

## THE SHIFTING LEGAL LANDSCAPE OF CONTINGENT EMPLOYMENT: A PROPOSAL TO REFORM WORK

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### INTRODUCTION

The American labor market has undergone dramatic changes in the last two decades.<sup>1</sup> Most notably, the high technology market has created an unpredictable economy whose labor needs are subject to sudden demand as well as the ordinary vicissitudes of the market.<sup>2</sup> As a matter of sound human resource management and thrifty business policy, companies have developed ways of dealing strategically with their fluctuating demand for quality labor.<sup>3</sup> The most controversial of these measures, and the subject of this Comment, is the employment of temporary staff, or “contingent” workers.

The temporary worker is a familiar part of the employment landscape. American companies have become increasingly reliant on their “temps” because they bring comparable skill to the workplace without the accompanying cost.<sup>4</sup> It is not difficult to see why employers often prefer to utilize contingent workers instead of permanent employees. Temporary personnel relieve the company of its usual obligations: withholding of taxes, overtime pay provisions,

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<sup>1</sup> Immanuel Ness, *Labor's New Frontier*, 4 WORKINGUSA 3, 3 (2001) (listing among the most significant changes: workers are working longer days; the emergence of the cyber-workplace; and an increase in non-standard work arrangements, especially the low-wage temporary employee).

<sup>2</sup> Paul Kellogg, *Independent Contractor or Employee: Vizcaino v. Microsoft Corp.*, 35 Hous. L. Rev. 1775, 1802-03 (1999) (discussing the instability inherent to the computer industry because of the highly competitive software market and the shifting demands of the consumer).

<sup>3</sup> Katherine M. Forster, *Strategic Reform of Contingent Work*, 74 S. CAL. L. REV. 541, 541-42 (2001) (noting that temporary employees generally receive less pay than regular employees, thus allowing employers to improve profit margins).

<sup>4</sup> *Id.*

unemployment and workers' compensation obligations, federal discrimination provisions, OSHA and state occupational safety requirements, family and medical leave obligations, and certain provisions of the National Labor Relations Act.<sup>5</sup> Even an employer with the best intentions understands that there is a powerful incentive to cut costs and minimize legal liabilities by using this attractive labor alternative.<sup>6</sup> Additionally, workers who do not have the status of "employees" are less likely to attempt unionization because the law often does not recognize the rights of non-employee laborers to bargain collectively.<sup>7</sup>

In 1996, the United States Court of Appeals for the Ninth Circuit sent shock waves through the employment world with its decision in *Vizcaino v. Microsoft Corporation*.<sup>8</sup> The Ninth Circuit found that despite their label as "independent contractors," the workers were "common law employees" and thus entitled to the benefits accorded permanent employees.<sup>9</sup> *Vizcaino* sparked wide debate over the rights of contingent workers in the integrated<sup>10</sup> workplace, including the right to bargain collectively with the employer.<sup>11</sup> Presently, management and the contingent workforce generally are at an impasse. Management asserts that it is its prerogative within the law to meet hiring needs while cutting costs.<sup>12</sup> Contingent workers contend that they are being exploited when employers retain them beyond a temporary period and refuse to give them compensation and other benefits equal to their permanent counterparts.<sup>13</sup>

As an extension of the human person, labor can either serve to

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<sup>5</sup> Susan L. Coskey, *Vizcaino v. Microsoft Corporation; A Labor and Employment Lawyer's Perspective*, 73 LAB. L.J. 91, 92 (1997).

<sup>6</sup> *Id.* at 92 (suggesting that it is not surprising that contingent employment is "growing between forty to seventy-five percent faster than employment for the economy as a whole" because of the "great savings on paper" and the simplicity with which the employer can expand or reduce its staff).

<sup>7</sup> Bitu Rahebi, *Rethinking the National Labor Relations Board's Treatment of Temporary Workers: Granting Greater Access to Unionization*, 47 UCLA L. REV. 1105, 1106-07 (2000) (discussing the employer's statutory right under the NLRA to prohibit temporary workers from joining the collective bargaining unit of regular employees).

<sup>8</sup> 97 F.3d 1187 (9th Cir. 1996)

<sup>9</sup> *Id.* at 1195, 1200.

<sup>10</sup> "Integrated" in this context indicates a workplace in which permanent employees and temporary employees work together and are indistinguishable in terms of duties and responsibilities.

<sup>11</sup> See, e.g., Christopher D. Cook, *Temps Demand a New Deal*, THE NATION, Mar. 27, 2000, at 16 (contrasting attempts by organizations to secure rights for temps with those of the temp industry, which asserts that the current law supports an employer's right to distinguish between classes of workers).

<sup>12</sup> *Id.*

<sup>13</sup> Aaron Bernstein, *A Leg Up for the Lowly Temp*, BUS. WK., June 21, 1999, at 102.

enhance or denigrate human dignity. Ultimately our labor and employment laws should be judged by what they contribute to human dignity and the just social order, not solely by how they aid in the functioning of a capitalist economy. In short, we need to understand what the good human life requires, and then strive to shape our laws accordingly. In the arena of contingent work, this will require a transformation in our understanding of work and the role it plays in social life. This Comment ultimately proposes that the issue of contingent work not only sounds in contract law and economics, but also in human rights and moral obligation.

The critical framework I will use to evaluate the legal regime governing contingent employment is derived from well-developed principles of Catholic Social Thought,<sup>14</sup> a body of wisdom reflecting a certain conception of the human person and the just society. Part I of this Comment sets forth the major principles of Catholic Social Thought and their impact on the areas of labor and employment. Part II outlines the legal background of contingent employment, including the landmark *Vizcaino* decision. Part II also analyzes a recent decision handed down by the National Labor Relations Board (NLRB) that may expand significantly the collective bargaining rights of contingent workers. Finally, Part III critiques these legal developments using Catholic Social Thought as the standard for desirable labor and employment laws.

#### I. LABOR AND EMPLOYMENT IN CATHOLIC SOCIAL THOUGHT

Scholars generally accept that Catholic Social Thought, particularly in its American application, has its origin in Pope Leo XIII's 1891 encyclical *Rerum Novarum* (*The Condition of Labor*).<sup>15</sup> The rise of the secular state, the increasing intellectual influence of Darwinism, and the Industrial Revolution profoundly transformed Western culture.<sup>16</sup> In the wake of these movements, the laboring

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<sup>14</sup> See RODGER CHARLES S.J., AN INTRODUCTION TO CATHOLIC SOCIAL THOUGHT 9 (1999) (identifying Catholic Social Thought as contained in the Scriptures and the Tradition of the Church).

<sup>15</sup> Yet some scholars place the genesis of modern Catholic Social Thought, or CST, in the eighteenth century. See PRINCIPLES OF CATHOLIC SOCIAL TEACHING 9 (David A. Boileau ed., 1994) (citing Benedict XIV's (1740-1758) encyclicals in response to the Enlightenment and French Revolution as the proper inception of a systematic Catholic response to social developments).

<sup>16</sup> Scholars argue that the Industrial Revolution changed the face of Europe, though they disagree on whether this change was in the best interest of the West. See T.B. Macaulay, "Southey's Colloquies," in A SHORT HISTORY OF WESTERN CIVILIZATION 184-88 (John B. Harrison & Richard E. Sullivan eds., 1967) (arguing generally that the Industrial Revolution undeniably represented social progress, especially as it

classes often suffered the effects of low wages, unemployment, and degrading working conditions.<sup>17</sup> With the publication of *Rerum Novarum*, the Church entered the modern debate on the just social order. This Comment focuses mainly on the Catholic theory of labor.

#### A. *Harmony Between Classes*

The Catholic vision of labor relations is not adversarial; it is a cooperative model based on mutual dependence between employer and employee.<sup>18</sup> While traditional socialist and capitalist theories see labor and management as mutually antagonistic, *Rerum Novarum* articulates a harmony between and among various social groups.

The Church's metaphor for a well-ordered society is the human body.<sup>19</sup> The health of the entire organism is dependent upon the functioning of the individual parts.<sup>20</sup> No part is inferior to another in that each contributes equally to the well-being of the whole.<sup>21</sup> Although the analogy is simplistic, it reflects an approach to labor questions that is markedly different from those adopted in the last two centuries.<sup>22</sup> The industrial upheavals that began in the nineteenth century dramatically increased the potential for profit among manufacturers.<sup>23</sup> The machine would produce as long as

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helped to alleviate poverty among the agrarian classes. Macaulay also charged opponents of the Industrial Revolution with an effete aestheticism that valued romantic notions of the good life over genuine improvements in people's lives.). *But see id.* See also John L. Hammond & Barbara Hammond, "The Rise of Modern Industry," *supra*, at 206-07 (arguing that increasing industrialization served to deprive people of civilizing influences and instead enslaved people to the work process:

For the new town [resulting from the Industrial Revolution] was not a home where man could find beauty, happiness, leisure, learning, religion – the influences that civilize outlook and habit; but a bare and desolate place, without colour, air, or laughter, where man, woman, and child worked, ate, and slept. This was to be the lot of the mass of mankind . . . . The new factories and the new furnaces were like the Pyramids, telling of man's enslavement, rather than of his power . . . .)

<sup>17</sup> 2 PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES 14-15 (1955).

<sup>18</sup> Pope Leo XIII, *Rerum Novarum* (*On the Condition of Labor, 1891*) 15, reprinted in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 20 (David J. O'Brien & Thomas A. Shannon eds., 1995) (All references to papal encyclicals hereinafter are found in this edition unless otherwise noted.)

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 1 FONER, *supra* note 17, at 69 (noting that the first American trade unions in the 1790s arose in response to the arrival of the "merchant capitalist" and the subsequent disintegration of employer/employee cooperation. The two classes thus became mutually antagonistic).

<sup>23</sup> 2 *id.* at 14.

there was a man or woman to operate it. With profit as their primary motive in organizing the workplace, managers and owners viewed the workers as simply another factor in the calculus of productivity.<sup>24</sup> Quite simply, the concepts of labor and capital had merged and the employee became an instrumentality indistinguishable from the machine he operated.<sup>25</sup>

While traditional Marxism posits that the means to rectify this imbalance of power is by reducing property to common ownership,<sup>26</sup> the Church reinforces the importance of private property and suggests that the answer lies not in rearranging schemes of ownership, but in reintroducing the notion of justice to existing employment relationships.<sup>27</sup> Justice requires the fulfillment of agreements equitably made and deference to the dignity of both parties.<sup>28</sup> Specifically, justice calls upon workers to carry out their contracts, to refrain from destroying capital, to favor amicable settlements of grievances, to reject violence in representing their position, to avoid “riot and disorder,” and to disavow contact with those who promise satisfaction but employ dubious means.<sup>29</sup> Conversely, the employer must recognize that employees are not indentured servants, that the laboring individual possesses a unique dignity, that the employee works in order to live a decent and honorable life, and that workers are never a means by which to make

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<sup>24</sup> *Id.* at 14-15 (noting that the rise of industrialism signaled the demise of the craftsman and the birth of the mass-produced commodity. With the emphasis shifted from quality to quantity, the worker was no longer needed for his creative faculties, but for his rather mundane ability to monitor the machine).

<sup>25</sup> Karl Marx offers one of the most penetrating analyses of work and man in the modern age, particularly the potential for work to dehumanize the person as he devotes ever more of himself to material production:

The worker becomes poorer the more wealth he produces, the more his production increases in power and extent. The worker becomes an ever cheaper commodity the more commodities he produces . . . . Labor not only produces commodities; it also produces itself and the workers as a *commodity* and it does so in the same proportion in which it produces commodities in general.

KARL MARX, EARLY WRITINGS 323-34 (Rodney Livingstone & Gregor Benton trans.).

Marx correlates directly the objectification of man as an instrumentality with society's increased capacity for production. *Id.* Explosive economic growth such as that witnessed during the Industrial Revolution often follows innovations in technology. *Id.* If periods of technological transformation pose the greatest threat to working conditions, as Marx seems to suggest, then perhaps it is not surprising that the contingent worker situation should arise out of the current high-tech arena.

<sup>26</sup> KARL MARX, COMMUNIST MANIFESTO 878, 889 (Steven Cahn ed., 1990).

