

FINE-LABOR: THE SYMBIOSIS BETWEEN MONETARY AND WORK SANCTIONS

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Monetary sanctions (fines and restitution) and work sanctions are theoretically superior to incarceration: they can deliver deterrence more cheaply, benefit victims tangibly, and promote offender rehabilitation. Yet incarceration remains the dominant punishment in America, even where incapacitation concerns are secondary. This is due in large part to practical drawbacks to the alternatives: monetary sanctions are difficult to enforce and do not seem punitive enough, and unions have successfully lobbied against the competitive threat of convict labor. In a hybrid "fine-labor" system, in which offenders are made to work to pay fines and restitution, the work component could remedy the flaws in monetary sanctions (e.g., by supplying both enforceability and retributive severity) and vice versa (e.g., by incentivizing the victims' rights movement to counter the influence of unions). This Article sketches a model fine-labor system, and addresses potential legal, philosophical, and pragmatic objections to its implementation.

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INTRODUCTION

The American prison system is, by a variety of measures, a failure. We spend over \$60 billion per year on corrections.¹ Between 1977 and 2003, state and local spending on corrections increased at more than double the rate of spending on education and health care.² This enormous investment in resources has yielded large prison populations—as of 2008, there were an estimated 2.3 million Americans behind bars,³ or more than one in every hundred adults⁴—but it has yielded crime-control results that are questionable at best. Two out of three offenders released from prison will be rearrested for committing a new crime within three years of their release.⁵ Many dispute that increasing incarceration levels has had any effect on reducing crime rates, let alone an effect large enough to justify the costs.⁶ Indeed, excessive reliance on incarceration may be actually *increasing* crime rates through increased recidivism and disruption of family and community bonds, among other things.⁷ Aside from its effect on crime, incarceration can have

1. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.1.4.2003 (2003), <http://www.albany.edu/sourcebook/pdf/t142003.pdf>.

2. KRISTEN A. HUGHES, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003 4 (2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeus03.pdf>.

3. HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008 – STATISTICAL TABLES, 16 TABLE 15 (2009), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim08st.pdf>. (2,310,984 total).

4. The estimated U.S. population in 2008 was 304,059,724. U.S. CENSUS BUREAU, POPULATION FINDER, http://factfinder.census.gov/servlet/SAFFPopulation?_submenuId=population_0&_sse=on (last visited Nov. 24, 2009). The adult population in 2008 was approximately 230,118,000, or about 75 percent of that total. U.S. CENSUS BUREAU, RESIDENT POPULATION BY AGE AND SEX: 1980 TO 2008, <http://www.census.gov/compendia/statab/2010/tables/10s0007.pdf> (last visited Feb. 23, 2010).

5. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002), <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>.

6. Compare Stephen Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q.J. ECON. 319, 338 tbl.6 (1996) (estimating crime-prison elasticities of -0.38 to -0.42 for violent crime and -0.26 to -0.32 for property crime), with Robert H. DeFina & Thomas A. Arvanites, *The Weak Effect of Imprisonment on Crime, 1971–1998*, 83 SOC. SCI. Q. 635, 651 (2002) (concluding that “[w]hen separate regressions are estimated for each state, as is appropriate, the data reveal that imprisonment has no statistically significant effect in the majority of states for any of seven crimes studied”).

7. See Todd Clear et al., *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q. 33,

a devastating impact not only on the incarcerated, but on their families and on the communities where those offenders resided and will likely return.⁸

These shortcomings—as well as persistent problems with prison overcrowding⁹—have driven scholars to take a serious look at finding alternatives that are cheaper or more effective than prison.¹⁰ Yet despite its drawbacks, prison persists as the dominant punishment in America. This persistence itself is the subject of much academic scrutiny. Hopefully, by identifying what keeps us coming back to prisons, we can develop alternatives that will actually stick.

One alternative to incarceration is monetary sanctions, which include fines and restitution orders. Economic theory tells us that fines should be preferred to prison in most instances, because they deliver retribution and deterrence at a much lower cost.¹¹ Restitution does this too, and has added benefits. It is retributively satisfying, as it involves literal and symbolic “payback.” Restitution is thought to help rehabilitate offenders by providing them a way to make amends. Moreover, unlike most other punishments, restitution provides tangible benefits to victims.

Despite increased reliance on these monetary punishments in recent years, they are still relatively seldom used. Various explanations have been offered: monetary sanctions penalize the poor; they fail to deter the rich; they are largely unenforceable; they are not harsh enough—or, even if they are, they do not *seem* harsh enough; and, whatever their merits, they do not incapacitate like prison does.

A second alternative to simply confining offenders is to make them work. Like fines, community-based labor (typically

55 (2003); Martin Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1089–90, 1093.

8. Pritikin, *supra* note 7, at 1065–69.

9. Throughout the 1990s, as many as forty states were subject to federal court orders related to overcrowding. Michael Tonry, *Intermediate Sanctions in Sentencing Reform*, 2 U. CHI. L. SCH. ROUNDTABLE 391, 395 (1995). Nevertheless, as of year-end 2005, state prison systems were still operating between 1 percent below and 14 percent above capacity, although the federal prison system was operating at 34 percent above capacity. WILLIAM J. SABOL, ET AL., U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2006 7 n.2 (2007), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf>.

10. See generally Susan Turner & Judith Greene, *The FARE Probation Experiment: Implementation and Outcomes of Day Fines for Felony Offenders in Maricopa County*, 21 JUST SYS. J. 1 (1999).

11. See *infra* text accompanying notes 14–18.

unpaid community service) avoids the high costs of incarceration. Community service also has the potential to help reintegrate the offender into society and build his self-esteem, and thereby rehabilitate him. Paid labor lacks this rehabilitative panache, but it does provide a number of practical benefits: it avoids idleness which can lead to misconduct; it provides skills and experience which increase the offender's employability and so reduce the risk of recidivism; and it generates revenue which can be used to reimburse the state for criminal justice and corrections costs, compensate victims, and support the offender's dependents.

Still, despite these benefits, work sanctions outside of prison are a rarity, and employment levels within prisons are low. As with monetary sanctions, there are plenty of explanations for this. Community-based work sanctions are thought to pose a public safety risk when offered to non-trivial offenders. Community service is also seen as insufficiently condemnatory of non-trivial crimes. As for prison labor, it can seem *too* degrading, particularly considering our country's shameful history of using chain gangs to exploit African-Americans. Perhaps more importantly, unions and other interest groups have successfully lobbied against prisoner labor to avoid having to compete with it.¹²

This Article posits that a system that integrates monetary and work sanctions should be more successful than one that utilizes either in isolation. By "successful," I mean that an integrated system should be able to overcome many of the political and practical limitations that have prevented more widespread use and acceptance of such sanctions, while at the same time serving the goals of appropriately punishing wrongful behavior, reducing crime, and reducing the costs of punishing crime. Admittedly, balancing these different and sometimes conflicting goals will result in a system filled with compromises between what is descriptively expedient and what is normatively desirable, and between conservative and liberal-progressive perspectives.

My proposal for such a system, which I call "fine-labor," has three key elements. First, fines should become the default punishment for a large class of criminals who do not pose a substantial public safety risk, yet who are typically punished with prison. (The highest risk and most violent criminals

12. See *infra* text accompanying notes 116–25.

would not be afforded the fine option.) Restitution, where applicable, would be given priority in the distribution of fine payments. Fines would be calculated according to the European “day-fine” system, which takes into account both the severity of the crime and the financial means of the offender, but would be modified to ensure full restitution wherever possible. All offenders, even indigent ones, would be presumed to be capable of earning minimum wage in order to work off their fines. Second, for those offenders who lack employment to fulfill their monetary obligations, the state should provide jobs for them. Infrastructure repair and improvement and jobs reclaimed from overseas outsourcing could provide a plentiful stream of offender employment. Third, offenders who refuse to pay their fines—or who refuse to work to pay them off—should be held in contempt and sent to prison, where they (along with other prisoners) would have to work in any event. This would disincentivize offenders from choosing in-prison idleness over non-incarcerative labor, increase the base of revenue available for restitution and fine payments, and promote prisoner rehabilitation.

The advantage of fine-labor is the *combination* of work and monetary sanctions, because the utilization of the former may address many of the issues that prevent broader utilization of the latter—and vice versa. Providing work ensures that no offender is “judgment-proof,” so that substantial fines can be imposed and ordering restitution is more than an empty gesture. Because offenders will not only pay money, but will be made to *work* to pay it, this should give the punishment enough retributive bite to satisfy the public demand for retribution. At the same time, the “carrot” of meaningful restitution could motivate the victims’ rights movement to counteract union and industry opposition to offender labor (especially since most fine-laborers will have committed non-violent property offenses). Moreover, making offenders work to compensate victims appears neither as soft as community service nor as harsh and exploitative as chain gangs or the like. Plus, broader offender employment should result in reduced recidivism, which redounds to the benefit of offenders, victims, taxpayers, and the state.

Although my fine-labor proposal incorporates features of traditional criminal sanctions, it integrates them in a way that is admittedly radical. The sheer novelty may be a major obstacle to fine-labor gaining a foothold: there is simply so much

political, economic, and social inertia to overcome. Moreover, by solving some problems, fine-labor invariably threatens to create new ones. Thus, much of this Article is devoted not only to discussing how fine-labor might work, but also to addressing the numerous objections that could be raised against it.

This Article is organized as follows: Part I discusses the theoretical advantages of using monetary sanctions over incarceration, describes their underutilization in practice, and offers various explanations for that underutilization. Part II follows the same structure in dealing with work sanctions. Part III sets forth my proposal for a system of fine-labor that integrates monetary and work sanctions. Part IV analyzes the potential advantages of integrating these sanctions, whereas Part V addresses potential concerns regarding the constitutionality, morality, and feasibility of implementing such a system. The picture that emerges is that fine-labor's ability to overcome the various potential objections may depend in large part on the particular details of implementation.

I. THE USE OF MONETARY SANCTIONS

Criminal offenders can be subjected to a variety of monetary penalties. The two primary forms are restitution, which seeks to compensate victims for personal injuries and damage to or loss of property¹³, and fines, which seek to penalize and deter criminal conduct. Because fines, restitution, and numerous costs can be assessed against an offender for a single crime,¹⁴ it is often sensible to impose a single fine against him in an amount designed to optimally deter and punish, and then use that fine payment to satisfy the different restitutionary and cost obligation components.¹⁵

13. Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 64 (1982).

14. Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST. 99, 127–28 (1996); see Turner & Greene, *supra* note 10, at 5 (noting sentiment among judges that “the patchwork of monetary penalties contributed to the erosion of the sentencing process”).

15. SUSAN TURNER & JOAN PETERSILIA, DAY FINES IN FOUR U.S. JURISDICTIONS 76–77 (RAND 1996), available at <http://www.ncjrs.gov/pdffiles1/pr/163409.pdf>.

A. *Advantages of Monetary Sanctions*

From an economic standpoint, there are several reasons why fines are preferable to nonmonetary sanctions such as prison. First, fines can be administered far more cheaply than prison, so an offender can be deterred without incurring the roughly \$25,000 per year it would take to incarcerate him.¹⁶ Avoiding incarceration is particularly important because prison beds are in high demand; imposing fines on lower-risk offenders frees up those beds for higher-risk offenders, for whom the social benefits of incapacitation are greater.¹⁷ Second, monetary sanctions can be tailored to the individual offender to achieve optimal deterrence more precisely than prison.¹⁸ Third, the disutility to the offender in paying money is balanced by the utility to the victim who receives restitution, or by the government (and taxpayers) through reimbursement of criminal justice costs.¹⁹ With prison, by contrast, the disutility suffered by the offender is not automatically balanced by utility to other parties.²⁰ Although a victim may feel some satisfaction in seeing an offender languish behind bars, this is not necessarily so; and, in any event, such satisfaction does little to tangibly improve the victim's welfare.

Imposing fines in lieu of prison may yield additional benefits. To the extent that offenders can remain in the community to pay off their fines, they may be spared the "criminalizing ef-

16. The estimated annual cost of incarcerating a federal prisoner in 2007 was \$24,922. U.S. Courts, *Costs of Incarceration and Supervised Release*, <http://www.uscourts.gov/newsroom/2008/costs.cfm> (last visited Nov. 18, 2008). State incarceration costs are substantially similar. See JAMES J. STEPHAN, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: STATE PRISON EXPENDITURES, 2001 1 (2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf> (stating that 2001 per-inmate state and federal costs were \$22,650 and \$22,632, respectively). Factoring in prison construction, lost human capital, and other costs, per-inmate estimates are as high as \$35,000 and are possibly far higher in reality. Levitt, *supra* note 6, at 324, 336–37.

17. TURNER & PETERSILIA, *supra* note 15, at 6 (summarizing the benefits of incapacitation); Turner & Greene, *supra* note 10, at 1.

18. Steven D. Levitt, *Incentive Compatibility Constraints as an Explanation for the Use of Prison Sentences Instead of Fines*, 17 INT'L REV. L. & ECON. 179, 180 (1997).

19. Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180, 193 (1968); Lisa E. Cowart, *Legislative Prerogative vs. Judicial Discretion: California's Three Strikes Law Takes a Hit*, 47 DEPAUL L. REV. 615, 647 (1998).

20. Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1235 (1985).

fects of incarceration”²¹—including the formation of anti-social bonds with fellow inmates and the disruption of pro-social bonds due to prolonged separation from friends, family, and community²²—making them less likely to recidivate. Incarceration can also have devastating effects on the offenders’ families, both because of the loss of a source of income and because of emotional and psychological strain. This is particularly true for children, who are far more likely to become delinquent when a parent is absent from the home due to incarceration.²³ Furthermore, when incarceration rates are concentrated geographically, as they are in certain low-income, inner-city neighborhoods, the social and economic fabric of the community itself can unravel.²⁴

Restitution has its own additional benefits. Criminal restitution may enable a victim to recover his losses from his wrongdoer more quickly and easily than he could through the civil tort system.²⁵ Making restitution is thought to confer a sort of cathartic benefit on the offender, by forcing him to acknowledge his victim and the harm that he inflicted upon her,²⁶ and by providing him the opportunity to rectify some of that harm.²⁷ From a retributive standpoint, restitution is “payback” in both a symbolic and literal sense,²⁸ and so it may be even more psychologically satisfying to victims and community members than the imposition of a prison sentence.²⁹

21. Turner & Greene, *supra* note 10, at 1.

22. See Clear et al., *supra* note 7, at 55; Pritikin, *supra* note 7, at 1089–90, 1093.

23. Pritikin, *supra* note 7, at 1066–67.

24. *Id.* at 1067–70.

25. Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 687–88 (2006).

26. Cowart, *supra* note 19, at 648.

27. See *Developments in the Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1960 (1998) (noting common argument that restitution programs “permit offenders to satisfy a psychological need to compensate their victims that undermines a competing need to justify their criminal behavior”); cf. Maxine D. Kersh, *The Empowerment of the Crime Victim: A Comparative Study of Victim Compensation Schemes in the United States and Australia*, 24 CAL. W. INT’L L.J. 345, 354 (1994) (arguing restitution is more personal and thus more effective punishment than either prison or fines).

28. STEPHEN SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 135 (Peterson Smith Publ’g Corp. 2d ed. 1970) (1960) (describing restitution as symbolic “payment [of one’s] debt to society”).

29. Becker argues that it is precisely the *lack* of satisfaction felt when offenders are punished with sanctions like incarceration, which do *not* restore anything to victims, that generates victim rage and the societal demand to inflict additional punishments on the offender. Becker, *supra* note 19, at 194.

Thus, whether we focus on tangible economic benefits or more intangible positive effects, there is good reason to expect monetary sanctions to be widely used.

B. The Underutilization of Monetary Sanctions

At first glance, it might appear that monetary sanctions are widely used. Criminal fines are authorized in all American jurisdictions,³⁰ and (due in large part to the rising influence of the victims' rights movement in recent decades),³¹ legislation authorizing criminal restitution is nearly as prevalent.³² In about half of the states, as well as the federal government, criminal restitution is mandatory for certain crimes.³³ Millions of fines are imposed each year,³⁴ and the amount of fines collected likely exceeds a billion dollars annually.³⁵ The total for all monetary sanctions collected, including restitution awards and various costs, is likely twice that amount.³⁶

However, these raw facts belie the true state of underutilization of monetary sanctions. First, monetary sanctions are used as a standalone penalty almost exclusively for relatively petty offenses, such as traffic offenses or certain misdemeanors.³⁷ Second, even when authorized for more serious offenses, monetary sanctions are seldom imposed. For example, despite Congress passing the Mandatory Victims Restitution Act ("MVRA")³⁸ in 1996 to beef up the availability of restitution to victims, a year later, restitution was still imposed in just 20 percent of federal criminal cases, and was not ordered against one- to two-thirds of offenders convicted of fraud, robbery, and

30. Turner & Greene, *supra* note 10, at 2.

31. Gilles, *supra* note 25, at 686; Heidi M. Grogan, *Characterizing Criminal Restitution Pursuant to the Mandatory Victims Restitution Act: Focus on the Third Circuit*, 78 TEMP. L. REV. 1079, 1082 (2005).

32. Harland, *supra* note 13, at 55.

33. Grogan, *supra* note 31, at 1083. For example, the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A(c)(1)(A) (1996), mandates restitution (with limited exceptions) for any enumerated "crime of violence," "offense against property . . . including any offense committed by fraud or deceit," or crime "relating to tampering with consumer products," whenever "an identifiable victim or victims has suffered a physical injury or pecuniary loss."

34. Tonry & Lynch, *supra* note 14, at 127.

35. Turner & Greene, *supra* note 10, at 2.

36. *Id.*

37. *Id.*; Tonry & Lynch, *supra* note 14, at 127.

38. The Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. §§ 3663A, 3664 (1996).

larceny.³⁹ Fines were imposed in less than 19 percent of federal cases⁴⁰—not much higher than the 13 percent imposed nearly twenty years earlier.⁴¹ Third, even where fines are imposed, judges typically set them well below the statutorily authorized limits,⁴² thereby depriving fines of much of their potential deterrent and retributive effect. Fourth, and perhaps most importantly, even where monetary sanctions are imposed, collection rates are dismal. A 2001 General Accounting Office study estimated that just 7 percent of state and federal restitution awards are actually collected.⁴³

One might counter that while monetary sanctions are seldom utilized, they are not underutilized. Perhaps it is implausible to expect that they could ever serve as a substitute for prison for moderate or serious offenses. Yet much of Western Europe stands a stark counter-example to America. In Finland, Sweden, Denmark, Germany, and Austria, among other places,⁴⁴ the so-called “day-fine” has indeed become a prominent criminal sanction.

Under a day-fine system, the fine for a given crime varies depending on the wealth and income of the offender.⁴⁵ The fine amount is arrived at by multiplying two factors. The first factor is the number of “day-fine units,” or units of punishment which reflect the gravity of the offense, including the nature of the offense as well as aggravating and mitigating circumstances.⁴⁶ The second factor is the value of the day-fine unit, which is tied to the personal and economic circumstances of the offender, including any accumulated wealth and anticipated income stream. It typically includes a discount for living expenses and the cost of dependent care.⁴⁷

39. Catharine M. Goodwin, *The Imposition of Restitution in Federal Criminal Cases*, FED. PROBATION, 95, 96 n.28 (1998) (noting that restitution and fines were imposed in 2.3 percent of federal cases while restitution alone was imposed in 17.5 percent of federal cases).

40. *Id.* (noting that 16.4 percent received a fine alone while 2.3 percent received a fine with restitution).

41. Gary M. Friedman, *The West German Day-Fine System: A Possibility for the United States?*, 50 U. CHI. L. REV. 281, 297 (1983).

42. Turner & Greene, *supra* note 10, at 2.

43. U.S. GEN. ACCOUNTING OFFICE, CRIMINAL DEBT: OVERSIGHT AND ACTIONS NEEDED TO ADDRESS DEFICIENCIES IN COLLECTION PROCESSES 40 (2001), <http://www.gao.gov/new.items/d01664.pdf>.

44. Friedman, *supra* note 41, at 282 n.6; Tonry & Lynch, *supra* note 14, at 128.

45. Friedman, *supra* note 41, at 281.

46. *Id.* at 287.

47. *Id.* at 287–88.

Although day-fines may appear to promote inequality of treatment—different offenders may receive wildly divergent fines for virtually identical crimes—they are designed to help ensure a proportionate impact on all offenders, rich or poor.⁴⁸ In order to encourage payment of these offender-tailored fines, courts typically have discretion to allow for installment payments or a grace period, so that payment of the day-fine is realistic given the offender's means.⁴⁹ If an offender still does not pay his fine, the fine may be converted into a prison sentence (usually set at one day in prison per day-fine unit).⁵⁰

For the most part, the European countries that have adopted day-fines have succeeded in reducing their dependence on prison. For example, former West Germany sought to replace short-term prison sentences (those of up to six months) with fines. The number of these prison sentences was 110,000 in 1968, the year before day-fine legislation was adopted. By 1979, only about 10,000 such sentences were imposed, and fines constituted 82 percent of all criminal sentences.⁵¹ In Sweden, which had adopted day-fines even earlier than Germany, fines made up an even greater share of sentences (91 percent) imposed in 1979.⁵² Yet that same year, fines made up just 13 percent of federal sentences in America—and, as noted, the rate of use has not increased much since then.⁵³

More significantly, these countries have succeeded in using fines for serious offenses. In West Germany in the late 1970s, fines were the sole sanction for three-quarters of property-crime offenders and two-thirds of those convicted of assault.⁵⁴ By 1986, the proportion of violent offenses for which fines were imposed rose to nearly three-quarters as well.⁵⁵ Similarly, in England in 1980, fines were imposed in nearly half of all convictions for “indictable offenses” (comparable to felonies in the United States), including half of those convicted of assault, 45 percent of convicted sex offenders, and almost a quarter of convicted burglars.⁵⁶

48. *Id.*

49. *Id.* at 290.

