age structure, reduced immigration and flu epidemics, finds that Prohibition exerted either (1) no statistically significant negative effect or (2) a small *positive* effect on alcohol consumption.<sup>171</sup> Putting this finding in other words, it can be tentatively asserted that, although total alcohol consumption declined during the Prohibition period, either (1) no significant portion of that decline can be attributed to the legal ban or (2) that decline would have been even *greater* in the *absence* of the

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World War I, during which high taxes and other restrictions were placed on the sale of alcoholic beverages.

168. Miron & Zwiebel, *Alcohol Consumption*, *supra* note 63, at 246 (arguing that the similarity of consumption rates during the middle and later years of Prohibition and immediately after Prohibition suggest that changes in social attitudes and demographics may have been the determinant factor in influencing consumption rates, rather than the threat of legal punishment). Other researchers contest the deterrent force of Prohibition by arguing that Prohibition exerted no greater a deterrent effect on alcohol consumption than tax-based and education-based policies employed contemporaneously and subsequently by the U.S. and other countries. See Harry G. Levine & Craig Reinerman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, in *CONFRONTING DRUG POLICY: ILLICIT DRUGS IN A FREE SOCIETY* 168-170 (Ronald Bayer & Gerald M. Oppenheimer eds., 1993).

169. See WARBURTON, *supra* note 164, at 107-08, 114-15.

170. *Id.* at 107-108, 260-61; Jeffrey A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, 9 J. ECON. PERSP. 175, 186-87 (1995) [hereinafter Miron & Zwiebel, *Drug Prohibition*].

171. MIRON, ALCOHOL PROHIBITION, *supra* note 22, at 21-23.

legal ban. Again, although it may be plausible to account for this result in terms of other considerations<sup>172</sup>, this Article's theoretical model can soundly account for this result in terms of an inverse relationship between rising formal and decreasing informal penalties.

## 2. Drug Prohibition

The Drug War in the United States began in earnest in the early 1970s under the Nixon Administration with the establishment of the Drug Enforcement Agency (the "DEA") and has proceeded at an especially intense level since the 1980s.<sup>173</sup> With the possible exception of marijuana use and possession in certain municipalities,<sup>174</sup> it is fair to say that the drug laws are strongly enforced.<sup>175</sup> This is a distinct change in the historical pattern of drug enforcement in the United States, which, until the Depression Era, had followed the classic underenforcement model.<sup>176</sup> This recent pattern of progressively intensified enforcement contrasts both with the underenforcement strategies that generally characterize morality legislation as well as current drug enforcement patterns in many European countries, which do not enforce many drug laws strictly, have decriminalized marijuana (and, in the case of some countries, even heroin) consump-

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172. Explanatory factors considered by the study's author include (1) the apparent elasticity of alcohol consumption and (2) the apparently small rise in the price of alcoholic beverages during Prohibition taking into account general inflationary trends. See *id.*

173. See BERTRAM ET AL., *supra* note 153, at 4-11.

174. See KLEIMAN, *supra* note 120, at 285 (stating that many big-city police departments refuse to deal with routine small-scale marijuana cases other than in response to neighbors' complaints).

175. The enforcement dollars devoted to the "Drug War," and the number of persons incarcerated for drug offenses, together offer the best testimony as to the vigor with which the laws against drug consumption and distribution are currently enforced. For these figures, see *infra* notes 194 and 195 and accompanying text.

176. FRIEDMAN, *supra* note 41, at 354-55 (stating that, in the nineteenth-century, drug laws "hardly mattered" and the progressively intensified enforcement of narcotics laws is the "great exception" to the progressively *de*-intensified enforcement of all other morals laws); Gusfield, *On Legislating Morals*, *supra* note 34, at 68-69 (stating that punishment of and hostility toward drug use has increased progressively since the turn of the century, although narcotics was not a publicly visible issue until the 1930s and did not begin to occupy a central place in public consciousness until the 1950s). Congress' passage of the Harrison Narcotic Drug Act in 1914, which required a physician's prescription for the sale of heroin, cocaine, and derivative medications, marked the start of the criminalization process. Aggressive enforcement by the Treasury Department converted this relatively mild statute, which appeared to implement no more than an administrative system of public-health regulation, into an instrument of criminal justice. FRIEDMAN, *supra* note 41, at 354-56. By the 1920s, drug distributors had acquired the status of serious criminals and, in 1937, Congress added marijuana to the list of banned opiates. BERTRAM, ET AL., *supra* note 152, at 4-11.