<sup>27</sup> *Rerum Novarum* 16, *supra* note 18, at 21.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

money at any expense.<sup>30</sup> Most significantly, the Church proffers an elevated vision of workers, one that views people not as a product of what they do for a living, but as beings of depth who require fulfillment on a “spiritual and mental” level.<sup>31</sup> Justice recognizes that both labor and management have their own priorities, and calls upon each side to advance its goals in a way consistent with the dignity of all persons.<sup>32</sup>

### B. Dignity of Labor

The Catholic philosophy of labor is comprehensive.<sup>33</sup> It acknowledges that work is a phenomenon common to all of humanity,<sup>34</sup> whether one occupies the position of employer or employee.<sup>35</sup> It is also pragmatic in its recognition that management usually possesses greater wealth and material resources.<sup>36</sup> As such, workers are generally in a weaker position to alter working conditions

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> DAVID HOLLENBACH, JUSTICE, PEACE, AND HUMAN RIGHTS: AMERICAN CATHOLIC SOCIAL ETHICS IN A PLURALISTIC CONTEXT 38-39 (discussing how Catholic labor theory, particularly as contained in John Paul II’s encyclical *Laborem Exercens*, ranges from concern for individual human fulfillment at work to the threat posed by labor distribution on the international level). John Paul II describes the depth and breadth of work in the human condition in *Laborem Exercens*: “[M]an’s life is built up every day from work, from work it derives its specific dignity, but at the same time work contains the unceasing measure of human toil and suffering, and also of the harm and injustice which penetrate deeply into social life within individual nations and on the international level.” Pope John Paul II, *Laborem Exercens (On Human Work, 1981)* 1, at 352.

<sup>34</sup> John Paul outlines the distinctiveness of labor in the created order and its position as something unique to humanity and not shared with any other form of life: “Man is made to be in the visible universe an image and likeness of God himself, and he is placed in it in order to subdue the earth. From the beginning therefore he is called to work. Work is one of the characteristics that distinguish man from the rest of the creatures, whose activity for sustaining their lives cannot be called work . . . . Thus work bears a particular mark of man and of humanity, the mark of a person operating within a community of persons.” *Introduction to Laborem Exercens*, *supra* note 33, at 352.

<sup>35</sup> HOLLENBACH, *supra* note 33, at 41 (noting that “[t]he human person is the image of God partly through the mandate received from the creator to subdue, to dominate, the earth. In carrying out this mandate, humankind, every human being, reflects the very action of the creator of the universe.”) (emphasis added).

<sup>36</sup> Catholic Social Thought acknowledges that the systematic response of the Church beginning with *Rerum Novarum* was justified under “principles of social morality.” Liberalism, as embodied by the capitalist economic system, “strengthened and safeguarded economic initiative by the possessor of capital alone, but did not pay sufficient attention to the rights of the workers . . . .” *Rerum Novarum* 8, *supra* note 18, at 362. This reality in turn gave rise to worker solidarity movements as a means of balancing the respective rights of labor and management.

set up by the employer who can simply replace objecting employees.<sup>37</sup> Absent any real influence in the employment relationship, the worker has no choice but to subject himself to the vagaries and indignities of the marketplace. But *Rerum Novarum* opposes this proposition with the bedrock principle of its labor proposal; namely, that all work is dignified because “the true dignity and excellence of man lies in his moral qualities, that is, in virtue; that virtue is the common inheritance of all, equally within the reach of high and low, rich and poor . . . .”<sup>38</sup> Pope Leo XIII grounds his assertion that all work has dignity in Christology.<sup>39</sup> Christ himself chose to realize the

<sup>37</sup> MICHAEL D. YATES, WHY UNIONS MATTER 10 (1998).

<sup>38</sup> *Rerum Novarum* 20, *supra* note 18, at 23.

<sup>39</sup> *Id.* “Christology” is the study of the nature of Christ, particularly with regard to what his life can tell us about how human life is to be lived and what the attributes of a just society are. See *The Craft of Theology: From Symbol to System*, discussing the Christian belief in Christ as more than symbolic:

By the act of coming into the world as a human being, Christ fully identified himself with those for whom he came . . . . He constituted himself as the unsurpassable symbol by all the mysteries of his life, including, climactically, his passion, death, and risen life. In the earthly ministry of Jesus each major event gives a further enrichment to his humanity and consequently to our ability to perceive him as God’s definitive self-disclosure.

AVERY DULLES S.J., THE CRAFT OF THEOLOGY: FROM SYMBOL TO SYSTEM 27 (1992); see also RICHARD P. MCBRIEN, CATHOLICISM 493 (1994) (identifying a distinction between Christology “from below” and Christology “from above.” The former emphasizes the “Jesus of history, a human being like us in all things except sin, who stands out from the rest of the human race by his proclamation of, and commitment to, the Kingdom, or reign, of God.” The latter “begins with the preexistent Word of God in heaven, who ‘comes down’ to earth to take on human flesh and redeem us by dying on the cross, rising from the dead, and returning to enjoy an exalted state as Lord in heaven.”). *Id.*

The essence of this idea is captured well in the encyclical *Redemptor Hominis*:

God entered the history of humanity and, as a man, became an actor in that history, one of the thousands of millions of human beings but at the same time Unique! Through the Incarnation God gave human life the dimension that he intended man to have from his first beginning; he has granted that dimension definitively – in the way that is peculiar to him alone . . . .

Pope John Paul II, *Redemptor Hominis (The Redeemer of Man, 1979) 1.2*, reprinted in THE ENCYCLICALS OF JOHN PAUL II 46-47 (J. Michael Miller C.S.B. ed., 1996).

According to Christian belief, therefore, the historical Jesus as portrayed in the New Testament is a source of moral and ethical wisdom. The Incarnation, the act of God assuming human form while also retaining His divine nature, was a profound act of love because it gave humanity God in its midst. No longer simply the object of philosophical speculation, God in the person of Jesus experiences the human condition fully, ultimately rises above its travails, and fulfills his temporal purpose. As such, the historical Jesus is not only to be studied, but emulated. See CATECHISM OF THE CATHOLIC CHURCH, at 471 § 1694.

Incarnation—the act of becoming human—as a carpenter,<sup>40</sup> a profession associated with common origins and the working class. The significance of Christ as carpenter to labor theory lies in its intimation that dignity is a function of our common humanity and not the particular profession in which we are engaged.<sup>41</sup> It suggests that any just employment relationship will be radically egalitarian<sup>42</sup>—it will treat both sides as equally deserving of just treatment regardless of who is in a position of greater wealth or power.<sup>43</sup>

*C. Work is Not Humankind's Ultimate Purpose*

Catholic Social Thought squarely rejects the tendency of modern society to view work as an end unto itself, subordinating other concerns to it, and demanding that we order our other priorities to it.<sup>44</sup> Work is instead relegated to the status of a means to the final end, which is God.<sup>45</sup> In Catholic theology, humankind originates in God and receives its nature from God.<sup>46</sup> By this nature,

<sup>40</sup> *Mark* 6:2-3.

<sup>41</sup> See CHARLES, *supra* note 14, at 63, stating:

Work has been given a new dignity by the example of God the Son made man, who spent most of his life on earth working with his hands for a living . . . All honest work is ennobled in that it is man, made in God's image and likeness, who does it. The *subject* of work is more important than the work done or the object achieved by it.

<sup>42</sup> The egalitarian ideal refers to the equal dignity of all people before God. It thus provides a basis for ensuring that both employer and employee treat each other fairly in establishing their working arrangement. It is not, as the Marxist notion seems to suggest, an assertion that distinctions among people are inherently unjust (e.g. rich/poor, employer/employee). The Catholic vision thus does not object to the notion of class, but insists on the equal worth of all people.

<sup>43</sup> National Conference of Catholic Bishops, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* 302, at 648 (United States Catholic Conference, 1986). The bishops of the United States have called for “new patterns of partnership” in the workplace in order to ensure that workers and management receive just treatment:

Partnerships between labor and management are possible only when both groups possess real freedom and power to influence decisions. This means that unions ought to continue to play an important role in moving toward greater economic participation within firms and industries . . . For partnership to be genuine it must be a two-way street, with creative initiative and a willingness to cooperate on all sides.

*Id.* Gould argues that such employee participation initiatives on a global scale are a major factor in the impending transformation in labor-management industrial relations. See WILLIAM B. GOULD IV, *AGENDA FOR REFORM* 109 (1993).

<sup>44</sup> *Rerum Novarum* 32, *supra* note 18, at 29.

<sup>45</sup> *Id.*

<sup>46</sup> ST. THOMAS AQUINAS ON POLITICS AND ETHICS 11-12 (Paul E. Sigmund ed., 1988).



human beings hold as their ultimate goal the return to the source of their creation.<sup>47</sup> During their lives on earth, men and women use their work as one means “to that attainment of truth and that practice of goodness in which the full life of the soul consists.”<sup>48</sup> By virtue of his creation, each person is vested with an inviolable dignity that directs man back to God as his ultimate end.<sup>49</sup> Man’s work, therefore, must do nothing to impugn that dignity and thereby impede man in the fulfillment of his final purpose.<sup>50</sup> The Church states emphatically its opposition to a social order that permits its citizens to live in an oppressive culture of work.<sup>51</sup> Indeed, *Rerum Novarum* dismisses the contention that the employment relationship is essentially a contractual one that simply reflects the acceptance by both parties of its terms and conditions.<sup>52</sup> The individual has no right to enter into contracts, however voluntary, that are “calculated to defeat the end and purpose of his being.”<sup>53</sup>

This proposition stands in stark contrast to the classical theory of contract law that once governed American employment law jurisprudence.<sup>54</sup> At the turn of the last century, the United States Supreme Court was loathe to interfere with the contractual relationship absent clear evidence of a State’s legitimate police

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<sup>47</sup> JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 15 (John J. Fitzgerald trans., Univ. of Notre Dame Press 1947).

<sup>48</sup> *Rerum Novarum* 32, *supra* note 18, at 29.

<sup>49</sup> *Redemptor Hominis* 11.2, *supra* note 39, at 60. (*Redemptor Hominis* describes this return to God as the “single goal to which is directed the deepest aspiration of the human spirit.” By virtue of this aspiration, the human person is necessarily on a quest for “the full dimension of its humanity . . . the full meaning of human life.”).

<sup>50</sup> *Rerum Novarum* 16, *supra* note 18, at 20-21.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 31.

<sup>53</sup> *Id.* at 32, at 29. (noting, for example, that such contracts would include those requiring work on Sundays, those requiring such excessive labor that they effectively treat the employee as an instrumentality, and any contracts not allowing for “proper rest for soul and body”).

<sup>54</sup> *See, e.g., Lochner v. New York*, 198 U.S. 45, 53 (1905) (holding unconstitutional a New York law setting maximum hours that bakers could work: “The statute necessarily interferes with the right of contract between the employer and employees . . . . The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.”). Chemerinsky notes that in *Lochner* the Court articulated the following three major principles: 1) Freedom of contract is a basic right protected under the Fourteenth Amendment; 2) Government may interfere with the freedom of contract only to advance a valid police purpose, such as public safety, public health, or public morals; 3) The role of the Court is to “carefully scrutinize” legislation that hinders the freedom of contract. *See* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 8.2.2 (1997).

power.<sup>55</sup> The contract represented the agreement of autonomous beings who were free to create whatever conditions suited their respective needs.<sup>56</sup> It was not the province of the state generally to regulate even gross inequities in the resulting terms of the contract, unless such regulation was consistent with a state's police power.<sup>57</sup> The prevailing *laissez-faire* philosophy of the day claimed to respect deeply man's freedom to contract and therefore refused to regulate the products of this freedom.<sup>58</sup> Against this backdrop, the Church's view of the nature of contract represents a radical departure.

Parties to an employment contract are bound not only by the precepts of human law, but also by the demands of the divine law.<sup>59</sup> While traditional contract law allowed man to accept onerous terms if he perceived that the resulting advantage was commensurate, the divine law denied man the right to accept such terms if they adversely affected his obligation to God.<sup>60</sup> In strong language the encyclical asserts that the employee has no power whatsoever to consent to treatment that violates his dignity in the eyes of God:<sup>61</sup>

To consent to any treatment which is calculated to defeat the end and purpose of his being is beyond his rights; he cannot give up

<sup>55</sup> See *Lochner*, 198 U.S. at 53-54. In the thirty years following *Lochner*, the Court struck down numerous social welfare laws. See, e.g., *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915) (declaring unconstitutional laws that prohibited employers from requiring that employees not join a union); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (declaring unconstitutional a law that set a minimum wage for women); *Adams v. Tanner*, 244 U.S. 590 (1917) (declaring unconstitutional a law that prohibited private employment agencies from charging a fee to employees).

<sup>56</sup> *Lochner*, 198 U.S. at 64.

<sup>57</sup> *Id.* at 53-54.

<sup>58</sup> SIDNEY FINE, *LAISSEZ FAIRE AND THE GENERAL WELFARE STATE* 140-41 (1964) (noting that the post-Civil War Supreme Court practiced a *laissez-faire* judicial philosophy in order to circumscribe the reach of social welfare legislation.). The author also traces the evolution of the Due Process Clause of the Fourteenth Amendment from "[b]road interpretations of liberty and property . . . [to] the derivative right of liberty of contract." *Id.* The effect of the Court's purported reverence for the freedom of contract was to seriously hinder the enactment of progressive social legislation. *Id.* at 164. In a coy assessment of the legal consequences of *laissez-faire* jurisprudence, Roscoe Pound wrote:

Today, when [the judiciary] assumes to stand between the legislature and the public and thus again to protect the individual from the state, it really stands between the public and what the public needs and desires, and protects individuals who need no protection against society which does need it.

Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403 (1908).

<sup>59</sup> *Rerum Novarum*, *supra* note 18, at 46.

<sup>60</sup> *Id.* at 29.

<sup>61</sup> *Id.*

his soul to servitude; for it is not man's own rights which are here in question, but the rights of God, most sacred and inviolable.<sup>62</sup>

It follows then that Catholic Social Thought will give this admonition meaning by defining in greater detail what constitutes the “end and purpose of being” and the “rights of God.” The nature and purpose of human life thus gives rise to certain non-waivable protections. Most significant, however, is the articulation of a standard that must govern the relationship between employer and employee. This standard is independent of any human law, country, or culture. Yet it is universal in its obligation and invites man-made law to participate in its goals and reflect its priorities in its own codes.

#### *D. Just Wages*

In determining the all-important question of the just wage, Catholic Social Thought once again takes issue with pure contract law.<sup>63</sup> Under contract analysis, employer and employee agree to a certain level of compensation and injustice occurs only when the employer fails to pay or the employee refuses to work.<sup>64</sup> In Catholic Social Thought, the wage represents more than the agreed-to compensation. *Rerum Novarum* suggests that labor has a dual nature: 1) *personal*—the worker chooses to sell his labor in exchange for some kind of personal profit; and 2) *necessary*—the worker labors in order to live. Man must work in order to sustain his very existence.<sup>65</sup> Our society tends to view the employee's wage as a function of the personal aspect alone.<sup>66</sup> As a personal concern, a working person is free to “accept any rate of wages whatever; for in the same way as he is free to work or not, so he is free to accept a small wage or even none at all.”<sup>67</sup> But the Church insists that work is also necessary, which compels us to look beyond the wage quoted in the contract to see if it permits the worker to live in human dignity.<sup>68</sup> The Church does not

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 31.

<sup>64</sup> *Id.*

<sup>65</sup> *Rerum Novarum*, *supra* note 18, at 31.

<sup>66</sup> See, e.g., Steven Greenhouse, *Temporary Workers Seeking Code of Conduct for Job Agencies*, N.Y. TIMES, Jan. 31, 2000, at B1 (discussing the objection of temporary work agencies to industry-wide standards in the context of wages and benefits. Agencies assert that such standards “like health insurance and a so-called living wage are unrealistically expensive.”). Simply stated, the employer offers a wage and the employee accepts. There is little concern for what standard of living this wage provides or how useful the wage is in effecting certain fundamental rights such as health care.

<sup>67</sup> *Rerum Novarum* 34, *supra* note 18, at 31.

<sup>68</sup> CHARLES, *supra* note 14, at 81 (noting that in a free society wages must rely on

deny that free negotiation is a prerequisite to the establishment of a just wage, yet it reminds us that

there is a dictate of nature more imperious and more ancient than any bargain between man and man, that the remuneration must be enough to support the wage earner in reasonable and frugal comfort . . . if through necessity or fear of a worse evil, the workman accepts harder conditions because an employer will give him no better, he is the victim of force and injustice.<sup>69</sup>

As Patricia Ann Lamoureux has observed, Leo XIII framed the question of just remuneration in terms of the right to live in dignity, and this important step moved the issue “beyond free consent . . . to the level of justice in the relationship between two persons.”<sup>70</sup> Interestingly, Catholic Social Thought does not look to the State to remedy such injustices directly.<sup>71</sup> Rather it calls upon the State to

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free agreement between parties, but at the same time society has a duty to ensure that prevailing wages are sufficient to meet human needs).

<sup>69</sup> *Rerum Novarum* 34, *supra* note 18, at 31.

<sup>70</sup> Patricia Ann Lamoureux, *Justice for Wage Earners*, HORIZONS (2001), at 213.

<sup>71</sup> The Catholic position on the role of the State has steadily evolved from *Rerum Novarum* through *Laborem Exercens* while maintaining certain principles consistently. Consistent with its concern for the common good and its encouragement of communal action to remedy societal ills, the Church does not reject the potential power of the State to ensure that proper standards of individual well-being are maintained. See A. Rauscher, *Institutions of Social Organization: Family, Private Property, State*, in PRINCIPLES OF CATHOLIC SOCIAL TEACHING 82 (David A. Boileau ed., 1994). Thus Leo XIII in *Rerum Novarum* places the primary onus on the State to “make sure that the laws and institutions, the general character and administration of the commonwealth, shall be such as to produce of themselves public well-being and private prosperity . . . for it is the province of the commonwealth to consult for the common good.” *Rerum Novarum* 26, *supra* note 18, at 26. This rather beneficent conception of the State would be profoundly challenged in the next century following the horrors of National Socialism and Stalinism. With the publication of the encyclical *Centesimus Annus* in 1991 to mark the centenary of *Rerum Novarum*, John Paul II articulates a more ambiguous role for the State. See J. Verstraeten, *Solidarity and Subsidiarity*, in PRINCIPLES OF CATHOLIC SOCIAL TEACHING 145 (David A. Boileau ed., 1994) (noting that while John Paul II supports some state involvement in providing security for society, excessive dependence on the state creates a “loss of human energy and the exaggerated increase of governmental apparatus . . .”). The State has the responsibility to encourage the national economy and thereby create gainful employment. It also occupies a position as defender of the most vulnerable in society. Yet as J. Bryan Hehir has commented, these affirmative duties are tempered by a concern that the State vested with excessive powers tends to totalitarianism. See J. Bryan Hehir, *Reordering the World*, in A NEW WORLDLY ORDER: JOHN PAUL II AND HUMAN FREEDOM 88 (George Weigel ed., 1992). Therefore *Centesimus Annus* “espouse[s] an activist state, but one constrained by the principle of subsidiarity.” *Id.* Hehir also observes that John Paul II has added a critique of “the welfare state” which is new to Catholic Social Thought. *Id.* The Pope cautions that even a State motivated by good intentions in providing for the basic needs of its citizens can become an undesirable behemoth. In a re-emphasis of the importance of community-based responses to individual need, *Centesimus* prefers voluntary

protect the right of workers to respond collectively to workplace conditions. The distinction is a subtle one since it would be difficult for workers to exercise rights in the workplace without the state extending legal sanction to their activity. It is desirable for the state to construct a legal regime supportive of worker-management cooperation, but undesirable for it to oversee the specific terms of every employment contract. Throughout Catholic Social Thought there is a tension between the individual and the state. While it is recognized that in some areas intimate state involvement may be essential to achieving social goals, there is a corresponding concern that the state may also become the sole agent in social life, thus minimizing the importance of the individual. Integral to Catholic Social Thought's philosophy of labor is the contribution of unions and other similar associations before government involvement, and the requirement that the state not work to undermine these groups.<sup>72</sup>

#### *E. Unions/Workers' Associations*

Common to Catholic Social Thought is the notion that social problems are best resolved using the resources of smaller, community-based organizations.<sup>73</sup> This principle of subsidiarity<sup>74</sup>

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associations to a government bureaucracy when providing for the public welfare. *Id.* For a comprehensive consideration of Catholic Social Thought and entitlements, see *Symposium on Entitlements*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419-793 (1997).

<sup>72</sup> *Rerum Novarum* 38, *supra* note 18, at 33.

<sup>73</sup> David L. Gregory, *Dorothy Day's Lessons for the Transformation of Work*, 14 HOFSTRA LAB. L.J. 57, 98-99 (1996).

<sup>74</sup> From the Latin *subsidium* meaning "help," subsidiarity is a central concept of Catholic Social Thought. In one sense it is the cognate of "welfare" in the secular system. Both ideas refer to the means by which a society provides temporary assistance to those in need. Subsidiarity, however, acknowledges first that as an independent being vested with natural rights, man is endowed with the capacity for self-direction and autonomy. See CATECHISM *supra* note 39, at § 1730. Yet this independence does not call for man to live an insular existence, incapable of solidarity with others. See CHARLES *supra* note 14, at 35. Although individual self-sufficiency is a requirement for the common good, solidarity with others mandates that as a society we assist "persons, families, and intermediate societies . . . when they need it." *Id.* Dorothy Day, the social justice advocate, premised the mission of *The Catholic Worker*, an organization in service of the poor and oppressed, on subsidiarity:

We advocate . . . [a] decentralized society in contrast to the present bigness of government, industry, education, health care, and agriculture. We encourage efforts such as . . . worker ownership and management of small factories . . . any effort in which money can once more become merely a medium of exchange, and human beings are no longer commodities.

Gregory, *supra* note 73, at 98.

Wolfe makes a persuasive argument that subsidiarity is consonant with the American tradition of limited government. See Christopher Wolfe, *Subsidiarity: The*

reflects the view that communities have a better understanding of their own deficiencies and therefore are more capable of effecting a just resolution than a larger, more bureaucratic entity.<sup>75</sup> The community is large enough to exercise coercive power over members not acting to promote the common good, yet small enough to instill virtuous habits in its individual members.<sup>76</sup> The State, on the other

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*"Other" Ground of Limited Government, in CATHOLICISM, LIBERALISM, AND COMMUNITARIANISM* 81 (Kenneth L. Grasso et al. eds., 1995). Unlike the American notion of limited government, however, subsidiarity is not based on a fear that "higher political authorities will abuse their power." *Id.* at 87. Wolfe suggests that the theoretical foundation for subsidiarity is "deeper" and "more principled"—it reflects the Church's teaching that people, not things, are the fundamental building blocks of society. *Id.* Therefore, people acting for the common good, not a bureaucratic entity, should bear the responsibility for the needy in their midst.

<sup>75</sup> See Gregory Baum, *Liberal Capitalism, in THE LOGIC OF SOLIDARITY* 80 (Gregory Baum & Robert Ellsberg eds., 1989) (positing that subsidiarity seeks "a balance between the freedom of small enterprises and the government's responsibility for the well-being of all").

<sup>76</sup> Communities are premised on a conception of the common good; that is, what is in the best interest of the group. See YVES R. SIMON, *A GENERAL THEORY OF AUTHORITY* 31-32 (1962). In a symbiotic manner, the individual contributes to the health of the community and the community enables man to flourish in his social capacity. See Michael Novak, *FREE PERSONS AND THE COMMON GOOD* 32 (1989) (proposing that the apparent tension between the individual and the community is often slight since they are not fundamentally contradictory: "When a human person acts with reflection and choice – acts, that is, *as a person* – the personal good and the common good tend to coincide"). An important aspect of community is the individual members' adherence to agreed-upon norms of conduct. A serious challenge to the concept of community, therefore, is one branch of modern liberal political theory that views community as a collection of discrete persons pursuing their individual ends with minimal state interference in these personally-determined priorities. See Kenneth L. Grasso, *Beyond Liberalism: Human Dignity, the Free Society, and the Second Vatican Council, in CATHOLICISM, LIBERALISM, AND COMMUNITARIANISM* 45-46 (Kenneth L. Grasso et al. eds., 1995). *But see* MARITAIN, *supra* note 47, at 49-51 (proposing that the goal of society can be neither the satisfaction of individual good nor the satisfaction of the collection of individual goods, as discussed above). Maritain posits that both of these proposals would be destructive of society, since it would result in an "anarchistic conception of individualistic materialism in which the whole function of the city is to safeguard the liberty of each; thus giving to the strong full freedom to oppress the weak." *Id.* at 50. Rather, he suggests, the "common good of [society] is neither the mere collection of private goods, nor the proper good of a whole which . . . relates the parts to itself alone and sacrifices them to itself. *Id.* at 50-51. It is the good *human* life of the multitude, of a multitude of persons; it is their communion in good living. It is therefore common to both *the whole and the parts* . . . ." *Id.* at 50. Maritain's words are in direct opposition to the modern individualist conception of society. Grasso, *supra* note 76, at 45. A related concern and a vexing difficulty with theories of community in general is the justification of coercion over individuals to encourage ethical behavior; that is, conduct promoting the good of the whole. The proper exercise of authority in political associations receives early treatment by Aristotle in Book 3 of *THE POLITICS*. The issue persists in the present day among political theorists. See ALISDAIR MACINTYRE, *AFTER VIRTUE* 150-52 (discussing a community's need to explicitly distinguish virtues from vices in order to

hand, is relatively aloof from the lives of the people.<sup>77</sup> As a result of this distance, it is unable to appreciate fully the life of the community and so less suited to forging solutions tailored to the unique circumstances of those people.<sup>78</sup> Catholic Social Thought does not deny that the State may attempt in good faith to rectify social ills in a particular community, but it prefers a response from the affected community. Such local responses have normative force and thus are more likely to be sustainable. There is less assurance that the State's response will have the same legitimacy among individuals in the community. In addition, the State exercises extensive coercive power while remaining virtually incapable of instilling virtuous habits in the citizenry.<sup>79</sup> When the State remedies a situation, it essentially imposes a solution, thus denying those affected a meaningful role in crafting

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determine what actions are destructive of community. In this way the community establishes moral and ethical norms, thus justifying coercive action over individuals not acting in the common good). See also the classic study of the nature of coercion in political society in YVES R. SIMON, *A GENERAL THEORY OF AUTHORITY* (1962). The labor union may also be viewed as a community established to achieve a common objective and maintain rules of conduct for individual members. Like political communities, unions embody the tension between individual self-fulfillment and community well-being. The marked rise of individualism, scholars argue, is related to the decline in American civic organizations such as churches, political clubs, and neighborhoods. See, e.g., Thomas C. Kohler, *Civic Virtue at Work: Unions As Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 290-91 (1995). The decline in unionism can also be traced to the prevailing individualist sentiment. See Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism As a Cause For Labor's Decline*, 16 HOFSTRA LAB. & EMP. L.J. 133, 134 (1998) (noting that "Americans are not attracted to unionization because they are increasingly inhospitable to collective action. Individualism has come to dominate American social structure and thought. The traditional labor organization is based on an opposing ideology of mutual aid and support, in which individual interests yield to group interests . . .").

