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Making Wage Theft Costly: District Attorneys and Attorneys General Enforcing Wage and Hour Law

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MAKING WAGE THEFT COSTLY: DISTRICT ATTORNEYS AND ATTORNEYS GENERAL ENFORCING WAGE AND HOUR LAW

*Anthony Damelio**

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INTRODUCTION

Wage theft is a simple idea: an employer steals an employee's wages.¹ In the early 2000s, advocates in the United States first deployed this term to frame employers' failure to comply with wage and hour laws not merely as noncompliance, but as real theft, akin to what attorneys general (AGs) and district attorneys (DAs) prosecute every day.² Historically, though, wage theft in the United States has been addressed exclusively by government agencies charged with enforcing these labor laws³ — typically departments of labor — or by workers bringing civil actions.⁴ These traditional enforcement tools, however, have failed to contain the wage theft epidemic,⁵ which costs workers and society around \$15 billion each year.⁶ So how can workers find relief?

In the United States and most other countries, a labor inspectorate is the primary mechanism to ensure employer compliance with labor

1. For a description of the manifold strategies by which employers steal workers' wages, see KIM BOBO, *WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID — AND WHAT WE CAN DO ABOUT IT* 23–41 (2014) (including paying below the minimum wage, not compensating for all hours worked, paying checks with insufficient funds, not paying or misclassifying workers as “exempt” from overtime, or simply not paying people at all).

2. César F. Rosado Marzán identifies 2005 as the year when advocates began to use the term to call attention to this practice. See César F. Rosado Marzán, *Wage Theft as Crime: An Institutional View*, 20 J.L. SOC'Y 300, 302 (2020) [hereinafter Rosado Marzán, *Wage Theft as Crime*]. Kim Bobo's 2009 book is recognized as the first mainstream use of the term. See Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL'Y REV. 93, 98 n.21 (2018). But see Sarah Green, *Wage Theft as a Legal Concept*, in CRIMINALITY AT WORK 134, 134 (Alan Bogg et al. eds., 2020) (arguing why this practice does not constitute theft).

3. This Note will employ the term “labor law” to encompass the range of laws regulating the U.S. workplace and employment standards, unless specified otherwise.

4. The Fair Labor Standards Act (FLSA), which governs wage and hour laws at the federal level, provides employees a right to bring federal claims under the Act. See 29 U.S.C. § 216(b). The Wage and Hour Division (WHD) of the Department of Labor (DOL) enforces the FLSA. See *Enforcement*, U.S. DEP'T LAB., <https://www.dol.gov/general/topic/youthlabor/enforcement> [<https://perma.cc/4FGC-YJW7>] (last visited Nov. 7, 2020).

5. See Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759, 769 (2019) (“Most government agencies responsible for enforcement allow employers to act with impunity by failing to adequately enforce existing wage and hour laws. The agencies may lack motivation or resources to enforce the law. A 2018 investigation found that six states lacked a single investigator to investigate minimum wage violations.” (citations omitted)); see also DAVID COOPER & TERESA KROEGER, ECON. POL'Y INST., *EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR* 5–6 (2017), <https://files.epi.org/pdf/125116.pdf> [<https://perma.cc/4YDM-8KFR>] (describing declining numbers of inspectors and how few workers are able to bring private claims and what percentage of them ultimately receive any restitution).

6. See COOPER & KROEGER, *supra* note 5, at 1.

laws.⁷ Labor inspectorates struggle to do just that, particularly in low-wage industries.⁸ This “enforcement gap” is well-documented: for decades, scholars have analyzed different inspectorate regimes throughout the world, identified failures and best practices, and proposed ways to reorganize inspectorates to better enforce the law.⁹ By building on their work, this Note focuses explicitly on how the U.S. enforcement system has failed to address the epidemic of wage theft, particularly for low-wage workers.

To analyze the United States’s enforcement gap, this Note will review some of the scholarly proposals to restructure inspectorate operations. It does not seek to *solve* the particular challenges that the U.S. inspection regime faces or even to address them in a comprehensive way. Rather, by acknowledging both the immensity of requisite reforms and the foreseeable political inability of achieving them, this Note advocates for a specific intervention in certain circumstances to enforce bad actor employers who steal from their workers.

