

Work in prison: Reintegration or exclusion and exploitation?

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journals.sagepub.com/home/ell**Virginia Mantouvalou** 

Professor of Human Rights and Labour Law, Faculty of Laws, University College London (UCL), London, UK

Abstract

Work opportunities in prison can be valuable for the incarcerated. However, prison labour presents significant challenges because of its location behind prison walls away from the public eye, where prison authorities exercise unprecedented power over individuals. Even though work is not part of prisoners' punishment in Europe, it is often compulsory. What is also striking is that in many legal orders prisoners are excluded from labour rights that other workers have. Unlike work outside prison, the legal regulation of prison work constitutes it as an instrument of exclusion from life outside prison rather than a path towards reintegration in society, and creates structures of exploitation. In this article I examine the value of work in prison and consider the exclusion of working prisoners from labour rights that other workers have. I also scrutinise some typical justifications of these exclusions of working prisoners. I propose that work in prison should be regulated in line with the purpose of reintegration in society and according to European and international human rights standards on prisons.

Keywords

Prison labour, prison work, workers' exploitation, rehabilitation and reintegration, prisoners' rights, labour rights

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Corresponding author:

Virginia Mantouvalou, Professor of Human Rights and Labour Law, Faculty of Laws, University College London (UCL), London, Bentham House, Endsleigh Gardens, WC1H 0EG, UK.

Email: v.mantouvalou@ucl.ac.uk

I. Introduction

Goffman described prison as the quintessential total institution, namely a place where there is a breakdown of the separation of spheres of life (work, play, sleep) and all activities are performed under one authority, with others who are being treated in the same way, under a strict schedule and in a manner that purports to fulfil the aims of the institution.¹ People are cut off from society for a significant period of time and live a managed life. Goffman analysed several aspects of inmates' lives in a total institution. He explained that as soon as they enter prison, their identities are 'mortified': they are stripped of the support that they have outside prison through a number of physical, psychological and legal barriers. Since Goffman wrote, prison conditions have changed in certain ways, while there is also variation from one prison to another, and from one country to another.² Yet taking Goffman's analysis as a starting point makes us think about the nature and central effects of incarceration: prison is a distinct domain, separate from the outside world, with special legal rules applying to its regulation. Prison labour ought to be understood against this background.

In prison, work seems to perform a very different function to the functions that it performs outside prison.³ Recent empirical studies focusing on prison work present a bleak picture of prisoners performing boring and monotonous tasks.⁴ What is the role of the law in regulating prisoners' work, how does it compare to work outside prison, and how does this fit with the purpose of incarceration? These questions are the subject of this article.

In what follows, I first consider the value of work in prison and work outside prison in section 2. While there are several reasons why work in prison can be valuable for the incarcerated, it also presents significant challenges because of its location behind prison walls away from the public eye, where prison authorities exercise unprecedented power over the opportunities that inmates can access. The quality of jobs on offer can be an issue. Yet what is also striking is that in many legal orders prisoners are excluded from labour rights that other workers have, as I explain in section 3. This exclusion is common, but I use the example of the UK in order to illustrate how it is framed in law.⁵ Unlike work outside prison, the legal regulation of prison work constitutes it as another instrument of exclusion from life outside prison rather than a path towards reintegration in society, and creates structures of exploitation, which I have described elsewhere as state-mediated.⁶ Prison work becomes an additional means of mortification, to use Goffman's terminology, and a way to manage prisoners.

Some may think that the exclusions of working prisoners from rights that other workers have, such as the right not to be forced to work, the right to fair pay and the right to organise and to strike, are justified. However, the supposed justifications should be scrutinised closely, as I explain in section 4, by engaging with some central arguments that support these exclusions. In

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1. Erving Goffman, *Asylums - Essays on the Social Situation of Mental Patients and Other Inmates* (Penguin, 1961).
 2. Goffman's work has been enormously influential, but it has also been challenged in more recent years. See, for instance, the discussion in Rachel Ellis, 'Prisons as Porous Institutions' (2021) 50 *Theory and Society* 175.
 3. See also the classic study of Gresham M Sykes, *The Society of Captives* (Princeton University Press, 2008) 25 ff.
 4. On the UK, see, for instance, Jenna Pandeli, Michael Marinetto, Jean Jenkins, 'Captivity in Cycles of Invisibility? Prisoners' Work for the Private Sector' (2019) 33 *Work, Employment and Society* 596. See also the older study by Frances H Simon, *Prisoners' Work and Vocational Training* (Routledge, 1999), 121. Similar arguments can be made in relation to work in immigration detention. See Katie Bales, in this special issue.
 5. For other legal orders, see the articles in this special issue.
 6. Virginia Mantouvalou, *Structural Injustice and Workers' Rights* (OUP, 2023), Chapter 4. I discuss how both the state and private entities benefit from the exploitation of working prisoners.

section 5 I explore the labour rights that working prisoners should have if we are to constitute work in prison in a way that promotes societal reintegration, rather than mortification. On the basis of European human rights law primarily, I present modern understandings of the role of imprisonment and prison labour, revolving around normalisation of work, an idea that is based on principles of reintegration as a key aim of imprisonment.

In this article, I do not claim that all that is wrong with imprisonment can be addressed through human rights law. There is increasing and important literature that questions the role of incarceration altogether.⁷ My argument is that if and to the extent that imprisonment is justified as a sentence, people who are incarcerated should not forfeit labour rights as a result of their sentence, as this is both contrary to fundamental values of dignity and autonomy and incompatible with modern understandings of the role of incarceration. The legal framework on prison labour should not form it as an instrument of mortification and exploitation. It should, instead, support connections with the outside world while in prison and in preparation for life after prison.