<sup>77</sup> HENRY TAM, COMMUNITARIANISM 144 (1988) (describing the alienation of individuals engendered by modern political systems: "Conventional politics . . . take the marginalization of citizens for granted. Political decisions are taken by the state, and the citizens are at best given a periodic vote . . .").

<sup>78</sup> *Id.* at 156 (arguing that communitarian forms of governance prevent political decisions that are ill-suited to local needs by "avoiding the imposition of authoritarian visions"). Communitarianism thus calls for more decentralized forms of government. *Id.* at 157.

<sup>79</sup> As Kenneth L. Grasso has noted, modern liberalism may be the political system least able to organize society around a conception of the common good. Grasso, *supra* note 76, at 46 (Kenneth L. Grasso et al. eds., 1995). The concept of subjective preference, which is fundamental to liberalism, prohibits any "substantive conception of the good life." *Id.* at 45. Because such a conception would be simply one "subjective preference" among others, liberalism would be loathe to value one preference over another. *Id.* Rather than articulate a conception of the human good for all, liberalism allows each person to determine subjectively his own private good. *Id.* at 46. The coercive power of the state, therefore, operates only to ensure that each person remains free to pursue his own private good. *Id.*

an alternative resolution.<sup>80</sup> The proper role of the State is to protect its citizens and ensure that a just social order, defined by the people, is maintained.<sup>81</sup>

Similarly, in the relationship between employer and employee, State interference should be kept to a minimum.<sup>82</sup> Disagreements that arise—hours of work, working conditions, wages—should be resolved at the level of employer/employee through those smaller organizations representing the interests of both groups.<sup>83</sup> Just as human beings naturally form families and communities to meet their various physical, emotional, and spiritual needs, workers form associations of people engaged in similar trades to meet their needs.<sup>84</sup> Workers' associations, or unions, are fundamental not only to securing rights for working people, but also to the flourishing of culture and advancement of knowledge.<sup>85</sup> This is so because, inevitably, human beings accomplish more as societies than they do as individuals.<sup>86</sup> Individuals have a "natural right" to associate in groups,<sup>87</sup> and the same principle that causes men to form a civil society also causes them to form unions.<sup>88</sup> Therefore, if the State prohibits workers from forming unions, "it contradicts the very principle of its own existence; for both [a union] and the State exist in virtue of the same principle, viz., the natural propensity of man to live in society."<sup>89</sup>

An interesting question is raised, however, when the State does not actively prohibit collective action by workers, but simply does not substantiate it. In other words, does the State have an affirmative

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<sup>80</sup> TAM, *supra* note 77, at 144.

<sup>81</sup> *Rerum Novarum* 26, *supra* note 18, at 26.

<sup>82</sup> *Id.* at 34, at 31.

<sup>83</sup> *Laborem Exercens* 20, *supra* note 33, at 380.

<sup>84</sup> *Id.* at 36.

<sup>85</sup> *Id.*

<sup>86</sup> MARITAIN, *supra* note 47, at 48 ("[The person seeks to live in society because] unless it is integrated in a body of social communications, it cannot attain the fullness of its life and accomplishment . . . . It is not by itself alone that it reaches its plenitude but by receiving essential goods from society.").

<sup>87</sup> ARISTOTLE, *THE POLITICS* 6 (Carnes Lord ed., 1984).

<sup>88</sup> Thomas C. Kohler, *Individualism and Communitarianism at Work*, 1993 BYU L. REV. 727, 730-33 (positing that collective bargaining arises directly out of the classical notion that "the primary function of community is to assist the full development and proper unfolding of the human personality . . .").

<sup>89</sup> *Id.* The notion of man as a social being naturally drawn to community-building and acting in concert with others for better living was first meaningfully articulated by Aristotle and strongly emphasized in the political theory of Aquinas, the philosopher credited with providing the intellectual and theological foundation for Catholic Social Thought.



duty to promote unions? While the State may not be morally obligated to advocate union activity, it should be careful that its neutrality does not effectively hinder such activity either. In this regard, Part II.B addresses how the joint employer doctrine has served to deny contingent employees the rights of representation contemplated by the National Labor Relations Act.

*F. Laborem Exercens and the Philosophy of Work*

In 1981, ninety years after the release of *Rerum Novarum*, John Paul II thoroughly reviewed the Catholic theory of labor and added his own insights to labor in the postmodern world in the encyclical *Laborem Exercens (On Human Work)*.<sup>90</sup> *Laborem Exercens* represents an exploration into the nature of work that is more subtle and theological than *Rerum Novarum*. It recognizes that work in the modern world plays an even more prominent role than it once did. It is not enough, John Paul argues, to view work as a necessary evil and merely ensure that a decent wage and satisfactory working conditions prevail.<sup>91</sup> *Laborem Exercens* creates a “gospel of work,” giving human toil a theological significance and a vital role in the self-realization of the human person.<sup>92</sup> The Church acknowledges that as human civilizations and cultures have progressed, the notion of work has also evolved.<sup>93</sup> There is an urgent need “for the discovery of the new meanings of human work.”<sup>94</sup> More specifically, it must be determined whether the legal and social structures we use to define work promote just relationships between individuals and therefore harmony among the various social strata.<sup>95</sup>

Work is a profound dimension in the life of an individual.<sup>96</sup> It occupies a significant portion of our daily lives, it defines our “station” in society, and it is largely determinative of the lifestyle we choose to adopt.<sup>97</sup> In Catholic Social Thought, work derives its

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<sup>90</sup> *Laborem Exercens*, *supra* note 33, at 352.

<sup>91</sup> Early in the encyclical, John Paul describes work as “the key to the social question” and asserts that the nature of human work is an important aspect of “making life more human.” *Id.* at 3, at 355. Work is invested with a deeply theological significance. *Id.*

<sup>92</sup> *Id.* at 25, at 386.

<sup>93</sup> *Id.* at 2, at 353-54.

<sup>94</sup> *Id.* at 354.

<sup>95</sup> *Id.* at 1, at 353.

<sup>96</sup> ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 65-66 (1985) (arguing that at its deepest, work is morally inseparable from one’s life. “It subsumes the self into a community of disciplined practice and sound judgment whose activity has meaning and value in itself . . .”).

<sup>97</sup> *Id.*

profundity from Biblical sources.<sup>98</sup> After all, the very existence of creation is a result of God's "labor" over a six-day period.<sup>99</sup> Following the creation of human beings, God passed along responsibility for further creation in his admonition that humanity is to "fill the earth and subdue it."<sup>100</sup> In one sense, then, *Genesis* is essentially about the divine mandate for man to be active in the world, to transform nature through his work into a place reflective of God's will.<sup>101</sup> This is a direct call, therefore, for a culture of work that enhances human dignity, strives for a just social order, and places a concern for man's well-being at the center of the process. In other words, it is focused on the worker, not on the end result of work.

*Laborem Exercens* elaborates on a theory of work that emphasizes two fundamental dimensions: objective and subjective.<sup>102</sup> Work is defined as a "transitive" activity, which indicates that an act of labor starts with the human subject and ends with the desired effect on an object.<sup>103</sup> This distinction assumes vital significance because, as the creation of God vested with supreme importance, man as the subject of work is the measuring stick against which any labor theory is measured.<sup>104</sup> The effect which any employment law or practice has on the objective aspect of work, namely profits, is of secondary

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<sup>98</sup> HOLLENBACH, *supra* note 33, at 39.

<sup>99</sup> *Genesis*, 1:1-31.

<sup>100</sup> *Laborem Exercens* 4, *supra* note 33, at 356.

<sup>101</sup> HOLLENBACH, *supra* note 33, at 41.

<sup>102</sup> *Laborem Exercens*, *supra* note 5, at 357-60.

<sup>103</sup> *Id.* at 4, at 356.

<sup>104</sup> As Neuhaus observes, man as the measure of theory is a common theme in John Paul II's writings, particularly in *Centesimus Annus*. RICHARD JOHN NEUHAUS, *DOING WELL AND DOING GOOD: THE CHALLENGE TO THE CHRISTIAN CAPITALIST* 182 (1992). Since his days as a student of Edmund Husserl, John Paul adhered to the teaching of phenomenology, "a philosophy that is determined to attend not so much to grand principles as to the structures and patterns of behavior by which people think and act." *Id.* at 181-82. Phenomenology is a realist philosophy in the sense that it places man in historical time with all his imperfections and shortcomings. *Id.* at 182. Perhaps in response to his own experiences under Communism in Poland, John Paul II's thought opposes the socialist objectification of man and resists its reduction of man from individual to mere instrument of the State. *Id.* With the encyclicals of John Paul II, injected into Catholic thought is a vibrant philosophy of "person as actor." *Id.* There is a renewed emphasis on "man as subject;" no longer is he the passive object of action, but the creative initiator. Man's conscious perception of his environment becomes important because he is not a cog in the machine. As the being vested with the highest dignity and intelligence, he is called to a life of intimate participation with God in the world of creation. HOLLENBACH, *supra* note 33, at 41. Therefore man as subject must not be alienated from this creative process of work, but feel integrated with it. As work assumes an ever greater role in our society, it may be that labor theory and employment practices will provide the most significant opportunity to build a more human way of life.

importance.<sup>105</sup>

*G. Objective Nature of Work*

The objective element of work is the technology used to accomplish the task and the products that result.<sup>106</sup> It is the process through which nature is transformed to meet the needs of humanity.<sup>107</sup> Man applies his intellectual and physical powers, for example, to devise ways of turning resources into productive sources of energy, food, or clothing. This may involve processes of growing plants, extracting minerals, or altering natural resources through the manufacturing process into items useful to human consumption.<sup>108</sup> Throughout history these processes have become less labor-intensive because sophisticated technology in the form of machines now accomplishes many of the tasks once performed by human workers.<sup>109</sup> The danger in this continued refinement of the objective aspect of work is that man becomes an increasingly insignificant factor in the calculus of labor, technology, and productivity.<sup>110</sup> Even the current economy's increased emphasis on human capital has not rendered these concerns obsolete. The rise of the employee-driven service economy has not necessarily resulted in increased job security or worker contentment. This danger did not end with the Industrial Revolution, but remains with us as technology and work generally have become even more sophisticated.<sup>111</sup> John Paul II suggests that in light of the dramatic changes in the post-industrial environment, there is a need once again for "reproposing in new ways the question

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<sup>105</sup> HOLLENBACH, *supra* note 33, at 38.

<sup>106</sup> *Laborem Exercens* 5, *supra* note 33, at 357.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> This phenomenon of the "displaced worker" is one of the most contentious issues in labor law. Technological change and its accompanying efficiency often eliminate jobs. See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 169-70 (1984). The response of organized labor to high-tech advances in the workplace has been varied. *Id.* Acknowledging that this may be perceived as against social progress, some unions support the continuing evolution of the workplace. *Id.* The difficulty arises, however, as unions attempt to support such changes while vigorously advocating job protection for their members. *Id.*

<sup>110</sup> *Laborem Exercens* 5, *supra* note 33, at 357.

<sup>111</sup> For a contemporary illustration of how increasing technological sophistication continues to adversely affect the wages and conditions of workers, see *Organizing High-Tech Permatemps in the Pacific Northwest: Interview with Barbara Judd*, 4 WORKINGUSA 100, 100-13 (2000-2001) (discussing the formation of WashTech, an association formed to organize workers employed in the technology industry of Washington State).

of human work.”<sup>112</sup> This consideration suggests the restoration of man, particularly in this age of mechanization, as “the proper subject of work.”<sup>113</sup>

#### H. Subjective Nature of Work

The subjective element of work is concerned with man’s action as he engages in the work process and what meaning work has for the person doing it.<sup>114</sup> Beyond the objective results achieved by these actions (“finishing the job”), a subjective view of work requires that in doing his job, man’s actions help him “to realize his humanity.”<sup>115</sup> Work is deeply related to the essential process of self-realization, whereby an individual becomes conscious of his freedom, his rationality, and his capacity for volition.<sup>116</sup> Remarkably, it holds that man has a right to expect his work to be fulfilling in the deepest sense.<sup>117</sup>

*Laborem Exercens* specifically outlines what is necessary for the individual to achieve this important subjective satisfaction in the workplace.<sup>118</sup> John Paul II cautions from the outset that an employee is not only concerned with the salary he receives for the work he performs.<sup>119</sup> The employee needs more than simply remuneration. Most importantly, a worker needs to feel a sense of ownership; that is, he must at some level truly believe that he is working “for himself.”<sup>120</sup>

<sup>112</sup> *Laborem Exercens* 5, *supra* note 33, at 357.