Analysis of inspectorates shows that, absent profound policy change, the U.S. inspectorate lacks the most punitive enforcement techniques that other countries’ inspectors use to compel compliance — large monetary fines, license suspension or revocation, or jail

7. See INT’L LAB. OFF., LABOUR INSPECTION: WHAT IT IS AND WHAT IT DOES 8, https://www.ilo.org/wcmsp5/groups/public/-ed_dialogue/-lab_admin/documents/instructionalmaterial/wcms_141403.pdf [<https://perma.cc/REJ6-J9XW>] (last visited Mar. 14, 2021) (“National governments adopt legislation and policies that promote decent working conditions, in consultation with employers’ and workers’ organizations and they appoint [labor inspectorates] to supervise the proper application of such legislation and policies and to promote their compliance.”).

8. See *infra* Section I.B. For a global overview of struggles facing inspectorates, see generally ILO Comm. on Emp. & Soc. Pol’y, *Strategies and Practice for Labour Inspection*, GB.297/ESP/3 (Nov. 2006). Scholars define “low-wage work” differently. This Note will define low-wage workers as those who earn less than two-third of the median full-time wage in a particular location. See *Low-Wage Work in California*, U.C. BERKELEY LAB. CTR., <https://laborcenter.berkeley.edu/low-wage-work-in-california/#the-numbers> [<https://perma.cc/5NNF-LH39>] (last visited Nov. 8, 2020). Other scholars define low-wage work as what would be necessary to lift a family of four above the poverty threshold. See, e.g., LAWRENCE MISHEL, JARED BERNSTEIN & SYLVIA ALLEGRETTO, *THE STATE OF WORKING AMERICA 2006/2007* (2007); see also Janice Fine, *Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States*, 50 OSOODE HALL L.J. 813, 814 n.1 (2013).

9. See generally INT’L LAB. OFF., LABOUR ADMINISTRATION AND LABOUR INSPECTION (2011).

time.¹⁰ In the U.S. system, however, other enforcement agents do hold these tools, namely AGs and DAs.¹¹ In recent years, these law enforcement lawyers have begun to prosecute bad-actor employers who steal from and otherwise exploit and endanger their workers, recovering millions of dollars in stolen wages for workers and exacting large fines from employers.¹² This Note argues that this work should be expanded under specific conditions that safeguard workers' interests and ensure more effective prosecutions.

Some worker advocates have recognized the utility of this intervention from a *complementary* perspective: in the current enforcement gap, responsible criminal law enforcement is a helpful intervention; prosecutors are one of many actors who can hold law-breaking employers accountable.¹³ This Note will argue, however, that the intervention of DAs and AGs is necessary, not merely complementary, in the current U.S. system. Because U.S. inspectors do not possess the punitive tools required to enforce employers who willfully break the law, they *cannot* effectively hold accountable bad actor employers who steal from their employees, absent profound policy change. To fill this structural enforcement gap, DAs and AGs should enter the breach. This Note will describe not only the benefits

10. See Kiran Mirchandani & Sheldon Matthew Bromfield, *Roundabout Wage Theft: The Limits of Regulatory Protections for Ontario Workers in Precarious Jobs*, 22 J. LAB. & SOC'Y 661, 664 (2019) ("Overall, in the United States, Canada, Australia, and Britain, the enforcement of labor laws and policies is weak and lacks strong deterrent penalties for wage theft of all forms . . ."). Chilean inspectors, for example, have the ability to issue very large fines for a variety of penalties and suspend work or close a workplace. See César F. Rosado Marzán, *Punishment and Work Law Compliance: Lessons from Chile*, 29 HOFSTRA LAB. & EMP. L.J. 343, 365, 378–86 (2012) [hereinafter Rosado Marzán, *Punishment and Work Law Compliance*]; see also Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 562 (2011) (arguing that "license revocation must be a meaningful possibility"); Hallett, *supra* note 2, at 115 (describing how, in the absence of federal-level tools, states and municipalities have begun to experiment with licensing schemes and other penalties). For further discussion, see *infra* Section I.B.