tion,<sup>177</sup> and generally speaking, have adopted policies centered on rehabilitation rather than criminal punishment.<sup>178</sup>

The deterrence logic that lies behind vice laws establishes a rebuttable presumption that the American exception to the underenforcement pattern is a mistake. Specifically, this deterrence logic predicts that significant increases in the enforcement of criminal prohibitions against drug offenses may *reduce* the level of compliance with those prohibitions, especially among marginal offenders.<sup>179</sup> Alternatively, if the government institutes super-strong levels of criminal penalties, the number of drug offenses may decline but enforcement costs (including policing expenditures and privacy costs) proba-

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177. See Portugal Legalises Drug Use, BBC NEWS (July 7, 2000), available at [http://news.bbc.co.uk/1/hi/english/world/europe/newsid\\_823000/823257.stm](http://news.bbc.co.uk/1/hi/english/world/europe/newsid_823000/823257.stm) (stating that Portuguese government has voted to decriminalize consumption but not the distribution of marijuana and heroin and that Spain and Italy also have decriminalized possession of small quantities of illicit drugs).

178. See DUKE & GROSS, *supra* note 45, at 303-04 (stating that numerous European countries, including the Netherlands and Britain, responded to the rise in hard-drug use in the seventies and eighties by either effectively decriminalizing marijuana use, abandoning criminal penalties, and/or integrating hard-drug users into society by offering rehabilitation programs); Robert MacCoun et al., *Assessing Alternative Drug Control Regimes*, 15 J. POL'Y ANALYSIS & MGMT. 330, 334 (1996) (stating that Italy (since 1975, except for the period between 1990 to 1993) and Spain "have eliminated criminal penalties for possession of any psychoactive substance" and that in several Swiss cantons, municipalities offer facilities for the safe injecting of illicit drugs).

179. Two drug-related economics publications have recently claimed on various grounds (other than crowding-out theory) that rigorous enforcement of the drug laws can have a counterproductive enforcement outcome. Jepsen and Skott present a model under which stricter enforcement of drug laws is likely in the long-term to increase drug use based on the following chain of reasoning: (1) stricter enforcement raises search costs and detection risk for existing addicts, which (2) increases addicts' loyalty to existing suppliers, which (3) increases drug dealers' pricing power and expected profits, which (4) encourages dealers to expand marketing efforts, which (5) attracts new users. See Gunnar Thorlund Jepsen & Peter Skott, *On the Effects of Drug Policy* (July 1997) (unpublished manuscript, on file with author), available at <http://www.papers.ssrn.com>. Notice that this argument relies on the problematic assumptions that demand for illegal drugs among existing addicts and potential addicts is highly inelastic. If either of these assumptions were not true, then higher prices as the result of higher enforcement should either (1) drive away new users and/or (2) lead some existing users to reduce or terminate consumption. Lee argues that intensive enforcement of drug laws against users (rather than dealers) increases users' "transaction costs" (i.e., cost of arrest and conviction) and, as a result, depresses consumer demand and drug transaction frequency. Reduced transaction frequency diminishes dealers' "transaction costs" and, as a result, may lead dealers to increase supply, which, in turn, reduces price and may consequently increase consumption despite decreased demand. See Li Way Lee, *Would Harassing Drug Users Work?*, 101 J. POL. ECON. 939, 954-57 (1993). Notice that this argument relies on the problematic assumption that the supply-side effect will dominate the demand-side effect, which is required if the model can successfully explain how enhancing enforcement against drug users will increase total drug consumption.

bly would exceed the social benefits resulting from a lower offense rate. The current intense investment in enforcement efforts and, especially, the stiff sentences for low-level offenders, claims to rely on an intuitive deterrence logic: harsh, swift, and certain punishments will discourage drug consumption by increasing the cost of violating the drug laws and thus, depressing demand for these illicit goods. But this Article claims that moral offenses exhibit a counterintuitive deterrence logic: harsh, swift, and certain punishment will increase drug consumption and distribution by displacing the informal sanctions that may discourage many potential drug users and sellers.

