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NOW I LAY ME DOWN TO SLEEP: WORK-RELATED SLEEP DEFICITS AND THE THEOLOGY OF LEISURE

ALISON MCMORRAN SULENTIC*

Sleep is as necessary to human health and well-being as food and water.¹ Yet, the American worker is sleepy. Recent medical studies insist that sleep deprivation is rampant in the United States.² The detrimental effect of a significant sleep deficit on a person's ability to perform skilled tasks is comparable to the impairment wrought by excessive drinking.³

The Catholic social thought tradition addresses the moral, social, and ethical status of the worker in relationship to God, to his employer, and to his family. This tradition has provided the theological and analytical basis for arguments in support of the right to a just wage and benefits, the right to unionize and to strike, the right to an environmentally safe workplace, and the right to have religious freedom in the workplace. In the framework of Catholic social thought, the significance of these rights restrains and sometimes outweighs an employer's pursuit of profit or other goals less closely supportive of human dignity.⁴ Catholic social thought has inspired decision-makers such as church leaders, the lay faithful, unionists, political activists, and business owners to examine why and how businesses endeavor to achieve particular goals.

Yet, implicit in the key writings of the social tradition is the idea that rest from work—whether for family requirements or for church-related activities—is as essential for human development as the right to work. A skeptic might suggest that a demanding

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1. See John W. Shepard, Jr. et al., *History of the Development of Sleep Medicine in the United States*, 1 J. CLINICAL SLEEP MED. 61, 62 (2005).

2. See *id.* (giving an excellent review of the historical development of clinical treatments of sleep disorders).

3. See J. Todd Arnedt et al., *Neurobehavioral Performance of Residents After Heavy Night Call vs. After Alcohol Ingestion*, 294 J. AM. MED. ASS'N 1025 (2005).

4. See ALBINO BARRERA, MODERN CATHOLIC SOCIAL DOCUMENTS AND POLITICAL ECONOMY 146 (2001).

schedule and the resulting fatigue are simply products of a free bargain between an eager worker and a willing employer.⁵ This was exactly the argument refuted by Pope Leo XIII in 1891 when he demanded that workers receive a baseline wage that accommodated their living needs rather than a wage resulting from imperfect marketplace bargaining. Not coincidentally, Leo XIII's encyclical, *Rerum Novarum*, launched the modern era of Catholic social thought, with its revolutionary impact on the way modern Catholics—and, one might add, society in general—view worker rights.

Twenty-first century Catholics would do well to follow Leo's lead and to challenge the facile argument that onerous work schedules are the result of freely negotiated workplace arrangements. Certainly, some people relish the opportunity to work when the rest of the world sleeps. It only takes a glance at workplace statistics, however, to note that financially and politically impoverished individuals, such as food-service workers, constitute the vast majority of night-shift workers and those with unusual work schedules.⁶ As twenty-first century Catholics, we have the opportunity to bring these inequities to light by drawing on more

5. For an explanation and critique of a "rationalist" perspective on the bargain between employer and employee, see Gerard Stockhausen, *Leisure in the Economic Thought of John Paul II*, 25 INT'L J. SOC. ECON. 1672 (1998). Stockhausen states:

[I]n standard economics, people give up some of their non-work time to produce goods and services. In return they get compensation that includes wages and working conditions. The net benefits of work must outweigh the costs, or else people would not work; the effects of production on the person, however, are outside the scope of economics.

Id. at 1672; see also BARRERA, *supra* note 4, at 122–29 (explaining the various anthropological models underlying different economic theories).

6. The fast food industry, for example, employs many immigrant workers and other disadvantaged persons. Eric Schlosser's study of McDonald's Corporation's business practices revealed that fast food workers, including many teenagers, not only work extra hours but are often encouraged to do so without pay. Schlosser's conclusions are based not simply on McDonald's practices but on other fast food employers such as Taco Bell. He cites one example of a worker who regularly worked between seventy and eighty hours at Taco Bell but received payment for forty hours. See ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 67–83 (2001). Agribusiness also employs many disadvantaged persons. Marie Failinger notes, in particular, that 800,000 to 1.5 million children between the ages of five and fifteen are employed in agriculture, with work days of twelve to eighteen hours in length. See Marie A. Failinger, "Too Cheap Work for Anybody But Us": *Toward a Theory and Practice of Good Child Labor*, 35 RUTGERS L.J. 1035, 1045 (2004). "Contrary to what the laws seem to promise, hazardous and illegal child labor is not a thing of the American past." *Id.* at 1042.

than a century's worth of reflection on the meaning of human dignity in the workplace.

To a society increasingly eager for and dependent upon the consumption of goods and services "24/7," Catholic social thought poses several provocative questions. Are rest and leisure so fundamental to our well-being that we must understand them as integral components of human dignity? Can a social ethic that values human dignity as a fundamental and non-negotiable precept support patterns of consumption and production that require us to forfeit our leisure? If so, does adherence to Catholic social thought principles demand that human working conditions allow workers sufficient leisure not because such a policy reduces the potential for liability, but because it is, simply, the right thing to do?

This Article engages the Catholic social thought tradition concerning work in order to explore its potential to support arguments in favor of work schedules that permit adequate rest and relaxation. I believe that the burgeoning scholarship on Catholic social thought and workplace law will both enrich and be invigorated by consideration of whether and how a concern for human dignity should similarly restrain the physical and emotional demands that onerous work schedules impose upon certain sectors of the American workforce.⁷ I do not propose to resolve this dilemma in a short Article of this kind but propose merely to open a conversation that, I hope, will encourage legal scholars to consider the human person as an integrated being, whose need for rest is at least as important as the need for work.⁸

7. For examples of recent legal scholarship on Catholic social thought, see John J. Coughlin, *The Human Being, Catholic Social Teaching and the Law*, 1 J. CATH. SOC. THOUGHT 313 (2004); Kevin J. Doyle, Comment, *The Shifting Legal Landscape of Contingent Employment: A Proposal to Reform Work*, 33 SETON HALL L. REV. 641 (2003).

8. Legal scholarship on the relationship between work and leisure is limited. Cathleen Kaveny's work on the commodification of lawyers' time is a significant contribution to this discussion. Kaveny writes:

The regime of the billable hour presupposes a distorted and harmful account of the meaning and purpose of a lawyer's time, and therefore, the meaning and purpose of a lawyer's life, which, after all, is lived in and through time. The account, which ultimately reduces the value of time to money, is deeply inimical to human flourishing. Because large firm life can press many lawyers to internalize this commodified account of their time, they may find themselves increasingly alienated from events in their lives that draw upon a different and non-commodified understanding of time, such as family birthdays, holidays, and volunteer work.

M. Cathleen Kaveny, *Billable Hours in Ordinary Time: A Theological Critique of the Instrumentalization of Time in Professional Life*, 33 LOY. U. CHI. L.J. 173, 175

Part I of this Article considers whether a theological understanding of human dignity can sustain public policies in favor of rest and renewal with a force comparable to the contribution of Catholic social thought to other workplace rights. Part II provides an overview of the clinical knowledge concerning sleep deficits in relationship to current practices in scheduling shift work. Part III suggests that the right to rest is ill-protected by statutory laws such as the Americans with Disabilities Act. Moreover, relying on fear of tort liability as a tool to motivate employers to adopt rest-friendly policies is a strategy fraught with too many contingencies to seem entirely reliable.

The practice of virtue, as understood in the Catholic social thought tradition, requires more of an employer than simply choosing business practices that meet minimum requirements of local law or that prove to be effective instruments to achieve a particular end. Instead, the values of Catholic social thought require employers to take a leap of faith by creating humane work schedules not because they are legal or useful but because they respect human dignity. In sum, while arguments grounded on the desire to avoid liability or to achieve efficient goals may prove persuasive,⁹ Catholic social thought supports these arguments by refocusing attention on the party on whom all work depends: the human person—someone, not something.

(2001). For additional legal scholarship on the decline of leisure and sleep, see Temesha Evans-Davis, Comment, *Pilot Fatigue: Unresponsive Federal Aviation Regulations and Increasing Cockpit Technology Threaten to Rock the Nation's Pilots to Sleep and Compromise Consumer Safety*, 65 J. AIR L. & COM. 567 (2000); Andrew W. Gefell, Note, *Dying to Sleep: Using Federal Legislation and Tort Law to Cure the Effects of Fatigue in Medical Residency Programs*, 11 J.L. & POL'Y 645 (2003).

Scholars from other disciplines have suggested that leisure is an appropriate and timely subject for further scholarly investigation. See, e.g., Douglas A. Kleiber, *The Neglect of Relaxation*, 32 J. LEISURE RES. 82 (2000) (advocating that scholars in leisure studies examine relaxation in addition to current work on high intensity recreation); Dean Juniper, *Leisure Counselling in Stress Management*, 52 WORK STUDY 7 (2003) (noting that leisure counseling is an underdeveloped therapeutic approach to work stress); Paul Heintzman, *Spiritual Wellness: Theoretical Links with Leisure*, J. LEISURABILITY, Spring 1999, at 21 (noting that more research is needed on the relationship between leisure and spiritual wellness).

9. See Gary S. Vasilash, *Wake Up to the Right Shift Work Schedule*, PRODUCTION, Dec. 1994, at 42 (describing the evolution of shift work in manufacturing).