50. *Id.*

51. *Id.* at 291–92; Turner & Greene, *supra* note 10, at 3.

52. Tonry & Lynch, *supra* note 14, at 128.

53. *See supra* text accompanying note 41.

54. Turner & Greene, *supra* note 10, at 3.

55. Tonry & Lynch, *supra* note 14, at 128.

56. *Id.*

Nor has the imposition of fines been an empty gesture—collection rates are typically high.⁵⁷ A German study from the 1970s showed that over 90 percent of day-fines were collected. Nearly half of all these were paid immediately, and almost a third were paid in accordance with a delayed-payment or installment-payment schedule.⁵⁸ In only about 20 percent of cases was the state required to resort to attachment of property or the threat of imprisonment for non-payment.⁵⁹ In just 4 percent of cases were prison terms in default of payment actually imposed.⁶⁰

Thus, despite the potential advantages of monetary sanctions, and the empirical evidence regarding their successful implementation elsewhere, America has remained reluctant to adopt fines as a prevalent criminal sanction for anything other than minor offenses.

C. *Explanations for the Underutilization of Monetary Sanctions*

1. The Judgment-Proof Problem

One possible explanation for why we fine so little in America may be *how* we fine. In contrast to the European variable-fine approach, American courts with discretion over fine amounts typically set them according to an informal “going rate” or “tariff,” in which the same fine is imposed upon all offenders who commit a given offense.⁶¹ This presents a dilemma. If the tariff is set high, poor offenders will be disproportionately impacted: they will have a harder time paying it, and will be more likely to suffer the consequences of default for nonpayment.⁶² Conversely, if the fine is set low, wealthier offenders can simply “pay to play,” and will not be deterred.⁶³

57. The lesser reliance on incarceration abroad cannot be explained by lower crime rates. See, e.g., Tapio Lappi-Seppälä, *Trust, Welfare, and Political Culture: Explaining Differences in National Penal Policies*, 37 CRIME & JUST. 313, 335–36 (2008) (“[T]he difference in American imprisonment rates, compared with those of the Scandinavian countries, cannot be explained by differences in crime since victimization rates are practically identical.”).

58. Friedman, *supra* note 41, at 296.

59. *Id.* at 296–97.

60. *Id.* at 297.

61. Turner & Greene, *supra* note 10, at 2.

62. Levitt, *supra* note 18, at 181.

63. Turner & Greene, *supra* note 10, at 2; see also Levitt, *supra* note 18, at 181.

Because most offenders tend to be poor—about half were under- or unemployed prior to arrest, and over two-thirds were living in poverty⁶⁴—tariffs are typically set at the lower end of the range. This decreases fines' punitive potential and makes them less appropriate for more serious offenses.⁶⁵

This is not to say that having America switch to a day-fine system would be a panacea. Variable fines can undermine deterrence for poor offenders. The potential benefit of a crime is a more or less constant value for all offenders (for example, stealing a \$1000 car);⁶⁶ but under a variable fine system, the potential cost of that crime will be lower for poorer offenders than for richer ones.⁶⁷ If an offender is poor enough, the potential costs of committing the crime (the amount of his day-fine) may be lower than the potential benefits, so he may be incentivized to commit it. This skewing of incentives is most pronounced among the poorest offenders;⁶⁸ the higher the proportion of poor offenders, the greater the skewing of incentives. Thus some have argued that, because Western European nations tend to have a smaller economic underclass than America, and so have a smaller proportion of offenders for whom day-fines would provide a perverse incentive to commit crime, they are better suited to a day-fine system than we are.⁶⁹

In order to avoid this incentive problem for poor offenders, a day-fine system could be modified by imposing a minimum fine for certain offenses.⁷⁰ Yet such a minimum raises the same concern that causes many judges to set low fines in the first place—offenders' inability to pay the fine. Indeed, surveys have shown that sentencing judges are hesitant to use fines more broadly because of concerns about (among other things) low collection rates, undue penalization of lower income offend-

64. Two-thirds of prisoners were employed prior to their arrest and up to a third were fully unemployed. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 219 tbl.351 (116th ed. 1996). Seventy percent of the prisoners earned less than \$15,000 in the year preceding their arrest and just under a third earned less than \$5,000. Kerry L. Pyle, Note, *Prison Employment: A Long-Term Solution to the Overcrowding Crisis*, 77 B.U. L. REV. 151, 169 n.151 (1997).

65. Turner & Greene, *supra* note 10, at 2.

66. This assumes that the risk of detection, apprehension, and conviction; access to black markets; and the psychological rewards of crime are equal for all offenders.

67. Friedman, *supra* note 41, at 302.

68. *Id.*

69. *Id.* at 302–03.

70. *Id.* at 303.

ers, and (when fines are used as a condition of probation) setting up poorer probationers for failure.⁷¹

In short, if many offenders lack financial resources—and many do—then punishing them through fines large enough to be effective deterrents may be a futile attempt to squeeze blood from the proverbial stone. Little wonder that many judges prefer to impose prison terms, since liberty is a universal resource of which all offenders, rich or poor, can be deprived.

2. Other Economic Barriers

Inability to pay is hardly the only incentive problem with fines. Determining offenders' ability to pay is itself an obstacle. As economist Steven Levitt points out, even if we wanted to tailor a fine to an individual offender's wealth, offenders have private information about their wealth, in terms of both financial capital and human capital (assuming we are willing to let them work to pay off the fine over time).⁷² Because offenders have an obvious incentive to understate their wealth in order to profess an inability to pay, the fines imposed will uniformly be set too low to optimally deter them.

Setting fines too high creates a different incentive problem. Each offender has his own threshold of what it is "worth" to him to avoid prison. Once an offender's fine is fixed above a certain amount, he will simply elect to go to prison in default of payment rather than pay the fine.⁷³ So to be enforceable, the fine must be set low enough that an offender is willing to pay it rather than go to jail. Yet if poorer offenders have a lower disutility to prison,⁷⁴ the fine that they will be willing to pay will be rather low—perhaps much lower than what will be needed to optimally deter them. Thus we find ourselves in a quandary: enforceable fines will be ineffective; effective fines will be unenforceable.

Due to the problems that may arise if fines are set too low or too high, setting the fine within the "sweet spot" for each offender on a case-by-case basis—even if attainable—could be both expensive and time consuming. A judicial or ministerial officer would want to obtain an offender's tax and employment records, among other things. The offender may challenge (legi-

71. Turner & Greene, *supra* note 10, at 2, 5.

72. Levitt, *supra* note 18, at 181.

73. *Id.*

74. *Id.* at 183.

timately or otherwise) access to these records.⁷⁵ And even if the data is obtained, the officer must read between the lines to try to determine the “true” picture of the offender’s income and assets.

Thus, it may be that information costs are a practical limitation of implementing fines that undercut the theoretical benefits of this form of sanction.

3. The Severity Problem

Another obstacle to using fines as punishments for non-trivial offenses is not whether the offenders themselves will accept such punishments, but whether sentencing judges and the public will. In a sense, this has less to do with fines than with what they would replace. According to Michael Tonry, the most difficult obstacle to utilizing any sanctions short of prison, be they fines or otherwise, is:

[T]he modern American preoccupation with absolute severity of punishment and the related widespread view that only imprisonment counts. The average lengths of prison sentences are much greater in the United States than in other Western countries. . . . This absolute severity frustrates efforts to devise intermediate sanctions for the psychological . . . reason that few other sanctions seem [commensurate] with a multi-year prison sentence.⁷⁶

Under this view, fines have successfully displaced prison sentences for crimes like assault and burglary in Europe not because Europeans view fines as a stiffer penalty than Americans do, but because they were punishing those crimes with lighter sentences to begin with.⁷⁷

The data bears out this observation. In Sweden, less than one fourth of all prison sentences are for terms of six months or longer, and in the Netherlands, less than a sixth are for a year

75. See Friedman, *supra* note 41, at 300–01 (discussing both laws granting sentencing judges broad discretion to obtain offenders’ economic data for sentencing purposes and laws that offenders may invoke to block disclosure).

76. Tonry, *supra* note 9, at 403.

77. *Id.* at 404; see Anthony N. Doob & Voula Marinos, *Reconceptualizing Punishment: Understanding the Limitations on the Use of Intermediate Punishments*, 2 U. CHI. L. SCH. ROUNDTABLE 413, 413 (1995) (“The failure of policymakers to adopt—or at least to explore—the concept of the ‘interchangeability’ of punishments . . . may reflect the view that punishments must be more severe than any form of ‘interchangeability’ will allow.”).

or longer. By contrast, in the United States, 90 percent of sentences handed down by state courts are for terms of a year or longer, and nearly three out of five are for terms greater than five years.⁷⁸

This American obsession with harsh punishment has worked to preclude the expansion of fines. Susan Turner has cited evidence showing that “the most inhibiting influence against an increased use of fines is the deep skepticism among American criminal justice practitioners about the ability of judges to set fines large enough to punish those convicted of crimes and deter individuals from repeated offenses.”⁷⁹ Another national survey found that “judges do not regard the fine alone as a meaningful alternative to incarceration”⁸⁰

4. The Social Meaning Problem

Another explanation for the minimal reliance on fines is not that they are not a severe enough punishment; after all, a million dollar fine is undoubtedly harsher than a single day in prison. Rather, it is that fines of any amount insufficiently express the condemnation which the public demands of criminal punishments.⁸¹

Dan Kahan is one of the most well-known proponents of the view that the social message expressed by different punishments is as important to their successful implementation as is their ability to deliver retribution, incapacitation, or deterrence.⁸² In comparing fines and incarceration, Kahan utilizes Robert Cooter’s distinction between a *sanction*—“a detriment imposed for doing what is forbidden”—and a *price*—“a detriment that an actor is required to endure ‘in order to do what is permitted.’”⁸³ Kahan thus observes that:

78. Tonry, *supra* note 9, at 404.

79. Turner & Greene, *supra* note 10, at 2.

80. Tonry & Lynch, *supra* note 14, at 128 (quoting George F. Cole & Barry Mahoney, *FINES AS A CRIMINAL SANCTION: PRACTICES AND ATTITUDES OF TRIAL COURT JUDGES IN THE U.S.* (1985)).

81. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 620 (1996).

82. *Id.* at 592. See also Doob & Marinos, *supra* note 77, at 414 (“[I]mprisonment may be seen as accomplishing the traditional sentencing goal of denunciation more effectively than intermediate sanctions can, independent of questions of severity. Thus, some offenses may be seen—by judges and by members of the general public—as ‘requiring’ imprisonment.”).

83. Kahan, *supra* note 81, at 621 (emphasis omitted) (citing Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1524–25 (1984)).

Prison . . . is clearly a sanction; because liberty is so universally and intensely valued, taking it away is our society's most potent symbol of moral condemnation. Fines condemn much more ambivalently. . . . [W]hen fines are used as a substitute for imprisonment, the message is likely to be that the offender's conduct is being priced rather than sanctioned. And while we might believe that charging a high price for a good makes the purchaser suffer, we do not condemn someone for buying what we are willing to sell. . . . Accordingly, when it lacks this signification [of condemnation], a fine, no matter how large, won't be viewed as an adequate substitute for an appropriate term of imprisonment.⁸⁴

Anthony Doob and Voula Marinos have expanded upon this idea, noting that since different punishments send different symbolic messages, fines may be an expressively appropriate punishment for certain offenses, but not others. They speculate that a fine as punishment may “fail[] symbolically to denounce harm against the person,” but may be “more easily accepted for offenses involving the damage or loss of property,” which involves harms more readily (or more appropriately) reduced to economic terms.⁸⁵ Interestingly, despite their hypothesis, their empirical examination of dispositions of Canadian juvenile cases revealed that fines did seem to serve as an “appropriate” intermediate sanction not only for some property offenses (as well as for possession of narcotics and disorderly conduct), but also for “less serious . . . violence offenses.”⁸⁶ In any event, their core insight seems to be a valid one: “punishments may differ qualitatively as well as quantitatively. Certain intermediate sanctions, though punitive, do not appear to be capable of serving certain purposes. Hence, it should not be surprising that judges do not impose them and that the public does not advocate their use.”⁸⁷

5. Political Risk Aversion

One obvious reason why community-based sanctions—including stand-alone fines or restitution orders—are not more frequently used as a substitute for incarceration is the risk

84. *Id.*; see also Doob & Marinos, *supra* note 77, at 426.

85. Doob & Marinos, *supra* note 77, at 426.

86. *Id.* at 429.

87. *Id.* at 414.

aversion of politicians, judges, and prosecutors. Whatever its drawbacks, the one thing that prison guarantees is that offenders will not commit new crimes for the duration of the punishment.⁸⁸ Community-based sanctions, notwithstanding any possible advantages in terms of cost savings or improved offender reintegration, possess no such guarantee. Even in a well-designed, well-implemented, community-based sanctions program, some offenders will commit serious crimes, and elected officials “are understandably concerned that they will be held responsible for supporting the program.”⁸⁹ Judges and prosecutors are likewise reluctant to divert offenders from prison, lest they be deemed responsible for crimes those offenders subsequently commit.⁹⁰

The politically “safest” way for these officials to support community-based sanctions is to reserve them for the less risky first-time and/or non-violent offenders—precisely the pool of offenders who were least likely to be sentenced to prison in the first place.⁹¹ This hampers the ability of fines to become a prevalent punishment for serious offenses.

6. Net Widening and Inefficiency

One of the principal arguments in favor of most alternatives to prison is economic: the avoidance of costly incarceration and the alleviation of prison overcrowding. Yet the evidence suggests that “any realistic prospect[] of saving money or prison beds require that [the alternatives] be used mostly for offenders who otherwise would have served prison terms.”⁹² Many alternative sanctions—such as intensive supervision programs (ISPs), day reporting, or house arrest—are not considered to be as “tough” on offenders as prison, so judges tend to impose them on offenders for whom prison was already deemed too severe, i.e., would-be probationers.⁹³ This phenomenon is known as “net widening” (as in widening the net of social control by imposing alternative punishments on those who would have otherwise received lesser punishments, not greater

88. Setting aside offenders escaping from prison, which is rare, and in-prison violence, which is common, but does not constitute a direct threat to *public safety*.

89. Tonry & Lynch, *supra* note 14, at 101.

90. *Id.* at 102.

91. *Id.*

92. *Id.* at 101.

93. *Id.* at 102.

ones).⁹⁴ Because alternative punishments are often more costly than probation, utilization of such alternatives can perversely lead to increases in corrections costs.⁹⁵

The cost-savings objectives of prison alternatives can also be undermined by heightened failure rates. Alternative sanctions such as those mentioned above often involve more intense scrutiny of offenders—and therefore reveal higher rates of technical violations—than standard probation.⁹⁶ The more frequently offenders are returned to prison for technical violations, the more prison beds and operating cost saving opportunities are lost. When those sent to prison for technical violations would have otherwise been sentenced to probation, with its less intensive surveillance and lower likelihood of discovery of technical violations, utilization of the alternatives potentially ultimately increases the demand on prison resources.⁹⁷ Even for those failing offenders who would have been sentenced to prison originally, processing them and transferring them back to prison entails additional costs.

Do these potential drawbacks of alternative sanctions generally apply to monetary sanctions in particular? It is hard to say. Officials and politicians should be at least as reluctant to sentence would-be prisoners to standalone monetary sanctions as to other community-based sanctions such as ISPs or house arrest, which appear even tougher. Because monetary sanctions have rarely been used for would-be prisoners, there is little hard evidence regarding failure rates. We might expect failure rates to depend on the size of the sanction, the schedule for repayment, the means and opportunities of the offender, the intensity of surveillance, and collection and default procedures, among other things. In any event, the frequent failure of other alternatives to deliver significant cost savings may help explain why there is little clamoring within the criminal justice system to expand the use of monetary sanctions as an alternative to prison.

In summary, while monetary sanctions may be quite attractive in theory, they have, due to a variety of practical and political obstacles, simply failed to catch on in this country as a

94. Tonry & Lynch, *supra* note 14, at 102; Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 239 (2009).

95. Tonry & Lynch, *supra* note 14, at 107.

96. *Id.*

97. *Id.* at 106.

major sentencing option. And unless they are retooled or repackaged in some significant way, the odds that their popularity will improve much in the future are low.

II. THE USE OF WORK SANCTIONS

The Thirteenth Amendment specifically exempts involuntarily servitude imposed upon a person “duly convicted” of a crime from the general prohibition on forced labor.⁹⁸ Thus, work as criminal punishment is permissible. The two most common forms of work punishments are prison labor and community service. Prison laborers are typically paid well below the minimum wage, if anything.⁹⁹ Community service involves public service of various sorts performed in a community setting, usually without pay.¹⁰⁰

A. *Advantages of Work Sanctions*

Both paid and unpaid work involves unpleasant burdens, and so can potentially deter and inflict retribution upon criminals. But there are additional advantages to employing prisoners. Work keeps inmates busy, preventing the idleness and boredom that can lead to violence and other misconduct, thereby improving institutional order.¹⁰¹ It can provide inmates with skills and experience that make them more marketable upon release, thereby reducing the temptation to lapse back into criminality.¹⁰² It may also instill them with a sense of dignity and competence, and so promote rehabilitation. And it can generate revenue to reimburse the state for correctional costs

98. U.S. CONST. amend. XIII.

99. For example, prisoners engaged in the federal employment program are paid between \$0.23 and \$1.15 per hour. UNICOR, FPI General Overview FAQs, <http://www.unicor.gov/about/faqs/faqsgeneral.cfm> (last visited Oct. 24, 2009).

100. See ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING 18-3.17 (3d ed. 1994).

101. Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 378–79 (1998); see also Lisa C. Phelan, Note, *Making Prisons Work*, 30 LOY. L.A. L. REV. 1747, 1754 (1997) (“The simple fact that work exhausts an inmate may contribute to the decrease in violent outbursts.”).

102. Jonathan M. Cowen, *One Nation's “Gulag” is Another Nation's “Factory Within a Fence”: Prison-Labor in the People's Republic of China and the United States of America*, 12 UCLA PAC. BASIN L.J. 190, 233 (1993); see Pyle, *supra* note 64, at 174–75 (noting that standing offenders employed while in prison were less likely to return to prison upon release, more likely to obtain employment, and earned higher wages than non-employed prisoners).

or make restitution to offenders' victims, thereby reducing taxpayer burdens and increasing public and victim satisfaction.¹⁰³

Community service also carries numerous benefits. As a non-residential sanction, it is far less costly to administer than prison. It generates public value, even if not direct economic value. It can readily be scaled to meet the seriousness of the crime or culpability of the offender by adjusting the type or amount of work.¹⁰⁴ Moreover, involving offenders in positive, socially respected activity may itself have a rehabilitative effect.¹⁰⁵

B. *The Underutilization of Work Sanctions*

Despite these advantages, prison labor and community service are rarely used. As of a decade ago, just 6.2 percent of the nation's state prison population worked¹⁰⁶—less than one in sixteen inmates. The federal prison system seems to be faring somewhat better, with a 2007 prisoner employment rate of 18 percent.¹⁰⁷ But even the federal system's apparent success is misleading: under the prevailing "state-use" system, goods or services provided by state and federal prisoners may only be sold to their respective governments, and the federal prison population is small compared to the state prison population, while its target market—the federal government—is relatively large.¹⁰⁸ On the whole, then, prisoner employment is the exception, not the rule.¹⁰⁹ As for community service, it has been

103. Timothy J. Flanagan & Kathleen Macguire, *A Full Employment Policy for Prisons in the United States: Some Arguments, Estimates, and Implications*, 21 J. CRIM. JUST. 117, 118 (1993).

104. Tonry & Lynch, *supra* note 14, at 124.

105. See Garvey, *supra* note 101, at 381 ("[T]he public's view of prisons continues to reflect 'a secular version of the Puritan ethic that envisages redeemability through [good] works and reassimilation into the community.'" (quoting Hans Toch, *Prison Reform in a Federalist Democracy*, 76 PRISON J. 495, 497 (1996))).

106. *Id.* at 370; see also Flanagan & Macguire, *supra* note 103, at 117–18 (noting that the prisoner employment rate falling below the 10 percent estimate from the early 1980s is consistent with expectations that employment opportunities would not keep pace with expanding prison populations).

107. FEDERAL PRISON INDUSTRIES, INC., UNICOR ANNUAL REPORT 2007 15 (2007), available at <http://www.unicor.gov/information/publications/pdfs/corporate/catar2007.pdf>.

108. Garvey, *supra* note 101, at 344, 371.

109. Some dispute this conclusion. See, e.g., Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 868 (2008) ("Although laments over the 'idleness' of prisoners are not uncommon, well over 600,000, and probably close to a million, inmates are working full time in jails and prisons throughout the Unit-

described as “the most underused intermediate sanction in the United States.”¹¹⁰ Like fines, community service orders have been used successfully in Europe and elsewhere to replace short-term prison sentences for crimes of moderate severity.¹¹¹ But, like fines, they have generally been used here only as a condition of probation or as a punishment for trivial offenses, not as a substitute for incarceration.¹¹²

C. *Explanations for the Underutilization of Work Sanctions*

What explains the underutilization of work-based punishments? Some obstacles apply to prison labor, some to community service, and some to both. Specifically, prison labor is subject to both interest group opposition and net widening, while both prison labor and community service may be (or at least are seen as) inadequate sanctions from an “expressive” standpoint.