Reflecting the difficulties in measuring the rate of drug use and in establishing a causal relation between legal sanctions and drug consumption trends, empirical evidence is unclear as to the strength of this Article's prediction in drug enforcement.<sup>180</sup> There is some evidence that recent increases in drug enforcement spending since the early 1980s have been accompanied by some modest but ambiguous gains in reduced consumption of illicit drugs.<sup>181</sup> But there is also survey evidence indicating that marijuana use increases as the perceived severity of legal penalties against marijuana use increases<sup>182</sup> while there is historical evidence that relaxing or eliminating enforcement of laws against marijuana possession in certain U.S. states had no appreciable effect on marijuana use.<sup>183</sup> Any empirical evidence of a recent decline in general drug use in apparent response to enhanced enforcement of the drug laws is further qualified by the fact that there has been no such decline among existing users, users of

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180. See Bruce L. Benson & David W. Rasmussen, *Deterrence and Public Policy: Trade-Offs in the Allocation of Police Resources*, 18 INT'L. REV. L. & ECON. 77, 78-79 (1998) (stating that estimates regarding drug use are conflicting and generally problematic, due to the fact that household surveys cannot measure drug use by important drug-using populations that generally avoid publicity); Jeffrey A. Fagan, *Do Criminal Sanctions Deter Drug Crimes?*, in DRUGS AND CRIME: EVALUATING PUBLIC POLICY INITIATIVES 192 (Doris Layton MacKenzie & Craig D. Uchida eds., 1994) (stating that "there has been virtually no research on the general or specific deterrent effects of criminal sanctions for drug offenders").

181. Some reports estimate that the total number of current users (defined as individuals who have taken drugs within the past month) "declined between 1985 and 1993 from 22.3 million to 11.7 million." BERTRAM, ET AL., *supra* note 152, at 10. See also U.S. DEP'T. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999, at 247 tbl. 3.88 (1999) (showing that estimated use during past year of any illicit drug dropped from 16.3% in 1985 to 12.4% in 1988 to 10.6% in 1998). Some commentators note, however, that White House reports indicate that this decline is largely attributable to a drop in casual marijuana use that began well before the drug enforcement campaigns of the 1980s. BERTRAM, ET AL., *supra* note 152, at 10.

182. See Meier & Johnson, *supra* note 152, at 299-302.

183. During the 1970s, eleven U.S. states effectively decriminalized the use and possession of marijuana in small quantities and none of these states experienced increases in marijuana consumption relative to states that retained strict prohibitions. DUKE & GROSS, *supra* note 45, at 242; KLEIMAN, *supra* note 120, at 268.



certain drugs<sup>184</sup>, the underclass population<sup>185</sup> and the general criminal population.<sup>186</sup> Moreover, there are reasonable grounds to attribute many of these downward trends in drug use to non-legal factors, such as an increased awareness about personal health, changes in social attitudes, and decreased numbers of young people.<sup>187</sup>

Even assuming there have been some small and ambiguous enforcement achievements, any decline in the rate of drug use has come at considerable social cost in the form of privacy violations,<sup>188</sup> police corruption, deepened racial divisions, increased violent crime related to drug-trafficking,<sup>189</sup> the diversion of enforcement resources away from non-drug criminal activity,<sup>190</sup> and more generally speaking, the diversion of enormous government and other social resources from non-law-enforcement uses. From 1973 to 2000, the DEA budget rose from \$74.9 million to \$1.55 billion<sup>191</sup> while from 1988 to 1999, the number of DEA arrests climbed from 24,652 to 40,383,<sup>192</sup> and from 1990 to 1999, the number of sentenced drug offenders in federal pris-

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184. Levels of heroin and cocaine abuse either have remained stable or *increased* in recent years according to some estimates. BERTRAM, ET AL., *supra* note 152, at 10.

185. See Denise B. Kandel, *The Social Demography of Drug Use*, in CONFRONTING DRUG POLICY 44-47.

186. Department of Justice statistics show that the percentage of state and federal inmates reporting ever using drugs rose from 60.1% in 1991 to 72.9% in 1997, the percentage of that same group reporting ever using drugs regularly rose from 42.1% in 1991 to 57.3% in 1997 and the percentage of that same group reporting using drugs in the month before their offense rose from 31.8% in 1991 to 44.8% in 1997. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES (1997), at 61.