2. The value of work outside prison/the value of work in prison

Outside prison, work is an important social good. It is not only a means by which people earn an income, crucial though this is. It is also important for self-realisation,⁸ the pursuit of excellence, making a social contribution, participating in a community, and achieving social recognition.⁹ Some of these goods achieved through work are connected to the income that work generates: high income through work is often associated with social recognition. Other goods, such as self-realisation and participation in community, are not connected to a high income but are broader benefits of work. Work is an important element of people's identity in many contemporary societies, while unemployment is stigmatising. Such is the importance of work that human rights law recognises a right to work.¹⁰

In labour law scholarship, there is a strong demand for decent work, which is also central in the agenda of the International Labour Organisation (ILO).¹¹ The employer exercises significant authority over workers, which is why the employment relationship is called one of submission and subordination.¹² This inequality of bargaining power can be addressed through labour protective legislation, unionisation and other mechanisms protecting workers' rights.¹³ In the labour market people generally have a right to change jobs if they are dissatisfied with their working conditions. In any case, as Goffman put it, 'the authority of the workplace stops with the workers' receipt of a money payment; the spending of this in a domestic and recreational setting is the worker's private affair and constitutes a mechanism through which the authority of the workplace is kept within strict bounds'.¹⁴ The employer has no say on how workers will spend their income.

7. A classic account is Angela Y Davis, *Are Prisons Obsolete?* (Seven Stories Press, 2003).

8. Hugh Collins, 'Is there a Human Right to Work?', in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing, 2015).

9. Anca Gheaus and Lisa Herzog, 'The Goods of Work (Other than Money!)' (2016) 47 *Journal of Social Philosophy* 70.

10. See generally Virginia Mantouvalou (ed), *The Right to Work – Legal and Philosophical Perspectives* (Hart Publishing, 2015).

11. See the recent discussion in Adalberto Perulli and Vania Brino, *Global Labour Law* (Routledge, 2024).

12. See the analysis by Hugh Collins, 'Is the Contract of Employment Illiberal?', in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP, 2018), 48.

13. For a discussion of the protection of human rights in the workplace, see Alan Bogg, Hugh Collins, Anne Davies and Virginia Mantouvalou, *Human Rights at Work* (Hart Publishing, 2024).

14. Goffman, (n 1), 20.

Prison labour has a different function to work outside prison. Imprisonment primarily constitutes punishment for a crime committed by depriving people of their physical freedom.¹⁵ In addition to being deprived of their physical freedom and being disconnected from other aspects of their self outside prison, prisoners are also deprived of many legal rights that individuals outside prison have, such as political rights and rights to private and family life. Some of these restrictions are a necessary implication of imprisonment, in the sense that people cannot have normal contact with the outside world while in prison. Other restrictions appear to be a result of authorities' and society's indifference or prejudice towards prisoners.¹⁶

Work in prison is not part of punishment, as I explain further below, but a route to societal reintegration. Prison work can have positive effects for the incarcerated, which is why in some countries prisoners have a right to work that is constitutionally protected.¹⁷ There are different types of work for those deprived of their physical freedom. Prisoners may be employed in prison workshops, where they typically work for outside employers, for instance manufacturing products, or around the prison, for instance in the kitchen or laundry, which is also described as 'prison housework'.¹⁸ People who are incarcerated may also work for employers outside prisons, for instance when they are released on temporary licence or when in open prisons.

For those working in prison workshops or in prison housework, work provides opportunities to leave their cells, socialise with others from within or outside prison, escape boredom, and feel in this way less isolated and disconnected from their selves outside prison. In addition to creating opportunities to socialise, work in prison can also provide prisoners with status and a sense of dignity that they do not have if they are simply idle.¹⁹ Moreover, work can give structure to their time and a welcome routine. For prisoners who have not worked before incarceration (not a negligible part of the prison population), work in prison can provide skills that can be deployed after prison. Obtaining skills that can be useful for life after prison can also protect them against what Noorda has described as 'exprisonment',²⁰ namely the harmful extensions of imprisonment outside prison walls. Further, work can inspire a sense of achievement and self-esteem, and constitute a source of recognition. Certain kinds of work can even be creative or fulfilling.²¹ To the extent that elements of this work are reminiscent of life outside prison, it can help people retain parts of their identity, rather than constituting it as an instrument of mortification.

What is also often not appreciated is that income earned through work is important for prisoners. Some may think that prisoners do not need to be paid for work that they do because their basic needs, such as accommodation and subsistence, are met in prison. However, prisoners may use this income to buy items from the prison canteen that are not provided, including refreshments, toiletries and other such goods. Moreover, people in prison may have kids or other dependents outside prison who suffer in multiple ways as a consequence of their imprisonment, and who still need

15. On the impacts of imprisonment, see Hadassa Noorda, 'Imprisonment' (2023) 17 *Criminal Law and Philosophy* 691.

16. For a discussion of prisoners' right to vote as an example, see Robert Jones and Gregory Davies, 'Prisoner Voting in the United Kingdom: An Empirical Study of a Contested Prisoner Right' (2023) 86 *Modern Law Review* 900.

17. See Spanish Constitution, Article 25(2) that provides for a right of prisoners to paid work and social security benefits.

18. Noah D Zatz, 'Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships' (2008) 61 *Vanderbilt Law Review* 857, 870.

19. See Didier Fassin, *Prison Worlds – An Ethnography of the Carceral Condition* (Polity, 2017), 203.

20. Hadassa Noorda, 'Exprisonment: Deprivation of Liberty on the Street and at Home' (2023) 42 *Criminal Justice Ethics* 1.

21. See, for instance, Frantzeska Papadopoulou Skarp, in this special issue.

financial support.²² Furthermore, individuals who are incarcerated can make savings that they can use to rebuild their lives post-release and reduce re-offending. It is well-documented that many people who are in prison come from a background of poverty and disadvantage.²³ When they leave prison in the UK they are offered just £76, with many of them having nowhere to live post-release.²⁴ If they have savings from work in prison, they are more likely to be able to make a fresh start after incarceration, which can also reduce the risk of re-offending.

However, in reality work in prison is often constituted as a mechanism used by prison authorities to manage people through discipline and rewards. This is not only because of the quality of work that is often offered to prisoners or for other operational factors that make work in prison challenging,²⁵ but also because of the legal rules that regulate prison labour. So disconnected is work in prison from the outside world, that instead of being fulfilling, it can become demoralising. This is primarily because of the exclusion of working prisoners from labour rights that other workers have.

