
YALE LAW & POLICY REVIEW

The Problem of Wage Theft

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Wage theft inflicts serious harm on America’s working poor but has received little attention from policymakers seeking to address income inequality in the United States. This Article provides a comprehensive analysis of the causes of the wage theft crisis and the failure of the current enforcement regime to address it. It argues that existing policy reforms will fail, because they misunderstand the nature of the crisis and the incentives that employers face when deciding to steal workers’ wages. It then proposes series of reforms that could work, while arguing that changing the economic calculus alone will be unlikely to solve the problem if social norms remain unchanged.

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INTRODUCTION

The minimum wage has been an important part of the social safety net since Congress first enacted the Fair Labor Standards Act (“FLSA”) in 1938.¹ President Roosevelt called it “the most far-reaching, far-sighted program for the benefit of workers ever adopted here or in any other country.”² FLSA contains one of the broadest definitions of “employee” in federal law today³ and, unlike other employment statutes, FLSA covers all but the smallest employers.⁴ The cornerstone of FLSA is the provision guaranteeing a minimum wage for all hours worked, a once-radical idea that has gained widespread public acceptance.⁵

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1. Fair Labor Standards Act of 1938, Pub. L. No. 718, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 206(a) (2018)).
 2. Franklin D. Roosevelt, Radio Address of the President, (May 24, 1938), *in* TEACHING AM. HIST. <http://teachingamericanhistory.org/library/document/radio-address-of-the-president> [<http://perma.cc/3U2H-98GJ>].
 3. *See* United States v. Rosenwasser, 323 U.S. 360, 362 (1945) (“A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.”).
 4. Employers are covered under the FLSA if they have an annual dollar volume of sales or business done of at least \$500,000 (enterprise coverage). 29 U.S.C. § 203(s)(1)(A)(ii) (2018). Even if there is no enterprise coverage, individual employees can be covered if they “engaged in commerce or in the production of goods for commerce.” 29 U.S.C. § 206(a) (2018).
 5. *See* Niv Elis, *Poll: Bipartisan Majority Supports Raising the Minimum Wage*, HILL (June 1, 2017), <http://thehill.com/homenews/335837-poll-bipartisan-majority-supports-raising-minimum-wage> [<http://perma.cc/3G8T-9ESQ>]; Press Release, *New Poll Shows Overwhelming Support for Major Minimum Wage Increase*, NAT’L EMP. L. PROJECT (Jan. 15, 2015) <http://www.nelp.org/content/uploads/2015/03/PR-Federal-Minimum-Wage-Poll-Jan-2015.pdf> [<http://perma.cc/QKG3-QTEK>] (polls demonstrating that 75% of Americans support an increase in the federal minimum wage to \$12.50 by 2020).

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Despite this popularity, the federal minimum wage has not been raised since 2009,⁶ and adjusted for inflation, is at its lowest point since 1955.⁷ State and cities have stepped in to fill the gap. Twenty-nine states and the District of Columbia⁸ as well as dozens of cities and counties⁹ have enacted minimum wage rates above the federal rate. Eighteen states and twenty cities saw their minimum wages rise at the beginning of 2018.¹⁰ The Fight for Fifteen,¹¹ an organizing movement that advocates for a \$15.00 minimum wage across the country, has seen its position go from radical to mainstream,¹² which would have been unimaginable just a few years ago.¹³ Several cities, including New York City, Seattle, Syracuse, and Pittsburgh, have enacted a \$15.00 minimum wage, almost twice that of the federal rate. In April 2016, California became the first state to enact a statewide minimum wage of \$15.00 per hour.¹⁴ Campaigns in other states are already underway.

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6. See 29 U.S.C. § 206(a) (2018).
 7. See Annalyn Kurtz & Tal Yellin, CNN MONEY, <http://money.cnn.com/interactive/economy/minimum-wage-since-1938/index.html> [<http://perma.cc/24FB-FWAW>].
 8. See Wage and Hour Division, *Minimum Wage Laws in the States – January 1, 2017*, U.S. DEP'T LABOR <http://www.dol.gov/whd/minwage/america.htm> [<http://perma.cc/45TH-6C6V>].
 9. See *City Minimum Wage Laws: Recent Trends and Economic Evidence*, NAT'L EMP'T LAW PROJECT 2-4 (2016), <http://www.nelp.org/content/uploads/City-Minimum-Wage-Laws-Recent-Trends-Economic-Evidence.pdf> [<http://perma.cc/E6R6-PJA7>].
 10. See Grace Donnelly, *The Minimum Wage Will Increase on January 1 for 18 States and 20 Cities*, FORTUNE (Dec. 20, 2017), <http://fortune.com/2017/12/20/minimum-wage-increases-jan-2018> [<http://perma.cc/D8SS-7Z49>].
 11. See FIGHT FOR FIFTEEN, <http://fightfor15.org> [<http://perma.cc/8LDB-FC6R>].
 12. See Benjamin Wallace-Wells, *How the Minimum Wage Movement Entered the Mainstream*, NEW YORKER (Mar. 31, 2016), <http://www.newyorker.com/news/benjamin-wallace-wells/how-the-minimum-wage-movement-entered-the-mainstream> [<http://perma.cc/35S3-3DEH>].
 13. See Chris Kirkham & Samantha Masunaga, *Why the Success of the \$15 Minimum Wage Movement Has Surprised Its Leaders*, L.A. TIMES (Nov. 11, 2015), <http://www.latimes.com/business/la-fi-1111-minimum-wage-protests-20151111-story.html> [<http://perma.cc/RRQ5-XTYS>].
 14. See John Bacon, *\$15 Minimum Wage Coming to New York, Calif.*, USA TODAY (Apr. 4, 2016), <http://www.usatoday.com/story/news/nation/2016/04/04/california-new-york-minimum-wage-hikes-signed-into-law/82617510> [<http://perma.cc/D8N2-UD8D>]. The minimum wage will not reach \$15 per hour until 2022. See *id.*

The push to increase the minimum wage is part of a broader movement to address income inequality in the United States. The financial crisis and its aftermath sparked a renewed focus on the most economically vulnerable in American society. The minimum wage is an obvious target for those interested in addressing poverty and economic inequality. An individual with one or more children who works full-time making the federal minimum wage will fall below the federal poverty line¹⁵ and will still need to access federal safety net programs. Though calls for a “living wage” have been around for decades,¹⁶ the concept has gained new currency in the post-Great Recession debate, and as Democrats have moved leftward in the Trump era.¹⁷

Absent from the debate, however, is an acknowledgement of the fact that almost two million workers in the United States are paid less than the minimum wage, notwithstanding current minimum wage laws.¹⁸ Some of these workers are not covered under minimum wage laws; the rise of the contingent workforce and the gig economy has meant that the number of workers classified as “independent contractors” continues to increase every year.¹⁹ But many should be covered and are victims of wage theft by

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15. *What are the Annual Earnings for a Full-Time Minimum Wage Worker*, CENTER FOR POVERTY RESEARCH, <http://poverty.ucdavis.edu/faq/what-are-annual-earnings-full-time-minimum-wage-worker> [<http://perma.cc/Z29C-EX63>].
 16. Paul K. Sonn & Stephanie Luce, *New Directions for the Living Wage Movement*, in *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA’S LABOR MARKET* 269 (Annette Bernhardt et al. eds., 2008).
 17. See Bryce Covert, *Democrats Are Now All on Board With a \$15 Minimum Wage*, THINK PROGRESS (Apr. 26, 2017), <http://thinkprogress.org/democrats-15-minimum-wage-bill-f7631a21ec24> [<http://perma.cc/2WF9-69RX>].
 18. See *Characteristics of Minimum Wage Workers, 2013*, at 1, BUREAU LABOR STAT., (2014) https://www.bls.gov/opub/reports/minimum-wage/archive/minimumwageworkers_2013.pdf [<https://perma.cc/865E-5C2G>] (calculating that 1.8 million workers in the U.S. make below the minimum wage); Eastern Research Group, *The Social and Economic Effects of Wage Violations Estimates for California and New York: Final Report*, U.S. DEP’T OF LABOR (2014), <https://www.dol.gov/asp/evaluation/completed-studies/WageViolationsReportDecember2014.pdf> [<http://perma.cc/2EHM-L7QF>] (finding that minimum wage violations amount to between \$1.6 billion and \$2.6 billion in lost wages in New York and California alone).
 19. An independent contractor is defined as “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 the undertaking.” RESTATEMENT (SECOND) OF AGENCY, § 2.3 (AM. LAW INST. 1958). In general, workers classified as independent

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their employers. The prevalence of wage theft rivals and even surpasses other categories of theft that receive considerably more public attention and law enforcement resources. Employers steal more wages from workers each year than is stolen in “bank robberies, convenience store robberies, street and highway robberies, and gas station robberies combined.”²⁰ Wage theft is, by many accounts, one of the most common crimes committed in the United States.

Because the working poor are disproportionately affected by the pervasive violation and under-enforcement of wage and hour laws, any effort to address income inequality and economic stratification must tackle this problem. Yet policymakers have focused more on increasing the minimum wage than they have on enforcing the existing minimum wage laws.

Some state and local governments—spurred by coalitions of worker centers and labor advocates—have begun to address the problem by enacting “wage theft laws” that aim to increase employer compliance with the law. Unfortunately, these laws have had minimal effect because they misunderstand the nature of the problem: the probability of being caught for wage theft is so low that it makes economic sense for employers to commit wage theft on a massive scale. The solutions proposed to address the problem either underestimate this cost-benefit imbalance or fail to acknowledge it altogether. In order to solve the problem of wage theft, one must first understand why and how wage theft occurs and then develop solutions informed by this analysis.

This Article aims to make several course corrections in the policy debate about low-wage workers and the minimum wage. First, it argues that a push for minimum wage increases must be coupled with a focus on preventing wage theft. Second, it argues that policymakers must take seriously the economics of wage theft when crafting policy interventions.

contractors are not protected by labor and employment laws, including the FLSA. Because of this, many companies illegally attempt to reclassify employees as independent contractors to cut labor costs and avoid liability. Studies suggest that up to thirty percent of independent contractors are misclassified by employers. See LALITH DE SILVA ET AL., *STUDY OF ALTERNATIVE WORK ARRANGEMENTS: INDEPENDENT CONTRACTORS* (2000), <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf> [<http://perma.cc/J9AH-S5CK>]. Nevertheless, some workers are properly classified as independent contractors under current law, and employers are not required to pay these contractors the minimum wage.

20. Ross Eisenbrey, *Wage Theft Is a Bigger Problem than Other Theft – But Not Enough Is Done to Protect Workers*, ECON. POL’Y INST. (Apr. 2, 2014), <http://www.epi.org/publication/wage-theft-bigger-problem-theft-protect> [<https://perma.cc/E6FY-F992>].

Specifically, it points to the importance of enforcement and argues that with abysmally low enforcement rates, no amount of tweaking the penalties of wage theft violators will make a dent in the wage theft crisis. Finally, it acknowledges that in order to ensure wage justice for low-wage workers, it may be necessary to think beyond traditional deterrence—to changing social norms to support compliance with wage and hour laws.

I. THE WAGE THEFT CRISIS

Wage theft is a relatively new term that refers to a constellation of behaviors by employers that result in workers not receiving wages to which they are legally entitled. Popularized in the last decade by labor activists and progressive scholars, the term recognizes that when workers are not paid the minimum wage or overtime, their employers are in effect committing a form of theft.²¹ It is intentionally provocative in its characterization of common employer behavior as a crime. Forms of theft that disproportionately affect the poor and working class have been historically considered much less serious than property crimes that are more likely to affect the upper socio-economic strata of society. Advocates using the term “wage theft” seek to correct this disparity by using a term that expresses the seriousness of the act and the moral culpability of those who commit it.

Wage theft takes many forms. As Kim Bobo explains in her book, *Wage Theft in America*, employers may pay less than the minimum wage or not pay an overtime premium for hours worked above forty per week.²² They may pay workers with checks that bounce or fail to pay them at all, claiming financial insolvency of some kind.²³ They may purposefully misclassify their workers as independent contractors or as “exempt” employees in an effort to avoid paying legal wages.²⁴ They may require their employees to work “off-the-clock” to cut down on the amount paid,²⁵ or require workers to pay recruiting fees, or illegally deduct wages from workers’ paychecks for things such as work-related equipment or for a

21. Though it existed before, the term “wage theft” was popularized by Kim Bobo’s book, *WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID – AND WHAT WE CAN DO ABOUT IT* (2009), and is now in widespread use.

22. *Id.* at 25.

23. *Id.* at 27.

24. *Id.* at 35-37.

25. *Id.* at 26-27.

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short register.²⁶ In industries where workers receive tips, employers may steal some of these tips, either by pocketing cash or by deducting a percentage from tips paid by credit card.²⁷ Commonly, employers refuse to pay the final paycheck after a worker quits or is fired.²⁸ Sometimes, employers engage in multiple strategies to deny workers their lawfully earned wages. This Article focuses mostly on minimum wage violations because they are the type of violation most likely to affect workers at the bottom of the wage distribution.

The term wage theft has generated quite a bit of controversy from those who believe it unfairly vilifies business owners. These critics argue that wage and hours laws are a complicated morass that are difficult for even the savviest employer to understand, and that technical violations of the law can lead to harsh penalties, layoffs, and in extreme cases, bankruptcy.²⁹ Of course, not every violation of federal and state wage and hour laws is intentional. An employer may misinterpret the law in good faith or make a clerical mistake that causes a loss to workers. The categorization of all violations of federal and state wage and hours laws as “wage theft” may require the term to bear too much.

However, the ubiquity of wage theft suggests that it often stems from a conscious decision by employers to skirt the law and cheat their workers. Most low-wage workers will become victims of wage theft at some point in their careers, with women, minorities, and those without legal authorization to work in the United States particularly vulnerable.³⁰ A

26. *Id.* at 29.

27. *Id.* at 32-33.

28. *Id.* at 34-35.

29. *See, e.g.,* Kim Jansen, *State Sen. Jim Oberweis Explains How the Term ‘Wage Theft’ Is Like, Um, Wife-Beating*, CHI. TRIB. (Mar. 17, 2017), <http://www.chicagotribune.com/news/chicago-inc/ct-jim-oberweis-wife-beating-0319-chicago-inc-20170317-story.html> [<http://perma.cc/CZ4X-MUHU>] (state senator arguing that accusing an employer of committing wage theft is like asking whether he beats his wife); Jon Hyman, *Revisiting the Misnamed and Misunderstood Term ‘Wage Theft’*, OHIO EMP’R LAW BLOG (Apr. 24, 2014) <http://www.ohioemployerlawblog.com/2014/04/revisiting-misnamed-and-misunderstood.html> [<http://perma.cc/7NK2-CAWN>] (“‘Theft’ connotes bad intent—yet most wage and hour mistakes are honest ones born out of a misunderstanding of the law, not a desire to cheat or steal from employees.”); Daniel A. Schwartz, *‘Wage Theft’: The Trendy Phrase that May Not Mean what You Think It Means*, CONN. EMP’T LAW BLOG <http://www.ctemploymentlawblog.com/2014/04/articles/wage-theft-the-trendy-phrase-that-runs-amok> [<http://perma.cc/MVP5-XF5J>].

30. *Id.* at 42.

2009 study by the National Employment Law Project found that 26% of workers in certain low-wage industries in Chicago, Los Angeles, and New York reported making less than minimum wage.³¹ More than 60% of these workers were underpaid by more than \$1.00 per hour.³² Seventy-six percent of workers who worked over 40 hours per week were not paid for all of their overtime, with employers failing to pay them for an average of 11 hours of overtime per week.³³ Nearly 17% had worked off-the-clock for no pay³⁴ and 12% of tipped employees reported that their employer or manager had stolen some or all of their tips.³⁵ Overtime violation rates were even higher, approaching 80-90% in some industries.³⁶ Wage theft varies dramatically by industry, with the highest rates seen in childcare, beauty and personal services, retail, food service, car wash, and home health care.³⁷ In all, 68% of workers surveyed experienced at least one pay-related violation in the previous week.³⁸ The fact that the vast majority of low-wage workers regularly experience wage theft suggests a concerted decision by at least some employers in these industries to violate the law, not simply technical violations or clerical errors. It is these intentional violations of wage and hour laws that this Article addresses.³⁹

31. Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 5 (2009), <http://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf> [<http://perma.cc/8N9Z-EX3D>].

32. *Id.*

33. *Id.*

34. *Id.* at 20.

35. *Id.* at 3.

36. *Id.* at 34.

37. *Id.* at 31.

38. *Id.* at 5.