I. CATHOLIC SOCIAL THOUGHT, WORK, AND LEISURE

A. *Magisterial Writings*

Belief in the inherent dignity of the human person animates the Catholic social thought tradition. The dignity of the person, without regard to particular talent, fortune, or ambition, is a basic component of catechesis and of analysis within the Catholic social thought tradition.¹⁰

Witness the centrality of human dignity in the official catechism of the Church: “[b]eing in the image of God the human individual possesses the dignity of a person, who is not just something, but someone.”¹¹ Catechesis, by its nature, strives to inculcate certain normative values in a person who seeks full membership in the Church. The importance of human dignity to the Catholic belief system thus requires a prominent role for this topic in the formation of the faithful.¹² The *General Directory for Catechesis* plainly ties affirmation of human dignity to the teleological goal to which catechesis is directed: “[t]he relationship between the Christian message and human experience . . . springs from the very end of catechesis, which seeks to put the human person in communion with Jesus Christ.”¹³ In the schema set forth in the *General Directory*, catechists are charged with inculcating an understanding of human dignity as fundamental to our understanding of God:

Catechesis, in presenting the Christian message, not only shows who God is and what his saving plan is, but, as Jesus himself did, it reveals man to man and makes him more aware of his sublime vocation. Revelation, in fact, . . . is not . . . isolated from life or artificially juxtaposed to it. It is concerned with the ultimate meaning of life and it illumines the whole of life with the light of the Gospel, to inspire it or to question it.¹⁴

The *Compendium of the Social Doctrine of the Church*, which identifies itself “as an instrument for the moral and pastoral dis-

10. See CHARLES E. CURRAN, *THE MORAL THEOLOGY OF POPE JOHN PAUL II* 14 (2005) (“Here [in *Evangelium Vitae*] and throughout the corpus of his encyclicals, John Paul II insists time and again that human dignity is not based on what we do or accomplish but on our being.”).

11. CATECHISM OF THE CATHOLIC CHURCH No. 357 (2000) [hereinafter CATECHISM]; see also *id.* at No. 1700.

12. See POPE JOHN PAUL II, *ENCYCLICAL LETTER CENTESIMUS ANNUS* No. 54 (1991) [hereinafter CENTESIMUS ANNUS].

13. CONGREGATION FOR THE CLERGY, *GENERAL DIRECTORY FOR CATECHESIS* No. 116 (1997).

14. *Id.* Further, “Centered on him, it is oriented in two directions: toward God and toward the human person.” *Id.* at No. 123.

cernment of the complex events that mark our time,"¹⁵ carries this theme forward into the particular concerns raised by a person's social interaction with others. According to the *Compendium*, "[t]he fundamental message of Sacred Scripture" is the likeness of the human person and God.¹⁶ The "essence and existence" of the human person is to be in relationship with God, as well as with other persons.¹⁷ Thus, with regard to the Church's social and ethical teaching, the normative goal of catechesis (as set forth in the *General Directory for Catechesis*) is to inculcate in the believer an appreciation of his or her own inherent dignity and an acceptance of the same feature in others. Viewed in the light of its own objectives, catechesis is successful when a person comes to believe in his or her inherent dignity as a human person (as "someone" rather than "something") and recognizes this same dignity in others.

Witness, as well, the young Karol Wojtyła's contemporary assessment of the work of the Second Vatican Council: "[a]lthough none of the completed constitutions or directives has the human person as its specific topic, the person lies deep within the entire conciliar teaching that is slowly emerging from our labors"¹⁸ Just as human dignity plays a pivotal role in the official teaching of the Catholic Church, the Catholic social thought tradition posits human dignity not only as the goal of social interaction but also as the basic assumption on which its particular method of analysis rests. Well into his pontificate, John Paul II continued the same theme in *Centesimus Annus*, writing that "the church's social doctrine . . . belongs to the field . . . of moral theology" and is "needed both for interpreting and solving present-day problems in human society."¹⁹

Christian moral anthropology explains, to a great extent, the significance of human dignity in Catholic thought.²⁰ To the modern ear, for example, Leo XIII's defense of the right to own private property may perhaps sound antiquated and, indeed, bound in its own historicity. Yet, the premise of his argument—the fundamental importance of the human person—is echoed in the most modern writings of the Magisterium. Very early in

15. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH* No. 10 (2005).

16. *Id.* at Nos. 108–09.

17. *Id.* at Nos. 109–10.

18. KAROL WOJTYŁA, *On the Dignity of the Human Person*, in *PERSON AND COMMUNITY: SELECTED ESSAYS 177, 177* (Theresa Sandok trans., 1993).

19. *CENTESIMUS ANNUS*, *supra* note 12, at No. 55.

20. *See id.*; *see also* Charles E. Curran, *Anthropology*, in *THE NEW DICTIONARY OF CATHOLIC SOCIAL THOUGHT* 44 (Judith A. Dwyer ed., 1994).

Rerum Novarum, Leo XIII based the right to hold private property (a very specific challenge to the momentum gathering in Marxist and other quasi-socialist thought) in his understanding of the nature of the human person. Leo XIII wrote:

For, every man has by nature the right to possess property as his own. This is one of the chief points of distinction between man and the animal creation, for the brute has no power of self direction, but is governed by two main instincts, which keep his powers on the alert, impel him to develop them in a fitting manner, and stimulate and determine him to action without any power of choice. One of these instincts is self preservation, the other the propagation of the species. . . . [Man] possesses, on the one hand, the full perfection of the animal being, and hence enjoys at least as much as the rest of the animal kind, the fruition of things material. But animal nature, however perfect, is far from representing the human being in its completeness It is the mind, or reason, which is the predominant element in us who are human creatures; it is this which renders a human being human, and distinguishes him essentially from the brute. And on this very account—that man alone among the animal creation is endowed with reason—it must be within his right to possess things not merely for temporary and momentary use, as other living things do, but to have and to hold them in stable and permanent possession²¹

Leo's key argument in favor of private property was the unique nature of the human person, who combines both a physical and a spiritual or intellectual nature. This theme, while rarely applied as a defense of property rights in modern statements from the Magisterium, resonates nonetheless in every social encyclical of the post-conciliar era.

This anthropological understanding of the human person undergirds the development of Catholic social thought regarding work, as it unfolded throughout the twentieth century. Leo XIII, having satisfied his theoretical concerns with the right to private property, set forth in *Rerum Novarum* two additional arguments that he saw as corollaries. Leo XIII saw labor as both personal (“the exertion of individual power belongs to the individual who puts it forth”) and necessary (“for without the results of labor a man cannot live”).²² Thus, the human person

21. POPE LEO XIII, ENCYCLICAL LETTER *RERUM NOVARUM* No. 6 (1891) [hereinafter *RERUM NOVARUM*].

22. *Id.* at No. 44.

has a right to work to obtain property, and the work must be performed in exchange for a just wage.²³

For the next century, the defense of the just wage remained at the forefront of papal writings concerning social issues. Pope Pius XI celebrated the fortieth anniversary of *Rerum Novarum* by setting forth an economic argument for the factors to be considered in the calculation of a just wage (the support of the worker and his family, the state of business, and the requirements of the common good).²⁴ In *Pacem in Terris*, Pope John XXIII urged not only Catholics but “all men of good will” to recognize that from human dignity flow many rights that cannot be forfeited, including the right to life and a worthy standard of living, as well as the right to freedom in thought and culture and the right to an opportunity to work.²⁵ The same themes appear in the work of the Second Vatican Council and the encyclicals of Popes Paul VI and John Paul II. In each case, the core argument in favor of workers’ rights (as well as all human rights) derives from the belief that the human person deserves to be treated with dignity because he or she is “made in the image of God.”²⁶

Although less prominent in public conversation about Catholic social thought, the right to rest often appears in close proximity to the right to work and shares the same theoretical basis. Rest, like work, responds to the physical and spiritual needs of the human person. The magisterial documents that discuss the importance of work and wages in Catholic social thought consistently point to rest as a foundational component of a working life that responds to the needs of the human person. In *Rerum Novarum*, for example, Leo XIII drew a close connection between the “spiritual and mental interests” of the worker and the “obligation of the cessation of work and labor on Sundays and certain festivals.”²⁷ Leo distinguished between “idleness” and the “repose united with religious observance” that he believed to be necessary to the contemplation and worship.²⁸ His concern was not, however, limited to ensuring attendance to religious obligations. For Leo, a person’s innate need for the restorative power of adequate rest mandated limitations on work hours:

23. *Id.*

24. See POPE PIUS XI, ENCYCLICAL LETTER QUADRAGESIMO ANNO NOS. 70–75 (1931).

25. POPE JOHN XXIII, ENCYCLICAL LETTER PACEM IN TERRIS NOS. 8–27 (1963) [hereinafter PACEM IN TERRIS].

26. CATECHISM, *supra* note 11, at No. 357.

27. RERUM NOVARUM, *supra* note 21, at No. 41.

28. *Id.*

It is neither justice nor humanity so to grind men down with excessive labor as to stupefy their minds and wear out their bodies. Man's powers, like his general nature, are limited and beyond these limits he cannot go. His strength is developed and increased by use and exercise, but only on condition of due intermission and proper rest. Daily labor, therefore, must be so regulated that it may not be protracted during longer hours than strength admits.²⁹

Likewise, in more modern times, John XXIII stated plainly that "religion, moral teaching, and care of health in turn require that relaxation be had at regular times" and exhorted management and labor officials to consider themselves accountable to "God and society" for implementation of policies that would facilitate such rest.³⁰

The Christian anthropology that permeates the early documents of modern Catholic social teaching comes vividly to life in the post-conciliar reflection on the human person. John Paul II wrote again and again of the nature of the human person both before and during his lengthy pontificate.³¹ His vision of the human person was, in the words of theologian Charles Curran, both theocentric and anthropocentric.³² While the idea of the human person as a manifestation of the "image and likeness of God"³³ is hardly unique to Roman Catholicism, this phrase is fundamental to understanding John Paul II's interest in and commitment to proclaiming the central importance of the dignity of the human person.

29. *Id.* at No. 42.

30. POPE JOHN XXIII, ENCYCLICAL LETTER *MATER ET MAGISTRA* Nos. 251, 253 (1961) (expressed more completely in *PACEM IN TERRIS*, *supra* note 25).

31. While John Paul II was certainly not alone in focusing on the central role of human dignity in post-conciliar expressions of Catholic social thought, his influence, both as a theologian and a philosopher, looms large in the more recent writings on Catholic social thought. The prominence of his contribution is due not only to his role at the Council and to his long papacy, but also to the passion with which he regarded human labor and its impact on the human person. Gerard Stockhausen writes,

John Paul II always locates economic choices within the larger context of the meaning of human life and the effect that economic behavior has on human life for good or ill. Since John Paul II considers the whole human person rather than the individual consumer or worker, what a person does when not working is at least as important as what one does when working, whether or not a person is consuming during that time.

