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PRISON WORK, WAGES, AND CATHOLIC SOCIAL THOUGHT: JUSTICE DEMANDS DECENT WORK FOR DECENT WAGES, EVEN FOR PRISONERS

William P. Quigley*

I. INTRODUCTION

“The degree of civilization in a society can be judged by entering its prisons.”¹

The United States leads the world in the incarceration of its citizens. This nation imprisons its people at rates several times higher than comparable industrialized countries.² As of the end of 2002, over two million people were in jails and prisons in the United States,³ nearly double the number of people in prison in 1996.⁴ Although many suggest that justice

* Janet Mary Riley Professor of Law, Loyola University New Orleans School of Law. Thanks to Rebecca Johnson, who spent six months in federal prison for civil resistance at the School of the Americas–Western Hemisphere Institute for Security Cooperation at Fort Benning Georgia, for her inspiration and friendship and her research help with parts of this article. The numerous prisoners of conscience whom I have had the honor of representing have helped educate me about the numerous justice issues in our jails and prisons. Finally, I dedicate this article to two million people in jail and prison and their families.

1. Feodor Mikhailovich Dostoyevsky (1821–81), *available at* <http://www.bartleby.com/73/1527.html> (last visited Nov. 9, 2003).

2. The United States incarcerates 702 persons per 100,000 persons making it the world leader in incarceration. Other national incarceration rates per 100,000 persons include Russia, 628; South Africa, 400; England and Wales, 139; Canada, 116; Australia, 112; Germany, 91; France, 85; and Japan, 53. *See THE SENTENCING PROJECT, U.S. PRISON POPULATION: TRENDS AND IMPLICATIONS, available at* <http://www.sentencingproject.org/pdfs/1044.pdf> (last visited Nov. 9, 2003).

3. The U.S. Department of Justice, Bureau of Justice Statistics, reported July 27, 2003 that 2,166,260 people were in U.S. prisons and jails. *See* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *U.S. Prison Population Rises 2.6 Percent During 2002, available at* <http://www.ojp.usdoj.gov/bjs/pub/press/p02pr.htm> (last visited Nov. 9, 2003).

4. Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN L. REV. 339, 392 n.362 (1998) (“The total number of prisoners under jurisdiction of Federal or State adult correctional authorities was 1,182,169 at year end 1996.” (quoting

calls for the complete abolition of prisons, as long as there are prisons and forced labor, the issue of work and wages in prisons should be reviewed.⁵

Outside of prison, work and wages, or the lack of either, are often occasions for injustice. However, when the issues of work, lack of work, and fair wages arise within the prison system, a hothouse of injustice flourishes. Currently most of the two million people in jails and prisons in this country are not working.⁶ Those who do work overwhelmingly do not receive fair pay for their labor.⁷ Because prisoners are mostly idle, they are not able to support their families on the outside, make restitution to victims, or contribute to their own support. Work is a social good, as are support of families and restitution to victims. Yet two million are idle.

Catholic social thought has some simple yet profound justice ideas to contribute to this issue, such as essential human dignity of all, reconciliation, rehabilitation, and the right to a work for a family wage.⁸ This article briefly explores these ideas and examines the intersection of prison work, prison wages, law, Catholic social thought, and justice and ends with a call for a new way of looking at prison work and prison wages.⁹

Some facts about the U.S. prison population of over two million prisoners are uncontested. First, almost all of the prisoners will be released from prison at some future time.

CHRISTOPHER J. MUMOLA & ALLEN J. BECK, U.S. DEPT OF JUSTICE, PRISONERS IN 1996, at 1 (1997)).

5. For more about prison abolition, see generally ANGELA DAVIS, *ARE PRISONS OBSOLETE?* (2003).

6. See Testimony of Morgan O. Reynolds, Director, Criminal Justice Center, National Center for Policy Analysis, Oct. 30, 1997, before U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Crime, No. 107, at 31. Another report suggests an even smaller percentage, a little more than 80,000 inmates, work for public entities or private corporations and earn anywhere from 25 cents to \$7 an hour. David Leonhart, *As Prison Labor Grows, So Does the Debate*, N.Y. TIMES, Mar. 19, 2000, at A1.

7. PETER WAGNER, *THE PRISON INDEX: TAKING THE PULSE OF THE CRIME CONTROL INDUSTRY* 37 (Bridgette Sarabi ed., 2003).

8. See discussion *infra* Part IV.

9. Those interested in more on this subject will benefit, as I have, from reviewing Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339 (1998); E.T. Hiller, *Labor Unionism and Convict Labor*, 5 J. CRIM. L. & CRIMINOLOGY 851 (1914); E.T. Hiller, *Development of the Systems of Control of Convict Labor in the United States*, 5 J. CRIM. L. & CRIMINOLOGY 241, 243-44 (1914) [hereinafter Hiller, *Control of Convict Labor*].

Second, almost all of them have needy families on the outside. It is because of these facts that the current system of forced prisoner idleness is unjust. It is in the interest of our shared common good that people work and families are supported. Opportunities for decent work at decent pay in prison must be created. It is time for significant systemic change.

II. PRISON WORK AND PRISON WAGES

“The history of the prison is in large measure a history of prison labor.”¹⁰

Prison and work have been through several cycles together. Prior to prison work, the situation within prisons was deplorable. Gustave de Beaumont and Alexis de Tocqueville described two prisons they visited in the early 1800s:

Ohio, which possesses a penal code remarkable for the mildness and humanity of its provisions, has barbarous prisons. We have deeply sighed when at Cincinnati, visiting the prison, we found half of the imprisoned charged with irons, and the rest plunged into an infected dungeon; and are unable to describe the painful impression which we experienced, when, examining the prison of New Orleans, we found men together with hogs, in the midst of all odors and nuisances. In locking up the criminals, nobody thinks of rendering them better, but only of taming their malice; they are put in chains like ferocious beasts; and instead of being corrected, they are rendered brutal.¹¹

Originally, prison work was a reform.¹² Started in Philadelphia in 1790, the first true U.S. penitentiary required prisoners to labor inside the prison in order to attack idleness, thought to be a major cause of crime.¹³ The focus was primarily on the moral rehabilitation of the prisoner and only secondarily on the idea of having prison work defray some of

10. Garvey, *supra* note 4, at 342.

11. GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *PENITENTIARY SYSTEMS IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* 48-49 (Carbondale: S. Ill. U. Press, 1964) (1831), *quoted in* Hans Toch, *Prison Reform in a Federalist Democracy*, 76 *PRISON J.* 495, 497 (1996).