1. Interest Group Opposition

Prison labor is so drastically underutilized primarily because unions and business interests have successfully lobbied Congress and the states to impose restrictive legislation that has effectively crippled the prison labor market.

From their inception in the late eighteenth century, American penitentiaries were premised on the notion that labor

ed States.”). However, most of the offenders included in this higher count are performing unpaid laundry, janitorial, culinary, office, and maintenance duties within the confines of prison walls, and often only on a less-than-full-time basis. Cowen, *supra* note 102, at 201; Garvey, *supra* note 101, at 379 n.290; Christopher Stafford, Note, *Finding Work: How to Approach the Intersection of Prisoner Reentry, Employment, and Recidivism*, 13 GEO. J. ON POVERTY L. & POL’Y 261, 272 (2006) (“Of those eligible for work assignments in prison, only 53 percent participate. . . . [T]he vast majority are simply performing institutional maintenance tasks rather than gaining employment experience for the outside world. . . . [O]nly 7 percent of all eligible inmates worked in producing consumer goods and services . . .”). *But see* Flanagan & Macguire, *supra* note 103, at 124 (noting that institutional maintenance jobs can provide some offenders real-world work experience).

110. Tonry & Lynch, *supra* note 14, at 124.

111. *Id.* at 125–26. For example, in England, Wales, and Finland offenders convicted of certain classes of larceny and burglary, who might otherwise have been punished with incarceration, are punished with community service orders. See Malcom Davies, Jukka-Pekka Takala & Jane Tyrer, *Sentencing Burglars and Explaining the Differences Between Jurisdictions: Implications for Convergence*, 44 BRIT. J. CRIMINOLOGY 741, 748 (2004).

112. Tonry & Lynch, *supra* note 14, at 124.

would reform offenders.¹¹³ With the expansion of industrialization during the nineteenth century, the reform rationale took a backseat, and putting prisoners to work for profit became a priority.¹¹⁴ Whatever the rationale, inmate employment was the norm. In 1885, for example, nine out of ten prisoners worked.¹¹⁵

As unions grew in size and influence during the latter part of the nineteenth century, they ratcheted up their resistance to prison labor. Initially, they objected on the grounds that forced prison labor was an assault upon the dignity of free labor.¹¹⁶ Toward the turn of the century, however, the opposition was increasingly premised on the economic threat posed by prison labor.¹¹⁷ Although labor and capital rarely saw eye-to-eye during this period, firms in industries that had to compete with prison industries sided with unions in opposing prison labor.¹¹⁸

In the early twentieth century, this organized opposition to prison labor began to make headway, first with state legislatures, and then—particularly with the onset of the Great Depression—with Congress. The Hawes-Cooper Act, passed in 1929, allowed states to prohibit the importation of out-of-state prisoner-made goods.¹¹⁹ The Ashurst-Sumners Act, passed in 1935, went further and made it a federal crime to knowingly transport prison-made goods into states that prohibited their sale.¹²⁰ Then, in 1940, Congress amended the Sumners-Amherst Act to make transporting and selling prisoner-made goods across state lines a federal crime, regardless whether states permitted it or not.¹²¹ This effectively foreclosed a national market for prisoner-made goods, leaving the state-use system, in which prisons sell their goods or services back to the government, as the only viable economic model.

Prisoner labor failed to flourish under the state-use system. Despite near-universal inmate employment half a cen-

113. Garvey, *supra* note 101, at 346–47.

114. *Id.* at 344–45, 352–55.

115. *Id.* at 370.

116. *Id.* at 359.

117. *Id.*

118. *Id.*

119. Act of Jan. 19, 1929, ch. 79, 45 Stat. 1084, *repealed by* Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(b), 92 Stat. 1468.

120. Act of July 24, 1935, ch. 412, 49 Stat. 494 (codified as amended at 18 U.S.C. §§ 1761–1762 (2006)); *see* Garvey, *supra* note 101, at 367 & n.211 (discussing Act as originally enacted).

121. Act of Oct. 14, 1940, ch. 872, 54 Stat. 1134 (codified as amended at 18 U.S.C. § 1761 (2006)); Garvey, *supra* note 101, at 367.

tury earlier, a report from the late 1930s found that just 23 percent of state prisoners were engaged in “productive jobs.”¹²² As noted above, the numbers have only gone down since then, as prisoner employment has failed to keep up with the rate of expansion of the prison population.

More recent federal legislation held some hope for revitalizing prisoner employment. The Prison Industry Enhancement Act (“PIEA”), passed in 1979, permits private firms to employ prisoners.¹²³ But the circumstances under which they may do so—including paying them the prevailing wage (notwithstanding the additional security costs and reduced productivity associated with employing workers behind bars), and demonstrating that their employment will not displace free labor—have themselves proven so cumbersome as to hamstring the development of this market.¹²⁴ Two decades after the PIEA was passed, its approved programs employed just 0.18 percent of the state prison population.¹²⁵ Thus, in the battle over putting prisoners to work, the opposition still holds the upper hand.

2. Net Widening

To the extent that offenders are permitted to do work outside of prison walls, such work sanctions will be subject to the same political risk aversion and potential to “widen the net of social control”¹²⁶ (by compounding, rather than scaling back, punishments) as monetary sanctions. Politicians, judges, and prosecutors will be reluctant to permit offenders who otherwise would be sent to prison to be “let out” to do work, lest they be held accountable for any crimes the offenders commit while unconfined. As a result, such work punishments are typically im-

122. DEPT OF JUSTICE, 5 ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES 53, t.5 (1939). The number of “productive jobs” was derived by taking reported figures on total value of goods produced in prison annually and estimating per-inmate productivity of \$1,000 per year. *Id.* at 50.

123. See Pub. L. No. 96-157, § 827, 93 Stat. 1167, 1215 (codified as amended at 18 U.S.C. § 1761 (2006)). A number of states have also relaxed restrictions on the intra-state sale of prisoner-made goods, and industry has started to make small steps toward working with prisoners in those states. See Flanagan & Macguire, *supra* note 103, at 122.

124. Garvey, *supra* note 101, at 371–72; see also ANDREW PEYTON THOMAS, CRIME AND THE SACKING OF AMERICA: THE ROOTS OF CHAOS 121 (1994) (“Prison labor remains prohibited *de facto* by federal statute.”).

125. Garvey, *supra* note 101, at 374.

126. Tonry & Lynch, *supra* note 14, at 102; Weissman, *supra* note 94, at 239.

posed as a supplement for, or in addition to, probation, and not as a substitute for imprisonment.¹²⁷ This political problem leads to the same economic one discussed above: intermediate sanctions cannot generate cost savings unless a substantial portion of the offenders subjected to it are diverted from prison.¹²⁸ As a result, non-incarcerative work sanctions as an alternative to prison have rarely been tried, and so they have not established a track record as a cost-effective option.

3. Another Social Meaning Problem

Just as monetary sanctions faced the obstacle that they were deemed insufficiently expressive of condemnation to satisfy the public, convict labor and community service face their own problems along the “expressive” dimension.

Community service orders, like fines, although potentially highly punitive (depending on the duration and nature of the work, as well as the sensibilities of the particular offender), apparently fail to adequately express the condemnation that the American public believes is required for serious crimes. As such, even a lengthy stint of community service is often viewed as a “slap on the wrist.”¹²⁹ What is more, community service orders, when imposed as a punishment, arguably send the message that such service is a burden rather than a social good, and so “denigrate[] the virtue” of those who volunteer to do it.¹³⁰

Conversely, prison labor has the potential to express *too much* degradation of the offender.¹³¹ Although prison labor is exempted from the Thirteenth Amendment ban on slavery,¹³² certain forms of prison labor present their own problems. For example, some have argued that the chain gang—which first re-emerged in Alabama state prisons in the 1990s after a half century of disuse—violates the Eighth Amendment prohibition on cruel and unusual punishment, as it “resurrect[s] a powerful and shameful symbol of this country’s legacy of racial injustice and institutionalized racial oppression[,]” and therefore does

127. Kahan, *supra* note 81, at 625.

128. *Id.* at 625 & n.135.

129. *Id.* at 626.

130. *Id.* at 627.

131. See, e.g., THOMAS, *supra* note 124, at 122 (“Many Americans, especially in academia, are still inclined to think of labor . . . as too severe and mean-spirited.”).

132. U.S. CONST. amend. XIII.

not comport with “evolving standards of decency that mark the progress of a maturing society.”¹³³

Thus, whether convict labor sends a tolerable message—tough enough, but not too tough—may depend in large part on the nature of the labor and the conditions under which it is imposed.

III. “FINE-LABOR”: A PROPOSAL TO INTEGRATE MONETARY AND WORK SANCTIONS

In this Part, I transition from the descriptive to the normative, and offer my own vision for a viable alternative to prison for many offenders. Under my proposal, which I call “fine-labor,” the role of fines and restitution orders would be greatly expanded, and offenders would be provided with work as needed to generate the funds to pay those monetary sanctions. Yet, even my normative recommendations are inextricably bound up with descriptive matters: the distinction between what is and what ought to be is blurry, for we “ought” to have criminal sanctions that take into account existing economic, political, and social constraints. Thus, although I will attempt to be fairly specific regarding the details of my proposal, where normative considerations do not strongly point in a particular direction, I will suggest options about how one could proceed depending on one’s preferences, without committing to any of them.

As discussed below, my fine-labor proposal envisions that fines, coupled with the requirement that offenders work to pay off those fines, would be imposed on a large population of lower- and mid-level offenders who are currently typically punished with incarceration. Fine amounts would be variable, taking into account the economic circumstances of the offender

133. Tessa M. Gorman, Comment, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 441, 443 (1997) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); see also Wendy Imatani Peloso, Comment, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishments Clause*, 70 S. CAL. L. REV. 1459 (1997) (arguing that chain gangs are an Eighth Amendment violation); cf. Nancy A. Ozimek, Comment, *Reinstitution of the Chain Gang: A Historical and Constitutional Analysis*, 6 B.U. PUB. INT. L.J. 753, 767–69 (1997) (features of particular chain gang programs, if not the practice itself, may violate the Eighth Amendment). But see Emily S. Sanford, Comment, *The Propriety and Constitutionality of Chain Gangs*, 13 GA. ST. U. L. REV. 1155, 1192 (1997) (arguing that chain gangs, although objectionable and counterproductive, likely pass constitutional muster).

(including his ability to “work them off” over time), and would be heavily oriented toward restitution in order to promote victim compensation. For those offenders lacking employment to pay off the fines, the government could coordinate such employment. Potential sources of offender employment, and the consequences or refusing to engage in offered employment, are also addressed.

A. *Restitution-Oriented Variable Fines*

The first prong of my proposal is to expand the use of fines, with a strong restitution component, as the primary sanction for nontrivial offenses. This immediately raises at least three questions. First, how will the amounts of the fines be determined? Second, upon whom will they be imposed? Third, how will they be enforced?

1. Calculating the Fine

Fine amounts would be determined according to a hybrid scheme: a variable day-fine system modified so that restitution sets a floor (but not a ceiling) on the total fine amount. As discussed above, the amount of a day-fine is a function both of the severity of the offense and the means of the offender. As to the first of these two variables—the number of days or units to assign to an offender’s crime—a schedule would be drawn up that allows a sentencing judge to take into account not only the nature of the crime, but also the offender’s criminal record, as well as any other aggravating and mitigating circumstances.¹³⁴ In determining the second variable—the value of each fine unit—the offender would provide evidence of his particular income stream or assets.¹³⁵ If an offender refuses to do so, the court could entertain presumptions about income based on age, field of work, and the like.¹³⁶

In assessing ability to pay, all offenders—including those who are unemployed or employed only part-time—would be

134. TURNER & PETERSILIA, *supra* note 15, at 12; Friedman, *supra* note 41, at 287.

135. See, e.g., 18 U.S.C. § 3664(d)(3) (2006); TURNER & PETERSILIA, *supra* note 15, at 7–8. Sensitive financial records could be subject to a protective order. See, e.g., 18 U.S.C. § 3664(d)(4) (2006).

136. See TURNER & PETERSILIA, *supra* note 15, at 67; Friedman, *supra* note 41, at 289.

presumed to be able to earn a full-time minimum wage.¹³⁷ The offender would have the burden of proving, by clear and convincing evidence, that he is unemployable due to a physical or mental disability.¹³⁸ Living expenses and dependent care costs would be taken into account, with poorer offenders obviously retaining a larger portion of their income for these purposes.¹³⁹ Court or corrections personnel would draw up a payment installment plan for each offender, and they, or the court, would have the authority to modify the plan based on changed circumstances, including employment changes, additional dependents, and the like.¹⁴⁰ If an offender refuses to make payments, he can be sent to prison for contempt in violating the court's order.¹⁴¹

But the day-fine calculation would not dictate the final fine amount. Because restitution would play a crucial role in the political viability of fine-labor, in any case in which restitution is applicable the amount of the restitution award should set a floor on the amount of the fine—even if that results in a fine larger than that calculated under the day-fine method.¹⁴² Res-

137. See, e.g., TURNER & PETERSILIA, *supra* note 15, at 41, 56, 67. *But see id.* at 8, 13 (discussing program in which indigent offenders are presumed to have access to welfare income in setting fines).

138. Even physically disabled offenders may be capable of performing jobs that involve data entry, customer service, and the like.

139. TURNER & PETERSILIA, *supra* note 15, at 13, 22, 55, 67–68 (discussing various discount schedules).

140. See, e.g., 18 U.S.C. § 3664(f)(3)(A), (k) (2006); TURNER & PETERSILIA, *supra* note 15, at 13.

141. Alternatively, fine payment could be structured as a condition of probation, and failure to pay would result in revocation. See TURNER & PETERSILIA, *supra* note 15, at 77.

142. See *id.* at 68 (noting analogous hybrid system in Oregon). There would be an exception where it is determined that the restitution amount is so large in comparison to the offender's means—including future income—as to make full restitution impracticable, in which case a sentencing judge should have discretion to set a lower amount, and/or combine the monetary sanction with a prison sentence or other sanction. An exception would also exist where the number of victims, or the complexity of the loss calculation, make restitution impracticable. See 18 U.S.C. §§ 3663A(c)(3), 3664(f)(3)(B) (2006) (noting circumstances where restitution is impracticable).

Because restitution imposes a floor on damages, in many cases the deductions for self- and dependent-support would likely affect the structure of the payment installment plan as much or more as they would the total fine amount. *Cf.* 18 U.S.C. § 3664(f)(2) (2006) (providing that “[u]pon determination of the amount of restitution owed to each victim, the court shall . . . specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled; (B) pro-

titution would also be given priority over all other administrative costs to which the offender's fine payment would be allocated. Restitution would not, however, place a ceiling on damages. After all, deterrent concerns can, and often will, dictate that the total amount that a defendant pays exceeds the amount of actual harm caused.¹⁴³

2. Selecting Offenders

The issue of who would receive fine-labor sentences is a delicate one. On the one hand, non-incarcerative options like fines clearly should not be made available to everyone. Incapacitation is of the utmost importance for serious violent criminals (murderers, rapists, armed robbers), high-ranking members of criminal organizations (mob leaders, drug kingpins), and property offenders with long criminal histories (career burglars or car thieves) who are seemingly undeterrable. For these offenders, prison is a sensible and necessary option.

On the other hand, if fines are imposed only on the lowest-risk offenders who would not be sent to prison anyway—first time, non-violent offenders, or those convicted of trivial offenses—then we will fail to save money or prison beds. We will also fail to realize other benefits of diverting offenders from prison: sparing them from exposure to the antisocial prison culture, the degrading experience of incarceration, the stigma of a prison record,¹⁴⁴ and the corollary separation from their families and communities; and avoiding harm to those families and

jected earnings and other income of the defendant; and (C) any financial obligations of the defendant; including obligations to dependents”).

143. Given that (1) the amount of harm caused correlates (roughly) with both the benefit to the offender and the quantum of retribution warranted, and (2) optimal deterrence theory dictates that fines should exceed the benefit to the offender (particularly when detection is less than certain), the optimal fine will probably be greater than the restitution amount the majority of the time.

144. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 941 (2003) (noting that the bulk of research shows strong negative correlation between record of incarceration and employment, although at least one study shows only negligible effect); *id.* at 955–58 (referencing a study demonstrating negative correlation).

Although *any* criminal conviction, whether resulting in a prison term or not, has the potential to stigmatize the offender, would-be employers and others may assume that offenses punished through incarceration were more serious than those punished through non-custodial sanctions. Moreover, people may tend to assume that offenders who have spent time in prison will have been “hardened” by the experience, whereas those punished by alternative sanctions will not have been.

communities themselves. Diverting offenders from prison can also benefit their spouses, children, and neighbors, who suffer from prisoners' absence during their period of incarceration, and suffer doubly when those hardened and hard-to-employ former inmates return home.¹⁴⁵

Yet there are still large numbers of "mid-level" offenders who are routinely sent to prison—even though they do not necessarily pose a significant threat to person or property—largely because prison is deemed the only punishment "severe" enough to reflect the gravity of their crimes. Such mid-level offenders could include many of those convicted of drug offenses (i.e., users or petty dealers); larceny, burglary, or simple assault (assuming they have brief criminal histories that do not yet indicate a pattern of recidivism); fraud, false pretenses and related crimes; DUIs; and other non-violent public disorder offenses.

What percentage of the prison population is made up of mid-level offenders? Obviously, it depends on one's view of which class of offense and what criminal history length qualifies an offender as a "mid-level" offender for whom diversion from prison is appropriate. If we assume that non-violent offenders without long criminal histories are such candidates (obviously, the views of a legislative body or sentencing judge may differ, either generally or as to the particulars), available nationwide data tell us the following: 51 percent of state prisoners are serving a sentence for a non-violent crime—most of these are for drug offenses;¹⁴⁶ nearly 40 percent of inmates had either one or zero sentences prior to probation or incarceration;¹⁴⁷ and 55 percent had two or fewer such sentences.¹⁴⁸ We can thus extrapolate that 21 percent to 29 percent of convicted prison inmates are non-violent offenders with no established pattern of recidivism. Of course, some of these offenders might be inappropriate candidates for community-based sanctions, due to ongoing drug addiction, mental illness, or other issues.¹⁴⁹ But other offenders, such as first-time simple assault

145. Turner & Greene, *supra* note 10, at 1; Pritikin, *supra* note 7, at 1065–70.

146. ALLEN BECK ET AL., U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE PRISON INMATES 1991 11 (1993), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sospi91.pdf>.

147. *Id.* at 13.

148. *Id.* at 11 (About 16 percent of inmates had exactly two prior sentences to probation or incarceration.).

149. For example, some offenders serving a sentence for a non-violent crime may have been previously convicted of a violent offense. *Id.* (noting that about

offenders, or non-violent offenders with slightly longer criminal histories, might also be potential candidates for diversion. Assuming an eligibility pool of roughly 20 percent, nearly 319,000 offenders could be diverted from prison through a system of fines.¹⁵⁰ At a per-inmate cost of \$25,000 per year, that could yield prison operation cost savings of as much as \$8 billion annually.

Sparing these mid-level offenders from prison may be desirable, but I still have not explained why my proposal should escape the “net widening” problem that has plagued other alternative sanctions. Michael Tonry, upon reviewing a variety of alternative sanctions in practice, has concluded that two techniques have the best odds of reducing net widening. They are: (1) creating sentencing guidelines to help ensure that judges are imposing the alternative on the intended pool of offenders; and (2) transferring authority regarding program placement to corrections officials.¹⁵¹ In line with Tonry’s recommendations, I would propose a statutory sentencing scheme that would make fines the presumptive sentence for mid-level offenders, based on a combination of offense-type and criminal history. Offenders would be screened pre-sentencing for drug abuse, mental health, and other factors relevant to eligibility. Alternatively, one could subdivide these offenders further into lower- and higher-risk categories, the latter including offenders with longer criminal histories or whose crimes involve some form of actual or potential violence (for example, weapons charges). The lower-risk offenders would be presumptively eligible for a fine as a “front-end” sanction by the sentencing judge. Higher-risk offenders would initially be sentenced to prison, but they would be monitored by corrections officials, who could assess their behavior over time and evaluate whether individual offenders would be appropriate candidates for release subject to the fine-labor alternative.¹⁵²

one quarter of the 51 percent of inmates convicted for a nonviolent offense had previously been convicted of a violent crime).

150. The state and federal prison population in 2007 was 1,595,034. WEST & SABOL, *supra* note 3, at 1. Twenty percent of that figure would be 319,007.

151. Tonry, *supra* note 9, at 406–08.

152. I would not recommend leaving the decision about whom to divert from prison solely in the hands of corrections officials—and neither would Tonry and Lynch, for that matter. See Tonry & Lynch, *supra* note 14, at 134. Relying entirely on back-end diversion robs the proposal of much of its cost and prison-bed savings advantages and raises troubling issues about unfettered discretion.