Stockhausen, *supra* note 5, at 1672.

32. See CURRAN, *supra* note 10, at 13.

33. CATECHISM, *supra* note 11, at No. 1700.

John Paul II's belief in the integration of the spiritual and the corporeal natures of the human person marks his writings on human work. It is significant in this regard that John Paul II is sometimes credited with developing the "theology of the body."³⁴ Certainly, his writings on human sexuality are the work of a man who understands the physical nature of the human person as well as the spiritual notion. John Paul II's writings seem, however, to reflect, more importantly, a conscious appreciation of the combined physicality and spirituality of the human person that has ramifications far beyond the field of human sexuality.

In 1961, before the Second Vatican Council convened and long before his own pontificate, John Paul II presented a paper entitled *Thomistic Personalism* during the Fourth Annual Philosophy Week at the Catholic University of Lublin. The paper explored Thomas Aquinas's contribution to the theological and philosophical foundations of Christian personalism. John Paul II's reflections on Thomas Aquinas's understanding of the human person is a useful starting point for examining the integration of mind and body in the idea of the human person that is evident in his later pontifical writings.

For Aquinas (and, arguably, John Paul II), a human person differs from "a Divine Person or an angelic person" because the rational nature of the human being results from "a spiritual soul, which is the substantial form of the body."³⁵ Thus, the human person unites both the spiritual and the corporeal, while the Divine person or an angelic person is wholly spiritual in nature.³⁶ As explained by John Paul II, Aquinas's analysis of the human soul ran as follows:

The human soul is a spiritual substance whose natural properties are reason and freedom. The human soul is the principle of the life and activity of the human being; it operates, in turn, through the mediation of faculties . . . [which are] reason and free will. They are also the principal means, so to speak, whereby the human person is actualized; based on their activity, the whole psychological and moral personality takes shape. But these are not the only faculties of the human soul. As the substantial form of the body, the soul also has, in addition to spiritual faculties, faculties that are intrinsically dependent on matter. These

34. See POPE JOHN PAUL II, *THE THEOLOGY OF THE BODY: HUMAN LOVE IN THE DIVINE PLAN* (1997).

35. KAROL WOJTYLA, *Thomistic Personalism, in PERSON AND COMMUNITY*, *supra* note 18, at 165, 168.

36. *Id.* at 168-69.

are primarily sensory faculties, both cognitive and appetitive. These faculties, as belonging to the concrete human being, are likewise found in the person and contribute in their own way to the shaping of the psychological and moral personality.³⁷

John Paul II brought to his philosophy and to his pontificate his own experience as an athlete and a manual laborer. It is hardly surprising that a Thomistic vision of the unity and the integration of spiritual and physical aspects of the soul would have claimed his attention.

John Paul II pushes Aquinas's awareness of the unity of spiritual and physical aspects of the soul into the modern era by suggesting that the subjectivity of lived experiences plays a part in human creativity and, thus, in human activity.³⁸ In John Paul II's estimation, Aquinas "shows us the particular faculties, both spiritual and sensory, thanks to which the whole of human consciousness and self-consciousness—the human personality in the psychological and moral sense—takes place, but that is also where he stops."³⁹ As a young bishop participating in the Second Vatican Council, John Paul II observed "an attitude toward the human being as a person . . . on the basis of experience and revelation."⁴⁰ Noting that "[t]here are eyes enough at the Council to see humanity in the whole diversity of its contemporary existence,"⁴¹ he cautioned against the ease with which one might "think and judge on the basis of people *en masse*."⁴² Shortly before his election to the pontificate, this cautious warning gave way to an affirmation of the importance of recognizing lived experience. In 1975, John Paul argued that "*the line of demarcation between the subjectivistic (idealistic) and objectivistic (realistic) views in anthropology and ethics must break down and is in fact breaking down on the basis of the experience of the human being.*"⁴³

The human experience of labor is so fundamental to John Paul II's thought that it formed the basis of one of the earliest encyclicals in his twenty-seven-year pontificate. In *Laborem Exercens*, John Paul II meditated upon the objective and subjective dimensions of labor and on the physical and intellectual

37. *Id.*

38. *Id.* at 171.

39. *Id.* at 170–71.

40. WOJTYLA, *supra* note 18, at 177.

41. *Id.*

42. *Id.* at 179.

43. KAROL WOJTYLA, *Subjectivity and the Irreducible in the Human Being, in PERSON AND COMMUNITY, supra* note 18, at 209, 210 (emphasis in original).

demands of the workplace.⁴⁴ The objective dimension of work, while important, is always secondary in importance to John Paul II. Used in an objective sense, work is “a ‘transitive’ activity, that is to say an activity beginning in the human subject and directed toward an external object.”⁴⁵ John Paul illustrates the objective nature of work by the biblical imagery of the human person’s right and obligation to “subdue the earth” and the more practical vision of his or her efforts “to cultivate [the earth] and then to transform its products, adapting them to his own use.”⁴⁶ Agriculture and industry, as well as service industries and research, “in . . . turn will always consist in linking the earth’s riches . . . with man’s work”⁴⁷

In John Paul II’s view, the subjective dimension of work is the more essential and perhaps more interesting topic. He argues that work transforms the worker:

As a person, man is therefore the subject of work. As a person he works, he performs various actions belonging to the work process; independently of their objective content, these actions must all serve to realize his humanity, to fulfill the calling to be a person that is his by reason of his very humanity.⁴⁸

In this process lies the “very ethical nature of work” that “clearly and directly remains linked to the fact that the one who carries it out is a person, a conscious and free subject, that is to say, a subject that decides about himself.”⁴⁹ For John Paul II, the dignity of human work derives not from its object but from “the fact that the one who carries it out is a person.”⁵⁰

The priority that John Paul II places on the subjective element of work is not an indictment of its objective dimension. Instead, the dynamic between the objective and subjective element of work enables the worker to “achiev[e] fulfillment as a human being and indeed in a sense becom[e] ‘more a human being.’”⁵¹ Thus, the human person works not only for the benefit of the social economy but also for his or her personal value.⁵² The primacy of the subjective element of work explains as well

44. See POPE JOHN PAUL II, ENCYCLICAL LETTER LABOREM EXERCENS (1981).

45. *Id.* at No. 4.

46. *Id.* at Nos. 4–5.

47. *Id.* at No. 5.

48. *Id.* at No. 6.

49. *Id.*

50. *Id.*

51. *Id.* at No. 9.

52. *Id.* at No. 15.

John Paul II's insistence that rest is essential to the person's becoming "more and more what in the will of God he ought to be" and not simply to the restoration of physical strength.⁵³

John Paul II's understanding of work was deeply informed by personalism and, although rest is not the major focus of *Laborem Exercens*, it is clear that he drew a deep connection between rest and the personal development to which work also contributes. It is fair to say that he differentiated between rest, which he saw as complementary to the virtue of industriousness, and enforced idleness due to unemployment or underemployment.⁵⁴ In *Centesimus Annus*, John Paul II singles out Leo XIII's affirmation of "the need for Sunday rest so that people may turn their thoughts to heavenly things and to the worship which they owe to Almighty God" as a non-forfeitable "human right."⁵⁵ The consequences of work systems that do not respect human dignity include not only material or economic poverty, but also "cultural and spiritual poverty."⁵⁶ An unhealthy emphasis on utilitarian values undermines and vitiates the "hierarchy of true values of human existence" by setting the pursuit of excessive production goals above the individual's "right and duty to seek God."⁵⁷ In the simplest terms, work will hinder rather than enhance the human person's ability to experience the fulfillment of a relationship with God if working conditions do not facilitate both the subjective fulfillment of the worker's personal creativity and the rest that is necessary for him or her to be receptive to religious or spiritual experience.

In the United States, *Economic Justice for All*, the pastoral letter issued by the U.S. Conference of Catholic Bishops in 1986, marked a watershed moment in the Church's efforts "to lift up the human and ethical dimensions of economic life, aspects too often neglected in public discussion."⁵⁸ The Bishops stated:

Every economic decision and institution must be judged in light of whether it protects or undermines the dignity of the human person. . . . We believe the person is sacred—the clearest reflection of God among us. Human dignity comes from God, not from nationality, race, sex, economic status, or any human accomplishment. We judge any economic sys-

53. *Id.* at No. 25.

54. See POPE JOHN PAUL II, ENCYCLICAL LETTER SOLLICITUDO REI SOCIALIS No. 18 (1987).

55. CENTESIMUS ANNUS, *supra* note 12, at No. 9.

56. *Id.* at No. 57.

57. *Id.* at No. 29.

58. U.S. CONF. OF CATH. BISHOPS, ECONOMIC JUSTICE FOR ALL No. 7 (1986).

tem by what it does *for* and *to* people and by how it permits all to *participate* in it. The economy should serve people, not the other way around.⁵⁹

Echoing John Paul II's insistence on the priority of the subjective dimensions of work, the pastoral letter maintains that "[w]ork should enable the working person to become 'more a human being,' more capable of acting intelligently, freely, and in ways that lead to self-realization."⁶⁰ The inability of an "able and willing" person to find a job not only causes the economic and developmental privation of the individual, but it also stands as a social failure to permit the "minimum level of participation in the economy" necessary to uphold human dignity.⁶¹ Among the strategies that the bishops offered for overcoming unemployment is an interesting call to explore "[m]ore extensive use of job sharing, flex time, and a reduced work week" and the limitation or elimination of mandatory overtime work.⁶²

Emphasizing the potential benefits of reducing workers' hours enabled the Bishops to present a practical solution to the pressing problem of unemployment as well as to introduce the concept of leisure into specific policy discussions concerning human rights. In the portion of the pastoral letter devoted specifically to leisure, the Bishops called for "a balance of labor and leisure in daily lives."⁶³ Like so many other dimensions of the pastoral letter, this balance is seen as the source of individual and social benefits:

The Christian tradition sees in leisure, time to build family and societal relationships and an opportunity for communal prayer and worship, for relaxed contemplation and enjoyment of God's creation, and for the cultivation of the arts which help fill the human longing for wholeness.⁶⁴

These benefits "contribute to building up the person as well as the family and community."⁶⁵

59. *Id.* at No. 13 (emphasis in original).