12. As with most American law involving the poor, there were significant English sources and parallels to the American prison experience. The English operated institutions called bridewells, which functioned both for punishment and for reform of the poor through forced labor. See Joanna Innes, *Prisons for the Poor: English Bridewells, 1555-1800*, in *LABOUR, LAW, AND CRIME: AN HISTORICAL PERSPECTIVE* 42-122 (Francis Snyder & Douglas Hay eds., 1987).

13. Garvey, *supra* note 4, at 348.

the costs of incarceration.¹⁴ Indeed, an 1829 Boston report praised the virtues of prison labor in words that could be used as goals today: "It is productive, it is healthful, it teaches convicts how to support themselves when they leave prison, it is reformatory, and is consonant with republican principles."¹⁵

Within a few decades, however, the motive to make money emerged as the primary goal of prison labor and the privatization systems of contract convict labor and convict leasing became the dominant models.¹⁶ In these systems, states sold or leased the labor of prisoners to private contractors in the hope of defraying some of the costs of the penitentiary system.¹⁷

But opposition to privatized prison labor grew, mostly from unions and businesses which objected to competition from low or no wage labor, and also from prison reformers.¹⁸ The end of widespread privatized prison labor can be traced to the Ashurst-Summers Act. Enacted by Congress in 1935 and amended in 1940, the Act made the interstate transportation and sale of prison-made goods a federal crime.¹⁹

Today, few prisoners work. Though the popular conception is that prison is confinement "at hard labor," few prisoners work on anything other than housework and upkeep of

14. *See id.* at 348-53.

15. Hiller, *supra* note 9, at 854 (quoting Boston Pris. Disc. Soc. Rept., 34 (1829)).

16. *See* Hiller, *Control of Convict Labor*, *supra* note 9, at 241, arguing that prison labor passed through four stages of legal development:

These are: 1, the period of personal and local control, prior to the nineteenth century; 2, the period of public control and public account, coinciding approximately with the first quarter of the last century; 3, the period of private control and private account, covering approximately the last three-quarters of the century; and 4, the period of public control and public use, coinciding with the last two decades. In these successive periods, characteristic methods of employing convicts predominated; in the first, the indenture and personal account systems; in the second, the public account system; in the third, the contract, lease, and piece-price systems; and in the fourth, the public or state use system.

Id. at 242.

17. *See* Garvey, *supra* note 4, at 353-57; *see also* Hiller, *supra* note 9, at 863. (pointing out that contract or leased prison labor was used extensively by states in both the South and North).

18. *See* Hiller, *supra* note 9, at 870-76 (giving an excellent history of the development of prison labor).

19. Ch. 412 § 1-4, 49 Stat. 494 (1935) (current and amended version at 18 U.S.C. § 1761); *see also* Garvey, *supra* note 4, at 366-69.

the prison itself.²⁰ In 1885 ninety percent of prisoners were working in prison industries; by 1979 the percentage declined to ten percent.²¹ Congressional testimony estimated: "Only 9.4 percent of female and 7.75 percent of male inmates worked at jobs other than housekeeping and maintenance . . . fewer than 2,000 prisoners (less than 0.2 of 1 percent) worked for private companies in joint ventures"²²

Private industry prison workers remain rare. The prohibition on sales of prison goods through interstate commerce was lifted in part by a 1979 federal statute, the Prison Industry Enhancement Act, which allows private firms to contract with and employ prisoners in limited circumstances, including most notably, a requirement that prisoners be paid the prevailing local wage.²³

State prison labor programs for private employers are quite limited and employ a total of only about 5,000 inmates.²⁴

20. See discussion *supra* note 6.

21. GAIL S. FUNKE ET AL., PRISONER EMPLOYMENT IN THE UNITED STATES, 1885-1979, at 20-21 tbl.2-7 (1982).

22. See testimony of Morgan O. Reynolds, *supra* note 6.

23. Justice System Improvement Act of 1979, Pub. L. No. 96-157, § 827, 93 Stat. 1215, 18 U.S.C. § 1761(c) (authorizing the Prison Industry Enhancement Certification Program (PIECP)). The PIECP was expanded by the Justice Assistance Act of 1984, Pub. L. No. 98-473, § 819 (1984). For a discussion of how the PIECP works and its proposed implementation in New York, see Brian Hauck, *Prison Labor*, 37 HARV. J. ON LEGIS. 279 (2000).