<sup>113</sup> *Id.*

<sup>114</sup> Neuhaus captures the meaning of “subjectivity” well. NEUHAUS, *supra* note 104, at 24. He argues that a theory taking into account the subjective nature of the human person is one that fits ideas to man and not vice versa: “[O]ur thinking about economics must attend to real, concrete human beings and how they behave. Not just how we think they *should* behave, but how they actually do behave. Real people do not easily fit into the procrustean beds of grand theories . . . . The ‘subjectivity of society’ means that we start by taking people where they are and as they are.” *Id.*

<sup>115</sup> *Laborem Exercens* 6, *supra* note 33, at 358.

<sup>116</sup> The notion that man possesses a deep inclination to understand his own human nature and his particular self does not, of course, originate in Christian philosophy. As Nozick notes in his discussion of self-identity, the admonition that humanity engage in a process of introspection appears in philosophical and religious systems worldwide. ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 27 (1981). From the oracle at Delphi’s charge of “know thyself” to the yogic emphasis on uncovering our true natures, there has always been a human need for self-knowledge. *Id.*

<sup>117</sup> *Laborem Exercens* 6, *supra* note 33, at 359.

<sup>118</sup> *Id.* at 15, at 373.

<sup>119</sup> *Id.*

<sup>120</sup> The idea that a worker needs to feel a sense of ownership echoes the concept of “alienated labor” familiar in the work of Marx. Marx expounded two distinct forms of alienation confronting the worker. The first is his estrangement from the product of his labor. MARX, *supra* note 25, at 324. The idea is that there is a

For many employees this is difficult to achieve since often they are not the owners of their work product, much less the business itself. Absent this sense of self-direction, an employee feels *anomie*, a disconnectedness from the work in which he participates.<sup>121</sup> Catholic teaching discourages “excessive bureaucratic centralization” because it suggests to employees that they are just parts of the production process, indistinguishable from the machines they operate.<sup>122</sup>

From this conception of man as the subject and focus of work derives a body of defined rights of workers.<sup>123</sup> In order to achieve the goals of self-realization and dignity in the workplace, employees are entitled to certain benefits and conditions.<sup>124</sup>

In terms of the employer and his employee, an employer has an obligation to provide unemployment benefits to those who have lost their jobs.<sup>125</sup> The basis for this benefit is each person’s right to “life and subsistence.”<sup>126</sup> It is a moral imperative that the larger community provide for others in its midst who are in temporary need of assistance.<sup>127</sup> For those who are employed, an employer must provide a just wage.<sup>128</sup> As Leo XIII first stipulated in *Rerum Novarum*, a just wage is not necessarily what the employer and his employee

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cognitive dissonance between the worker and the product of his labor. *Id.* The product is the embodiment of his labor, yet he feels alienated from it. *Id.* The second is his estrangement from the work process itself. *Id.* at 326. The act of working somehow estranges the worker from himself. *Id.* In Marx’s view, “The estrangement of the object of labor merely summarizes the estrangement, the alienation in the activity of labor itself.” *Id.* at 324-26.

<sup>121</sup> ERICH FROMM, *MARX’S CONCEPT OF MAN* 44 (1961).

<sup>122</sup> *Laborem Exercens* 15, *supra* note 33, at 373.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 18, at 376.

<sup>126</sup> *Id.* at 18, at 377.

<sup>127</sup> This is derived from the notion of the common good. Maritain explained this duty as inherent to the nature of social man. It distinguishes the individual from society and explains how man seeks individual self-fulfillment and in the process finds himself serving the common good of the community:

The person as person insists on serving the community and the common good freely. It insists on this while tending toward its own fullness, while transcending itself and the community in its movement toward the transcendent Whole. The person as an individual is necessarily bound, by constraint if need be, to serve the community and the common good since it is excelled by them as the part by the whole.

MARITAIN, *supra* note 47, at 77.

<sup>128</sup> “Just wage” theory has a long tradition in Catholic Social Thought beginning with *Rerum Novarum*. For an excellent exposition of just wage theory in the years immediately following *Rerum Novarum* in the United States, see the classic JOHN A. RYAN, *A LIVING WAGE* (Macmillan 1912).

establish by contract.<sup>129</sup> For an employee with family responsibilities, an acceptable wage is that which allows the needs of the entire family to be met without the other spouse having to work.<sup>130</sup> In addition, justice requires that workers have convenient access to health care (either provided by the State or by the employer) and that this service be easily affordable or free.<sup>131</sup> In a related manner, employees have a right to a pension as well as insurance during old age.<sup>132</sup> Each of these enumerated rights is intimately related to the labor union, which functions to gain these rights and also to maintain them once they are obtained.<sup>133</sup>

Catholic Social Thought upholds the right of workers to form associations by profession in order to promote their respective interest both in the workplace and in private life.<sup>134</sup> *Laborem Exercens* recognizes that unions often occupy an adversarial role as organizations directly opposed to the interests of managers and owners.<sup>135</sup> But Catholic Social Thought rejects the notion of struggle between classes that gave rise to the unions of industrialized nations and instead envisions unions as entities with a unifying mission of building community.<sup>136</sup> Unions legitimately represent the interests of workers, but they are not engaged in “struggle” for its own sake.<sup>137</sup> Rather, they are vehicles by which workers gain a voice in the employment context and contribute to a constructive dialogue with employers.<sup>138</sup>

<sup>129</sup> *Rerum Novarum 34*, *supra* note 18, at 31.

<sup>130</sup> Lamoureux, *supra* note 70, at 220.

<sup>131</sup> *Id.* at 218 (noting how in Catholic Social Thought the just wage allows a person to live in human dignity. Consistent in the encyclicals is the assertion that the wage must promote more than mere survival. Benefits such as health care and pensions therefore are firmly rooted in the just wage tradition.).

<sup>132</sup> *Laborem Exercens 19*, *supra* note 33, at 380.

<sup>133</sup> Americans who join labor unions do so for traditional economic reasons (higher wages, comprehensive benefits), not because they view the union as a means of participating more meaningfully in the work process. See Margalioth *supra* note 76, at 145-46. The dramatic decline in the American labor union seems to suggest that workers do not see unions as integral to the achievement of better working conditions. Yet in recent times the trend appears to be reversing, particularly among professionals, a group traditionally not attracted to unionization.

<sup>134</sup> *Laborem Exercens 20*, *supra* note 33, at 380-82.

<sup>135</sup> *Id.* at 20, at 380.

<sup>136</sup> *Rerum Novarum 15*, *supra* note 18, at 20.

<sup>137</sup> *Laborem Exercens 20*, *supra* note 33, at 380.

<sup>138</sup> *Id.* The distinction between employees and independent contractors depends essentially on the degree of control exercised by the employer. RESTATEMENT (SECOND) OF AGENCY § 2. In the traditional language of the Restatement, an employee is “an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the

II: LEGAL BACKGROUND AND *VIZCAINO V. MICROSOFT*

Under traditional employment law principles, there is a presumption in favor of the employer-employee relationship.<sup>139</sup> As Gregory and Leder have observed, the bulk of existing case law reflects the suspicion with which courts have viewed the employer who attempts to characterize his staff as “independent contractors” rather than “employees.”<sup>140</sup> Yet despite this presumption, courts have also looked to the employment contract to determine the rights and obligations governing the relationship.<sup>141</sup> Some courts have relied on the words of the contract to uphold the employer’s designations of the worker as an independent contractor, thus denying these people benefits accorded to similarly situated colleagues whom the employer has classified as “employees.”<sup>142</sup> In a marked departure from many of its sister circuits, however, the United States Court of Appeals for the Ninth Circuit in *Vizcaino v. Microsoft Corporation* refused to rely solely on the terminology in the contract to determine the plaintiffs’ proper classification.<sup>143</sup> Instead the court utilized the common law employee doctrine with its traditional analysis of employer control to find the plaintiffs eligible for benefits.<sup>144</sup>

In *Vizcaino*, the Microsoft Corporation (Microsoft) established two classes of workers.<sup>145</sup> The first class was comprised of its “regular

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right to control by the master.” *Id.* § 2(2). The independent contractor, in contrast, is “a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of his undertaking.” *Id.* § 2(3). This distinction is crucial in cases involving an employer’s potential liability to third parties for injuries caused by an agent. Under principles of *respondet superior*, an employer may be held vicariously liable for the torts committed by those in her employ. *Id.* at § 219. As a general rule, the employer is not liable for employees’ tortious conduct outside of the scope of their employment. *Id.* § 219(2). Consequently, the employer may avert liability if she proves that the tortfeasor was an independent contractor and therefore beyond her control.

<sup>139</sup> David L. Gregory & William T. Leder, *Employee or Independent Contractor?* *Vizcaino v. Microsoft Corporation*, 47 LAB. L.J. 749 (1996).

<sup>140</sup> *Id.*

<sup>141</sup> See *Trombetta v. Cragin Fed. Bank*, 102 F.3d 1435, 1439-40 (7th Cir. 1996) (holding that plaintiffs were not entitled to participate in stock ownership plan because each had signed an agreement designating them independent contractors).

<sup>142</sup> See *Sprague v. GM Corp.*, 133 F.3d 388 (6th Cir. 1998) (denying plaintiffs entitlement to benefits because of contractual agreements).

<sup>143</sup> 97 F.3d 1187 (9th Cir. 1996), *aff’d en banc*, 120 F.3d 1006 (1997), *cert. denied*, 522 U.S. 1098 (1998).

<sup>144</sup> *Id.* at 1195, 1200. Thus, in *Vizcaino* the Ninth Circuit expanded the common law employee doctrine beyond the tort context to justify the extension of health benefits etc. to affected employees.

<sup>145</sup> *Id.* at 1189-90.

employees” who were considered the permanent core of the company’s staff.<sup>146</sup> To these employees Microsoft extended paid vacations, sick leave, holidays, short-term disability, group health and life insurance, pensions, savings benefits under its Savings Plus Plan, and stock options under its Employee Stock Purchase Plan.<sup>147</sup> The second class was comprised of temporary agency employees who were “fully integrated into [its] workforce” and often performed tasks identical to those of the permanent employees.<sup>148</sup> These “temps” were entitled to none of the fringe benefits that the regular employees enjoyed.<sup>149</sup> The temps freely contracted with Microsoft to work as freelancers and from the inception of their employment knew they were not entitled to benefits.<sup>150</sup> The company informed the temps that they were responsible for all taxes, insurance, and benefits.<sup>151</sup> Subsequently an IRS audit concluded that under the common law the freelancers were employees, and so Microsoft would have to pay employment taxes and its portion of Federal Insurance Contribution Act (FICA) tax.<sup>152</sup> The IRS reasoned that because “Microsoft either exercised, or retained the right to exercise, direction over the services performed,” it was required to pay the corresponding “employee” taxes.<sup>153</sup> As a result of this ruling, the plaintiffs contended that the common law employee doctrine also entitled them to the benefits Microsoft had denied them by contract.<sup>154</sup>

On appeal the Ninth Circuit reversed the district court’s denial of benefits and remanded the case for determination of individual eligibility for benefits.<sup>155</sup> Most significantly, the court stipulated that employment status is not controlled by the label assigned to workers in their contract.<sup>156</sup> In addition, the court rejected Microsoft’s contention that by treating its temps differently (assigning them distinct I.D. badges and e-mail addresses, providing them with a less formal orientation, not inviting them to official company functions, not paying overtime wages, and paying them through accounts

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<sup>146</sup> *Id.* at 1189.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 1190.

<sup>149</sup> *Vizcaino*, 97 F.3d at 1189.

<sup>150</sup> *Id.* at 1190.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 1190-91.

<sup>153</sup> *Vizcaino*, 97 F.3d at 1191.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 1200.