60. *Id.* at No. 72.

61. *Id.* at No. 15.

62. *Id.* at No. 167.

63. *Id.* at No. 337; see also H.M. Burdinski & D.H. Dunson, *Acquiring Economic Justice for All: An Ongoing Struggle*, 20 J. BUS. ETHICS 93, 95 (1999) (noting that Americans must ask, "How do I strike a balance between labor and leisure that enlarges my capacity for friendships, for family life, for community?").

64. See ECONOMIC JUSTICE FOR ALL, *supra* note 58, at No. 338.

65. *Id.*

B. *Scholarly Reflection and Commentary on Leisure and Rest*

The magisterial documents provide the basis for reflection upon the importance of rest and leisure to the human person, but, by and large, the documents do not set forth a practical meaning to the terms. The magisterial documents are chiefly concerned with work and economic activity and consider leisure in relationship to these more developed ideas. It would be churlish to suggest that the Magisterium undervalues leisure; instead, it is worthwhile to simply note that the focus of most social documents of the modern era is on work and the conditions of work. Leisure is not the main subject with which these documents are concerned, although the groundwork for consideration of this topic is generously scattered throughout the treatment of work.

In two short essays originally published in the mid-twentieth century, however, German philosopher Josef Pieper turned his attention to leisure, drawing specific connections between leisure and religious experience.⁶⁶ Pieper argued that leisure was essential to the development of culture, a term that he defined as “the quintessence of all the natural goods of the world and of those gifts and qualities which, while belonging to man, lie beyond the immediate sphere of his needs and wants.”⁶⁷ For Pieper, *cultus*, the Latin root for culture, was “something else than, and some-

66. See JOSEF PIEPER, *LEISURE: THE BASIS OF CULTURE* (Alexander Dru trans., The New American Library 1963) (1952). In a recent article in *Theological Studies*, Jon Vickery notes that Pieper’s “devastating critique of contemporary society” and “lucid explanations and applications of Thomistic thought” have received relatively little scholarly attention. Jon Vickery, *Searching for Josef Pieper*, 66 *THEOLOGICAL STUD.* 622 (2005). Vickery suggests that “historians have done Pieper a significant injustice” in raising “formidable challenges to the authenticity of Pieper’s opposition to Hitler’s regime.” *Id.* at 623. Vickery asks whether Pieper, like Bonhoeffer (who studied Pieper’s work), was “one of those rare instances of Christian defiance.” *Id.* Attributing Pieper’s resilience as a theologian to his Thomistic roots, Vickery writes:

While Pieper may indeed have fallen victim to a lack of courage, he still represents a rare and praiseworthy exception to the many Roman Catholic thinkers deceived in the early 20th century by the intoxicating spirit of National Socialism. . . .

The great irony in all of this, of course, is that the same theologian—Thomas Aquinas—whose authority was used to support the collusion of the Roman Catholic Church with National Socialism was the very theologian who guided Josef Pieper through the minefield of National Socialist error. . . . Accordingly, while Aquinas may be said to have delivered Pieper from the peril of his day, we may also say that Pieper has, by discovering in Aquinas a sure guide through a dark night, delivered Aquinas as well from an alleged indirect contribution to one of the greatest failures of the Christian Church.

Id. at 637.

67. Pieper, *supra* note 66, at 17.

thing more than, religion”; *cultus* “really means fulfilling the ritual of public sacrifice” and is the “primary source of man’s freedom, independence and immunity within society.”⁶⁸ Conversely, culture, in Pieper’s view, enables the possibility of leisure by giving meaning to the “gifts and faculties” of the human person that are not absolutely necessary for physical survival.⁶⁹

The mutual dependence of culture and leisure is reminiscent of some aspects of Greek thought. Pieper suggests, however, that when Aristotle said, “[W]e are un leisured in order to have leisure” (Pieper’s own translation), his concept of leisure was more closely akin to modern ideas of contemplation than to modern ideas of work and recreation.⁷⁰ While Kant believed that a person acquired knowledge by the active work of “comparing, examining, relating, distinguishing, abstracting, deducing, demonstrating,”⁷¹ in Pieper’s view, Aquinas held the more tenable position that “man participates in the angelic faculty of non-discursive vision, which is the capacity to apprehend the spiritual in the same manner that our eye apprehends light or our ear sound. Our knowledge in fact includes an element of non-activity, of purely receptive vision”⁷² In this view, a human person acquires knowledge not only through the analytical and deductive work based on rational reasoning but also through apprehension of spiritual knowledge that is not based on the active work of reasoning.⁷³

Pieper’s work suggests that the twentieth-century culture “exaggerated” the value of work to an extent that vitiated an appreciation of the Christian notion of grace. Pieper paints a picture of a worker with a “fixed, mask-like readiness to suffer *in vacuo*, without relation to anything. . . . [M]an seems to mistrust everything that is effortless; he can only enjoy, with a good conscience, what he has acquired with toil and trouble; he refuses to have anything as a gift.”⁷⁴ The grim determination of Pieper’s worker and the concomitant utilitarian evaluation of work as the social measure of human worth led Pieper to ask, “Is there a sphere of human activity, one might even say of human existence, that does not need to be justified by inclusion in a five-year plan and its technical organization?”⁷⁵

68. *Id.*

69. *Id.* at 17–18.

70. *Id.* at 21–22.

71. *Id.* at 25.

72. *Id.* at 27.

73. *Id.* at 28.

74. *Id.* at 32–33.

75. *Id.* at 34.

This line of reasoning opens the possibility of reaching a conceptual understanding of leisure that has practical meaning in social policy.⁷⁶ Pieper's question first targets the social ramifications of a work-based value system, but the inquiry quickly becomes significant in his evaluation of the individual human person's need for leisure. Because the human person is both capable of apprehending and in need of knowledge that is contemplative rather than analytic, leisure is the antithesis of idleness.⁷⁷ For Pieper, leisure is "an attitude of mind, a condition of the soul, and as such utterly contrary to the ideal of . . . work as activity, as toil, as a social function."⁷⁸ While this concept of leisure is far more spiritual and far more contemplative than the idea of physical rest, Pieper draws a correlation between sleep and leisure as well as between sleeplessness and the incapacity for leisure.⁷⁹ A functional or utilitarian decision to provide breaks in the workday or workweek for the purpose of physical rest finds its justification in the argument that rest will enable the worker to become more productive when he or she recommences work duties.⁸⁰ For Pieper, such a justification for rest implicitly recognizes that rest should be subservient to work. Leisure, instead, is a state that is independent in value and in nature from work. Leisure may have a positive impact on a person's ability to per-

76. "Leisure" is a fluid concept that has posed difficulties for researchers who might otherwise see advantages to a standard definition. See, e.g., John Wilson, *Sociology of Leisure*, 6 ANN. REV. SOC. 21 (1980) ("Leisure is notoriously difficult to define."); Gary Burtless, *Squeezed for Time? American Inequality and the Shortage of Leisure*, BROOKINGS REV., Fall 1999, at 18, 19 (noting differing methodologies used to calculate leisure time). In a recent survey of the scholarly literature concerning leisure, Beatty and Torbert argue that leisure should "receive the same level of scrutiny and respect that we as management scholars naturally give to work." Joy E. Beatty & William R. Torbert, *The False Duality of Work and Leisure*, 12 J. MGMT. INQUIRY 239, 239 (2003). Beatty and Torbert note three common typologies for defining leisure: (1) a time-based approach measuring the amount of time spent outside work; (2) an activity-based approach that examines what people do when they are not working; and (3) an intention-based approach that examines the intention to act in a leisurely manner. See *id.* at 240. Beatty and Torbert endorse the third option, which bears a distinct resemblance to the concept of leisure presented in Pieper's work. See *id.* at 243. In contrast, economist Juliet Schor bases her empirical studies of declining leisure time on an "objective" definition of work (hours of paid employment and hours of household labor), which enables her to define "leisure" as the residual time remaining after work is completed. See JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 13 (1991).

77. See Beatty & Torbert, *supra* note 76, at 241 ("[E]nforced idleness is not typically enjoyed or experienced as leisure.").

78. PIEPER, *supra* note 66, at 40.

79. See *id.* at 41-42.

80. See *id.* at 43.

form work with renewed vigor, but this is merely a felicitous by-product of something that is of value for its own independent role in celebrating a holistic view of the human person.

The concept of leisure offers a moral and ethical basis for restraining labor for reasons that surpass the lesser utilitarian argument that a rested person is more likely to perform well on the job. The view of leisure that Pieper offers finds its highest expression in contemplation and worship that is “done for its own sake”: “[l]eisure cannot be achieved at all when it is sought as a means to an end, even though that end be ‘the salvation of Western civilization.’”⁸¹ Viewed as an essential component of our understanding of the dignity of the human person, Pieper’s work offers a paradigm for differentiating between the utilitarian support for rest in the service of productivity at work and a policy that is aimed at furthering the wholeness of the human person in his or her life experience.

Like Pieper, Jesuit economist Gerard Stockhausen rejects the “neo-classical economic definition of leisure as non-work.”⁸² Stockhausen argues that the concept of leisure as “non-work activity that contributes to the health and wholeness of a person” captures the essence of John Paul II’s thought as expressed in *Centesimus Annus*.⁸³ This concept of leisure as constitutive of the “wholeness” of the human person informs Stockhausen’s argument that extended work hours, mandatory overtime, and low wages that result in the need to hold more than one job “can all rob people of the capacity for leisure” and, correspondingly, their ability to appreciate the fullness of their humanity.⁸⁴

Stockhausen’s analysis of the economic incentives that diminish the opportunities for leisure implicitly holds individuals accountable for safeguarding the possibility of leisure. Stockhausen argues that consumerism and increasing consumption of goods that do not contribute to the health and dignity of the human person do not in themselves enhance the value and happiness that can be found in leisure.⁸⁵ By implication, then, an individual’s restraint in his or her consumption of goods and services can have a salutary effect on his or her experience of leisure.