B. *Community-Based Work Opportunities*

If condemnation, and not incapacitation, is the principal rationale for sending mid-level offenders to prison, it stands to reason that if we could formulate an alternative sanction that adequately expresses condemnation while avoiding the high cost of prison, it should be not only acceptable but preferable. The reason why this has not occurred is ostensibly because no punishment short of prison sufficiently condemns. Thus, even if we could develop net widening avoidance techniques that enable us to impose alternatives on non-trivial offenders, the political will to do so simply isn't there.

This is where offender labor comes into play. Making offenders work can provide both the expression of severity that the public demands, as well as an answer to our third question—how would we enforce payment of the fines? Indeed, *without* introducing a labor component, my proposal merely sounds like a straightforward (albeit aggressive) plan to expand the use of fines and restitution orders. And if that is where the proposal ended, there would be no reason to expect that it would catch on any more than monetary sanctions already have: that is, not very much at all. Moreover, presuming that virtually all offenders¹⁵³ could work to pay their fines, without taking steps to ensure they can do so, both undermines victim compensation and sets up offenders for failure.¹⁵⁴ If, however, the state made paid work available to any offender who lacked the ability to make fine payments on his own, this would essentially take all offenders out of the category of “unable” to pay. Thus, an offender who refused to engage in the work offered by the state would be categorized as refusing to pay the fine, and thus could be held accountable just like an offender who refuses to turn over assets or income to the state.

As I will discuss below, the work component of fine-labor not only supplies the means to generate revenue, it supplies the requisite punitive “bite” that fines alone lack. But this

153. To be precise, *virtually* all, since offenders who are so severely disabled as to make them unemployable would be exempted from this presumption. *See supra* note 131.

154. *Cf. Toch, supra* note 105, at 498 (“The United States is currently embarked on welfare reform. This entails insistence that able-bodied recipient find jobs that do not exist. When welfare nonrecipients cannot find work, many will join the underground economy, which is the target of the drug raids that are congesting prisons.”). However, some programs do just this. 18 U.S.C. § 3664(f)(1)(A) (2006); TURNER & PETERSILLA, *supra* note 15, at 22, 41.

raises the question of what should be done with wealthier offenders who could afford to pay their fines without relying on state-provided jobs. Ostensibly, higher fines for wealthier offenders would mean that they would have to work a commensurate amount as poorer offenders, albeit at a higher garnishment rate. But this does not solve everything. First, some offenders may be so wealthy that they could pay even very high fines without working a single day. Second, working a "commensurate" amount may or may not be deemed a suitable punishment by the public. Third, working at a job of one's choosing, even for an identical quantum of time, may not be seen as being as punitive as working at a job foisted upon the offender by the state.

There are several (not necessarily incompatible) possible ways to address these issues, each with its own pluses and minuses. One is for the state to accept fine payments only via wage or salary garnishment, so that the fine is tantamount to a work order even for the wealthiest offenders. This would have the added advantage of precluding the payment of fines by any offenders through illegitimate income from theft, prostitution, gambling, or drug sales. However, it would likely be difficult to administer in practice. First, it would *require* that some wealthier offenders go out and get high paying jobs, a somewhat bizarre sight to behold. Second, rather than merely ensuring that timely payment is being made, corrections officials would have to coordinate garnishment for every offender. Third, it would effectively mandate disclosure to employers of the fact of conviction, which might jeopardize the offender's standing with his employer. The state could pass legislation limiting the power of employers to terminate employees on this basis, but that adds yet another layer of political, economic, and regulatory complexity. Moreover, mandating fine payment through garnishment would actually cause a delay in payment of fines and restitution by some wealthier offenders.

A second option is to require wealthier offenders to engage in state-provided work. Punishment and condemnation, not revenue-generation, would be the primary rationales for requiring this labor, and so these offenders could be made to do fine-labor on weekends and/or evenings, so as not to jeopardize their higher-paying regular jobs. But such scheduling creates additional logistical and cost burdens on employers. In addition, if only wealthier offenders must do state work in addition

to private work, it raises possible problems of reverse economic discrimination.

A third solution would be to make all offenders, rich or poor, spend a short period of time in prison (anywhere from several days to perhaps a month), after which they would be released to pay their fines via state labor, independent employment, and/or existing financial assets, as the case may be.¹⁵⁵ Psychological research shows that much of the retributive and deterrent effect of prison is front-loaded in the early period of incarceration, so longer sentences may not be necessary to serve those penological goals.¹⁵⁶ Moreover, the wealthiest offenders tend to have the highest disutility to prison, so short sentences followed by very large fines may be the most effective and most punitive for them. Of course, this option means eschewing benefits of prison-avoidance, but only to a limited extent. Very short periods of incarceration do not require significant disruptions in offenders' outside jobs or family lives. Nor do they create much of an opportunity for offenders to be exposed to the criminalizing effects of prison, or to develop the "learned helplessness" that often accompanies long-term confinement.¹⁵⁷ And incarcerating an offender for days or weeks obviously costs the state only a fraction of what it costs to incarcerate him for months or years.¹⁵⁸

Assuming that the rich/poor punishment differential could be adequately addressed through one or a combination of these strategies, the fact remains that state-arranged labor could enable tens or hundreds of thousands of poorer, erstwhile "judgment-proof" offenders to pay substantial fines and restitution

155. Indeed, the desire that offenders be subject to a sanction, and not just pay a price, may help explain the trend in the 1980s toward sentencing well-to-do white-collar criminals to prison terms. See Kahan, *supra* note 81, at 618.

156. See John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 10–12 (U. of Chi. Law & Econ, Olin Working Paper No. 424, 2008), available at <http://ssrn.com/abstract=1241008>; see generally EDWARD ZAMBLE & FRANK PORPORINO, *COPING, BEHAVIOR AND ADAPTATION IN PRISON INMATES* (1988); see also Anthony N. Doob & Cheryl M. Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, in 30 *CRIME & JUST.: A REVIEW OF RESEARCH* 143, 187 (Michael Tonry ed., 2003) (finding "no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence").

157. See Richard Schill, & David Marcus, *Incarceration and Learned Helplessness*, 42 *INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY* 224 (1998).

158. This (or any of the other options) could, of course, also be accompanied by temporary transitional placement in a "halfway house" or other community-based residential facility that provides a structured environment for offenders that are not prepared to immediately manage their affairs entirely on their own.

orders. The state, although incurring the burden of arranging the offenders' employment, would enjoy the benefits of the offenders' labor, and would be at least partially reimbursed through fine payments; and victims would receive compensation (and would also obtain the satisfaction of knowing their offenders had to work to provide that compensation) that they would not have otherwise received.

But finding work for all these offenders is no small feat, economically or politically. If jobs were taken from law-abiding citizens and transferred to convicted criminals, there would undoubtedly be a public outcry.¹⁵⁹ If, instead, the government were able to create many new jobs, the public would still demand an explanation why they were going to criminals and not to the non-criminal unemployed. Thus, ensuring that offender employment is not perceived as undercutting non-criminal employment will be essential to the public acceptability of any fine-labor program, especially in a recessionary market.

The creation of numerous work opportunities for offenders—without raising the ire of the public—is far from unattainable. Two areas of employment could prove particularly fruitful: (1) reclaiming jobs lost to overseas outsourcing and (2) infrastructure projects.

1. Reclaiming Outsourced Jobs

Numerous corporations have chosen to outsource much of their manufacturing and customer service work overseas to take advantage of cheap foreign labor. Forrester Research, Inc. estimated that two million manufacturing jobs alone were lost overseas between 1983 and 2002¹⁶⁰—enough to employ almost

159. Under models more optimistic about employment rates than my own, full prison employment would constitute just one-half of one percent of the workforce. See Flanagan & Macguire, *supra* note 103, at 125. But the main issue here is the *perception* of competition, not the actual impact of offender labor on the job market.

160. Sharon Otterman, Trade: Outsourcing Jobs, (Feb. 20, 2004), <http://www.cfr.org/publication/7749/> (last visited Dec. 3, 2008). The pro-union AFL-CIO cites evidence suggesting that the situation is even more dire. See AFL-CIO, Shipping Jobs Overseas: How Real Is the Problem? http://www.aflcio.org/issues/jobseconomy/jobs/outsourcing_problems.cfm?RenderForPrint=1 (last visited Dec. 3, 2008) (As many as 1.78 million such jobs were lost in just a ten year period.).

I focus here on outsourced manufacturing and customer service jobs because, although white-collar and professional jobs are being lost overseas as well, they would not be readily transferrable to American convicts. The two most common categories of unpaid community service to which offenders are assigned are

every state and federal prison inmate in the country. Hundreds of thousands of additional jobs are projected to be lost by 2015.¹⁶¹ This trend has been the subject of much criticism, as it arguably deprives American workers of jobs and bleeds money that could be pumped back into the American economy. Apparently, these firms have found that the wage differential between foreign and American labor justifies the additional cost of building overseas factories and transporting their goods thousands of miles back to the United States, as well as whatever domestic ill-will the practice engenders.¹⁶²

If low wages were the driving factor in outsourcing these jobs, the federal and/or state governments could offer wage subsidies to employers to re-domesticate these jobs and replace foreign workers with American offenders. Aside from the subsidy itself, employers would enjoy other benefits of re-domestication. They would avoid transcontinental transportation costs—especially important in the face of high fuel prices. They could advertise that their products are “American made,” enjoying the benefit of that added goodwill. Indeed, among inner-city communities, in which the adverse effects of pervasive incarceration are painfully felt, the fact that corporations are employing not just Americans but convicted American offenders may itself be a selling point.¹⁶³

“clerical” (36 percent) and “manual labor” (18 percent). See Malcolm M. Feeley et al., *Between Two Extremes: An Examination of the Efficiency and Effectiveness of Community Service Orders and their Implications for the U.S. Sentencing Guidelines*, 66 S. CAL. L. REV. 155, 170 (1992). Similarly, most prisoners who are employed are engaged in manufacturing, customer service, and data entry jobs. See Garvey, *supra* note 101, at 372–73.

161. See NOW with Bill Moyer, *Politics & Economy: Foreign Service* (Aug. 29, 2003), <http://www.pbs.org/now/politics/jobflight.html> (last visited Sep. 17, 2008) (citing Forrester report).

162. Outsourcing customer service jobs overseas does not involve a commensurate tradeoff in terms of physical infrastructure or transportation costs as do manufacturing jobs, but it has still led to widespread dissatisfaction amongst American consumers due to language and cultural barriers, among other things. See, e.g., Bill McGee, *When Customer Service Is Lost in Translation*, USA TODAY, May 29, 2007, http://www.usatoday.com/travel/columnist/mcgee/2007-05-29-foreign-call-centers_N.htm (last visited Dec. 3, 2008) (“[T]here has been a growing backlash in recent years against foreign call centers—not because of social, economic, or labor issues, but because of more mundane customer service issues.”).

163. There is certainly precedent for the market appeal of prisoner-made goods. The slogan for “Prison Blues,” designer jeans made by inmates at the Eastern Oregon Correctional Institute, is: “Made on the inside to be worn on the outside.” Garvey, *supra* note 101, at 373. They are sold to hundreds of stores nationwide, as well as to retailers in five countries. *Id.*

Subsidizing community-based offender labor also makes economic sense for states. Fully subsidizing a full-time minimum wage job for an offender for a year would cost the state approximately \$15,000 per year¹⁶⁴—far less than the approximately \$25,000 it costs to keep him in prison.¹⁶⁵ Obviously, a less-than-total job subsidy could result in even greater savings. Offenders who can find better-paying work than what the state could provide are an even greater boon, as they impose zero subsidy costs on the state. Additionally, the money that offenders earn partially redounds to the state's benefit via fine payments and increased tax revenues.

This arrangement also benefits the public. Re-domesticating these jobs benefits victims by facilitating restitution, and benefits taxpayers by increasing tax revenues and by facilitating payment of fines so as to offset taxpayer-funded corrections costs. And it would not really involve taking jobs away from law-abiding Americans, because these employers were unwilling to pay the domestic wages required to employ law-abiding Americans in the first place.¹⁶⁶

Still, even if the citizenry would not object to the state giving jobs to criminals, it might balk at actually subsidizing those jobs. But the federal government already subsidizes employment for *ex-convicts*, and there is nary a peep from the public about it. The Small Business Job Protection Act of 1996 autho-

164. Assuming a forty-hour work week, a fifty-week work year, and a nationwide average minimum wage of \$7.40, the yearly wage for an offender would be \$14,800. (The average wage was calculated by taking the minimum wage for each state, using the mid-2009 federal minimum wage of \$7.25 for any state with no minimum wage or one lower than the federal minimum). See U.S. Dep't of Labor, Minimum Wage Laws in the States (Oct. 1, 2009), <http://www.dol.gov/esa/minwage/america.htm>. This also assumes offender laborers would receive no additional benefits. *But see infra* text accompanying note 246 (state may need to subsidize wages slightly above minimum wage for fairness and pragmatic reasons).

165. See *supra* text accompanying note 16. Admittedly, this ignores costs to the state of administering the fine-labor alternative. But even factoring in these costs, there should still be significant savings. See *infra* Part V.C.2.

166. There is a separate issue of whether employers that are *considering* transferring jobs overseas, but have not yet done so, would be permitted to shift those jobs to American offenders instead. If we permit this, employers could falsely claim plans to outsource in order to replace more expensive American workers with cheap American convict labor. But if we forbid it, we miss the opportunity for employers with genuine intent to outsource to employ American offenders and keep those wages circulating in the American economy. Because intent to outsource is difficult to verify, forgoing such opportunities may be a political necessity. This point may also be moot given that there are already more outsourced jobs than there would be eligible offenders. See *supra* note 160.

rized the Work Opportunity Tax Credit, which gives employers a federal tax credit for hiring (among others) former felons.¹⁶⁷ Although not a direct subsidy, the tax credit makes the effective wage employers must pay former felons less than what they would pay non-felons, which thus provides a similar financial incentive to prefer the former.¹⁶⁸

2. Infrastructure

A second likely avenue for creating jobs for offenders is infrastructure repair and improvement: building and renovating roads, bridges, dams, waterways, power and waste-treatment plants, and a variety of other public works. The most recent “report card” of the American Society of Civil Engineers gave the national infrastructure an overall grade of “D,” and estimated that it would take \$1.6 trillion over the next five years to restore the nation’s infrastructure to a good condition.¹⁶⁹ Diverting mid-level offenders from prison to infrastructure jobs could save state and federal governments billions of dollars in incarceration costs—savings that could fund those very same jobs with money left over to fund jobs for non-criminals.¹⁷⁰ Thus, by putting offenders to work, governments could meet a

167. 26 U.S.C. § 51 (2006).

168. A direct wage subsidy is by no means the only possible mechanism for providing employers the incentive to employ offenders. A tax incentive, similar to the Work Opportunity Tax Credit, might also work. A third option would be a “pay-or-play” system (analogous to legislation some states have implemented to increase employer-provided health insurance), in which the government would mandate that employers in certain industries draw a certain portion of their workforce from the offender pool, and individual firms could choose to comply or pay a tax or fee in the alternative. *Cf.* Jason Burge, *Rethinking Fees and Taxes in Light of the New York City Health Care Security Act*, 61 N.Y.U. ANN. SURVEY AM. L. 679, 680–81 (2006) (discussing New York’s pay-or-play insurance system). This third alternative could help ensure more rapid and widespread employment of offenders, with all the cost-savings benefits that that entails. It might, however, also be the most politically unappealing, as it overtly demands that offenders be given priority in employment.

169. Am. Soc’y of Civil Engineers, Report Card for America’s Infrastructure: 2005 Grades, <http://www.asce.org/reportcard/2005/page.cfm?id=103> (last visited Nov. 30, 2008). The breach of the New Orleans levee during Hurricane Katrina in 2005 and the collapse of a bridge in Minneapolis in 2007 are two dramatic examples of the vital importance of maintaining adequate infrastructure.

170. The extent of savings would depend on administrative costs. *See infra* Part V.C.2.

portion of their infrastructure needs without raising overall expenditures by a single dollar.¹⁷¹

There are several advantages to using infrastructure work to employ offenders. First, because infrastructure needs are ongoing and varied, this field can provide a stable source of employment without regard to general market contractions¹⁷² or shifts in market focus.¹⁷³ Second, much infrastructure work involves manual labor requiring relatively little skill or training. Accordingly, many offenders will be suitable for the work, regardless of their prior experience. They can be put to work rather quickly without an extensive preparatory period, and a high turnover rate (due to offenders completing their fine payments) will not be unduly disruptive, as new offenders can replace old ones rapidly. Third, because national infrastructure needs are greater than offender labor could ever fulfill, there need not be a conflict between increasing offender and non-offender employment in this field.¹⁷⁴ Indeed, because governments essentially have a monopoly on public works, the argument that employing prisoners interferes with that “market” is weaker than in the private sector. Thus, there should be less union or public opposition to offender labor in infrastructure,¹⁷⁵

171. Nothing about my proposal precludes governments spending additional moneys on employment-assistance programs for non-offenders, or on other social programs that could address the underlying causes of crime and therefore reduce the need for spending on punishment. *See generally* John J. Donohue III & Peter Siegelman, *Allocating Resources among Prisons and Social Programs in the Battle against Crime*, 27 J. LEGAL STUD. 1 (1998) (discussing whether educational and vocational programs may be more cost-effective in reducing crime than prison). My point here is simply that, given that society demands punishment for crimes that do occur, fine-labor could be a more cost-effective and penologically effective option than incarceration.

172. Of course, during economic contractions, there is less of a tax base and therefore fewer government funds available to spend on infrastructure. However, I am assuming that governments would only spend money on offender infrastructure jobs that would have been spent on corrections in any event.

173. For example, if alternative energy sources like wind or solar power were to replace coal as a means for generating electricity in a given area, offenders could simply be shifted from rebuilding coal-powered plants to building new wind-powered ones.

174. If the \$1.6 trillion estimate cited above is correct, *see supra* text accompanying note 169, then even assuming a liberal \$50,000 annual wage per job, additional infrastructure work could employ thirty-two million additional Americans—far more than not only the entire prison population, but also the entire unemployed population.

175. There should be less, but not zero, opposition given that unions frequently obtain government contracts for infrastructure work. The unions would, however, have a harder time complaining about employing offenders if the contracts for offender employment were funded entirely from corrections budgets. Furthermore,

because there is less of an expectation that non-criminals would get those jobs to begin with. Fourth, infrastructure improvements promote efficiency (by avoiding gridlock and its concomitant waste of time and fuel, for example), facilitate commerce, and avoid costly accidents and disasters, providing a subtle but tangible boost to the overall economy. Finally, because there are infrastructure needs in virtually every geographic location, it should be relatively easy to find jobs for offenders that allow them to remain in their communities, no matter where they reside. This not only avoids transportation and housing costs for offenders; but more importantly, it avoids the serious personal and familial disruptions that arise when offenders are removed from their communities and relocated to prisons.

But there are also several potential disadvantages that must be addressed. First, because the state is the employer and the direct beneficiary of offenders' work, it may have an incentive to over-criminalize activity in order to boost its supply of cheap labor.¹⁷⁶ But this objection assumes that offender labor is "cheap." Granted, non-criminal workers might fetch an even higher wage than what the state would pay offenders, but those workers will tend to be more skilled and productive than offenders, and so worth the added cost. Thus, the state saves money by diverting would-be prisoners to fine-labor, but not by inflating the ranks of would-be prisoners.

A second potential drawback is the fact that much infrastructure work is unskilled can be a detriment to offenders, as it will fail to help them find fulfilling or well-paying permanent employment upon completion of their punishment. A number of factors mitigate this problem. First, while relegating offenders to relatively unskilled labor is far from ideal, it is still far better than the alternative—prison.¹⁷⁷ Released prisoners face huge barriers to obtaining employment, due not only to the stigma of a prison record, but also to the fact that their prison term—which is invariably spent idly—is a gaping hole in their

the work that offenders do is often input- and management-intensive, and thus creates a market for raw materials as well as private jobs. Flanagan & Macguire, *supra* note 103, at 127.

176. Cf. Garvey, *supra* note 101, at 357 (describing the lease system of the Jim Crow South, in which rates of arrest, conviction, and sentencing to prison tracked industrial labor demands).

177. Arguably, prisoners could benefit from educational, vocational, and other rehabilitative programming. However, those same programs could be offered—or even mandated—as part of a non-custodial, fine-labor sentence.

employment and education history.¹⁷⁸ By contrast, keeping offenders employed on the outside, even in unskilled labor, gives them a track record of steady employment, instills beneficial work habits,¹⁷⁹ and spares them the stigma of a stint in prison. Second, offenders who take state-provided jobs will usually have been unemployed or minimally employed prior to their arrest and conviction. Steady, full-time work—even at the minimum wage—is probably at least as good as what such an offender could have obtained before he committed his offense. Third, infrastructure needs will tend to shift with changes in technology. Alternative energy production, recycling, and environmental protection are fields that promise to create an increasing number of jobs—including infrastructure jobs (the blue-collar of “green collar”)—and therefore could offer offenders job experience that is relevant to the market. Fourth, participating in fine-labor does not preclude additional vocational training or education to boost an offender’s marketability. Finally, if an offender does show particular skill or promise, there is certainly nothing stopping the state from promoting him to a higher-paying, more complex job.