24. Between 1979 and the end of 2001, the Prison Industry Enhancement Certification Program paid out over \$215 million in inmate wages. These wages were mostly re-routed into deductions for victim programs (approximately \$19 million); room and board (approximately \$55 million); family support (approximately \$12 million); and taxes (approximately \$29 million). U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Program Brief: Prison Industry Enhancement Certification Program*, July 2002, available at <http://www.ncjrs.org/pdffiles1/bja/193772.pdf> (last visited Feb. 15, 2004). As of September 30, 2003, the program reported thirty-eight participating states sponsoring programs employing 5,362 inmates. See Prison Industry Enhancement Certification Program, Certification & Cost Account Center Listing, *Statistics for Quarter Ending September 30, 2003*, available at <http://www.nationalcia.org/qtr0303certlist.pdf> (last visited Feb. 15, 2004). For example, California reports that 6,000 inmates work at over twenty-two prisons in agriculture, manufacturing, and service jobs for \$0.30 to \$.95 an hour. Prison Industry Authority, *PIA Fast Facts*, at http://www.pia.ca.gov/piawebdev/pia_know.html (last visited Nov. 10, 2003). Delaware pays its prisoners \$0.25 to \$1.30 an hour to work on auto maintenance, print shop, small appliance repair, and furniture manufacturing and repair. See State of Delaware, Department of Correction, *Prison Industries*, at <http://www.state.de.us/correc/Data/BOP/PrisonIndustry.htm> (last visited Nov. 10, 2003).

In federal prisons, however, a much higher percentage of prisoners are working at real jobs, though not usually receiving real wages. The work is available because the federal government has its own government-owned corporation, UNICOR, which employs over 21,000 workers earning between \$0.23 and \$1.15 an hour.²⁵ These wages compare favorably to the average wages for federal prisoners who work in prison maintenance at \$0.12 to \$0.40 per hour.²⁶ The UNICOR prisoners represent about twenty-five percent of the sentenced federal prison population who are medically eligible for work.²⁷

Little work and less wages—that is the reality of prison work and prison wages.

III. THE LAW OF PRISON WORK AND WAGES

A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punishment, to all the laws which the Legislature in its wisdom may enact for the government of that institution and the control of its inmates. For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. *He is for the time being the slave of the State. He is civiliter mortuus;* and his estate, if he has any, is administered like

25. UNICOR, 2002 Annual Report: Industrial Programs, Inmate Employment, and Net Sales as of September 30, 2002, *available at* http://www.unicor.gov/about/2002annual/industrial_programs.htm (last visited Nov. 10, 2003). UNICOR is not without controversy. On November 7, 2003, the U.S. House of Representatives voted 350-65 to make federal prison labor compete with private businesses in the sale of office furniture, electronics, and other products. Jesse J. Holland, *Bill Pits Prisoners Against Businesses*, ASSOCIATED PRESS, Nov. 7, 2003, *available at* <http://www.contracostatimes.com/mld/cctimes/news/7205453.htm> (last visited Mar. 29, 2004). Lawmakers complained that the government-run corporation using prison labor would put other Americans out of work. *Id.* Ironically, two days earlier, Voice of America featured David Hawk, researcher for the U.S. Committee for Human Rights in North Korea, who authored a report detailing North Korea's prison labor system. Press Release and Documents, Voice of America, Korea: Human Rights (Nov. 5, 2003), *available at* 2003 WL 66799066.

26. WAGNER, *supra* note 7, at 37.

27. INMATE PROGRAMS AND SERVICES: OVERVIEW (Feb. 2000), *at* <http://www.bop.gov>.

that of a dead man.

The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of freemen. *They are the slaves of the State* undergoing punishment for heinous crimes committed against the laws of the land.²⁸

The law of prison work and wages starts with the Thirteenth Amendment, which allows slavery and involuntary servitude as punishment for crimes: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."²⁹

Once convicted, prisoners can be required to work, even pending appeal.³⁰ And cases even have held that pre-trial detainees can be compelled to provide, without pay, "general housekeeping responsibilities," for their detention area, upon threat of punitive action.³¹ Though in 1948, Article 23, section 4 of the Universal Declaration of Human Rights gave everyone "the right to form and to join trade unions,"³² in 1977 the U.S. Supreme Court upheld a North Carolina warden's ban on prisoner labor unions.³³

The Fair Labor Standards Act generally requires that workers be paid a minimum wage, but is silent as to coverage of state prison labor.³⁴ Prisoners have no constitutional right to be paid at all for the work they are forced to perform.³⁵ Nor

28. *Ruffin v. Commonwealth*, 62 Va. 790, 795-96 (1871) (emphasis added).

29. U.S. CONST. amend. XIII, § 1.

30. See *Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999); *Plainsance v. Phelps*, 845 F.2d 107, 108 (5th Cir. 1988); *Omasta v. Wainwright*, 696 F.2d 1304, 1305 (11th Cir. 1983); *Stiltner v. Rhay*, 322 F.2d 314, 315 (9th Cir. 1963).

31. *Hause v. Vaught*, 993 F.2d 1079, 1085 (4th Cir. 1993); *Bijeol v. Nelson*, 579 F.2d 423, 424 (7th Cir. 1978).

32. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Pt. 1, at 71, U.N. Doc. A/810 (1948).

33. See *Jones v. N.C. Prisoner's Labor Union, Inc.*, 433 U.S. 119 (1977).

34. See 29 U.S.C. § 201-219 (2004); see also Matthew J. Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prison Workers*, 5 U. PA. J. LAB. & EMP. L. 191 (2002).

35. See generally *Murray v. Miss. Dep't of Corrs.*, 911 F.2d 1167 (5th Cir. 1990) (per curiam):

Compelling an inmate to work without pay is not unconstitutional.

do they have the right to refuse to work if ordered to do so by prison authorities.³⁶

Prisoners producing goods and services used by state prisons have not been considered employees under the FLSA.³⁷ One court decision illustrates the many arguments why prisoners should not be paid minimum wages:³⁸

[F]orced prison labor for the prison is not subject to the FLSA. The relationship is not one of employment; prisoners are taken out of the national economy; prison work is often designed to train and rehabilitate; prisoners' living standards are determined by what the prison provides; and most such labor does not compete with private employers. . . . As a result, no Court of Appeals has ever questioned the power of a correctional institution to compel inmates to perform services for the institution without paying the minimum wage. Prisoners may thus be ordered to cook, staff the library, perform janitorial services, work in the laundry, or carry out numerous other tasks that serve various institutional missions of the prison, such as recreation, care and maintenance of the facility, or rehabilitation. Such work occupies prisoners' time that might otherwise be filled by mischief; it trains prisoners in the discipline and skills of work; and it is a method of seeing that prisoners bear a cost of their incarceration.³⁹

Work performed by state prisoners outside of the prison, for private employers is a contested subject under the Fair

The thirteenth amendment specifically allows involuntary servitude as punishment after conviction of a crime, *see* U.S. Const. amend XIII, § 1, and this Court has held that "compensating prisoners for work is not a constitutional requirement but, rather, 'is by the grace of the state.'"