187. See Kandel, *supra* note 185, at 71.

188. See DUKE & GROSS, *supra* note 45, at 122-45 (stating that enforcement efforts in the narcotics field have resulted in a progressive relaxation of many procedural and constitutional protections through the proliferation of exceptions to the Fourth Amendment and the widespread use of asset forfeiture laws).

189. Drug prohibition may increase criminal violence due to (1) the impossibility of recourse to judicial mechanisms for contractual enforcement, and (2) the lack of government enforcement against price-fixing, predatory and other anti-competitive tactics. For empirical arguments that prohibitions on alcohol and drug consumption have resulted in an increase in the U.S. homicide rate, see JEFFREY A. MIRON, VIOLENCE AND THE U.S. PROHIBITION OF DRUGS AND ALCOHOL (Nat'l Bureau of Econ. Research Working Paper No. 6950, 1999), available at <http://www.nber.org/papers/W6950> [hereinafter MIRON, VIOLENCE AND THE U.S. PROHIBITION]; Miron & Zwiebel, *Drug Prohibition*, *supra* note 170, at 177-78.

190. For a study of drug enforcement that places special emphasis on this allocational side-effect, see generally DAVID W. RASMUSSEN & BRUCE L. BENSON, THE ECONOMIC ANATOMY OF A DRUG WAR: CRIMINAL JUSTICE IN THE COMMONS (1994).

191. U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, available at <http://www.usdoj.gov/dea/stats/lawstats.htm> (last visited Feb. 21, 2002) (providing a breakdown of DEA employees and budget each year from 1973 to 2000).

192. U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, available at <http://www.usdoj.gov/stats/drugstats.htm> (last visited Feb. 21, 2002).

ons increased 124.4%.<sup>193</sup> Like Prohibition, the Drug War exhibits an unfortunate pattern where enforcement expenditures and prison terms increase but arrest rates and consumption rates do not exhibit any significant decline.<sup>194</sup> Given this fact (among numerous others), many commentators agree that it is highly debatable whether the enormous social costs of the Drug War have resulted in comparably enormous social benefits.<sup>195</sup> This ambiguous enforcement outcome is no surprise for this Article's deterrence model. That model expects that the Drug War must work hard to achieve even modest reductions in consumption levels since only a very harsh regime of formal sanctions could make up for the sharp decline in informal sanctions that, absent *any* criminal sanction, probably would deter a good deal of drug use and distribution.

Given the above, it is certainly worth considering seriously whether a policy of weak enforcement could achieve comparable or lower consumption levels at a far lower social cost. It would be worthwhile to consider applying formal sanctions for drug abuse in a manner that complements and cultivates, rather than depletes and counteracts, informal deterrence mechanisms to discourage drug use. Specifically, policymakers who are intent on reducing drug consumption levels should consider tolerating drug use and distribution in certain well-defined "pockets" while continuing to enforce the drug laws in all other areas. A handful of drug policy commentators have begun to explore "intermediate" policy options<sup>196</sup> and a growing num-

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193. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE: PRISONERS IN 2000, at 11, available at <http://www.usdoj.gov/bjs/abstract/p98.htm> (last visited Feb. 20, 2002).

194. See DUKE & GROSS, *supra* note 45, at 87. Vigorous enforcement of the drug laws since the 1980s has resulted in enormous volumes of incarcerated persons and only relatively small declines in drug activity. See *id.*; see also RASMUSSEN & BENSON, *supra* note 190, at 67 (stating that the drug problem is not "demonstrably smaller" as a result of enhanced enforcement efforts from 1984 to 1989).

195. See MacCoun & Reuter, *supra* note 152, at 233 (stating that U.S. drug policies consume an approximately \$30 billion annual expenditure, have not significantly reduced levels of drug consumption over the past twenty years, inflict privacy costs due to intrusive and widespread testing, and trigger violence and other crimes among sellers and buyers of illegal drugs); see also SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 27-28 (MacMillan Pub. Co., 1987) (1967) (stating that the rigorous enforcement of the drug laws has triggered enormous social costs, in the form of diverted government resources, diverted judicial attention due to evidence law litigation, and the cultivation of related criminal industries).