81. *Id.* at 62.

82. Stockhausen, *supra* note 5, at 1675.

83. *Id.*

84. *Id.* at 1676.

85. *See id.* at 1680. Stockhausen suggests that leisure in partnership with reduced consumption similarly slows the depletion of ecological resources. *See id.* at 1681–82.

A striking consequence of considering leisure as an attitude that enhances the human person's ability to fully experience and explore his or her humanity is the ability to regard work and leisure as complementary rather than opposing ways for the use of time.⁸⁶ Joy Beatty and William Torbert argue:

[I]nstead of a harsh dichotomy [between work and leisure], the two terms are related on a spectrum that ranges from purely externally and determined actions, as in the case of assembly-line labor done for the money and as the boss requires, to purely internally motivated actions, such as meditating by oneself or producing works of art for which there is no preexisting market, for the pure suffering and pleasure of doing so. Between these poles of pure work and pure leisure are many hybrid states, which can be both intrinsically and extrinsically motivated.⁸⁷

The interdependence of work and leisure also suggests that the modification of one of these states is likely to affect a person's ability to enter into and experience the other.

Beatty and Torbert argue for the active cultivation of leisure, undertaken with the purpose of enlarging the narrowing or "flattened" meaning of "leisure" when understood as watching television or going to the mall. In arguments reminiscent both of Pieper's work and Stockhausen's commentary on *Centesimus Annus*, they also suggest some degree of individual responsibility in engaging in the mindful awareness and assessment of personal beliefs concerning the virtuosity of work as compared to that of leisure.⁸⁸ However, the employer's ability to integrate leisure as "a legitimate part of work life" suggests that work policies can also contribute to a social reclaiming of "leisure skills."⁸⁹

II. SLEEP DEPRIVATION IN THE AMERICAN WORKPLACE

How might Catholic social thought assess the ability of American workers to share in the fullness of human dignity? Let us posit an ideal based on a personalist understanding of work and the priority of its subjective dimension, and further, set as a goal the realization of work systems that allow for sufficient opportunities for rest. Can the American worker rest easy in the assumption that our culture will help us to fully realize our human dignity?

86. See Beatty & Torbert, *supra* note 76, at 240.

87. *Id.* at 244–45.

88. See *id.* at 248.

89. *Id.* at 248–49; see also ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 4 (1989); SCHOR, *supra* note 76, at 7.

The colloquialisms of modern American life suggest an understanding of the price exacted by permitting tired workers to perform tasks that they would be able to master in the absence of fatigue. If a person misspeaks in a meeting, we say, "He's asleep at the switch." Or, if a student has stayed up several nights in a row to prepare for exams or to complete a paper, we might conclude that "she just ran out of gas" if the flow of ideas comes to a halt. Wide-scale news coverage of incidents such as the Exxon Valdez disaster reinforces the assumption that fatigue and error are inevitable companions.

Empirical research suggests that this public perception is very likely to be correct. A study of twenty-four interns at Brigham and Women's Hospital in Boston compared the duration of sleep and the rate of attention failure experienced on a traditional work week schedule and on an "intervention" schedule.⁹⁰ The traditional schedule was a three-day cycle, with extended work shifts of thirty consecutive hours every other shift.⁹¹ The intervention schedule limited work shifts to sixteen consecutive hours.⁹² While interns on both shifts typically worked longer than their scheduled shifts, the interns on the traditional schedule worked an average of seventy-seven to eighty-one hours per week, and the interns on the intervention schedule worked sixty to sixty-three hours.⁹³ Interns who worked the traditional schedule slept almost six hours less per week than those who worked the intervention schedule.⁹⁴ Not surprisingly, night-time attention failure was twice as high among the interns who worked the longer, traditional hours than their counterparts on the intervention schedule; the rate of daytime attention failure was 1.5 times greater among the traditionally scheduled interns than among the interns who worked the reduced, intervention hours.⁹⁵

A 2005 study compared the performance reactions of hospital residents after a heavy call-schedule and after the consumption of alcohol. Residents who experienced four weeks of heavy calls exhibited impairments similar to those attributable to a blood alcohol content of 0.04% to 0.05%.⁹⁶ The similarity between the effects of sleep deprivation and the effects of alcohol consumption was particularly striking when the residents per-

90. See Steven W. Lockley et al., *Effect of Reducing Interns' Weekly Work Hours on Sleep and Attentional Failures*, 351 NEW ENG. J. MED. 1829, 1830 (2004).

91. See *id.* at 1830.

92. See *id.*

93. See *id.*

94. See *id.* at 1833.

95. See Lockley et al., *supra* note 90, at 1834.

96. See Arnedt et al., *supra* note 3, at 1025.

formed simulated driving tasks. The performance deficits suggested that “resident driving skills are impaired post-call and contribute to increased injury risk.”⁹⁷

This information merely confirms what we already knew: people who are sleepy are at greater risk for making mistakes. So why is sleep so critical to our well-being? What happens to our bodies when we sleep that restores us to a greater level of efficiency in our performance, and often, an improvement in our mood? No matter what cultural boundaries may divide human beings, the need for sleep unites us all. Sleep is integral to the well-being of the biologic functions of every individual person.⁹⁸ Why is this the case?

Clinical researchers define “sleep” as a “state characterized by stereotypic posture, minimal movement, reduced responsivity to stimuli, reversibility, and species-specific diurnal timing and duration.”⁹⁹ Sleep, unlike coma, will end in accordance with the norms of our species.¹⁰⁰ As human beings, our sleep normally takes place in a reclining position and reduces our awareness of our surroundings and other stimuli such as sound or physical sensation.¹⁰¹

During a period of sleep, a person cycles between periods characterized by rapid eye movement (REM) and periods characterized by non-rapid eye movement (NREM).¹⁰² A period of eight hours of sleep may involve three to six repetitions of the NREM-REM cycle,¹⁰³ with the greatest amount of time spent in NREM sleep.¹⁰⁴ NREM sleep or, as it is sometimes known, “deep sleep,” begins with a brief transitional period during which a person may easily be awakened and moves toward a longer period

97. *Id.* at 1031.

98. See Shepard, Jr. et al., *supra* note 1, at 62 (“[S]leep is viewed as a basic biologic process that affects all individuals and has significant impact on the function of all organ systems.”).

99. See Thomas Roth & Timothy Roehrs, *Sleep Organization and Regulation*, 54 NEUROLOGY S2 (Supp. 1 2000); see also *Sleepiness Versus Sleeplessness: Shift Work and Sleep Disorders in the Primary Care Setting*, 6 PRIM. CARE COMPANION J. CLINICAL PSYCHIATRY 204 (2004) (reporting highlights of the teleconference series “Differential Diagnosis and Management of Excessive Sleepiness” held April 5, 7, & 22, 2004).

100. See Roth & Roehrs, *supra* note 99, at S2.

101. See *id.*; Thomas Roth, *Characteristics and Determinants of Normal Sleep*, 65 J. CLINICAL PSYCHIATRY 8 (Supp. 16 2004).

102. See Roth, *supra* note 101, at 8.

103. See *id.*

104. According to Roth, seventy-five percent to eighty-five percent of sleep occurs in NREM, while twenty to twenty-five percent occurs during REM. See *id.* at 9 (noting also that the remaining five percent of nocturnal sleep relates to wakefulness).

characterized by low brain activity.¹⁰⁵ In contrast, REM sleep involves fast brain activity and little body movement.¹⁰⁶

Scientists hypothesize that three biologic processes regulate the amount and quality of our sleep: first, a “homeostatic process” determined by prior amounts of sleep and wakefulness; second, a “circadian process” related to the cycle of light and darkness in our environment; and, third, an “ultradian rhythm” of rapid and non-rapid eye movement during a period of sleep.¹⁰⁷ The homeostatic factor is easy to explain; most people understand that shortening the time a person sleeps at night is likely to produce a feeling of sleepiness the next day.¹⁰⁸ A simplistic understanding of the circadian rhythm, which is closely associated with our normal perceptions of the twenty-four-hour cycle of night and day, has also crept into normal parlance.¹⁰⁹ The biologic significance of the circadian rhythm largely explains why human beings tend to sleep in the night and wake during the day. In addition to the REM/NREM cycle, biologic functions such as core body temperature and the secretion of melatonin reflect sensitivity to a twenty-four-hour circadian cycle.¹¹⁰ A deviation from the normal circadian rhythm of sleep is known as “desynchronosis.”¹¹¹ The term “ultradian” is, perhaps, the most obscure of these phrases and the most removed from the experience of which most people are sensible. An “ultradian” rhythm refers to a biologic rhythm that lasts for a duration of less than twenty-four hours.¹¹² In the context of sleep science, the alternating periods of REM and NREM sleep reflect an ultradian rhythm.

The biologically-motivated desire to sleep at night and to be active in the day is deeply engrained in the cultural experience and development of humankind. Even the clinical diagnostic cri-

105. *See id.* at 8–9.

106. *See id.* at 9. Roth reports that “REM sleep is thought to consist of tonic and phasic periods, which are distinguished by short clusters of rapid eye movement activity (phasic) that are followed by periods of relative inactivity (tonic).” *See id.*

107. *See* Roth & Roehrs, *supra* note 99, at S3.

108. *See* Roth, *supra* note 101, at 9.

109. Gloria Kuhn explains that the suprachiasmatic nuclei (SCN), located in the lower frontal hypothalamus of the brain, are connected by a direct neural tract to the retina. *See* Gloria Kuhn, *Circadian Rhythm, Shift Work, and Emergency Medicine*, 37 ANNALS EMERGENCY MED. 88, 89 (2001). This connection makes the difference between light and dark significant in the development of the circadian rhythm. *See id.*

110. *See id.* at 89.

111. *See id.* at 90.