3. Labour rights in prison

Prisoners are not sentenced to work. Work in prison should therefore be a right rather than a duty. However, it is often made compulsory by prison rules. Those who refuse to work may have benefits withdrawn (such as visits from friends and family, television or gym time, less or no income) and may also be sanctioned with solitary confinement.²⁶ A Council of Europe survey that looked at 40 (out of its 47 at the time) Member States found that, in 25 states, prisoners are required to work at least in certain circumstances.²⁷ The fact that work is compulsory but not part of one's sentence is concerning not least because it raises issues of proportionality of punishment.²⁸

Moreover, studies on the legal rights of working prisoners in European countries show how prison labour becomes an instrument of mortification by excluding working prisoners from other basic entitlements that workers outside prison have. Working prisoners are often excluded from the right to form trade unions and the right to strike, from being covered by collective agreements or a social security system, and from minimum wage laws.²⁹ A Council of Europe survey

22. See, for instance, Rose Smith, Roger Grimshaw, Renee Romeo and Martin Knapp, 'Poverty and Disadvantage Among Prisoners' Families', (Joseph Rowntree Foundation, 2007), 16 ff; Megan Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison* (University of Chicago Press, 2007).

23. See, for example, Jeffrey Reiman and Paul Leighton, *The Rich Get Richer and the Poor Get Prison – Ideology, Class and Criminal Justice* (Routledge, 2016, originally published in 1979).

24. See, for instance, Kaya Kannan, 'More than Six out of 10 Women Prisoners Homeless on Release', *The Justice Gap*, 23 March 2021.

25. On some of the operational issues, see Ben Jarman and Catherine Heard, in this special issue, who also examine several national legal orders.

26. Pandeli, Marinetto and Jenkins (n 4), 604.

27. Azerbaijan, the Czech Republic, Estonia, Finland, Georgia, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Montenegro, Russia, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom. See *Stummer v Austria*, App No 37452/02, Judgment of 7 July 2011, para 60(a).

28. See Rory Kelly, in this special issue.

29. See the articles in this special issue. See also European Prison Observatory, 'Prison in Europe: Overview and Trends', 2013, available at <https://www.prisonobservatory.org/upload/PrisoninEuropeOverviewandtrends.pdf>, 30–31. See also Evelyn Shea, 'A Comparative Study of Prison Labour in France, Germany and England' (2006) *Penal Issues* 11; and 'On Strike in Germany's Jails: An Interview with the Prisoners' Union' <<https://rs21.org.uk/2016/01/26/on-strike-in-germanys-jails-an-interview-with-the-prisoners-union/>>.

explained that in 12 Member States, prisoners are not included in a pension system,³⁰ while in other countries the affiliation to a social security system depends on the type of work performed, and particularly whether it is remunerated and whether it is for outside employers. In French law, the employment relations of incarcerated people are not covered by an employment contract.³¹ As a result, prisoners do not have a right to form and join trade unions or a right to sick pay. Moreover, prisoners are not entitled to a minimum wage. Similar exclusions are found in Germany, where prison work is compulsory but those working in prison have better coverage in unemployment protection than in France.³² Importantly, the German Federal Constitutional Court recently ruled that prisoners' low wages are incompatible with the Constitution.³³

Rules treating working prisoners differently to other workers exist in many legal orders. These rules either explicitly exclude the incarcerated or view them as outside the scope of protective laws as a result of the fact that they are not classified as employees.³⁴ It has therefore been said that working prisoners are used as a 'source of cheap labour or in order to undercut the wages of local workers',³⁵ which also suggests that the exploitation of working prisoners has effects on the wages of all workers.

3.1. UK legal framework

I will discuss the situation in the UK in some more detail to illustrate the extent of the exclusions of working prisoners from labour rights and the approach of courts to the question of prison work. It is interesting to note that there is scarce academic research on the topic in labour law scholarship, while labour law textbooks do not generally discuss prison labour, probably because it is not viewed as part of the labour market.

In the UK, as in other legal orders, there are several types of work in prison, and work opportunities also vary from one prison to another. Prisoners are not viewed as working under a contract of employment (even when they work outside the prison walls) and are excluded from many legal protections as a result.³⁶ Looking at the question of whether the Factories Act 1937, which applies to those working in factories, also applies to prisons, it was ruled in *Pullin* that this is not the case:

for the Factory Act to apply there must be found to exist [...] the relationship of master and servant and employment for wages. There is no employment for wages in the case of prisoners. Prisons are put under the control of the Secretary of State, who exercises his control through the Prison Commissioners, and through visiting magistrates who visit the prisons to see that the provisions of the Prison Act 1952, are being carried out.

30. *Stummer v Austria*, (n 27), para 60(c).

31. See Sophie Robin-Olivier, in this special issue.

32. See generally, Shea (n 29).

33. BVerfG of 20.06.2023 (2 BvR 166/16, 2 BvR 1683/17). See Azinovic, in this special issue.

34. See this volume. For an overview of several legal orders see also Dirk Van Zyl Smit and Frieder Dunkel (eds), *Prison Labour: Salvation or Slavery? International Perspectives* (reissued by Routledge 2018, originally published in 1999).

35. Andrew Coyle, *A Human Rights Approach to Prison Management* (International Centre for Prison Studies, 2009), 92.

36. *Pullin v Prison Commissioners* [1957] 1 WLR 1186; *Keatings v Secretary of State for Scotland* 1961 S.L.T. (Sh. Ct.) 63 (1961). See further, Hugh Collins, in this special issue.

Prison work is 'penal in the sense that the prisoners are obliged to work as a consequence of their sentence'.³⁷ The Health and Safety at Work Act 1974 provides that the employer also has duties towards those who are not employees (section 3), which means that the employment status of prisoners does not make a difference to the health and safety duties that are owed to them by the employer. However, section 52 of the Act requires a contract. Moreover, many of the detailed regulations, such as the Manual Handling Operations Regulations 1992, are restricted to employees with contracts. The fact that there is no contract of employment for working prisoners is therefore crucial.