11. See *infra* Section II.C.

12. See *infra* Section II.C.

13. See, e.g., Arisha Hatch & Terri Gerstein, *Representing the People*, STAN. SOC. INNOVATION REV., Winter 2020, https://ssir.org/articles/entry/re-envisioning_the_roles_of_prosecutors_and_attorneys_general_to_make_the_justice_system_work_for_everyone# [<https://perma.cc/47LP-U42R>]; Daniel J. Galvin, *Deterring Wage-Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSPS. ON POL. 324, 325 (2016) (reviewing advocates' championing of criminal penalties as part of an "everything but the kitchen sink" strategy to address wage theft at the state-level); Rosado Marzán, *Wage Theft as Crime*, *supra* note 2, at 306–07 (arguing that criminalization of wage theft can help fill the gap created by insufficient enforcement agencies and private claims).

and drawbacks of encouraging DAs and AGs to enforce labor laws but also the ideal or necessary circumstances for law enforcement lawyers to wield these powers in favor of workers, particularly undocumented workers.

Part I outlines what wage theft is and why the U.S. inspectorate is unable to curtail it. By examining employers' economic motivations for complying with wage and hour law, Part II reviews two primary ways to increase compliance: raising the likelihood of getting caught and increasing the penalties for unlawful behavior. Because this Note does not propose sweeping federal policy changes,¹⁴ Part II will identify one of the interventions¹⁵ that *is* working to address low-wage worker exploitation: DAs and AGs using their criminal enforcement powers to hold accountable bad-actor employers. Part III will both review the challenges this model faces and propose best practices to safeguard the rights of workers and ensure more successful outcomes for these cases.

I. U.S. INSPECTORATE'S FAILURE TO ENFORCE LABOR LAWS

A. What Is Wage Theft?

While labor law violations come in many flavors — that often exist together in workplaces¹⁶ — this Note focuses on wage theft as a lens to analyze enforcement failures and opportunities. Wage theft can

14. Congress indeed has the ability to allocate significantly more resources to labor inspection and to enable much stiffer penalties. Over the course of the last half century, however, we have witnessed the opposite: inspector levels have declined while numbers of workplaces have grown significantly. *See* Fine & Gordon, *supra* note 10, at 554 (describing expanding numbers of employees and employers and falling numbers of inspectors); *see also* Galvin, *supra* note 13, at 327 (demonstrating that the likelihood of getting investigated was between 0.5% and 1%). In addition to the low likelihood of getting investigated, civil money penalties have remained stubbornly low: maximum penalties for willful violations of wage and hour laws are \$1,100, adjusted annually for inflation to \$2,074 in 2021. *See* 29 U.S.C. § 216(e)(2); *Civil Money Penalty Inflation Adjustments*, U.S. DEPT' LAB., <https://www.dol.gov/agencies/whd/resources/penalties> [<https://perma.cc/96AP-MKSC>] (last visited Feb. 14, 2021). While they are highly unlikely, this Author would welcome Congress to make dramatic improvements to U.S. labor law enforcement.

15. For a survey of other anti-wage theft strategies being implemented at the state level, *see generally* Lee & Smith, *supra* note 5; Hallett, *supra* note 2; Galvin, *supra* note 13.

16. *See* MICHAEL J. PIORE & ANDREW SCHRANK, *ROOT-CAUSE REGULATION: PROTECTING WORK AND WORKERS IN THE TWENTY-FIRST CENTURY* 37 (2018) [hereinafter *PIORE & SCHRANK, ROOT-CAUSE REGULATION*] (In the United States, “the same employers often violate multiple laws and nonetheless limit their liability to the particular violations discovered by specialist inspectors with narrow jurisdictions and training”).