112. *Id.* at 89.

teria used to classify sleep disorders recognize that, in some cases, the notion of “disordered” sleep patterns reflect social and cultural assumptions about the proper time and pattern of individual sleep habits. The American Academy of Sleep Medicine (AASM) notes that the “major feature” of circadian rhythm sleep disorders is “a misalignment between the patient’s sleep pattern and the sleep pattern that is desired or regarded as the societal norm.”¹¹³ Thus, in the words of the AASM’s diagnostic and coding manual, “the underlying problem is that the patient cannot sleep when sleep is desired, needed, or expected.”¹¹⁴ The diagnosis of a circadian rhythm sleep disorder is appropriate when two elements are present: first, the “timing of sleep is the predominant cause of the sleep disturbance,” and second, the timing of sleep “is outside the societal norm.”¹¹⁵

The fact that social norms play a significant role in setting the times and conditions under which sleep is “desired, needed, or expected” does not alleviate the physical reality experienced by a person who cannot meet those norms. The catalogue of ills that may accompany desynchronosis includes fatigue, gastrointestinal distress (such as dyspepsia or changes in bowel habits), and changes in mood.¹¹⁶ Some scientists link desynchronosis to a heightened risk of cardiovascular disease.¹¹⁷ The impact of desynchronosis may also extend to a developing fetus; one study suggests that female shift workers are more likely to give birth to premature infants or to low birth-weight infants.¹¹⁸ Moreover, the rate of miscarriage was twice as high for women who worked fixed night shifts and increased fourfold among women who worked fixed evening shifts during pregnancy in comparison to women who worked daylight hours.¹¹⁹ Additional studies have suggested an association between sleep deprivation and degradation of the immune system as well as elevation of blood pressure.¹²⁰

There are, of course, many reasons why a person’s sleep patterns might deviate from conventional norms. New parents, sports fans, travelers, and students, for example, may curtail or

113. AM. ACAD. OF SLEEP MED., THE INTERNATIONAL CLASSIFICATION OF SLEEP DISORDERS, REVISED: DIAGNOSTIC AND CODING MANUAL 117 (2001) [hereinafter AASM].

114. *Id.*

115. *Id.* at 118.

116. See Kuhn, *supra* note 109, at 90.

117. See *id.* at 92.

118. See *id.*

119. See *id.*

120. See *id.*

re-organize the hours devoted to sleep for reasons that are independent of any workplace considerations.

Nonetheless, work remains a significant factor in distorting normal sleep patterns. According to the Bureau of Labor Statistics (BLS), 27.5 million Americans worked variable shifts in May 2004.¹²¹ Almost fifteen percent of workers worked a “non-daytime” schedule on a full-time basis.¹²² The duration of shifts varies from one industry to another, but general estimates suggest that an eight to twelve-hour shift is common.¹²³ This estimate of duration is almost certainly too simplistic, however, because shift work often requires or offers the opportunity to work overtime hours. One study of 623 extended-hours facilities (defined as businesses that operate outside the 7:00 a.m. to 7:00 p.m. time frame) found that 41.5 percent of the facilities required some mandatory overtime.¹²⁴ Moreover, ten percent of the surveyed facilities reported an average of more than 500 hours of overtime work per employee.¹²⁵ The same study reported that facilities that were identified as having “severe fatigue problems” also reported twice as much overtime hours as the norm for the study.¹²⁶ In addition to overtime (whether mandatory or not), shift workers in fields such as healthcare or public safety also find their work hours to be complicated by call schedules that disrupt hours that would otherwise be devoted to activities other than work.¹²⁷

Why do people agree to work conditions that are so far removed from the stereotypical “nine-to-five” schedule enshrined in our popular culture? More than half of the workers who participated in the May 2004 Current Population Study stated that the reason for this schedule was the “nature of the job.”¹²⁸ Even more striking is the fact that three-quarters of workers on rotat-

121. See Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Workers on Flexible and Shift Schedules in 2004 Summary (July 1, 2005), available at <http://www.bls.gov/news.release/flex.nr0.htm>.

122. See *id.*

123. See CLAIRE C. CARUSO ET AL., DEP’T OF HEALTH & HUMAN SERVS., OVERTIME AND EXTENDED WORK SHIFTS 27 (2004), available at <http://www.cdc.gov/niosh/docs/2004-143/pdfs/2004-143.pdf>.

124. See TODD DAWSON ET AL., DEP’T OF HEALTH & HUMAN SERVS., INDUSTRY TRENDS, COSTS AND MANAGEMENT OF LONG WORKING HOURS (2004), <http://www.cdc.gov/niosh/topics/workschedules/abstracts/dawson.html>.

125. See *id.*

126. See *id.*

127. See Anne-Marie Nicol & Jackie S. Botterill, *On-call Work and Health: A Review*, 3 ENVTL. HEALTH: A GLOBAL ACCESS SCI. SOURCE (2004), <http://www.ehjournal.net/content/pdf/1476-069X-3-15.pdf>.

128. See Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Table 6. Full-Time Wage and Salary Shift Workers By Reason For Working a

ing shifts stated that the “nature of the job” required them to work this schedule.¹²⁹ These results suggest that occupational choice, rather than the desire for a particular work schedule, explains the reason a person works a non-traditional schedule. When the BLS correlated shift schedules to occupations, the survey results demonstrated that the service workforce (including public safety officers and food-service personnel) accounted for the greatest number of non-daytime workers.¹³⁰ Irregular work schedules were also prevalent among transportation workers and workers engaged in the manufacturing of nondurable goods.¹³¹ Stated differently, the BLS statistics suggest that people who work outside normal business hours largely do so because they want a particular job or a particular occupation and not because they prefer nighttime work.

Given the strong biological predisposition for nighttime sleep and the disruption which inadequate sleep produces in human physiology, the fact that nighttime workers work in order to pursue a job rather than because they like to stay awake is noteworthy. Some nighttime workers may, of course, choose to work the night shift because they really are “night owls.” However, the BLS statistics suggest that the rationale for accepting the consequences of nighttime or rotating work is more likely than not to go something like this: “I really want to be a firefighter [or to be home with my kids after school, or to take this job because there are no others], so in exchange I will work at night even though it will likely be bad for my health and social relationships.” If human dignity includes both the right to meaningful work and the right to sufficient rest, these workers must sacrifice one aspect of their personal well-being or the other.¹³² The aspiring firefighter must choose either the fulfillment he or she finds in preventing or suppressing fire or the sense of well-being that accompanies a well-rested body. The situation presents little choice at all for workers who, for whatever reason, find that night work is the only job available to them.

Non-Daytime Schedule, May 2004, available at <http://www.bls.gov/news.release/flex.t06.htm> (last visited Apr. 29, 2006).

129. See *id.*

130. See Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Table 5. Shift Usually Worked: Full-Time Wage and Salary Workers by Occupation and Industry, May 2004, available at <http://www.bls.gov/news.release/flex.t05.htm>.

131. See *id.*

132. See Linda K. Glazner, *Shift Work and its Effects on Fire Fighters and Nurses*, OCCUPATIONAL HEALTH & SAFETY, July 1992, at 43.

This predicament is not hypothetical. It is a physical and social reality, with measurable physical consequences and observable social consequences. A National Institute of Occupational Safety and Health review of the results of twenty-two studies found that “[a] pattern of deteriorating performance on psychophysiological tests and injuries while working long hours was observed across study findings.”¹³³ Twelve-hour night shifts were associated with greater fatigue, as well as increased smoking and alcohol use.¹³⁴ In addition, four twelve-hour night shifts per week produced greater fatigue in the upper extremities than five eight-hour days or four twelve-hour days.¹³⁵ The additional stress of unplanned overtime may also contribute to poor worker health; a Finnish study determined that lack of control over one’s work schedule was associated with poor health among female workers.¹³⁶

It is important to note that while many shift workers may experience a disruption of their circadian rhythms and, as a result, experience fatigue, not all workers suffer from shift-work sleep disorders. According to some estimates, only five to ten percent of night shift workers meet the clinical standards for a diagnosis of shift work sleep disorder.¹³⁷ Yet, for these unfortunate few, the consequences of sleep deprivation extend far beyond an inconvenience and become instead a disabling condition that transforms every aspect of their lives. The International Classification of Sleep Disorders identifies the essential elements of shift work sleep disorder as “symptoms of insomnia or excessive sleepiness that occur as transient phenomena in relation to work schedules.”¹³⁸ This disorder relates directly to social decisions concerning the hours that an individual may appropriately devote to sleep. There is “no known anatomic or biochemical pathology” that accounts for the onset of this disorder.¹³⁹

133. See CARUSO ET AL., *supra* note 123, at 27.

134. See *id.*

135. See *id.* at 28 (citing R.R. Rosa et al., *Work Schedule and Task Factors in Upper Extremity Fatigue*, 40 HUM. FACTORS 150–58 (1998)).

136. See L. Ala-Mursula et al., *Effect of Employee Worktime Control on Health: A Prospective Cohort Study*, 61 OCCUPATIONAL ENVTL. MED. 254 (2004); L. Ala-Mursula et al., *Employee Control over Working Times: Associations with Subjective Health and Sickness Absences*, 56 J. EPIDEMIOLOGY & CMTY. HEALTH 272, 277 (2002).

137. See Charles A. Czeisler et al., *Modafinil for Excessive Sleepiness Associated with Shift-Work Sleep Disorder*, 353 NEW ENG. J. MED. 476 (2005).

138. See AASM, *supra* note 113, at 122. The term “shift work sleep disorder” is the modern name for the condition formerly known as “work shift change in conventional sleep-wake schedule.” See *id.* at 118.