<sup>156</sup> *Id.* at 1195.



receivable rather than payroll),<sup>157</sup> the company was clearly separating its classes of employees for purposes of benefits.<sup>158</sup> The Ninth Circuit sent a clear message that contractual language and superficial distinctions among employees would not suffice to classify some as independent contractors and deny them employee benefits.<sup>159</sup>

*Vizcaino* sparked considerable controversy on both sides of the issue. One view wholly rejects the Ninth Circuit's allowance of common law employee considerations to affect the classification of employees.<sup>160</sup> This theory embraces *laissez-faire* market capitalism and necessarily views the *Vizcaino* decision as a threat to the integrity of contract and the freedom of autonomous actors to direct their lives in their own self-interest.<sup>161</sup> Its proponents view the *Vizcaino* court's approach as tantamount to ignoring the parties' intentions and, in the process, undermining principles of contract.<sup>162</sup> This view argues that courts should not presume to understand the customs of the industry in which these arrangements are made.<sup>163</sup> For example, the computer industry is unpredictable and companies rely on independent contractors both to easily fill needs as they arise and to reduce staff as required.<sup>164</sup> From this angle, the court interfered with the efficient market response to fluctuating demand.<sup>165</sup>

For the practitioner advising an employer-client, *Vizcaino* suggests that the law on independent contractors is sufficiently in a state of flux such that employers need to be careful in classifying their staff.<sup>166</sup> It is suggested that *Vizcaino* is a dramatic example of a growing trend by "courts and administrative agencies . . . to prevent employers classifying workers so as to avoid legal liabilities and

<sup>157</sup> *Id.* at 1190.

<sup>158</sup> *Vizcaino*, 97 F.3d at 1195, n.9.

<sup>159</sup> *Id.* at 1195:

We have no doubt that the company did not intend to provide freelancers or independent contractors with employee benefits, and that if the plaintiffs had in fact been freelancers or independent contractors, they would not be eligible under the plan. The plaintiffs, however, were not freelancers or independent contractors. They were common law employees . . . .

<sup>160</sup> See *infra* note 161 and accompanying text.

<sup>161</sup> Kellogg, *supra* note 2, at 1779 (noting that "the Ninth Circuit showed a disturbing eagerness to recast the employment relationship from the beginning . . . . The Ninth Circuit ignored contractual agreements to the contrary.").

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1802.

<sup>165</sup> *Id.* at 1802-03.

<sup>166</sup> Coskey, *supra* note 5, at 91.

responsibilities.”<sup>167</sup> The employer is cautioned to avoid the retroactive financial burdens of having a court determine that its staff are common law employees.<sup>168</sup> As Microsoft did following the *Vizcaino* ruling, employers often resort to hiring freelance employees through temp agencies.<sup>169</sup> The agency then becomes responsible for payroll services and withholding of federal taxes.<sup>170</sup> It is not clear whether in doing so the employer protects itself from liability under other employment laws.<sup>171</sup> At the very least it is reasonable to expect that employers after *Vizcaino* will take two courses of action: hire from temporary agencies and take even stronger steps to distinguish workers for whom they will provide benefits and those for whom they will not. Each of these practices has dramatically impacted the workplace and employment law.

#### A. *The Temp Agency as a Means of Reducing Control*

Employers utilize temp agencies in an attempt to lessen their degree of control over certain employees and thereby avoid certain legal obligations.<sup>172</sup> These agencies assume a significant portion of the obligations formerly carried out by the on-site employer, such as payment of salary, withholding of taxes, and other duties mandated by the National Labor Relations Act (NLRA).<sup>173</sup> By transferring these responsibilities to the temporary employment agency, the user employer essentially designates the agency as the “employer” and thereby avoids the serious financial liabilities associated with having a court determine that the contingent workforce are common law employees.<sup>174</sup> Such a legal arrangement, however, is premised on an instrumental conception of the employee. The employee is

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<sup>167</sup> *Id.* at 92.

<sup>168</sup> *Id.*

<sup>169</sup> Gregory & Leder, *supra* note 139, at 753.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* For example, what is the employer’s obligation in terms of workers’ compensation, the NLRA, anti-discrimination laws, and FMLA provisions?

<sup>172</sup> As George Gonos has noted, the employer’s use of the temp agency: effectively severs the employer-employee relationship between workers and those user-firms on whose premises they work and for whom they provide needed labor input. That is, this arrangement allows the [temporary help firm’s] client to utilize labor without taking on the specific social, legal, and contractual obligations that since the New Deal have been attached to employer status . . .

Professor George Gonos, *The Battle Over ‘Employer’ Status in the Post-War U.S. : The Case of the Temporary Help Firm*, Address Before the Annual Meeting of the Law and Society Association 6 (June 1995) (on file with author).

<sup>173</sup> *Id.* at 8.

<sup>174</sup> Coskey, *supra* note 5, at 96.

indistinguishable from production capital and ought to be manipulated to meet narrow business goals: greater productivity and lesser costs.<sup>175</sup> There is little, if any, consideration of the resulting adverse consequences to the temporary employees.<sup>176</sup> These consequences range from the employee feeling that he is expendable and not integral to the job, to the arbitrary denial of employment benefits to contingent workers who do exactly the same work as their permanent colleagues.<sup>177</sup> Recent developments in employment law, however, strongly suggest that employers may find it more difficult to use the temp agency artifice to sidestep the issue of contingent workers' rights.<sup>178</sup>

*B. Joint Employer Doctrine and Evolving Rights of Temporary Employees*

As discussed above, when a user-employer hires its non-permanent staff from a temporary agency, it attempts to assign "employer" status to the agency.<sup>179</sup> In addition to avoiding certain financial obligations, the employer also endeavors to circumvent the concomitant obligation to collectively bargain with its staff.<sup>180</sup> In the

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<sup>175</sup> Ness, *supra* note 1, at 4.

<sup>176</sup> Even the language used by management representatives reflects a purely rational, business-model approach to the utilization of labor. In a recent report from the American Management Association, a representative of that organization used this familiar jargon to advise companies on making productive use of the contingent worker tool:

[t]hese [Staffing and Structure] surveys show us the importance of approaching staffing issues from a *strategic* viewpoint. As companies try harder and harder to reap efficiencies and competitive advantage from their organizational structures the sophisticated and strategic use of a variety of staffing solutions, from temporary workers and outsourcing, to full-time hires, will become essential. Companies should be schooled and ready to capitalize on the variety of options at their disposal.

*Need for Talent and Flexibility, Not Cost Savings, Drive Hiring of Contingent Workers*, AMA UPDATE (Am. Mgmt. Ass'n., New York, N.Y.), July 18, 2000, at 3 (emphasis added).

<sup>177</sup> For a general account of this phenomenon and the efforts of temp advocates to institute concrete changes in the temp industry's employment practices, see Bernstein, *supra* note 13, at 102. One specific measure is a code of conduct governing the temporary agencies' practices. The code would require, among other things, that temps receive adequate training for their assignments. *Id.* at 102-03. It would also encourage companies to convert temps into permanent employees by abolishing the fee typically paid by the hiring company for such conversions. *Id.* at 103.

<sup>178</sup> See *infra* note 188 and accompanying text.

<sup>179</sup> See *supra* note 155.

<sup>180</sup> Richard Posthuma & James B. Dworkin, *The Joint Employer, the NLRB, and Changing Rights for Contingent Workers*, 90 LAB. L.J. 19, 20 (1997).

context of the contingent workforce, this added advantage ensures that the user-employer will not have to formally negotiate with workers over the inevitable wage and benefit grievances that will arise.<sup>181</sup>

Under the joint employer doctrine, however, the law provides that an employee may have two employers for collective bargaining purposes.<sup>182</sup> Joint employers are “two or more clearly distinct firms that share the authority to determine the terms and conditions of employment of specified employees. The firms do not have to be jointly owned, operated, or controlled to be designated joint employers.”<sup>183</sup> This has the potential, of course, to expand contingent workers’ rights of representation under traditional labor law. The user-employer, therefore, may be considered a joint employer with the temporary employment agency if “there are sufficient facts to show that one employer essentially controls the labor relations of another.”<sup>184</sup> This returns us to a control analysis similar to the one ratified by the *Vizcaino* court to find that the plaintiffs were employees entitled to benefits.<sup>185</sup> In other words, despite the involvement of the temporary employment agency, the question is whether the user-employer still exercises control over the employees in the workplace sufficient to make it a joint employer. As a joint employer, the company would not be permitted to sever its legal bonds completely.<sup>186</sup> Its power to make unilateral decisions regarding employment conditions would be significantly reduced if collective bargaining duties are imposed.<sup>187</sup> Notwithstanding evidence of control, until recently the employer could still avoid collective

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<sup>181</sup> Thus the already tenuous connection between the contingent worker and his work environment is compounded by the law’s protection of the employer’s right to refuse to engage in constructive dialogue with the temporary staff. Prior to August 2000, the NLRB did not extend collective bargaining rights under the NLRA to any class of temporary worker. See Chirag Mehta & Nik Theodore, *Winning Union Representation for Temps*, 4 WORKINGUSA 37, 38-39 (2000-01). The alienation of the temporary worker, therefore, has a two-fold source: the first is the measures taken by the employer to separate out the temp so as to avoid the adverse consequences of a court’s finding of control. The second is the legal barriers denying the temp the right to assume a more active role in the workplace culture.

<sup>182</sup> Posthuma & Dworkin, *supra* note 180, at 20.

<sup>183</sup> *Id.* (distinguishing the joint employer doctrine from the single employer and alter ego doctrine).

<sup>184</sup> *Id.*

<sup>185</sup> *Vizcaino*, *supra* note 143, at 1191-92.

<sup>186</sup> Specifically, the user-employer would have to bargain over a contract termination with the temp agency. The employer may also be subject to laws governing unfair labor practices. Posthuma & Dworkin, *supra* note 180, at 23.

<sup>187</sup> Posthuma & Dworkin, *supra* note 180, at 23.

bargaining with his temporary employees under the NLRA.<sup>188</sup>

The joint employer doctrine requires not only that the element of control be satisfied, but also that the employer *consents* to collective bargaining with the employees of a temporary agency.<sup>189</sup> This requirement, commonly referred to as the *Greenhoot* consent rule, rendered virtually irrelevant the finding of control by the employer over the temporary employees.<sup>190</sup> *Greenhoot* assured the employer that, simply by withholding its consent, it could avoid answering for its employment practices at the bargaining table.<sup>191</sup> This aided in maintaining the adversarial paradigm that has traditionally characterized the employer/employee relationship.<sup>192</sup> Recognizing that the *Greenhoot* consent rule may be denying contingent workers the representation rights contemplated by the NLRA, the NLRB revisited the rule recently in *M.B. Sturgis, Inc.*<sup>193</sup>

In *M.B. Sturgis*, the Board significantly refined *Greenhoot* to allow temporary workers who are jointly employed to form a bargaining unit with permanent employees without the consent of the employers.<sup>194</sup> The Board first noted that under Section 9(b) of the NLRA, it had the authority to examine novel employment arrangements to ensure that employees had the “fullest freedom in exercising the rights guaranteed by this Act.”<sup>195</sup> *M.B. Sturgis* employed thirty-four to thirty-five permanent employees and ten to

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<sup>188</sup> The recently decided case *M.B. Sturgis*, 331 N.L.R.B. 440 (2000), has significantly altered the potential bargaining rights of temporary workers. See *infra* note 207 and accompanying text.

<sup>189</sup> *Greenhoot, Inc.*, 205 N.L.R.B. 250, 251 (1973)

<sup>190</sup> Posthuma and Dworkin have astutely observed that the *Greenhoot* consent rule effectively denied contingent workers any substantive bargaining rights:

The irony . . . is that the more control the user-employer exercises over the wages, hours, and terms and conditions of employment of temporary workers, the greater the likelihood that it will be deemed a joint employer, and thus have the right to refuse to bargain with the temporary workers. This situation has led some to conclude that temporary employees have virtually no protection under the NLRA.

See *supra* note 180, at 22.

<sup>191</sup> *Id.* at 23.

<sup>192</sup> Theodore Eisenberg, *The Price of Protection*, 148 N.J. L.J. 117 (1997) (noting the need for organized labor to improve upon the adversarial model in order to facilitate management-labor cooperation).

<sup>193</sup> *M.B. Sturgis, Inc.*, 331 N.L.R.B. 440 (2000)

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 448 (quoting the following from Section 9(b) of the NLRA: “The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.”).

fifteen temporary agency employees at its flexible gas hose manufacturing plant.<sup>196</sup> Although the agency hired the temps, determined their wages and benefits, and paid them their salaries, the temps “work[ed] side-by-side with Sturgis’ employees, perform[ed] the same work, and were subject[ed] to the same supervision.”<sup>197</sup> When the temporary employees sought to join the same collective bargaining unit as the Sturgis employees, the Regional Director of the NLRB excluded them, reasoning that since they were jointly employed, the consent of both employers was required to include the temporary employees.<sup>198</sup> Since the agency had not given its consent, the temps’ inclusion in the bargaining unit was barred.<sup>199</sup>

The Board reversed the decision on the ground that the requirement of consent under the joint employer doctrine was not proper in the *M.B. Sturgis* context.<sup>200</sup> In the Board’s opinion, Section 9(b) contemplates a bargaining unit consisting of “all of an employer’s employees or a subgroup of such employees.”<sup>201</sup> Furthermore, consent is not required for employees to gain representation in an employer-wide unit.<sup>202</sup> The Board then determined that a bargaining unit consisting of regular and temporary employees must only meet the community of interest test.<sup>203</sup> In applying the community of interest test, the Board opined that the test establishes “whether a mutuality of interests in wages, hours, and working conditions exists among the employees involved.”<sup>204</sup> The test would likely be satisfied where employees worked together in the same environment, with identical supervisors, and under similar conditions.<sup>205</sup> The Board ultimately decided that the contingent employees in *M.B. Sturgis* shared a community of interest with their permanent colleagues and did not need employer consent to join the bargaining unit.<sup>206</sup>

The decision correctly recognized that the *Greenhoot* consent requirement needed to be reinterpreted in the case of contingent

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<sup>196</sup> *Id.* at 443.

