

2009

The Consociative Value of Work: What Homelessness-to-Work Programs Can Teach Us About Reforming and Expanding Prison Labor

Christopher Angevine

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/clb>



Part of the [Criminal Law Commons](#)

Recommended Citation

Angevine, Christopher. "The Consociative Value of Work: What Homelessness-to-Work Programs Can Teach Us About Reforming and Expanding Prison Labor." *American University Criminal Law Brief* 4, no. 1 (2009): 19-34.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University Criminal Law Brief* by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

The Consociative Value of Work:

What Homelessness-To-Work Programs Can Teach Us About Reforming and Expanding Prison Labor

By: *Christopher Angevine*

“A man’s work is one of the more important parts of his social identity, of his self, indeed of his fate in the one life he has to live.”¹

The crisis in the American prison system is well known. At this moment, American jails and prisons hold 2.3 million people inside their walls.² Millions more are on probation or parole and thus in danger of incarceration if they violate the terms of their release.³ Tough anti-crime measures, such as mandatory minimums and three strikes laws, have taken more criminals off the streets. Yet, for all the political attention paid to crime, politicians and voters have demonstrated comparatively little consideration as to what will become of convicts once they leave prison and return to society. This debate has been far from productive, as it is torn between litigation by prisoners’ rights activists seeking to constitutionalize prisoner access to amenities, and the more populist “tough on crime” politicians seeking to deny prisoners any such privileges.⁴ A new discussion is necessary.

Sometimes the best approach is an indirect one. Valuable lessons for reforming America’s prisons can be found through an examination of an analogous group of social outcasts: the homeless. Homelessness in America is a very real crisis. Three-quarters of a million people are homeless on any given night.⁵ Yet, over the past several years, there has been real success in combating homelessness. Spurred by increased federal intervention and private charitable ventures, numerous homelessness-to-work programs have succeeded in reintegrating former homeless men and women back into society.

These homelessness-to-work ventures reveal a promise that could serve America’s prisons well: the social value of work. They demonstrate that work can be a consociative⁶ process serving to promote an individual’s connection to his fellow citizens and to society as a whole. By expanding on homelessness-to-work programs’ success and instituting a reformed system of prison labor based on consociative punishment, America’s prisons can more successfully reintegrate offenders back into the community and thereby reduce recidivism, crime, and strain on the prison system.

Part I has served as a brief introduction to the topic at hand. Part II will explain the importance of work to the American consciousness and modern American society paying particular attention to a consociative concept of work. Part III will then provide an account of American prison labor from the earliest penitentiaries to the present, explaining how prison labor’s past failures have often been a result of these programs’ conflicted and incomplete goals. Part IV will discuss homelessness in America, examine past failures in combating it, and expand upon a few successful modern anti-homelessness ventures. Part V will then demonstrate how lessons learned from homelessness-to-work programs can help overcome prison labor’s historical baggage and provide an avenue for creating a revitalized prison labor system in America. Part VI will conclude.

Work and American Society

America is a nation obsessed with work. Americans work longer hours than workers in any other industrialized nation.⁷ People often self-identify through their profession.⁸ Entrepreneurship is regarded as a civic virtue; small businessmen are commonly lauded as the foundation of the economy. This is neither a mere historical anomaly, nor a product of recent changes in the economy. It is a continuation of a long-lived trend in the American work ethic: the idea that work brings with it something intrinsically valuable, in addition to the instrumental value of a wage. Americans’ devotion to work may have manifold causes – among them a tax structure that does not disincentivize extra work, social concern for material wealth, and a culture of self sufficiency and raw individualism – but that commitment has deep roots in the very fabric of the nation’s history.

Irrespective of the hours an individual American might spend on the job, work is a vital part of social existence. There, of course, exists “no one work ethic” that fits all Americans.⁹ Different people approach work in different fashions. Yet, work is of great importance to American society as a whole; the need to work helps define the cultural milieu in which all Americans live. It is through work, paid or unpaid, that individuals are able to connect with their fellow citizens and form a social bond extending beyond kinship or ethnicity. Work is a fundamentally social endeavor. Thus, those Americans who eschew work have a much more difficult time forming such bonds and risk becoming alienated from modern society.

A Brief Thematic History of Work in America

Work has played an “integral part”¹⁰ in American history from the earliest days of the nation. As with many things in the American social order, much about the American ideology of work derives from the colonial period. The colonial era created a framework, the Protestant Ethic, upon which modern American society’s relationship to work is largely dependent.¹¹ Though the American idea of work has changed in the past three centuries, the colonial ideals of individualism and the obligation to work have remained constant to the present day.¹² Intervening American history, most notably the frontier experience and continual immigration, has served to reinforce the importance of work to the social fabric. Of course, no single conception completely encompasses work’s role for all of American society, particularly when considering the entire history of the nation. Yet, today just as in colonial times, work serves as a valuable social anchor through which Americans strive to gain not only income, but also a sense of self-worth and respect in their community.

The Protestant Ethic

Any discussion of the importance of work to the American self conception should begin with the insights brought by Max Weber’s seminal study on *The Protestant Ethic and the “Spirit” of Capitalism*.¹³ For our purposes,

Weber's most important contribution is his identification of the Calvinist inspired belief in work as a "calling" with an intrinsic moral value.¹⁴ Under this ideal, work is not simply instrumental in the process designed to acquire wealth or support one's family. For the Calvinist-inspired Puritans, "striving for worldly goods" was certainly not "an end in itself."¹⁵ Rather, they valued "life as a task to be accomplished"¹⁶ and glorified a pursuit of one's calling as a means by which to "labor in the service of God's glory."¹⁷

The impact of the Protestant Ethic and the colonial experience on American society has been a significant and long lasting one. In her formative years, America was indeed an experiment. She was a new nation, largely removed from the social strictures of Europe and confronted with the hard challenges inherent in not only surviving, but also flourishing in a new world. More fertile ground for the Protestant Ethic could hardly be found. Confronted by harsh conditions and sometimes hostile natives, Puritan and other settlers could not tolerate those among them who would not work. As the colonial period progressed, security became less of a concern to the colonists. Yet, the religious devotion to work, reinforced by the early colonial experience, remained strong.

Early in the American experience, many religious Protestants placed "a religious value . . . on ceaseless, constant, systematic labor in a secular calling."¹⁸ In combination with strictures against over-consumption, the Protestant Ethic provided a religious justification for the acquisition of capital.¹⁹ In a young nation in which a man's social status was determined by his profession rather than his ancestry, the concept of religious morality quickly became a strong influence on American social morality.²⁰ To be more precise, the conception of work as the fulfillment of a duty to pursue one's calling has become an "essential element" of the "social ethic of capitalist culture."²¹ In so doing, the Protestant Ethic helped to "build... the modern economic order"²² that encapsulates America today. It is this economic order that determines "with overwhelming coercion" the lifestyle of everyone who lives within the capitalist system.²³ Americans living in a capitalist society have little choice but to embrace, at least partially, the Protestant Ethic. Work is a vital link between the individual and society. Those who refuse to work risk being marginalized. As Weber himself put it, "Puritans wanted to be men of the calling – we, on the other hand, *must be*."²⁴

Colonial Redux: The Frontier and Immigrant Experience

Over the course of American history, two major trends have served to reinforce the social structure crafted by the colonial experience and the Protestant Ethic: the frontier and immigration. Both have reproduced the colonial understanding of hard work as a prosocial endeavor, thereby maintaining the consociative importance of labor in American society.

For "three-quarters"²⁵ of American history, the frontier played a vibrant role in the development of the nation's social structure. America was a frontier society.

At least for a portion of Americans, the frontier effectively reproduced the hardships experienced among the early colonists and re-emphasized the obligation to work. The pioneers, finding themselves in a harsh and unforgiving landscape, were forced to rely on their own hard work for their survival.²⁶ Just as it did in the years before the Founding, work continued to play a vital role in building the social ethos.

Away from the frontier, immigration emphasized the integrative role of work and continues to do so today.²⁷ New immigrants to America entered a society while lacking linguistic, cultural or fraternal bonds to the larger social milieu.²⁸ They had only their skills to rely on and, for later immigrants, the solicitude of those who had come before them. For many, a devotion to work became the means by which to establish themselves in a new world and, eventually, to expand their social connections beyond their own ethnic group. Common nativist reactions against job losses caused by immigration support this understanding.²⁹ On the whole, immigrants have come to America to work and, notwithstanding some social resistance, have used their labor as a means to integrate into their newfound home.

Modern American Capitalism, Work, and America's Outcasts: The Conception of Work in Modern America

Despite American society's widespread embrace of the importance of work, American capitalism has not come without complications. The Great Depression warned of the dangers of unfettered capital and led to a dramatic shift in political and economic life. Yet even as America embraced the welfare state, society refused to abandon the importance it placed on work.

The advent of Social Security, Medicare and Medicaid fundamentally altered the role of government in American life, but they did so in a structure that largely preserved an ethic of hard work and self reliance, and "[t]he obligation to work is still a dominant ideology."³⁰ Social Security was designed not as a handout to the poor, but as old-age insurance for "working Americans."³¹ Social Security Benefits are based on employment; the amount of money a retiree receives is indexed to how much he or she earns over a lifetime.³² Medicare and Medicaid are designed mainly to provide health insurance to those who are too old or too infirm to be able to earn it on their own.³³ For the remainder of Americans, the health insurance system assumes gainful employment. Most insurance is provided through employers, leaving the unemployed largely uninsured.³⁴ Recent public debate about welfare and the poor has centered not on a universal right to governmental support, but on welfare recipients' potential disincentives to work,³⁵ and on the need to improve education and create employment.³⁶

Beyond the welfare debate, work retains a vital position in American public life. The industrial economy, heavily reliant on blue collar manufacturing jobs, has been replaced by a flexible service economy competing with countries across the globe. This has shifted the nature of employment away from careers spent in mills

and factories toward more mobile careers spent moving from one office job to another. Yet, the rise of the service economy has done little to decrease the emphasis Americans place on work. Americans continue to work long hours, with many white collar workers working longer hours than blue collar workers.³⁷ Long hours are no longer the exclusive province of society's lowest paid; investment bankers, lawyers, financiers, and executives all work incredibly long hours.³⁸ For the vast majority of Americans, irrespective of social station, work remains an invaluable part of social existence. Offering "discipline, identity and worth,"³⁹ work serves a vital purpose beyond the simple earning of income. Thus, those who do not work lose more than mere wages.

Societal Outcasts and the Consociative Potential of Work

A capitalist society relies, to a significant degree, on economic inequality to drive creativity and economic production. This requires that some people be relatively worse off than the average individuals in a capitalist society. The relative gains enjoyed by those who participate in America's capitalist system are beyond the scope of this Note. Of greater concern are two groups of people: the homeless and the incarcerated. They are not simply poor but, have rejected, explicitly or implicitly, the American economic and social structure or been rejected by it.

These two groups, the homeless and the incarcerated, obtain their status through a variety of means. There are a multitude of reasons why someone might end up sleeping on the streets: substance abuse, loss of family ties, mental illness, lack of job skills, poverty, lack of affordable housing, irresponsible spending, laziness, or simple wanderlust to name a few. Individuals might turn to crime for very similar reasons: poverty, a lack of job skills, mental illness, substance abuse, poor impulse control, a lack of respect for the rights of others and poor choices are all possible causes. Once imprisoned or homeless, individuals become further disaffected with and disassociated from society. This leads them to continue on the outskirts of the community, physically and psychologically, making it more difficult to repudiate crime or overcome destitution.

The multitude of reasons that a man might find himself in prison or without a roof over his head portend that no "one size fits all" policy exists for reducing homelessness or decreasing criminal recidivism. Indeed, "no single category of treatment [is] likely to be successful"⁴⁰ for all convicts or all homeless individuals. However, the social disaffiliation implies that there might be a useful common ingredient in the fight against homelessness and criminal recidivism: work. Recent success in fighting homelessness suggests that this common link between the homeless and the incarcerated can be exploited to improve America's prisons, better reintegrate convicts into society and reduce crime.

Work has a negative correlation with crime: when an ex-convict starts a new job, he becomes less likely to commit a crime, while his chances of offending increase if he is fired.⁴¹ Work helps prisoners and the homeless overcome their disaffiliated world view, by providing a "regular and regulating force"⁴² in their lives. Prison labor is useful to both inmates and society not simply because it can help impart job skills.