196. See, e.g., KLEIMAN, *supra* note 120, at 19-20 (arguing that drug regulation should proceed on the basis of a new social and legal category of "grudgingly tolerated vices"—that is, "items not strictly prohibited, but forbidden—enforceably forbidden—to minors and to adults who have shown an inability to consume them responsibly" and subject to other discouraging measures with respect to the rest of the population). For a systematic taxonomy of intermediate strategies in the drug arena, see MacCoun & Reuter, *supra* note 152, at 330; see also RASMUSSEN & BENSON, *supra* note 190, at 176 (arguing that "[b]etween the extremes of legalization and prohibition is a continuum of

ber of U.S. state legislatures are tending in a similar direction. Recent legalization in eight states of the medical use of marijuana may be a "gray market" strategy that punches holes in the formal deterrence regime and shifts a portion of formally illegal activity toward tolerated transaction settings.<sup>197</sup> Recent passage or serious public consideration of proposals in Arizona, California, and New York that mandate rehabilitation rather than punishment for nonviolent drug users would institute similar standing exceptions to the regular enforcement of criminal laws against drug use.<sup>198</sup> Although there is no guarantee that the practical results of these gray-market strategies will be promising, a theoretical understanding of informal deterrence regimes, coupled with ample empirical findings, suggests that a weak enforcement strategy is likely to do no worse than the current strong (and possibly super-strong) enforcement strategy.

### 3. Tobacco Prohibition

Regulation of tobacco consumption, and cigarette use in particular, offers an interesting instance of the historical development of the enforcement of a vice law. It also offers perhaps the most compelling evidence of how an underenforcement strategy can, at low social cost, significantly reduce participation in a vice offense. Numerous governments have instituted fairly harsh sanctions (including the death penalty) to enforce complete criminal prohibitions on tobacco consumption.<sup>199</sup> Conforming to the standard underenforcement model, all of these campaigns have failed miserably and most of these governments predictably settled back into a policy of either open or implicit

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operational policy alternatives").

197. See VT. LEGISLATIVE RESEARCH SHOP, UNIV. OF VT., *The Legalization of Marijuana for Medical Use*, available at <http://www.uvm.edu/~vlrs.doc/MedicalMarijuana.pdf> (Mar. 6, 2002) (stating that laws permitting the use of marijuana for medical purposes had been enacted in Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington). For a review of these new changes in state drug laws and a recent government commission report recommending scientific research into possible therapeutic uses of marijuana, see David Brown, *U.S. Panel Sees Potential for Medical Marijuana*, WASH. POST, Mar. 18, 1999, at A1.

198. See Somini Jengupta, *Pataki Proposes Changes in Drug Sentencing*, N.Y. TIMES, March 10, 2001, at B5 (stating that New York Governor Pataki has proposed an end to Rockefeller-era laws that mandate minimum drug sentences and remove judicial discretion on drug sentencing); Editorial, *Forging an Uneasy Truce in a Maddening Drug War*, SAN FRANCISCO CHRON., at A22 (stating that California voters approved Proposition 36, which requires treatment instead of incarceration for first-time and second-time nonviolent drug offenders); Timothy Egan, *In States' Anti-Drug Fight, a Renewal for Treatment*, N.Y. TIMES, June 10, 1999, at A1 (stating that Arizona voters recently passed a proposition that mandates that the state order treatment instead of prison for drug offenders).

199. For a description of these sanctions, see *supra* note 45.

toleration.<sup>200</sup> From 1893 to 1921, fourteen U.S. states enacted laws prohibiting cigarette sales, but none of these prohibitions were successful—in fact, cigarette consumption *increased* during this period<sup>201</sup>—and all states had lifted these prohibitions by 1927.<sup>202</sup> Starting roughly in the late 1970s, however, federal, state, and local governments in the United States have adopted a variety of “soft” regulatory devices to reduce cigarette consumption.<sup>203</sup> These measures consist principally of a zoning strategy that has narrowed considerably the venues in which smoking is permitted and a taxation strategy that has increased considerably the cost of acquiring cigarettes.<sup>204</sup> Additionally, state and local governments have strengthened the enforcement of prohibitions against the sale of tobacco to minors, enacted laws against smoking in most public places<sup>205</sup> (including office and other workplaces<sup>206</sup>), imposed significant sales taxes on cigarettes<sup>207</sup>, placed legal constraints on cigarette advertising<sup>208</sup>, and funded public education campaigns against smoking.<sup>209</sup> This “zoning”

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200. See DUKE & GROSS, *supra* note 45, at 23-25; see also SULLUM, *supra* note 45, at 33 (noting that cigarette bans enacted by U.S. states were rarely enforced).