A third risk to the acceptance of fine-labor is that offenders laboring outdoors on infrastructure projects (as opposed to doing factory or service work out of the public view) may conjure up the degrading “chain gangs” that were so prevalent in the Jim Crow South;¹⁸⁰ this may jeopardize public acceptance of fine-labor. Chain gangs are a powerful symbol of oppression of African-Americans, who are disproportionately incarcerated (they constitute just 13 percent of the population,¹⁸¹ but over 42 percent of the prison population).¹⁸² Thus, African-Americans would make up a large portion of offenders who would be on display working on roads and other physically demanding projects. But this risk is overstated, in part for the

178. See Pritikin, *supra* note 7, at 1061–63; Stafford, *supra* note 109, at 269 (“[T]he nature of incarceration creates an inconsistent work record . . .”).

179. Garvey, *supra* note 101, at 383 (“[E]ven if the industries likely to be established under a contract system do not teach inmates highly marketable skills, the inmates’ experience with steady employment may nonetheless help inculcate the habits of industry.”).

180. The decision by Alabama (and several other Southern states) to begin using chain gangs again in the mid-1990s was the subject of widespread criticism. See *supra* text accompanying note 133.

181. U.S. Census Bureau, 2006–2008 American Community Survey on Race, <http://factfinder.census.gov> (select “People”; then select “Race and Ethnicity”; then select “Race”) (last visited Nov. 26, 2009).

182. WEST & SABOL, *supra* note 3, at 7 tbl.9.

simple reason that fine-laborers would not be in chains. Prisoners must be prevented from escaping when let outside the prison's walls to do work. But fine-laborers, like probationers, are not confined, and so measures to prevent their "escape" while working, like chains or armed guards on horseback, are unnecessary.¹⁸³ They would do their work as non-offenders would—unrestrained—and the visible symbolism of racial oppression would largely be absent.¹⁸⁴ Furthermore, it is often economically depressed African-American communities that suffer the most from high rates of incarceration and the burdens of re-absorbing large numbers of hardened and hard-to-employ former inmates.¹⁸⁵ It is quite possible that these communities would welcome, rather than condemn, a reform that spared many African-American offenders from the experience of prison, and provided them with steady employment that would allow them to remain in their homes and support their families—even if some of that work involved physical labor.¹⁸⁶

C. Prison Labor

Even a robust system of fines and restitution orders, backed up by state-provided work opportunities, is still missing an important piece of the puzzle: ensuring that offenders actually comply with their sanction. When faced with a fine, an offender can choose to default and be sent to prison rather than pay it. At a certain point, he will rationally do so: some offenders may value avoiding work more than they value their liber-

183. There would, of course, be consequences for refusal to work. *See infra* notes 189, 191.

184. The sight of unshackled offenders fulfilling community service obligations by cleaning up trash near highways is fairly common in many places and does not seem to evoke the same indignation as chain gangs.

185. *See* Pritikin, *supra* note 7, at 1070.

186. *Cf.* Garvey, *supra* note 101, at 388 ("The problems giving rise to that disparity [between the incarceration rates of blacks and whites] are deeply disturbing and need to be addressed, but denying prisoners productive labor will do nothing to address them. All it will do is perpetuate the idleness that makes life inside prison less bearable for inmates of every race."). Another possible source of jobs for offenders is farm work, which requires relatively little skill or training, and is, in practice, often given to undocumented workers at below minimum wage. But if we require agricultural employers to demonstrate that giving jobs to offenders would not take jobs away from law-abiding citizens, this would essentially require them to admit that they had been employing illegal workers at an illegal wage all along. Absent some sort of "amnesty" for such employers, this option would likely not be pragmatically viable.

ty.¹⁸⁷ Additionally, if we set restitution as the floor on the fine amount, we increase the likelihood of fines large enough to induce offenders to default, as it could take offenders many months or years at a minimum-wage job to pay them off. The possibility of substantial default rates threatens to undermine victim compensation, offender rehabilitation, and prison-bed and operating-cost savings.¹⁸⁸

A solution to this problem is to require defaulting fine-laborers who are sent to prison to work once there. Rather than a fine-laborer choosing between working to pay off his fine outside of prison and avoiding his financial obligations by sitting idly in prison, he would choose between working to pay off the fine on the outside and working to pay it off on the inside. Given this choice, most offenders would likely choose the former option and do the work asked of them.¹⁸⁹ All things being equal, work plus liberty is better than work without liberty.

Another factor favoring compliance rather than default is that, as between out-of-prison work and in-prison work, all things are not equal. Aside from the obvious fact that prison is not merely a deprivation of liberty but a particularly unpleasant one, discharging one's fine and restitution obligations should take longer in prison. Offenders working in prison have generally been found not to be protected by the Fair Labor Standards Act ("FLSA") and not entitled to a minimum wage.¹⁹⁰ Prisoners will make far less than their community-based counterparts, will have less money available to pay off their fines, and so will take longer to pay them off.¹⁹¹

187. Or, at least, they may think they do, either when assessing the options ex ante, or once they are already working and imagine the grass is actually greener on the inside.

188. See *supra* text accompanying notes 96–97.

189. Offenders who do not flatly refuse to work, but who are fired for disobedience, frequent unexplained absences, insufficient performance, or other violations, could also be subject to incarceration, as they are unwilling to take steps to maintain employment in order to pay off their monetary sanctions. See *infra* Part VI.A.

190. See, e.g., *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters.*, 112 F.3d 1119 (11th Cir. 1997); *Danneskjold v. Hausrath*, 82 F.3d 37 (2d Cir. 1996); *Reimonenq v. Foti*, 72 F.3d 472 (5th Cir. 1996); *McMaster v. Minnesota*, 30 F.3d 976 (8th Cir. 1994); *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993) (en banc).

191. If an offender still refuses to work once in prison, the most that the state could do is to hold him in prison for the maximum sentence allowable for the crime committed. *Williams v. Illinois*, 399 U.S. 235, 241 (1970). But the prospect of getting out of prison sooner by working and paying off the fine should be incentive enough to make most inmates do their assigned work.

Of course, offenders sent to prison for defaulting on their fines should not be the only prisoners put to work. To the extent possible, all prisoners—even those for whom incarceration was their original sentence—should be employed. Keeping prisoners busy with work reduces boredom and thus prisoner violence, and is an essential component of effective prison management.¹⁹² Work provides prisoners with experience, skills, and a record of employment which improves their chances of obtaining employment upon release.¹⁹³ Full prisoner employment also provides a means for all offenders (not just fine-laborers) to generate revenue to compensate victims, the state, and taxpayers for the costs they incur.

IV. ADVANTAGES OF INTEGRATING MONETARY AND WORK SANCTIONS

My proposal for penal reform integrates fines, restitution, and offender labor—none of which are novel topics in the national conversation over penal reform. However, combining these elements in the manner that I have suggested is novel, and it could solve many of the problems that have prevented each of them from becoming more widely used and accepted. Among other things, providing offenders with work opportunities facilitates the imposition of larger fines, which strengthens deterrence and compensation, as well as gives monetary sanctions the retributive “bite” they have heretofore lacked. Conversely, the prospect of significant restitution for victims could provide the political impetus to counter opposition groups to offender labor.

A. *How Work Sanctions Support Monetary Sanctions*

The first drawback to using monetary sanctions is that many offenders lack the means to pay fines or restitution, thereby undermining both deterrence and compensation.¹⁹⁴ But under a fine-labor system, the state provides such offenders with the means via work. Thus, no offender is “judgment proof.”

192. See *supra* note 101 and accompanying text.

193. For these reasons, work does, in a sense, improve prison life. However, it is unlikely that it improves it enough to make prison an attractive option. Garvey, *supra* note 101, at 389–90.

194. See *supra* text accompanying notes 62–71.

Second, the deterrent impact of fines (particularly variable fines) is thought to be undermined by the fact that offenders possess private information about their financial and human capital, and have a universal incentive to understate those assets in order to receive a lower fine.¹⁹⁵ While this information differential regarding financial capital can be overcome through compelled disclosure of financial data, the differential regarding human capital (which is more important for most offenders, who will pay their fines off over time) is addressed under fine-labor by empowering the state to demand that offenders work. Offenders would lose much of their monopoly on “private” information regarding their human capital, because simply being able to walk into a courtroom and stand before the judge is a public demonstration of the ability to engage in at least basic labor.¹⁹⁶ Moreover, because restitution would put a floor on fine amounts, and offenders would be expected to work as long as it takes to repay their fines, understating income may result in a longer repayment horizon, but not a lower fine. Thus, although offenders in a fine-labor system would still have an incentive to understate their capital, they would simply have less power to do so.

Third is the problem that variable fines may not create the desired incentives for offenders.¹⁹⁷ If the fine is too low, an offender may rationally choose to reap the benefits of the crime and bear the risk of being fined if caught. But under fine-labor, setting the harm to the victim, which is roughly equivalent to the benefit to the offender, as a floor on the fine amount helps ensure that the downside of committing the crime matches or exceeds the upside.¹⁹⁸ Conversely, if the fine is set too high, an offender could simply choose to default and go to prison rather

195. See *supra* text accompanying note 72.

196. The capacity necessary to commit the crime itself will often indicate a basic level of intelligence or physical ability needed to do many jobs. Even offenders who suffer physical handicaps that preclude imposing manual labor could still engage in productive service sector work (for example, telemarketing or customer service).

197. See *supra* text accompanying notes 72–74.

198. Actually, the harm incurred by the victim is often greater than the benefit received by the criminal. See, e.g., Note, *Property Theft Enforcement and the Criminal Secondary Purchaser of Stolen Goods*, 89 YALE L.J. 1225, 1232 (1980) (stating that stolen goods usually sell for less than their true value when sold on the black market). Imposing a larger amount on the defendant also helps to offset the “discount” offenders will factor in for the time delay of punishment or for the chance that they will not be apprehended and punished. See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 954 (2003).

than pay it. But a community-based fine-laborer who refuses to work to pay off his fine is not only sent to prison, he must work once there (at lower pay under worse conditions) to pay it off over a longer period of time. This should sufficiently alter the incentive structure to ensure compliance in most cases.

The fourth problem is that monetary sanctions are thought to be an insufficiently severe punishment for non-trivial offenses, especially given the American insistence upon harsh punishment.¹⁹⁹ But labor addresses this problem as well. Where the state makes available the means for even indigent offenders to pay off substantial fines over time, the assumption that only low fines are feasible to collect against most defendants no longer holds. For example, the average larceny and burglary cause tangible losses to victims of \$1,834 and \$855, respectively.²⁰⁰ An offender working at a state-provided, full-time, minimum-wage job, contributing even as little as fifty cents per hour from his wages toward restitution,²⁰¹ would work for twenty-two months or ten months, respectively, to pay off those amounts. Thus, whereas community service orders are criticized because they are typically for a rather short duration,²⁰² fine-labor allows for higher fines that are worked off over a longer period of time.

Fifth, monetary sanctions inadequately express condemnation,²⁰³ but requiring that offenders work to pay their fines provides the expression content that fines alone lack. Although a fine (even a large one) may be viewed as a mere “price,” making someone spend their days toiling at a job to pay that price is unmistakably a “sanction.” Work is not inherently more se-

199. See *supra* text accompanying notes 76–80.

200. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS—2006 tbl.23, http://www.fbi.gov/ucr/cius2006/data/table_23.html (last visited Nov. 30, 2008). The figure for larceny excludes auto theft.

201. Non-incarcerated offenders making minimum wage will presumably have a substantial cost-of-living discount that will prevent them from dedicating a large percentage of their income to making restitution. See TURNER & PETERSILIA, *supra* note 15, at 41 (discussing discount factors).

202. Tonry, *supra* note 9, at 407–08 (citing various community service sanctions programs wherein the maximum number of hours to which an offender can be sentenced range from 70 to 240 hours). However, one study showed that offenders were sentenced to community service in the Northern District of California for anywhere between 50 and 2,000 hours, with a mean of 387 hours and a median of 250 hours. Feeley et al., *supra* note 160, at 169. While this undercuts the argument that fine-labor has a “leg up” on existing community service sanctions, it simultaneously undercuts the argument that community-based work requirements cannot be set long enough to serve as a serious sanction.

203. See *supra* text accompanying notes 81–85.

vere than a fine, but it is a deprivation along a weightier dimension: a deprivation of liberty. The phrase “life, liberty, and the pursuit of happiness” suggests a descending hierarchy of goods:²⁰⁴ capital punishment is reserved for the most heinous criminals; prison, which infringes liberty, is imposed upon the broad middle swath of offenses; and fines, which merely interfere with an offender’s property or “pursuit of happiness,” are usually relegated to trivial offenses. Work, although not as thorough a restraint on liberty as prison, does limit the offender’s mobility and choice of activity for much of his day. Paid labor as punishment is also expressively superior to unpaid community service: the virtuous engage in the latter out of altruism, but the former is something we all endure because we must—there are bills to pay. Accordingly, fines coupled with a work requirement should be deemed fitting for a broader range of crimes than standalone fines. Indeed, survey evidence indicates that there has long been broad public support for putting offenders to work—particularly if some of their earnings will be transferred to victims or the state.²⁰⁵

The sixth and final obstacle to utilizing monetary sanctions has to do with net widening—the political reluctance to sentence would-be prisoners to community-based sanctions, and the resulting failure to generate savings.²⁰⁶ No alternative to prison can fully eliminate these risks; but, as discussed above, careful development of program eligibility criteria to exclude higher-risk offenders, clear sentencing guidelines, and the transfer of some program placement authority to “back end” corrections officials who have the opportunity to monitor

204. Adam M. Gershowitz, *The Supreme Court’s Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1288 (2000) (“[A] textual argument can be made that life, liberty, and property are hierarchical rights of descending [sic] importance . . .”).

205. Flanagan & Macguire, *supra* note 103, at 119 (citing survey evidence from the 1980s of favorable public attitudes toward inmate labor); BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995 180 tbl.2.66 (1996) (stating that 79.4 percent of poll respondents thought it would be a “good idea” if prisoners were paid for their work but were required to return two-thirds of that amount to their victims as restitution or to the state as reimbursement for the costs of incarceration). A state-run victim compensation fund could result in more rapid transfers to victims than a lengthy offender repayment process, but this would deprive the system of much of its symbolic—and perhaps rehabilitative—appeal.

206. See *supra* text accompanying notes 92–97.

individual offenders' long-term behavior can do much to minimize them.²⁰⁷

The work component of fine-labor offers an additional hedge against net widening, because reductions in recidivism from offender employment may help offset the public safety risk of letting offenders avoid prison. Released prison inmates face barriers to obtaining legitimate employment—stigma, a lack of skills and experience, loss of community contacts—that undoubtedly contribute to some of their choices to relapse into crime.²⁰⁸ But community-based fine-labor not only helps them avoid (or at least minimize) that stigma, it can give them job skills, experience, work habits, a track record of stable employment, and (assuming they perform well) an employer who will endorse them, if not keep them on long term.²⁰⁹

Making restitution might itself have a rehabilitative effect on offenders.²¹⁰ But even if neither labor nor restitution is truly rehabilitative, at the very least, policymakers and the public perceive them to be.²¹¹ Moreover, when offenders are spared prison in order to generate revenue to pay fines and make restitution, members of the public are at least “getting something” in exchange for shouldering the risk of letting those offenders remain in the community—which cannot be said for other community-based sanctions like ISPs or house arrest. These perceptions about restitution and offender labor make fine-

207. See *supra* text accompanying notes 151–52.

208. Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 AM. J. SOC. 329, 342 (1990) (“Poverty is not a neutral variable, of course, and with high rates of poverty come a variety of other social and economic conditions . . . [including] elevated crime rates”); see WILLIAM G. SAYLOR & GERALD G. GAES, PREP: TRAINING INMATES THROUGH INDUSTRIAL WORK PARTICIPATION, AND VOCATIONAL AND APPRENTICESHIP INSTRUCTION, U.S. FED. BUREAU OF PRISONS 2 (1996), available at http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprprep_cmq.pdf (“There is a great deal of theoretical and empirical support for the proposition that unemployment is a predictor of criminal activity.”); Charles L. Cappell & Gresham Sykes, *Prison Commitments, Crime, and Unemployment: A Theoretical and Empirical Specification for the United States, 1933–1985*, 7 J. QUANTITATIVE CRIMINOLOGY 155, 193 (1991) (analyzing the correlation between unemployment and risk of recidivism).

209. See Garvey, *supra* note 101, at 381; see Tonry & Lynch, *supra* note 14, at 106.

210. See Garvey, *supra* note 101, at 381.

211. See *supra* text accompanying note 93; Cowen, *supra* note 102, at 222–24 (citing statistics demonstrating that most citizens, legislators, penologists, attorneys, and inmates believe rehabilitation is the primary objective of prison labor); Harland, *supra* note 13, at 122–26 (citing numerous statutes and judicial opinions that consider the possibility—or assert as fact—that restitution rehabilitates).

labor a more attractive “sell” to the public, and so may make politicians more willing to divert offenders from prison, and the public more willing to tolerate this community-based alternative to prison.

B. How Monetary Sanctions Support Work Sanctions

Offender labor, both outside and inside prison, is obviously central to fine-labor. Prisoner employment incentivizes fine-laborers not to shirk their community-based jobs, and would be an economic and social boon to taxpayers, prisons, victims, offenders, and their families and communities in any event. The single biggest obstacle to expanding offender employment is state and federal legislation that restricts the sale and transportation of prisoner-made goods and services.²¹² This legislation effectively makes the state-use system (with limited exceptions) the only viable system for the sale and distribution of such products, artificially curtailing the potential market. From a public choice perspective, the existing restrictive legislation, most of which was passed in the early twentieth century, was a compromise among the relevant players at the time: unions and manufacturers on the one hand, who wanted to eliminate competition, and prisoner wardens and reformers on the other, who wanted to keep prisoners occupied and engaged in potentially rehabilitative activities.²¹³ Taxpayers also benefit from prison labor, in that it offsets corrections costs; but they are a diffuse and disorganized group, and so historically have had little role in countering the influence of prison labor’s opponents.²¹⁴

Restitution could be the needed missing ingredient that tips the balance in favor of repealing the anti-prison labor laws. The victims’ rights movement—nonexistent when the restrictive legislation was passed—has emerged as a powerful political force that has succeeded in achieving numerous legislative reforms.²¹⁵ Because victims are the direct beneficiaries of of-

212. Flanagan & Macguire, *supra* note 103, at 120.

213. Garvey, *supra* note 101, at 369.

214. *Id.* at 390–92 (“[U]nless some organized interest group mobilizes in support of prison industry, politicians would have little incentive to change the status quo against the wishes of organized labor and industry.”).

215. *Id.* at 394–95; National Center for Victims of Crime, Crime Victims’ Rights in America: An Historical Overview, <http://www.ojp.usdoj.gov/ovc/ncvrvw/1999/histr.htm> (last visited Nov. 30, 2008) [hereinafter Historical Overview] (cataloging developments in the victim’s rights movement from 1965 to 1998).

fenders making restitution, they have the greatest incentive to push for laws that facilitate restitution—including laws that expand offender labor.²¹⁶ Steven Garvey described the dynamic over a decade ago:

If the victims' rights movement organizes in support of prison labor in order to make restitution a meaningful remedy, the political calculus facing today's lawmakers will differ significantly from that which faced lawmakers at the turn of the century. Rather than confronting a politically powerless group like prisoners, or a politically unorganized group like the general public, those interests opposing prison labor would face a far more organized and formidable opponent. Where once it may have looked like prison labor was stealing work from free labor, today it could look like the opponents of prison labor are depriving victims of their legitimate claims to restitution.²¹⁷

Since Garvey wrote those words, the victims' rights movement has only grown stronger.²¹⁸ Of course, compensation is not the only thing crime victims care about. It may well be that many victims, if they had to choose, would prefer that their offender be imprisoned rather than make restitution. However, because the typical fine-labor candidate will have committed a property offense, not a serious crime of sexual assault or other violence, it seems logical to assume that the typical victims of this class of crimes would prioritize compensation over incarceration of offenders.

The other obstacles to greater utilization of offender labor were net widening and a failure to express the appropriate social message. The potential for work combined with monetary

216. Detlev Frehsee, *Restitution and Offender-Victim Arrangement in German Criminal Law: Development and Theoretical Implications*, 3 BUFF. CRIM. L. REV. 235, 236 (1999) (noting restitution as currently enforced "appears too uncertain and inadequate" for victims); see also Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 967–68 (1985) (including "full restitution" among the elements of an "ideal criminal process" from the perspective of the victim).

217. Garvey, *supra* note 101, at 395–96.

218. See Historical Overview, *supra* note 215; LISA C. NEWMARK, CRIME-VICTIMS' NEEDS AND VOCA-FUNDED SERVICES: FINDINGS AND RECOMMENDATIONS FROM TWO NATIONAL STUDIES 5–9 (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/214263.pdf> (describing increase in victim-oriented legislation and services through 2003); U.S. Dep't of Justice, Office for Victims of Crime, Crime Victims' Rights Act (Part of the Justice for All Act), <http://www.ojp.usdoj.gov/ovc/help/cvra.html> (last visited Nov. 30, 2008) (describing additional legislative and judicial developments in victims' rights through 2006).

sanctions to combat net widening has already been addressed. But the social meaning problem deserves mention. We have seen that, whereas community service as punishment inadequately expresses condemnation, compulsory labor can be all too condemnatory for the tastes of modern society. Yet restitution gives fine-labor an “expressive” advantage over offender labor generally. The fact that offenders are working to restore what was taken from victims gives their labor a beneficial purpose, and so allows it to be cast in a redemptive light.²¹⁹ At the same time, restitution forcefully satisfies the impulse for retribution.²²⁰ By entitling the victim to confiscate the fruits of the offender’s labor, we raise the victim up vis-à-vis the offender, symbolically restoring the moral balance between the two that the offender had tried to deny through his crime.²²¹ The ability of restitution to express redemption and retribution simultaneously lends it an expressive complexity, which helps it satisfy the expressively complex demands that society makes of its criminal punishments.