For prison labor programs to be successful, they must

help create a sense of self sufficiency and societal worth in the mind of the convict. Work is a vital anchor in social existence, and it "satisfies various psychological and social needs such as discipline, connectedness, regularity, and self-efficacy."⁴³ By providing these needs, work serves to provide the convict, or the homeless individual, with the means to make a lifelong connection with society. Work holds the potential to give the worker both the capacity to survive in the American economy and to create in him a sense that, by doing so, it is possible to become a self sufficient, fully engaged member of society.

A man who thinks that the rules of society are stacked against him often refuses to play by those rules, to the detriment not only of himself but also society as a whole. An individual with a job is more likely to conceive of himself as a full member of society. Successful homelessness-to-work programs do not simply make the homeless better employees; they help create citizens. Prison labor programs have it in their grasp to achieve the same. In so doing, labor programs seize not simply upon the rehabilitative potential of work, but, more importantly, its consociative promise.

In practice, creating a successful prison labor program is much more complex than this short theoretical discussion might make it seem. Locating the goal is quite different from achieving it. Throughout the history of the American penitentiary, prison labor has achieved mixed results, with its rehabilitative contributions checkered by prisoner abuse and harm to the interests of free labor. Reformers cannot institute a functioning prison labor system without reference to prison labor's muddled past.

The History of Prison Labor in America: Early Developments

Early prisons developed along two models, often known respectively as the Auburn and Pennsylvania systems.⁴⁴ Both sought to reform prisoners through an environment of self-examination created by "silence and labor."⁴⁵ In the Pennsylvania system, prisoners were held in isolation from other inmates;⁴⁶ whereas in the Auburn system, prisoners were allowed to mingle together throughout the course of the day.⁴⁷ For a number of reasons, the Auburn system won out;⁴⁸ modern prisons largely use isolation as a means not to rehabilitate, but to punish prisoners.⁴⁹

The Rise of Prison Contracting and the Convict Lease

In these early penitentiaries, labor was designed to affect the moral reform of prisoners. "Work itself was prayer."⁵⁰ Labor would keep prisoners busy and away from the evil that invariably followed idleness, but would also provide skills enabling them to become self-supporting on release.⁵¹ These prisons operated on a "state-account" model, in which the state controlled the prisoners and their production and then sold the goods produced by their labor on the open market.⁵² This simple model soon fell victim to cost considerations.⁵³ States, hoping that prison labor might make prisons self-financing, began contracting prisoner labor out to private companies in an effort to make production more efficient.⁵⁴ Under the contract system, the state retained "responsibility for inmate custody, care and discipline," while private firms oversaw the production of goods.⁵⁵ By 1867,

contracting was the dominant form of prison labor, at least in the northern United States.⁵⁶

In the South, the Civil War ravaged Southern infrastructure and destroyed the plantation economy. After the war and emancipation, many Southern industries soon found themselves lacking a captive labor force. To make matters worse, the Southern states were effectively bankrupt; prisons were just one of many things they could not afford.⁵⁷ As Southern plantation owners and industrialists confronted the prospect of a free market in labor, many landowners were only too happy to pay for prisoners to work their land.⁵⁸ Prison labor seemed to be the perfect replacement to newly prohibited human bondage; the Thirteenth Amendment itself had exempted “punishment for crime whereof the party shall have been duly convicted”⁵⁹ from its general prohibition against involuntary servitude. The convict lease system, which had begun before the Civil War, soon exploded in popularity. Unlike the contract system, convict leasing gave lessees physical control over prisoners. In addition to managing the production of goods, landowners and industrialists were responsible for a leased prisoner’s upkeep and for preventing escape.⁶⁰ States were thus absolved of nearly all costs associated with prisoner upkeep, while earning money from the lease fee. Lessees received a cheap source of labor to help support Reconstruction. State governments cut costs, thereby making punishment profitable.⁶¹ Everyone benefited. That is, everyone except those whom prison labor had been instituted to help in the first place: the prisoners.

The Decline of Prison Labor

By the Second World War, both contracting and convict leasing had been largely eliminated nationwide.⁶² This decline, particularly with respect to convict leasing, was doubtlessly motivated by concerns about the welfare of prisoners.⁶³ Yet, the driving force in this shift was largely economic.⁶⁴ As the Industrial Revolution progressed and organized labor achieved greater political power, many free laborers began to view prison labor as a menace to their livelihoods and as a degradation of their trade.⁶⁵ Southern coal miners alone launched twenty strikes between 1881 and 1900 in protest of leased prisoners working in coal mines.⁶⁶ In rare moment of concordance, both manufacturers and laborers agreed that prison labor posed a threat: labor unions feared that prisoner labor would drive down wages, while manufacturers forced to compete with companies using contract prison labor risked going out of business if they were unable to extract concessions from their own workers.⁶⁷

State governments had little interest in ending the system: contracting reduced prison expenditures and convict leasing was profitable for the state. In the end, union pressure forced the end of the contract system in the North.⁶⁸ In the South, an economic slowdown in the early 1900s soon made convict leasing unprofitable for the lessees; employers with production slowdowns were forced to pay for prisoners’ upkeep even if they could not put them to work. Thus, the system lost the support of its biggest backers and soon became unfeasible. By the middle of the 1930s, no state retained the convict lease system,⁶⁹ though there were remnants of it at the county level until the Civil Rights era.⁷⁰

The decline of the contract and lease systems did not mean the end of prison labor, merely its diminution. In the South, where leasing was no longer profitable, states soon turned to chain gangs.⁷¹ Though they were expanded after the decline of the convict lease, chain gangs, in which prisoners worked long hours under brutal conditions to build roads, had existed since the Civil War.⁷² Once again, humanitarians raised concerns about brutality toward prisoners, but it was the economy that ended the chain gang system. Seeking to create jobs in the midst of the Great Depression, the federal government prohibited the use of prisoners to build federally financed roads.⁷³

Meanwhile, those interested in the reform of prisoners continued to exalt the virtues of work for the incarcerated.⁷⁴ Yet, concerns about the impact of prison labor on the larger economy remained, forcing those prisons that retained prison labor to switch to a “state use” system.⁷⁵ As with the state account system used before the advent of the contract and lease systems, “state use” prison labor allows the state to retain physical control over prisoners. However, prison industries no longer sell their products on the open market. Instead, as the phrase “state use” implies, products of prison labor are reserved for government consumption. Two Depression-era federal laws, the Hawes-Cooper Act⁷⁶ and the Ashurst-Summers Act⁷⁷ enable states to prohibit the interstate transportation and sale of prison made goods, thereby forever sealing the fate of the contract and lease systems.⁷⁸ By 1940, “almost all prisoners worked for the state.”⁷⁹

The “state use” system remains the dominant model of prison labor today.⁸⁰ However, prison labor has changed dramatically over the years, largely depending on the purposes for which it has been employed. The history of prison labor demonstrates that the various ends of prison labor are often in tension with one another. Any attempt to understand the modern incarnation and possible future of prison labor must take as its analytical starting point the purpose for which prisoners are put to work. Almost invariably, the objectives of prison labor systems have led directly to factors, such as prisoner abuse or political opposition, that have caused the demise of prison labor. A clear hierarchy of purpose must exist in using prison labor to achieve various penological goals. A house divided cannot stand; no system of prison labor can succeed if it is employed to pursue multiple, sometimes contradictory, objectives.

To What End?

Prison labor can have multiple objectives. Taking a purposive account of prison labor is thus all-important, for prison labor programs are invariably shaped by the objectives society uses it to achieve. Historically, prison labor programs have sought to achieve one or more of six general purposes: (1) deterrence, (2) retributive punishment, (3) administrative control, (4) shaming, (5) revenue generation and restitution, and (6) rehabilitation and job training. To date, these models have largely proven lacking. Some have led to serious prisoner abuses. Others have prompted political backlashes that have greatly circumscribed the scope of prison labor programs, threatening to destroy the entire system. Those that have been successful have focused on limited aims. In choosing their objectives, these programs have emphasized the wrong

aspects of work and largely ignored its consociative value. In so doing, they have sown the seeds of their own failure.

Deterrence and Retributive Punishment

Retributivism and deterrence are two very different philosophies of criminal law, which often call for very different treatment of prisoners. With respect to prison labor programs alone, however, they have a similar impact. Self-evidently, prisoners are only forced to labor in prisons after being sentenced to a term of imprisonment. Thus, if prison labor is to have any deterrent value, this must come on top of the deterrence caused by incarceration. Likewise, if prison labor is used to punish prisoners for their crimes, it must punish above and beyond the punishment of incarceration alone.

Any prison labor program based on deterrence or retributivism will necessarily require harsh labor conditions, almost certainly without parallel in the outside world. Criminals do not fear being forced to build office chairs or make license plates in a state owned facility; they fear the loss of liberty inherent in being imprisoned. At the same time, prisoners are not forced to make license plates or clean up streets out of a sense of punishment. Convicts are forced to do so to help defray the state's costs or to prepare them for release.⁸¹ It is not prison labor that acts as a deterrent or as retributive punishment, but the harshness of that labor that does.

Hard labor for its own sake can dissociate work from any concrete purpose and thereby eliminate its meaning. Meaningful prison work can be done in harsh circumstances, but this is different from forcing prisoners to labor at a task simply because that task is difficult. Prison chain gangs working for long hours under a hot summer sun to maintain public roads may be difficult work, but these gangs are accomplishing a defined and useful purpose. This is quite different from forcing prisoners to break rocks with a sledgehammer underneath the same sun, when the resultant gravel is not put to any use.⁸² When ascendant, deterrent, and retributive impulses inevitably lead prison labor programs toward the latter, prisons begin to focus their efforts on making labor punishing rather than productive. This dissociates work from production and dilutes its ability to link the laborer with society as a whole, thereby vacating labor's greater social meaning. Labor that is designed to punish (or deter) becomes, for the prisoner, nothing more than punishment.⁸³ If society hopes to reintegrate prisoners back into the workforce upon their release, little could be more counter-productive.

Ideals of retributivism and deterrence must inform the construction of any prison labor program, but they cannot become prison labor's primary goals. Convicts might prefer a life of total idleness in prison to one of forced labor. For these prisoners, any work program will make prison less enjoyable and therefore help punish crime and deter recidivism.⁸⁴

The need for deterrence and punishment counsels against the total elimination of prison labor, but deterrence and retributivism need not be the driving forces behind prison labor. In creating work programs, policymakers should rely on other aspects of prison, including loss of liberty, separation from home and family, and strict supervision of day-to-day activities, to ensure that prison both punishes and deters. They can then employ prison labor to further other objectives.

Labor as a Shaming Punishment

Shaming punishments stigmatize and debase offenders not only to express society's condemnation of an act, but also to induce contrition on the part of the offender.⁸⁵ Such penalties come in many forms – from forcing adulteresses to wear signs labeling themselves as such,⁸⁶ to billboards naming men convicted of soliciting prostitutes⁸⁷ – but, occasionally, shaming punishments involve labor.

Widespread in the early 1900s and growing in popularity in recent years,⁸⁸ chain gangs are the most famous example of prison labor as a shaming punishment. Chain gangs can fulfill a number of penological goals. Working outside on a hot summer day might deter some criminals from committing crimes in the first place. If inmates must work outdoors to help defray the societal cost of their imprisonment, chains might be necessary to prevent escape. Wardens might also employ chain gangs to punish those inmates who behave badly while in prison.⁸⁹ However, much of chain gangs' efficacy in achieving these goals relies on their larger shaming function. Prisoners assigned to chain gangs often do not labor in anonymity; they work on public roads in uniforms clearly demarcating them as offenders.⁹⁰ Using labor to shame prisoners in such a way can inhibit prison labor's ability to achieve rehabilitative or consociative goals.

In theory, chain gangs enable prisoners to labor outside prison walls while perhaps also inducing contrition for wrongful acts. It is not the work that chain gangs do that is shaming, but the manner in which they do it.⁹¹ The distinction between security precautions and shaming can sometimes be a fine one. Chains may be necessary to prevent prisoner escape. Uniforms are likely necessary to allow officials to monitor prisoners and to prevent them from blending in with the public. Yet, emphasis on chain gangs' shaming function, rather than their ability to enable prisoners to provide needed services outside prison, will inevitably have untoward consequences for inmates' conception of work. If work does have consociative potential, its pro-social effects are directly threatened by the use of labor to shame offenders.