Many other labour rights are dependent on employment status. The employment status of working prisoners was discussed in the UK Supreme Court decision of *Cox v Ministry of Justice*,³⁸ where a working prisoner in the prison kitchen accidentally injured the catering manager. The question was whether the prison service was vicariously liable for the act of the working prisoner. In the Court's judgment it was pointed out that the relationship of the working prisoner and the prison authorities differs from an employment relationship: prisoners do not work on the basis of contract, but because they have been sentenced to imprisonment, and are only paid nominally. However, these features 'rendered the relationship if anything closer than one of employment: it was founded not on mutuality but on compulsion'.³⁹ The Supreme Court concluded that the prison service was vicariously liable because those working in prison kitchens are integrated into the operation of the prison as their activities are essential for the running of the prison, they work in circumstances where they may commit negligent acts, and they work under the direction of staff of prisons.⁴⁰ The principle of *Cox* that the relationship between the prison authorities and working prisoners is even closer than an employment relation because they are compelled to work should make us question whether it is legitimate to exclude them from basic labour protections.

Prisoners are also excluded from minimum wage for work they do within prison walls. The legal framework applicable to all pay for work within prisons is as follows. Section 47 of the Prison Act 1952 provides that the Secretary of State may 'make rules for the regulation and management of prisons... and for the... employment ... of persons required to be detained'. The National Minimum Wage Act 1998 explicitly excludes working prisoners by providing that a 'prisoner does not qualify for the minimum wage in respect of any work which he does in pursuance of prison rules'. The Prison Rules 1999 state that '[a] convicted prisoner shall be required to do useful work for not more than 10 hours a day' (31.1), and that 'prisoners may be paid for their work at rates approved by the Secretary of State' (31.6). For this work within prisons, pay is regulated through Prison Service Order (PSO) 4460. The Order explains that setting and administering the pay of prisoners is a responsibility of the Governors of prisons. This work includes things such as cleaning or cooking in prison facilities, but also work in prison workshops that are located outside prison cells but within prison walls. It is prisoners who are more trusted who do the cleaning and cooking. All work performed in prison has to be paid at least at the minimum weekly rate, which is £4 a week according to PSO 4460, Annex B. Moreover, under section 2.5.1 of the PSO 4460, there can also be piecework schemes, whereby prisoners are paid according to the quality and quantity of items produced. In this case prisoners may be paid even below the prison

37. Pullin *ibid*, 1190.

38. *Cox v Ministry of Justice* [2016] UKSC 10.

39. *Ibid*, [14]; see also [35].

40. *Ibid*, [32].

employed rate. The UK Working Time Regulations do not explicitly exclude working prisoners, but the regulations do not apply in prison for there is no contract of employment between employers and prisoners.

The legal basis for this exclusion of working prisoners from employment rights in the UK was examined in a case in the Employment Tribunal.⁴¹ A convicted prisoner, Mr. Pimm, issued a claim, arguing that as a working prisoner, he was entitled to a number of employment rights that other 'workers' have, such as payment for the work he did. By way of background, Mr. Pimm was sentenced to a term of imprisonment in 2017, expecting to be released in 2025. In 2017 and 2018, when in prison in HMP Peterborough, a prison operated by Sodexo on behalf of the Ministry of Justice, he worked as a 'Learning and Skills Coach', supporting less educated prisoners. For this job, he was given a 'compact' and 'job description', which provided that he would be doing three sessions a day on weekdays, and two sessions per day at the weekend. Each session was paid a small sum of £1.70, falling far below the UK minimum wage. Mr. Pimm lost in the Employment Tribunal. The Judge explained both that working prisoners are not 'workers' in the legal sense and that there is a legal framework that applies specifically to prison labour, which differentiates it from other work.

In a Report that was published in 2011 by the Howard League for Penal Reform, the oldest penal reform charity in the UK, it was documented that the average pay for prison service work is £9.60 per week, which was described as derisory,⁴² while it has also been reported that prisoners work up to 60 hours per week in some cases.⁴³ A freedom of information request revealed that in 2022 prisoners earned 50p per hour for work in prison workshops (when the minimum wage was £9.50 per hour).⁴⁴ It should be noted that work in prison workshops can be either for the state or for private employers, such as DHL, that send work to prisons.⁴⁵

Work outside prison, for instance when prisoners are in an open prison or on release on temporary licence, is not directed by prison rules, and is therefore not excluded from the national minimum wage. However, prisoners do not receive the minimum wage for the work that they do outside prison either. This is because of the Prisoners' Earnings Act 1996, which applies when a prisoner is paid for 'enhanced wages work' and the person's weekly earnings exceed a prescribed amount. Enhanced wages work is work that is not directed in accordance with prison rules. In this case, the prison authorities may make discretionary deductions from their pay. Prison Service Instructions 76/2011 involve work only done outside prison for outside employers (1.4). This means that they apply to open prisons or to work done regularly outside prison by those who are in prison (1.11). On this pay, authorities can impose a levy (of up to 40%) on any income above £20 net pay per week. Net pay means in this instance pay after deductions for tax, national insurance, payments that are required to be made after court order, or following a maintenance assessment under the Child Support Act 1991. The amount of this levy is used to support, *inter alia*, voluntary organisations on victim support and crime prevention.

41. *Mr M Pimm v Sodexo Justice Services Ltd and Secretary of State for Justice (Intervener)*: 3312375/2019.

42. Howard League for Penal Reform, 'Prison Behind Bars – Making Real Work in Prison', 2011, available at https://howardleague.org/wp-content/uploads/2016/05/Business_behind_bars.pdf, 35.

43. Arianna Silvestri, 'Prison Conditions in the United Kingdom', European Prison Observatory 2013, available at <https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Prison%20conditions%20in%20the%20UK.pdf>, 32.

44. See Inside Times, 'Pay Prisoners National Minimum Wage, Says Union Leader', 4 April 2022, available at <https://insidetime.org/pay-prisoners-national-minimum-wage-says-union-leader/>

45. *Ibid.*

To conclude this section, the legal exclusions of working prisoners from rights that other workers have constitute prison labour in a way that is as far removed as possible from work outside prison. Working prisoners cannot earn an income that will contribute towards their own needs while in prison, the support of their dependents, or their life after prison. They also cannot associate with others, form unions and go on strike to claim their rights, like other workers. A member of staff of a prison said in an empirical study:

There's a great deal of difference [between work in prison and work outside]... In prison it's very artificial. Outside you're earning a salary, you're living a full life, in prison you're living part of a life. A lot of your life is very controlled, where it wouldn't be outside, you'd make more decisions outside. This is a half-life. Things stop once you come into prison.⁴⁶

Insofar as there are connections between the work of the incarcerated and the work of others, these are connections to some of the most precarious and exploitative work. It has therefore been suggested that those who have worked in this context 'come to expect – and sometimes embrace – low-wage precarious work outside prison'.⁴⁷ The exclusions of working prisoners from labour rights contribute towards prisoners' mortification, rather than helping them maintain aspects of their identity and supporting their social reintegration.