Id. at 1167-68 (citing *Mikeska v. Collins*, 900 F.2d 833, 837 (5th Cir. 1990) (quoting *Wendt v. Linaugh*, 841 F.2d 619, 621 (5th Cir. 1988))).

36. *See United States v. Reynolds*, 235 U.S. 133, 149-50 (1914). "There can be no doubt that the state has authority to impose involuntary servitude as a punishment for crime." *Id.* at 149.

37. *See Lang*, *supra* note 34, at 203-04; *see also Tourscher v McCullough*, 184 F.3d 236, 243 (3d Cir. 1999); *Gambetta v. Prison Rehabilitative Indus.*, 112 F.3d 1119, 1124-25 (11th Cir. 1997); *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d Cir. 1996); *Reimonenq v. Foti*, 72 F.3d 472, 475 n.3 (5th Cir. 1996); *Henthorn v. Dep't of Navy*, 29 F.3d 682, 684-87 (D.C. Cir. 1994); *McMaster v. Minnesota*, 30 F.3d 976, 980 (8th Cir. 1994); *Hale v. Arizona*, 993 F.2d 1387, 1392-98 (9th Cir. 1993) (en banc); *Franks v. Oklahoma State Indus.*, 7 F.3d 971, 972 (10th Cir. 1993); *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993); *Miller v. Dukakis*, 961 F.2d 7, 8-9 (1st Cir. 1992); *Vanskike v. Peters*, 974 F.2d 806, 809-10 (7th Cir. 1992).

38. *See Danneskjold*, 82 F.3d at 42-43.

39. *Id.*

Labor Standards Act.⁴⁰ FLSA has been applied to work outside the prison in the Second, Fifth, and Eighth Circuits.⁴¹ But an en banc panel of the Ninth Circuit disagreed.⁴² Federal prisoners are in an even worse position seeking coverage under FLSA because, while the FLSA is silent on coverage for state prisoners, a specific federal statute sets up a scheme for determining compensation for federal prisoners.⁴³

Thus, current law offers little opportunity to reverse the idleness of two million incarcerated people. Under the Constitution they are the equivalent of slaves, and federal statutes offer little protection for the super-majority who work in prisons. Because existent law offers little reason for hope to address this issue, it is worthwhile to examine the justice dimension under an alternative system of justice, Catholic social thought.

IV. CATHOLIC SOCIAL THOUGHT ON PRISONERS, WORK, AND WAGES

We are still a long way from the time when our conscience can be certain of having done everything possible to prevent crime and to control it effectively so that it no longer does harm and, at the same time, *to offer to those*

40. See Lang, *supra* note 34, at 204.

41. See Carter v. Dutchess Cmty. Coll., 735 F.2d 8 (2d Cir. 1984). *But see* Danneskjold v. Hausrath, 82 F.3d 37 (2d Cir. 1996) (finding that work for private contractors completed *inside* the prison does not trigger FLSA coverage); Reimonenq v. Foti, 72 F.3d 472 (5th Cir. 1996) (finding that even where outside work is compensated at the statutory minimum wage, the prison can force working inmates to pay some charges out of their wages, thus reducing their wages below FLSA standards as long as the employer is meeting FLSA requirements); Watson v. Graves, 909 F.2d 1549, 1554-55 (5th Cir. 1990) (holding the FLSA applicable where prisoners worked for an outside construction company in competition with other private employers and where this competition tended to undermine compliance with the FLSA). See also Barnett v. YMCA, 1999 U.S. App. LEXIS 3412 (8th Cir. 1999) (*per curiam*).

42. See Hale, 993 F.2d at 1389-90 (finding that even though up to twenty percent of Arizona prisoners worked for a private correctional industries program "whose goods and services include clothing, fabricated steel, livestock, dairy products, and hotel reservations for Best Western motels," the FLSA did not apply).

43. See 18 U.S.C. § 4126(c)(4) (2004) (giving authority to set compensation rates for work by federal prisoners to rules and regulations set up by the Attorney General); see also Emory v. United States, 2 Cl. Ct. 579 (1983), *aff'd*, 727 F.2d 1119 (Fed. Cir. 1983) (finding that the FLSA was not applicable because there was another contradictory federal statute creating and regulating inmates' work).

who commit crimes a way of redeeming themselves and making a positive return to society.

- Pope John Paul II, July 9, 2000⁴⁴

Putting more people in prison . . . has not given Americans the security we seek. It is time for a new national dialogue on crime and corrections, justice and mercy, responsibility and treatment.

- U.S. Catholic Bishops, November 15, 2000⁴⁵

The work to which a resident is assigned should be—and appear to be—worthwhile and compatible with the dignity of a human being. . . . National standards should be adopted and promulgated regarding compensation for work. Enabling the residents to work at a fair wage may, among other things, help keep their families off the welfare rolls, either totally or partially.

- U.S. Catholic Conference, November 1973⁴⁶

Catholic social thought starts with a proposition that recognizes the prisoner as a fellow human being. Like those who are not imprisoned, prisoners are both responsible for their human actions and entitled to their human rights. Building on this fundamental human dignity, the institutions in which we imprison our brothers and sisters must protect society from dangerous persons and act to correct past wrongs, but these institutions must also respect the human rights of prisoners and function to rehabilitate and equip them to rejoin society in a positive way. One of the ways in which rehabilitation can occur is to allow prisoners to engage in meaningful, constructive work.