Shaming punishments work through a combination of inclusionary and exclusionary social controls on offender behavior.⁹² Inclusionary controls work to reinforce the bonds between individual offenders and wider society, while exclusionary controls reinforce society's bonds by excluding offenders against societal norms. Exclusionary controls, which stigmatize and scapegoat the offender, are "symbolically much richer" and easier for society to sustain than are inclusionary, or re-integrative, controls.⁹³ Thus, instead of inducing criminals to obey the law and reintegrate into society, shaming often achieves expressive condemnation of an offender through social exclusion.⁹⁴ Chain gangs fall into this trap. As a result, the shaming aspect of prison labor often works at cross purposes with its consociative goals.

Administrative Control

Wardens have long realized the administrative benefits of having prisoners spend part of their day at work.⁹⁵ In addition to the "correctional value of work," prison labor programs hold "administrative advantages in terms of security and discipline, not to mention inmate and staff morale." Work requires

pline, not to mention inmate and staff morale.”⁹⁶ Work requires regimented days, thereby helping prisoners avoid idle mixing with fellow prisoners that might lead to trouble. Good jobs can incentivize good behavior, while less enjoyable tasks might be assigned to more troublesome inmates. In the absence of prison labor, near chaos can ensue. As one warden stated during the prison work stoppages of the Great Depression, “[t]he enforced idleness of a substantial percentage of able-bodied men and women in our prisons . . . militates against every constructive objective of a prison program. It is one of the direct causes of the tensions which burst forth in riot and disorder.”⁹⁷

To be sure, prison labor can make the day-to-day administration of prison substantially easier.⁹⁸ Yet, it can do more. If the object of prison labor is simply to keep convicts busy, prisoners “will have learned nothing” at the end of the day.⁹⁹ With imagination on the part of prison administrators, menial tasks might be made meaningful for prisoners.¹⁰⁰ Nearly any type of structured activity will bring administrative benefits to prison life. Prison labor programs with grand ambitions, rehabilitative or otherwise, do not have fewer institutional management advantages; they simply cost more than programs directed at “busywork”¹⁰¹ alone.¹⁰² Thus, policymakers should judge the efficacy of prison labor by whether a program’s benefit to society, over and above administrative control, exceed the cost of giving prisoners nothing more than time-consuming menial tasks.

Defraying Crime’s Cost to Society

Economic considerations have long been a driving force in the development of prison labor. These considerations have several motivations: (1) prison labor might enable prisoners to earn money to make restitution to their victims; (2) prisoners should pay for their room and board and fulfill social obligations, such as child support,¹⁰³ just as those who have not committed crimes must do; and (3) prison work might make prisons self supporting or, as with convict leasing, profitable. Each of these motivations affects prison labor programs differently.

Using prison labor to help convicts pay their debt to society springs, in part, from an idea of restorative justice, a concept of justice predicated, “to some extent[, on] making right the wrongs done.”¹⁰⁴ Under a restorative system, offenders use mediation, community service, and financial restitution to help restore their victims, as best as possible, to their condition prior to the offense.¹⁰⁵ Prison labor, by providing convicts with a source of current income and skills for future use, can assist in achieving restorative goals.

Prison labor can also do much to offset the state’s substantial costs in housing and feeding inmates for long periods of their lives.¹⁰⁶ Demands to reduce imprisonment costs through inmate labor stem from two distinct rationales: a belief that it is fundamentally unfair for criminals to be excused from their basic social obligation of self-support and a simple desire to reduce government outlays on prisons. Significant public support exists for forcing inmates to do some kind of work while in prison. Many citizens simply want prisons to ensure that offenders behave responsibly;¹⁰⁷ a program forcing inmates to work to help support themselves comes across as a good first step.¹⁰⁸

Given the large amount of untapped human capital available in American penitentiaries, it is no wonder that prison self-sufficiency through inmate labor has “proved irresistible to

policymakers.”¹⁰⁹ Yet, any prison labor program whose main focus is making punishment less costly to the state, or perhaps even profitable, should “be greeted with concern.”¹¹⁰ Punishment, the legitimate use of force, is a monopoly belonging to the state.¹¹¹ For a self-interested state, making punishment profitable incentivizes more punishment.¹¹² Inexpensive imprisonment could also lead to the further expansion of prisons, as opposed to alternative forms of sanction, something with which many Americans would be rightfully concerned.

As the convict leasing era makes all too clear, history should give any politician pause before proposing a cost-driven prison labor program. Problems caused by a desire to use inmate labor to cut costs are readily apparent. Whether through convict leasing or state operated prison farms, the cost-cutting impulse has led to prisoner abuses “worse than slavery.”¹¹³ These abuses, though surely influenced by racism and the legacy of slavery, were a direct result of the cost saving impulse. States abdicated responsibility over prisoners to save money, and lessees, in possession of prisoners for a set period of time, sought to get as much work out of them as humanly possible.¹¹⁴ Inevitably, this led to abuse. To be sure, modern prisoners, largely under state rather than private control and endowed with a much wider range of constitutional rights than their leased predecessors, would not face conditions nearly as harsh.¹¹⁵ Yet, the impulse to increase prison labor profitability will increase the likelihood of prisoner abuse or exploitation by providing incentives to overwork inmates.

History demonstrates that cost-driven prison labor systems also lead to conflict between prisons and free workers. Prisons seeking to raise funds through inmate labor will seek to compete on the largest possible market. Inevitably, prison-made goods begin to compete, in price and quality, with regular goods. Prisons seeking profit thus seek to compete with, and displace, goods or services provided by free labor. This unavoidably prompts political conflict and may lead to widespread restrictions on prison labor.

Almost any inmate labor, even if its products are reserved for “state use” alone, will have an impact on the wider market for goods and services. Most work done by prisoners is work that others could have done. Prison labor programs that seek to maximize their return will leave a much larger footprint on the wider economy, in particular on the labor market.

The risk becomes inciting a backlash against prison labor, leading to restrictions on inmate labor that might impede prison work programs’ ability to accomplish penological, as opposed to budgetary, goals.

Rehabilitative Labor and Vocational Training

“Rehabilitation is the central premise of the modern prison as an institution.”¹¹⁶ Rehabilitation programs come in many forms, built to combat the various social and psychological problems common to criminals. These include education programs, substance abuse treatment, psychiatric treatment, faith-based programs, and work or vocational training programs.¹¹⁷ Here, I examine only the use of labor as a means either to rehabilitate inmates, or to provide them with the vocational training necessary to make them employable outside prison.¹¹⁸ Rehabilitative labor programs have a great deal of practical overlap with vocational training, but the distinction between the two is meaningful. From its very conception, penal labor was designed to prepare prisoners for a return to society on the outside as better men. Work as inmates, it was

hoped, would “teach new habits, and lead to a recovery of lost virtue.”¹¹⁹

Traditional rehabilitative labor programs, such as those instituted in America’s first penitentiaries, are designed to instill the “habits” and “virtue” necessary to make inmates better men upon their return to free society.¹²⁰ Vocational training programs concern themselves less with inmates’ virtue, preferring instead to focus on imparting the job skills that many prisoners lack.¹²¹ Modern prison labor programs, though part and parcel of a wider rehabilitative effort, belong almost exclusively to the latter category. No longer do prisons view work as a character changing endeavor. Instead, prisons focus their main rehabilitative efforts in education, psychiatric and drug treatment programs.¹²² Labor is now used as a vocational, rather than a purely rehabilitative, tool.

As it is concerned with preparing inmates for reintegration into society, rehabilitation is necessarily focused only on those prisoners who will one day be released from their bonds. Work might carry other benefits for the over 130,000 inmates on death row or sentenced to life without parole,¹²³ but rehabilitation programs are unconcerned with them. Instead, the success of any rehabilitation program must be judged based on the recidivism rate among program participants who have since been released from custody. Results have been, at best, mixed. A number of studies, citing decreased recidivism, have claimed rehabilitation and vocational training as success stories. A closer look at many of these studies reveals that methodological biases, most notably selection problems, lead them to overstate results that are, in reality, far from conclusive.¹²⁴

The unfulfilled promise of rehabilitation has led some critics to call for a redistribution of resources away from rehabilitative prison labor programs.¹²⁵ If prisons cannot rehabilitate, they argue, America would be better served by using harsh prison sentences to deter crime and by increasing the use of intermediate punishments¹²⁶ for less dangerous offenders.¹²⁷ Others continue to defend the current conception of rehabilitation with few, if any, reservations.¹²⁸ Neither approach is optimal. To rely on deterrence alone and eliminate rehabilitation programs altogether would be to throw the baby out with the bath water. Underemphasizing the importance of convict decision making in avoiding recidivism and blaming crime on societal factors alone is nothing, if not naïve. If rehabilitation is to be successful, it must strike a *via media*, emphasizing not merely the rehabilitative value of counseling, education and drug treatment, but also the rehabilitative and consociative value of work. Prison labor programs must place a larger value on adjusting inmate attitudes and behavior so that ex-convicts can function within society without resorting to crime. Work can be a crucial component to this transition.

Prison Labor Today: Conflicted Goals, Limited Promise

Prison labor did not end with the fall of the contract system and the convict lease. Four broad categories of prison labor remain. First, many prisoners work in “institution work programs”¹²⁹ to support the day-to-day operation of prisons, in cafeteria, laundry or janitorial positions. Second, some states now use prisoners to complete public works projects, most notably cleaning highways.¹³⁰ Third, “state use” labor remains legal despite the Ashurst-Sumners and Hawes-Cooper Acts.¹³¹

Many states retain state use prison labor to produce license plates, office furniture and other goods for state government consumption.¹³² The federal government’s state use program, known as Federal Prison Industries (FPI) or UNICOR, is by far the largest of any state use program, employing 17%¹³³ of the two hundred thousand federal inmates.¹³⁴ Lastly, in 1979 Congress created a pilot program, called the Prison Industry Enhancement Certification Program (PIECP), which reintroduces contract prison labor.¹³⁵

Institutional work assignments are a useful means of administrative control, as they give prisoners something to fill their days and provide a means of incentivizing good behavior. These jobs, which include janitorial and food service work, generally do not include a significant degree of vocational training.¹³⁶ Using inmates to complete these jobs forces prisoners to contribute to their upkeep and allows prisons to operate with a leaner payroll, saving the taxpayers money. Many states and the federal government require labor from all inmates who are medically able to provide it.¹³⁷ However, day-to-day operation of a prison cannot possibly require enough labor to fully employ every prisoner, or even the majority of them. Thus, most prison labor consists of “busywork”¹³⁸ designed simply to keep prisoners occupied.¹³⁹ Even then, the average American prisoner’s workday consists of a mere 6.8 hours.¹⁴⁰

In addition to working inside prison walls, some states employ inmates outside of prisons as part of public works or community service programs.¹⁴¹ Prisoners are able to help repay their debts to society by providing a service, such as cleaning public highways, that the public might not otherwise be able to afford. Such projects may include the use of chain gangs. The use of prisoners to complete public works projects is generally limited by the logistical problems involved in supervising significant numbers of inmates outside of prison grounds. Managing prison labor is decidedly easier inside the prison walls.

“State use” labor programs are more formal than the simple tasks expected of all prisoners; they offer inmates steady work, extra income and “marketable job skills” that are useful upon release.¹⁴² They are more popular than institutional work assignments and often have long waiting lists filled with inmates looking for jobs.¹⁴³ These programs assist in administrative control; misbehaving inmates quickly lose the opportunity to work for FPI or its state counterparts.¹⁴⁴ They also further restitution goals. Prisoners’ wages can be garnished to fulfill outstanding financial obligations, such as child support or victim restitution.¹⁴⁵

Mandatory source status requires the government to purchase their products, as long as their prices are competitive.¹⁴⁶ Yet, these labor programs occupy only a small number of prisoners. However, 17% of federal prisoners work for FPI,¹⁴⁷ a much smaller percentage of state prisoners are similarly employed, meaning that only 6% of American prison inmates are employed in prison industry.¹⁴⁸ The fact that these labor programs can only be used to produce goods for government consumption is fatal to their expanded growth. Whereas, under the contract system prison labor could be used to produce an extremely wide variety of goods and services, the state use system constricts inmate labor to a small subset of industries common to government procurement, most notably office furniture. This concentrates prison labor’s impact on a small subset of the

American economy. Though the current inmate work force is very small, at 0.02% of the national work force,¹⁴⁹ “state use” policies concentrate their impact on a small group of industries, increasing the likelihood of economic damage to the private sector.