139. See *id.* at 123.

A person who suffers from shift-work sleep disorder is unable to obtain the optimal amount of sleep during his or her off-duty hours and may experience the little sleep that is possible as “unsatisfactory and unrefreshing.”¹⁴⁰ Sleep deprivation typically reduces a person’s ability to remain alert and may result in “reduced performance capacity, with consequences for safety.”¹⁴¹

In addition to the physical discomfort of sleep deprivation, shift workers experience social deprivations. The diagnostic criteria for “shift work sleep disorder” specifically include the observation that the shift worker’s need to sleep during daylight hours may result in “marital disharmony and impaired social relationships.”¹⁴²

Attempts to accommodate the disconnect between social norms and sleep needs can produce unfortunate consequences in people who meet the clinical criteria for shift work sleep disorder. Unlike its close cousin, “jet lag syndrome,”¹⁴³ the symptoms of shift work sleep disorder generally cannot be alleviated by enduring a brief period of adaptation to new light-dark cycles or local customs. Instead, people who experience shift work sleep disorder typically wage an ongoing battle to accommodate the social demands typical of daily life with the disruption imposed by the competing demands of workplace schedules.¹⁴⁴ In addition to reducing their hours of sleep, male shift workers are more likely to engage in heavy drinking while female shift workers are more frequent consumers of sleep-aid medications such as sleeping pills.¹⁴⁵

III. CHALLENGES FOR A LEGAL RESPONSE TO WORK-RELATED SLEEP DEPRIVATION

Leisure, as suggested by the more traditional sources of inspiration in Catholic social thought and as developed more fully by Pieper and other academic commentators, is an attitude that permits a human being to explore the facets of his or her

140. See *id.* at 122. Gloria Kuhn reports that “[t]he factor most closely associated with premature termination of sleep is the rising phase of the temperature cycle,” rather than ambient noise. Kuhn, *supra* note 109, at 91. In some instances, melatonin production, which is normally inversely correlated with rising temperatures, becomes variable. The “uncoupling of these 2 circadian rhythm markers” may account for the poor quality and short duration of sleep episodes among shift workers. See Kuhn, *supra* note 109, at 92.

141. See AASM, *supra* note 113, at 122.

142. *Id.*

143. *Id.* at 118–21.

144. See Kuhn, *supra* note 109, at 96.

145. See *id.* at 92.

person that cannot be fully realized in the context of productivity-oriented work. Leisure, while not equivalent to rest or sleep, is very closely associated with the ability to set aside the responsibilities of productive and active work. Workplace policies and incentives that minimize a worker's ability to obtain adequate sleep are very likely to reduce the ability of the worker to engage in meaningful leisure.¹⁴⁶ If leisure is essential to our becoming fully human and to basking in the knowledge that we are made in the image of God, then Catholic social thought must encourage employers and policy makers to incorporate opportunities for adequate rest into the expectations concerning work relationships.¹⁴⁷

146. Juliet Schor ties the decline in leisure time to an upward trend in consumption. In Schor's view, both phenomena are related to employer preferences for smaller workforces composed of people who work longer hours. She explains the circularity in the relationship between patterns of consumption and hours worked as follows:

The strongest argument put forward by defenders of consumer society is that if consumers didn't like it, they could stop buying. . . . While this is a powerful logic, it is based on unfounded assumptions. The most important is that consumer choice in products is matched with employee choice in hours. Because the vast majority of the income Americans spend in consumer markets is earned in labor markets, the two are intimately tied. . . . [T]he market in hours is very limited. Employers set hours, employees do not. And employers prefer, *ceteris paribus*, to have their people working long hours, even overtime, because they are thus able to hire fewer workers and to save on fringe benefits and other costs. To get short hours, a worker must typically make large sacrifices in pay, benefits, and, most important, upward mobility. . . . This failure of the "market in hours" creates a structural bias toward spending and against free time. Employers pass on productivity growth in income rather than the option of more free time.

See JULIET B. SCHOR, *THE OVERSPENT AMERICAN: UPSCALING, DOWNSHIFTING, AND THE NEW CONSUMER* 240–41 n.162 (1998); see also JULIET B. SCHOR, *BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE* 10–13 (2004) (examining the impact of the work hours and consumption behavior of parents on consumption behavior of children); Peter Cullen, *Time, Tastes and Technology: The Economic Evolution of Eating Out*, *BRIT. FOOD J.*, Oct. 1994, at 4 (noting link between work patterns and consumption of restaurant meals in Britain).

Cathleen Kaveny notes similar behavior in lawyers who "rationalize shopping at boutiques rather than T.J. Maxx because their time is 'worth' more than the money that could be saved by a trek to the discount mall." See Kaveny, *supra* note 8, at 186. Like Schor, Kaveny observes that this pattern of behavior extends to exchanging luxury goods for time spent with a child, a spouse, or friends. See *id.* at 187.

147. Dennis Bakke, co-founder and former CEO of AES, a multinational energy company, relates the story of his attempt to change compensation structures in a company in which ninety percent of the workforce worked for an hourly wage. Workers were given the choice between receiving an hourly rate

One common method of motivating employers to change the manner in which they treat employees or the manner in which they organize their workforces is to mandate certain behaviors (such as setting a minimum wage or, as is common in the transportation industry, to require mandatory periods of rest between duties). In the alternative, a purely economic perspective might expect employers to make rational, profit-maximizing, and risk-minimizing decisions to eliminate policies and practices that are likely to result in large damages awards or other economic rents. This portion of the Article examines two legal theories that, on the surface, would seem to motivate employers to create more leisure-friendly workplace policies. I conclude that an approach that relies upon fear of liability under workplace discrimination laws or vicarious liability for employee error is unlikely to do more than set a minimum awareness of the gravity of sleep deprivation. Instead, an open appeal to virtuous behavior may prove a more compelling argument to motivate employers to adopt leisure-friendly workplace policies. This moral appeal, while admittedly and unabashedly idealistic, nonetheless joins forces with more and more scholars, theologians, and workers' rights activists to urge employers to choose behavior patterns and policies that exceed the minimum requirements of the law.

A. *Americans with Disabilities Act*

The Americans with Disabilities Act (ADA) has proven to be of little help to employees whose physical well-being and work performance suffer as a result of work-related deficits. The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees . . . and other terms, conditions, and privileges of employment."¹⁴⁸ The statute also requires employers to make reasonable accommodations with respect to the limitations of a qualified individual with a disability.¹⁴⁹ A successful plaintiff must demonstrate that he or she is disabled within the meaning

(with the opportunity for overtime pay) or become salaried workers. According to Bakke, by 2002, ninety percent of AES's forty thousand workers had elected to receive a salary. Bakke states, "On average, people were paid about the same amount of money as before but spent less time at their plants and offices." See DENNIS W. BAKKE, *JOY AT WORK: A REVOLUTIONARY APPROACH TO FUN ON THE JOB* 121-23 (2005). Kaveny's argument against the use of billable hours in law firms ties billing practices and salary structures to increased work time and decreased leisure hours. See Kaveny, *supra* note 8.

148. See 42 U.S.C. § 12112(a) (2000).

149. See 42 U.S.C. § 12112(b)(5)(A) (2000).

of the ADA, that he or she can perform the essential functions of a job (with or without reasonable accommodation), and that he or she has experienced an adverse employment decision related to his or her disability.¹⁵⁰

The prevalence of sleep deprivation and the likelihood that shift work will result in sleep deprivation is the key problem for plaintiffs who bring an ADA claim concerning sleep-related deficiencies. The roadblock that they confront is very simple to state: working outside the normal night-day cycle makes most of us sleepy. This simple statement makes it very difficult to argue that any particular individual is disabled within the meaning of the ADA. The definition of "disability" requires that a condition "substantially limits one or more of the major life activities of an individual."¹⁵¹ The examples of a "major life activity" that are provided in the ADA regulations include activities such as walking, seeing, hearing, breathing or working.¹⁵² The fact that a court accepts the argument that sleep, which is not mentioned in the list of examples, is a major life activity does not guarantee that the other elements necessary to a successful ADA claim will follow suit.¹⁵³ In order to qualify as a qualified individual with a disability, an individual must experience a substantial limitation on his ability to engage in a major life activity. The ADA regulations measure the concept of a "substantial limitation" in relation to the experience of "the average person in the general population."¹⁵⁴

Baulos v. Roadway Express, Inc. illustrates the limits of the ADA's ability to prevent working conditions that are themselves the source of a worker's disability.¹⁵⁵ In *Baulos*, a trucking company instituted a system of "sleeper duty" to reduce the cost and the time involved in trips over five hundred miles.¹⁵⁶ Drivers assigned to sleeper duty worked as teams; while one partner drove for five to eight hours, the other would be able to sleep in the rig's sleeper cab.¹⁵⁷ In theory, this arrangement accomplished dual objectives; drivers would be less likely to fall asleep at the wheel, and there would be no need to incur the costs of

150. See *Wendt v. Village of Evergreen Park*, No. 00 C 7730, 2003 WL 223443, at *5 (N.D. Ill. 2003).

151. 42 U.S.C. § 12102(2) (2000); 29 C.F.R. § 1630.2(g)(1) (2004).

152. 29 C.F.R. § 1630.2(i) (2004).

153. See *Wendt*, 2003 WL 223443, at *6 (citing *Silk v. City of Chicago*, No. 95 C 0143, 1997 WL 790598, at *7 (N.D. Ill. 1997)) (agreeing with courts that find sleep is a major life activity).