4. Objections

It could be objected that the exclusions of working prisoners from labour rights are justified. Tommie Shelby, in his book *The Idea of Prison Abolition*, discussed arguments in favour of the abolition of prisons. In his discussion Shelby also engaged with the central arguments in relation to prison labour.⁴⁸ It is important to appreciate that Shelby argued that the vast majority of people in prison in the US should not be incarcerated and that imprisonment should only be reserved for the most serious crimes, such as murder or rape, which means that he did not defend that current system of prisons or prison labour. His discussion involved work in prison in an ideal system against background conditions of fairness. However, his analysis can serve as a useful starting point because he engages with some of the most common arguments on work in prison.

Shelby was prepared to accept that in an ideal system mandatory prison labour as punishment is acceptable for deterrence and rehabilitation.⁴⁹ If we accept mandatory community work as punishment, why not also work in prison, he explained. This point should be examined more closely, though. Mandatory community work may raise separate problems that I will not discuss further here,⁵⁰ but it has crucial differences to prison labour. First, as mentioned earlier, when prison

46. Simon, (n 4), 121.

47. Erin Hatton, 'Introduction' in Erin Hatton (ed), *Labor and Punishment – Work in and out of Prison* (University of California Press, 2021), 1 at 6.

48. Tommie Shelby, *The Idea of Prison Abolition* (Princeton University Press, 2022), particularly 70–79.

49. *Ibid* 72–73.

50. On this, see Virginia Mantouvalou and Hadassa Noorda, 'Community Sentences and Human Rights', in (2024) *European Human Rights Law Review*. See also Report of the Director-General, Eighth Supplementary Report of the Committee set up to examine the representation alleging non-observance by the United Kingdom of the Forced Labour Convention, 1930 (No 29), made under Article 24 of the ILO Constitution by the trade unions UNISON, GMB and Napo, 29 October–12 November 2015.

labour is not part of a person's sentence, mandatory work may make punishment disproportionate to the crime committed, as Shelby recognised,⁵¹ while in community work the sentence consists in the work itself. Second, work in the community consists in work that is beneficial to the public, such as decorating public places, while work in prison can often be for private, profit-making entities. The fact that these entities make profit from prison work needs to be taken into account when considering its legal regulation.⁵² Moreover, imposing labour as a sentence when people are behind prison walls, with working conditions and terms determined by the state, constitutes a much more significant restriction of freedom, involving 'control over the time, energy, effort, and attention of individuals. As such, it is control over the very currency of their being', as Lippke put it.⁵³ This has particularly serious implications for their autonomy, making their treatment akin to slavery.⁵⁴ While the state may be justified to restrict freedom in certain circumstances through incarceration for reasons of public safety, this does not mean that it can legitimately interfere with all aspects of offenders' lives.⁵⁵

Mandatory work while in prison raises serious dangers of abuse and exploitation, as has been recognised by human and labour rights monitoring bodies. Prisoners are employed behind walls, while their freedom of movement and choice of work is restricted. Sykes explained that imprisonment leads to control of almost every aspect of people's lives, making them unable to make basic decisions that autonomous beings can make.⁵⁶ Prisoners may be punished or have rights and privileges removed if they do not work or if their work is not of a sufficient standard. This is why as early as 1932, the International Labour Organisation said that:

wherever human labour is performed in conditions of subordination, dangers arise; and with prisons, these conditions and the resulting dangers are pushed to the extreme. As a rule, the work of prisoners is performed under compulsion. Thus a penalty involving the obligation to work may easily become the cause of social evils.⁵⁷

For this reason, at least in Europe, prison labour is never a permissible sentence, while the Council of Europe has created standards for prison work, to which I turn in more detail in the section that follows.⁵⁸ Moreover, when examining other countries that permit prison labour as a sentence, the UN Committee of Economic, Social and Cultural Rights, monitoring compliance with the Covenant on Economic, Social and Cultural Rights, said that this is incompatible with the prohibition of forced labour. In its Concluding Observations on Japan, for instance, the Committee said:

51. Shelby, (n 48), 71. See further the discussion by Rory Kelly, in this special issue; and Richard Lippke, 'Prison Labour: Its Control, Facilitation, and Terms', (1998) 17 *Law and Philosophy* 533.

52. See Jenna Pandeli, 'A Money-Making Cycle of Incarceration: The Private Sector and UK Prison Labour', *Futures of Work Blog*, 30 September 2019.

53. Lippke (n 51), 541.

54. *Ibid.*, 542.

55. *Ibid.*

56. Sykes (n 3), 73.

57. Cited in Gerard de Jonge, 'Still "Slaves of the State": Prison Labour and International Law', in Dirk Van Zyl Smit and Frieder Dunkel (eds), *Prison Labour: Salvation or Slavery? International Perspectives*, (n 34), 313, 323. On the ILO approach to prison labour, see Faina Milman-Sivan and Yair Sagy, 'On the International Labour Organization and Prison Labour: An Invitation to Recalibrate' (2020) 159 *International Labour Review* 505.