FPI, like its state counterparts is, “first and foremost, a correctional program.”¹⁵⁰ It is not a business, but instead seeks to help offenders transition into becoming law-abiding members of society.¹⁵¹ Yet, the vast majority of prisoners do not participate in formal labor program. They thus fail to reap the rehabilitative benefits. Prison industries cannot achieve their rehabilitative aims without expanding their operations. “State use” policies largely prevent inmate work programs’ expansion into new industries. Existing prison industries cannot expand their operations in “state use” industries without placing an undue burden on certain sectors of private industry.¹⁵² Thus, the “state use” system is caught between the proverbial rock and hard place; it must increase the number of inmates involved but cannot do so without damaging the private sector.

Perhaps recognizing this dilemma, Congress created the Prison Industry Enhancement (PIE) program. The PIE program enables up to fifty jurisdictions to obtain certifications from the federal government exempting them from restrictions on the interstate sale of prison-made goods.¹⁵³ As of early 2008, thirty-seven states and four county-based correctional institutions have received certifications allowing inmates to work for private companies.¹⁵⁴ Prisoners are paid a market wage, up to 80% of which is deducted to pay for prisoner upkeep and to fulfill the prisoners’ financial obligations.¹⁵⁵ However, despite its widespread nature, the PIE program employs a minute number of inmates: approximately four thousand prisoners participate in PIE certified programs nationwide.¹⁵⁶ This is an extremely small percentage of the over two million people currently incarcerated in the United States. Thus, even if the PIE system does effectively reduce recidivism, its impact is greatly limited by the low number of contracted inmate employees. America’s modern prison labor system is far from successful. The product of conflicting penological goals and economic forces, modern prison labor manages to do little more than improve administrative control while harming America’s office furniture industry. The use of labor to deter crime and shame or punish prisoners reduces the rehabilitative efficacy of prison labor and prompts prisoner rights litigation and activist backlash that could threaten the entirety of American prison labor. “State use” policies multiply prison labor’s economic harm by concentrating its impact on a few sectors of the economy. Using work simply to keep prisoners busy relegates most inmates to menial tasks with little productive meaning or rehabilitative value. Significant reform is required.

Prison labor is a political hot button issue, affected by prisoners’ rights litigation, populist “tough on crime” movements and entrenched interest groups. When few prison labor programs have proven themselves unequivocally successful, this makes policy experimentation quite difficult. Rather than cabin their work inside the prison labor rubric, policymakers would be wise to look to an analogous situation: homelessness-to-work programs. Though sometimes politically controversial, many anti-homelessness ventures have been able to avoid the political hurdles facing prison reform. They are thus able to take a more experimental approach. By so doing, they shed new

light not only on the fight against homelessness, but also on a new path for prison labor.

Homelessness: A Prison Without Walls: The Homeless in America

Though it strikes many as a uniquely modern problem, homelessness has been a part of American society since the colonial era.¹⁵⁷ In the decades between the Civil War and the Second World War, homelessness emerged as a national problem.¹⁵⁸ To describe this phenomenon, new words entered the American lexicon. The “hobo” was a migratory worker, bouncing across the country from job to job.¹⁵⁹ “Tramps” wandered from town to town, but rarely worked.¹⁶⁰ Meanwhile, “bums” settled in to skid row and neither worked nor traveled much.¹⁶¹

World War II marked a significant turning point. Economic changes concomitant with the end of the Great Depression, combined with the aging population of many homeless men, soon brought an end to widespread wandering. The rate of homelessness declined substantially. Tramps and hobos became a fixture of the past; those that remained homeless settled down in major urban centers.¹⁶² Ever since, homelessness has been an urban, rather than a national, problem. “Mass homelessness”¹⁶³ in major cities appeared in the 1970s and 1980s, as urban poverty expanded, deinstitutionalization left more mentally ill living on the streets,¹⁶⁴ Vietnam veterans failed to readjust to life on the home front, drug abuse increased, and the federal government cut social benefits.¹⁶⁵ Though the rate of homelessness amongst Americans has not approached that of the early Twentieth Century, these “new homeless”¹⁶⁶ have seemingly become “a permanent feature of postindustrial America.”¹⁶⁷

Viewed as a local problem confined to large cities, homelessness has not attracted the government resources that a national problem of similar gravity might. Yet, it is a problem of immense proportions. In 2005, federal researchers determined that over seven hundred and fifty thousand people were homeless on a given night, 45% of whom were unsheltered.¹⁶⁸ The number of people who have experienced homelessness at some point in the past year might be several times higher.¹⁶⁹ Nearly 25% of the homeless population is under seventeen years of age.¹⁷⁰ In some places, families may constitute as much as half of the homeless population.¹⁷¹ This often comes as a surprise to the public, as homeless families, who spend more time in shelters and less time on the street than do individuals, remain largely out of the public eye.¹⁷²

Not Simply ‘Lazy or Crazy’: The Many Causes of Homelessness

Like criminality, homelessness comes in many forms and is a result of many factors. Homelessness itself is best divided into three general patterns: temporary, episodic and chronic.¹⁷³ Temporary homelessness is nothing more than a brief period of homelessness, likely caused by unexpected circumstances such as a house fire or a sudden and severe loss of income.¹⁷⁴ Episodic homelessness, on the other hand, encapsulates brief periods of homelessness occurring repeatedly in the life of an individual.¹⁷⁵ Women or adolescents periodically fleeing from bad home environments are likely to experience episodic homelessness, as are the underemployed and others who are on the borderline of self-sufficiency. The third category, chronic

homelessness, is more in line with the popular view of homelessness; it incorporates those who are homeless for a year or more¹⁷⁶ and are much more likely to be mentally ill, abuse drugs, and be disconnected from society. The chronic homeless, though they are the minority of homeless Americans, consume a significant amount of anti-homelessness resources.¹⁷⁷ It is the chronic homeless, and those that run the risk of becoming chronically homeless, that will be the focus of this Note, for it is they who most closely mirror the social condition of the incarcerated.

Why Do Individuals Become Homeless?

In his seminal examination of the hobo, sociologist Nels Anderson declared that “no single cause can be found to explain how a man may be reduced to the status of... homeless.”¹⁷⁸ Over eighty years later, this remains the case. As with the debate over what might lead a person to turn toward (or away from) crime, the debate over the causes of homelessness can be divided into two broad categories: (1) structural problems and (2) individual choices and vulnerabilities.¹⁷⁹

Structural, or sociological, explanations emphasize that aspects of American social structure as a whole, rather than of individual homeless persons, lead to homelessness. Common points of emphasis for the structural argument include a dearth of low-cost housing,¹⁸⁰ cuts in welfare benefits,¹⁸¹ the weakening of family structures,¹⁸² economic downturns,¹⁸³ and the deinstitutionalization of the mentally ill.¹⁸⁴ Mirroring those who emphasize poverty as a causal factor in crime, structuralists argue that homelessness in America is best addressed by focusing policy on meta-issues rather than the individual behavior of the homeless.¹⁸⁵ Combating homelessness thus requires measures to increase employment and wages, improve welfare, and subsidize housing. Since the homeless are in such a condition through little fault of their own, to focus on their individual behavior is to blame the victim.¹⁸⁶

Yet, for those concerned with the individual causes of homelessness, it is precisely this behavior that is of the utmost importance.¹⁸⁷ To be more precise, they seek to focus on a combination of individual vulnerabilities and poor decision-making among individuals who become homeless. Many homeless individuals abuse drugs and alcohol. Others need psychological treatment. Still, more simply cannot manage their personal finances – they cannot support themselves. Some suffer from physical disabilities or are simply unable (or unwilling) to keep a job. They are alienated from friends and family. In other words, the homeless are simply “frustrated and angered by personal lives out of control... entrapped by alcohol and drug addictions, mental illness, lack of education and skills, and self-esteem so low it was often manifested as self-hate.”¹⁸⁸

No Panacea, but Perhaps a Treatment

The myriad causes of homelessness make combating homelessness difficult. Here, I make no effort to discern the victor in the structural problems versus the individual vulnerabilities debate. Surely, it is only a matter of emphasis, as both structural and individual factors have some impact on homelessness. I make no judgment on the effects of housing policy or welfare on homelessness. Instead, it will suffice to point out that those anti-homelessness programs that have focused on individual behaviors have achieved a significant level of suc-

cess in reintegrating homeless individuals into society. This success relies on one overarching concept: an effort to use the consociative impact of work as a means to overcome homeless individuals’ disaffection with society.

For the homeless, the path to redemption is rife with a litany of social, psychological and physical problems.¹⁸⁹ Exactly how the homeless might attempt to overcome these hurdles is beyond the scope of this Note; the topic has filled countless books and policy memoranda. Yet, for those homeless individuals who are able to kick a drug habit, earn a G.E.D. or receive needed psychological treatment, there remains the issue of holding that ground which they have gained. In order to stay off the streets, the homeless must (1) become self-sufficient and (2) reconnect with society as a whole. Anti-homelessness success stories demonstrate that work is the lynchpin to both of these processes.

Putting the Homeless to Work: Punishment or Empowerment?

At a Salvation Army run homeless shelter in New York City, a sign reads “Your Way of Life Does Not Work. If It Does Work, What Are You Doing Here?”¹⁹⁰ Anti homeless programs reject sociological explanations for homelessness; “housing alone is not the solution.”¹⁹¹ The individual choices and actions of the homeless individual remain paramount. However, these programs seek to correct, not simply punish, these choices and actions. They do so by focusing on the impact that social disaffiliation has on the actions of the homeless.

Disaffiliation from society “is the most universal characteristic of homelessness.”¹⁹³ The homeless are not “just like us.”¹⁹³ Many people suffer economic crises or drug abuse without losing their homes. The homeless are in a fundamentally different position, and “homelessness is a metaphor for profound disconnection from other people and institutions.”¹⁹⁴ The homeless are disengaged from their social support systems; they are disaffiliated from family, friends, church and community.¹⁹⁵ Like the convict, they bear the stigma of being societal outcasts.¹⁹⁶ Their disconnectedness results in “a set of behavioral and attitudinal stances” best termed “drift.”¹⁹⁷ Though they lack discipline and direction, “most... want to live self-sustaining lives.”¹⁹⁸ Homelessness-to-work programs seek to enable the homeless to do exactly that.

A Useful Model

By emphasizing the importance of self-sufficiency to successful societal reintegration, homelessness-to-work programs use the consociative value of work to help the homeless improve their station in life. Done correctly, work programs can provide both discipline and direction. Work enables the homeless to reconnect with society, to regain self-confidence, and to build new social support systems. This, in turn, serves to prevent them from backsliding into homelessness.