<sup>197</sup> *Id.*

<sup>198</sup> *M.B. Sturgis, Inc.*, 331 N.L.R.B. at 443.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 448.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *M.B. Sturgis, Inc.*, 331 N.L.R.B. at 449.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 453.

employment. The consent requirement had become arbitrary in work environments where temporary employees were indistinguishable from permanent workers in terms of wages, functions, supervisors, and expectations. With this modification of the consent rule, the employer's bargaining obligations will be solely a function of whether the user-employer is a joint employer, thus making it easier for unions to organize temporary workers.<sup>207</sup> The *M.B. Sturgis* decision, however, is not without its potentially negative ramifications, particularly employers' decisions to terminate temporary positions rather than extend costly bargaining rights to those employees.<sup>208</sup>

As the foregoing discussion illustrates, the issue of contingent workers is a complex one involving valid competing claims from both the employer and employee. Each side presents its position as grounded in certain rights: for the employer, it is the right to contract for employees who are willing to fill a need for less total compensation; for the employee it is the right to earn a living wage and receive treatment equal to his permanent colleagues.<sup>209</sup> The ultimate resolution to this question and the legal framework we subsequently adopt must not only satisfy sound legal principle, but must also be morally acceptable. A morally justifiable regime is one that respects individual rights but also promotes human dignity.<sup>210</sup> Rights are not unqualified; they are not to be exercised without

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<sup>207</sup> Posthuma & Dworkin, *supra* note 180, at 26.

<sup>208</sup> *Id.* Posthuma and Dworkin argue that:

[w]e may see employers reduce the control they exercise over temporary employees to insure that they do not expose themselves to a bargaining obligation as a joint employer. User employers may be forced to carefully tailor their relationships with temp help agencies to show that they do not exercise control over the temp workers. As they tailor their relationships to reduce control, they may also reduce their flexibility in handling temporary workers . . . This could mean that some user employers would reduce their reliance on temporary workers, and consequently reduce the number of temp jobs available.

*Id.*

<sup>209</sup> See Cook, *supra* note 11, at 16, quoting a representative of the American Staffing Association regarding employers' rights in the contingent employment context:

[e]mployers ought to be free to say 'we're going to provide coverage to this group of workers and not to that group of workers . . .' Although it may strike some people as arbitrary or unfair, the law currently allows them to do that, for reasons that don't have to be justified.

<sup>210</sup> Second Vatican Council, *Gaudium et Spes (Joy and Hope: Pastoral Constitution on the Church in the Modern World)* (1965) 29, reprinted in *The Documents of Vatican II* 228 (Walter M. Abbott S.J. ed. & Very Rev. Msgr. Joseph L. Gallagher trans., 1966) (acknowledging that while human institutions must "safeguard the basic rights of man," they must also "minister to the dignity and purpose of man").

regard for the common good. What is in the best interest of society cannot be determined until we can ascertain what is in the best interest of man individually.<sup>211</sup> Catholic Social Thought is very well-situated to appraise the evolving social condition of man because it has developed over time a consistent philosophy of human nature and the kind of society that allows that nature to flourish.<sup>212</sup>

### III: CONTINGENT EMPLOYMENT UNDER CATHOLIC SOCIAL THOUGHT

Underlying the issue of contingent work are competing theories of individualism<sup>213</sup> and communitarianism.<sup>214</sup> The individualist theory tends to frame the issue as an employment arrangement freely chosen by the parties and established in contract.<sup>215</sup> Parties enter into contract to secure for themselves what they believe is an advantage of some sort.<sup>216</sup> The State and its laws are not to interfere paternalistically with these arrangements, but to defend vigorously the rights of individuals to use the contract as a means of achieving their own personally-defined happiness.<sup>217</sup> By contrast, the

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<sup>211</sup> *Id.* at 25, at 224 (noting that the human person is the focus of social life, and that all institutions exist to serve man).

<sup>212</sup> *Id.* at 10, at 208 (“The Church believes that Christ . . . can through His Spirit offer man the light and the strength to measure up to his supreme destiny . . . The Church also maintains that beneath all changes there are many realities which do not change . . .”).

<sup>213</sup> “Individualism” as used in this article refers to the ethos whereby citizens determine for themselves what the good life is and expect the law to “afford all lifestyles and belief systems equal treatment.” See Kenneth L. Grasso, *Introduction: Catholic Social Thought and the Quest for An American Public Philosophy*, in CATHOLICISM, LIBERALISM, AND COMMUNITARIANISM 3 (Kenneth L. Grasso et al. eds., 1995) (“The state exists simply to make public arrangements designed to secure individuals the greatest possible amount of freedom to lead their lives in the way they choose consistent with the exercise of that freedom by others.”).

<sup>214</sup> “Communitarianism” refers to precepts similar to those embodied in the *Preamble to the Responsive Communitarian Platform: Rights and Responsibilities*, among which are the recognition “[o]f individual human dignity and the social dimension of human existence . . . that communities and politics have obligations . . . to foster participation and deliberation in social and political life, of the social side of human nature; the responsibilities that must be borne by citizens, individually and collectively, in a regime of rights . . .” See THE ESSENTIAL COMMUNITARIAN READER xxv (Amitai Etzioni ed., 1998).

<sup>215</sup> Kellogg, *supra* note 2, at 1795.

<sup>216</sup> CHARLES FRIED, CONTRACT AS PROMISE 2 (1981) (noting that “[t]he law of contracts facilitates our disposing of [these] rights on terms that seem best to us. The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights”).

<sup>217</sup> *Id.* Professor Fried observes that in the last fifty years this notion of contractual obligation as “essentially self-imposed” is not as unquestioned as it once was. It may be argued, he notes, that “intermediate institutions,” such as the state, the union,



communitarian ethic asks whether the social or legal regime promotes individual human dignity by allowing individuals to contribute to “sustainable forms of community life.”<sup>218</sup> It actively promotes “the social dimension of human existence,”<sup>219</sup> and recognizes that a flourishing society consists not in a ruthless pursuit of self-gratification, but in personal fulfillment achieved in community.<sup>220</sup> The communitarian strand in Catholic Social Thought recognizes that we each contribute to the health of a reality greater than ourselves and, in turn, are personally enriched by our participation therein.<sup>221</sup>

The notion that the human person has a need for development in society is firmly established. According to Aristotle, man is by nature a social being who forms a variety of associations, including families, neighborhoods, and cities, to accomplish a good of which he is incapable alone.<sup>222</sup> During his nineteenth century tour of America, Tocqueville observed similarly that one of the most distinguishing features of our society was its propensity to form associations for a variety of purposes.<sup>223</sup> He observed that voluntary associations are essential in a democratic society because individually men are powerless to accomplish their goals.<sup>224</sup> These communities were united by popular adherence to an “agreed-upon set of norms.”<sup>225</sup> St.

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and the corporation have reduced man’s individual capacity overall for unfettered contract formation. The argument, therefore, that the *Vizcaino* court’s decision is an affront to the integrity of contract seems somewhat disingenuous.

<sup>218</sup> TAM, *supra* note 77, at 7 (listing three central communitarian principles: 1. A society’s determinations of what is “true” can only be made by cooperative enquiry. 2. The responsibilities of individual members of society can be based only on common values as determined by the community. 3. Society must be re-structured to allow all citizens equal participation in deciding how power will be exercised over them).

<sup>219</sup> See *supra* note 192.

<sup>220</sup> See TAM, *supra* note 77, at 7.

<sup>221</sup> *Gaudium et Spes* 25, *supra* note 210, at 224.

<sup>222</sup> ARISTOTLE, THE POLITICS at B.

<sup>223</sup> 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 106 (Phillips Bradley ed., Alfred A. Knopf 1984).

<sup>224</sup> *Id.* at 107. Tocqueville even proposed that “civilization itself would be endangered” if human beings did not cultivate the habit of forming associations. *Id.* This is because a society that prevented its citizens from banding together to accomplish “great things” would necessarily devolve into “barbarism.” *Id.* Most tellingly, Tocqueville warned that “[i]f men are to remain civilized or to become so, the art of associating together must grow and improve in the same ratio in which the equality of conditions is increased.” *Id.* at 110. He seems to be suggesting that a culture which strives for social equality must simultaneously encourage the formation of civic associations or it will fail.

<sup>225</sup> Joseph P. Viteritti & Gerald J. Russello, *Community and American Federalism: Images Romantic and Real*, 4 VA. J. SOC. POL’Y & L. 683, 689 (1997) (describing the

Thomas Aquinas, the philosopher whose political theory underlies Catholic Social Thought, asserted that without social interaction man may live, but he may not live *well*.<sup>226</sup> Likewise in the encyclical *Gaudium et Spes*, the Church echoed the sentiment: “Man’s social nature makes it evident that the progress of the human person and the advance of society itself hinge on each other.”<sup>227</sup>

Our work environments then should also reflect this profound social instinct in man. The most obvious manifestation of employees coming together in a cooperative venture is the labor union. Without some effective means of addressing workplace issues, the contingent employee can expect less take-home pay, less health insurance, less retirement benefits, and less legal protection.<sup>228</sup> Yet an individual employee protesting these inequities risks discharge when he raises the issue with his employer. The freedom to associate and form groups based on shared interests and common concerns is an essential right. This is one of the most vital elements in the Catholic tradition because it represents the confluence of various integral principles: that man possesses an important social inclination; that this social nature requires man to rise above his weakness in pursuing a narrow individualism at the expense of the common good; that in the tradition of subsidiarity, people are called to collectively resolve their disputes. Contingent workers must be permitted to exercise their right of association at work. In language reminiscent of Leo XIII, the NLRB in *M.B. Sturgis, Inc.* decided that the temporary workers could not be denied collective bargaining rights because they shared a “community of interest” with their permanent colleagues. The community of interest standard is an implicit recognition of the

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classical notion of community as “a small, bounded, voluntary association, intermediate between the individual and the state, brought into being with a limited social agenda”).

<sup>226</sup> Aquinas posited two reasons for man’s involvement in social life: The first is for the furnishment of necessities and the second is for the moral development that allows for a higher form of existence, which is achieved through civic involvement. See VERNON J. BOURKE, *THE POCKET AQUINAS* 232 (1960).

<sup>227</sup> THE DOCUMENTS OF VATICAN II, *supra* note 210, at 224.

<sup>228</sup> See Cook, *supra* note 11, at 15, citing the Bureau of Labor Statistics’ findings that:

[contingent workers] take home nearly \$100 less per week than their nominally permanent counterparts . . . 20% of contingent workers receive employer health insurance, compared with more than 50% of noncontingent workers . . . one-fourth of contingent workers are eligible for employer pension plans, while nearly half of permanent workers qualify. Perhaps most significantly, the vast majority of contingents fall through vast loopholes in worker-protection laws . . .

*Id.*

right of people similarly situated to form associations. This does not necessarily mean that contingent workers have no place in the economy. It does mean, however, that employers may not use “temporary” workers in a permanent capacity without extending to these workers the same benefits accorded permanent employees.

Rather than imposing a blanket rule for the treatment of contingent workers, the NLRB opened the channels for these workers to participate in crafting policies that will affect them personally. In the best tradition of subsidiarity, the accretion of temps into existing bargaining units maintains decision-making at the level of the workplace community. The temp unions that may result from this decision will only promote efficiency and equity in the context of dispute resolution. Bargaining as a unified voice, contingent workers can freely and openly discuss grievances and help to craft joint-solutions without fear of reprisals. The result is an arrangement respecting the equal dignity of all parties concerned. Catholic Social Thought has always called for a “family wage,” and this consists of a just remuneration for work done and benefits necessary to maintain family life.<sup>229</sup> Because of his legal classification, the law permits the temporary employee to work without these benefits. It is morally unjustifiable to contend, as free-market advocates do, that the price at which labor is bought is rightly determined by the forces of supply and demand.<sup>230</sup>

From the perspective of the individual contingent worker, a more participatory work environment respects his or her dignity as an independent moral agent. It engages directly the subjective aspect of work and actively opposes the instrumentalist view of the worker that is so prevalent currently. The degradation of the contingent worker that is the result of employers paying substandard wages and reduced benefits is directly linked to our culture’s over-emphasis on the *objective*<sup>231</sup> aspect of labor. Though there do appear to be some signs of change,<sup>232</sup> a view persists that labor is the property of the employer

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<sup>229</sup> *Laborem Exercens*, *supra* note 33, at 379.