take many forms, but it consists of more than an inadvertent payroll mistake.¹⁷ Broadly speaking, employers steal workers' wages by: "(1) paying less than the minimum, promised, or overtime wage; (2) taking unauthorized deductions from a worker's pay; or (3) failing to pay for all hours worked."¹⁸ Even if workers know their rights, employers sometimes use sophisticated techniques to fool employees including: "time-shaving," where managers alter time cards by small amounts on different days; requiring workers to clock out and keep working or to arrive early to start working before clocking in; or compelling workers to do preparatory tasks off the clock, like sharpening knives or changing into protective gear.¹⁹ Employers also intentionally misclassify workers as independent contractors to avoid minimum wage and overtime regulations, mandatory employer benefit contributions, tax payments, and more.²⁰

Wage theft costs U.S. workers billions of dollars per year. A 2017 study estimated that in the ten most populous U.S. states, workers lose around \$8 billion to wages stolen by employers.²¹ Extrapolating these numbers across all 50 states, the total wages stolen from workers each year exceeds \$15 billion in the United States.²² By way of comparison, all other property theft in 2017 amounted to \$16.4 billion.²³ The collateral consequences of wage theft extend throughout society, increasing workers' and families' reliance on public assistance programs and costing the government — federal, state, and local — millions of dollars in lost tax revenue each year.²⁴ Critically, the impact of wage theft falls most heavily on low-wage workers²⁵ who already face significant economic and workplace

17. *See supra* note 1.

18. Lee & Smith, *supra* note 5, at 765 (internal citations omitted).

19. *See* CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 62–63 (2010).

20. *See* FRANÇOISE CARRÉ, *ECON. POL'Y INST., (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION 2* (2015).

21. *See* COOPER & KROEGER, *supra* note 5, at 1.

22. *See id.* at 2.

23. *See* Luke Darby, *Is Your Employer Stealing from You?*, *GQ* (Nov. 8, 2019), <https://www.gq.com/story/wage-theft> [<https://perma.cc/72RM-GMLN>] (quoting a statistic from the Federal Bureau of Investigation).

24. *See* COOPER & KROEGER, *supra* note 5, at 28 (describing not only lost income tax revenue but also lost sales tax revenue from the stolen income that workers could not spend).

25. *See id.* at 8–9 (noting that significant, pervasive violations of core workplace laws occur in many low-wage industries and that women, immigrants, and people of color are disproportionately affected by workplace violations).

struggles.²⁶ Despite recent scholarly interest in wage theft, very little is known about the full extent of the problem.²⁷

Why do employers fail to comply with wage and hour laws? Quite simply, noncompliance pays: the economic incentives of noncompliance are much too large compared with the likelihood of inspection and expected punishment.²⁸ David Weil's study of the Los Angeles apparel industry found that — factoring in the likelihood of inspection and median civil penalty if caught — an employer in 2002 stood to make roughly \$11,000 more per worker annually by choosing noncompliance over compliance.²⁹ If enforcement actions occur at all in the United States, they typically only secure a portion of back wages owed.³⁰ While more inspections would change the equation, insofar as unscrupulous employers would have a higher likelihood of being discovered, the level of available punishment remains insufficient to outweigh the employer's cost savings.³¹

B. The Broken U.S. Inspectorate

Labor laws traditionally are enforced by labor inspectors who deploy a range of tools to ensure compliance with the law. How inspectors do and should work is a topic of significant scholarly analysis. Setting aside questions of resources — how much money a

26. See Steven Bittle & Lauren Snider, *How Employers Steal from Employees: The Untold Story*, 45 SOC. JUST. 119, 137 (2018) (listing struggles that include “the paucity of their choices and avenues for recourse, the precariousness of their employment, the underenforcement of employment standards, the advent of electronic timekeeping, the absence of union representation to support their claims of unpaid wages, and, for undocumented immigrant workers, the threat of deportation” (citation omitted)).

27. See Galvin, *supra* note 13, at 327.

28. See David Weil, Compliance with the Minimum Wage: Can Government Make a Difference? 9–10 (Jan. 6, 2003) (unpublished manuscript) [hereinafter Weil, Compliance with the Minimum Wage], <https://hctar.seas.harvard.edu/files/hctar/files/hr05.pdf> [<https://perma.cc/D2QW-DZXP>]; see also NAT'L EMP. L. PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE'S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT 17 (2011), <https://www.nelp.org/wp-content/uploads/2015/03/WinningWageJustice2011.pdf> [<https://perma.cc/R4PA-23JW>].