V. ANALYSIS OF POTENTIAL CONCERNS

If my analysis is correct, fine-labor should be an acceptable alternative to incarceration because of the symbiosis between monetary and work sanctions. Labor generates the revenue to make fines and restitution enforceable, and provides the symbolic “teeth” to make monetary sanctions a sufficiently stiff punishment for non-trivial offenses. And restitution provides the political impetus to undo legislation that hamstring offender labor, as well as the redemptive and retributive symbolism needed to make labor publically palatable.

But in order to assess whether fine-labor is truly a reform worth pursuing, at least three additional concerns must be addressed. First, is it constitutional? Finding the political wherewithal to overcome legislation curtailing offender labor is meaningless if the federal or state constitutions would forbid having poorer offenders work to pay fines. Second, is it moral?

219. See *supra* text accompanying note 105.

220. See, e.g., Irving E. Cohen, *The Integration of Restitution in the Probation Services*, 34 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 315, 316 (1944) (“As a condition of probation, [restitution] is readily acceptable to the community, inasmuch as it can be regarded as a sublimation of society’s unconscious ‘lex talionis,’ with money as the symbol of retaliation.”).

221. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686–87 (1992).

Even if fine-labor does not transgress the dictates of law, this does not necessarily mean that it promotes justice: the law permits many things that our consciences would not. Third, can we reasonably expect that the system will do what we want it to—punish and condemn roughly as well as incarceration does, but at a lower cost and without unduly jeopardizing public safety? I address each of these concerns in turn below.

A. *Constitutional Concerns*

Although requiring convicted criminals to work is not itself unconstitutional, the circumstances under which they are required to do so could be. The most likely constitutional challenge to fine-labor is that requiring offenders who lack the means to engage in labor to pay off their fines—and imprisoning them for failure to do so—arguably violates their rights to equal protection and/or due process. But, as I will show, the system I propose should avoid this constitutional conflict.

Several United States Supreme Court opinions have addressed the Fourteenth Amendment implications of sending criminals to prison for failure to pay fines, restitution, or costs. In the first, *Williams v. Illinois*, the Court held that a statute that permitted an offender to be imprisoned in default of payment of a fine beyond the maximum period authorized by the statute regulating the substantive offense, although nondiscriminatory on its face, effected in practice an “impermissible discrimination that rests on ability to pay.”²²² The following year, in *Tate v. Short*, the Supreme Court extended *Williams* to a case in which the only prescribed punishment for the underlying offense was a fine, and the offender was imprisoned for failure to pay that fine.²²³ The Court adopted the view that:

the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely be-

222. 399 U.S. 235, 241 (1970). The Court further held that “[w]hat we have said regarding imprisonment for involuntary nonpayment of fines applies with equal force to imprisonment for involuntary nonpayment of court costs.” *Id.* at 244 n.20.

223. 401 U.S. 395, 396–97 (1971).

cause the defendant is indigent and cannot forthwith pay the fine in full.²²⁴

Finally, *Bearden v. Georgia* involved a defendant whose probation was conditioned upon (among other things) payment of a fine and restitution.²²⁵ When he failed to comply solely based upon inability to pay, his probation was revoked and he was sentenced to imprisonment for the remainder of the probationary period.²²⁶ The Supreme Court, analyzing the defendant's Fourteenth Amendment challenge under both due process and equal protection principles, found that the reason for the probationer's failure to pay was pivotal:

If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority.²²⁷

Thus, the Supreme Court has made clear that imprisonment for willful failure to pay or to take steps to acquire the means to pay is perfectly permissible.²²⁸

Based on these constitutional principles, fine-labor should survive equal protection or due process scrutiny. By providing offenders with paid employment to work off their fines over time, the state effectively eliminates the category of "unable to pay." If an offender cannot pay a fine on his own, but refuses to participate in the work that the state offers to him to facilitate payment, he has "failed to make sufficient bona fide efforts legally to acquire the resources to pay."²²⁹ He may be imprisoned

224. *Id.* at 398 (quoting *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970)).

225. 461 U.S. 660, 662 (1983).

226. *Id.* at 663.

227. *Id.* at 672.

228. *See id.* at 668 ("Both *Williams* and *Tate* carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine. . . . This distinction, based on the reasons for nonpayment, is of critical importance here. If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection."). Notably, the inverse is not true—nonpayment due to good faith inability to pay does not categorically preclude imprisonment. The state must consider whether alternate measures are adequate to meet the state's interests in punishment and deterrence; but, if it determines that they are not, the offender may be imprisoned. *Id.* at 672.

229. *Id.*

just as readily as a wealthier offender who refuses to turn over assets, or who refuses to show up to work in order to thwart the state's ability to garnish his wages.²³⁰ Indeed, the Supreme Court wrote approvingly of proposals such as fine-labor that avoid the problem of imprisonment for inability to pay. The *Bearden* Court noted that, in formulating a fine or restitution order for an indigent defendant, a "sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine."²³¹

Fine-labor might also arguably violate the Eighth Amendment proscription against excessive fines and cruel and unusual punishment.²³² If even indigent offenders will be required to pay full restitution (except in exceptional circumstances), and they are provided with minimum wage jobs to pay off those fines, it could take some offenders years or even decades to complete payment. This would essentially mean that the government could be involved with and have control over an offender's life for an extended period of time, even though he may have committed a relatively petty crime.²³³

Although the Supreme Court itself has not directly addressed the Eighth Amendment implications of mandatory restitution, at least one circuit court has upheld it in the context of the MVRA. In *United States v. Dubose*, the Ninth Circuit rejected the contention by a defendant convicted of bank robbery that the MVRA provision mandating full restitution regardless of his economic circumstances constituted excessive fines and cruel and unusual punishment.²³⁴ As to excessive fines, the court noted that the applicable constitutional test was gross

230. Federal law reflects precisely the distinction made in *Bearden*, prohibiting incarceration for failure to pay a fine due solely to inability to pay based on indigency, but permitting it for willful refusal to pay or make sufficient good faith efforts to pay. 18 U.S.C. § 3614(b)–(c) (2006). Other fine systems are in accord. See, e.g., TURNER & PETERSILIA, *supra* note 15, at 23, 39.

231. *Bearden*, 461 U.S. at 672; see also *Williams v. Illinois*, 399 U.S. 235, 244 n.21 (1970) (noting appellant himself suggested "impos[ing] a parole requirement on an indigent that he do specified work during the day to satisfy the fine").

232. U.S. CONST. amend. VIII.

233. Consider an offender who burglarizes a home and steals \$10,000 worth of property. If the state gives him a minimum-wage job and garnishes a dollar per hour for restitution (plausible given likely cost-of-living deductions), it will take him five years of working full time to discharge his restitution obligation.

234. 146 F.3d 1141 (9th Cir. 1998).

disproportionality,²³⁵ and ruled that “[w]here the amount of restitution is geared directly to the amount of the victim’s loss caused by the defendant’s illegal activity, proportionality is already built into the order.”²³⁶ The court was also not persuaded that an order to pay \$5 per month during a 151 month prison sentence, followed by \$25 per month for 20 years afterwards, constituted cruel and unusual punishment through “extensive government oversight over the life of a defendant.”²³⁷ Noting that the Supreme Court rejected an Eighth Amendment challenge to the harsher penalty of life imprisonment in *Harmelin v. Michigan*,²³⁸ the court held that “it would be difficult to find any mandatory restitution imposed under the MVRA cruel and unusual under *Harmelin*, for it would neither be grossly disproportionate to the crime, nor would it offend societal notions of decency.”²³⁹ If the MVRA withstood this constitutional challenge, fine-labor certainly should as well.

The federal constitution aside, federal statutes and virtually all states (either by statute or constitution) forbid imprisoning an individual for failing to pay a debt.²⁴⁰ Arguably, imposing restitution as a condition of a suspended prison sentence creates a debtor-creditor relationship, and therefore revoking probation for failure to make restitution constitutes imprisonment for debt. However, cases that have addressed the issue have invariably rejected this argument.²⁴¹ Alternatively, if restitution, instead of being a condition of probation, were made

235. *Id.* at 1145 (citing *United States v. Bajakajian*, 524 U.S. 321, 336 (1998)).

236. *Id.* (quoting the district court opinion below in a consolidated case, *United States v. Dean*, 949 F. Supp. 782, 786 (D. Or. 1996)).

237. *Id.* at 1146.

238. 501 U.S. 957 (1991).

239. *Dubose*, 146 F.3d at 1147.

240. See Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Assessment of Individual Bankruptcy*, 64 OHIO ST. L.J. 855, 875 (2003). Many states allow imprisonment for failure to pay child or spousal support, as this is considered a form of contempt of court, not non-payment of a “debt” in the classic, contract-based sense. *Id.* at 875 n.109.

241. See, e.g., *Maurier v. State*, 144 S.E.2d 918, 919 (Ga. Ct. App. 1965) (finding that restitution as a condition of a suspended sentence is not violative of the state constitution providing that there shall be no imprisonment for debt); *People v. Mosesson*, 356 N.Y.S.2d 483, 484 (N.Y. Sup. Ct. 1974) (finding that restitution as a condition of probation does not create a debt nor a debtor-creditor relationship between persons making and receiving restitution); *State v. Campbell*, 929 P.2d 1175, 1178 (Wash. Ct. App. 1997) (holding that imprisonment is not for debt where offenders are not imprisoned solely for indigency). A contrary position has been suggested in dicta or in dissenting opinions. See, e.g., *State v. Garner*, 566 P.2d 1055, 1057 (Ariz. Ct. App. 1977); *Flores v. State*, 513 S.W.2d 66, 71 (Tex. Crim. App. 1974) (dissenting opinion).

the primary sentence under a court order, subsequent imprisonment for contempt for refusal to pay (or refusal to work to pay) would still not be deemed imprisonment for debt.²⁴² Thus, fine-labor, which threatens imprisonment for refusal to work to pay fines or restitution, avoids imprisonment-for-debt challenges.

B. Moral Concerns

Because fine-labor involves imposing monetary sanctions in differing amounts against offenders depending on their income and assets—and requiring those without means to engage in state-provided work to pay them off—there are at least four different moral issues raised. First, is it fair to make offenders pay monetary sanctions? Second, is it fair to make the amount of the sanction depend on an offender's economic circumstances? Third, is it fair to make offenders work? Fourth, is it fair to make the work requirement depend on their economic circumstances?

1. Monetary Sanctions

There is clearly nothing unfair about punishment through compelled payment of money. By wronging another individual or jeopardizing some important societal interest, an offender makes himself an appropriate subject for the infliction of suffering. As compared with other forms of suffering, such as public humiliation, physical pain, loss of liberty, or loss of life, loss of economic value is relatively benign (assuming the amount is not disproportional), and is not unduly degrading of the offender's intrinsic moral value. Indeed, the problem with monetary sanctions is that they do not appear to be painful or degrading enough for many crimes.

242. See Harland, *supra* note 13, at 116 (“In cases in which restitution is imposed as part of an active sentence, . . . the defendant who fails to pay restitution may be held in contempt of court. Legislative provisions dealing with contempt in restitution cases generally provide for incarceration until the debt is paid . . .”); *cf.* State ex rel. Daly v. Snyder, 72 P.3d 780, 783 (Wash. Ct. App. 2003) (rejecting a claim that imprisonment for failure to pay court-ordered child support violates the state constitutional prohibition against imprisonment for debt: “It is not imprisonment for a debt, but rather imprisonment for refusing to comply with the court’s equitable order to do or not do something.”).

2. Variable Monetary Sanctions

Varying the amount of the fine to reflect the offender's means superficially violates the principle of equality of treatment, but it actually maintains equality of impact better than do flat fines. If two offenders commit crimes of comparable culpability, why should one's fine "hurt" a great deal more or less than the other?

Of course, the proposed fine-labor system does not adopt a pure variable fine approach, but rather puts restitution as a floor; so a poor offender might be required to pay thousands of dollars in restitution, even where a fine designed to inflict the appropriate "bite" on someone of his means would be far lower. Yet this modification is itself morally defensible: from a harm-retributivist perspective, the amount of suffering it is fair to inflict on the offender depends on amount of harm caused.²⁴³ From the innocent victim's perspective, the economic circumstances of the offender who harmed him have no bearing on his moral claim to demand repayment. From the offender's perspective, it may be unfair to ask him to pay sums he has no realistic way of paying. But fine-labor solves this problem by providing him the means (i.e., a job) to pay. Of course, "solving" the payment problem with work begs the third question: is it fair to make offenders work?

3. Work Sanctions

The morality of making offenders work must be assessed in the context of the alternative—incarceration.²⁴⁴ When an offender is diverted from prison to fine-labor, he is spared the danger, dehumanization, and boredom of prison life, as well as the stigma of a prison record; and he and his family are spared the emotional and financial strain of physical separation. In exchange, the offender is provided stable employment that gives structure to his day, increases his chances of obtaining work upon completion of his sentence, helps him make amends to his victim, and helps him support himself and his family. If

243. Kevin Cole, *Deference, Tolerance, and Numbers: A Response to Professor Wright's View of Sentencing Commission*, 31 SAN DIEGO L. REV. 651, 659 (1994).

244. Cf. Garvey, *supra* note 101, at 386 ("[A] fair assessment of the risks involved in a return to the contract system cannot consider those risks in isolation. They must instead be compared to the problems that prevail under the existing regime.").

work can benefit an offender in so many ways, it is difficult to see how it is unfair to ask him to engage in it.²⁴⁵

Even if making offenders work is not objectionable in the abstract, perhaps making them do so for effectively less than minimum wage (factoring in garnishment) still is. Many American heads of households working full time at minimum wage still find themselves below the poverty line.²⁴⁶ Indeed, community-based fine-laborers who must support themselves and their families at below minimum wage are arguably even worse off than prisoners, who do not have to pay for their own necessities. It is perhaps unfair, or at least unrealistic, to expect these offenders to eschew illegal income or other criminal activity under such intense financial pressure.

But it must not be forgotten that any offender who could find better-paying work is not only permitted but encouraged to do so. Only those offenders who would have no other means of paying their fines would take state-provided, full-time, minimum wage jobs. As for this subclass of offenders, the problem of garnishment should not be overstated. Given cost-of-living and dependent-support deductions made during fine assessment, which will be quite large for the poorest offenders,²⁴⁷ the garnishment from a fine-laborer's wage will probably be a small fraction of his total pay. And as long as welfare, Medicare, and related benefits are adjusted upward to reflect the offender's real take-home wage, offenders and their dependents are not unduly burdened by the garnishment. As to the point that the minimum wage itself is not a livable wage, this is a larger societal problem, not just a problem with fine-labor.²⁴⁸ In any event, states could (and should) use some of the money saved by diverting offenders from prison and invest it in job placement, education, and counseling programs that will help fine-laborers cope with their economic challenges and improve their chances of long-term success.

245. See ALAN WERTHEIMER, *EXPLOITATION* 14 (1996) (distinguishing between "harmful exploitation" and "mutually advantageous exploitation").

246. See, e.g., Scott Beckman, *Reframing the Minimum (Livable) Wage*, OPEDNEWS, Nov. 21, 2006, http://www.opednews.com/articles/opedne_scott_be_061120_reframing_the_minimu.htm (last visited Oct. 24, 2009) (stating that a minimum wage of \$9.62 per hour is needed to keep a single-earner family of four above the 2006 poverty line).

247. TURNER & PETERSILIA, *supra* note 15, at 13, 22, 67–68.

248. Cf. Friedman, *supra* note 41, at 288 (pointing out that German statutes provide that fines may not be so high as to deprive an offender of a minimal living standard).

In the end, though, even these responses are arguably inadequate. It may be that for fine-labor to be both fair and realistic, offenders must be guaranteed not just a minimum-wage job, but at least a minimum-wage take-home pay (after taxes, of course), with any amounts over the minimum wage going to fine and restitution obligations. Under this view, the state would have to provide a slightly larger wage subsidy to provide the means for both a livable wage and the discharge of monetary sanctions. Of course, providing a higher wage and a larger government wage subsidy encroaches upon both the political viability of fine-labor, as well as the cost-savings benefit of implementing it. But this may be necessary not only on fairness grounds, but to achieve other goals like recidivism reduction. (Supplementing offender income through welfare and other benefits may mitigate the livability concern without unduly jeopardizing the political appeal of fine-labor.) Striking the right balance between these competing concerns may be a significant practical challenge to implementing fine-labor, but it does not present a uniquely moral challenge to the system.

The morality of expanding prison labor, another key component of my proposal, must also be assessed. Prisoners are arguably unfairly disadvantaged, as they will work for even lower wages than community-based offenders, and will be permitted to keep an even smaller portion of their wages.²⁴⁹ Yet this, too, is not an unfair imposition: as noted, prisoners have fewer expenses than community-based laborers.²⁵⁰ More pointedly, having prisoners work for no pay at all would be better than the existing system, in which idleness is pervasive. Labor was viewed as beneficial to the prisoner from the inception of the penitentiary, and it declined for political, not humanitarian, reasons.²⁵¹ Even labor unions, which were politically responsible for that decline, recognized the moral imperative to employ prisoners in some useful activity. Nearly a century ago, Samuel Gompers, leader of the American Federation of Labor, wrote: "Certainly no thoughtful, humane person, and most assuredly no trade unionist, wants the inmates of our prisons to remain idle."²⁵² The boredom that results from prisoner idle-

249. See *supra* text accompanying note 190.

250. See *supra* text accompanying note 231.

251. Garvey, *supra* note 101, at 368–69.

252. *Id.* at 369 (quoting SAMUEL GOMPERS, LABOR AND THE COMMON WELFARE 110 (1919)); see *id.* ("[D]espite their different objectives nearly everyone agreed that inmates should not remain idle.").

ness invariably leads measurably to violence.²⁵³ Several empirical studies have shown an inverse correlation between levels of prisoner involvement in work, education, or skills training, on the one hand, and inmate misconduct, rioting, and gangs on the other.²⁵⁴ Even the president of the federal prison guards' union flatly asserted that without the prisoner labor program, federal prisons would be "unmanageable."²⁵⁵

If employing prisoners makes their experience less hellish and degrading, and makes them more employable upon release, it is hard to find fault with it on moral grounds. Victims' advocates may argue that anything that makes prison less unpleasant is immoral in that it undercuts appropriate retribution and deterrence. But work, while less psychologically damaging than idleness, still requires more exertion, and in that sense does make prison life "harder." In any event, the prospect of confinement in prison probably loses little of its deterrent impact when work is added into the equation.

4. Variable Work Sanctions

Making poor offenders—and only poor offenders—work at minimum-wage jobs to pay off their fines sounds morally indefensible. But, as discussed above, fine amounts and payment schedules would be set such that virtually all offenders would have to work a roughly commensurate amount to pay off their fines. To the extent that wealthier offenders are still better off, this disparity could be addressed either by requiring them to do some state-mandated labor, or by imposing short prison sentences on all offenders. It also should not be overlooked that giving poor offenders work is the only practical means to enforce their fines. If such offenders could avoid working due to their economic circumstances, they would neither work nor pay, and would be unfairly advantaged compared to their wealthier counterparts.²⁵⁶

253. See *supra* text accompanying note 101; Pritikin, *supra* note 7, at 1059.

254. Gravey, *supra* note 101, at 380.

255. *Id.* at 379 (quoting Federal Prison Industries, Inc.—UNICOR: Hearing Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. on the Judiciary, 103d Cong. 32, 94 (1993) (statement of Michael Grotefend, President, Council of Prison Locals, American Federation of Government Employees (AFL-CIO))).

256. The Supreme Court recognized as much, noting that failing to hold poor offenders accountable for nonpayment of fines "would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment

5. Additional Concerns

Although fine-labor overcomes the moral objections discussed above, it could have other unintended and unfair consequences in practice. Here, I address three such risks.

First, if private firms are employing community-based offenders, those offenders might be made to work in degrading or exploitative conditions. This is what happened under the convict leasing system in the South during the Jim Crow era.²⁵⁷ But several factors would help prevent such abuses today. First, the firms would not be responsible for housing and feeding offenders, as happened under convict leases, so the opportunity to cut corners and short-shrift offenders in this regard simply doesn't exist. Second, community-based offenders would be subject to FLSA protections, including overtime and "whistleblower" statutes, just like non-convicts.²⁵⁸ Third, the state would have an interest in monitoring and preventing abuses of prisoners, because such abuses could increase failure rates and recidivism, the burden of which the state bears in the form of higher criminal justice and corrections costs.

Second, even if the risk of abuses of community-based offenders is small, the risk for prisoners themselves is arguably greater. Most courts have found that prisoners are not subject to FLSA protections.²⁵⁹ Moreover, the state has a greater interest in their exploitation. Due to the logistical difficulties associated with private firms employing prisoners, they are more likely to work directly for the state than are community-based offenders, so the state benefits more directly from overworking them.²⁶⁰ The state also incurs much greater costs per offender with prisoners and, thus, has a greater incentive to extract work from them to offset those costs.

Several factors mitigate the potential for such abuse. First, exploitation of prison laborers can be counterproductive.

for nonpayment whereas other defendants must always suffer one or the other conviction." *Williams v. Illinois*, 399 U.S. 235, 244 (1970).