The Doe Fund is a New York City based charity that, through a program entitled “Ready Willing and Able” (RWA), seeks to help formerly homeless men and women become self-sufficient members of society.¹⁹⁹ By focusing on the importance of work, RWA has been able to help more than 3,000 men and women live drug-free, self-sufficient lives,²⁰⁰ secure employment at any one of dozens of private companies,²⁰¹ and obtain self-supported housing.²⁰²

By using the consociative impact of work to reconnect

the homeless to a community “they once felt apart from,”²⁰³ RWA overcomes the disaffiliation that many homeless individuals feel. Through a series of tough requirements for its participants, RWA has been able to achieve a level of success unequaled in larger anti-homelessness programs. As a first step, participants agree to give up any entitlements they receive and live for a month in an RWA facility, working four hours a day under close supervision in exchange for room, board and a small stipend.²⁰⁴ After one month, participants secure full time employment in one of RWA’s paid employment and work training programs. Working as garbage men, street cleaners, apartment repairmen, and in the culinary arts, RWA participants earn a wage of \$7 to \$8 per hour and are forced to contribute both toward their upkeep and toward a personal savings account.²⁰⁵ If they demonstrate a work ethic and an ability to remain clean and sober, participants enter the third and final phase of the program.²⁰⁶ Here, participants participate in a six-week job preparation program, learning computer skills and other tools useful for full time private sector employment.²⁰⁷ Upon obtaining independent, unsubsidized housing and earning a full time position, participants may graduate from the program. On average, RWA participants spend ten months in the program²⁰⁸ and earn \$9.45 per hour upon graduation.²⁰⁹

Throughout the process, RWA does more than simply impart job skills. Rather, the program works because it uses work as a means by which to break down barriers between the homeless and society as a whole. Case managers work closely with participants to reconnect with family and loved ones, pay past debts and fulfill overdue obligations such as child support.²¹⁰ Rather than flee from their past problems, participants are forced to confront these issues and are given the support necessary to work their way toward a new life. The opportunity to keep a job does more than simply provide income; it enables participants to reconnect with society, to gain a sense of self-worth and societal importance through work. As a case in point, RWA graduates continually cite the “respect” given to them as a result of their work and the sense of community inherent in the program as major reasons for their success.²¹¹

RWA is not alone. Other anti-homelessness ventures have created similar programs, emphasizing the consociative value of work to varying degrees. Homes for the Homeless²¹² and Project Renewal,²¹³ both New York charities, run similar programs. New Directions, Inc. has a similar program for homeless veterans in Los Angeles.²¹⁴ These efforts have not put an end to homelessness in America, but they have provided a blueprint useful for reintegrating society’s downtrodden. If this model can work for the homeless, it might also serve to reintegrate a similarly disaffiliated population: the 2.3 million inmates in America’s prisons. After all, over 75% of the homeless men who enter Ready, Willing and Able’s program have a history of incarceration.²¹⁵

What Prison Labor Can Learn From Homelessness-to-Work Programs: The Impact of Social Disaffiliation

As the high numbers of homeless ex-convicts might suggest, inmates and the homeless are, in many ways, similarly situated. Drug and substance abuse run high in both groups. Untreated mental illness is found with a higher than average prevalence among both criminals and the homeless. In both, kinship ties are often weak. Friends are rare. Both the inmate

and the homeless person have failed, for one reason or another, to live up to society’s expectations. As such, they are quick to believe that society has failed them. For the convict and the homeless man, life simply seems unfair. This inevitably results in social disengagement. They exist in a world separated from the mainstream, physically, emotionally and psychologically.

If society has any interest in preventing ex-convicts from returning to crime, policymakers must focus on reintegrating the disaffected into society. Ready, Willing & Able and other anti-homelessness programs demonstrate that disaffected individuals can gain a sense of self-esteem and societal worth through work. Similar success is possible in prison labor. Inmates, like the homeless, are disaffiliated from and disaffected with society. Through the consociative influence of work, they have the potential to overcome the gulf between them and their fellow citizens.

Providing education and drug treatment are useful first steps, but, alone, neither will address the reasons why an individual turns to drugs or crime in the first instance. Criminals commit crimes because they believe that society’s strictures do not apply to them or because they believe it is simply not worth obeying the law. They conceive of themselves as, at least partially, outside of and separate from the law abiding world.²¹⁶ This perception is only reinforced by time spent in prison, physically isolated from society. Prison establishes routines “alien to life in the community.”²¹⁷ Upon release, if an inmate still feels no connection to society, he is more likely to return to crime. An individual who believes that success is possible through lawful behavior is, indeed, more likely to comport himself according to the law’s demands. Work can significantly affect this perspective, for the better or the worse. Prison labor programs can reinforce the bonds between an inmate and society. Labor can also reinforce the walls between the two.

Purpose Matters

Simply putting prisoners to work is insufficient. Instead, prison labor must be carefully directed toward a specific purpose: the reduction of recidivism through the reintegration of inmates into society. Hence, prison labor programs must particularly emphasize the consociative aspect of work.

As Part III made clear, prison labor has a multitude of purposes, often operating in conflict with one another. The history of prison and homeless labor demonstrates that the purpose for which people are put to work goes a long way toward determining the impact of their labor.

Labor imposed as punishment for crime or vagrancy may be just in terms of moral dessert. Sentences of hard labor may deter crime. Yet, neither does much to improve the position of the laborer. Labor that, on top of a prison sentence, is sufficiently harsh to further punish or deter crime will likely not impart new skills to the inmate. It will certainly result in inmates conceiving of work as a punishment, and as something to be avoided, rather than as a vital step toward self-sufficiency. Surely, homelessness is not so rewarding that labor is needed to deter it. Further, punitive labor for the homeless simply reinforces the notion that society does not care for them. From their perspective, the same society from which they have been cast out only concerns itself with their plight to punish it. Punitive labor is therefore dissociative rather than consociative.

Labor used to shame inmates operates in a very simi-

lar way. Chain gangs fail to exploit the consociative value of work. Instead, they force prisoners to bear the stigma of their status as inmates while working on public roads and in other places where they are likely to confront members of the public. Contrast this with RWA, whose participants don recognizable blue jumpsuits with “Ready Willing & Able” stitched across the back while picking up garbage and sweeping the streets of New York City.²¹⁸ Both entail contact with the public, both require laboring in clearly demarcated attire, but only chain gangs involve shame. RWA members frequently cite their interactions with the public as encouraging and uplifting experiences, far from shaming.²¹⁹

Thus, it appears that a system can be created in which prisoners, perhaps only the non-violent ones, can do public works projects in a uniform without shame. To eliminate the shaming aspect, emphasis must be placed not on the prisoner’s status as inmates, but on their taking steps to improve themselves and reintegrate into society. Under the current system of chain gangs, this is not possible. However, if prisons rewarded, rather than punished, inmates with the prospect of working outside the prison walls, labor on a road gang (without chains) could be an empowering experience.

The employment of prison labor to defray societal costs can work both toward and against consociative ends. Forcing homeless men and women to work to pay for their beds struck many as simply another hardship upon already down-trodden individuals. Criminals may garner less public sympathy, but labor programs designed merely to cut the costs of imprisonment will likely strike the inmate as exploitative.

This is the wrong impression, as it is fundamentally unfair for criminals to be able to live without supporting themselves, while law-abiding citizens must work. Regardless, it is the mindset of the incarcerated individual and his relationship with society that impacts his future behavior. If prison labor’s primary purpose is to reduce prison costs in the short term, rather than to help reintegrate prisoners into society, inmates will see work as an alienating feature of their incarceration.

Of course, cutting costs and promoting societal reintegration can go hand-in-hand. The question is simply one of emphasis. A reduction in criminal recidivism reduces the long term cost to society. Moreover, useful work that gives an inmate a sense of purpose will inevitably produce goods that have value, which can, in turn, be sold on the open market or used by the state. RWA participants clean streets, renovate apartments, work as exterminators and do office work for a wage.²²⁰ Part of their money goes toward room and board.

An analogous system of prison labor would thus bring in money to defray the costs of imprisonment. Prisons might obtain smaller cost offsets in the short term than if they cared little for the consociative value of work, but inmate labor will reduce their costs nonetheless.

Vocational Training and Education Alone Will Not Suffice

Those most concerned with the wellbeing of prisoners in our modern penal system have often focused on rehabilitating inmates so that they can lead successful lives on the outside. Though well intentioned, this approach is wanting. The rehabilitative aspects of such programs have ignored the rehabilitative value of work, instead focusing on improving prisoner’s life skills through education as well as substance abuse and psycho-

logical counseling.²²¹ Work only comes into play as a way to fill prisoners’ time and a method by which to impart job skills. While vocational training, education and counseling are necessary, prisoners might garner further benefit from work itself. The earliest American prisons used work to change the habits and values of prisoners.²²² Modern prisons use it merely to provide new opportunities.

Vocational programs fail to comprehend the importance of individual decision making on crime. For vocational programs to reduce recidivism significantly through the simple provision of job skills and education, crime must be a result of a lack of opportunity. To be easily quelled by vocational programs alone, crime must not be a matter of individual choice,²²³ but a learned behavior arising from a lack of opportunity and “impersonal forces in society.”²²⁴ To be sure, crime is higher in impoverished neighborhoods than it is in wealthy ones. It does not follow that a lack of opportunity causes crime. Crime remains the result of individual acts, which necessarily follow from individual choices.

It is one thing to teach a man how to work, it is quite another to convince him why he should work. To be sure, if they are to remain outside the prison walls, ex-convicts must have the capacity to earn a living without resorting to crime. This capacity alone will not suffice, however. Sufficiently disaffiliated from society to resort to crime in the first place and physically and socially separated from their fellow citizens during their imprisonment, prisoners must learn to believe not only in themselves, but also in society. A critical stitch in the American social fabric is a strong work ethic. In a capitalist society, it is through work that individuals connect with those around them. If prisoners do not learn to work, they will remain disconnected from wider society, believing that society’s rules are somehow unfair or inapplicable to them. Without both the capacity and the desire to work, prisoners will never be able to live a life without crime. To recall Weber’s warning: “The Puritans wanted to be men of the calling – we, on the other hand, *must be*.”²²⁵

Using Consociative Labor to Create a Prison Labor System That Works

A prison labor system modeled on the consociative value would look quite different from what exists today. First, it would have to be significantly expanded. Today’s state use systems and the small PIE program reach only an extreme minority of inmates. The federal government’s prison labor system, Federal Prison Industries (FPI), is the largest of any state use system, but it employs fewer than one in five federal prisoners.²²⁶ A reformed prison labor system must strive to involve, in some way or another, all inmates. This would require a significant transition, but is likely not as difficult as it seems at first blush.

A state use system cannot suffice to create a consociative system of prison labor. Instead, prison labor reform must take a holistic approach. If America’s inmates are going to be rehabilitated through consociative punishment, the prison labor system must be all encompassing. It cannot be a reform simply of America’s prison industries, whether state use or contract, but instead a reform of *all labor* done by prisoners. Currently, work in prison consists of: (1) institutional work assignments, (2) public works projects off prison grounds, often done in chain gangs, (3) “state use” prison industries and, (4) under the PIE program, inmate labor contracted to private companies. In

order to harness the consociative potential of work, prison labor programs should be reconstituted to combine all four of these areas into one labor system.

In some areas, the solution might simply be an issue of emphasis. Many prisoners spend a portion of their day sweeping floors, landscaping, serving food in the prison cafeteria, or otherwise contributing to the day-to-day operations of the prison.²²⁷ Often, these institutional work assignments are approached by prison administration as simply a means by which to keep the prisoners busy. For the most hardened criminals, and for those who will never be released, this may be all that prison labor has to offer. Yet, for the majority of prisoners, institutional work can be harnessed to provide a greater output. Much of this work has clear counterparts in the outside world – janitorial, landscaping and food service work are prevalent low wage jobs. By approaching these work assignments as training for life on the outside and not simply as busy work, prisons can imbue these tasks with meaning.²²⁸

Institutional work assignments are a vital part of a holistic reform of the prison labor system, for the majority of prison work will be in such assignments. In those prisons with operating prison industries, whether for state use or contract, a waiting list often exists for employment.²²⁹ If certain jobs are preferable to inmates, they should be used as incentives, both for good job performance and for good overall comportment. Similarly, less enjoyable jobs should be given to discourage poor performance. Since part of the rationale behind prison labor is to train prisoners without skills to become better workers, simple productivity cannot be used as the sole marker of success. Instead, a more subjective assessment, including an inmate's progress and receptivity to improvement, must be employed.

If prison labor is to help inmates for life in the labor market outside prison walls, it should operate with two broad purposes in mind: (1) improving skills and work ethic for as many prisoners as possible and (2) mimicking the outside labor market as effectively as possible. The goal should be full inmate employment while in prison and all prisoners should be forced to work, in some way or another, for much of their day. Not only will such a system help introduce more inmates to the consociative benefits of work, but it will also improve administrative control, defray prison costs, and satisfy the public's sense that prisoners should work just like non-criminals.²³⁰ Given current underemployment in prison, however, approximating full employment will require greater job opportunities.