29. See Weil, Compliance with the Minimum Wage, *supra* note 28, at 10.

30. See ESTLUND, *supra* note 19, at 60. The FLSA allows workers to collect two years of prior wages or three for “willful violations.” See 29 U.S.C. § 255(a).

31. See Weil, Compliance with the Minimum Wage, *supra* note 28, at 10; see also Annette Bernhardt, Michael W. Spiller & Diana Polson, *All Work and No Pay: Violations of Employment and Labor Laws in Chicago, Los Angeles and New York City*, 91 SOC. FORCES 725, 728 (2013) (“[I]n the absence of strong penalties and enforcement, compliance with workplace laws is best understood as one specific form of employers' decision making about labor costs”); *infra* Section II.A.

government allocates to this work — countries have configured and equipped their inspectorates in two general ways: compliance or deterrence.³² In countries that follow a compliance approach, inspectors have broad purview over the labor code and tend to deploy pedagogical strategies that encourage or educate employers, as opposed to punishing them.³³ By contrast, in the United States and other countries that adhere to a deterrence or “command-and-control” framework, labor inspectors primarily use punitive tools, like fines, to dissuade employers from breaking the law.³⁴ While legal scholars debate the comparative effectiveness of compliance and deterrence approaches, these two models are premised on fundamentally different assumptions about the *causes* of labor violations.³⁵ Under compliance theory, employers may be ignorant or incompetent but generally do not intentionally contravene the law.³⁶ In contrast, deterrence theory is based on the idea that a substantial

32. See, e.g., PIORE & SCHRANK, ROOT-CAUSE REGULATION, *supra* note 16, at 5–8; Leah F. Vosko et al., *The Compliance Model of Employment Standards Enforcement: An Evidence-Based Assessment of Its Efficacy in Instances of Wage Theft*, 48 INDUS. REL. J. 256, 256–57 (2017); JOHN HOWE, TESS HARDY & SEAN COONEY, CTR. FOR EMP. & LAB. REL. L., TRANSFORMATION OF ENFORCEMENT OF MINIMUM EMPLOYMENT STANDARDS ENFORCEMENT IN AUSTRALIA 59–60, https://law.unimelb.edu.au/_data/assets/pdf_file/0008/1556738/FWORreport-FINAL.pdf [<https://perma.cc/7YSY-AH8R>] (last visited Oct. 21, 2021). Some countries blend the two models with some success. Brazil and Chile are two particular examples. See Renato Bignami & Mari Cristina Serrano Barbosa, *Labor Inspection and Wage Theft in Brazil: Justice at the Street Level, Social Peace, and Development*, 37 COMPAR. LAB. L. & POL’Y J. 267, 279 (2016); see also Roberto Pires, *Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil*, 147 INT’L LAB. REV. 199, 200 (2008) (showing examples of how Brazilian inspectors fashion innovative approaches using their wide discretion in a “sustainable compliance” framework that combines punitive and pedagogical approaches); Rosado Marzán, *Punishment and Work Law Compliance*, *supra* note 10, at 364–72 (describing the Chilean inspector’s wide discretion to levy large fines and other punishments or replace fines with training or alternative compliance programs).

33. See PIORE & SCHRANK, ROOT-CAUSE REGULATION, *supra* note 16, at 5–6. France is the classic model for a compliance-based inspectorate. See, e.g., Marc Vericel, *The Labor Inspectorate in France and the Protection of Wages*, 37 COMPAR. LAB. L. & POL’Y J. 299 (2016). Notably, in France, employers are required to carry wage insurance to allow employees to collect back wages even where an employer claims insolvency. See Janice Fine, *The Franco-Iberian Model from the U.S. Perspective*, 37 COMPAR. LAB. L. & POL’Y 397, 400–02 (2016).

34. See PIORE & SCHRANK, ROOT-CAUSE REGULATION, *supra* note 16, at 5–6; see also Michael J. Piore & Andrew Schrank, *Toward Managed Flexibility: The Revival of Labour Inspection in the Latin World*, 147 INT’L LAB. REV. 1, 5 (2008) [hereinafter Piore & Schrank, *Toward Managed Flexibility*].