257. Garvey, *supra* note 101, at 356–58.

258. Granted, affording these protections would reduce the incentive for employers to hire offenders, but this cost should be reflected in the amount of the wage subsidy each employer negotiates with the state. And if an employer finds offender labor cost-effective only if it abuses its workers, then perhaps pricing such an employer out of the market through the cost of regulation is a good thing.

259. See *supra* text accompanying note 190.

260. Garvey, *supra* note 101, at 397 ("Once punishment becomes a source of profit to the state, its incentive to punish increases.").

When prisoners work at manufacturing-type jobs, which are “care-intensive” and require attention to detail, abuse can actually reduce productivity.²⁶¹ When they do “effort-intensive” labor such as building roads, short term gains in productivity by overworking prisoners can result in increased injuries, raising health care costs and reducing long-term productivity. Second, prisoners resentful of exploitation are more likely to engage in misconduct, thereby increasing prison administration costs. Third, the prisoners’ rights movement may have passed its peak, but it still has vitality: courts will still not tolerate physical abuse of inmates.²⁶² If inmates balk at working conditions, judicial oversight limits what the state can do to punish or coerce them. Fourth, infrastructure work, a fruitful source of jobs for prisoners, tends to be done in public; in the modern age of ubiquitous media, blatant abuses will simply be harder to get away with. Indeed, unions and free laborers generally will be motivated to expose serious abuses of prison laborers in order to embarrass the state and curtail the competitive threat, if not out of altruistic concern for the prisoners themselves.²⁶³

A third potential risk is that in a system that improves the collectability of restitution, alleged victims will have an incentive to fabricate or exaggerate harms.²⁶⁴ This does not seem like a serious concern for several reasons. First, fabrication is not without its costs: penalties for perjury or making false statements to the government would exist in this context, as elsewhere. Second, assuming courts limit restitution to documentable harms,²⁶⁵ most damages would be difficult to fabricate even by those willing to do so. Third, because many offenders will have to pay off their restitution obligations gradually over time, fine-labor is not a quick “score,” and thus would be a relatively unattractive target for the unscrupulous.²⁶⁶

261. *Id.* at 385.

262. *See id.* at 384–85 & n.330.

263. *Id.* at 398.

264. *See* Frehsee, *supra* note 216, at 235 (“Research tells us that people who report crimes to the police are motivated primarily by private interests. . . . [T]hey want compensation for their injuries.”).

265. Most state and federal criminal restitution statutes restrict victims to recovery of “economic loss,” “out-of-pocket” loss, “pecuniary” loss, and the like. Harland, *supra* note 13, at 87–88; *see, e.g.*, 18 U.S.C. § 3663(b) (2006).

266. *See* TURNER & PETERSILIA, *supra* note 15, at 11.

Because of these barriers to fabrication, fine-labor should encourage legitimate victims (and their family, friends, and neighbors) to report crimes and cooperate with police more often than it will spur frivolous claims. Thus, putting some weight behind restitution might actually improve law enforcement—particularly given the fact that increasing the likelihood of punishment does more to improve deterrence than increasing the severity of punishment.²⁶⁷

In summary, the fine-labor system is not without potential for unfairness and abuse. However, the current system of pervasive incarceration already entails serious injustice and abuse of offenders. If fine-labor can spare large numbers of offenders from the horrors of prison, and can bestow the psychological and practical benefits of employment upon offenders whether or not they are in prison, it may be well worth the speculative risks.

C. *Practical Concerns*

Fine-labor may sound nice in theory, but can we expect it to work in practice? Retributivists, utilitarians, and social meaning theorists differ about what it means for a punishment to “work”: inflict suffering, reduce the social costs of crime, and express the community’s condemnation of wrongdoing, respectively. If a punishment can satisfy each of these goals, one can avoid the thorny issues of which one should trump. I have argued above that fine-labor can deliver “enough” retribution and “enough” expression of condemnation to be deemed an acceptable punishment for many middle-range offenders. The pertinent question, then, is whether fine-labor is superior to prison under a utilitarian cost-benefit analysis. In short, can it save us money and still keep crime rates down?

On a simplistic account, fine-labor is clearly much cheaper for the state than prison: it costs the state \$25,000 per year to keep an offender in prison, but only \$15,000 to fully subsidize a full-time minimum-wage job.²⁶⁸ However, a more realistic assessment of the true impact of fine-labor requires taking into account numerous variables, including: (1) the relative proportion of fine-laborers diverted from prison versus probation; (2) administration costs; (3) the offender failure rate; (4) the short-

267. John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates By Increasing the Severity of Prison Sentences*, 13 J.L. & POL’Y 189, 189–90, 203 (2005).

268. See *supra* text accompanying note 164.

term costs of lost incapacitation; (5) longer-term recidivism rates; (6) revenue generated by fine-labor; and (7) additional benefits of avoiding incarceration.

These variables are not only complex, they interact with each other in complex ways. For example, the first variable alone—the rate at which fine-laborers are taken from the population of would-be prisoners versus would-be probationers—affects virtually every other variable. Prison is more costly to administer than probation,²⁶⁹ so for every offender diverted to fine-labor from probation rather than prison, fewer costs savings are enjoyed (variable 2). When would-be probationers fail at fine labor and are incarcerated as a result, savings fall even further (variable 3). Conversely, the more fine-laborers are diverted from probation, the lesser the negative impact of lost incapacitation, because those offenders would not have been incapacitated anyway (variable 4). If prisoners have higher recidivism rates than probationers, then diverting probationers rather than prisoners to fine-labor dilutes its potential recidivism-reducing effects; but it may also make fine-labor less of a threat to public safety (variable 5). The more offenders diverted from probation rather than prison, the more revenue would have to be generated from labor to offset the smaller cost savings (variable 6). To the extent that incarceration generates additional costs for offenders and their families and communities, then diversion of probationers to fine-labor fails to capture these costs savings as well (variable 7).

There is obviously not yet any empirical data about fine-labor itself to aid in this enormously complex cost-benefit analysis. Yet we can look at data regarding related sanctions—such as fines, restitution, community service, and prison labor—as clues to what we might expect of fine-labor.

1. Diversion Rates from Prison versus Probation

In theory, the risk of net widening can be mitigated by several features of fine-labor, including eligibility criteria that exclude high-risk criminals from the program, front-end sentencing guidelines for judges, and back-end discretion for correctional officials.²⁷⁰ Unfortunately, empirical data tells us little about the likelihood of avoiding the problem of net widen-

269. See *supra* text accompanying note 268.

270. See *supra* text accompanying notes 151–52.

ing in connection with fine-labor in practice. A half-dozen small-scale experiments with day-fines were conducted in the United States in the late 1980s and early 1990s.²⁷¹ However, in virtually all of these, the programs were designed so that day-fines were reserved for offenders who would not have been sentenced to prison in any event;²⁷² they thus offer little guidance on whether day-fines could succeed when used for would-be prisoners.²⁷³ Similarly, community service is typically imposed as an “add-on” to probation, not as a substitute for prison, so there is little precedent to draw from regarding the success of community-based labor in diverting prisoners.

2. Administration Costs

The cost of administering fine-labor is difficult to predict. On the one hand, we would expect that it would be cheaper to administer than traditional probation because most of the monitoring of the offender will be done by the employer (where offenders spend most of their waking day) and not by a probation officer.²⁷⁴ In addition, because faster payment of fines results in earlier completion of the sentence, offenders’ incentives are aligned to reduce correctional supervision costs.²⁷⁵ On the other hand, it could be more costly, in that corrections liaisons would have to contact and negotiate with potential employer-participants; assess offenders for work suitability and place them with the employers; monitor working conditions; handle wage garnishment; coordinate distribution of garnished sums

271. See generally TURNER & PETERSILIA, *supra* note 15 (noting prior programs in Staten Island and Milwaukee and discussing programs in counties in Arizona, Connecticut, Iowa, and Oregon).

272. Tonry & Lynch, *supra* note 14, at 129–30; TURNER & PETERSILIA, *supra* note 15, at xv–xvii, 22–23, 30, 42, 66, 75–76.

273. TURNER & PETERSILIA, *supra* note 15, at 75. Only the Connecticut day-fine project included any would-be prisoners (convicted of drug possession and, occasionally, burglary or larceny), but due to the small number and project design, no data is available regarding the extent or success of prison diversions. *Id.* at 51–62.

274. Cf. Feeley et al., *supra* note 160, at 173 (“Although probation and parole offices have continuing responsibility for offenders undertaking community service, they rarely provide direct supervision of work performance. Instead they rely on reports from supervisors in the receiving social service agencies.”).

275. Turner & Greene, *supra* note 10, at 4; see also TURNER & PETERSILIA, *supra* note 15, at 55 (stating that a ten percent discount is given to offenders who pay the full amount of their fine on the day of sentencing in Connecticut’s program).

to victims or state agencies; and deal with the discipline, transfer, and/or incarceration of offenders who fail.²⁷⁶

Whether these factors will drive overall administration costs of fine-labor higher than probation likely depends in large part on how a particular program is run. The fact that many offenders would work directly for the state or for firms contracting with the state could greatly streamline the collections process. Some cost savings could also be achieved by utilizing existing probation infrastructure and personnel. But many features of fine-labor administration would be highly specialized and require additional recruiting, training, and support.²⁷⁷ The lesson learned from the American day-fine experiments was that proper staff training and specialized administrative and collection procedures were crucial to a program's success and cost-effectiveness.²⁷⁸

Even if fine-labor were more administratively burdensome than standard probation, the costs would still likely be much closer to those of probation than those of a residential-based sanction like prison. Probation costs only about \$3,600 per-year per-offender, roughly one-seventh what prison costs.²⁷⁹ Thus, so long as the vast majority of fine-laborers are not diverted from probation, we should expect to see significant administrative cost savings.

3. Failure Rates

Although fine-labor should involve less intense supervision than standard probation, and so yield a lower rate of technical violations,²⁸⁰ offenders diverted from prison may commit new offenses (or technical violations) at a higher rate than would those offenders who were deemed a low enough risk to be given probation in the first place. Thus, success at avoiding net widening could actually correlate with higher failure rates.

276. Cf. Feeley et al., *supra* note 160, at 173–74.

277. Turner & Greene, *supra* note 10, at 4.

278. TURNER & PETERSILIA, *supra* note 15, at 11–12, 78–79.

279. \$3,621.64 per year per probation. U.S. Courts, Costs of Incarceration and Supervised Release, *supra* note 16.

280. Tonry & Lynch, *supra* note 14, at 101. About one in six offenders has his probation revoked and is incarcerated; at least half of the time, the revocation is due to a rule violation, not a new offense. Lauren E. Glaze & Thomas P. Bonzcar, U.S. Dept. of Just., Bureau of Just. Statistics, Bulletin: Probation and Parole in the United States, 2006, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus06.pdf> at 2 (last visited Nov. 30, 2008).

But fine-laborers would have strong incentives to hold onto their jobs. Their wages go not only to discharging their sentences, but also to supporting themselves and their dependents.²⁸¹ And failure means being sent to prison, where they will have to work anyway under worse conditions for less pay. In addition, the structure and order of a regular work day and time spent separated from criminal associates should help reduce their likelihood of lapsing into criminality.

Evidence shows that offenders sentenced to day-fines usually fail at lower rates—or at least at no higher rates—than those sentenced to traditional probation. Offenders who participated in the Maricopa County, Arizona day-fine program had much higher rates of successful completion,²⁸² and much lower rates of technical violations,²⁸³ than a comparison group sentenced to probation. Data from day-fine programs in other jurisdictions demonstrated that “it was possible to augment fine collection without increasing either technical probation violations or arrests.”²⁸⁴ Whether these positive results could be achieved with would-be prisoners—as opposed to would-be probationers—is uncertain.

The limited American data we have regarding the failure rates of offenders sentenced to community service is also promising.²⁸⁵ One of the most systematic studies of community service orders, conducted in the District Court for the Northern

281. Cf. Phelan, *supra* note 101, at 1795 (“By earning wages, inmates also develop a strong disincentive to violate the rules.”).

282. See Turner & Greene, *supra* note 10, at 13–14 (“One year after sentencing, over half of the FARE [day-fine] offenders had completed their terms of probation, compared to approximately 10 percent of comparison group offenders. While slightly more than one-third of the FARE offenders remained on FARE after one year, almost 70 percent of the comparison group offenders were still on probation at this point. None of the FARE offenders had their sentences revoked during the time period, and fewer than 5 percent had a warrant issued for absconding.”).

283. *Id.* at 15 (Comparison group offenders are “significantly more likely to incur a technical violation”: 20 percent versus just 9.4 percent for day-fine offenders.).

284. *Id.* at 4; *id.* at 3 (describing Staten Island day-fine program in which the majority of fines were paid in full, 77 percent of total fine amounts were collected, and only 10 percent of offenders with completed cases were jailed for default). The Iowa experiment was apparently the exception: although fine collections increased dramatically under a day-fine regime, the number of fine cases returned to court for resentencing rose from less than 1 percent to more than 15 percent. TURNER & PETERSILIA, *supra* note 15, at 48–49.

285. Most of the evidence is from Canada or abroad, which is of limited use in assessing the sanction’s viability in the United States. Feeley et al., *supra* note 160, at 156.

District of California in the early 1990s, found that 87 percent of offender's quality of work was deemed "excellent" or "satisfactory" by work supervisors; 74 percent had no attendance problems; and only 8 percent had problems serious enough to warrant contacting the probation officer.²⁸⁶ These results should be read with caution, however, because the federal system typically involves lower case-loads, better-educated offenders, and better-administered probation than many state systems.²⁸⁷

4. Lost Incapacitation

When an offender is sentenced to a community-based sanction like fine-labor instead of prison, whatever crime he commits for the duration of the would-be prison term is a social cost that prison would have avoided. So whereas the failure rate deals with the costs to the state of putting fine-laborers back in prison (for either new offenses or technical violations), this factor deals with the costs to society of the new crimes committed by fine-laborers while not in prison.

Estimates of how many crimes are avoided by incarcerating an offender for a year diverge wildly,²⁸⁸ but recent well-designed studies tend to cluster around a figure of twelve to fifteen crimes for the median offender.²⁸⁹ Given that most crimes avoided are less socially costly property crimes, Steven Levitt estimated that incarcerating the median offender avoids \$53,900 per year in social costs of crime, seemingly justifying

286. *Id.* at 176.

287. *Id.* at 178.

288. See Tonry & Lynch, *supra* note 14, at 402 (citing Kleiman and Cavanagh's estimate that the "benefits of incarcerating that one inmate for a year at between \$172,000 and \$2,364,000," as well as Zimring and Hawkin's response that based on those scholars' assumptions, the "increase in the prison population that occurred between 1977 and 1986 should have reduce[d] crime to zero on incapacitation effects alone. . . . [O]n this account, crime disappeared some years ago.>").

289. See Levitt, *supra* note 6, at 346 (citing studies finding twelve to fifteen crimes avoided per offender); *id.* at 345 (estimating fifteen crimes); Rucker Johnson & Steven Raphael, National Bureau of Economic Research, *How Much Crime Reduction Does the Marginal Prisoner Buy?*, at 4 (2006), <http://www.nber.org/~confer/2007/crimef07/raphael.pdf> (Dec. 2, 2008) (citing general consensus of ten to twenty offenses); John J. DiIulio, Jr. & Anne Morrison Piehl, *Does Prison Pay? The Stormy National Debate Over the Cost-Effectiveness of Imprisonment*, BROOKINGS REV. 28 (Fall 1991) (study of Wisconsin prisoners shows median of twelve non-drug crimes); Anne Morrison Piehl & John J. DiIulio, Jr., "Does Prison Pay?" Revisited: Returning to the Crime Scene, BROOKINGS REV. 21 (Winter 1995) (New Jersey study confirms median of twelve non-drug crimes); see also Johnson & Raphael, *supra*, at 24 (estimating 9.4 felonies per offender).

the \$25,000 price tag.²⁹⁰ Piehl and DiIulio similarly estimate that the benefits of incarcerating the median offender outweigh the costs by a rough ratio of two to one.²⁹¹ However, they also conclude that it is not cost-effective to incarcerate the least dangerous quartile of offenders.²⁹² Moreover, once drug crimes are included,²⁹³ the incapacitation benefits of incarceration drop dramatically (on the assumption that incarcerated drug dealers will simply be replaced with other dealers to transact the same sales) such that prison is not cost-effective even for the median offender.²⁹⁴

The costs saved by diverting offenders from prison to fine-labor should outweigh the societal costs of lost incapacitation. Well-tailored selection criteria and thorough pre-sentencing assessment should help ensure that the vast majority of fine-laborers are in the lowest quartile of dangerousness, or at least below the median.²⁹⁵ In addition, crime rates should be affected not just by whom we select for fine-labor but by what we do with them once selected. Fine-laborers are not simply avoiding prison; they are *working* while avoiding prison. A lack of legitimate income, lack of structure, and idleness are factors that can lead to the relapse of offenders on probation or

290. Levitt, *supra* note 6, at 345 tbl.8. I have not adjusted Levitt's crime cost figures for inflation, given that he estimates the costs to taxpayers of incarceration for each offender (including prison construction costs) at roughly \$30,000. *Id.* at 324, 346–47. Thus, the comparison is already roughly apples-to-apples without adjustment.

One could argue that the benefit of incarcerating criminals in terms of cost of crime avoided are even greater, for the standard account of the cost of crime fails to take out more intangible or hard-to-measure factors, like fear, anguish, lost time from work, additional security measures, changed behavior, and so forth. David A. Anderson, *The Aggregate Burden of Crime*, 42 J. L. & ECON. 611, 614–19 (1999). In any event, as I argue in Part V.C.5, *infra*, fine-labor should reduce overall crime rates, so, if anything, the fact that crime costs more than is estimated should be a mark in favor of fine-labor.

291. See Piehl & DiIulio, "Does Prison Pay?" *Revisited*, *supra* note 289, at 34 & tbl.5 (benefit-cost ratio of 1.84 for the median offender).

292. *Id.*

293. Studies tend to exclude drug crimes since the high volume of drug sales tends to distort estimates. *Id.* at 32.

294. *Id.* at 25 & tbl.4.

295. For an example of a study that successfully correlates particular offender and criminal history characteristics with recidivism risks, see U.S. Sentencing Comm'n, *Recidivism and the "First Offender"* (2004), available at http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf. Because many adult prisoners committed crimes as minors, making juvenile records available to sentencing judges and prosecutors could help them assess the potential dangerousness of ostensible first-time offenders. See Piehl & DiIulio, "Does Prison Pay?" *Revisited*, *supra* note 289, at 22.

parole.²⁹⁶ All of these are avoided when offenders are employed full-time with legitimate work.

5. Reductions in Recidivism

This factor is probably both the most complex (because recidivism is such a highly overdetermined phenomenon) and the most important of them all. If fine-labor can yield long-term reductions in recidivism rates large enough to offset the short-term sacrifice of incapacitation benefits, it can reduce net levels of crime—an obvious boon to society.²⁹⁷

Studies regarding the incapacitation benefits of prison typically assume that prison has no effect—be it positive or negative—on future criminality.²⁹⁸ But other studies have attempted to determine whether prison is associated with different recidivism rates than other sanctions. Don Andrews and his colleagues conducted a meta-analysis of eighty different studies of adult and juvenile correctional programs and found that, on average, institutional and residential-based sanctions (i.e., prison, jail, and their correlates for juveniles) were associated with a 9 percent higher rate of recidivism than community-based sanctions (probation, house arrest, etc.).²⁹⁹ A study of California prisoners and probationers yielded similar findings.³⁰⁰ Another study has found that prison overcrowding

296. Pritikin, *supra* note 7, at 1061–63; see Pager, *supra* note 144, at 961 (“Research consistently shows that finding quality steady employment is one of the strongest predictors of desistance from crime.”).

297. Cf. Sheldon Ekland-Olson & William R. Kelly, *Justice Under Pressure: A Comparison of Recidivism Patterns Among Four Successive Parolee Cohorts* 120, 125 (Alfred Blumstein & David P. Farrington eds., 1993).

298. See, e.g., DiIulio & Piehl, “Does Prison Pay?” *Revisited*, *supra* note 289, at 31.

299. Don A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 29 *CRIMINOLOGY* 369, 383 tbl.2 (1990). For a discussion of the mechanisms that may be responsible for this, see Pritikin, *supra* note 7, at 1054–64; Stafford, *supra* note 109, at 270.

300. See, e.g., Joan Petersilia, Susan Turner & Joyce Peterson, *Prison Versus Probation in California—Implications for Crime and Offender Recidivism*, 150 *PLI/CRIM.* 105, 109 (1989) (finding that prison led to a 17 percent increase in recidivism over probation for felons convicted for property crimes, an 11 percent increase for drug offenders, and a 3 percent increase for violent offenders); see also Ted Bartell & L. Thomas Winifree, Jr., *Recidivist Impacts of Differential Sentencing Practices*, 15 *CRIMINOLOGY* 387, 393 (1977) (noting that probationers “substantially less likely to be convicted of a subsequent felony,” and the “most important predictor of subsequent burglary convictions was the number of previous incarcerations for any crime”); cf. Don M. Gottfredson, Michael R. Gottfredson & James Garofalo, *Time Served in Prison and Parole Outcomes Among Parolee Risk*

has contributed to a decrease in its deterrent effect, particularly for property offenders.³⁰¹ Other studies, however, have shown no uniform recidivism benefit of either prison or its alternatives.³⁰² The overall picture that emerges from this data suggests that the mere fact that fine-labor allows offenders to be punished in a non-residential setting may reduce the likelihood that they will re-offend in the future;³⁰³ at the least, there is little reason to think recidivism rates should be any worse.