58. See European Prison Rules, rule 26.1, which I discuss further below.

The Committee notes with concern that the State party's Penal Code provides for imprisonment with assigned work as one of the penal sentences, in breach of the Covenant's prohibition of forced labour (art. 6). The Committee calls on the State party to abolish forced labour either as a corrective measure or as a penal sentence, and amend or repeal relevant provisions in line with its obligation under article 6 of the Covenant. The Committee also encourages the State party to consider ratifying International Labour Organization (ILO) Convention No. 105 (1957) concerning the Abolition of Forced Labour.⁵⁹

Shelby further explained that compulsion to perform other civic duties is viewed as acceptable 'at least when the background social structure is just and the governing regime legitimate'.⁶⁰ As mentioned earlier, in the *Idea of Prison Abolition*, he considered prisons (and prison labour) in an ideal system. However, it is important to note that in reality, as Shelby's powerful work on *Dark Ghettos* also illustrates, individuals who are caught in the web of criminal justice are alienated from society and are trapped in poverty and disadvantage with very limited or no opportunities to escape, as a result of unjust social structures.⁶¹ Many people in prison have not had fair and equal opportunities in life. Our thinking on the role and regulation of prison labour should be informed by this reality.

Shelby also considered the exclusion of working prisoners from other labour rights, such as the right to organise, collective bargaining and strike. He said that the state, through imprisonment, interferes with 'even more fundamental liberties – freedom of movement, association, privacy, and so on'.⁶² In response to this point, it is worth saying that it is not obvious that these liberties are more fundamental than the right to organise and strike against exploitative working conditions. Labour rights such as these can be viewed as fundamental, pressing and urgent as other human rights.⁶³ These rights can also help protect prisoners from violations of other rights that are uncontroversially fundamental, such as working conditions that can be described as slavery, servitude, forced and compulsory labour.⁶⁴ In any case, Shelby himself immediately accepted that 'maybe this interference [with other freedoms] is necessary for crime control in a way that interfering with labor freedoms is not'.⁶⁵ This point is important to emphasise and has often been highlighted in academic scholarship and by human rights monitoring bodies. We must distinguish between freedoms that are necessarily restricted because of imprisonment for reasons of crime control, and other freedoms that are restricted through blanket bans and exclusions that are due to prejudice towards and neglect of the incarcerated.

Van Zyl Smit explained that 'the penal content of imprisonment is the loss of liberty and that the prison regime may not deliberately be organized to be punitive in any other way',⁶⁶ and that except

59. See CESCR, Concluding observations on the third periodic report of Japan, adopted by the Committee at its fiftieth session (29 April–17 May 2013), para 14. I am grateful to Shinya Ito for bringing this to my attention.

60. Shelby (n 48), 73.

61. See Tommie Shelby, *Dark Ghettos – Injustice, Dissent and Reform* (Belknap Press, Harvard, 2016), 204 ff. See also the analysis in Nicola Lacey, 'Criminal Justice and Social (In)justice', in Virginia Mantouvalou and Jonathan Wolff (eds), *Structural Injustice and the Law* (UCL Press, 2024), 168; see further Reiman and Leighton, (n 23).

62. Shelby (n 48), p 74.

63. Virginia Mantouvalou, 'Are Labour Rights Human Rights?', (2012) 3 *European Labour Law Journal* 151.

64. For further analysis on the role of collective labour rights in this context, see Incarcerated Lawyers' Organising Committee, 'Incarcerated Workers: One Big Union Inside and Out', (2019) 82 *Socialist Lawyer* 26; Keith Armstrong, "'You May Be Down and Out, But You Ain't Beaten": Collective Bargaining for Incarcerated Workers' (2020) 110 *Journal of Criminal Law and Criminology* 593.

65. Shelby (n 48) 74.

66. Dirk van Zyl Smit, 'Degrees of Freedom', (1994) 13 *Criminal Justice Ethics* 31, 31.

for the loss of their physical freedom, prisoners retain all other rights with the exception of those that are restricted for their safe custody. The European Court of Human Rights (ECtHR) has been clear on this point when considering human rights in prison:

prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention; they continue to enjoy the right to respect for family life; the right to freedom of expression; the right to practise their religion; the right of effective access to a lawyer or to a court for the purposes of Article 6; the right to respect for correspondence; and the right to marry. Any restrictions on these other rights must be justified.⁶⁷

Another typical justification of exclusions of prisoners from a right to fair pay specifically, which Shelby discussed, is the contribution of prisoners towards the cost of their room and board. The argument is that in an ideal system people are incarcerated because of their own actions. They should therefore pay for accommodation and food, which is costly. Through the work that they do, they contribute towards the cost of running the prison. Shelby compared this to other domestic work that is unpaid. Many people may hold this view, but a couple of points are important to make: first, that domestic work is undervalued and unpaid should not be taken to mean that prison ‘domestic work’ should be unpaid too.⁶⁸ Second, there are fundamental differences between cleaning your own home, and cleaning a prison. Crucially, people have a choice whether they will clean their home or not. In prison, there is no such choice: not cleaning may incur further punishment by the prison authorities. In addition, prisons tend to have a regular schedule of long hours whereby prisoners have to clean not only after themselves, but also after hundreds of inmates; this work in the prison setting can be particularly challenging; and the prison authorities may punish them if their work does not meet the required standards. Moreover, the income that individuals could earn through their work in prison could help support their dependents, and their life post-release, as was mentioned earlier.⁶⁹ In any case, Shelby also explained ‘there is little doubt that prisoners should receive higher wages than they typically do’.⁷⁰ The real question, therefore, is not whether prisoners should receive wages or higher wages than those that they currently receive, but what these wages should be, as the German Constitutional Court reminded us in 2023.⁷¹

The exclusion of working prisoners from labour rights is further complicated when prisons are privatised or when private entities are otherwise involved in prison work.⁷² In this case, the work of cleaning or cooking is performed for private entities that make profit from running prisons through getting prisoners to perform essential work that would have normally been paid the minimum wage at least. Private entities may also be involved in prison workshops, where prisoners may be

67. *Hirst v UK* (no 2), App No 74025/01, Grand Chamber Judgment of 6 October 2005, para 69, references to the case law omitted.

68. See also the discussion in Zatz, (n 18).

69. Shelby also discusses this and many other reasons why work in prison can be valuable for the incarcerated, (n 48) 76–77.

70. *Ibid*, 76.

71. See Miriam Azinović, in this special issue, discussing the debate in Germany; Hugh Collins, in this special issue, discussing this in relation to the UK; Petra Herzfeld Olsson, in this special issue, discussing the debate in Sweden.