39. It would be difficult to effectively deter employers from committing accidental violations of wage and hour laws. However, there may be ways of detecting and correcting these violations. A new program recently rolled out by DOL, called the Payroll Audit Independent Determination (PAID) Program, is one way to identify such violations. Through PAID, employers voluntarily submit to an audit by DOL, who will determine whether any compliance issues exist. If they do, employers are required to pay back wages, but are not required to pay any additional penalties, such as liquidated damages and attorney's fees. *See*, Wage & Hour Division, *PAID Program*, U.S. DEP'T LABOR, <https://www.dol.gov/whd/PAID> [<https://perma.cc/889A-99H5>]. PAID represents a new and creative way to deal with the problem of accidental violations, though it is unlikely to do anything to solve

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The economic impact of wage theft is devastating. A recent report by David Cooper and Teresa Kroeger from the Economic Policy Institute (EPI) found that in the ten most populous U.S. states, “2.4 million workers lose \$8 billion” annually from wage theft.⁴⁰ The authors estimate that employers steal \$15 billion from workers across the country each year.⁴¹ The effect of wage theft on individual workers is severe. The EPI study estimates that the average victim of wage theft loses \$3,300 per year, receiving only \$10,500 in annual wages.⁴² Similarly, a U.S. Department of Labor (DOL) study found that wage theft lowers a minimum wage worker’s income by 37-49% on average when a violation occurs.⁴³ This can mean the difference between barely making ends meet and falling into extreme poverty, particularly where workers begin making low wages. The DOL study estimated that 67,000 families in New York and California alone live below the poverty line because of wage theft.⁴⁴ In addition, wage theft has second order effects such as increased spending on social programs, like food stamps,⁴⁵ and possible adverse public health outcomes.⁴⁶

the problem I focus on here. Employers knowingly violating wage and hour laws are unlikely to volunteer for an audit or willingly pay employees back wages.

40. David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers’ Paychecks Each Year*, ECON. POLICY INST. (May 10, 2017), <http://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year-survey-data-show-millions-of-workers-are-paid-less-than-the-minimum-wage-at-significant-cost-to-taxpayers-and-state-economies> [<http://perma.cc/V9CH-MXL5>].
41. *Id.*
42. Cooper & Kroeger, *supra* note 40.
43. DEP’T OF LABOR, *supra* note 18 at ES-3.
44. *Id.* at ES-4.
45. See David Cooper, *Balancing Paychecks and Public Assistance: How Higher Wages Would Strengthen What Government Can Do*, ECON. POLICY INST. (2016), <http://www.epi.org/publication/wages-and-transfers> [<http://perma.cc/VL78-3SXF>]. A study by the UC Berkeley Labor Center has found that the U.S. and state governments spend \$152.8 billion in social programs for the working poor. At least some percentage of these expenditures can be attributed to wage theft. See Ken Jacobs et al., *Low Wages Cost U.S. Taxpayers \$152.8 Billion Each Year in Public Support for Working Families*, <http://laborcenter.berkeley.edu/the-high-public-cost-of-low-wages> [<http://perma.cc/FN9S-2JKG>]. But see Joseph Sabia & Thanh Tam Nguyen, *The Effects of Minimum Wage Increases on Means-Tested Government Assistance*, NAT’L BUREAU ECON. RES. (2015), <http://www.epionline.org/wp->

Wage theft is likely to blunt the impact of any minimum wage increase. Researchers have found that a minimum wage increase does not result in a corresponding increase in low-wage workers' income.⁴⁷ Most chalk this up to employers' decision to cut labor costs, for instance by cutting hours when hourly wages rise.⁴⁸ But it is also possible that part of the minimal increase in low-income workers' wages is due to employers' wage-theft behaviors.⁴⁹ Given the endemic rates of wage theft, the focus on minimum wage increases is puzzling. To state the obvious, an increase in the minimum wage will only benefit low-wage workers if employers comply with the law. And yet, very little national political attention is paid to the problem of wage theft, even among progressive politicians.⁵⁰ It is a crisis unfolding largely outside of public view.

content/uploads/2016/01/EPI_MW_GovtAssist_Study_V2-5.pdf [https://perma.cc/CQG4-56MF].

46. Meredith Minkler et al., *Wage Theft as a Neglected Public Health Problem: An Overview and Case Study From San Francisco's Chinatown District*, 104 AM. J. PUB. HEALTH 1010, 1010 (2014).
47. In fact, some studies show that worker income actually decreases. See, e.g., Jardim et al., *Minimum Wage Increases, Wages, and Low-Wage Employment: Evidence from Seattle*, NAT'L BUREAU ECON. RES. 2 (2017), <http://evans.uw.edu/sites/default/files/NBER%20Working%20Paper.pdf> [http://perma.cc/5TTM-K9P5].
48. *Id.*; David Neumark & William Wascher, *Do Minimum Wages Fight Poverty?*, 40 ECON. INQUIRY 318, 324 (2002).
49. This conclusion could lead some minimum wage skeptics to argue that wage theft is less of a problem and more of a feature of the current system—strategic law breaking that lowers wages in industries and locations that cannot support the higher minimum wage. Even assuming that, in certain locations, the minimum wage is set at a level that has adverse effects on low-wage workers, wage theft is not an appropriate solution because of the harmful secondary effects that wage theft causes.
50. For instance, the 2016 Democratic Party Platform prominently featured support for a \$15 minimum wage but did not contain a single reference to wage theft. See *2016 Democratic Party Platform*, DEMOCRATIC PARTY COMMITTEE (July 8-9, 2016) <http://www.presidency.ucsb.edu/sites/default/files/books/presidential-documents-archive-guidebook/national-political-party-platforms-of-parties-receiving-electoral-votes-1840-2016/117717.pdf> [https://perma.cc/S76F-LT]E].

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II. WHAT EXPLAINS THE WAGE THEFT CRISIS

Worker advocates have a clear explanation for the wage theft crisis: greed and unequal power between workers and employers. For instance, Kim Bobo argues that “[s]ome employers are just greedy and don’t want to share profits with their employees. Some don’t view the minority or female workers as human beings, who have the same needs and desires as they.”⁵¹ This is undoubtedly true but not sufficient to understand the conditions under which employers decide to engage in wage theft. Policymakers and advocates must first understand this decision-making process if they want to solve the problem of wage theft.

Economists have long sought to explain non-compliance with wage and hour laws as a rational profit-maximizing decision employers make in response to low enforcement rates and weak penalties. In their seminal 1979 article, *Compliance with the Minimum Wage Law*, Orley Ashenfelter and Robert Smith theorized that an employer’s decision to pay less than the minimum wage involves a cost-benefit analysis that takes into account the probability of detection, the expected penalties that would occur if detected, and the profit the employer expects to make by violating the law.⁵² More specifically, the benefit to an employer can be calculated by multiplying the additional profit the employer will make if they violate the law with the probability that the employer will escape detection. Conversely, the cost can be calculated by multiplying the probability that he will get caught violating the law with the amount in damages he will be required to pay if he does get caught.⁵³

In other words, “employers will not comply with the law if the expected penalties are small because it is easy to escape detection or because assessed penalties are small.”⁵⁴ As enforcement approaches zero,

51. Bobo, *supra* note 21, at 50.

52. See Orley Ashenfelter & Robert Smith, *Compliance with the Minimum Wage Law*, 87 J. POL. ECON. 333, 336 (1979); Yang-Ming Chang & Isaac Ehrlich, *On the Economics of Compliance with the Minimum Wage Law*, 94 J. POL. ECON. 83, 85 (1985); Gideon Yaniv, *Minimum Wage Noncompliance and the Employment Decision*, 19 J. LABOR ECON. 596, 597 (2001).

53. Ashenfelter and Smith predict that an employer will choose to violate the law if: $E(\pi) - \pi(M, r, p) = (1 - \lambda) [\pi(w, r, p) - \pi(M, r, p)] - \lambda D > 0$, where $E(\pi)$ is the expected profit if the employer choose to violate the law, $\pi(M, r, p)$ is the profit if the employer pays the minimum wage, $\pi(w, r, p)$ is the profit if the employer paid the market wage, λ is the probability that an employer will get caught violating the law and D is the penalties the employer will have to pay if caught. *Id.* at 335.

54. *Id.* at 336.

rates of wage theft should skyrocket. Moreover, workers who are more vulnerable across any number metrics will suffer from higher rates of wage theft because employers know they risk more by complaining and may have fewer options if they lose their job. Thus, the probability of getting caught committing wage theft is lower and non-compliance is higher with respect to those workers, all else being equal.⁵⁵

On the other side of the equation, employers stand to gain more from violating the law the greater the difference between the market wage and the minimum wage, and therefore they are more likely to commit wage theft in low-wage and low-skilled industries.⁵⁶ Employers are also more likely to violate the law when labor elasticity is low, meaning that an employer cannot easily cut labor costs by increasing efficiency.⁵⁷ Thus, wage theft rates should be higher in industries with high labor costs that are not well suited to mechanization.⁵⁸

These predictions are all born out in the current wage theft crisis. Under the current enforcement regime, few employers ever get caught committing wage theft and fewer still ever pay the price for it. Enforcement of minimum wage and overtime laws occurs mostly through complaints filed by individual workers,⁵⁹ but most victims of wage theft

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55. See Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1071 (2014) (applying Ashenfelter and Smith's model to vulnerable workers who suffer higher rates of noncompliance).
56. See, e.g., David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUST. & LAB. REL. REV. 238 (2005) (applying Ashenfelter and Smith's model to the L.A. apparel industry).
57. See Ashenfelter & Smith, *supra* note 532, at 336. Taking into account labor elasticity, an employer will violate the law if $L(M - w) - (L/w)[1/2(M - w)^2 e] > [\lambda/(1 - \lambda)]D$ where $e = (\partial L/\partial w)(w/L) < 0$ is the elasticity of the demand for labor and $[\lambda/(1 - \lambda)]D$ are the odds of getting caught. A higher e (elasticity of labor demand) will make it less likely that an employer will commit wage theft, all else being equal. Likewise, a larger difference between the minimum wage and the market wage ($M - w$) will make noncompliance more profitable.
58. See Ashenfelter & Smith, *supra* note 532 at 335; see also Annette Bernhardt et al., *Employers Gone Rogue: Explaining Industry Variation in Violations of Workplace Laws*, 665 ILR REV. 808 (2013) (finding that small firm size, non-standard pay systems, and lack of benefits all correlate with higher rates of employer noncompliance with wage and hour laws).
59. See JACOB MEYER & ROBERT GREENLEAF, ENFORCEMENT OF WAGE AND HOUR LAWS: A SURVEY OF STATE REGULATORS (2011), <https://www.law.columbia.edu/sites/>

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never file a complaint.⁶⁰ Many workers never know that they have been cheated because they are uninformed about the laws that protect them. In one study, for instance, fifty-nine percent of workers surveyed misunderstood their minimum wage or overtime rights.⁶¹ Workers most vulnerable to wage theft often have limited education and English proficiency and do not have time or resources to research the laws that protect them. Employers have no incentive to educate their employees about their rights. Laws requiring employers to disclose certain workplace rights to workers are routinely violated.

Even when workers know their rights, they face severe obstacles in coming forward. Workers can file lawsuits in federal or state court,⁶² but doing so requires navigating the process pro se, which is difficult and costly, or finding a lawyer. Plaintiff-side employment lawyers do take wage-and-hour cases on contingency, but they often cherry-pick cases where they are likely to get large attorney's fees awards, such as class actions and lawsuits on behalf of highly paid employees whose damages are likely to be higher.⁶³ Paying a private attorney out-of-pocket is prohibitively expensive for all but the highest paid workers. Filing fees and court costs alone might dwarf the amount that the worker might recover in damages at the end of the case, if he or she recovers anything at all.⁶⁴

default/files/microsites/career-services/Wage%20and%20Hour%20Report%20FINAL.pdf [http://perma.cc/KPY9-BJPM].

60. See Gideon Yaniv, *Complaining About Noncompliance with Minimum Wage Laws*, 14 INT'L REV. L. ECON. 351 (1994) (explaining that when enforcement occurs mostly through individual complaints, an employer's decision to comply will be based in part on how likely it is that their particular employees will complain).
61. Alexander & Prasad, *supra* note 55, at 1093. In another survey of restaurant workers in Philadelphia, only 38.5% of respondents knew what the legal minimum wage was. See RESTAURANT OPPORTUNITIES CENTER OF PHILADELPHIA ET AL., BEHIND THE KITCHEN DOOR: THE HIDDEN REALITY OF PHILADELPHIA'S THRIVING RESTAURANT INDUSTRY (2012), http://rocunited.org/wp-content/uploads/2013/04/reports_bkd-philly.pdf [http://perma.cc/DD4L-84CE].
62. See 29 U.S.C. § 216(b) (2018).
63. Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 662 (2014) (lawyers are often deterred from taking wage-and-hour cases from low-wage workers because of low damage amounts).
64. For example, the fee to file a federal lawsuit under the FLSA is \$400 in the United States District Court for the Southern District of New York, not including fees for service of process, which can easily exceed hundreds of dollars. See *District Court Fee Schedule and Related Information*, U.S. DIST. COURT, SOUTHERN DIST. N.Y., <http://nysd.uscourts.gov/fees.php> [http://perma.cc/3UKY-PWKT]. A person working full-time making the minimum

Many legal services offices have employment units, but these units are more likely to focus on unemployment or worker's compensation than wage and hour claims. And given the legal services shortage, even if all legal services offices were fully engaged in prosecuting wage theft, their efforts would still fall short.⁶⁵

That leaves workers to file complaints with the DOL or an equivalent state agency. The advantage of filing an administrative complaint is that it is usually free to file and the process is easier to navigate pro se than filing a case in court. Unfortunately, the DOL is woefully underfunded and understaffed.⁶⁶ Most complaints sit in lengthy queues, or worse, go uninvestigated altogether.⁶⁷ For example, a report by the Government Accountability Office in 2009 found that the Wage and Hour Division of DOL mishandled or failed to investigate nine out of ten complaints filed by undercover researchers.⁶⁸ State agencies are even more understaffed.⁶⁹

wage in New York City who did not receive a final paycheck would be out \$520.

65. For example, a 2017 report by the Legal Services Corporation found that only four percent of LSC services go towards helping people with employment problems. LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 39 (2017), <http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<http://perma.cc/XB7Z-ED4X>].
66. The number of DOL investigators decreased by fourteen percent between 1975 and 2004, while the number of businesses covered by FLSA rose by more than one hundred percent. Annette Bernhardt & Siobhán McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004*, BRENNAN CTR. FOR JUSTICE 1 (2005), <http://www.nelp.org/content/uploads/2015/03/Trends-in-Wage-and-Hour-Enforcement.pdf> [<http://perma.cc/M25W-D7U7>].
67. *See Department of Labor: Wage and Hour Division's Complaint Processes Leave Low Wage Workers Vulnerable to Wage Theft*, GOV'T ACCOUNTABILITY OFFICE (2009), http://graphics8.nytimes.com/packages/pdf/national/20090325_GAOTestimony.pdf [<http://perma.cc/M25W-D7U7>].
68. *Id.*
69. ZACH SCHILLER & SARAH DECARLO, POLICY MATTERS OHIO, *INVESTIGATING WAGE THEFT: A SURVEY OF THE STATES* i (2010), <http://www.fairwarning.org/wp-content/uploads/2014/04/Link23.pdf> [<https://perma.cc/9P7A-37WQ>]. A study in New York State found that as of July 2013, DOL had a backlog of 14,000 cases for unpaid wages. *See NYS Department of Labor's Widespread Failure to Serve Wage Theft Victims*, NAT'L MOBILIZATION AGAINST SWEATSHOPS, <http://nmass.org/nys-department-of-labors-widespread-failure-to-serve-wage-theft-victims> [<http://perma.cc/TP2Q-VNWB>]; *see also* Mandy Locke, *For Many Workers Cheated Out of Wages, NC Department of Labor Offers No*

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For workers who do decide to file a complaint, additional risks abound. Workers risk being fired, blacklisted, or retaliated against in other ways, such as being reported to immigration authorities if they lack immigration status. In the 2009 NELP study, forty-three percent of workers who complained reported being retaliated against in some way.⁷⁰ Such retaliation is illegal,⁷¹ but a claim for retaliation must proceed through the same convoluted process as the wage claims and may take many months or years to win. In the meantime, the worker is out of a job, unable to pay his or her bills (or deported to his or her home country, unable to return). Low-wage workers are less likely to have the luxury of the time it takes to file a complaint and work their way through the complaint process than their higher-paid counterparts. They have also become increasingly unlikely to enjoy the protection of labor unions, which traditionally played the role of workplace watchdog. Not coincidentally, union density in many industries with high rates of wage theft approaches zero.⁷²

Nothing about the system encourages workers to come forward to make complaints. Quite the opposite, the system encourages workers to take no action and accept the loss of their wages.⁷³ Indeed, the research suggests that most workers choose this path. In the 2009 NELP study, 20% of low-wage workers had experienced a serious problem at their job in the last year but had chosen not to complain.⁷⁴ Of these workers, 51% were worried that they would be fired if they complained, 10% believed their hours would be cut, and 36% did not complain because they didn't think it would make any difference.⁷⁵ Another study by David Weil and Amanda Pyles found that only one in 130 workers who experience an overtime violation come forward to make a complaint and that workers are less likely to complain in industries with the highest levels of violations.⁷⁶ For

Help, CHARLOTTE OBSERVER (Nov. 22, 2014), <http://www.charlotteobserver.com/news/business/article9235580.html> [<http://perma.cc/MDP2-6JSV>].

70. Bernhardt et al., *supra* note 31, at 25.

71. 29 U.S.C. § 215(a)(3) (2018).

72. *Compare* Bureau of Labor Statistics, *Union Members - 2016*, <https://www.bls.gov/news.release/pdf/union2.pdf> [<http://perma.cc/PLE3-8KVR>] *with* Bernhardt et al., *supra* note 31, at 4.

73. Yaniv, *supra* note 60, at 353.

74. Bernhardt et al., *supra* note 31, at 24.

75. *Id.*

76. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LABOR LAW & POL'Y J. 59, 82 (2006).

their part, employers understand that the odds that one of their employees will file a claim against them is miniscule,⁷⁷ and that they can decrease the likelihood of that happening by retaliating against any worker who does complain.