Andrews' meta-analysis also found that well-tailored rehabilitative programs are more successful in non-custodial environments than in custodial ones.³⁰⁴ So the crime-reducing benefit of fine-labor may come not from any particular rehabilitative effect inherent in paying fines, in making restitution, or in working, but simply from the fact that fine-labor

Categories, 5 J. CRIM. JUST. 1, 2 (1977) (citing several studies showing that "persons required to serve longer periods of time in prison tend to do more poorly" on parole).

301. Ekland-Olson & Kelly, *supra* note 297, at 121–22.

302. See, e.g., Lin Song & Roxanne Lieb, *Recidivism: The Effect of Incarceration and Length of Time Served*, at 2 (Washington State Institute for Public Policy, (Sept. 1993)), available at <http://www.wsipp.wa.gov/rptfiles/IncarcRecId.pdf> (last visited Dec. 4, 2008) (concluding that incarceration increases recidivism for some offenders and reduces or has no effect on it for others); Nigel Walker, David P. Farrington & Gillian Tucker, *Reconviction Rates of Adult Males After Different Sentences*, 21 BRIT. J. CRIMINOLOGY 357, 360 (1981) (An analysis "casts a certain amount of doubt on assertions . . . that imprisonment is invariably followed by worse-than-average reconviction rates."); Bartell & Winifree, Jr., *supra* note 300, at 392–93 (noting that probation is better than prison in some circumstances, but also better than other sentences; and prior incarceration for *burglary* associated with *lower* rate of reconviction for any crime); cf. Thomas Orsagh & Jong-Rong Chen, *The Effect of Time Served on Recidivism: An Interdisciplinary Theory*, 4 J. QUANTITATIVE CRIMINOLOGY 155, 162–66 (1988) (finding longer prison sentences associated with higher recidivism rates overall, but also finding a "U-shaped" relationship between sentence duration and recidivism for certain subclasses of offenders); see also Gottfredson et al., *supra* note 300, at 10 (although "there is no large positive relation between time served in prison and favorable parole outcomes," there is not necessarily a negative one either, as "time served and parole success are unrelated for substantial numbers of offenders," and "the relation, if any exists, may differ in important ways according to differences in inmate characteristics."). See generally Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, in 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH 143, 187 (Michael Tonry ed., 2003) (reviewing substantial body of literature and finding "no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence"); DeFina & Arvanites, *supra* note 6, at 651 (concluding that "imprisonment has no statistically significant effect in the majority of states" for any of seven crimes studied).

303. Gottfredson et al., *supra* note 300, at 10.

304. Andrews et al., *supra* note 299, at 383 tbl.2, 384.

provides an opportunity to deliver rehabilitative services to offenders outside of prison.³⁰⁵ Thus, in addition to working and paying off fines, fine-laborers could also be required to participate in job training, life skills, or other transitional programming to help increase their odds of success after completion of their sentences.³⁰⁶

Incarceration may also increase crime not through its effect on offenders subjected to it, but through its effect on their children. Removal of a parent from the home due to incarceration can greatly increase delinquency in children. This, coupled with the large number of children with parents behind bars, means that increased criminality of children of inmates may be the single largest criminogenic effect of incarceration.³⁰⁷

But fine-labor is not just a generic alternative to prison. It integrates monetary and work sanctions, each of which could have their own unique impact on recidivism. As for monetary sanctions, there is a popular perception that restitution rehabilitates; unfortunately, there is little empirical evidence to corroborate this.³⁰⁸ There is, however, evidence that fines are associated with lower recidivism rates. In the Maricopa County

305. See *United States v. Buechler*, 557 F.2d 1002, 1006–07 (3d Cir. 1977) (“[I]f the availability of restitution prompts the sentencing judge to forego sentencing a youth to commitment, then all the evils attendant upon prolonged confinement in the company of other wrongdoers may be avoided.”); Harland, *supra* note 13, at 125 (“[R]estitution per se is not necessarily the rehabilitative factor; rather, the less intrusive penalty is thought to hold more promise for rehabilitation” than prison.).

306. Fine-labor raises the touchy issue of whether offenders will lose their state-provided jobs once their sentences are completed. If offender employment is heavily subsidized, then presumably, once the offender’s sentence is completed, the subsidy ends, and the employer will find it cheaper to hire a new offender than keep on the now ex-offender. But even aside from any job placement or other transitional assistance, an offender released from his job after sentence completion has a far better chance of finding new employment than an offender just released from prison. And the existing tax-credit for employing *ex-felons*—albeit a lower subsidy than what would likely be provided for *current* offenders under fine-labor—incentivizes employers to keep on higher-performing workers. See *supra* text accompanying note 8. Of course, if a particular offender performs well enough, an employer would find it worth it to keep him on even at a full wage.

307. Pritikin, *supra* note 7, at 1081–82.

308. Cowart, *supra* note 19, at 648 (“[T]here is no conclusive information tending to show that restitution positively affects recidivism.”). But see Christopher T. Lowenkamp et al., *Adhering to the Risk and Need Principles: Does It Matter for Supervision-Based Programs?*, 70-DEC FED. PROBATION 3, 4 (2006) (citing evidence that paying restitution or other forms of rehabilitative program participation can reduce recidivism rates of offenders sentenced to intensive supervisory probation by 10 percent to 20 percent).

experiment, for example, offenders who participated in the day-fine sanction had fewer arrests in the one-year follow-up than the control group sentenced to prison or probation (11 percent versus 17.3 percent).³⁰⁹ Other evidence shows that fines at least do not increase recidivism rates, if they do not actually decrease them.³¹⁰

The evidence regarding the recidivism rates of offenders assigned to in-prison labor is also promising. A 1991 study by the U.S. Bureau of Prisons found that 6.6 percent of federal inmates employed in prison industries were rearrested or violated parole within a year of release, as compared to 20 percent of non-employed inmates.³¹¹ Another federal study from 1996 found that inmates involved in prison labor were 35 percent less likely to recidivate a year after release and 24 percent less likely to be sent back to prison eight to twelve years after release.³¹² Florida inmates participating in the state's prisoner labor program had a four-year recidivism rate of just 15 percent, compared to 51 percent for the general inmate population.³¹³ Yet another study showed that, on average, inmates who participated in vocational programs had a 20 percent lower recidivism rate than nonparticipants.³¹⁴ If fine-labor could achieve comparable long-term reductions in recidivism, it could more than offset any short-term increases.

There is less data from America regarding the effect of community-based labor on recidivism. Even after accounting for offender characteristic differentials,³¹⁵ a study from the Northern District of California found that incarcerated offenders were still 50 percent more likely to reoffend upon release than those who were sentenced to probation; but, among those sentenced to probation, adding a community service require-

309. Turner & Greene, *supra* note 10, at 15–16; *see also* Walker et al., *supra* note 302, at 359 (Analysis of reconviction rates of British offenders sentenced to different sanctions revealed that “[t]he only measures for which the percentages are consistently better than expectation are financial (usually fines, but sometimes compensation orders.)”).

310. TURNER & PETERSILIA, *supra* note 15, at 13–14.

311. THOMAS, *supra* note 124, at 121 (citing “Factories Behind Bars,” U.S. NEWS & WORLD REPORT, Dec. 30 1991/Jan. 6, 1992 at 30).

312. SAYLOR & GAES, *supra* note 208, at 17–18, 22.

313. Phelan, *supra* note 101, at 1820–21.

314. Jeremy Travis et al., Urban Institute Justice Policy Center, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* 32 (2001), available at http://www.urban.org/UploadedPDF/from_prison_to_home.pdf.

315. That is, those offenders who were more likely to reoffend were more likely to be sentenced to prison rather than probation (without or without community service) in the first place.

ment had no significant impact on recidivism.³¹⁶ Again, this suggests that recidivism rates of offenders engaged in fine-labor should be lower than those sent to prison. Other studies from America and abroad yield similar results.³¹⁷

Fine-labor has the potential to reduce recidivism not only by providing employment but by providing a link to future employment. One Chicago-based program that helps Illinois inmates obtain employment upon release boasted a recidivism rate of 21 percent—a full 61 percent lower than the rate for nonparticipants.³¹⁸ Similarly, the federal prison system found that “[t]wenty-eight percent of inmates released that had arranged for employment prior to release recidivated, as compared to 54 percent of inmates who did not.”³¹⁹

Although the evidence regarding the effect of monetary and work sanctions on recidivism is promising, the way these elements are integrated under fine-labor could impact recidivism in unpredictable ways. Perhaps the single thorniest issue is the wage garnishment rate. There is an inherent tension pulling the decision about how much of a fine-laborer’s wage to garnish in opposite directions. The more an offender’s wage is garnished to make restitution to victims and reimburse the state for administrative costs, the more that victims and criminal justice institutions are tangibly benefited—and the more fine-labor appears to be an appropriately punitive and condemnatory sanction. But, at the same time, as offenders are permitted to retain less and less of their wages, this increases the economic strain on them and raises the likelihood that they will look for illegitimate means to boost their income, or relapse into other criminogenic behavior (like drug abuse) due to the stress. Indeed, if they keep too little of their pay, they may simply refuse to work at all. Moreover, the lower the worker’s take-home wage, the more that his labor appears to be exploitative, thereby exacerbating the risk that fine-labor will be perceived as a renewed form of slavery among minority communities.

316. Feeley et al., *supra* note 160, at 190–91.

317. Tonry & Lynch, *supra* note 14, at 125–27.

318. John Levin, *Returning to the Community: Groups Help Former Inmates Repair Lives*, CBA RECORD, Oct. 19, 2005, at 40, 40.

319. The Fed. Bureau of Prisons Inmate Release Preparation and Transitional Reentry Programs, U.S. Dep’t of Justice, Office of the Inspector General, Audit Division, Audit Report 04-16, at 5 (March 2004), available at <http://www.usdoj.gov/oig/reports/BOP/a0416/final.pdf>.

Unfortunately, addressing this problem raises other problems. If we increase offender's take-home pay in order to reduce his temptation to recidivate, this necessarily comes at the expense of victim and taxpayer repayment. It also makes fine labor look like a slap on the wrist, or even a handout to those least deserving of it. Once again, this shows how pushing on the balloon in one spot makes it bulge in another. Balancing these competing concerns will be a delicate matter indeed.

There is one way in which fine-labor could possibly *increase* recidivism: some unemployed individuals might commit crimes in order to be given a job. (This is the inverse of the argument that when the government provides welfare, it gives people an incentive not to work.) But this risk is mitigated by a variety of factors. First, there are usually easier ways to land a minimum wage job than committing a crime and subjecting oneself to criminal justice processing—which can take months and involve much stress and inconvenience. Second, many fine-labor jobs will involve demanding physical labor to which many would not want to voluntarily subject themselves. Third, fine-laborers effectively make less than minimum wage because of deductions for fine and restitution amounts. Fourth, although fine-laborers avoid the stigma of a prison record, they do not avoid the stigma of a criminal record. That stigma itself should be powerful enough to deter most law-abiding citizens from offending just to “get the job.” Finally, would-be offenders act in the shadow of uncertainty; one who offends in order to receive the “punishment” of a job has no guarantee that he will be sentenced to fine-labor, as opposed to prison or even probation without work.

On balance, it is reasonable to assume—but by no means certain—that fine-labor will yield lower long-term recidivism rates than prison and therefore reduce long-term crime costs.

6. Revenue Generated

Data clearly demonstrates that day-fines have the potential to increase collection of fines and restitution amounts. In Maricopa County, 96 percent of day-fine participants made some payment during the first twelve months compared to 77 percent of the comparison group; the average total fine paid per offender was \$669 versus \$344; and one year into their sentences, 53 percent had fully paid their fines compared to just 20

percent of the comparison group.³²⁰ Similarly, in the Staten Island experiment, the average fine increased by 25 percent; 70 percent of offenders paid their fines in full;³²¹ and 77 percent of total fines imposed were collected within the first year.³²² Under fine-labor, because the means to pay the fine are provided to the offender—and the fine amount and the payment schedule are set to reflect those means—collection amounts and rates should be at least as good, if not far better, than in these experiments.

Moreover, unlike other alternative sanctions like boot camp or ISPs, fine-labor actually generates revenue.³²³ Whatever wages an offender earns constitute a social gain compared to keeping him idle, no matter whether those wages are allocated to fines and restitution or not. Governments (and taxpayers, indirectly) benefit from the federal, state, and local taxes that the offender pays on his wages. The earnings that offenders retain for self and dependent support will at least in part displace monies that the government would have expended for their support through welfare or other publicly funded programs. And when offenders spend their earnings on goods and services, that money flows back into their local economies, benefitting non-offenders directly.

Offender labor creates additional economic benefits. Offenders working in industries such as manufacturing will utilize raw materials and supplies from private firms, boosting those firms' revenues. The federal prison industries program reported that in 2007, the work done by its inmate-employees resulted in \$539 million spent on purchases from the private sector—an average of over \$23,000 in purchases per worker.³²⁴ If fine-labor could place up to a fifth of the current prison population in community-based jobs, it could potentially generate \$7.5 billion per year in private sector purchases.³²⁵ If even half

320. TURNER & PETERSILIA, *supra* note 15, at 34; Turner & Greene, *supra* note 10, at 14.

321. Tonry & Lynch, *supra* note 14, at 129.

322. Turner & Greene, *supra* note 10, at 3; *see also* TURNER & PETERSILIA, *supra* note 15, at 47 (noting that the Iowa day-fine program increased full payment rates from 31.5 percent to 72.2 percent).

323. Community service does generate value, but this does not result in direct monetary transfers to victims or the state.

324. UNICOR Annual Report 2007, *supra* note 107, at 15 (23,152 offenders yield an average of \$23,277 per offender.).

325. Assuming a per-offender purchase rate similar to the federal purchase rate for 320,000 offenders, *see supra* text accompanying note 150, this would yield total purchases of \$7.449 billion per year.

of the remaining prison population could be similarly employed behind bars, this could generate another \$15 billion in purchases. In addition, the efficiencies generated by offenders working on infrastructure projects (higher productivity due to improved transportation and communications, less wasteful energy production, etc.) are a real economic gain, if harder to quantify.

A final note about net widening: although it is generally assumed to increase costs, fine-labor could actually prove the exception. A full-time fine laborer generates more money than an unemployed or underemployed probationer. As long as fine-labor's administration costs and failure rates are not dramatically higher than those of probation (neither of which we would expect to be true), the added value of putting would-be probationers to work should offset additional costs. (Nor are these savings offset by the cost of lost incapacitation, because probationers would not have been incapacitated in any event.) So even if fine-labor fails to draw its participant pool exclusively (or even predominantly) from prisons, it could still prove to be a cost-effective program.

7. Additional Benefits of Avoiding Prison

Sound penal policy counsels that we consider all costs to society of utilizing a given punishment, regardless of whether those costs manifest themselves in additional crime. Incarceration may not only exacerbate recidivism. It can have lasting effects on offenders' quality of life, imposing a stigma and depressing their employment opportunities. It can create financial and emotional strain on prisoners' families. It can even destroy the fabric of the inner-city communities from which prison populations are increasingly drawn, through reduced property values, lowered tax bases, worsened schools, and more.³²⁶ These negative externalities are difficult to measure, but they are no less real. Although it may be hard to include them in a quantitative cost-benefit analysis, we can intuit that they would help tip the scales in favor of a prison-avoidance mechanism like fine-labor.

326. Pritikin, *supra* note 7, at 1067–68.

8. Overcoming Inertia

Proving that fine-labor could achieve all of its goals—generating significant cost-savings, providing meaningful compensation to victims, and promoting offender rehabilitation, all without jeopardizing public safety—will be difficult unless and until such a system is actually implemented. Ironically, however, there will be resistance to implementation without evidence that fine-labor can work.

Even if one could somehow demonstrate *a priori* that fine-labor would succeed, there would still be resistance to implementing it: simple inertia. The status quo, whatever its drawbacks, has the advantage that it *is* the status quo. A transition to fine-labor as the punishment for a substantial portion of the current inmate population would involve a number of dramatic changes in a number of formal and informal institutions. Politicians would have to be persuaded that the political risks of pursuing reforms are outweighed by the benefits. Legislatures would have to modify rules regarding sentencing and the authority of sentencing judges to discover and consider information about individual offenders, and sentencing judges themselves would have to become accustomed to the new sentencing options. Probation officers and other players in the corrections industry would need new data systems, training, and a reorientation of focus. Employers would have to be persuaded to participate in the system, and to make internal changes to accommodate oversight of offender employees as well as coordination with corrections officials. Change is uncomfortable, and not readily adopted.

Fortunately, given the current economic climate and the ubiquitous pressure on federal, state, and local governments to slash their budgets, politicians and the public may be more receptive to creative solutions that reduce corrections costs. Yet acceptance of fine-labor, if it is to occur, will necessarily be a slow, gradual process. It would have to begin with the implementation of a small number of well-designed local pilot programs. Researchers would then need time to gather enough data to provide insights as to whether these initial programs were successful. To the extent that flaws in these programs are identified, additional pilots would have to be implemented to determine whether the problems are inherent in the concept or were particular to the programs themselves. If fine-labor can build a track-record of proven success over time, policy-

makers and average citizens will likely become more receptive to adopting it.

To summarize, fine-labor, even if more expensive to administer than probation, and even factoring in a full-wage subsidy, should still be cheaper to administer than prison.³²⁷ Any increases in crime that incarceration would have avoided should be small; and in any event, they could well be outweighed by longer-term reductions in recidivism. The work that offenders would do would generate revenue for victims, the state, and offenders and their families; it would also generate business for the private sector. Fine-labor would also avoid additional economic and non-economic costs that incarceration imposes on offenders and their families and communities. Although it would be presumptuous at this point to offer a concrete dollars-and-cents estimate of the potential net savings, the existing evidence gives us reason to be optimistic.

CONCLUSION

Fine-labor is one of the few alternatives to prison that has the potential to satisfy the social demand for serious punishment for non-trivial offenders, while at the same time reducing both crime and the social cost of punishing crime. Yet there are a number of obstacles that stand in the way of successful implementation of a fine-labor system.

The first obstacle is sheer inertia. In one sense, fine-labor, which incorporates fines, restitution, and offender labor, is just a continuation of what we are already doing. But in another sense, it is a radical departure from the status quo. It would require changes in existing legal, political, economic, administrative, and even social structures. People and institutions naturally resist change, even change for the better.

Second are the numerous inherent tensions within fine-labor. For fine-labor to succeed requires balancing the need to incentivize employers to hire offenders against the public demands that jobs go to law abiding citizens; the goal of compensating victims against the offenders' need for a livable wage; the legitimate impulse to punish against the risk of dehumanizing the offender; the drive to generate revenue against the temptation to exploit offender labor; and the desire to realize

327. Even at twice the cost of probation (i.e., \$7300), and a 100 percent subsidy of a full-time minimum wage job (\$15,000), the resulting \$22,300 cost would still be cheaper than the \$25,000 to house an inmate in prison for a year.

the advantages of avoiding incarceration against the threat to public safety of community-based sanctions.

Third is the sensitivity to detail. Whether fine-labor can keep crime levels down in a cost-effective manner may depend not only on whether a program is designed to balance the competing concerns mentioned above, but also on proper implementation. Personnel who evaluate offenders, place them with employers, monitor workplace conditions, handle wage garnishment, and coordinate offenders' work with other rehabilitative programming must be qualified and well-trained. They must be provided adequate resources. Electronic databases would need to be created and/or modified to manage information and coordinate the efforts of various departments.

Fourth, the need to overcome so many obstacles itself casts doubt on the viability of fine-labor. If so much must be changed for it to work, and so much could potentially go wrong, perhaps we shouldn't even try.

These obstacles are real, but not insurmountable. First, change engenders resistance, but that is not a normative ground for avoiding change. In any event, no sweeping nationwide changes would be needed at first. As with other innovative sanctions, fine-labor would be tried in discrete, small-scale experiments. The results of those projects would indicate whether fine-labor should continue, be retooled, or be abandoned altogether.

Second, fine-labor does bring into sharp relief the competing concerns that are tacitly at play in any criminal sanction. But bringing these issues to the surface instead of just ignoring them improves the chances that they will be addressed and resolved satisfactorily.

Third, fine-labor is not unique in its sensitivity to detail. All public policy ideas need sound implementation to succeed. Rehabilitation as a concept in criminal law was widely believed not to "work," until further research revealed that whether it works depends very much on the details of a particular rehabilitative program.³²⁸

Finally, even if the obstacles to implementing fine-labor are numerous, the increasingly obvious failure of our prison

328. See generally Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974) (concluding rehabilitation has no appreciable effect on recidivism); James Q. Wilson, "What Works?" *Revisited: New Findings on Criminal Rehabilitation*, 61 PUB. INT. 10 (1980) (concluding that some rehabilitation programs definitely do work for some offenders).

system impels us to consider it as an option. Otherwise, we have only the status quo, in which we deal with criminals by removing them from society. . . for a while, and then bringing them back again (and again and again), hoping for a different result the next time around. Albert Einstein was famously said to have a term for this sort of behavior: insanity. The American penal system can do better than insanity.