154. See *id.* (citing 29 C.F.R. § 1630.2(j)(1)(i)).

155. See *Baulos v. Roadway Express, Inc.*, 139 F.3d 1147 (7th Cir. 1998).

156. See *id.* at 1149.

157. See *id.*

motels accommodations or to halt for rest periods.¹⁵⁸ Drivers, who bid on the shifts in order of seniority, generally seemed to prefer single-driver arrangements to sleeper duty. As a result, newer drivers were unable to avoid the more onerous requirements of sleeper duty.¹⁵⁹ Two drivers independently submitted statements from physicians maintaining that their physical well-being was compromised by the grueling sleeping arrangements.¹⁶⁰ Each driver requested to be removed from sleeper duty. Both management and the drivers' union responded unfavorably to the drivers' requests for exemption from sleeper duty, an outcome that would have required the parties to sidestep the existing seniority system.¹⁶¹

The dilemma of the *Baulos* plaintiffs is a fascinating example of the limitations of anti-discrimination laws. The ADA is very helpful when a person with a disability experiences discrimination that prevents him from obtaining a job for which he is otherwise suited. In contrast, the statute could not provide an effective mechanism to cope with poor work conditions that created a disability in an otherwise healthy employee. The Seventh Circuit wrote:

If a job keeps drivers awake, and in turn causes some sort of sleep deficit disorder, *it is pretty obvious that the job is the problem, not that the drivers are disabled.* The drivers were told they were supposed to sleep in the back of a moving truck where sleeping conditions are poor if not impossible. The deprivation of sleep was basically inevitable, although there may be a minority of drivers who can tolerate and perhaps even thrive under these harsh sleeping conditions. In fact, rather than a disability that requires accommodation, this appears to be a potential safety hazard emerging in the trucking industry.¹⁶²

A strange irony indeed prevented the *Baulos* plaintiffs from winning their ADA case. Their jobs reduced them to exhaustion, but because most other people would have suffered similar symptoms, their complaints were not sufficiently unique to warrant the protection of the laws preventing disability discrimination.¹⁶³

The *Baulos* plaintiffs are not alone in finding that the ADA offered them no protection. In fact, at least one court has

158. *See id.*

159. *See id.*

160. *See id.* at 1149–50.

161. *See id.*

162. *See id.* at 1153 (emphasis added).

163. *See id.* at 1154.

described fatigue (even fatigue that is so severe as to form the basis for a diagnosis of shift work sleep disorder) as “the expected physical response to night shift work by the ‘overwhelming majority’ of workers.”¹⁶⁴ In *Williams v. City of Charlotte*, a sergeant in the Charlotte Police Department asked to be re-assigned to daylight hours because the combination of her night-shift work schedule and her off-duty responsibilities as a single mother were causing her to experience difficulty in sleeping.¹⁶⁵ After several unsatisfactory attempts to change her work schedule, Sergeant Williams consulted a doctor who diagnosed her as having shift work sleep disorder.¹⁶⁶ The Police Department ultimately placed Sergeant Williams on daytime administrative duty and offered a different “non-sworn” job suited to her scheduling needs.¹⁶⁷ Like the *Baulos* plaintiffs, Sergeant Williams was unsuccessful in maintaining an action under the ADA because her “alleged disability [was] nothing more than a commonplace condition which does not precipitate any particular disadvantage.”¹⁶⁸ The court concluded that, in addition to the commonplace nature of the complaint, Sergeant Williams’s ADA claim was inapposite because her status as a victim of shift work sleep disorder did not preclude her from working at many non-night-shift jobs in the Charlotte area.¹⁶⁹ Other police officers have been equally unsuccessful in protesting rotating or permanent night shift work schedules under the ADA.¹⁷⁰

In sum, the ADA fails as a consistently effective means of safeguarding the worker’s ability to rest in at least two ways. First, the ADA is designed to assist people with disabilities. Sleepiness that is attributable to harsh working conditions simply does not meet the definition of “disability” within the meaning of the ADA. The irony is unmistakable: a worker suffers from sleep deprivation, but that deprivation is not unusual and the commonality of his suffering takes the sleepy person outside the protection of the Act. Second, even if sleep deprivation were a condition to which the ADA offered consistent protection, this

164. See *Williams v. City of Charlotte*, 899 F. Supp. 1484, 1489 (W.D.N.C. 1995).

165. See *id.* at 1486.

166. See *id.*

167. See *id.*

168. See *id.* at 1488.

169. See *id.*

170. See *Wendt v. Village of Evergreen Park*, No. 00 C 7730, 2003 WL 223443, at *7 (N.D. Ill. 2003); *Mont-Ros v. City of West Miami*, 111 F. Supp. 1338 (S.D. Fla. 2000).

would be poor consolation to workers whose need for rest is not, first and foremost, a physical need, but rather a spiritual need.

B. *Employer Liability for Injury to Worker or Third Party*

A second obvious strategy to motivate employers to adopt work schedules that permit employees to obtain adequate rest might be to increase the threat of liability (whether based in tort or contract theories) for injuries inflicted by sleep-deprived workers.

Beyond potential liability for on-the-job accidents, employers have generally been able to evade liability for workers' compensation in cases related to accidents that occur outside of working hours. It is true, of course, that some claimants have successfully argued that employers should be held liable for injuries that result from negligently sending workers to drive vehicles when they were tired.¹⁷¹ These occasional successes, however, are not indicative of a consistent or cut-and-dried rule that employers will always be responsible for such decisions. *Britt v. Shelby County Health Care Authority* illustrates the limits of an employer's liability for an accident that occurs outside of work hours but is nonetheless due in part to sleepiness related to work schedules.¹⁷² In *Britt*, an employee worked two sixteen-hour shifts with only an eight-hour break between shifts.¹⁷³ She fell asleep while driving home after the second shift ended and caused an accident.¹⁷⁴ Alabama law permitted compensation only when the worker's injury arose "out of and in the course of" employment.¹⁷⁵ The resolution of *Britt's* claims turned on whether the injury was in the course of her employment.¹⁷⁶ The employer was not required to pay workers' compensation because the accident occurred when the employee was off duty and therefore outside her employer's control.¹⁷⁷ Similarly, in *Willey v. Williamson Produce*, an employer was not required to pay for workers' compensation in connection with the accident-related death of a fatigued worker who also had evidence of

171. See, e.g., *Duston v. Daymark Foods, Inc.*, 122 F.3d 1146 (8th Cir. 1997).

172. See *Britt v. Shelby County Health Care Auth.*, 850 So.2d 322 (Ala. Civ. App. 2001).

173. *Id.* at 324.

174. *Id.*

175. *Id.* at 327.

176. *Id.* at 328.

177. *Id.*

cocaine and marijuana in his urine.¹⁷⁸ In *Fonder v. WCAB (Fox Integrated)*, the Commonwealth Court of Pennsylvania explained that public policy would not support employer liability for “self-induced exhaustion.”¹⁷⁹ The *Fonder* decision is particularly indicative of the difficulty of holding employers accountable for fatigue-inducing schedules; in *Fonder*, working forty-eight hours in a row was characterized as the cause of “self-induced exhaustion.”¹⁸⁰

When sleepy drivers cause vehicle accidents, it is not unusual for courts to impose criminal or civil sanctions on the driver. Negligence results not from the involuntary actions of the sleeping driver but from his or her disregard of the danger of driving while sleepy.¹⁸¹ In *Conrad v. Commonwealth*, for example, a driver who had been awake for twenty-two hours dozed off during a lengthy drive home. His vehicle struck and killed a pedestrian. The evidence supported a finding that the driver was criminally negligent for the consequences of continuing to drive on a public highway after having realized that he had dozed off four or five times before the accident occurred.¹⁸²

It is not certain, however, that the fact that a driver is sleepy because of a demanding work schedule is a sufficient basis for imposing on his employer the liability for injuries that the driver might cause to third parties. In *Bermudez v. Martinez Trucking*, a truck-driving instructor fell asleep while his trainee was operating the truck. Although the trainee lost control of the truck and allowed the truck to strike a barrier, an Illinois state court held that the instructor’s failure to remain awake was not the proximate cause of the accident.¹⁸³

IV. THOUGHTS FOR THE FUTURE

What strategies might motivate employers to adopt working schedules that are conducive to insuring that workers may rest and enjoy the fullness of their human experience? Motivating employers to adopt worker-friendly schedules in order to avoid liability seems an uncertain strategy in several ways. The brief

178. See *Willey v. Williamson Produce*, 562 S.E.2d 1 (N.C. Ct. App. 2002), *rev'd on other grounds*, 577 S.E.2d 622 (N.C. 2003).

179. See *Fonder v. Workers' Comp. Appeal Bd. (Fox Integrated)*, 842 A.2d 512 (Pa. Commw. Ct. 2004).

180. See *id.* at 514.

181. See Russell L. Wald, *Sleeping Motorist*, 16 AM. JUR. PROOF OF FACTS 3d 1, §2 (1992).

182. See *Conrad v. Commonwealth*, 514 S.E.2d 364 (Va. Ct. App. 1999).

183. See *Bermudez v. Martinez Trucking*, 796 N.E.2d 1074 (Ill. App. Ct. 2003).

review of these cases hardly constitutes an exhaustive examination of the potential for employer liability for employees' accidents that are connected to work-related sleep deprivation. However, the inconsistency of the results in this sampling of cases suggests that an employer is unlikely to expect that the corporation will consistently face large damage awards in such cases. Absent government regulation, the remote possibility of incurring damages for an accident caused by a worker's sleepiness is not a solid foundation for an argument that the employer should re-work its demands in terms of scheduling. In addition, a liability-based motivational strategy does not address the individual worker's own needs. The cautious worker, who pulls over to the side of the road after determining that she is too tired to drive after forty-eight hours at work, might save herself and perhaps even her employer from becoming embroiled in the consequences of a sleep-related accident. Yet, a decision to pull over the car does not help the worker to experience rest or leisure; indeed, if anything, such a decision delays the moment when she may sleep at home and, when rested, wake to experience the other spiritual benefits of rest and leisure.

Here enters the real challenge of Catholic social thought. Catholic social thought, in the company of modern psychology and medicine, has introduced the basis for arguing that the right to rest is a fundamental human right that takes priority over production goals. In application, much of Catholic social thought finds its meaning not in the effort to dissuade employers from undertaking illegal activities but in the effort to help employers discern between actions that are merely legal and those that contribute to the well-being of society as a whole. In truth, the goals of Catholic social thought will not be achieved if scholars and business leaders merely provide employers with economic arguments that demonstrate that adopting a more leisure-friendly policy will result in greater worker efficiency. Instead, Catholic social thought demands a leisure-friendly policy because the worker, a human person, is "someone" rather than "something."

We simply need to face this fact: Catholic social thought is about virtue, and the practice of virtue or moral prudence is an end in itself. As lawyers, we need to be able to honestly tell our clients the truth. Many strategies are legal without being virtuous. If lawyers are to contribute to the realization of human dignity, we may just have to say right out loud, for everyone to hear: Do not adopt worker policies because you are afraid not to. Do it because it is right.