When an enforcement system depends almost entirely on worker complaints, and the complaint rate remains abysmally low, then Ashenfelter and Smith's model predicts low compliance rates unless the penalties paid are very high.⁷⁸ But the current enforcement regime falls short here, too. Even if employers are caught committing wage theft, they almost never pay more than the unpaid wages they owe and in many cases pay substantially less than they owe or nothing at all. As the National Employment Law Project has explained:

Employers know that if they fail to pay wages, the worst that may happen is that they will eventually have to pay the bare amount of wages owed. In effect this amounts to a free loan. If there are no consequences to violating the law beyond nominal penalties, employers experience no "lesson learned." They simply do not have sufficient incentive to comply with the law.⁷⁹

This is the case despite the fact that the Fair Labor Standards Act and some state labor statutes provide for substantial penalties to deter employers from committing wage theft. Workers can recover double damages under federal law and some state laws.⁸⁰ They can also recover attorney's fees and court costs,⁸¹ which is supposed to both encourage

77. David Weil's estimate that a non-complying employer has a 10% chance of being investigated by DOL each year may be too high. David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. LAB. REL. REV. 238, 242 (2005). In 2010, DOL completed 10,529 investigations where violations of minimum wage laws were found. *Fiscal Year Data for WHD*, U.S. DEP'T LABOR, <https://www.dol.gov/whd/data/datatables.htm#panel2> [<https://perma.cc/4Y2E-RLZG>]. That same year, there were almost twenty-eight million businesses in the United States. See FAQs, SMALL BUS. ADMIN., http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf [<https://perma.cc/GQQ8-S44E>], for an investigation rate of 3.7%.

78. See Ashenfelter & Smith, *supra* note 52, at 336.

79. NAT'L EMP. LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE'S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT 17 (2011) [hereinafter WINNING WAGE JUSTICE].

80. 29 U.S.C. § 216(b) (2018).

81. *Id.*

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workers to file lawsuits⁸² and further deter employers from violating the law.⁸³

Yet these penalties have not translated into effective deterrence. First, the statute of limitations for wage claims under federal law is two years (three years if the violation is willful).⁸⁴ Even if a worker complains, some of the wages he or she is owed is likely to be outside the statute of limitations and therefore unrecoverable in all but the shortest employment relationships. Employers know that even if they do get caught, much of what they owe will be wiped away because of the statute of limitations.

Moreover, civil cases are likely to settle for far less than the amount the employers would owe if the cases went all the way to judgment. Because DOL lacks resources to bring every worker complaint to trial, it routinely settles cases on workers' behalf for pennies on the dollar. Most private lawsuits also end in settlement as well⁸⁵ and workers have many incentives to accept less than they are owed. Some of these incentives are common to all civil litigation. Litigation is time-intensive. A worker may have to spend countless hours meeting with his or her attorney, attending court and mediations, and prepping for trial. The civil litigation process is long and it often takes years to see a case through to trial. Workers may prefer quick settlements that allow them to avoid the time and expense required to get a judgment.

Then there is the uncertainty of trial itself and possibility that the worker will be left with nothing because of an unsympathetic jury or judge. Many employers who commit wage theft pay their employees off the books and in cash to avoid detection.⁸⁶ This means that wage theft cases often come down to a he-said, she-said on what the worker was paid.

82. Percival & Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233 (1984).

83. Thomas D. Rowe, *The Legal Theory of Attorney Fee-Shifting: A Critical Overview* 1982 DUKE L.J. 651, 660 (1982).

84. 29 U.S.C. § 255(a) (2018).

85. Adam Liptak, *U.S. Suits Multiply, But Fewer Ever Get to Trial, Study Says*, N.Y. TIMES (Dec. 14, 2003), <http://www.nytimes.com/2003/12/14/us/us-suits-multiply-but-fewer-ever-get-to-trial-study-says.html> [https://perma.cc/88GD-XJEE] (finding that only 1.8% of civil cases went to trial in 2002).

86. See Steven Greenhouse, *Dozens of Companies Underpay or Misreport Workers, State Says*, N.Y. TIMES (Feb. 12, 2008), <https://www.nytimes.com/2008/02/12/nyregion/12labor.html> [http://perma.cc/DS7Z-45J4] (reporting on enforcement action that found dozens of companies paying workers "off the books" to avoid paying taxes and to avoid detention of labor violations).

A low-wage worker who lives close to or below the poverty line may need the money a quick settlement will bring and be economically unable to wait for a better offer.⁸⁷ All of these factors may lead a worker to accept a settlement that is far less than what he or she is owed.

Neither is obtaining a wage judgment a guarantee that the worker will see any money. Unable to win on the merits, many employers engage in a variety of tricks to avoid paying wage judgments, including filing for bankruptcy, transferring assets to third parties, closing⁸⁸ or selling the business for little or no remuneration, or in some cases disappearing altogether. A recent report by the Community Development Project of the Urban Justice Center identified \$125 million in unpaid wage judgments between 2003 and 2013 in New York alone.⁸⁹ Another study out of California found that only seventeen percent of wage judgments in that state were paid from 2008 to 2011.⁹⁰

In one such case, five workers in Manhattan sued their former employer, a restaurant operating under the name Charm Thai, for unpaid minimum wage and overtime violations and illegal retaliation in 2011. A court awarded the workers a judgment in the amount of \$830,000. The owners, a husband and wife team, responded by closing several of their businesses, transferring assets between them, and eventually declaring bankruptcy. The bankruptcy filing put a stop to all collection efforts,

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87. Many researchers have examined how being poor is costly because poverty pushes people into making economically disadvantageous decisions. *See, e.g.*, A. Yesim Orhun & Mike Palazzolo, *Frugality is Hard to Afford* (working paper), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742431 [<http://perma.cc/7M9N-LRQQ>] (finding that the poor are unable to take advantage of some cost-saving measures such as bulk buying and waiting to buy when there are sales); *It's Expensive to Be Poor: Why Low-Income Americans Often Have to Pay More*, *ECONOMIST* (Sept. 3, 2015), <http://www.economist.com/news/united-states/21663262-why-low-income-americans-often-have-pay-more-its-expensive-be-poor> [<http://perma.cc/8ALF-2587>] (discussing how poverty drives people to utilize high-cost strategies such as pay day lenders).
88. *See, e.g.*, Jim Dwyer, *Another Voice Joins Chorus for Fair Pay*, *N.Y. TIMES* (June 10, 2014), <http://www.nytimes.com/2014/06/11/nyregion/another-voice-joins-chorus-for-fair-pay.html> [<http://perma.cc/3BYL-V3WN>] (citing case of restaurant in New York that closed six months after the complaint was filed).
89. *See Empty Judgments: The Wage Collection Crisis in New York* 5 (2014), NAT'L CTR. L. ECON. JUST., <http://nclej.org/wp-content/uploads/2015/11/Empty-Judgments-The-Wage-Collection-Crisis-in-New-York.pdf> [<http://perma.cc/ULY7-KXEY>] [hereinafter *Empty Judgments*].
90. *See* EUNICE HYUNHYE CHO ET AL., *HOLLOW VICTORIES: THE CRISIS IN COLLECTING UNPAID WAGES FOR CALIFORNIA'S WORKERS* 2 (2013).

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allowing the pair to drain all assets out of their businesses and disappear. The workers never received a dime from the judgment.⁹¹

The inability to collect on wage judgments gives workers further incentive to forgo filing complaints at all, or if they do file a complaint, gives them an incentive to settle early and for much less than they are owed. In these cases, the employer's gamble has still paid off; in the worst case scenario, they end up paying less than they would have if they had complied with the law. In the best case scenario, they pay nothing at all. Very rarely, an employer is forced to pay full back-wages and penalties. But this happens so seldomly that it has very little effect on employers who decide to violate the law.

As Noah Zatz has explained, some employers act in open defiance of the law and "accept[] expected remedies as the cost of doing business."⁹² These employers may continue to violate the law even after paying a settlement or court judgment. In one recent high-profile example, Grand Sichuan, a popular Chinese restaurant in lower Manhattan, was sued in 2012 for minimum wage violations and tip stealing. In response, the restaurant fired several of the complaining workers.⁹³ The restaurant settled the case in 2013 and rehired the workers as part of the settlement. However, the restaurant eventually reneged on the terms of the settlement agreement and continued to pay less than the minimum wage. Several workers were fired again in 2014 for organizing against the employer.⁹⁴ The workers filed a second lawsuit, which Grand Sichuan agreed to settle before reneging on the agreement several months later. After the National Labor Relations Board found that Grand Sichuan had unlawfully

91. *Empty Judgments*, *supra* note 89, at 12.

92. Noah Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in ANNETTE BERNHARDT, HEATHER BOUSHEY, LAURA DRESSER, & CHRIS TILLY, *THE GLOVES-OFF ECONOMY, WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET* 43 (2008).

93. *See East Village Grand Sichuan Inc. v. Chinese Staff & Workers Ass'n*, No. 02-CA-086946, 1, 5-6 (Nov. 6, 2013), <http://hr.cch.com/ELD/EastVillage.pdf> [<http://perma.cc/2SGF-PHSZ>].

94. Rob Scher, *Ex-Workers Picket Grand Sichuan as Wage Dispute Rages On*, BEDFORD & BOWERY (July 2, 2015), <http://bedfordandbowery.com/2015/07/ex-workers-picket-grand-sichuan-as-wage-dispute-rages-on> [<https://perma.cc/XL46-BLJ3>]; Jessica Warriner, *Former Grand Sichuan Workers Brave Bitter Cold To Call For Restaurant Boycott*, GOTHAMIST (Jan. 8, 2015), http://gothamist.com/2015/01/08/grand_sichuan_protest.php [<https://perma.cc/3CX4-BCUY>].

terminated one of the workers,⁹⁵ the restaurant closed (the owner still owns and operates several other branches of the restaurant in New York).⁹⁶ The workers still have not received their wages.

In another example, Goodfellas Restaurant in New Haven, Connecticut paid back wages to workers as part of Department of Labor investigations in 2009 and 2010,⁹⁷ just to be sued by workers in 2015 for engaging in the same illegal conduct.⁹⁸ In each case, the restaurant reorganized under a different corporation owned by the same couple.⁹⁹ During negotiations with the workers, owner Gary Iannoconne admitted that

he would continue to pay less than the minimum wage because “he could get away with it” and “that’s the way business works in America.” He said the penalties from the seven DOL investigations—a few thousand dollars for multiple wage violations against at least 60 workers—were like a slap on the wrist.¹⁰⁰

Most employers do not make the mistake of saying this out loud, but this type of calculus happens in businesses across the country every day.

Policy interventions, therefore, must seek to make wage theft unprofitable. Such interventions can either step up enforcement of wage and hour laws, thereby raising the probability that any particular employer will be caught committing wage theft, or they can increase penalties paid by employers, thereby raising the potential costs employers

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95. *East Village Grand Sichuan Inc.*, 364 N.L.R.B., No. 151 (Nov. 30, 2016), http://c.yumcdn.com/sites/www.aabany.org/resource/resmgr/Board_Decision.pdf [<https://perma.cc/WGQ3-JJFM>].
96. EV Grieve, *Grand Sichuan Has Closed on St. Mark’s Place* (Nov. 2, 2016), <http://evgrieve.com/2016/11/grand-sichuan-has-closed-on-st-marks.html> [<https://perma.cc/U7QQ-88QP>].
97. Complaint, *Perez v. Goodfellas Café LLC*, 3:15-cv-00642 ¶¶ 24-29 (D. Conn. May 1, 2015); Thomas MacMillan, *Goodfellas Gives In*, NEW HAVEN INDEP. (May 2, 2011), http://www.newhavenindependent.org/index.php/archives/entry/goodfellas_gives_in [<http://perma.cc/HWD5-Q5F7>].
98. Mary O’Leary, *New Haven’s Goodfellas Restaurant Sued Over Alleged Worker Violations*, NEW HAVEN REG. (May 3, 2015), <http://www.nhregister.com/article/NH/20150503/NEWS/150509945> [<http://perma.cc/HK85-D5M2>].
99. I was counsel of record for Plaintiffs in both the Grand Sichuan and Goodfellas cases at certain points in the litigation.
100. Unidad Latina en Acción, *The Connecticut Wage Theft Crisis: Stories and Solutions* 6 (2015), <https://ulanewhaven.org/wp-content/uploads/2015/03/Wage-Theft-Report.pdf> [<http://perma.cc/BE2W-XFGE>].

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would pay if caught committing wage theft. The amount of penalties that an employer pays can be increased either by increasing the amount of de jure penalties available under the law or by increasing the amount of de facto penalties an employer pays by strengthening judgment collection mechanisms. As Ashenfelter and Smith make clear, these two factors—enforcement and penalties—must be thought of in relation to each other. If penalties are very low, then the probability of getting caught must be very high to encourage compliance. If enforcement rates are very low then penalties must be very severe to reach the same result.

The benefits to committing wage theft, on the other hand, depend on factors that do not lend themselves to easy or effective policy interventions, such as the market rate for labor and labor elasticity. Thus, policymakers seeking to deter violations of minimum wage laws are left with two main strategies—increasing penalties and strengthening enforcement.

III. EXISTING POLICY REFORMS

Though little attention is paid to the problem of wage theft nationally, there has been more activity at the local level. Worker centers and other non-traditional labor organizations¹⁰¹ have spearheaded public campaigns across certain (mostly urban) geographic areas.¹⁰² They have also sought to amend state and local laws to address wage theft on a systemic level.¹⁰³ The fight against wage theft has been “both a cause and a consequence of the burgeoning alt-labor movement: workers’ rights groups have led the charge to enact stronger laws at the state level while their resulting policy campaigns have provided the impetus for further coalition- and movement-building.”¹⁰⁴

101. See JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 2* (2006); Josh Eidelson, *Alt-Labor*, AM. PROSPECT (Jan. 29, 2013), <http://prospect.org/article/alt-labor> [<https://perma.cc/XK26-N9XM>].

102. See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2723 (2008).

103. See Marc Doussard & Ahmad Gamal, *The Rise of Wage Theft Laws: Can Community-Labor Coalitions Win Victories in State Houses?* 52 URB. AFF. REV. 780, 781 (2015).

104. Daniel Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSP. ON POL. 324, 326 (2016).

A. *Local Wage Theft Laws*

Two-hundred and fifty-five wage theft laws were introduced at the state level between 2004 and 2012,¹⁰⁵ with a dozen major wage theft laws being passed during this or similar periods.¹⁰⁶ These laws have typically taken one of two forms: either they increase penalties available under the law for employers caught committing wage theft, or they seek to facilitate collection of wage judgments from noncomplying employers.

When local and state governments have increased penalties, they have largely done so by increasing the *monetary* penalties for violating the law. This is one of the easier reforms to pass because civil penalties already exist in the law in many states,¹⁰⁷ and doing so has no direct consequences on state budgets. Eight states now have treble damages provisions for minimum wage claims and/or wage non-payment claims: Arizona, Idaho, Maine, Maryland, Massachusetts, Michigan, New Mexico, Ohio and Rhode Island.¹⁰⁸ Some localities have also passed increased penalties for wage and hour violations, particularly in states with weak enforcement regimes such as Florida, where Miami-Dade County passed treble damages for

105. See Doussard & Gamal, *supra* note 1033, at 781.

106. See Galvin, *supra* note 104, at 336.

107. See Lauren K. Dasse, *Wage Theft in New York: The Wage Theft Prevention Act as a Counter to an Endemic Problem*, 16 CUNY L. REV. 97, 114 (2012) (noting that twenty-one states already allow for double damages in wage and hour claims).

108. ARIZ. REV. STAT. ANN. § 23-364(g) (West 2008); IDAHO CODE ANN. § 45-615 (West 2016); ME. REV. STAT. tit. 26, §§ 626-A, 670 (West 2012); MASS. GEN. LAWS ch. 151, § 1B, 20 (West 2012); MD. CODE ANN. LAB. & EMPL. § 3-507.1; MICH. COMP. LAWS § 408.488 (West 2012); N.M. STAT ANN. § 50-4- 26(c) (West 2012); OHIO CONST. art. II § 34a.; R.I. Gen. Laws § 28-14-19.2 (West 2012).

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wage claims in 2010.¹⁰⁹ In 2013, the District of Columbia became the first jurisdiction to approve *quadruple* damages for unpaid wage claims.¹¹⁰

Other states have increased penalties in the form of civil fines payable to the state. For instance, in 2010, the State of Washington increased the minimum civil penalty for wage non-payment from \$500 to \$1000 per violation.¹¹¹ That same year, Iowa passed a bill that increased civil penalties for non-compliant employers fivefold from \$100 to \$500 per violation.¹¹² Though these fines seem small, every week an employee suffers a wage violation is a separate violation, meaning that an employer who has failed to pay fifteen employees the minimum wage for a year would be on the hook for \$390,000 if \$500 per violation is levied.