72. Shelby addresses prisons’ privatisation and prison labour for private profit in Chapter 4, *The Idea of Prison Abolition* (n 48).

manufacturing products for outside employers. Private economic interests are increasingly influential in prisons nowadays, which is why scholars refer to the ‘prison-industrial complex’. This term emphasises the economic connections between prisons and prison labour, on the one hand, and the economy and work outside prison, on the other.⁷³ The legal framework that permits the exclusion of working prisoners, as a result, creates and sustains structures of exploitation from which private entities benefit.⁷⁴ For reasons such as these, Shelby considered whether only entities that respect workers’ rights should be involved in work in prison, while he also considered the possibility of the involvement of private non-profit entities.⁷⁵

A final important objection that may be raised against granting prisoners labour rights involves the purpose of incarceration. Some may say that the whole point of incarceration is to punish prisoners, and that work in prison should be understood against this background. It is correct that punishment is a purpose of incarceration, but it is not its sole purpose. The section that follows discusses this point and examines the human rights framework on prison labour.

5. Human rights for working prisoners

Thus far we have seen that work in prison is an instrument of exclusion, but this is not a necessary implication of imprisonment but a separate choice, which is reflected in the legal rules regulating prison labour. How should work in prison be regulated to counter aspects of mortification?

To consider how work in prison ought to be regulated, we need to examine it alongside the aims of incarceration reflected in the case law of the ECtHR, the European Prison Rules and other human rights materials of the Council of Europe and the United Nations. Legal documents guaranteeing prisoners’ rights explain that the purpose of work in prison is not punishment but offenders’ rehabilitation and reintegration,⁷⁶ which the ECtHR has used several times to support connections of prisoners with the outside world.⁷⁷ The UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), a non-binding but influential document, provides that:

Sentenced prisoners shall have the opportunity to work and/or to actively participate in their rehabilitation, subject to a determination of physical and mental fitness by a physician or other qualified health-care professionals.⁷⁸

73. See Davis, (n 7) Chapter 5. See also the discussion in Ellis, (n 2). On the distinction between private and public sector involvement in prison labour, see Faina Milman-Sivan and Yair Sagy, in this special issue, and Mario Guido, in this special issue. See also Faina Milman-Sivan and Yair Sagy, (n 57); and Colin Fenwick, ‘Private Use of Prisoners Labour: Paradoxes of International Human Rights Law’ (2005) 27 *Human Rights Quarterly* 249.

74. Mantouvalou, (n 6).

75. Shelby, (n 48) 136 ff.

76. I use the term reintegration primarily, but the terms rehabilitation and reintegration are overlapping. For other accounts of rehabilitation, see Hadassa Noorda, in this special issue.

77. See, for instance, *Wakefield v United Kingdom*, App No 15817/89, Admissibility Decision of 1 October 1990. *Mastromatteo v Italy*, App No 37703/97, Judgment of 24 October 2002.

78. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Resolution adopted by the General Assembly on 17 December 2015, A/RES/70/175, Rule 96(1). See further Dirk Van Zyl Smit, ‘Incorporating the Nelson Mandela Rules into National Prison Legislation’, UN Criminal Justice Handbook Series, 2022, particularly article 24 on Work, and its commentary.

The ECtHR has recognised that ‘the emphasis on rehabilitation and reintegration has become a “mandatory factor” that member states need to take into account when designing their penal policies’.⁷⁹ In this context, rehabilitation has been connected to human dignity,⁸⁰ a concept that plays an important role in examining prison conditions not only in the case law of the ECtHR but also in the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment that monitors compliance with the prohibition of torture, inhuman and degrading treatment and punishment by visiting prisons and other detention centres across Europe.⁸¹ The European Prison Rules and the Nelson Mandela Rules also make regular references to prisoners’ dignity.⁸²

International human rights documents and national Constitutions contain a number of labour rights, which are generally viewed as universal, but even here we notice that prisoners are sometimes exempted from their scope. When looking even at the fundamental prohibition of the worst forms of labour exploitation, we observe that prisoners are excluded. For example, Article 4 of the European Convention on Human Rights (ECHR), which prohibits slavery, servitude, forced and compulsory labour, states: ‘For the purpose of this Article the term “forced or compulsory labour” shall not include [...] any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during release from such detention’.⁸³

Dissenting judges in case law that has examined prison work in recent years have taken the view that the exclusion of working prisoners is outdated. The compulsion to work while being exempted from labour and social security rights should be understood as a violation of the prohibition of forced and compulsory labour, Judge Tulkens explained in her dissenting opinion in a case involving the pension rights of a working prisoner.⁸⁴ Similarly, in a case involving the trade union rights of working prisoners, dissenting Judges Lemmens and Serghides provided a thoughtful and considered analysis, explaining that a total ban on union activities is incompatible with the Convention and that a general reference to the prevention of disorder and crime as a reason for restrictions of trade union rights should not be viewed as sufficient.⁸⁵ There are examples from national legal orders where prisoners have been successful in challenging their exclusion from labour rights.⁸⁶ The ECtHR has repeatedly recognised that prisoners are a vulnerable group.⁸⁷ This should support the position that their labour and social security rights must be protected robustly in line with the requirements of specialist social and labour rights monitoring bodies to which we now turn.⁸⁸

79. *Khoroshenko v Russia*, Application no. 41418/04 30 June 2015, para 121. See Sonja Meinjer, ‘Rehabilitation as a Positive Obligation’ (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice* 145.

80. Meinjer, *ibid.*, 149.

81. Sonja Snacken, ‘Human Dignity and Prisoners’ Rights in Europe’, (2021) 50 *Crime and Justice* 301. Its findings are enormously influential in the case law of the ECtHR, as Snacken explains at 312.

82. See, for instance, the Preambles of both documents.

83. Article 4, para 3(a) of the ECHR.

84. *Stummer* (n 27), dissent of Judge Françoise Tulkens, para 10.

85. *Yakut Republican Trade-Union Federation v Russia*, App No 29582/09, Judgment of 7 December 2021.

86. On Germany, see Azinović in this special issue. See also the Spanish Social Chamber of the Supreme Court, Sentencia Number 566/2023 of 19 September 2023.