Creating more job opportunities for inmates while in prison requires significant reforms. Institutional work assignments are already saturated: there are simply not enough tasks to employ all prisoners. The "state use" system cannot be expanded much without causing a major impact in the few industries that produce goods for state consumption. Accordingly, any expansion would have to occur in contract labor or in public works projects. Both show promise. Contract labor could be expanded on the model of the current federal "state use" system, Federal Prison Industries. Significant attention should be paid to improving prisoner skills and education

through an apprenticeship or probationary period. Choice of industry will also be important. Diffusing prison labor away from "state use" industries will simultaneously diffuse the political backlash against it. That does not mean, however, that opposition to labor competition from prisoners will not exist. Methods exist to avoid this problem. The primary one is to concentrate prison labor in those areas where labor shortages currently exist.

As the growing number of immigrant workers, legal and illegal, demonstrates, the current market is unable to fulfill its demand for unskilled and semi-skilled labor through American citizens and legal residents alone. Prisoners can be used to supplant a small part of the labor supply coming from illegal immigration. Of course, it is worth noting that prison labor can only affect a portion of this labor shortfall, as there are currently about five times as many illegal immigrants as there are prisoners in the United States.²³¹ Given that many prisoners would work in institutional or public works projects and not as contracted labor, the number of prisoners entering the labor force would be even smaller. This, of course, is not an original proposal. Some states have already implemented it in a few instances.²³² Politicians have proposed it as a way to eliminate the need for illegal immigrant labor.²³³ Prison labor will not solve the illegal immigration problem. The numbers simply do not add up. Yet, using prisoner labor in these areas can provide an outlet for valuable inmate work while reducing political opposition.

Public works projects also show potential for increased inmate labor activity. As the recent experiment in chain gangs has demonstrated, the state always has a need for extra labor, whether for cleaning highways, maintaining parks, or helping to build roads. A number of projects that the state would not otherwise hire labor to complete, could be undertaken by inmates.²³⁴ Chain gangs, in both their historical and modern incarnations, have also demonstrated another fact: laboring in chains is a punishing and shameful experience that does little to reinforce the social bonds between the chained and society.²³⁵ Public works programs need not depend on chain gangs.²³⁶ A modern community work crew system should thus operate in an inverse fashion to traditional chain gangs. Rather than punish prisoners by forcing them to labor outside in the public eye as a shaming experience, prisons should reward those prisoners who, as they approach their release dates, have made the most progress during their incarceration. The public should be notified of the program. Rather than being a mark of shame, working in a guarded, but unchained, work crew should be, like the ex-homeless street sweepers of RWA,²³⁷ a badge of honor signifying significant progress toward rehabilitation. To preserve public safety, assignments on community work details should be given only for those inmates who have demonstrated a serious commitment to reform.

As opportunities for labor in prisons expand, prisons must determine how to allocate jobs to prisoners. In doing so, they should seek to replicate the outside labor market as best as possible. Inmates should be allowed to apply for jobs they

desire and should be selected based on their commitment to improving themselves and working hard. Those who do not demonstrate a commitment should be given less desirable jobs, in particular institutional work assignments. However, these jobs should not be used as punishment alone; every job should carry with it a significant aspect of instruction, so that prisoners may gain skills and a sense of social worth through employment.

Compensation should be provided for inmate labor. As with the PIE program, market prices should be paid for those inmates who work for contracted companies. Prisoners should be required to use part of these funds to contribute toward their upkeep in prison, the payment of any outstanding obligations such as child support or court ordered restitution,²³⁸ and toward a savings account to serve as “gate money” upon their release. To ensure incentive to work, however, prisoners should be allowed to keep a significant portion of their wages.

A prison labor system such as this will help to instill the importance of work in the minds of prisoners and, by giving them some sense of purpose, will encourage them to maintain an upstanding existence upon their release. More than vocational training alone, consociative punishment uses work as a means to bond the individual to society as a whole. To maintain a law-abiding life upon release, an ex-convict must work. Even if he has a job, he must also become a stakeholder in society. He must believe that society’s rules apply to him and that he can flourish within the American social order. By using labor neither to punish, nor to shame, nor to save money, but to instill a sense of self-sufficiency through job skills and work ethic, a consociative system of prison labor holds the potential to help reintegrate America’s two million soon-to-be ex-convicts.

Conclusion

America’s history and culture have crafted an American society that is based, in large degree, on the idea of a strong individual work ethic. As a nation of immigrants, Americans have used work to establish themselves in this country and bond across ethnic and religious lines. Even with a welfare state, those who do not work find it very difficult to succeed. When they fail, those who do not work envision themselves not as members of society, but as its victims. They believe that society’s rules have contributed to their dilemma and are thus unlikely to follow them.

Both the homeless and the incarcerated are disaffiliated from society. Physically separate from the rest of us, they are also socially, psychologically and emotionally alienated. Homelessness-to-work programs have demonstrated that work has the power to overcome this divide. By promising self-sufficiency, a crucial component to self-worth in a capitalist society, work has a significant consociative impact on the homeless. It can have the same impact on convicts.

By any account, America’s prison system leaves much to be desired. Prison rehabilitation efforts have for too long ignored the value of work. Focused on education, vocational training, and counseling, rehabilitation has ignored the importance of human agency in determining whether or not an inmate returns to a life of crime upon release. Crime, though affected by circumstance, is not the result of it. Crime is the result of the bad choices made by criminals. They make these decisions, in part, because they have become, for one reason or another, disconnected from society at large. Emerging from prison after a period of physical separation from his fellow citizens, bearing the stigma of a felon status, an ex-convict is quite likely to experience this sense of disaffiliation. Work can reconnect him

to his fellow man and help him overcome his disassociation.

Prison labor in America is in need of a holistic reform. It should be expanded dramatically, but in a form divergent from its controversial, and sometimes dark, past. Prison administrators must reassess the purposes they seek to achieve through inmate work. Prison labor can accomplish a multitude of goals, but society will benefit most if the consociative value of work is paramount. Institutional control will still improve under a consociative system of prison labor, for those prisoners who will be released and those who will not. Some of the costs of imprisonment will still be defrayed by the value of prisoners’ labor, and preventing ex-convicts from returning to prison might save even greater costs.

By using work as it is used in the outside world, as a means of empowerment and self-sufficiency, prisons can better position inmates for life on the outside. If inmates are shamed through labor, they will be less likely to take pride in their work as free men. If their labor is exploited for the state’s monetary gain with little attention paid to their training, convicts will never learn the value of a hard day’s work. If ex-convicts cannot embrace a work ethic, they will find it hard to succeed in an American society in which work is an invaluable social link. Without the consociative impact of work, the odds are lower that an ex-convict will reintegrate into society. It logically follows that his chances of returning to prison are higher. If that happens, the vicious cycle simply begins again.

1 DAVID A. SNOW & LEON ANDERSON, *DOWN ON THEIR LUCK: A STUDY OF HOMELESS STREET PEOPLE* 110 (Univ. of Cal. Press 1993) (quoting EVERETT C. HUGHES, *MEN AND THEIR WORK* 43 (1958)).

2 *Report: 1 Percent of U.S. Adults Behind Bars*, CNN.COM, Feb. 28, 2008, <http://www.cnn.com/2008/CRIME/02/28/prison.population.ap/index.html> (last visited Mar. 13, 2008).

3 As of December 31, 2006, slightly over five million people were on parole or probation in the United States. *Bureau of Justice Statistics, Probation and Parole Statistics*, <http://www.ojp.usdoj.gov/bjs/pandp.htm> (last visited Mar. 13, 2008).

4 *See generally*, Peter Finn, *No-Frills Prisons and Jails: A Movement in Flux*, 60 FED. PROBATION 35 (1996).

5 U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *THE ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS* (2007), <http://www.huduser.org/Publications/pdf/ahar.pdf>.

6 *See* WEBSTER’S NEW INTERNATIONAL DICTIONARY 484 (3d ed. 1993) (defining consociative as “[p]romoting, exhibiting, or having to do with association or fellowship”).

7 Porter Anderson, *Study: U.S. Employees Put In Most Hours*, CNN.COM, Aug. 31, 2001, <http://archives.cnn.com/2001/CAREER/trends/08/30/ilo.study/> (last visited Mar. 15 2008).

8 *See* JOANNE B. CIULLA, *THE WORKING LIFE* 8 (Random House 2000) (noting that people tend to associate feelings of satisfaction and well-being with their jobs).

9 HERBERT APPLEBAUM, *THE AMERICAN WORK ETHIC AND THE CHANGING WORK FORCE* 215 (Greenwood Press 1998).

10 APPLEBAUM, *supra* note 9, at 216.

11 APPLEBAUM, *supra* note 9, at x-xi (remarking that the Protestant Ethic has also been termed the Puritan Ethic).

12 *Id.* at 3.

13 MAX WEBER, *THE PROTESTANT ETHIC AND THE “SPIRIT” OF CAPITALISM* (Peter Baehr and Gordon C. Wells eds., Penguin Books 2002) (1905) [hereinafter WEBER, *THE PROTESTANT ETHIC*].

14 *Id.* at 12-13.

15 *Id.* at 35.

16 *Id.* at 34.

17 *Id.* at 116.

18 *Id.* at 107.

19 *Id.* at 116.

20 *Id.* at 120.

23 *Id.* at 120.

24 *Id.* (emphasis in original).