States and localities have also begun to experiment with non-monetary penalties in an attempt to deter employers from violating wage and hour laws. The two most common types of penalties in this category are individual criminal liability for wage theft and revocation of business licenses for non-complying employers. Criminal liability for “theft of services” has existed in many states under statutes that pre-date the recent push for wage theft legislation,¹¹³ but there have been attempts to clarify the laws or increase criminal penalties for such conduct. For instance, Texas recently amended its theft of services statute to make clear that an employer can be criminally prosecuted for “theft of services” even if he pays part of the wages due.¹¹⁴ In 2011, New York increased criminal

109. Miami Dade Wage Theft Ordinance, Miami-Dade Municipal Code 22-2(h). The State of Florida dismantled the state’s Department of Labor and Employment Security (DOLES) in 2000 and the Attorney General’s Office, the agency tasked with enforcing the state’s wage and hour laws, has not held an employer responsible for violating the laws since 2011. *See* Spencer Woodman, *Florida Has Not Held an Employer Responsible for Violating the Minimum Wage Since 2011*, NATION (July 11, 2016), <https://www.thenation.com/article/florida-has-not-held-an-employer-responsible-for-violating-the-minimum-wage-since-2011> [<https://perma.cc/A9PL-3SF2>].

110. *See* D.C. CODE ANN. § 32-1303 (West 2015). Other states, such as New York, have considered and rejected treble damages for wage and hour claims.

111. *See* 2010 WASH. LEGIS. SERV. CH. 42 (S.H.B. 3145) (West 2010).

112. *See* 2009 IA. LEGIS. SERV. CH. 49 (H.F. 618) (West 2009).

113. WINNING WAGE JUSTICE, *supra* note 79, at 111 (forty-five states and the District of Columbia either have theft of services provisions in their larceny statutes or criminalize some violations of the state’s labor law).

114. *See* Haleigh Svoboda, *Austin Officials Announce Crackdown on Wage Theft*, TEX. TRIB. (Nov. 11, 2011), <https://www.texastribune.org/2011/11/17/>

penalties for minimum wage violations to a maximum of \$20,000 per violation and up to a year imprisonment.¹¹⁵ Campaigns to allow revocation of business licenses have mostly occurred at the local level, since localities are often responsible for issuing many business licenses. For example, in 2013, Chicago passed the Anti-Wage Theft Ordinance, which allowed the city to revoke the business license of any employer found guilty of wage theft.¹¹⁶ Cities and counties in Florida and New Jersey have since passed similar ordinances.¹¹⁷

A second way that states have sought to address the wage theft crisis is by improving wage judgment collection mechanisms. The most common of these mechanisms is the wage lien, which allows workers to place a lien on an employer's property for the amount of unpaid wages due. The wage lien is modelled on the mechanic's lien, which has long allowed workers in the construction industry to place a lien on an employer's property to obtain unpaid wages.¹¹⁸ A wage lien prevents an employer from moving or hiding assets to avoid paying an eventual judgment, and encourages employers to settle wage claims early. Ten states currently have some

texas-officials-announce-crackdown-wage-theft
[<https://perma.cc/Z67P-YTL6>].

115. See N.Y. LAB. LAW § 662 (West 2016). The 2011 Wage Theft Prevention Act was the result of a years-long campaign spearheaded by Make the Road New York, a community organization based out of New York City. See Jane McAlevey, *Make the Road New York: Success Through 'Love and Agitation*, NATION (May 22, 2013), <https://www.thenation.com/article/make-road-new-york-success-through-love-and-agitation> [<https://perma.cc/MW6A-8H8M>].
116. See Anti-Wage Theft Ordinance Passes City Council Unanimously, ARISE CHICAGO (Feb. 18, 2015), <http://arisechicago.org/anti-wage-theft-ordinance-passes-unanimously> [<https://perma.cc/UX77-YWWL>]; Josh Eidelson, *Big Win For Labor in Chicago*, SALON (Jan. 18, 2013), http://www.salon.com/2013/01/18/big_win_for_labor_in_chicago/ [<https://perma.cc/SN7K-8J4Z>].
117. See Alan Pyke, *Florida County Makes It Easier For Workers To Get Unpaid Wages From Bosses*, THINK PROGRESS (Mar. 24, 2015), <http://thinkprogress.org/florida-county-makes-it-easier-for-workers-to-get-unpaid-wages-from-bosses-de505088096b> [<https://perma.cc/WM9S-HG7M>] (citing Osceola, Florida's law that allows revocation of business licenses for employers found to have committed wage theft); Hank Kalet, *Business Groups, Worker Advocates at Odds Over Local 'Wage-Theft' Laws*, N.J. SPOTLIGHT (July 24, 2015), <https://www.njspotlight.com/stories/15/07/24/business-groups-worker-advocates-at-odds-over-local-wage-theft-laws> [<https://perma.cc/D46N-EDSY>] (citing laws in Jersey City, Newark, Princeton, Highland Park, and New Brunswick).
118. All states currently have mechanic's liens. See CHO ET AL., *supra* note 90, at 16.

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form of wage lien,¹¹⁹ though they vary considerably in how broad they are.¹²⁰ Wisconsin's wage lien—one of the oldest and broadest in the country¹²¹—allows a worker or the Department of Labor to place a lien on the personal or real property of employers for up to six months of unpaid wages (up to \$3,000).¹²² The Wisconsin lien has served as a model for other campaigns across the country, including in Maryland, which passed its own wage lien in 2013.¹²³ Wage lien campaigns in New York and California are underway: a coalition of worker advocates in New York have advocated (so far unsuccessfully) for the passage of the Securing Wages Earned Against Theft (SWEAT) Act.¹²⁴

B. Wage Theft Laws' Effectiveness

The push for these wage theft laws comes from the recognition that penalties are not currently high enough nor certain enough to deter employer noncompliance. If double damages do not adequately deter employers from violating the law, then perhaps treble damages or increased civil fines will. If civil penalties are not sufficient, maybe the threat of criminal liability and incarceration will do the trick. On its face, this logic seems unimpeachable, and indeed, the Ashenfelter and Smith model predicts that these new penalties should have an effect.¹²⁵ Likewise, if employers know that they will have to pay wage judgments, and that they won't be able to engage in tricks to evade collection, then the risk of

119. Alaska Stat. § 34.35.440, § 34.35.445 (West 2014); Idaho Code Ann. § 45-620 (West 2016); Ind. Code § 32-28-12-1 (West 2002); N.H. Rev. Stat. Ann. § 275:51 (West 2005); Ohio Rev. Code Ann. § 1311.34 (West 1979); Tenn. Code Ann. § 66-13-101 (West 2010); Tex. Lab. Code Ann. § 61.081 (West 1993); Tex. Lab. Code Ann. § 61.0825 (West 2001); Tex. Lab. Code Ann. § 61.051 (West 2017); Wash. Rev. Code Ann. § 49.48.084, § 49.48.086 (West 2010); Wisc. Stat. Ann. § 109.09 (West 2018); Md. Code Ann., Lab. & Empl. § 3-1101, et seq. (West 2013).

120. See CHO ET AL., *supra* note 90, at 22 n.33 (noting that some state's liens are limited to employers in particular industries or require a finding by the state's labor agency before a lien can be placed).

121. See *Empty Judgments*, *supra* note 899, at 17.

122. See Wisc. Stat. Ann. § 109.09 (West 2018).

123. Md. Code Ann., Lab. & Empl. § 3-1104 (West 2013); *VICTORY for Maryland's Low-Wage Workers!*, <https://populardemocracy.org/impact/victorymarylands-low-wage-workers> [<https://perma.cc/9QAP-F2TS>].

124. See <http://www.sweatnys.org> [<https://perma.cc/L3GR-WG6Y>].

125. See Ashenfelter and Smith, *supra* note 52.

committing wage theft goes up, and non-compliance with wage and hour laws should go down.

Indeed, anecdotal evidence about the effects of these new wage theft laws is overwhelmingly positive. For instance, after Miami-Dade County in Florida passed its treble damages provision, the county handled almost 2000 cases of wage theft and recovered almost \$3 million in unpaid wages.¹²⁶ One study found that the Wisconsin wage lien has allowed workers to recover fifty-five percent of money wage judgments compared to only seventeen percent in California, which does not have a wage lien.¹²⁷

Wage theft laws no doubt made a difference to individual workers who were able to recover unpaid wages because of the new laws. But there is little evidence that these laws made more than a small dent in the wage theft crisis overall. A recent study by Daniel Galvin found that most wage theft laws passed in the last ten years have had no statistical effect on wage theft rates.¹²⁸ The only exception was in states that had enacted treble damages provisions. In these states, he found a small, but statistically significant decline in wage violations.¹²⁹ Even in these states, however, workers faced a significant risk of being a victim of a minimum wage violation each year.¹³⁰ Ashenfelter and Smith's model helps us understand why this is so. Even when employers face higher penalties for committing wage theft—either because the penalties themselves are higher or because it is more likely that if caught an employer will have to pay the penalty—compliance rates will remain low if the odds of getting caught remain miniscule.

Take treble damages provisions as an example. A move from double to treble damages means that an employer's potential loss if caught committing wage theft will rise fifty percent. If an employer fails to pay workers \$50,000 in wages, an employer's potential liability rises from \$100,000 to \$150,000, a substantial increase. However, when you take into account the probability of getting caught—which remains very low—the

126. See Laura Huizar, *Effective Strategies and Tools for Wage Enforcement: Hearing before the New Jersey Senate Labor Committee*, NAT'L EMP. L. PROJECT (June 6, 2016), <http://www.nelp.org/content/uploads/Testimony-Effective-Wage-Enforcement-New-Jersey.pdf> [<https://perma.cc/RQ5G-ZD4A>].

127. CHO ET AL., *supra* note 90, at 13, 17.

128. See Daniel Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSP. ON POL. 324, 339 (2016).

129. *Id.*

130. *Id.* at 334.

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deterrence effect all but disappears.¹³¹ In other words, the cost of committing wage theft in a treble damages state is higher, but the expected benefit to the employer is greater than the expected cost in both states—by a lot. In fact, at a four percent detection rate—a reasonable estimate of the probability that an employer will be subject to a federal DOL investigation in a given year¹³²—damages would need to exceed twenty-four times the unpaid wages owed in order for the cost-benefit analysis to come out in favor of compliance.¹³³ Given this reality, the wage theft crisis is less surprising than the fact that any employer decides to comply with the law at all.

In addition, these new damages provisions operate at the state and local level where enforcement rates are often even lower than the nationwide average. Iowa, for example, doubled civil fines for employers caught committing wage theft.¹³⁴ Yet Iowa is one of three states in the country with only one wage and hour investigator for the whole state.¹³⁵ In other words, state enforcement in Iowa is effectively non-existent, meaning that an increase in penalties—even a substantial increase—in unlikely to make a difference. The Galvin study confirmed that increased civil fines such as Iowa's have no effect on wage theft rates.¹³⁶

131. Let us assume there is a four percent chance of getting caught committing wage theft. An employer in a double damages state calculates the cost of committing wage theft at \$4,000 (\$100,000 multiplied by four percent) whereas he calculates the benefit of not complying with the law at \$48,000 (\$50,000 multiplied by ninety-six percent). An employer in a treble damages state calculates his cost at \$6,000 (\$150,000 multiplied by four percent); the expected benefit remains the same at \$48,000.

132. *See supra* note 77. In addition, assuming a detection rate of four percent obscures the difference in enforcement that exists depending on industry, employer type, and worker characteristics.

133. An employer would have to pay \$1.2 million for failing to pay workers \$50,000 if damages were set at 24 times the amount of unpaid wages. At a four percent detection rate, the employer's "cost" would be priced at \$48,000. The potential benefit would remain the same as the above example, \$48,000. In this scenario, the benefits of compliance would equal the cost of violating the law.

134. *See* 2009 Ia. Legis. Serv. Ch. 49 (H.F. 618) (West 2009).

135. *See* Colin Gordon, Matthew Glasson, Jennifer Sherer and Robin Clark-Bennett, *Wage Theft in Iowa*, IOWA POL'Y PROJECT, 17 (2012), <http://www.iowapolicyproject.org/2012docs/120827-wagetheft.pdf> [<https://perma.cc/X6GV-THEN>].

136. *See* Galvin, *supra* note 128, at 341.

Wage judgment collection mechanisms suffer from much the same problem. They undoubtedly help individual workers collect on wage judgments, as the Wisconsin study showed.¹³⁷ But the study also revealed the limits of such mechanisms on raising compliance rates across the board. Even with the wage lien, workers only successfully collected twenty-five percent of the wages they were owed; seventy-five percent went uncollected.¹³⁸ Even though Wisconsin law allows for double damages for wage claims, workers collect only one eighth of that amount. Under these circumstances, employers still have a strong incentive to commit wage theft.

A similar problem plagues criminal wage theft statutes. Imposing criminal liability has the potential to provide a strong deterrent effect.¹³⁹ But despite the laws on the books, very few wage theft prosecutions have occurred. One study found only eleven wage theft prosecutions between 2011 and 2013 in the entire country.¹⁴⁰ With millions of noncomplying employers in the country, the odds of getting convicted for committing wage theft are similar to the odds of getting hit by lightning¹⁴¹—in other words, not high enough to change anyone's behavior.

Private enforcement remains a possibility, of course. But, as discussed above, private enforcement is most likely to benefit higher wage workers with than it is low-wage workers making a sub-minimum wage or getting cheated out of wages they were promised. And private enforcement plays no role in levying civil fines, prosecuting employers under criminal wage

137. CHO ET AL., *supra* note 90, at 16.

138. *Id.* at 18.

139. See Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 173 (2004), <https://www.law.upenn.edu/live/files/1352-does-criminal-law-deter-robinson-and-darley-edited> [<https://perma.cc/H3WW-8WVC>] (“Having a criminal justice system that imposes liability and punishment for violations deters.”).

140. There are 28 million businesses in the United States, see *supra* note 77, and an average of 3.66 wage theft prosecutions per year for a rate of 1 in 7.6 million. *Winning Wage Justice: A Summary of Criminal Prosecutions of Wage Theft in the United States*, NAT'L EMP. L. PROJECT (2013), [http://www.nelp.org/content/uploads/2015/03/Crim-Prosecutions-WW\].pdf](http://www.nelp.org/content/uploads/2015/03/Crim-Prosecutions-WW].pdf) [<https://perma.cc/SYF2-3HSN>].

141. The odds of getting hit by lightning are approximately 1 in 700,000 each year. *Flash Facts About Lightning*, NAT'L GEOGRAPHIC, http://news.nationalgeographic.com/news/2004/06/0623_040623_lightningfacts.html [<https://perma.cc/4WF4-LB3U>].

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theft laws, or revoking business licenses, all of which require the participation of a state actors.

There are a couple of reasons why most wage theft laws focused on increased penalties and better collection mechanisms even though they do little to increase compliance with wage and hour laws. First, the campaigns to pass such laws are typically led by labor advocacy groups such as worker centers with support from unions and workers' rights lawyers.¹⁴² Such actors may not be thinking about the problem from a systemic perspective. Instead, they draw lessons from individual cases of wage theft. For example, a workers' rights attorney may be thinking about what could increase his or her leverage in settlement negotiations (treble damages) or how to ensure he or she gets paid at the end of the day (wage lien). A worker center may have an active campaign against an employer in which a judgment goes unpaid, and may focus on punitive measures such as criminal liability or business license revocation as a way of expressing moral outrage at the employer's illegal behavior. Indeed, the campaigns for such wage theft laws are often replete with tales of individual workers who would have benefited from the proposed legal reform.¹⁴³

Such stories should not be disregarded. Increased penalties and collection mechanisms are an important part of an effective enforcement regime, and even in the absence of more enforcement, they can be effective tools for individual workers to recover wages they are owed. Yet, it should be clear by now that the current legal reforms by themselves are insufficient to address the wage theft crisis by themselves.

IV. THE MISSING PIECE: ENFORCEMENT

Despite the importance of enforcement, very few wage theft campaigns have focused their efforts there. One reason for this is that enforcement is expensive. Moving from double to treble damages for wage claims does not affect the state budget. Indeed, in the case of civil fines, reforms have the possibility of increasing state revenue. Conversely, more enforcement requires resources in the form of additional personnel and funding for enforcement activities, which may be politically impractical in the current fiscal climate. In addition, workers' advocates often distrust the state and federal labor agencies and do not want to focus on pushing

142. *See supra* notes 101-102.

143. *See, e.g.*, <http://www.sweatnys.org/workers-stories> [<https://pema.cc/PS7D-DKN2>].

reforms to their enforcement activities. However, without rethinking how our wage and hour laws are enforced, the crisis will continue unabated.

What would an effective enforcement regime look like? An obvious place to start would be to increase the number of investigators at the state and federal labor agencies. States vary considerably in the extent to which they devote resources to enforcing their wage and hour laws. A recent study found that there is one state investigator for every 146,000 workers in the United States.¹⁴⁴ Of course, this figure obscures enormous differences between states. Some states, such as Alabama and Delaware, have no state enforcement of their wage and hour laws.¹⁴⁵ Others, such as New York and California, have relatively robust enforcement.¹⁴⁶ However, all states could benefit from more investigators given the magnitude of the wage theft crisis.

The same dearth of investigators exists at the federal level. The number of U.S. DOL investigators peaked in 942 at 1998 before falling to 731 in 2008 at the end of the Bush Administration.¹⁴⁷ Under the leadership of Obama-era Administrator David Weil, the number of investigators increased to over one thousand,¹⁴⁸ an accomplishment that the Trump Administration is unlikely to match.¹⁴⁹ But even this increase failed to keep pace with the U.S. economy. On a per capita basis, the U.S. DOL would need 2,232 investigators to have the same enforcement power as it did in 1975.¹⁵⁰

144. See SCHILLER & DECARLO, *supra* note 69.

145. *Id.* at 8.