A building block of Catholic social thought, also a basic principle in the Universal Declaration of Human Rights, is that every person, no matter what, is entitled to human dig-

44. *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice*, USCCB STATEMENT (United States Conference of Catholic Bishops), Nov. 15, 2000, available at <http://www.usccb.org/sdwp/criminal.htm> (last visited Nov. 9, 2003) (emphasis added) [hereinafter *Responsibility, Rehabilitation, and Restoration*].

45. *Id.*

46. *The Reform of Correctional Institutions in the 1970s*, USCCB STATEMENT, (United States Conference of Catholic Bishops), Nov. 1973, at Recommendation 10 (on file with author) [hereinafter *Reform of Correctional Institutions*].

nity.⁴⁷ This shared human dignity is critical in understanding the analysis of Catholic social thought which, unlike current political and popular thought, stresses the humanity and the need not only of the victims of crime but also of the persons who commit crimes and who are incarcerated.

Decent work at living wages is also a fundamental principle of Catholic social thought.⁴⁸ Since the late 1800s, Catholic social thought has repeatedly supported the right of all people to work and the right to a just and living wage for all workers because of the fulfillment that people derive from work, because of the needs of families to live in conditions of human dignity, and because of the common good.⁴⁹ John Paul

47. See *Universal Declaration of Human Rights*, *supra* note 32 ("All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."). The Church has also noted:

Any human society, if it is to be well-ordered and productive, must lay down as a foundation this principle, namely, that every human being is a person; that is, his nature is endowed with intelligence and free will. Indeed precisely because he is a person he has rights and obligations flowing directly and simultaneously from his very nature. And as these rights and obligations are universal and inviolable, so they cannot in any way be surrendered.

JOHN XXIII, *PACEM IN TERRIS: PEACE ON EARTH*, para. 9 (1963), *reprinted in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE* 132 (David J. O'Brien & Thomas A. Shannon eds., 2001) [hereinafter *CATHOLIC SOCIAL THOUGHT*].

48. Specific calls for the payment of a living wage can be found in many documents of Catholic social thought. See *RERUM NOVARUM, THE CONDITION OF LABOR*, para. 34 (1891), *reprinted in CATHOLIC SOCIAL THOUGHT, supra* note 47, at 31; *PIUS XI, QUADRAGESIMO ANNO: AFTER FORTY YEARS*, para. 71 (1931) [hereinafter *PIUS XI, AFTER FORTY YEARS*], *reprinted in CATHOLIC SOCIAL THOUGHT, supra* note 47, at 58; *STATEMENT ON CHURCH AND SOCIAL ORDER*, Feb. 7, 1940, para. 41-42, *reprinted in CATHOLIC SOCIAL THOUGHT, supra* note 47, at 435; *MATER ET MAGISTRA*, para. 71 (1961), *reprinted in CATHOLIC SOCIAL THOUGHT, supra* note 47, at 95-96; *PACEM IN TERRIS: PEACE ON EARTH, supra* note 47, at para. 64; *GAUDIUM ET SPES, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD*, para. 67 (1965), *reprinted in CATHOLIC SOCIAL THOUGHT, supra* note 47, at 211-12; *JOHN PAUL II, LABOREM EXERCENS: ON HUMAN WORK*, para. 18-19 (1981) [hereinafter *JOHN PAUL II, ON HUMAN WORK*], *reprinted in CATHOLIC SOCIAL THOUGHT, supra* note 47, at 377-78; *ECONOMIC JUSTICE FOR ALL*, para. 196 (1986), *reprinted in CATHOLIC SOCIAL THOUGHT, supra* note 47, at 573-74; *CENTESIMUS ANNUS, ON THE HUNDRETH ANNIVERSARY OF RERUM NOVARUM*, para. 10 (1991), *reprinted in CATHOLIC SOCIAL THOUGHT, supra* note 47.

49. See WILLIAM P. QUIGLEY, *ENDING POVERTY AS WE KNOW IT: GUARANTEEING A RIGHT TO A JOB AT A LIVING WAGE* 114-16, 130-01 (2003); see also David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 *WASH. & LEE L. REV.* 119, 119-20 (1988) (discussing Catholic social thought and work); William Quigley, *Full-Time Workers Should Not Be Poor: The Living*

II issued a document in 1981 called *On Human Work*.⁵⁰ In this document, he described work as “a fundamental dimension of man’s existence on earth.”⁵¹ And “in every case a just wage is the concrete means of verifying the justice of the whole socioeconomic system and, in any case, of checking that it is functioning justly.”⁵²

Catholic social thought has also discussed the role of prisons, the treatment of prisoners, and the need for decent work opportunity and decent wages for prisoners.⁵³ It is from applying these currents in Catholic social thought to prisoner work and wages, in light of their requirements for justice and the just treatment of prisoners, that a right to fair compensation for prisoners emerges.

In 1973, the U.S. Catholic Conference issued a statement titled *The Reform of Correctional Institutions in the 1970s*.⁵⁴ They recognized that human dignity required that society be concerned about and supportive of the victims of crime, but also about the perpetrators of crime. In that concern they expressed a justice interest in both rehabilitation and reconciliation.

It behooves us to be aware that, despite well-publicized exceptions, prisons are largely filled with the poor We insist that punishment, in order to fill its proper purpose, must fit the nature of the crime; it must be considerate of the offender’s human dignity; and it must be tempered by mercy and constantly aimed at reconciliation The injustices and inequities that plague our society affect both the incidence of crime and the administration of correctional institutions.⁵⁵

In supporting the human dignity of the prisoner, the statement pointed out the importance of work opportunities and fair wages for that work, in part so prisoners could support their families.