35. See Vosko et al., *supra* note 32, at 259.

36. See *id.*

proportion of employers who violate labor laws, including wage and hour law, have determined they are better off by not complying.³⁷ To effectively deter law-breaking employers, inspectors must raise the risk of being caught and/or increase the penalties for breaking the law.³⁸

Apart from using primarily punitive tools, U.S. inspectors are specialists who enforce a narrow portion of the labor code, as opposed to generalists who inspect for violations across the labor code.³⁹ The U.S. enforcement regime is divided horizontally between various federal agencies and vertically between federal and state agencies.⁴⁰ Different federal agencies and their inspectors are tasked with enforcing very particular labor laws,⁴¹ often overlapping with their state counterparts. For example, the Wage and Hour Division (WHD) can only enforce wage and hour laws, whereas the Occupational Safety and Health Administration (OSHA) is limited to enforcing health and safety laws and the Equal Employment Opportunity Commission (EEOC) addresses discrimination in the workplace.⁴² Instead of cross-training inspectors or consolidating agencies, the federal government has moved in the other direction: not only has the Department of Labor (DOL) further divided its agencies but also the Government Accountability Office has found a shockingly low level of interagency referrals.⁴³

This inspector specialization served well in the post-World War II economy that was marked by the rapidly growing sophistication of both production and management.⁴⁴ U.S. inspectors grew specialized

37. See Weil, Compliance with the Minimum Wage, *supra* note 28, at 2 (“[T]here are strong reasons to believe that many employers will choose to violate minimum wage standards when evaluating the benefits and costs of compliance.” (citation omitted)); see also PIORE & SCHRANK, ROOT-CAUSE REGULATION, *supra* note 16, at 102 (“[T]he U.S. model is punitive and reactive in nature; it is *designed* to raise the costs of — rather than lower the need or desire for — noncompliance” (emphasis in original)).

38. See Vosko et al., *supra* note 32, at 259.

39. See PIORE & SCHRANK, ROOT-CAUSE REGULATION, *supra* note 16, at 19.

40. States may enact their own wage and hour laws that extend greater protection to workers than does the FLSA — and many do just that. See Galvin, *supra* note 13, at 328–39. For a breakdown of federal agencies, see Piore & Schrank, *Toward Managed Flexibility*, *supra* note 34, at 5.

41. See BOBO *supra* note 1, at 112–14.

42. See *Agencies*, U.S. DEP’T LAB., <https://www.dol.gov/general/jobs/dol-sub-agencies> [<https://perma.cc/B82T-23MP>] (last visited Feb. 13, 2021); see also *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/overview> [<https://perma.cc/946W-5PAN>] (last visited Feb. 13, 2021).

43. See PIORE & SCHRANK, ROOT-CAUSE REGULATION, *supra* note 16, at 38–40.

44. See *id.* at 26.

in response to advancing technologies on the shop floor and in the corporate office.⁴⁵ Under that period's "Fordist" model of mass production by large employers,⁴⁶ inspectors could exploit economies of scale despite their narrow scope, using one trip to the field to investigate a large number of workers in a single workplace.⁴⁷ Additionally, inspectors could rely on these large businesses' infrastructure to facilitate both inspection and compliance, something that smaller firms often lack.⁴⁸ And inspectors grew to depend on a higher level of employer compliance, developing a "symbiotic relationship" between managers and regulatory officials.⁴⁹

Specialization's effectiveness, however, was predicated on two particular facets of the economy that no longer exist: firms' large size and the mass industrial unionism that allowed worker representatives to participate in the enforcement process.⁵⁰ Beginning in the mid-twentieth century, large firms began to disaggregate and the economy began to "fissure," creating a host of problems for workplace compliance.⁵¹ This fissuring has radically changed employment relationships. Aside from an increase in the number of small firms, employers began to employ — with greater frequency — franchise networks, supply chains, subcontractors, and other temporary arrangements to both lower costs and limit liability under labor

45. *See id.* at 30.