146. *Id.* (146 and 395 full-time investigators, respectively).

147. See David Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division* (2010), <http://www.dol.gov/whd/resources/strategicEnforcement.pdf> [<https://perma.cc/V8BS-35NE>].

148. See Alana Semuels, *The Future of the Department of Labor Under Trump*, ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/business/archive/2017/03/the-department-of-labor-under-trump/518307> [<https://perma.cc/3KWP-SRST>] (interview with David Weil).

149. The Administration's proposed budget issued on March 16 cut the DOL's budget by 21%. See Ben Penn, *Trump Wants 21 Percent Cut in Labor Department Budget*, BLOOMBERG BNA (Mar. 17, 2017), <https://www.bna.com/trump-wants-21-n57982085353> [<https://perma.cc/TJ47-TH6J>].

150. These numbers come from Bernhardt and McGrath, *supra* note 66 and recent statistics on the number of establishments in the United States by the Bureau of Labor Statistics, <https://www.bls.gov/cew/data.htm> [<https://perma.cc/HJu8-8VUR>].

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It is difficult to determine what would constitute an optimal number of federal investigators, and at some point there may be diminishing returns, with each additional investigator bringing in less recovery for workers, but there is no danger of hitting the point of diminishing returns anytime soon. As the number of investigators grew by thirty percent in the Weil era, the amount of wages collected almost tripled.¹⁵¹ A return to 1975 enforcement levels would substantially increase the deterrent effect of wage and hour enforcement.

However, returning enforcement to previous levels will not solve the wage theft crisis. Ashenfelter and Smith found minimum wage compliance stood at sixty-nine percent for the country as a whole in 1973,¹⁵² hardly a sign of a golden age of compliance with wage and hour laws.¹⁵³

Some efforts to reform wage and hour enforcement have taken place at the federal level. Before becoming Administrator in 2014, David Weil issued a 112-page report on how to improve the U.S. DOL's enforcement of wage and hour laws,¹⁵⁴ and he worked to implement some of the recommendations in the report after he took the job.¹⁵⁵ But similar reforms largely have not occurred at the state level. This is problematic for several reasons. First, the U.S. DOL cannot enforce state labor laws, which often cover more employers¹⁵⁶ and are more generous to workers¹⁵⁷ than the federal law. Second, states can continue to enforce wage and hour laws

151. See *Fiscal Year Data for WHD*, U.S. DEP'T LABOR, <https://www.dol.gov/whd/data/datatables.htm#panel3> [<https://perma.cc/3RT8-SFFQ>].

152. See Ashenfelter and Smith, *supra* note 52, at 343.

153. In fact, recent studies have found higher compliance rates than Ashenfelter and Smith found. See Bernhardt et al., *supra* note 31 at 2 (reporting compliance rate of seventy-four percent); Galvin, *supra* note 104, at 334 (finding compliance rate of 78-86% depending on the state).

154. See David Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division*, U.S. DEP'T LABOR (May 2010), <https://www.dol.gov/whd/resources/strategicEnforcement.pdf> [<https://perma.cc/4UN4-X577>].

155. See Semuels, *supra* note 148 (detailing the policies he implemented as WHD Administrator).

156. For instance, FLSA only applies to enterprises with more than \$500,000 per year in sales, which excludes many small businesses. See 29 U.S.C. § 203 (2018).

157. FLSA allows states to set higher minimum wages, 29 U.S.C. § 218 (2018), and 29 states and the District of Columbia have. See *Minimum Wage Laws in the States - July 1, 2017*, U.S. DEP'T LABOR, <https://www.dol.gov/whd/minwage/america.htm> [<https://perma.cc/YE5Z-XZUX>].

even when federal priorities change, as they undoubtedly will under the current Administration. Third, states may have access to additional enforcement tools not available to the U.S. DOL. The following are reforms that could be the focus of advocacy campaigns at the state level, where most energy for reform is likely to be in the next several years.

A. Targeted Enforcement

Most wage and hour enforcement occurs through complaints filed by workers. Yet, workers who are the most likely to suffer from wage theft are the least likely to come forward to report a violation because they lack information about their rights, access to legal advice and counsel, time and resources to pursue a complaint, and the economic security necessary to risking complaining.¹⁵⁸ This disconnect leads to resource misallocation and gaps in enforcement.

Limited resources would be better spent on targeted enforcement that focuses on industries where violations are likely to be the highest, and on workers who are more likely to experience wage theft. This shift in enforcement has already begun to occur at the federal level. Under Weil, the U.S. DOL sought to increase targeted enforcement.¹⁵⁹ By the end of 2016, fifty percent of the WHD's enforcement recourses were directed towards targeted rather than complain-driven enforcement.¹⁶⁰ A few states have made similar decisions, including New York, where an investigative report into pervasive wage theft in the nail salon industry¹⁶¹ led to the creation of an Exploited Worker Task Force.¹⁶² Subsequent targeted enforcement actions in New York resulted in 143 nail salons

158. *See supra*, Section II.

159. *See* Secretary of Labor Thomas Perez, *U.S. Department of Labor Strategic Plan: 2014-2018*, U.S. DEP'T LABOR, <https://www.dol.gov/sites/default/files/StrategicPlan2014-2018.pdf> [<https://perma.cc/HYU6-7FFE>].

160. *See* Semuels, *supra* note 148 (interview with David Weil).

161. *See* Sarah Maslin Nir, *The Price of Nice Nails*, N.Y. TIMES (May 7, 2015), <https://www.nytimes.com/2015/05/10/nyregion/at-nail-salons-in-nyc-manicurists-are-underpaid-and-unprotected.html> [<https://perma.cc/8BPJ-FCVL>].

162. *See* Governor Cuomo Announces Statewide Task Force to Combat Worker Exploitation and Abuse Throughout New York State, N.Y. ST. (July 16, 2015), <https://www.governor.ny.gov/news/governor-cuomo-announces-statewide-task-force-combat-worker-exploitation-and-abuse-throughout> [<https://perma.cc/DK8F-WHKD>].

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being order to pay \$2 million in unpaid wages and damages.¹⁶³ A similar targeted enforcement action in Connecticut found that ninety-two percent of nail salons had committed wage violations.¹⁶⁴ Still, most enforcement at the state level occurs through the investigation of complaints, even in states that have embraced targeted enforcement such as New York and Connecticut.

An employer who fears being caught committing wage theft in a complaint-driven system has an incentive to decrease the likelihood that their workers will file a complaint by hiring vulnerable workers, such as non-English speaking immigrants, who are less likely to complain, discouraging workers from complaining through threats of retaliation, or failing to provide workers with information about their labor rights as required by law. In a targeted enforcement system, none of these strategies works because whether or not a worker complains has no effect on whether the employer is discovered. The easiest way to target enforcement is to focus on industries where violations are the highest, such as the industries identified by the New York Exploited Worker Task Force: nail salons, farming, childcare, cleaning, home health care, laundry, restaurants, retail, construction, landscaping, car washes, supermarkets, janitorial services, truck and waste disposal.¹⁶⁵ Even within this list, some industries have higher rates of wage theft than others. For example, targeted enforcement focused on the restaurants, farms, and nail salons would likely net a high percentage of legal violations.¹⁶⁶

There may also be a role for the use of data tools in choosing which employers to target for enforcement actions. The U.S. DOL has eighty years

163. See Chris Fuchs, *New York Nail Salons Ordered to Pay \$2 Million in Unpaid Wages, Damages*, NBC NEWS (May 11, 2016), <http://www.nbcnews.com/news/asian-america/new-york-nail-salons-ordered-pay-2-million-unpaid-wages-n572021> [<https://perma.cc/H9Q8-RJN9>].

164. See Mark Pazniokas, *Nail Salons Are Ubiquitous, and So Are Labor Violations*, CT MIRROR (Aug. 17, 2015), <https://ctmirror.org/2015/08/17/nail-salons-are-ubiquitous-and-so-are-labor-violations> [<https://perma.cc/7853-GUYR>].

165. See *Joint Task Force on Worker Exploitation and Employee Misclassification: About the Task Force*, N.Y. ST., <https://www.ny.gov/end-worker-exploitation/task-force-combat-worker-exploitation> [<https://perma.cc/9CVA-5LG2>].

166. For example, a targeted sweep of restaurants by the U.S. Department of Labor found 84% of targeted restaurants were committing at least one wage and hour violation. See Sylvia A. Allegretto, *Waiting for Change: Is It Time to Increase the \$2.13 Subminimum Wage?* 1, 5 n.2, INST. RES. ON LAB. EMP. (2013), <http://irle.berkeley.edu/files/2013/Waiting-for-Change.pdf> [<https://perma.cc/7HYM-8JAF>].

of enforcement data about which employers have been found to violate the law. This data could be useful for identifying patterns of wage theft and characteristics of wage theft violators. In addition to industry, algorithmic analysis could take into account worker characteristics, geography and neighborhood, sub-industry, pricing, tax records, and products to identify employers who are likely to be violating wage and hour laws and who could be subjected to targeted enforcement. In some industries, such advanced targeting techniques may not even be necessary. As long as wage theft rates remain high, almost any targeted employer is likely to be violating the law. It is much easier to find a needle in a haystack when the haystack is made of needles.¹⁶⁷

Targeted enforcement can also include use of routinized records inspections to identify potential noncomplying employers. Employers are required to keep payroll records under federal and many state laws and records violations can result in civil penalties and fines.¹⁶⁸ Many noncomplying employers do not, precisely because such records would reveal legal violations.¹⁶⁹ Records inspections would require fewer resources per employer than full-scale wage and hour investigations, which also usually include extensive worker interviews and other investigatory techniques.¹⁷⁰ If an employer is found to lack payroll records during a records inspection or there were indicia of fraud found in the records themselves, then the employer could be fined and a full investigation could be opened. Importantly, if such records inspections were conducted randomly, then employers could not take any steps to avoid an inspection and possible discovery. Even if records inspections were not used to identify non-complying employers, merely enforcing the records keeping requirements would increase employer compliance by

167. A common joke in workers' rights circles goes like this: which restaurant is more likely to be violating the law—the restaurant sued last year for wage theft, or the restaurant next door that has never been sued. The answer is the restaurant next door. The restaurant who was sued actually may now be complying with the law, whereas it's probably business as usual at the restaurant next door.

168. See, e.g., 29 C.F.R. § 516 (2018) (recordkeeping requirements under the FLSA); *Fact Sheet #21: Recordkeeping Requirements Under the Fair Labor Standards Act*, U.S. DEP'T LABOR, <https://www.dol.gov/whd/regs/compliance/whdfs21.htm> [<https://perma.cc/9TPM-EQMZ>].

169. See Bernhardt et al., *supra* note 58 at 827 (finding that employers who pay in cash or do not use time clocks more likely to be wage and hour violators).

170. See, e.g., *Fact Sheet #44: Visits to Employers*, U.S. DEP'T LABOR, WAGE AND HOUR DIVISION, <https://www.dol.gov/whd/regs/compliance/whdfs44.htm> [<https://perma.cc/X8K3-R8R8>] (explaining DOL investigation process).

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making it more difficult for non-complying employers to commit violations.¹⁷¹

Finally, targeted enforcement should focus on “repeat offenders,” who continue to violate the law even after being discovered. Typically, once the U.S. DOL or the state labor agencies close an investigation, no follow up investigation occurs unless a worker files another complaint. A targeted enforcement program could make these employers a priority and keep investigations open by conducting periodic inspections of these employers. If this were the norm, one worker complaint would lead to years of increased scrutiny of the employer’s labor practices, further deterring violations.

B. Improved Complaint Process

It may not be wise to move away from a complaint system altogether. A worker who is owed wages and who cannot find private counsel should not have to wait for a targeted enforcement action to recoup them. Moreover, the complaint process, while imperfect, has the benefit of identifying employers who are more likely to be violating the law, and can lead to targeted enforcement that focuses on employers who have already been caught, as discussed above. But it should be possible to improve the complaint system so that it does a better job of deterring employer behavior.

First, states could take steps to encourage the most vulnerable workers to come forward to make complaints when their employer fails to pay them what they are owed. One way to accomplish this goal is through public education, because a worker who does not know his rights cannot file a complaint. States already recognize how important it is that workers

171. Immigration and Customs Enforcement (ICE) uses this same tactic to enforce the prohibition against hiring undocumented workers. Employers are required by law to keep “I-9” forms for each employee that confirm employees have valid work authorization. ICE routinely conducts “I-9” inspections of this paperwork and non-complying employers are fined. ICE conducts these records inspections in addition to more traditional enforcement actions that may lead to more serious civil or criminal penalties. See *Form I-9 Inspection Overview*, U.D. IMMIGRATION & CUSTOMS ENFORCEMENT, <https://www.ice.gov/factsheets/i9-inspection> [<https://perma.cc/K4SY-WQRU>]; Andorra Bruno, *Immigration-Related Worksite Enforcement: Performance Measures*, CONG. RES. SERV. (2015), <https://fas.org/sgp/crs/homesecc/R40002.pdf> [<https://perma.cc/F7XK-LKRX>].

know their rights, as evidenced by the requirement under FLSA and some state labor laws that employers post a notice about wage and hour laws.¹⁷²

Fundamentally, there are two problems with relying on notice posting to educate workers about their rights. First, wage and hour law is too complicated to impart sufficient information in a one-page poster. For instance, the federal wage and hour poster, after explaining basic minimum wage and overtime rights, states that “[c]ertain occupations and establishments are exempt from the minimum wage, and/or overtime pay provisions” but does not explain what the exemptions are.¹⁷³ The notice also briefly explains that employees are generally entitled to the minimum wage and overtime while “independent contractors” are not, but does not explain what the definition of each is.¹⁷⁴ It would be next to impossible to provide enough information for workers to determine whether their rights are being violated.

Second, notice posting relies on employers, whose incentives lie not in educating workers, but in keeping them in the dark. Not surprisingly, employers who are violating the law are the least likely to follow the posting requirements. The notices are supposed to be posted in “conspicuous places” so as to allow workers “to observe readily a copy,”¹⁷⁵ but often they are not. The notice is available in other languages,¹⁷⁶ but with a few exceptions, there is no requirement that employers post it in

172. *See, e.g.*, Workplace Posters, U.S. DEP’T LABOR, <https://www.dol.gov/whd/resources/posters.htm> [<https://perma.cc/2TRM-FCCG>]; *Posting Requirements for Oregon Employers*, OREGON.GOV, http://www.oregon.gov/boli/ta/pages/req_post.aspx [<https://perma.cc/NV5W-LHKA>]; *Workplace Postings*, CAL. DEP’T INDUS. REL., <https://www.dir.ca.gov/wpnodb.html> [<https://perma.cc/MZD9-NUEK>]; *Employment-Related Posters*, ALASKA DIVISION LAB. STANDARDS & SAFETY, <http://labor.alaska.gov/lss/posters.htm> [<https://perma.cc/GRH6-EARB>]; *DWD Workplace Posters*, WIS. DEP’T WORKFORCE DEV., <https://dwd.wisconsin.gov/dwd/posters.htm> [<https://perma.cc/R5A4-Q9KN>].

173. *Minimum Wage Poster*, U.S. DEP’T LABOR, <https://www.dol.gov/whd/regs/compliance/posters/minwage.pdf> [<https://perma.cc/A8GN-9YGN>].

174. *Id.*

175. 29 C.F.R. § 516.4 (2017).

176. The federal minimum wage poster is available in many different languages, *see* <https://www.dol.gov/whd/pubs-by-language.htm> [<https://perma.cc/7VQ8-L4FA>], but there is no requirement that employers post it in any language other than English.

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any language except English.¹⁷⁷ Some employers fail to post the notice at all,¹⁷⁸ and with such a small likelihood of a surprise inspection by DOL, most employers who violate the posting requirements are never caught.

The first problem could be solved by having new employees watch a video about wage and hour laws, which would allow more information to be imparted than can be conveyed on a poster. But solving the second problem requires that we rethink whose responsibility it is to educate workers about their rights. The state labor agencies have a role to play here, and state wage theft campaigns could focus on getting these agencies to embrace this role. Different strategies may work in different places. In dense urban centers, state agencies could open neighborhood store front offices where workers could go to get information, ask questions, and file complaints. In rural areas, agencies may need to employ more online education through phone apps or chat programs, which could allow workers to get information through the internet.¹⁷⁹ In farming communities with large populations of workers without consistent internet access, agencies may need to get creative; for instance, there may be a role for mobile labor vehicles that visit rural farms and dispense information.¹⁸⁰ The information is available now for those workers who actively seek it out, but most workers will not and may not have the time or resources to do so. Workers with more information are more likely to file complaints, and would allow the complaint-based system to uncover problems across all industries and workers.

Even workers who know their rights will not file complaints if the benefit of complaining is uncertain and the risk of complaining is high. Reforms should address both sides of this equation. On the benefit side, wage theft campaigns should advocate for state labor agencies to set timelines for investigating wage claims and to mandate that all wage

177. See *Frequently Asked Questions*, U.S. DEP'T LABOR, [http://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=546&faqsub=Office+of+the+Assistant+Secretary+for+Policy+\(OASP\)&faqtop=Agencies+%26+Offices](http://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=546&faqsub=Office+of+the+Assistant+Secretary+for+Policy+(OASP)&faqtop=Agencies+%26+Offices) [<https://perma.cc/N3MF-UJRB>].

178. I have litigated countless cases against employers where the employer failed to post the required notice, or posted it in a place where employees could not read it.