Wage Movement, 70 MISS. L.J. 889, 902-05 (2001) (discussing Catholic social thought and the right to a living wage).

50. JOHN PAUL II, ON HUMAN WORK, *supra* note 48, reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 47, at 350.

51. *Id.*, reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 47, at 355.

52. *Id.*, reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 47, at 378-79.

53. *Responsibility, Rehabilitation, and Restoration*, *supra* note 44 (addressing the role of prisons and the treatment of prisoners).

54. *Reform of Correctional Institutions*, *supra* note 46, at Recommendation 10.

55. *Id.* at Recommendation 10, para. 6-7.

The work to which a resident [of a correctional institution] is assigned should be—and appear to be—worthwhile and compatible with the dignity of a human being. Nothing is so devastating to human aspirations as a work assignment which both parties know is really useless. National standards should be adopted and promulgated regarding compensation for work. Enabling the residents to work at a fair wage may, among other things, help keep their families off the welfare rolls, either totally or partially. Much greater emphasis is needed on practical job training and post-release employment opportunity.⁵⁶

More recently, in a 2000 statement, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice*, the U.S. Catholic bishops clearly state their support for the victims of crime and support their rights, and the rights of all innocent people, to safety and human dignity.⁵⁷ However, this statement goes much further and also stands with those in prison and supports their rights to human dignity as well.

The *Responsibility, Rehabilitation, and Restoration* statement begins by reaffirming the idea that *all* persons, no matter what their position in society, are entitled to human dignity.

The fundamental starting point for all of Catholic social teaching is the defense of human life and dignity: every human person is created in the image and likeness of God and has an inviolable dignity, value, and worth, regardless of race, gender, class, or other human characteristics. *Therefore, both the most wounded victim and the most callous criminal retain their humanity.*⁵⁸

The inherent dignity of prisoners is underscored by scriptural references demonstrating that Jesus began his mission

56. *Id.* at Recommendation 10. Included in a footnote to this recommendation was the suggestion that national standards be adopted to regulate the fair compensation of prisoners. They hoped for voluntary standards, but said that “consideration should be given to making adherence a pre-condition of any federal grants to the state’s criminal justice system.” *Id.*

57. See *Responsibility, Rehabilitation, and Restoration*, *supra* note 44 (addressing in numerous sections the concerns and rights of victims, see sections titled: Crime and the Catholic Community, Victims of Crime in the U.S., Human Life and Dignity, The Common Good, Promoting Serious Efforts Toward Crime Prevention and Poverty Reduction, Offering Victims the Opportunity to Participate, and Stand with Victims and Their Families).

58. *Id.* (emphasis added).

with a startling call for liberty to captives,⁵⁹ insisted that people visit the imprisoned or forfeit his favor,⁶⁰ and openly rejected traditional methods of punishment.⁶¹ As a result: "In our day, *we are called to find Christ in young children at risk, troubled youth, prisoners in our jails and on death row, and crime victims experiencing pain and loss.*"⁶² This reflection of the divine, this human dignity, is found not only in the innocent or wrongly incarcerated but also in those people who are guilty of crimes against others. "[N]one of us is the sum of the worst act we have ever committed. . . . As people of faith, we believe that grace can transform even the most hardened and cruel human beings."⁶³ There are real consequences resulting from the belief that even guilty people in prison have human dignity:

All are created in the image of God and possess a dignity, value and worth that must be recognized, promoted, safeguarded, and defended. For this reason, *any system of penal justice must provide those necessities that enable inmates to live in dignity: food, clothing, shelter, personal safety, timely medical care, education, and meaningful work adequate to the conditions of human dignity.*⁶⁴

The right of prisoners to be treated with human dignity imposes controversial obligations on those who are not in prison.

Crime and corrections are at the intersection of rights and

59.

The Spirit of the Lord is upon me, because he has anointed me to bring glad tidings to the poor. He has sent me to proclaim liberty to captives and recovery of sight to the blind, to let the oppressed go free, and to proclaim a year acceptable to the Lord.

Luke 4:18-19.

60. In Matthew, Jesus sets out the test for being one of his followers: "For I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me, naked and you clothed me, ill and you cared for me, in prison and you visited me." *Matthew 25:31-46.*

61. Jesus refused to participate or sanction the traditional punishment of a woman charged with adultery. *See John 8:1-11; see also Responsibility, Rehabilitation, and Restoration, supra* note 44 (discussing all of these scriptural quotes in the section on Scriptural, Theological, and Sacramental Heritage, Scriptural Foundations).

62. *Responsibility, Rehabilitation, and Restoration, supra* note 44 (emphasis added).

63. *Id.* (quoting a pastoral letter from Wisconsin's Roman Catholic Bishops, *Public Safety, the Common Good, and the Church: A Statement on Crime and Punishment in Wisconsin* (Sept. 1999)).

64. *Id.* (emphasis added).

responsibilities. Those who commit crimes violate the rights of others and disregard their responsibilities. *But the test for the rest of us is whether we will exercise our responsibility to hold the offender accountable without violating his or her basic rights.* Even offenders should be treated with respect for their rights.⁶⁵

To what end does society hold the offender accountable? The purpose of a system of punishment or correction is to serve the common good and should serve three principal purposes: "(1) the preservation and protection of the common good of society, (2) the restoration of public order, and (3) the restoration or conversion of the offender."⁶⁶ The restoration of the offender is a restatement of Catholic social thought that "punishment has a medicinal value; as far as possible it should contribute to the correction of the offender."⁶⁷

As a result of this analysis, the Catholic bishops conclude that reforms of the criminal justice system must change from a punitive and retributive one to include much more of an emphasis on restorative justice and an insistence that punishment have a constructive and rehabilitative purpose.⁶⁸ "Since nearly all inmates will return to society, prisons must be places where offenders are challenged, encouraged, and rewarded for efforts to change their behaviors and attitudes, and where they learn the skills needed for employment and life in community."⁶⁹ And where do prisoners learn the skills needed for employment and re-entry into life in the community? They learn not in confinement in a prison cell, but in opportunities for meaningful, constructive work.