25 APPLEBAUM, *supra* note 9, at xi.

26 *Id.*

27 *See* Michael Powell, *Early-20th-Century Concerns Resurface in Immigration*

- Debate, WASH. POST, May 8, 2006 (discussing the inability of many immigrants to advance by traditional social means, specifically education: “[I]ike today’s Mexican immigrants, these earlier immigrants often... stressed work over education.”).
- 28 *Id.*
- 29 *See id.* (discussing the recurrent patterns involved in native reactions to increased immigration).
- 30 *Id.* at 217.
- 31 JACOB HACKER, *THE GREAT RISK SHIFT* 42 (2008).
- 32 Karen Kornbluh, *Families Valued*, DEMOCRACY, Fall 2006, at 36.
- 33 JONATHAN COHN, SICK 120 (2007).
- 34 *Id.* at 9.
- 35 R. KENT WEAVER, ENDING WELFARE AS WE KNOW IT 21 (2000).
- 36 JASON DEPARLE, AMERICAN DREAM 105 (2004).
- 37 *See generally*, JILL ANDRESKY FRASER, WHITE COLLAR SWEATSHOP: THE DETERIORATION OF WORK AND ITS REWARD IN CORPORATE AMERICA (W.W. Norton & Co. 2002).
- 38 *See* Shankar Vendatam, *In Today’s Rat Race, the Most Overworked Win*, WASH. POST, Sept. 4, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/03/AR2006090300773.html> (discussing the ubiquity of overworked Americans across the socioeconomic ladder).
- 39 CIULLA, *supra* note 8, at 7.
- 40 HANS J. EYSENCK AND GISLI H. GUDJONSSON, *THE CAUSES AND CURES OF CRIMINALITY* 200 (1989).
- 41 Stephen Farrall, AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION 57, 59 (Willian Publishing 2004); *See also* Oregon Department of Corrections, The Oregon Accountability Model – Work and Programs Component, http://www.oregon.gov/DOC/PUBAFF/oam_work.shtml (last visited Mar. 15, 2008) (claiming “research shows meaningful work is known to contribute to the success of inmates upon release.”).
- 42 WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 52 (Random House 1996).
- 43 CIULLA, *supra* note 8, at 4.
- 44 *See generally* Stephen Garvey, Freeing Prisoners’ Labor, 50 STAN. L. REV. 339, 347-353 (1998) (examining the operation of the Auburn and Pennsylvania prison systems).
- 45 *Id.* at 350; *see* Matthew W. Meskell, Note, *The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 851-59 (1999).
- 46 Garvey, *supra* note 44, at 350.
- 47 *Id.*
- 48 Due to efficiencies created by allowing prisoners to share common areas, the Auburn system was less expensive to maintain than was the Pennsylvania system. Garvey, *supra* note 44, at 352. The isolation created by the Pennsylvania system also often drove prisoners insane. Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343, 347 (2001).
- 49 *See* Eva S. Nielsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 127-29 (2007). *See generally* Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates*, 34 CRIME & JUST. 441 (2006).
- 50 Daniel T. Rodgers, *THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920* 8 (1974).
- 51 Garvey, *supra* note 44, at 350.
- 52 *Id.* at 344, 351.
- 53 *Id.* at 352.
- 54 Garvey, *supra* note 44, at 352.
- 55 *Id.* at 344.
- 56 *Id.* at 352.
- 57 *Id.* at 354.
- 58 *See* ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR* 3-16 (Verso 1996) (discussing the economic reasons behind the switch to the convict lease system in the post-Civil War South).
- 59 U.S. CONST. amend. XIII, § 1.
- 60 Garvey, *supra* note 44, at 354-55.
- 61 *Id.* at 356.
- 62 Garvey, *supra* note 44, at 367.
- 63 *Id.* at 358-66.
- 64 N.E.H. Hull, Working on the Chain Gang, 8 CRIM. L.F. 311, 314-16 (1997) (book review).
- 65 Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 U.C.L.A. L. REV. 1143, 1174 (2006); Garvey, *supra* note 44, at 359.
- 66 LICHTENSTEIN, *supra* note 58, at 96.
- 67 Garvey, *supra* note 44, at 359.
- 68 *Id.* at 360.
- 69 *Id.* at 364.
- 70 Braman, *supra* note 65, at 1175.
- 71 LICHTENSTEIN, *supra* note 58, at 156-85.
- 72 Lynn M. Burley, *History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama’s Experience Raises Eighth Amendment Concerns*, 15 LAW & INEQ. 127, 129-30 (1997).
- 73 Garvey, *supra* note 44, at 365.
- 74 *Id.* at 361-62.
- 75 *Id.* at 345.
- 76 49 U.S.C. § 11507 (1994).
- 77 18 U.S.C. §§ 1761-1762 (1994).
- 78 Garvey, *supra* note 44, at 366-67.
- 79 *Id.*
- 80 *Id.* at 370.
- 81 *See, e.g.*, N.C. Dep’t of Corrections, North Carolina Prison Inmates at Work, <http://www.doc.state.nc.us/work/workover.htm> (last visited Feb. 28, 2008) (citing these types of work as useful rehabilitative and restitutive, but not deterrent, tools).
- 82 *See* Burley, *supra* note 72, at 133.
- 83 *See* Garvey *supra* note 44, at 396-397 (stating that the current prison industry relies too heavily on imprisonment).
- 84 Few, if any, serious proposals exist to allow prisoners to fill their days with idle time.
- 85 Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631-37 (1996).
- 86 *See generally*, NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (1850).
- 87 Kahan, *supra* note 85, at 632.
- 88 *See* Wendy Imatani Peloso, Note, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishments Clause*, 70 S. CAL. L. REV. 1459, 1459-60 (1997) (listing eight states in which chain gangs were reinstated in the 1990s and several others in which doing so has been debated).
- 89 *See, e.g.*, Burley, *supra* note 72, at 132 (citing Alabama’s policy to use chain gangs “as punishment for violations of prison rules”).
- 90 *Id.* at 132; *see also* LICHTENSTEIN *supra* note 58, at photo pages between 108 and 109.
- 91 *See* Recent Legislation, *Florida Reintroduces Chain Gangs*, 109 HARV. L. REV. 876, 876 (1996) (describing the use of heavy leg irons and long hours of labor as a “degrading ordeal”).
- 92 *See generally*, Eric P. Baumer, Richard Wright, Kristrun Kristinsdottir, and Helgi Gunnlaugsson, *Crime, Shame and Recidivism*, 42 BRIT. J. CRIMINOLOGY 40 (2002).
- 93 *Id.* at 53.
- 94 *Id.* at 53-54; *see also* Christopher Uggens, Jeff Manza and Angela Behrens, ‘Less Than the Average Citizen’: Stigma, Role Transition and the Civic Reintegration of Convicted Felons, in AFTER CRIME AND PUNISHMENT, *supra* note 41, at 261, 263-266.
- 95 Garvey, *supra* note 44, at 360.
- 96 ALAN COFFEY, CORRECTIONAL ADMINISTRATION: THE MANAGEMENT OF PROBATION, INSTITUTIONS AND PAROLE 145 (1975).
- 97 *See* DANIEL GLASER, PREPARING CONVICTS FOR LAW-ABIDING LIVES: THE PIONEERING PENOLOGY OF RICHARD A. MCGEE 45 (State Univ. of N.Y. Press 1995) (quoting Richard A. McGee, Prisons at the Crossroads, Address Before the Annual Congress of Correction, (Oct. 12, 1953)).
- 98 *See, e.g.*, UNICOR, About FPI Programs, <http://www.unicor.gov/about/> (last visited Jan. 31, 2009).about_fpi_programs/?navlocation=InmateProgram (last visited Mar. 2, 2008) (citing prison labor as contributing “significantly to the safety and security of federal correctional facilities”).
- 99 BENEDICT S. ALPER, PRISONS INSIDE-OUT: ALTERNATIVES IN CORRECTIONAL REFORM 77 (Ballinger Publishing Co. 1974).
- 100 *Id.* at 77.
- 101 *Id.*
- 102 DAVID FARABEE, RETHINKING REHABILITATION 65 (2005).
- 103 *See, e.g.*, U.S. Bureau of Prisons, Inmate Work Programs, http://www.bop.gov/inmate_programs/work_prgms.jsp (last visited Mar. 2, 2008) (describing the federal government’s Inmate Financial Responsibility Program, which requires that inmates use part of their work earnings to pay restitution, fines and child support).
- 104 *See* CHARLES W. COLSON, JUSTICE THAT RESTORES 113 (Tyndale House Publishers 2001); *see also* Francis T. Cullen, Bonnie S. Fisher and Brandon K. Applegate, Public Opinion About Punishment and Corrections, 27 CRIME & JUST. 1, 45-47 (2000) (discussing high levels of public support for using “restorative justice” to improve the wellbeing of the offender, the victim and the community).
- 105 *See* Gordon Bazemore & Mara Schiff, *Understanding Restorative Community*

Justice: What and Why Now in RESTORATIVE COMMUNITY JUSTICE: REPAIRING HARM AND TRANSFORMING COMMUNITIES 21, 25-26 (Gordon Bazemore & Mara Schiff, eds. 2001).

106 See Kerry L. Pyle, Note, *Prison Employment: A Long Term Solution to the Overcrowding Crisis*, 77 B.U. L. REV. 151, 164 (1997) (pointing out that as of the mid-1990s, state and federal prisons spent between \$30,000 and \$50,000 per inmate per year).

107 Braman, *supra* note 65, at 1153.

108 See Gordon Bazemore & Michael Dooley, *Restorative Justice and the Offender: The Challenge of Reintegration*, in *RESTORATIVE COMMUNITY JUSTICE*, *supra* note 105, at 114-6.

109 Mary Parker, *The Myth That Prisons Can Be Self-Supporting*, in *DEMISTIFYING CRIME AND CRIMINAL JUSTICE* 209, 209 (Robert M. Bohm & Jeffery T. Walker, eds. 2006).

110 Garvey, *supra* note 44, at 397.

111 See MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 154 (A.M. Henderson & Talcott Parsons, trans., The Free Press 1947) [hereinafter WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION*].

112 Garvey, *supra* note 44, at 397.

113 See generally, DAVID OSHINKSY, "WORSE THAN SLAVERY:" PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

114 LICHTENSTEIN, *supra* note 58, at 3-4.

115 However, the growing use of private prisons has caused concern that these prisons, as private actors, might be more likely to maltreat inmates. See CHARLES H. LOGAN, *PRIVATE PRISONS* (1990); see also Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005).

116 Rubin, *supra* note 48, at 344.

117 See FARABEE, *supra* note 102, at 27-34. See generally GLENN D. WATERS, *CHANGING LIVES OF CRIME AND DRUGS: INTERVENING WITH SUBSTANCE-ABUSING OFFENDERS* (Clive R. Hollin & Mary McMurrin eds., John Wiley & Sons 1998)

118 Though, inevitably, the success or failure of rehabilitative labor programs depends on the success of wider prison efforts at rehabilitation, I seek only to examine the efficacy of prison labor as a rehabilitative tool, while assuming the efficacy of other prison programs.

119 See Garvey, *supra* note 44, at 348 (quoting MICHAEL MERANZE, *LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION AND AUTHORITY IN PHILADELPHIA, 1760-1835* 169 (1996)).

120 *Id.*

121 See FARABEE, *supra* note 102, at 25-35 (discussing the predominant modern approach to prisoner rehabilitation).

122 *Id.*

123 Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES, Oct. 2, 2005, available at <http://www.nytimes.com/2005/10/02/national/02life.web.html> (last visited Mar. 16, 2008).

124 FARABEE, *supra* note 102, at 13-20.

125 See, e.g., FARABEE, *supra* note 102, at 64-66.

126 See generally INTERMEDIATE PUNISHMENTS: INTENSIVE SUPERVISION, HOME CONFINEMENT, AND ELECTRONIC SURVEILLANCE (Belinda R. McCarthy ed., 1987) (articulating that intermediate punishments are those sanctions between incarceration and basic probation).

127 FARABEE, *supra* note 102, at 61-74.

128 See, e.g., Rubin, *supra* note 48, at 376 (arguing that, through rehabilitation, government can enable offenders to return to society and live a normal and productive life, thereby justifying the preeminence of rehabilitation as a penological goal).

129 U.S. Bureau of Prisons, *Inmate Work Programs*, *supra* note 103.

130 See, e.g., N.C. Dep't of Corrections, *Community Work Service Jobs for State Prisoners: December 1-31, 2004*, available at <http://www.doc.state.nc.us/DOP/CWPJOBS/tipsheets/COM-WORK.DEC.PDF> (last visited Jan. 7, 2009).

131 See *id.* (explaining that these Acts brought an end to the contract system).

132 See e.g. Ill. Dep't of Corrections, *Illinois Corrections Industries*, available at <http://www.idoc.state.il.us/subsections/industries/default.shtml> (last visited Mar. 2, 2008); N.J. Dep't of Corrections, *DEPTCOR*, <http://www.state.nj.us/deptcor/index.html> (last visited Mar. 2, 2008) (stating that these inmates are voluntarily employed in meaningful work situations that aid in developing usable skills and positive work habits).

133 See U.S. Bureau of Prisons, *Inmate Work Programs*, *supra* note 103.

134 See U.S. Bureau of Prisons, *Quick Facts*, <http://www.bop.gov/about/facts.jsp> (last visited Mar. 2, 2008).

135 See Justice System Improvement Act of 1979, Pub. L. No. 96-157, § 827, 93 Stat. 1167 (1979); U.S. Dep't of Justice, *Bureau of Justice Assistance, Programs: Prison Industry Enhancement Certification Program (PIECP)*, available at <http://www.ojp.usdoj.gov/BJA/grant/piecp.html> (last visited Mar. 2, 2008).

136 See, e.g., U.S. Bureau of Prisons, *Inmate Work Programs*, *supra* note 103. Inmates help prepare and serve three meals daily. They also work in helping with the receiving, handling, and storing of food, as well as in sanitation.

137 See, e.g., U.S. Bureau of Prisons, *Inmate Work Programs*, *supra* note 103. (stating sentenced inmates are required to work if they are medically able).

138 ALPER, *supra* note 99, at 77.

139 See K. Daniel Glover, *Prison Labor under Fire by Lawmakers*, Private Industry, NAT'L J., Apr. 12, 2004, available at <http://www.govexec.com/dailyfed/0404/041204nj1.htm>. For example, sixty prisoners -- instead of five to ten -- are sometimes assigned to landscape prison grounds. *Id.*

140 See Senator John Ensign, *The Mandatory Prisoner Work and Drug Testing Act of 2003*, Address Before the U.S. Senate (Mar. 20, 2003) available at <http://ensign.senate.gov/counties/record.cfm?id=224171&>. Current Federal Law does not mandate a minimum workweek for the Federal Prison system. *Id.*

141 See, e.g., Md. Dep't of Public Safety and Correctional Services, *Reentry Goals and Priorities*, available at <http://www.dpscs.state.md.us/rehabservs/reentry.shtml> (last visited March 3, 2008) (stating that over 1,000 of the state's inmates are involved in public works or community service projects).

142 See U.S. Bureau of Prisons, *Inmate Work Programs*, *supra* note 103 (asserting that currently, FPI jobs offer wages between \$0.23 and \$1.15 per hour).