201. See JACOBSON & WASSERMAN, *supra* note 7, at 4; SULLUM, *supra* note 45, at 34.

202. See DUKE & GROSS, *supra* note 45, at 23-25. For additional discussions of historical attempts to regulate and prohibit tobacco use in the early twentieth century, see JACOBSON & WASSERMAN, *supra* note 7, at 3-4; Alston, *Social Reformers*, *supra* note 64.

203. For a review of current federal, state and local anti-tobacco ordinances, and other anti-tobacco enforcement measures, see JACOBSON & WASSERMAN, *supra* note 7, at 8-16.

204. See *id.*

205. One example are municipal ordinances in over 400 cities or counties restricting smoking in public places. See SULLUM, *supra* note 45, at 151. Other examples are a federal executive order banning smoking in all federal buildings and a New York City municipal ordinance, in effect since April 1995, banning smoking in most restaurants and offices. See *id.* at 153.

206. In California, a state law, which took effect in January 1998, prohibits smoking in all public places, defined to include offices, stores, restaurants, stadiums, and even parks. See SULLUM, *supra* note 45, at 152. Between 1990 and 1992 alone, about forty cities (mostly in California) enacted ordinances banning smoking in restaurants and workplaces. *Id.* at 153. As of 1995, forty-three states had restricted smoking in public work sites and twenty-three states had restricted smoking in private work sites. See JACOBSON & WASSERMAN, *supra* note 7, at 10.

207. For a description of federal and state taxes on cigarette sales, see SULLUM, *supra* note 45, at 119-37. Cigarette taxes in certain U.S. states are so high that they have triggered the development of black markets that would normally arise under a traditional prohibitionist regime. On black markets in cigarettes in certain U.S. states, see RASMUSSEN & BENSON, *supra* note 190, at 187.

208. Television and radio advertisements for cigarettes are prohibited under the Public Health Cigarette Smoking Act, effective since 1971. As part of the tobacco settlement with certain U.S. states, the tobacco companies agreed to additional advertising restrictions. SULLUM, *supra* note 45, at 12, 183-84.

209. *Id.*

strategy has effectively pushed smoking out of the public arena and relegated it to either the streets<sup>210</sup> or the private home (with the exception of bars and outdoor smoking areas in restaurants in certain jurisdictions<sup>211</sup>), and has been accompanied by a drop in cigarette consumption during roughly the same period.<sup>212</sup>

The absence of a firm criminal prohibition against cigarette use and distribution may prompt the objection that the existing package of anti-smoking measures more reasonably qualifies as a zero enforcement than a weak enforcement strategy.<sup>213</sup> That may have been true more than a decade ago but it is clearly no longer the case today. The extent of existing zoning regimes, advertising restrictions, manner of sale restrictions, and educational campaigns probably play an

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210. Smoking on the street is fairly difficult under the laws of certain localities, however, such as Davis and Palo Alto, California, where smoking is prohibited within twenty feet of any building that is open to the public. *Id.* at 156.

211. These are the principal exceptions under the New York City ordinance described above. *See supra* note 205.

212. The percentage of men regularly smoking cigarettes declined from 51.9% in 1965 to 32.6% in 1985 to 26.4% in 1998, while the percentage of women regularly smoking cigarettes declined from 33.9% in 1965 to 27.9% in 1985 to 22% in 1998. AM. LUNG ASSOC., *Statistics*, available at <http://www.lungusa.org/data> (last visited May 7, 2001).