179. The U.S. DOL has a phone app called "Timesheet," which allows workers to keep records of their pay and hours if their employer does not do it for them. The U.S. DOL, however, does not have an app that allows workers to interface with a live person over the internet to get information or file a complaint.

180. For an example of this type of worker education see Nanny Van, <http://www.nannyvan.org> [<https://perma.cc/BCH4-4C77>].

claims get resolved. These administrative reforms will only work if more resources are devoted to investigating wage claims. Much of the current problem with long delays has to do with the small number of investigators available to handle claims. It is unrealistic to expect the same number of investigators to resolve claims at a substantially faster rate.

However, there may be ways to make the complaint process more efficient even with limited resources. For instance, one persistent problem is that employers stonewall investigations, missing agency-imposed deadlines for turning over records in wage disputes.¹⁸¹ Investigators spend countless hours simply trying to get information from employers, which delays the resolution of the claims and decreases the number of complaints that can be handled by each investigator. One way to solve this problem is to institute a default system not unlike default judgment available under Rule 55 of the Federal Rules of Civil Procedure. State agencies could give employers a certain amount of time to respond—say, thirty days—and then issue an order in favor of the worker if the employer fails to respond. Under federal law, if an employer fails to maintain payroll records, then the worker can prove his claim for unpaid wages through his testimony alone.¹⁸² This rule could also be instituted by state labor agencies, which would incentivize employers to keep records and also could allow for faster resolution of wage claims.

On the risk side, state labor agencies could do more to ensure that workers who file complaints are not retaliated against by employers. Beyond vigorously enforcing anti-retaliation laws, one way to do this is to use new technology to allow for truly anonymous complaints. The U.S. DOL and some state labor agencies currently have policies in place that protect the identities of workers who complain.¹⁸³ But the agencies still know the workers' identities. Workers may not trust that the agency will keep the complaint confidential and they may have reason to worry. The U.S. DOL, for instance, tells workers up front that they may have to turn over the identity of complaining witnesses if the dispute ends up in court.¹⁸⁴ State

181. I have observed this in many wage and hour investigations at both the state and federal level that I have observed through my representation of witnesses.

182. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

183. *See Fact Sheet #44: Visits to Employers*, *supra* note 170 (“All complaints are confidential; the name of the worker and the nature of the complaint are not disclosable; whether a complaint exists may not be disclosed.”); WINNING WAGE JUSTICE, *supra* note 79 at 58 (noting nine states that keep workers’ identities confidential).

184. *See Frequently Asked Questions: How to File a Complaint*, U.S. DEP’T LABOR, https://www.dol.gov/whd/faq_workers.htm [<https://perma.cc/46DA-G72Y>]

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laws governing confidentiality contain similar caveats.¹⁸⁵ Some organizations such as Wikileaks and the Intercept have created portals through which informants can provide information related to government malfeasance and other sensitive subjects.¹⁸⁶ These portals allow individuals to remain anonymous even to the organizations themselves, thus mitigating the risk that individuals' identities will be revealed. The U.S. DOL and state labor agencies could create similar portals for worker complaints.¹⁸⁷

Immigrant workers are especially at risk of retaliation. Unfortunately, most measures designed to protect immigrant workers must be implemented by the federal government, which is exclusively responsible for immigration enforcement. For instance, only the federal government can ensure that employers' efforts to retaliate against immigrant workers are unsuccessful by refusing to follow up on tips related to labor disputes. A Memorandum of Understanding (MOU) between U.S. DOL and Immigration and Customs Enforcement (ICE) that has been in place since at least 1998 prohibits ICE from initiating enforcement actions during pending DOL investigations.¹⁸⁸ It also requires ICE to assess "whether tips

] (complaints are not confidential "when the WHD [Wage and Hour Division] is ordered to reveal information by a court").

185. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-364(C) (2018) ("The name of any employee identified in a complaint to the commission shall be kept confidential as long as possible. Where the commission determines that an employee's name must be disclosed in order to investigate a complaint further, it may do so only with the employer's consent.").

186. The Intercept uses a system called securedrop, through which individuals can provide information in a secure, anonymous way. *See The Intercept Welcomes Whistleblowers*, INTERCEPT, <https://theintercept.com/leak> [<https://perma.cc/VF4A-783D>]. Wikileaks uses a system called TAILS (The Amnesic Incognito Live System), which allows users to run a program off a USB drive to transmit documents and communicate with Wikileaks anonymously. *See TAILS*, <https://tails.boum.org> [<https://perma.cc/J6S2-A8E3>]; *Submit documents to Wikileaks*, WIKILEAKS, https://wikileaks.org/index.en.html#submit_help_tor [<https://perma.cc/7C69-NWH9>].

187. Some states already allow for anonymous complaints. *See WINNING WAGE JUSTICE*, *supra* note 79, at 58 (identifying six states that allow for anonymous complaints). However, workers in these states are limited to filing paper complaints by mail using claim forms which ask for the worker's name. Workers may not be aware that they can file a complaint anonymously. Moreover, allowing workers to file such complaints electronically would increase accessibility to the complaint process.

188. *See* John Morton & M. Patricia Smith, *Revised Memorandum of Understanding between the Departments of Homeland Security and Labor*

and leads it receives concerning worksite enforcement are motivated by an improper desire to manipulate a pending labor dispute, retaliate against employees for exercising labor rights, or otherwise frustrate the enforcement of labor laws.”¹⁸⁹ In practice, until very recently, ICE rarely followed up on tips received during the course of a labor dispute. However, the Trump Administration’s commitment to deconfliction of labor and immigration enforcement appears weak, even though the MOU remains in effect. In California, ICE agents have attempted to arrest several workers scheduled to appear for interviews or meetings with the Labor Commissioner’s Office since November 2016.¹⁹⁰ Current and former staff of U.S. DOL have reported that immigrant workers have begun refusing to cooperate in investigations due to fears that they will be reported to ICE and deported.¹⁹¹ This policy shift will almost certainly lead to fewer workers filing complaints and more labor exploitation.

Another needed reform at the federal level is an expansion of the U-visa program to explicitly cover employees retaliated against during labor disputes. Currently, immigrant victims of certain crimes are eligible for relief from deportation and a path to a green card,¹⁹² but the list of qualifying crimes is circumscribed.¹⁹³ The U.S. DOL and some state labor agencies currently certify immigrant workers for U visas as victims of

Concerning Enforcement Activities at Worksites, DEP’T OF HOMELAND SECURITY & U.S. DEP’T LABOR, 2 (2011), <https://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf> [<https://perma.cc/8D52-GSW5>].

189. *Id.*

190. See Natalie Kitroeff, *Officials Say Immigration Agents Showed Up at Labor Dispute Proceedings. California Wants Them Out*, L.A. TIMES (Aug. 3, 2017), <http://www.latimes.com/business/la-fi-ice-california-labor-20170802-story.html> [<https://perma.cc/8JSE-8JUS>].

191. See Sam Levin, *Immigration Crackdown Enables Worker Exploitation, Labor Department Staff Say*, GUARDIAN (Mar. 30, 2017), <https://www.theguardian.com/us-news/2017/mar/30/undocumented-workers-deportation-fears-trump-administration-department-labor> [<https://perma.cc/VB5K-5N78>].

192. 8 U.S.C. § 1184(p) (2018).

193. The statutory list of qualifying crimes is: rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, stalking, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, fraud in foreign labor contracting, or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. See 8 U.S.C. § 1101(U)(iii) (2012).

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certain existing qualifying crimes, such as witness tampering, obstruction of justice, and extortion.¹⁹⁴ Expanding the list of qualifying crimes to include retaliation would give federal and state agencies an important tool to protect workers who have complained of wage theft.

As in the case of the MOU, expanded U-visa protection for workplace crimes will only protect immigrant workers to the extent that federal immigration officials share that goal. Obtaining a U visa is a long process and ICE can legally remove individuals while their U visa applications are pending. During the Obama Administration, ICE had a policy of not removing victims of crime who were eligible for U visas.¹⁹⁵ This policy appears to have changed.¹⁹⁶

States can do very little to encourage immigrant workers to come forward as long as federal immigration policy remains an obstacle. Advocates should pressure labor agencies in states that do not currently certify U visas for workplace crimes to do so and to fully enforce anti-retaliation laws against employers who retaliate by calling immigration on their workers. But if the federal government wishes to deport immigrant workers while their U visa applications are pending, there is very little that states can do. This means that, ultimately, states must rely on tools other than complaints to deter employers from violating the law, particularly

194. See *IDOL Policy Memorandum: Obtaining U-Visas in Investigated Cases*, ILL. DEP'T OF LABOR, <https://www.nationalimmigrationproject.org/PDFs/il-dol-protocol.pdf> [<https://perma.cc/RT65-7L2B>]; *Memorandum & Order Regarding Certification of U Visa Petitions, U Visa Protocol*, N.Y. ST. DEP'T LABOR, <https://www.nationalimmigrationproject.org/PDFs/ny-dol-protocol.uvisa.pdf> [<https://perma.cc/G576-LBAB>]; *U and T Visa Certifications*, U.S. DEP'T LABOR, <https://www.dol.gov/whd/immigration/UTCert.htm> [<https://perma.cc/HNB4-VMF7>]; *U and T Visa Certifications*, CAL. DEP'T FAIR EMP. HOUSING, <https://www.dfeh.ca.gov/u-and-t-visa-certifications> [<https://perma.cc/3JGV-CV4A>].

195. See U.S. Immigration and Customs Enforcement, *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal* (Sept. 25, 2009), https://www.ice.gov/doclib/foia/dro_policy_memos/vincent_memo.pdf [<https://perma.cc/X4YZ-ML4D>]; U.S. Immigration and Customs Enforcement, *Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-visa) Applicants*, Sept. 24, 2009, available at https://www.ice.gov/doclib/foia/dro_policy_memos/11005_1-hd-stay_requests_filed_by_u_visa_applicants.pdf [<https://perma.cc/59NB-MDDR>].

196. Nora Caplan-Bricker, *"I Wish I'd Never Called the Police"*, SLATE (Mar. 9, 2017), http://www.slate.com/articles/news_and_politics/cover_story/2017/03/u_visas_gave_a_safe_path_to_citizenship_to_victims_of_abuse_under_trump.html [<https://perma.cc/87GY-K9LR>].

employers who employ many immigrant workers.¹⁹⁷ Long term, only immigration reform that addresses the status of the millions of undocumented immigrants living and working in the United States will allow the wage crisis to be solved.

C. Utilization of All Enforcement Tools

Enforcement tools on the books are meaningless if enforcement agencies do not utilize them. In states with steep civil fines, for example, employers often get away with paying far less than the maximum amount for which they are liable under the law. Some states have experimented with making liquidated damages mandatory to ensure that penalties are actually imposed.¹⁹⁸ Expanded use of these mandatory damages provisions would decrease the possibility of employers paying no penalty beyond the wages owed.

But given that traditional monetary penalties have proven ineffective at deterring employer misconduct, it is important that states simultaneously explore alternate enforcement strategies. States must challenge employers' assumption that they can violate the law and at worst pay a fine. Instead, they must utilize tools that disrupt the use of wage theft as a business model.

For instance, states could enact "hot goods" provisions similar to the one that currently exists in FLSA, which permits a court to enjoin the transportation or sale of goods produced using unlawful labor practices.¹⁹⁹ The U.S. DOL has rarely used its power to enjoin the sale or transportation of "hot goods," despite the fact that it is a potent tool to force compliance with wage and hour laws.²⁰⁰ The U.S. DOL under Obama attempted to resurrect it, but ran into fierce opposition from employers.²⁰¹ In 2015, two

197. Undocumented workers are the most vulnerable to retaliation by employers. In the current political climate, however, even legal immigrants may fear that a call to ICE will result in negative consequences, particularly if the worker has undocumented family members.

198. *See, e.g.*, 2010 Wash. Legis. Serv. Ch. 42 (West 2018).

199. 29 U.S.C. § 215 (2018); *see* Karen L. Able, Note, "Hot Goods" Liability: Secured Creditors and the Fair Labor Standards Act, 87 COLUM. L. REV. 644, 644-47 (1987).

200. *See* Stephanie A. Koltookian, *Some (Don't) Like It Hot: The Use of the "Hot Goods" Injunction in Perishable Agriculture*, 100 IOWA L. REV. 1841, 1844 (2015).

201. *See* Gabriel Thompson, *Good Crop, Bad Crop*, SLATE (Aug. 2, 2016), http://www.slate.com/articles/business/the_grind/2016/08/the_hot_good

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blueberry growers successfully sued the Department of Labor, arguing that the “hot goods” provision was economically coercive when used to force a settlement in cases involving perishable produce.²⁰² The case was not a general challenge to the “hot goods” provision, however, and it remains one of the strongest tools that U.S. DOL currently has to force employer compliance.²⁰³ States—if they could overcome the immense opposition that would surely arise—could enact “hot goods” provisions of their own.

States could also utilize existing tools to raise the stakes for employers who commit the most egregious violations of the wage and hour laws. Most obviously, state law enforcement agencies could begin enforcing criminal wage theft laws. Since local police departments are often resistant to enforcing laws against wage theft to the same extent they enforce laws against other types of theft, states might need to create task forces to do this work. However, reliance on criminal enforcement also has disadvantages. There is the risk that criminal law enforcement against employers will ensnare workers as well. But the possibility of criminal penalties, including imprisonment, will send the message to employers that they cannot violate the law and get off with a slap on the wrist.²⁰⁴

Likewise, state labor agencies could use the ability to enjoin employers from violating wage and hour laws—and the corresponding recourse to contempt proceedings if the injunction is violated—to raise the personal risk an employer takes when violating the law. FLSA²⁰⁵ and sixteen states’ wage and hour laws²⁰⁶ allow courts to issue injunctions. FLSA permits the

s_provision_allows_the_labor_department_to_stop_wage_theft_it.html
[<https://perma.cc/6AVX-6W9X>].

202. See *Perez v. Pan-Am. Berry Growers, LLC*, No. 6:12-CV-1439-TC, 2014 WL 198781 (D. Or. Jan. 15, 2014), *report and recommendation adopted*, No. 6:12-CV-1439-TC, 2014 WL 1668254 (D. Or. Apr. 24, 2014).

203. See Koltookian, *supra* note 200.

204. Criminal penalties would not need to be severe to have the intended effect. Research suggests that it is the fact of criminal liability, not the extent of that liability, that deters illegal conduct. See Robinson & Darley, *supra* note 139.

205. 29 U.S.C. §§ 211, 217 (2018).

206. ALASKA STAT. § 23.05.115 (2018); ARK. CODE ANN. § 11-4-206(i) (2018); CONN. GEN. STAT. § 31-2(d) (2018); FLA. STAT. § 448.110(6)(c)(2) (2018); HAWAII REV. STAT. § 387-12(d)(1) (2018); IDAHO CODE ANN. § 44-1508(1) (West 2018); MASS. GEN. LAWS ch. 149, § 150 (2018); MINN. STAT. § 181.171, subd. 1 (2018); N.M. STAT. ANN. § 50-4-26(F) (2018); N.C. GEN. STAT. § 95-25.24 (2018); OR. REV. STAT. § 652.125 (2018); 28 R.I. GEN. LAWS § 14-19-2(a); TEX. LAB. CODE ANN. § 61.082 (2018); UTAH CODE ANN. § 34-40-205 (2018); WASH. REV. CODE § 49.48.060(2-3) (2018); W. VA. CODE § 21-5C-6(e) (2018).

U.S. DOL, but not private parties, to seek an injunction to restrain violations of minimum wage and overtime laws.²⁰⁷ States vary in whether private parties can seek injunctive relief or whether state labor agencies must bring such actions.²⁰⁸ But these provisions are rarely used at either the federal or state level.²⁰⁹ The threat of being held in contempt provides a much stronger deterrent than the possibility that the labor agency will file a new case somewhere down the road. It would at least ensure that employers who are caught committing wage theft do not become repeat offenders.

D. Recovery-First Enforcement

One of the problems with the current enforcement regime is that workers cannot be assured that they will recover their wages if they file a complaint. Thus, we should think about reordering the recovery process. A recovery-first enforcement regime would pay back wages to workers after an investigation by the relevant agency, which would then seek recovery from the employer in an enforcement action. The system could operate like the tax enforcement system does today. Employers would get a bill after an investigation that would require them to pay back wages, penalties, civil fines, and interest on wages already paid out to workers. Employers could then challenge the determination in court at their own expense. Because the money would be owed to the government, not an individual worker, the government could use all legal tools within its disposal to effectuate recovery, including liens, garnishment, and seizure of property and assets. A worker would file a “claim,” not a “complaint,” and would be assured that if the Department of Labor found the claim valid, it would result in real money in their pockets. The government would take the risk that the employer will be found insolvent or will disappear.

A few states and cities have already begun to experiment with a very limited form of recovery-first enforcement called wage pools, which collect revenues from employers and pool them to provide a fund of last resort for

207. Jordan Laris Cohen has argued that federal law should be changed to allow private parties to use the FLSA injunction that is currently only available to U.S. DOL. See Jordan Laris Cohen, *Democratizing the FLSA Injunction: Toward a Systemic Remedy for Wage Theft*, 127 YALE L.J. 706, 708-20 (2018).

208. *Id.* at 710-12.

209. A search of FLSA cases between 2013-2017 identified seventeen cases in which the U.S. DOL sought an injunction under 29 U.S.C. § 217.