Finally, in discussing the needs of the prisoner and of the

65. *Id.* (emphasis added).

66. *Id.* (paraphrasing CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH §§ 2265-2267 (1994)).

67. CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH § 2266 (2d ed. 2000).

68. See *Responsibility, Rehabilitation, and Restoration*, *supra* note 44 (encouraging innovative programs of restorative justice and insisting that punishment has a constructive and rehabilitative purpose). It is noteworthy that the 2000 statement questions the wisdom of private prisons and the profit motive they introduce: "We bishops question whether private, for-profit corporations can effectively run prisons. The profit motive may lead to reduced efforts to change behaviors, treat substance abuse, and offer skills necessary for reintegration into the community." *Id.* (insisting that punishment has a constructive and rehabilitative purpose).

69. *Id.* (insisting that punishment has a constructive and rehabilitative purpose).

larger community, the U.S. bishops aptly point out that inmates have families outside the prison walls. They call for special attention to the children of offenders and ask that the needs of children left without the support of their incarcerated parent be addressed.⁷⁰

This plea for families brings the discussion back to Catholic social thought and the right to work and earn a living wage. The idea of a living wage was described as a family wage in Catholic social thought in 1931 because the support of the family was a driving force for the call of just wages. "In the first place, the wage paid to the workingman should be sufficient for the support of himself and of his family."⁷¹

The common good of the entire public should be the focal point for evaluating the fairness and justice of the wage paid to the worker. "[T]he wage level should be arrived at with the public economic welfare in mind."⁷² Further, equally important is the opportunity to have a job in the first place. "Another point, however, of no less importance and especially necessary these days, is that employment opportunities be provided those able and willing to work."⁷³ An analysis of the principles upon which a right to employment and a right to a living wage rest shows that their foundation is built on the common good and the need to support the family.

By looking at Catholic social thought in work, wages, and prisons, we arrive at several inter-related principles. The opportunity to work and the right to earn a family wage must be evaluated in light of the needs of the family and of the common good. Treatment of prisoners must be rehabilitative and restorative rather than punitive and retributive, consistent with the call for respect of the human dignity of all, demonstrative of the concern for their families, particularly their children, and practical as a preparation for the prisoner for re-entry into society.

With these principles in mind, consider some questions based on the principles of Catholic social thought. Though the state certainly has reason and right to impose some form of punishment on a person convicted of crime, does sitting in

70. *See id.*

71. PIUS XI, AFTER FORTY YEARS, *supra* note 48, reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 47, at 58.

72. *Id.* at 59.

73. *Id.*

a cell without working or working for no or low pay advance the common good of the community outside of the prison? Does it enhance the prisoner's potential for a constructive re-entry into society? Does it rehabilitate? Is it consistent with restorative justice? Does it recognize the fundamental human rights of prisoners? Does it assist the family, especially the children, of the prisoner? Is there any reason the punishment of criminals should be imposed upon their family? And finally, does forced unpaid or underpaid labor for private companies by prisoners assist public economic welfare or any of these principles of justice?

I submit that Catholic social thought suggests the answer to all of these questions is a simple no. Therefore, since the current institutional and legal framework of prison work and pay is inconsistent with the call for justice in Catholic social thought, just alternatives need to be created.

V. WHAT JUSTICE DEMANDS

You got this cat who is going to be let out of prison someday When you're let out, after having been put in a one-hundred percent criminal population, and not learning the basic skills of survival on the street, other than being a predator. You don't learn how . . . to relate and articulate with people . . . you don't have no vocational skills, so what do you do when you're let out. You're given \$200 gate money, and you're right back to the same environment you came from.⁷⁴

As noted at the beginning of this article, there are two incontestable facts about the two million people in prison.⁷⁵ Almost all of the people in prison have families on the outside. And almost all of the people in prison are coming out. The common good of all people, inside and outside of prison, strongly suggests that a system of rehabilitative prison work that pays a decent wage is in the common interest. Therefore, justice demands it is time for universal opportunity for work in prison and fair pay for those who work. Work in prison at decent wages will help prisoners become employable after release, provide them with an income to support their

74. Stefanie Evans, *Making More Effective Use of Our Prisons Through Regimented Labor*, 27 PEPP. L. REV. 521, 548 (1999) (quoting *A&E Investigative Reports Special: Behind Bars* (A&E Network 1996)).

75. See *supra* Part I.

families, and permit time to be filled with meaningful activity, thus helping advance rehabilitation in prison and reducing recidivism upon release.⁷⁶

In 1987, the Committee of Ministers of the Council of Europe adopted the European Prison Rules to address work by prisoners in a more progressive manner.⁷⁷ The rules recognize that work can be required but describe work as a “positive element in treatment, training and institutional management.”⁷⁸ The rules suggest that prisoners who work for outside contractors “inside or outside the [prison]” should earn “the full normal wages” paid by the employer.⁷⁹ Also, they require that “[t]here shall be a system of equitable remuneration of the work of prisoners” and that the prisoners should be allowed to spend part of their earnings for their own use and part for their families, and savings should be given to the prisoner upon release.⁸⁰

Criminal justice scholars have affirmed the value of real work for prisoners and advocated payment of minimum wages to working prisoners.⁸¹ Others have called for new prison work policies, ranging from full employment in an open market version of the private contract system to mandatory hard labor for prisoners in the U.S.⁸² The American Bar

76. See Ernest van den Haag, *Rights and Obligations of Prisoners*, 11 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 2-3 (1985).