<sup>230</sup> Lamoureux, *supra* note 70, at 213. Lamoureux notes that market forces are not suited to set a just wage because “it ignores the fact that the laborer must work in order to live; that is, the employer is free to offer a substandard wage and can arbitrarily offer or withhold work. The employee, however, is constrained by need to accept whatever is offered or go without work.” *Id.*; see also YATES, *supra* note 37, at 10 (“We [workers] have only our ability to work to sell, but they [management] have the jobs . . . . It is a simple but powerful truth that working people and their employers do not face each other as equals . . . workers are replaceable.”)

<sup>231</sup> See *supra* note 89 and accompanying text.

<sup>232</sup> See STUDD TERKEL, *WORKING* at xii (Pantheon Books 1974) (1972): as early as thirty years ago the author noted that young Americans were questioning the

objectified as the means of producing profit.<sup>233</sup> Work becomes merely the process by which business tasks are accomplished.<sup>234</sup> Once employees are objectified in this manner, it is not difficult to understand why companies vigorously defend the independent contractor doctrine as a cost-effective measure.<sup>235</sup> The Catholic emphasis on the dual nature of human labor, the objective and subjective, is a powerful challenge to the market liberal ideal. The subjective conception of work elucidated in *Laborem Exercens*, that all work aids man in the process of self-realization, casts serious doubt on the contingent employment proposal. In the subjective analysis, the temporary employee is not a factor in production, but “a conscious and free subject who decides about himself.”<sup>236</sup> It restores a real sense of dignity to *all* work because it is performed by human beings, who are the source and measure of human dignity.<sup>237</sup> And as the human creations of God, the temporary employee is endowed with a human nature and from this nature spring certain definite natural rights.<sup>238</sup>

The *Vizcaino* decision recognized an important principle of justice; namely, that equal work deserves equal compensation.<sup>239</sup> By using the common law employee doctrine, the Ninth Circuit was able to give this principle effect at the Microsoft Corporation. Yet instead of placing the temporary and regular employees in a comparable position, the decision paradoxically created a more fractured and segregated work environment. Rather than risk the same fate as Microsoft, employers have taken even bolder steps to separate permanent workers from temporary employees.<sup>240</sup> The workplace is

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prevailing work ethic that one’s job was obligatory with no guarantee of personal fulfillment.

<sup>233</sup> For a spirited attack of this view, see YATES, *supra* note 37, at 19-20, discussing the tendency of companies to reduce employees to another cost of production akin to a tool or machine.

<sup>234</sup> *Laborem Exercens* 5, *supra* note 33, at 358.

<sup>235</sup> Ness, *supra* note 1, at 4.

<sup>236</sup> *Laborem Exercens*, *supra* note 33, at 358.

<sup>237</sup> *Id.* at 364.

<sup>238</sup> CATECHISM OF THE CATHOLIC CHURCH § 1956 (Doubleday 1995) (“The natural law, present in the heart of each man and established by reason, is universal in its precepts and its authority extends to all men. It expresses the dignity of the person and determines the basis for his fundamental rights and duties.”) (quoting Cicero’s *De Republica III*).

<sup>239</sup> Lamoureux, *supra* note 70, at 224 (noting that in the American context Catholic just wage theory has been influential in securing greater rights for women in the workplace. For example, the National Council of Catholic Women urged legislatures to enact laws regarding “minimum wages, limitations on hours, equal pay for equal work, overtime pay, pension, and maternity benefits.”).

<sup>240</sup> Forster, *supra* note 3, at 555-56 (noting that employers have gone so far as to require contingent workers to wear distinctive badges, to refuse to invite them to

less a cooperative environment than it is a disjointed collection of discrete groups discouraged from associating with one another. It must be remembered that these groups often are doing the same jobs under the same supervisors. By virtue of these similarities, the permanent and temporary workers share job-related interests and concerns, yet worker solidarity and the resulting associations and groups are conspicuously absent.

The issue of contingent work reminds us that law has a moral dimension.<sup>241</sup> While law and morality may operate in theoretically distinct spheres, their related function as shapers of human conduct inevitably leads to conflict.<sup>242</sup> Often the law stirs deep moral resentment when it supports or maintains structures that do not comport with one's moral sense, however one may define it.<sup>243</sup> Yet a legal regime that does not reinforce a society's moral sentiment risks its legitimacy and consequently the citizens' adherence to its precepts.<sup>244</sup> This Comment has proceeded from this very premise,

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company social gatherings, and to disallow them from using company parking lots).

<sup>241</sup> DENNIS LLOYD, *THE IDEA OF LAW* 57 (1964) (noting that law and morality share common concerns. Both "are concerned to impose certain standards of conduct without which human society would hardly survive and, in many of these fundamental standards, law and morality reinforce and supplement each other as part of the fabric of social life.").

<sup>242</sup> *Id.* at 67-69 (positing that there are three theoretical responses to conflicts between the positive law and the moral law: 1. the Judeo-Christian response essentially denies any conflict because "the moral law dictates the actual content of human law." *Id.* at 68. For the medieval Scholastic philosopher, this is akin to the notion of human law as derivative of the natural law, which in turn descends from the divine law. See St. Thomas Aquinas, *The Treatise on Law Questions* 90-97, in ST. THOMAS AQUINAS ON POLITICS AND ETHICS 44-54 (Paul E. Sigmund ed., 1988). 2. The Hegelian/Hobbesian response resolves any apparent divergence by collapsing law and morality into one. Thus, man's moral obligation is simply to obey the law. *Id.* at 68. In this view, the distinction between *just* and *unjust* laws is an unwarranted one since law is inherently just and deserving of the people's obeisance. *Id.* at 3. The legal positivist response acknowledges no conflict because law and morality are conceptually distinct and therefore one is incompetent to critique the other. *Id.* at 69. As a means of critique, a moral system is able to evaluate only other moral systems using common moral criteria. *Id.* The same holds true for legal systems. *Id.* Most importantly, "neither can resolve questions of validity save in its own sphere." *Id.* In practical terms, morality is in no position to judge law and law is incapable of evaluating morality. Each makes no sense outside of its own domain. *Id.* To the legal positivist, therefore, the application of Catholic moral principles to labor/employment law is fundamentally incongruous.

<sup>243</sup> See, e.g., LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990) (treating generally the seemingly intractable issue of abortion in American society). Tribe notes, for example, the vigorous reaction to *Roe v. Wade* of the Catholic Church and the subsequent rise of the Catholic right-to-life movement. *Id.* at 143.

<sup>244</sup> LLOYD, *supra* note 241, at 32 ("For without such [legitimacy] . . . the automatic and impersonal operation of legal authority would cease to function and would be replaced by anarchy and disorder."); see also *Introduction* to CHRISTIAN PERSPECTIVES

and has proposed Catholic social principles as the moral system against which the law relating to contingent employment is to be measured.

Catholic Social Thought is a powerful tool in the transformation of workplace culture. Its consistent emphasis on the dignity of individuals and the unique nature of man strikes at the core of the contingent worker problem. At its root, the philosophy underlying contingent employment offends man in his individual and social disposition. Catholic Social Thought advances the issue beyond mere freedom of contract and business necessity. It provides an independent standard that promises to elevate the issue from competing employer/employee rights to objective human rights.<sup>245</sup>

The application of Catholic Social Thought would achieve harmony between management and employees because it would promote a cooperative model of labor relations. The adversarial model that has marked employment arrangements for so long would cede to a more collaborative practice. Recognizing that each side shares in the responsibility of creating an environment that is both productive and human, employers and temporary workers will respect each other individually and work for a system that not only gets the job done, but respects people in the process.

In addition, Catholic Social Thought will return to labor its inherent worth and dignity.<sup>246</sup> Its comprehensive labor theory reminds us that ultimately work does not define man. Man is not deserving of more or less respect by virtue of his job status. Therefore, any attempts to draw hierarchical distinctions between workers for purposes of employment benefits would be suspect. The temporary nature of some contingent employment and the nominal distinction between “temporary” and “permanent” employees, for example, are not grounds for disparate treatment. This would give pause to employers utilizing contingent workers as a means of lowering costs.

Catholic Social Thought actively opposes our culture’s preoccupation with work as the defining element of our lives. It restores to work its proper role as a means of subsistence and a

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ON LEGAL THOUGHT xix (Michael W. McConnell et al. eds., 2001) (noting that “[i]t is important for a free people to connect the positive law to their ideals of a higher good. Unless they perceive such a connection, the people will resist compliance with the law, and the state will be forced to turn to naked coercion.”).

<sup>245</sup> *Laborem Exercens* 20, *supra* note 33, at 380 (cautioning that unions should be formed not merely to “struggle ‘against’ others,” but to further the aims of “social justice”).

<sup>246</sup> *Id.* at 9, at 363-64.

contributing (though not defining) element of our personhood. In the context of contingent work, the terms of employment cannot be justified simply by reference to a contract “freely made” between employer and employee.<sup>247</sup> The employer would recognize that in addition to work, the contingent employee has obligations to himself, family, and community. The employee meets these obligations in large part because his job does not require excessive hours with minimal pay. Under Catholic Social Thought, employers are called upon to recognize these fundamental commitments and to refrain from imposing onerous conditions that detract from these responsibilities. In concrete terms, the contingent worker would earn a “living wage,”<sup>248</sup> enabling him to sustain the well-being of his family and contribute to the health of his community either through financial means or by donation of time.

Furthermore, a vital contribution of Catholic Social Thought to the transformation of work is its emphasis on the labor union.<sup>249</sup> One of the most significant hindrances to improving the conditions of contingent employees has been the law’s reluctance to afford collective bargaining rights to temps.<sup>250</sup> Under Catholic Social Thought, temps would have the freedom to form unions in order to propose creative, group-formulated solutions to workplace issues. In so doing, temps would satisfy the deep social instinct of people to associate according to common interests and desires.<sup>251</sup> The fraternity of the union would thus aid in the process of individual self-realization as well as promote a more cooperative and representative workplace.<sup>252</sup> *M.B. Sturgis* is an encouraging sign that labor law is beginning to acknowledge the important role of the union in creating just working conditions.

Finally, Catholic Social Thought would eradicate the very foundation that gave rise to the contingent worker phenomenon—

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<sup>247</sup> *Rerum Novarum* 34, *supra* note 18, at 31.

<sup>248</sup> Lamoureux, *supra* note 70, at 219 (“A laborer’s right to a living wage is the concrete expression of the general right that inheres in all people to obtain in a reasonable way as much of the common bounty of nature required to enable the laborer to maintain a decent livelihood.”).

<sup>249</sup> *Rerum Novarum* 36, *supra* note 18, at 33; *see also Laborem Exercens* 20, *supra* note 33, at 380.

<sup>250</sup> *See Chirag & Mehta, supra* note 181, at 38-39.

<sup>251</sup> *Rerum Novarum* 38, *supra* note 18, at 33 (noting that both the state and the union have identical premises; namely, “the natural propensity of man to live in society”).

<sup>252</sup> *Economic Justice For All* 304, *supra* note 43, at 648 (describing the purpose of unions as “enabl[ing] workers to make positive and creative contributions to the firm, the community, and the larger society in an organized and cooperative way”).

the objectification of work.<sup>253</sup> It would restore man as “the proper subject of work” and strive to create an environment where work has deeper subjective meaning. The contingent worker, therefore, would no longer be simply a cost-effective means of getting the job done, but a free human being seeking fulfillment in his work and a sense of ownership in the process. Mindful of these considerations, employers would be more likely to create environments where employee input is welcome and job satisfaction is valued.

#### CONCLUSION

The rights of contingent workers represents one of the most pressing labor and employment issues of the day. These workers are among the most vulnerable in the workforce because the law provides them with few protections. Unsurprisingly, employers are adamant that the contingent worker is an indispensable tool in the evolving labor market. By utilizing temporary employees, the employer cuts costs through reduced salaries and benefits. He also achieves maximum flexibility because he can hire and fire as demand requires with relatively slight legal consequences. These boons for management, however, often come at great cost to the contingent employee. Less take-home pay, often non-existent benefits, alienation in the workplace, and decreased job security are just a few of the drawbacks. Management’s asserted right to make strategic use of human labor and employees’ claims to certain minimal guarantees appear irreconcilable. What is required is a profound transformation of the culture of work: a more balanced view that envisions labor not as an instrumentality to be effectively exploited, but as a deeply human activity that sanctifies as it creates. Only then will man cease to be the object of work and instead become the subject, the one who labors for himself and thereby truly participates in the ongoing process of creation.

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<sup>253</sup> *Laborem Exercens* 5, *supra* note 33, at 358.