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workers who are owed wages and are unable to collect them from their employers. Wage pools currently exist in Maine, Oregon, Ohio, California (for certain industries,) and the District of Columbia.²¹⁰ Some of these wage pools are limited with respect to how much money a worker can recover or which employers are covered. For instance, Maine's Wage Assurance Fund guarantees the final two weeks of wages owed by any employer who has terminated his or her business and/or declared bankruptcy.²¹¹ In Ohio, the wage pool is only available for violations of the state's prevailing wage statute, not for minimum wage violations.²¹² The District of Columbia's Wage Theft Prevention Fund is probably the broadest wage pool in the country because it contains no statutory limitations on who can recover or how much they can recover and states broadly that it "shall be used to enforce the provisions of this chapter, the Minimum Wage Revision Act, the Sick and Safe Leave Act, and the Living Wage Act."²¹³

Wage pools acknowledge that many workers will never be able to recover money they are owed directly from their employers. But even the broadest wage pools only pay out money to workers after they have exhausted all other avenues of recovery. To access wage pools, workers must still file a complaint, work through the complaint process, and obtain a wage judgment. Only if they are unable to collect on that judgment can they rely on the wage pool. This means that wage pools suffer from many of the same problems that afflict the traditional wage complaint process: most workers don't complain and those that do rarely make it all the way to obtaining a judgment, either because they are convinced to settle for pennies on the dollar or they drop the complaint altogether. Moreover, most wage pools would collapse if more than a fraction of workers owed money filed claims because their funding structure is not robust. Most are paid for by licensing fees or civil fines,²¹⁴ neither of which can sustain the billions of dollars a year that are owed to low-wage workers across the country.

A recovery-first enforcement regime would require more government resources than are available to wage pools to be successful. The government would need to operate under the assumption that it would be

210. *See* ME. REV. STAT. ANN. tit. 26, § 632 (2018); OHIO REV. CODE ANN. § 4115.101 (West 2018); OR. REV. STAT. § 657.439 (2018); CAL. LAB. CODE § 2675.5 (West 2018); D.C. CODE § 32-1307.01 (2018).

211. *See* ME. REV. STAT. ANN. tit. 26, § 632(1) (2018).

212. *See* OHIO REV. CODE ANN. § 4115.101 (West 2018).

213. D.C. CODE § 32-1307.01 (2018).

214. *Id.*

unable to recoup all of the wages paid out to workers. The government could finance recovery-first enforcement through increased civil fines, taxes, or some combination of both. Moreover, for such a system to be an effective deterrent, the government would still need to invest resources in effectuating recovery from employers; otherwise, employers would have little incentive to comply with the law, and the enforcement regime would turn into a wage supplementation program, in which the government would merely be subsidizing unscrupulous employers who break the law.

Nevertheless, it is worth considering whether the government is better suited than workers to take on the risk associated with recovering wages from recalcitrant employers.

E. Diffuse Enforcement

This Article has for the most part focused on enforcement by governmental agencies, but the scope of the problem requires that we also look to other actors to play a role in the enforcement of wage and hour laws. Centralized enforcement must be complemented by diffuse enforcement that keeps employers accountable even when they have not come to the attention of governmental authorities.

The private bar participates in diffuse enforcement by litigating wage and hour claims under the private right of action available under FLSA and state labor statutes,²¹⁵ but it fails to fill the gaps left by lax government enforcement for several reasons. First, as discussed above, there are simply not enough private attorneys who take wage and hour cases to solve the enforcement problem.²¹⁶ Moreover, the type of cases that the private bar takes are likely to leave the most vulnerable workers without legal representation, because lower value cases are less attractive to attorneys working on contingency. There may be reforms that would help—for instance, increasing liquidated damages makes cases with small damages amounts more profitable. A qui tam action would allow the private bar to collect civil fines and might encourage more civil suits.²¹⁷

215. See 29 U.S.C. § 216(b) (2018).

216. See *supra* Section II.

217. A qui tam action, which allows a private party to sue to recover damages owed to the government, is a well-established mechanism for increasing the incentive for private parties to engage in socially-desirable litigation. See David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1253 (2012). Qui tam actions under the False Claims Act have been used quite effectively to deter fraud against the government. *Id.*

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But other actors can contribute to diffuse enforcement. Labor unions traditionally played this role.²¹⁸ Workers in unionized workplaces had clear avenues for lodging complaints about wages and had protection from retaliation if they complained.²¹⁹ Today, most industries with high rates of wage theft have union density rates that approach zero.²²⁰ Stepping in are worker centers and other non-traditional labor organizations who, in addition to being the driving force behind many wage theft laws, also play the watchdog in many low-wage industries with low union density.²²¹ However, worker centers are not evenly distributed across the country. In places like New York and Los Angeles,²²² there are numerous worker centers providing these services. In smaller cities or rural areas, they either do not exist or exist in embryonic form.²²³ Encouraging the growth of the worker center movement is one way to indirectly address the wage theft crisis. Similarly, policies that foster labor unions are likely to have a positive effect on the prevalence of wage theft.

Another possibility is to require employers in industries with high wage theft rates to purchase “wage insurance,” which would both ensure that workers can recover their wages if they complain and also give private insurance companies the role of monitoring employers’ wage practices. Employers are already required to purchase workers’ compensation insurance and often obtain liability insurance for negligence claims. In the case of workers’ compensation insurance, the insurance

218. See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 326 (2005) (discussing the shift of workplace regulation from labor unions to administrative agencies).

219. Most collective bargaining agreements set up grievance procedures that union members can utilize if they have a complaint against their employer. See Sean C. Doyle, *The Grievance Procedure: The Heart of the Collective Agreement*, INDUS. REL. CENT. (1999), <https://irc.queensu.ca/sites/default/files/articles/the-grievance-procedure-the-heart-of-collcetive-agreement.pdf> [<https://perma.cc/7BRD-TP6U>].

220. For example, in 2017, the food service industry had a unionization rate of 1.4%. See BUREAU OF LAB. STAT., *Union Members—2017*, (Jan. 19, 2018), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/2ZSX-86GP>].

221. See FINE, *supra* note 101.

222. See Janice Fine, Tam Doan & Jon Werberg, *Worker Centers: Community-Based and Led Worker Organizing Projects*, NAT’L STUDY ON IMMIGRANT WORKER CTRS. (2005), http://www.cornellpress.cornell.edu/resources/titles/80140100932140/extras/Map_Worker-Centers.pdf [<https://perma.cc/HN66-N3YC>].

223. *Id.*

company often does a safety inspection to identify any issues that may give rise to future claims.²²⁴ Such inspections are not normally legally required, but certainly could be, and would identify potential legal violations before a worker complains.²²⁵

The incentive to obtain the lowest possible rates on wage insurance could create a deterrent effect that sporadic governmental enforcement could never achieve. If employers knew that their insurance rates would go up if they had a wage claim filed against them, it would encourage them to ensure their wage practices were compliant. Repeat violators, unable to procure private insurance, would be pushed out of business or would face additional penalties for failure to maintain insurance.²²⁶

A wage insurance system would work synergistically with the existing enforcement regime. Enforcement by either government agencies or private parties would still be necessary to prompt compliance; insurance companies would need to believe that there was a realistic probability that their clients would be subject to a wage action in order to be incentivized to police their clients. However, a wage insurance system would amplify the government resources spent on enforcement by enlisting private parties. Such a system would also make recovery easier because workers and agencies would be seeking recovery from centralized insurance companies rather than individual businesses.

Though no jurisdiction currently requires wage insurance, some do require employers to purchase a wage “bond” as insurance against future wage claims. Wage bonds are most common in the construction

224. John Dwight Ingram, *Liability of Insurers for Negligence in Inspection of Insured Premises*, 50 *DRAKE L. REV.* 623, 624 (2002).

225. The workers' compensation regime is not without its problems. The lack of a private cause of action and the limitations on damages for workplace injuries has arguably made workers less safe by failing to adequately deter employer misconduct. See Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 *HOUS. L. REV.* 119, 119-29 (1994) (discussing the failures of the worker compensation regime to lower rates of workplace injuries).

226. In every insurance market, there are “uninsurable” individuals or companies that are unable to purchase insurance on the open market without regulatory controls. For example, prior to the enactment of the Affordable Care Act, approximately 16% of Americans were unable to purchase health insurance on the private market. See Gary Claxton et al., *Pre-existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA*, KAISER FAM. FOUND. (Dec. 2016), <https://www.kff.org/health-reform/issue-brief/pre-existing-conditions-and-medical-underwriting-in-the-individual-insurance-market-prior-to-the-aca> [<https://perma.cc/HZ5S-DP97>].

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industry²²⁷ and agricultural sector,²²⁸ but have begun to spread to other industries as well. For instance, in New York, nail salons are required to procure a wage bond of between \$25,000 and \$125,000 depending on the number of employees.²²⁹ Wage insurance, in the form of bonds or a more traditional insurance policy, could be expanded to all low-wage industries or even to all employers below a certain size. Importantly, wage insurance could be designed and implemented by state and local jurisdictions, which would allow the program to be narrowly tailored to respond to local patterns of wage theft.

The more eyes there are on employers, the less likely employers will be able to commit wage theft with impunity. Given the scope of the problem, no single actor can do it. The private bar, labor unions, worker centers, and insurance companies all have a role to play in deterring wage theft.

V. SOCIAL NORMS AGAINST WAGE THEFT

Many employers are clearly acting in their economic self-interest when they commit wage theft. The risk that they will get caught and have to pay a penalty is low, and the profit they stand to gain is substantial. Yet it is also true that most employers do not commit wage theft, despite the clear economic benefit of doing so. Why? In short, because some employers are obeying extrinsic or internalized social norms.

People obey the law for all sorts of reasons, only some of which relate to avoiding detection and legal consequences.²³⁰ In particular, social norms encourage compliance with the law even when it is otherwise adverse to one's self-interest.²³¹ In many cases, social norms are more effective at

227. *See, e.g.*, KY. REV. STAT. § 337.200 (West 2018); MICH. CON. LAWS ANN. § 129.203 (2018).

228. *See, e.g.*, CAL. LAB. CODE § 1684(a)(3) (West 2018); NEB. REV. STAT. ANN. § 48-1705 (West 2018).

229. *See* New York State Nail Salon Industry Enforcement Task Force, *Nail Salon Wage Bond Coverage FAQs*, N.Y. DEP'T ST., <https://www.dos.ny.gov/licensing/appearance/Wage%20Bond%20FAQs.pdf> [<https://perma.cc/EE2-XFVM>].

230. *See* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3-4 (1990) (identifying both "instrumental" and "normative" reasons that people obey the law).

231. *See* DONALD BLACK, *THE BEHAVIOR OF LAW* 106-107 (1976); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354-55 (1997). Social norms act like an alternative form of social control that affect behavior through indirect means. *See also* Lawrence Lessig, *The New*

regulating behavior²³² and more resource efficient than traditional deterrence. Indeed, most enforcement regimes would be prohibitively expensive without reliance on norms of voluntary compliance.²³³ Changing social norms is difficult, but it can happen quite quickly under the right circumstances, as evidenced by the successes of other social movements in recent years, such as the fight for gay rights,²³⁴ marijuana legalization,²³⁵ and #metoo.²³⁶

Social norms work to change employer behavior in several ways. First, violating well-established social norms may harm employers' economic or reputational interests.²³⁷ Consumers may decide to take their business elsewhere. Publicly traded companies may see their stock price fall. Business owners may also experience a social cost to being a norm-violator.²³⁸ Second, as Mitt Romney once said, "corporations are people,

Chicago School, 27 J. LEGAL STUD. 661, 662 (1998) (identifying law, market forces, and social norms as alternative models of social control).

232. See Tracey Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579, 594 (1997).

233. See TYLER, *supra* note 230, at 4 ("If police officers and judges need to compel the public to obey by threatening or using force, they are required to expend enormous amounts of resources.").

234. See JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* (2014).

235. See *U.S. Public Opinion on Legalizing Marijuana, 1969-2017*, PEW RES. CTR. (Jan. 5, 2018), http://www.pewresearch.org/fact-tank/2018/01/05/americans-support-marijuana-legalization/ft_18-01-05_marijuana_line_update [<https://perma.cc/2QVY-GW8F>] (citing a study showing that support for marijuana legalization has gone from 16% in 1990 to 61% today).

236. See Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979> [<https://perma.cc/TF5B-22RT>] (describing the rapid rise and spread of the #metoo movement).

237. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997).

238. For an example of how social shaming could work in this context, see Alan Dershowitz, a professor emeritus at Harvard Law School, who has vehemently defended President Trump and who has complained that his former friends on Martha's Vineyard have shunned him for violating norms of acceptable behavior. See Niraj Choksi, *Alan Dershowitz Says Martha's Vineyard Is 'Shunning' Him Over Trump*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/alan-dershowitz-marthas-vineyard.html> [<https://perma.cc/W6QA-VGXT>].

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my friend.”²³⁹ Employers are often corporate entities, but they are still comprised of individual people making individual decisions about whether to follow wage and hour laws. Employers make those decisions in part based on the social norms they have internalized.²⁴⁰

The data on wage theft suggests that social norms play an important role in minimum wage compliance. For instance, Daniel Galvin has demonstrated that minimum wage compliance is higher in states that are more ideologically liberal or identify more strongly with the Democratic Party and posits that these states’ political orientations leads to a “culture of compliance.”²⁴¹ Similarly, research suggests that employers with high brand visibility are less likely to engage in wage theft because they fear reputational harms, an outward manifestation of social norms.²⁴² By contrast, the employer who bragged committing that wage theft was “the way business works in America” was expressing the opposite norm—that wage theft is normal and morally acceptable.

Those wanting to change social norms around wage theft should look to strategies used by other social movements with great success.²⁴³ These strategies can be broadly placed into three categories: reframing, naming, and shaming.

239. Phillip Rucker, *Mitt Romney Says Corporations Are People*, WASH. POST (Aug. 11, 2011), https://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html [https://perma.cc/6NYJ-SA4V].

240. See TYLER, *supra* note 230 (arguing that people obey the law because they believe that the law is just); McAdams, *supra* note 237, at 339.

241. Galvin, *supra* note 104, at 333.

242. See David Weil, *Examining the Underpinnings of Labor Standards Compliance in Low Wage Industries*, RUSSELL SAGE FOUND. (2012), <http://www.russellsage.org/sites/all/files/Weil.Final%20Report%202012.pdf> [https://perma.cc/7WLP-XR68]. Working for a large corporation does not fully insulate low-wage workers from wage theft. For example, Wal-Mart recently paid \$4.83 million to 4,500 workers as part of a U.S. DOL settlement for failure to pay overtime. See *Press Release, US Department of Labor Recovers \$4.83 Million in Back Wages, Damages for more than 4,500 Wal-Mart Workers*, U.S. DEP’T LABOR (May 1, 2012), <https://www.dol.gov/newsroom/releases/whd/whd20120501> [https://perma.cc/J882-PF4X].

243. Cass Sunstein has written about so-called “norm entrepreneurs,” who identify social norms standing in the way of social change and work to change them. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2030 (1996).

A. Reframing the Issue

The language we use to discuss a problem is an important part of how social norms develop. We have seen this most recently with the movement to address sexual harassment and assault in the workplace, known as the #metoo movement.²⁴⁴ One of the lasting victories of the movement may be the push to reclassify a large body of male behavior, previously considered “normal,” as aberrant or criminal, largely by changing the words we use to describe it. #Metoo activists consistently use words previously reserved for more extreme behavior, such as assault, harassment, hostile work environment, and abuse of power. Opponents in turn have tried to use words with a different moral valence, such as “flirting,” “eros,” and “sexual banter.”²⁴⁵ This war of words is meaningful because social norms are influenced by the normative value of language.

Worker centers and labor advocates have used a similar strategy. The campaign to reframe minimum wage non-compliance as “wage theft,” discussed earlier in this Article, is an attempt to give moral valence to the practice by associating it with a concept—theft—with clear normative implications. The actual practice of failing to pay workers legal wages has remained the same, but the language used to describe that practice signals its social significance. An employer is perhaps less likely to cheat workers if he thinks of it as stealing as opposed to thinking about it as a regulatory violation. A customer is perhaps more likely to avoid a restaurant that is committing “wage theft” rather than committing a minimum wage violation. A worker is more likely to file a complaint or march in the streets if he or she feels like a victim of a crime, rather than of an accounting error.

The way that the justice system classifies particular conduct can provide a similar signaling role. Criminalizing conduct, even if penalties remain low, can give rise to stronger social deterrence because of the expressive function of declaring something a criminal act.²⁴⁶ Social movements have often relied on the criminalization or decriminalization of conduct to advance social causes. For example, advocates for gender equality have pushed for affirmative consent laws in part on the theory

244. See *Me Too*, ME TOO MOVEMENT, <https://metoomvmt.org> [<https://perma.cc/M29S-9YTW>].

245. Daphne Merkin, *Publicly, We Say #MeToo. Privately, We Have Misgivings*, N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html> [<https://perma.cc/9VVD-JTLF>].

246. See e.g., Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 615 (1998); McAdams, *supra* note 237, at 398; Robinson & Darley, *supra* note 139, at 475-76; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 964 (1996).