77. Committee of Ministers, *European Prison Rules*, No. R(87)(3) (Feb. 12, 1987), reprinted in JOHN W. PALMER & STEPHEN E. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 787 & app. IV (7th ed. 2004).

78. See Committee of Ministers, *European Prison Rules*, No. R(87)(3) (Feb. 12, 1987), at art. 71.1. All prisoners can be required to work, subject to their physical and mental fitness. See also *id.* at art. 71.2.

79. *Id.* at art. 73.1.b.

80. *Id.* at art. 76.

81. See Francis T. Cullen & Lawrence F. Travis, III, *Work as an Avenue of Prison Reform*, 10 NEW ENG. J. CRIM. & CIV. CONFINEMENT 45, 57 (1984). But see van den Haag, *supra* note 76, at 2-3 (proposing paying the average amount paid in the region or the average of the occupation in which prisoners are employed).

82. See Timothy J. Flanagan & Kathleen Maguire, *A Full Employment Policy for Prisons in the United States: Some Arguments, Estimates and Implications*, 21 J. CRIM. JUSTICE 117 (1993) (discussing the vast unemployment of inmates and proposing a number of models to make full employment a possibility). Although the authors do not specifically address how much of wages prisoners should earn, they do argue that full employment would “mak[e] funds available for offenders’ families and for restitution of crime victims” and provide “offenders with an earned fund to support the transition from institutional to community life.” *Id.* at 128. But see Garvey, *supra* note 4, at 374-76 (arguing for a modified return to the unregulated private market approach for

Association officially supports paying prisoners at least minimum wage when they work for private companies.⁸³

One of the differences between law and justice is that justice is not subject to majority approval, but legislation to enact just changes certainly is. Thus, the importance of public understanding cannot be overlooked. Though conventional wisdom and popular political pandering would suggest that the public wants only to lock people up and throw away the key, the public is, as usual, much wiser. Polls show that the public is fully aware that the current system is not working and show significant support for rehabilitation of prisoners and the teaching of job skills in prison.⁸⁴

prison labor, and suggesting an optional program for prison labor, allowing prisoners the choice to work in prison for private contractors at whatever rate the market will bear). *See also* Evans, *supra* note 74, at 543-45 (suggesting yet another kind of full employment prison policy: that U.S. prisons should adopt the universal regimented labor requirements of China's prisons and make hard physical labor a mandatory requirement by which prisoners must work their way out of prison).

There are legislative proposals that would require all federal inmates to work fifty hours a week at unspecified wages with percentages of the wage going toward compensating victims, reimbursing incarceration costs, supplying basic prisoner needs, and establishing mandatory savings. *See* Mandatory Prison Work and Drug Testing Act of 2003, S. 672, 108th Cong. (2003).

83. AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS, Standard 23-4.5 (1985) (outlining Bar Association position that prisoners employed by private contractors should be paid minimum wages).

84. Recent and historical polling shows general support for these themes. *See* Eagleton Institute of Politics Center for Public Interest Polling at Rutgers University, *Prisoner Reentry: The State of Public Opinion*, available at http://www.njisj.org/reports/eagleton_report.html#opinion (last visited Jan. 11, 2004). This report concludes that "[t]he majority feel that the criminal justice system needs to be fair (to the victim, to the community, and to the criminal), balanced, and effective with a focus on rehabilitation. This view does not seem to be rooted in purely humanitarian concerns, but stems from a belief that rehabilitation is a more effective way to create safe communities. This emerging opinion also appears to be a reaction to perceived failures of recent 'get tough' policies." *Id.* The same report also notes that eighty-eight percent of the public says that prisons should be required to teach job skills in order to reduce recidivism and only one-third of the public believes that the prison system is doing a decent job at rehabilitation. *Id.* (citing Belden, et al., *Optimism, Pessimism, and Jailhouse Redemption: American Attitudes on Crime, Punishment, and Overincarceration* (2001); Peter D. Hart Research Assoc., Inc., *Changing Public Attitudes Toward the Criminal Justice System* (2001)).

See also William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 79, 144 (1994). Polls in the 1990s also show the importance that the public attaches to work in prison. *Id.* at 79. In fact, even when dealing with the death penalty, which is usually supported by over half of the people polled, the poten-

VI. CONCLUSION

"To address the problem of the criminal offender effectively and thereby secure the safety of every citizen, it will be necessary to use the creativity and talents of all our people."⁸⁵

There is historical precedent for widespread work for prisoners. There are moral, just, family, and practical reasons to offer work opportunities at decent wages to prisoners. As discussed above, prisons, like all other institutions, change. What seemed new a century ago is commonplace now. The same will happen in the next century. Unless we do away with prisons altogether, decent work opportunities and decent pay should, and likely will, be part of the changes that come in the future. Valid prisoner work and wages are important to the two million people in prison and their families. Because their families are not in prison, and the two million prisoners will be out before long, this is our problem as well. Thus, there are millions of reasons to start making decent prison wages a reality. The creativity and talents of people outside of prison are needed to address the failure to use the creativity and talents of those inside prison, in order to advance the common good of all.

tial for prison work deeply influences public opinion and, in combination with certain prison sentences, reverses the outcome. *Id.* at 144. When people are polled about the death penalty but are presented with an alternative of long prison sentence and prison work for restitution to murder victim's families, they consistently choose the non-death penalty alternative.

Polls in the 1980s also show that while society overwhelmingly supports locking people up, the same polls show the public overwhelmingly also supports rehabilitation of those in prison. See Francis T. Cullen & Lawrence F. Travis, III, *Work as an Avenue of Prison Reform*, 10 NEW ENG. J. CRIM. & CIV. CONFINEMENT 45, 48-49 (1984).

85. *Community and Crime*, COMMITTEE ON SOCIAL DEVELOPMENT AND WORLD PEACE STATEMENT (United States Conference of Catholic Bishops), Feb. 15, 1978.