87. See, for instance, *Algür v Turkey*, App No 32574/96, Judgment of 22 October 2002, para 44; *Mikadze v Russia*, App No 52687/99, Judgment of 7 June 2007, para 109; *Aliev v Georgia*, App No 522/04, Judgment of 13 January 2009, para 97.

88. For further discussion of the ECtHR case law, see Petra Herzfeld Olsson, in this special issue.

The Council of Europe's European Prison Rules are an important point of reference in relation to prison conditions, including work in prison. These state that '[p]rison work shall be approached as a positive element of the prison regime and shall never be used as a punishment'.⁸⁹ Even though these rules are not legally binding, the detailed standards that they set are influential at national and supra-national level, having regularly been invoked by the ECtHR in the course of the interpretation of the ECHR.⁹⁰ Discussing the value of the European Prison Rules in the interpretation of the ECHR, for instance, Judge Pinto de Albuquerque described them as 'the prototype of hardened soft law in the Council of Europe's normative system'.⁹¹ This is in line with the so-called 'integrated approach' to the interpretation of the Convention, whereby the Court takes into account specialist materials in interpreting provisions of the ECHR.⁹²

In the European Prison Rules, there is reference to the principle of 'normalisation'. They state that '[l]ife in prison shall approximate as closely as possible the positive aspects of life in the community'.⁹³ This means that conditions in prison should be as close to normal as possible. How can prison labour be normalised? This is explored in both the European Prison Rules and the UN Nelson Mandela Rules.⁹⁴ The explanatory notes of the European Prison Rules state that the principle of normalisation underpins Rule 26 on prison work.

The Rules provide that the prison authorities must purport to provide useful work opportunities,⁹⁵ which should maintain or increase the ability to find work post release.⁹⁶ Rule 26.7 states that '[t]he organisation and methods of work in the institutions shall resemble as closely as possible those of similar work in the community in order to prepare prisoners for the conditions of normal occupational life'. The Rules further explain that prisoners should have employment rights like people outside prison. These include wages, social security rights, working hours regulation, and health and safety protection.⁹⁷ In addition, they refer to the involvement of private entities in running prisons. Rule 26.8 protects prisoners from exploitation by private entities, explaining that prisoners' interests should not be subordinated to economic profit, and rule 26.10 provides that prisoners' work must be remunerated equitably in all instances. The commentary to the European Prison Rules further clarifies that prisoners should be paid wages which are related to wages for work outside prison and that standards of prison work should be as similar as possible to those outside prison.

The European Committee of Social Rights, monitoring compliance with the European Social Charter, considered prison labour in the context of Article 1 paragraph 2 of the ESC, which protects the right to work in an occupation freely entered upon. It found that working conditions in prison have to be regulated strictly, and that when employed by private employers, prisoners have to be

89. European Prison Rules, Rule 26.1.

90. See, for instance, *Ivan Karpenko v Ukraine*, App No 45397/13, judgment of 16 December 2021, where the Court explained that it attaches considerable importance to the European Prison Rules, para 57.

91. See *Mursic v Croatia*, App No 7334/13, judgment of 20 October 2016.

92. See Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation', (2013) 13 *Human Rights Law Review* 529.

93. European Prison Rules, Rule 5.

94. See Nelson Mandela Rules, Rules 96–103.

95. EPR, Article 26.2.

96. *Ibid*, Article 26.3.

97. See European Prison Rules 26.13, 26.15, 26.17. and UN SMR Rules 96.2, 100.2, 101.1, 101.2, 102.1. See Jill van de Rijt, Esther van Ginneken and Miranda Boone, 'Lost in Translation: The Principle of Normalisation in Prison Policy in Norway and the Netherlands' (2023) 25 *Punishment & Society* 766.

employed with their consent and in conditions as similar as possible to working conditions outside prison.⁹⁸ The Committee further said that the prohibition of discrimination concerns their pay, working hours and other working conditions, as well as social security rights.⁹⁹

The ILO has examined prison labour in the context of the prohibition of forced labour. Looking at private use of prison labour, the ILO considered whether prison labour for private employers complies with the Forced Labour Convention No 29 of 1930, and developed principles in the area.¹⁰⁰ In order for prison work for private employers to comply with the Forced Labour Convention, what is needed is the formal written consent of the prisoner and working conditions similar to a free labour relationship (in relation to wage levels, social security and occupational safety and health). These would indicate that labour is voluntary.¹⁰¹ The Committee of Experts of the ILO also said in a report: 'where private enterprises are permitted to pay prisoners wages that are less than the minimum wage, their relationship cannot be considered comparable to a free employment relationship'.¹⁰²

Different instruments in European and international human rights and labour law suggest a very different legal framework on prison labour to what we currently have in many European countries, to conclude. In this context, work in prison is viewed not as punishment but as a route to rehabilitation and social reintegration. In light of this, labour rights of working prisoners have to be as close as possible to labour rights of people outside prison for work in prison to support reintegration rather than contributing to mortification.

6. Conclusion

Blanket exclusions from labour rights of those in prison should no longer be viewed as normal. These are mainly grounded on views that work constitutes punishment, and contribute towards prisoners' mortification, while also creating serious dangers of exploitation. Contemporary understandings and moral and legal standards on imprisonment set challenges to this mode of thinking, emphasising that people in prison do not forfeit all rights. There are many reasons to support the argument that prisoners should not be excluded from protections that other workers have, with a key argument being that work in prison can be valuable for societal reintegration. This aim cannot be achieved when work is constituted by law in a way that mortifies prisoners' identity. Prisoners should have labour rights like other workers, because this helps maintain and increase their social connections with the outside world while in prison, it helps develop skills that can be useful after prison, and support them to earn an income and make savings to help them rebuild their lives.

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98. Conclusions XVI-1, Germany.

99. Conclusions 2012, General Introduction, Statement of Interpretation of Article 1 para 2.

100. ILO Report of the Committee of Experts for the Application of Conventions and Recommendations, 'Eradication of Forced Labour', International Labour Office 2007. For analysis of the ILO position in this context, see the literature above, n 73.

101. *Ibid*, paras 59–60 and 114 ff.

102. ILO Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference (ILO 1990), 90.

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ORCID iD

Virginia Mantouvalou  <https://orcid.org/0000-0002-7474-0744>