143 See Glover, *supra* note 139.

144 *Id.*

145 U.S. Bureau of Prisons, *Inmate Work Programs*, *supra* note 103.

146 See generally Philip C. Mitchell, *Federal Prison Industries: Ending Their Mandatory Source Status*, 83-SEP MICH. B. J. 19 (2004). Stating that this has been eliminated by 18 USC 2410(n), now federal contracting officers can buy items available through UNICOR from other sources).

147 U.S. Bureau of Prisons, *Inmate Work Programs*, *supra* note 103.

148 Garvey, *supra* note 44, at 370.

149 See ATKINSON, *PRISON LABOR: IT'S MORE THAN BREAKING ROCKS, POLICY REPORT, PROGRESSIVE POLICY INSTITUTE 1*, (2002), available at http://www.ppionline.org/documents/prison_labor_502.pdf.

150 UNICOR, *About FPI Programs*, *supra* note 98.

151 *Id.*

152 See Mitchell, *supra* note 146, at 19.

153 See *id.*

154 See *id.*

155 See Cal. Prison Industry Authority, *Joint/Free Venture Program Summary*, available at http://www.pia.ca.gov/Inmate_Development/JointVenture.html (last visited Mar. 15 2008). "The Prison Industry enhancement Certification Program (PIECP) was created by Congress in 1979 to encourage local government to establish private sector work opportunities for inmates, enabling the acquisition of marketable skills to increase the potential for meaningful employment upon release." *Id.*

156 ATKINSON, *supra* note 149, at 1.

157 See KENNETH L. KUSMER, *DOWN & OUT, ON THE ROAD 3* (Oxford University Press 2002) (stating that at first the homeless were not very noticeable but they became more noticeable in the eighteenth century).

158 See *id.* at 3-4.(explaining that during that decade the homeless population drastically increased in size).

159 See NELS ANDERSON, *THE HOBO: THE SOCIOLOGY OF THE HOMELESS MAN* 87 (University of Chicago Press 1923).

160 See *id.* at 87.

161 See *id.*

162 KUSMER, *supra* note 157, at 6.

163 *Id.* at 6.

164 See generally Milton Greenblatt, *Deinstitutionalization and Reinstitutionalization of the Mentally Ill*, in *HOMELESSNESS: A NATIONAL PERSPECTIVE* 57 (Marjorie J. Robertson & Milton Greenblatt, eds., Plenum Press 1992).

165 See RALPH DACOSTA NUNEZ, *HOPES, DREAMS, & PROMISE: THE FUTURE OF HOMELESS CHILDREN IN AMERICA*, 17-23 (Institute for Children and Poverty 1994) (discussing the causes of the rapid expansion of homelessness in America during the 1970s and 1980s).

166 See generally KUSMER, *supra* note 157, at 239.

167 See *id.* at 239

168 See U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, *supra* note 5, at iii.

169 KUSMER, *supra* note 157, at 239.

170 U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, *supra* note 5 at iv.

171 See *id.*

172 See KUSMER, *supra* note 145, at 242.

173 See PAUL A. ROLLINSON & JOHN T. PARDECK, *HOMELESSNESS IN RURAL AMERICA* 7 (Haworth Press 2006).

- 174 *Id.* at 7.
- 175 *Id.*
- 176 *Id.* at 8.
- 177 See Dennis P. Culhane, Stephen Metraux & Trevor Hadley, *Public Service Reductions Associated with Placements of Homeless Persons with Severe Mental Illness in Supportive Housing*, 13 FANNIE MAE FOUND. HOUSING POL'Y DEBATE 107, 139, 140 (2002) available at http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1301_culhane.pdf (stating at least 280,000 adults are chronically homeless in America).
- 178 NELS ANDERSON, *supra* note 159, at 86.
- 179 ROLLINSON & PARDECK, *supra* note 173, at 14.
- 180 *Id.* at 17-18.
- 181 DACOSTA NUNEZ, *supra* note 165, at 17.
- 182 ROLLINSON & PARDECK, *supra* note 173, at 16.
- 183 *Id.*
- 184 See generally Greenblatt, *supra* note 164.
- 185 See ALICE S. BAUM & DONALD W. BURNES, A NATION IN DENIAL: THE TRUTH ABOUT HOMELESSNESS 2 (Westview Press 1993).
- 186 ROLLINSON & PARDECK, *supra* note 173, at 18.
- 187 See *id.*, at 14.
- 188 BAUM & BURNES, *supra* note 185, at 2.
- 189 U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, *supra* note 5, at iv. Nearly twenty five percent of those individuals who stay in homeless shelters are disabled. *Id.* Between one-third and one-half of homeless individuals abuse drugs or alcohol. See KUSMER, *supra* note 157, at 243. Almost as many are mentally ill. *Id.* Thirty seven percent of the homeless lack a twelfth grade education. *Id.* Homeless women and children often must deal with abusive husbands and fathers. They must also find a way to care for and educate their children, while they themselves confront their own personal afflictions.
- 190 See Thomas J. Main, *Homeless Men in New York City: Toward Paternalism through Privatization*, in THE NEW PATERNALISM 161, 178 (Lawrence M. Mead, ed., Brookings Institution Press 1997). This message neatly summarizes the paternalistic approach that several private anti-homelessness programs have taken to reforming and reintegrating the homeless.
- 191 DACOSTA NUNEZ, *supra* note 165, at 40.
- 192 BAUM & BURNES *supra* note 185, at 153.
- 193 *Id.* at 16.
- 194 *Id.* (internal quotations omitted).
- 195 BAUM & BURNES *supra* note 185, at 153.
- 196 *Id.* at 154.
- 197 Main, *supra* note 190, at 176.
- 198 KUSMER, *supra* note 157, at 247.
- 199 See The Doe Fund, *A Word from Our Founder*, available at <http://www.doe.org/about/?aboutID=1> (last visited Mar. 12, 2008) [hereinafter A Word from Our Founder]. The guiding principle of RWA is simple: the homeless are motivated to work and are capable of doing so, if only they are given the necessary opportunity and support.
- 200 The Doe Fund, *Ready, Willing & Able*, available at <http://www.doe.org/programs/?programID=1> (last visited Mar. 12, 2008) [hereinafter Ready, Willing & Able].
- 201 The Doe Fund, *Ready Willing & Able: Job Placement*, available at <http://www.doe.org/programs/employers.cfm?programID=678> (last visited Mar. 12, 2008) [hereinafter Job Placement].
- 202 *Ready, Willing & Able*, *supra* note 200.
- 203 *A Word from Our Founder*, *supra* note 199.
- 204 See The Doe Fund, *Ready Willing & Able: Work Assignments*, available at <http://www.doe.org/programs/?programID=2> (last visited Mar. 12, 2008) [hereinafter Work Assignments]. "Their performance is closely monitored and reviewed in terms of their motivation, ability to follow directions and quality of work."
- 205 *Id.*
- 206 *Id.*
- 207 *Job Placement*, *supra* note 201.
- 208 The Doe Fund, *Ready Willing & Able: After-Care*, available at <http://www.doe.org/programs/?programID=10> (last visited Mar. 12, 2008).
- 209 See *id.* "Participants have ended their homelessness themselves by becoming self-sufficient members of our community and productive, welcome members of society."
- 210 The Doe Fund, *Ready Willing & Able: Services*, available at <http://www.doe.org/programs/?programID=9> (last visited Mar. 12, 2008).
- 211 The Doe Fund, *Work Works: Success Stories*, available at http://www.doe.org/workworks/success_stories.cfm (last visited Mar. 12, 2008) [hereinafter Work Works: Success Stories].
- 212 DACOSTA NUNEZ, *supra* note 165, at 110-122.
- 213 See Project Renewal, Employment, <http://www.projectrenewal.org/employment.html> (last visited Mar. 12, 2008). The mission of this project is to renew the lives of homeless men and women in New York City.
- 214 See National Coalition for Homeless Veterans, NDI Combines Drug Treatment With Innovative Job Training Program, available at http://www.nchv.org/hvrp_article.cfm?id=53 (last visited Mar. 12, 2008)
- 215 See The Doe Fund, Criminal Justice, available at <http://www.doe.org/programs/?programID=13> (last visited Mar. 12, 2008). "This is a resource and technical assistance center for a national network of community-based service providers and local, state and federal agencies that provide emergency and supportive housing, food, health services, job training and placement assistance, legal aid and case management support for hundreds of thousands of homeless veterans each year." *Id.*
- 216 See Kahan, *supra* note 85, at 588 (explaining that the "distinctive meaning of criminal wrongdoing" is that the criminal denies an important societal value, such as the "moral worth" of a victim)
- 217 DEAN J. CHAMPION, FELONY PROBATION 9 (1988).
- 218 See The Doe Fund, *Ready Willing & Able: Street Cleaning*, available at <http://www.doe.org/programs/?programID=3> (last visited Mar. 13, 2008).
- 219 See Work Works: Success Stories, *supra* note 211.
- 220 The Doe Fund, Doe Fund Ventures, available at <http://www.doe.org/ventures/> (last visited Mar. 13, 2008).
- 221 See FARABEE, *supra* note 102, at 25-35.
- 222 Garvey, *supra* note 44, at 348.
- 223 Cf. JAMES Q. WILSON AND RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 44 (1985) (arguing that crime is the result of individual decisions based on incentives).
- 224 COLSON, *supra* note 104, at 53.
- 225 WEBER, *supra* note 13, at 120 (emphasis in original).
- 226 U.S. Bureau of Prisons, *Inmate Work Programs*, *supra* note 103.
- 227 See ALPER, *supra* note 99, at 77.
- 228 *Id.*
- 229 See generally Glover, *supra* note 139.
- 230 See Braman, *supra* note 65, at 1153.
- 231 There are 2.3 million people in prison in the United States. *Report: 1 Percent of U.S. Adults Behind Bars*, *supra* note 2. The illegal immigrant population is estimated to be over 12 million people. Stephen Ohlemacher, *Number of Illegal Immigrants Hits 12M*, BREITBART.COM, Mar. 7, 2008, available at http://www.breitbart.com/article.php?id=D8G6U2ko8&show_article=1.
- 232 See, e.g., Dan Frosch, *Inmates Will Replace Migrants in Colorado Fields*, N.Y. TIMES, Mar. 4, 2007, available at <http://www.nytimes.com/2007/03/04/us/04prisoners.html> (last visited Mar. 15, 2008). In Colorado, supervised teams of low-risk inmates will be available to harvest vegetables.
- 233 See, e.g., 'Let The Prisoners Pick The Fruits', CBS NEWS, Mar. 30, 2006, available at <http://www.cbsnews.com/stories/2006/03/31/politics/main1459355.shtml> (last visited Mar. 15, 2008).
- 234 This might include simple tasks such as picking up litter in the public right-of-way alongside state and county roads or more complex public works projects such as maintaining and repaving the roads themselves. While the government, be it state or federal, currently funds much of this work, there is a seemingly endless supply of tasks to be completed. Tax dollars can run short; not every road can be cleaned of litter, nor can every pothole be quickly filled. 235 See generally Burley, *supra* note 72 (arguing that chain gangs are not merely degrading, but instead so cruel as to violate the Eighth Amendment); Kahan, *supra* note 85, at 631-52 (discussing the "expressive condemnation" effects of shaming punishments).
- 236 See Oregon Department of Corrections, *supra* note 41 (discussing the work done outside prison walls by "community work crews").
- 237 See Work Assignments, *supra* note 204. Ready, Willing & Able's "men in blue" wear recognizable blue jumpsuits as they pick up garbage and clean the streets of New York City. *Id.*
- 238 See Braman, *supra* note 65, at 1195-6. Significant public support exists for using mandatory prison labor as an "accountability-reinforcing sanction" in which they satisfy unpaid debts and compensate victims and the state. *Id.*

Christopher Angevine is a graduate of New York University School of Law 2008, and an Assistant Attorney General, with the New York State Office of the Attorney General. The views and opinions expressed herein are the views of the author and are not necessarily representative of the views of the Office of the Attorney General. THE author would like to thank to Cristina Rodríguez, Mike Wishnie, and Randy Hertz for their invaluable insight and assistance.