213. It is also possible to object that laws targeting cigarette smoking do not plausibly fall under the vice law or "victimless" crime category since smoking has a direct victim—namely, those who are unwillingly exposed to the medical dangers of secondary smoke. This would be a compelling argument if current smoking laws were proportionately tailored to the currently verified dangers of secondary smoke. Current medical opinion regarding the levels of secondary smoke required to pose a serious health danger is ambiguous and uncertain and arguably does not warrant the expansive scope of many smoking laws, including those that prohibit smoking in large and well-ventilated public places such as airports, train stations, or sports stadiums (or, in some areas, even city streets or certain "zones" near public buildings) or those that prevent restaurants from designating a separate smoking area. AM. COUNCIL ON SCI. & HEALTH, *Environmental Tobacco Smoke: Health Risk or Health Hype*, available at <http://www.acsh.org/publications/booklets/ets.html> (last visited Feb. 8, 2002) (stating that the equivocal results of numerous epidemiological studies, have led numerous observers to question the validity of those studies' scientific methods and whether the health risks such studies attribute to environmental tobacco smoke are significant); DR. ELIZABETH M. WHELAN, AM. COUNCIL ON SCI. & HEALTH, *Warning: Overstating the Case Against Secondhand Smoke is Unnecessary—and Harmful to Public Health Policy*, available at <http://www.acsh.org/press/editorials/warning080100.html> (last visited Aug. 1, 2000) (stating that calls for a complete ban on smoking in restaurants and bars in New York City is a disproportionate response to the scientific literature on environmental tobacco smoke, which suggests that evidence linking environmental tobacco smoke to chronic diseases is uncertain and controversial). For this reason, it is fair to argue that the extent of current legal restrictions on smoking in many U.S. states and municipalities can only rationally be supported by either (1) moralistic considerations regarding the putative moral evils of smoking, (2) paternalistic considerations designed to protect individuals' health by discouraging smoking, or (3) pragmatic considerations designed to reduce health costs by discouraging smoking.

informational function that is closely akin to that played by a formal criminal prohibition. Moreover, most state and local governments have instituted enforcement strategies that do include clear “zoning” prohibitions on cigarette smoking, often with accompanying criminal penalties.<sup>214</sup> Are these measures then better described as a strong enforcement policy? Clearly not, since there is little evidence to show that any of these smoking laws are regularly, if ever, enforced by public authorities.<sup>215</sup> Even laws against the sale of cigarettes to minors, the single law that seem most likely to be enforced, do not seem to attract many enforcement resources<sup>216</sup> and do not seem to impede significantly youths’ access to cigarettes.<sup>217</sup> Providing compelling evidence for the counterintuitive deterrence logic of vice laws, these smoking laws are hardly empty legal declarations with which no one complies or to which no one ascribes any normative significance due to the lack of formal enforcement. Rather, it is widely agreed that smoking laws are most commonly enforced informally by a set of community sanctions, supported by intensive public education campaigns, that impel compliance with the growing anti-smoking norm, as currently defined.<sup>218</sup>

Current patterns of cigarette regulation represent an excellent example of the impressive virtues of a weak enforcement strategy. Obviously there are a number of external factors—bans on advertising, changed social attitudes, and increased health awareness, just to name a few—that played an important contributory role in the recent enforcement results in the cigarette sector.<sup>219</sup> Notwithstanding that

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214. See *supra* notes 205-14 and accompanying text.

215. See JACOBSON & WASSERMAN, *supra* note 7, at xiv-xv, 49-50 (stating that it is widely believed that state “clean indoor air” laws prohibiting workplace smoking are voluntarily obeyed despite the absence of any systematic enforcement effort by government authorities); Cooter, *Normative Failure Theory*, *supra* note 26, at 976-77 (stating that most local governments have enacted ordinances prohibiting smoking in public buildings but officials never enforced the prohibitions, possibly because it was believed that non-smoking citizens would enforce the law through social pressures).

216. See KLEIMAN, *supra* note 120, at 343 (noting that there are widespread violations of laws against selling cigarettes to minors).

217. See JACOBSON & WASSERMAN, *supra* note 7, at 17 (stating that several studies show that youths still have relatively easy access to cigarettes). The 1999 National Youth Tobacco Survey found that 72.2% of middle school respondents who purchased cigarettes in a store were not asked for proof of age and 66.2% were not refused cigarettes because of age while 59.3% of high school respondents were not asked for proof of age and 65.3% were not refused cigarettes because of age. See NAT’L YOUTH TOBACCO SURVEY, available at [http://www.edc.gov/tobacco/research\\_data/youth/ss4910.fact.htm](http://www.edc.gov/tobacco/research_data/youth/ss4910.fact.htm) (last visited Oct. 13, 2000).

218. See JACOBSON & WASSERMAN, *supra* note 7, at xv, xix, 49-50, 83; Cooter, *Normative Failure Theory*, *supra* note 26, at 976-77.