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that they will change social norms about sexual assault.²⁴⁷ This principle works in reverse as well. For instance, LGBT advocates worked for years to overturn laws that criminalized homosexual conduct on the theory that these laws contributed to social stigma.²⁴⁸ Criminalization or decriminalization can have clear and swift effects on public opinion.²⁴⁹ Just look at the public's perception of marijuana legalization in the few years since the first states laws legalized its sale and use.²⁵⁰ Of course, these examples suffer from a kind of chicken-and-egg problem: which came first, the laws or the social norms? Social norms must be in the process of changing for legislators to even consider changing the law. But legal changes clearly accelerate social changes and vice versa.²⁵¹

Governments trying to address the wage theft crisis can use this same strategy. For instance, making wage theft a criminal offense would not change the economic calculus because criminal wage theft laws are essentially unenforced. But classifying wage theft as a crime may itself change the way the public and employers think about it.²⁵² Likewise, passing a law that revokes business licenses for wage theft violators sends a signal that wage theft is a serious offense. That perception, more than the number of business licenses that actually get revoked, may drive increased compliance. Other reforms, such as moving from double to treble damages, are unlikely to have the same signaling effect because the difference is one of degree not kind. Because of the difficulty of changing the economic calculus in a meaningful way, policy reforms may be more successful as norm-setting devices.

B. Spotlighting the Problem

Like many social ills, wage theft has flourished in part because it has existed in the darkness. Shedding light and naming the problem can quickly change social norms around a practice. A clear example of this

247. See Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 444 (2016).

248. See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 104 (2000).

249. See McAdams, *supra* note 237, at 405.

250. Support for marijuana legalization has gone from 31% in 2000 to 61% in 2018. See Abigail Geiger, *About Six-In-Ten Americans Support Marijuana Legalization*, PEW RES. CTR. (Oct. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/01/05/americans-support-marijuana-legalization> [<https://perma.cc/6VW6-Y2CY>].

251. See McAdams, *supra* note 237, at 401-03.

252. See Robinson & Darley, *supra* note 139, at 173.

strategy in action was the public campaigns about sweatshops in the developing world that sprang to light in the 1990s and early 2000s.²⁵³ A practice that many companies once employed with impunity became radioactive overnight not because the problem changed or worsened, but because the broader public discovered that it existed. Moreover, research has shown that anti-sweatshop advocacy resulted in higher wages for unskilled workers in developing countries.²⁵⁴

Similarly, worker centers have been successful in raising awareness of wage theft. Traditional labor unions have gotten into the game as well, adopting worker center strategies of engaging in industry-wide campaigns that seek to raise working conditions through advocacy and public awareness. Campaigns such as the Fight for Fifteen and Healthcare Workers Rising have flourished with support from the Service Employees International Union.²⁵⁵ These campaigns have focused much of their energy on raising the minimum wage, but also have brought public attention to the issue of wage theft.²⁵⁶ Unions and worker centers have begun working together, as evidenced by the partnership between the AFL-CIO and the National Day Laborer Organizing Network.²⁵⁷ These campaigns seek to shed light on industry practices. In this way, campaigns for local wage theft laws are important because they raise awareness of the problem of wage theft, even if the policy changes do little to deter employer conduct on their own.

253. See Steven Greenhouse, *Anti-Sweatshop Movement Is Achieving Gains Overseas*, N.Y. TIMES (Jan. 26, 2000), <http://www.nytimes.com/2000/01/26/us/anti-sweatshop-movement-is-achieving-gains-overseas.html> [<https://perma.cc/E53R-ZSCD>].

254. See e.g., Ann Harrison & Jason Scorse, *Multinationals and Anti-Sweatshop Activism*, 100 AM. ECON. REV. 247, 247-48 (2010).

255. See Steven Greenhouse, *How to Get Low-Wage Workers Into the Middle Class*, ATLANTIC (Aug. 19, 2015), <https://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540> [<https://perma.cc/7CEL-LG8E>] (discussing the long-term viability of SEIU's strategy of underwriting Fight for Fifteen-style campaigns); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 83 (2016).

256. See, e.g., Fight for Fifteen, *In Fast Food, Wage Theft Runs Rampant*, <https://fightfor15.org/unionsforall/2016/11/27/in-fast-food-wage-theft-runs-rampant/> [<https://perma.cc/755K-64GS>].

257. See Jayesh M Rathod, *The AFL-CIO—NDLON Agreement: Five Proposals for Advancing the Partnership* (Human Right Brief 14, Paper No. 3, 2007).

C. *Shaming Bad Employers*

Another way to deter wage theft is to use the power of public shaming against employers who violate the wage and hour laws.²⁵⁸ Too often, wage complaints are resolved quietly and outside of the public eye. Consumers have no way of knowing whether a particular business commits wage theft or not. In the age of consumer boycotts,²⁵⁹ where the public often votes with their pocketbooks against companies' policies, this is a missed opportunity. Wage judgments against employers should be searchable on state labor agency websites and the results of large investigations should be publicized in the press. Employers are more likely to comply with the law if they fear that not doing so will negatively affect their bottom line beyond what they may have to pay in unpaid wages and penalties. Worker centers and other alternative labor organizations have used this strategy very effectively for many years.²⁶⁰ For the most part, state labor agencies have not.²⁶¹

Conversely, states could implement programs that reward employers who do comply with the law. The Restaurant Opportunity Center (ROC) has pioneered the technique of identifying and trumpeting so-called "high road" employers.²⁶² State labor agencies could expand on this idea by creating a certification that employers could seek, establishing that they

258. See Emily Chiang, *Institutional Reform Shaming*, 120 PENN ST. L. REV. 53, 74 (2015); Sunstein, *supra* note 246, at 941.

259. See Richard Levick, *The 'Trump Effect': Consumer Boycotts Could Become Pervasive On Both Sides*, FORBES (Dec. 5, 2016), <https://www.forbes.com/sites/richardlevick/2016/12/05/the-trump-effect-consumer-boycotts-could-become-pervasive-on-both-sides> [<https://perma.cc/FP7Z-M3UF>].

260. See Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 434 (2006).

261. There have been some high-profile exceptions, particularly after a settlement has been reached. See, e.g., Press Release, Illinois Att'y Gen. Lisa Madigan, Madigan: Subcontractor Guilty in Scheme to Cheat Carpenters' Wages on O'Hare Construction Project, ILL. ATT'Y GEN. (Mar. 19, 2012), http://illinoisattorneygeneral.gov/pressroom/2012_03/20120319.html [<https://perma.cc/P5MR-PFJE>]; Press Release, Massachusetts Att'y Gen. Martha Coakley, Three Companies to Pay More Than \$2.8 Million in Restitution, Fines and Penalties for Violating the State Wage and Hour Laws, MASS.GOV (Mar. 8, 2012), <http://www.mass.gov/ago/news-and-updates/press-releases/2012/2012-03-08-prevailing-wage-violations.html> [<https://perma.cc/P5V3-TQZ8>].

262. See *Diners Guide*, RESTAURANT OPPORTUNITY CTR. UNITED, <http://rocunited.org/diners-guide> [<https://perma.cc/KF9V-Y3NB>].

are complying with the law. In return for such a certification, employers would open their books to the agencies voluntarily to confirm their compliance with wage and hour laws.

VI. MINIMUM WAGE POLICY AND WAGE THEFT

At this point, it is clear that there are no easy solutions to solving the wage theft crisis, which prompts the question: is wage theft an inevitable consequence of the minimum wage? And perhaps more fundamentally, is wage theft even a problem we should attempt to solve? If the minimum wage is bad policy, then one could argue that wage theft is less of a problem and more of a feature of the current system—strategic law breaking that lowers wages in industries and locations that cannot support the minimum wage. Indeed, many scholars have argued that the minimum wage is not the panacea that progressive advocates believe it is, but objectively bad for the very people that it is supposed to help—low-wage workers.²⁶³

In general, a law-abiding employer has a finite number of options when faced with a minimum wage set above the market rate for labor: they can reduce employment or hiring, reduce hours worked, increase efficiency, raise prices, or reduce profits.²⁶⁴ Economists have long sought to determine which combination of these effects occur after a minimum wage increase. Early research in the 1970s and 1980s suggested that even small increases in the minimum wage depressed low-wage job growth,²⁶⁵ though most studies focused on teenage employment only.²⁶⁶ The conventional wisdom began to shift in the 1990s as new studies found

263. See David Neumark & William Wascher, *Minimum Wages and Low-Wage Workers: How Well Does Reality Match the Rhetoric?*, 92 MINN. L. REV. 1296, 1297 (2008). Critics also argue that the minimum wage distorts the labor market and leads to inefficiencies and lower rates of economic growth. This Article will not address these arguments directly because it fundamentally disagrees with the premise that the goal of labor policy should be wealth maximization and economic efficiency at the expense of wealth redistribution.

264. See Sara Lemos, *A Survey of the Effects of the Minimum Wage on Prices*, 22 J. ECON. SURVEYS 187, 187 (2008).

265. See Neumark & Wascher, *supra* note 263, at 1309.

266. See Leif Danziger, *Noncompliance and the Effects of the Minimum Wage on Hours and Welfare in Competitive Labor Markets*, 16 LAB. ECON. 625, 625 (2009) (“Note, however, that the studies concerned with the number of employed workers have almost exclusively focused on teenagers, most of whom are only temporarily holding low-paying jobs.”).

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little to no effect in incremental minimum wage increases. Dueling meta-regression analyses in recent years have come to opposite conclusions,²⁶⁷ and economists are now roughly split between those who believe small minimum wage increases will cause a loss of low-wage jobs and those who do not.²⁶⁸ Economists also disagree about whether minimum wage increases cause a decrease in the number of hours worked by low-wage workers. Some studies show that hours worked by low-wage workers decrease after a minimum wage increase.²⁶⁹ Other studies show a negligible or positive effect on hours.²⁷⁰

Prior to the Fight for Fifteen movement, most minimum wage increases were relatively small, and therefore, most research could not explore the effect a large increase would have on low-wage workers. The various successful efforts to raise the minimum wage across the country have provided fertile ground for researchers to reexamine these questions in a natural laboratory. The results from the first of these experiments in Seattle, which was the first city to raise the minimum wage to \$15.00, have been decidedly mixed.²⁷¹ One study out of the University of Washington found that when Seattle raised its minimum wage to \$13.00 (an incremental step on the way to a \$15 minimum wage), the average low-

267. Compare Hristos Doucouliagos & T.D. Stanley, *Publication Selection Bias in Minimum-Wage Research? A Meta-Regression Analysis*, 47 BRIT. J. OF INDUS. REL. 406, 422 (2009) (showing no negative association between minimum wages and employment) with DAVID NEUMARK & WILLIAM L. WASCHER, *MINIMUM WAGES* (2008) (finding minimum wage to be a poor policy tool based on analysis of a variety of factors).

268. A 2013 survey of 38 economists found that 34% agreed that an increase of the minimum wage to \$9.00 per hour would decrease low-wage employment, 32% disagree, and 24% were uncertain. See IGMForum, *Minimum Wage* (February 26, 2013), <http://www.igmchicago.org/surveys/minimum-wage> [<https://perma.cc/DW4N-9ESH>]; DALE BELMAN & PAUL J. WOLFSON, *WHAT DOES THE MINIMUM WAGE DO?* 108 (2014).

269. See Neumark & Wascher, *supra* note 263, at 1312; Neumark & Wascher, *supra* note 48, at 332.

270. See Arindrajit Dube et al., *The Economic Effects of a Citywide Minimum Wage*, 60 IND. & LAB. REL. REV. 552, 531 (2007) (finding a negligible effect on hours); Madeline Zavodny, *The Effect of the Minimum Wage on Employment and Hours*, 7 LAB. ECON. 729, 729 (2000) (finding a positive effect on hours).

271. See Jordan Weissman, *The \$15 Question*, SLATE (July 6, 2017), http://www.slate.com/articles/business/moneybox/2017/07/seattle_s_huge_wage_hike_might_be_backfiring_it_won_t_stop_the_fight_for.html [<https://perma.cc/BQF4-CJWL>].

wage worker worked nine percent fewer hours per month.²⁷² Despite the increase in their hourly wage, the average low-wage worker took home \$125 less per month.²⁷³

The study was criticized for methodological issues that may have overestimated the adverse effects of the minimum wage increase, including the fact that it excluded multi-location businesses and failed to account for Seattle's red hot employment market.²⁷⁴ A competing study from the Berkeley Labor Center found minimal to no effects,²⁷⁵ and even the Seattle study showed little effect of an initial increase to \$11.00 per hour.²⁷⁶ In other words, the verdict is still out on how successful the Seattle experiment has been and whether a \$15.00 minimum wage is prudent, even in one of the United States' healthiest labor markets. The debate will undoubtedly continue as more data from the recent minimum wage experiments begins to come in. Nevertheless, almost all economists agree that above a certain point, minimum wage increases will lead to reductions in low-wage jobs and other adverse effects on low-wage workers.²⁷⁷

272. See Ekaterina Jardim et al., *Minimum Wage Increases, Wages, and Low-Wage Employment: Evidence from Seattle 2* (Nat'l Bureau of Econ. Research, Working Paper No. 23532, 2017).

273. *Id.*

274. See Ben Zipperer & John Schmitt, *The "High Road" Seattle Labor Market and the Effects of the Minimum Wage Increase: Data Limitations and Methodological Problems Bias New Analysis of Seattle's Minimum Wage Increase*, ECON. POL'Y INST. (2017), <http://www.epi.org/publication/the-high-road-seattle-labor-market-and-the-effects-of-the-minimum-wage-increase-data-limitations-and-methodological-problems-bias-new-analysis-of-seattles-minimum-wage-incr> [<https://perma.cc/A69R-72ZX>].

275. See Michael Reich et al., *Seattle's Minimum Wage Experience 2015-16*, INST. FOR RES. ON LAB. & EMP. (2017), <http://irl.berkeley.edu/files/2017/Seattles-Minimum-Wage-Experiences-2015-16.pdf> [<https://perma.cc/AC8V-QAXG>].

276. See Jardim et al., *supra* note 272, at 2.

277. See DAVID CARD & ALAN KRUEGER, MYTH AND MEASUREMENT 13 (1995) ("Of course, if the minimum wage is increased too much, firms will choose to cut employment, just as in the conventional model."); Steven Greenhouse, *\$15 Wage in Fast Food Stirs Debate on Effects*, N.Y. TIMES (Dec. 4, 2013), <http://www.nytimes.com/2013/12/05/business/15-wage-in-fast-food-stirs-debate-on-effects.html> [<https://perma.cc/Q7HA-ZGUU>]; Paul Krugman, *Raise That Wage*, N.Y. TIMES (Feb. 17, 2013), <http://www.nytimes.com/2013/02/18/opinion/krugman-raise-that-wage.html> [<https://perma.cc/5KAW-968B>] ("[E]ven most liberal economists would, I suspect, agree that setting a minimum wage of, say, \$20 an hour would create a lot of problems.").

THE PROBLEM OF WAGE THEFT

In a situation in which the minimum wage is set too high, employers may choose to commit wage theft rather than cut low-wage jobs or hours. In fact, some economists have argued that the reason that larger effects are absent after minimum wage increases is because some employers simply decide not to comply with the higher minimum wage.²⁷⁸ But even in this case, wage theft is not the optimal solution. Wage theft's ills are unevenly distributed, with women, minorities, and immigrant workers suffering a disproportionate amount of the harm.²⁷⁹ Moreover, there are secondary effects of wage theft that cause further harms, including the economic insecurity that results from not knowing when wage theft will occur and the illegal retaliation that often occurs when workers complain.

If minimum wage compliance were to increase, then some of the negative effects of minimum wage policy may become apparent. Without an "escape valve," employers may decide to cut jobs or hours in a way that harms low-wage workers. If this occurred, then policy-makers would need to reevaluate whether the minimum wage was set too high, or find some other way of supplementing low-wage workers' income that did not rely on employer compliance with wage and hour laws.²⁸⁰ Because we have never had full or near-full compliance with wage and hour laws, we do not know precisely how the market and employers would respond. Right now, however, we have a minimum wage in theory, but not in practice. If we are committed to ensuring that the minimum wage protects workers from exploitation, then we have to address wage theft.

278. See RONALD EHRENBERG & ROBERT S. SMITHER, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY* 111 (11th ed. 2012); Arnab K. Basu et al., *Turning a Blind Eye: Costly Enforcement, Credible Commitment and Minimum Laws*, 120 *ECON. J.* 244, 246 (2010).

279. Noah Zatz has sought to justify the minimum wage as a civil rights protection that prohibits employers from discriminating against certain workers by paying them a wage below other workers. See Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments*, 1 *U. CHI. LEGAL F.* 1, 1-3 (2009).

280. One example of such a program is the Earned Income Tax Credit (EITC), which supplemented the income of low-wage workers with a refundable tax credit that is calculated as a percentage of total income. See, e.g., Daniel Shaviro, *The Minimum Wage, the Earned Income Credit and Optimal Subsidy Policy*, 64 *U. CHI. L. REV.* 405, 408 (1997).

CONCLUSION

The wage theft crisis requires that we completely rethink minimum wage enforcement. Current wage theft campaigns do not; instead they advocate for changes around the margins and hope that will be enough. But they are not enough, and predictably so. This article explores some possible solutions, including a greater emphasis on enforcement and a focus on changing social norms. It also explores particular enforcement strategies that may increase compliance with wage and hours laws, such as wage insurance and recovery-first enforcement. None of these strategies alone are likely to solve the problem. The extent of the wage theft crisis requires us to think outside the box and pursue multiple strategies; otherwise, the problem of wage theft will persist.