219. See JACOBSON & WASSERMAN, *supra* note 7, at 4-9.

fact, cigarettes represent a vice sector in which (1) strong enforcement strategies have historically failed to reduce consumption rates and (2) weak enforcement strategies have achieved (or at least coincided with) a measurable reduction in consumption rates relative to strong and zero enforcement strategies. The highly effective—and relatively cheap—mix of weakly enforced formal laws and intensive public education campaigns in addressing cigarette consumption may offer a useful model for enforcement strategies in other vice sectors. The smoking experience also has policy lessons for further regulation of cigarette consumption insofar as it counsels against either an outright prohibition of cigarette sales (admittedly, a minority view), draconian taxes on cigarette sales (effectively equivalent to a strictly enforced formal prohibition), or enhanced enforcement of formal sanctions against cigarette smoking. The deterrence logic of vice laws would suggest that regular enforcement of anti-smoking laws is liable to injure potential violators' intrinsic commitment to the underlying anti-smoking norm. As a result, increasing official sanctions for smoking violations is liable to decrease the social-capital losses that attend violations of the anti-smoking norm and, absent super-strong sanctions against smoking violations, potentially increase cigarette consumption rates.

#### IV. CONCLUSION

In this Article, I offer an account explaining why governments have most commonly regulated consensual crime in an inconsistent and ambiguous manner. Political-economic theories can account reasonably well for the chronic underenforcement of vice laws, but they mistakenly view this strategy exclusively as a pragmatic concession that states must make in light of political opposition or resource constraints. This oversight is theoretically significant because it conceals the interesting anomaly that vice laws pose for deterrence theory and the important lessons these laws supply for enforcement policies that target practices already subject to significant extra-legal regulation. Vice laws demonstrate that the existence of a social-capital network, and the accompanying set of informal sanctions and rewards, sometimes means that strong enforcement of a criminal law can deter *fewer* offenders than weaker enforcement strategies. Thus the chronic underenforcement that characterizes vice laws is probably not a compromise strategy. If a state wishes to deter the most moral offenses (and is rationally unwilling to apply non-cost-beneficial super-strong sanctions), it will always be better off selecting this weak enforcement strategy.

To summarize, this Article presents the following proposition. If an enforcement agency wishes to minimize participation in a consensual transaction that violates a widely shared moral norm, then its

preferable cost-beneficial deterrence strategy is likely to consist of (1) adopting a formal prohibition, and (2) sporadically enforcing that prohibition. Applying standard experimental findings in social psychology and recent findings in experimental economics, I argue that this weak enforcement strategy is superior to all alternative cost-beneficial deterrence strategies. An intrusive policy of strong enforcement results in significant enforcement costs and, except at super-strong (but socially unaffordable) levels, probably deters fewer offenders. This is principally because stiff criminal sanctions undermine marginal offenders' noncalculative commitment to the underlying moral norm. A zero enforcement policy obviously reduces enforcement costs but deters fewer offenders because it lacks a formal prohibition (coupled with occasional enforcement efforts) that encourages marginal violators to discount appropriately the expected benefits of morally disreputable conduct.

This Article's key insight may be the following proposition: the fact that most people within a particular jurisdiction have intense moral objections to certain disreputable activities raises a presumption in favor of lax, rather than strict, enforcement of a criminal prohibition against those activities. This insight has two important policy implications. First, it establishes a standing presumption against the imposition of strict enforcement policies to deter consensual criminal offenses (including, most notably, drug offenses). Second, it suggests that both opponents and supporters of vice laws currently subject to active debate, such as the laws against euthanasia and those against marijuana possession, neglect to consider the virtues of a range of "softer" regulatory strategies that lie between the poles of full criminalization and full legalization. This Article's discussion hopefully suggests fruitful avenues for further research that might articulate weak enforcement strategies tailored to particular vice industries. If there already exists a system of informal sanctions that deters most moral offenders, the state can minimize social costs and induce compliance most effectively by adopting weak enforcement strategies that *pretend* to crack down on crime, rather than "really getting serious" with crime. This is because only a strategy of lax enforcement preserves and enhances incentives to accumulate social capital by sustaining a noncalculative commitment to the underlying moral norm. Where a significant majority suffers emotional costs from a morally controversial practice, and a minority would suffer privacy costs or financial costs if the government vigorously sought to suppress that practice, the state is likely to discourage that practice most effectively by enacting a criminal prohibition and then intentionally neglecting to enforce it.