46. *See id.* at 26. As used by economic historians and labor law scholars, "Fordism" can be defined as "a system of mass production combining the new technological innovations of the early twentieth century which accelerated the pace of manufacture, particularly the assembly line, with a managerial ethos encouraging greater efficiency in the organization of work." *See* Daniel Watson, *Fordism: A Review Essay*, 60 LAB. HIST. 144, 145 (2019).

47. *See* PIRE & SCHRANK, ROOT-CAUSE REGULATION, *supra* note 16, at 31.

48. *See* Fine & Gordon, *supra* note 10, at 555.

49. *See* PIRE & SCHRANK, ROOT-CAUSE REGULATION, *supra* note 16, at 30 (quoting Thomas Kochan & Peter Cappelli, *The Transformation of the Industrial Relations and Personnel Function*, in INTERNAL LABOR MARKETS 136 (Paul Osterman, ed., 1984)).

50. *See id.* at 30–33.

51. *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 7–19 (2014) [hereinafter WEIL, THE FISSURED WORKPLACE] (describing both the changes in the structure of the workplace over the last four decades — "[l]ike a rock with a fracture that deepens and spreads with time" — and the ways these changes have negatively affected workers and our society).

laws.⁵² This fissuring has both depressed wages and benefits and shielded employers from responsibility for workplace abuse.⁵³

In a fissured economy, the U.S. inspectorate model has broken down quickly. Inspector numbers have plummeted while the number of workplaces has grown dramatically in the past several decades.⁵⁴ The rapid growth in both workplaces and classes of covered workers combined with stagnating inspection resources means that employers face little chance of being inspected and operated accordingly.⁵⁵ In 2012, the probability that a U.S. employer would be investigated by the WHD was a paltry 0.5%.⁵⁶ Even in the industries most targeted by inspectors, the probability of inspection still did not reach 1%.⁵⁷ Despite the hiring of more inspectors during the Obama Administration, the number of federal wage and hour investigators remains lower than its number in 1980, despite a 52% increase in the workforce.⁵⁸ From 1980 to 2015, the number of wage and hour violation cases WHD investigated fell by 63%.⁵⁹

Compared with its peers, the United States is marked by a very low percentage of inspectors per worker.⁶⁰ The International Labor Organization (ILO) has established benchmarks for inspector capacity: one inspector per 10,000 workers in developed market economies, one per 20,000 in transition economies, and one per 40,000 in less developed countries.⁶¹ As of 2008, the United States

52. See DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 9–11 (2010) [hereinafter WEIL, IMPROVING WORKPLACE CONDITIONS].

53. See WEIL, THE FISSURED WORKPLACE, *supra* note 51, at 268–76; see also Lee & Smith, *supra* note 5, at 771–72.

54. Between 1980 and 2007, the number of wage and hour inspectors declined by 31% while the labor force grew by 51%. At the 2009 staffing levels for OSHA, it would take the agency 133 years to inspect each workplace just once. See ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 52 (2009). By 2014, the WHD employed 1,100 investigators to cover 135 million workers; in 1948, for example, 1,000 investigators covered 22.6 million workers. See Galvin, *supra* note 13, at 325.

55. See WEIL, IMPROVING WORKPLACE CONDITIONS, *supra* note 52, at 5–6.

56. See Galvin, *supra* note 13, at 327; WEIL, THE FISSURED WORKPLACE, *supra* note 51, at 22 (“[T]he annual probability of a workplace receiving an investigation is well below 1 in 100, and in industries with deep fissuring as tiny as 1 in 1,000.” (citation omitted)).

57. See Galvin, *supra* note 13, at 327. For inspection probabilities in common low-wage industries, see WEIL, THE FISSURED WORKPLACE, *supra* note 51, at 217.

58. See Bittle & Snider, *supra* note 26, at 126.

59. See COOPER & KROEGER, *supra* note 5, at 5.

60. See INT’L LAB. OFF., *supra* note 9, at 70–71.

61. See David Weil, *A Strategic Approach to Labour Inspection*, 147 INT’L LAB. REV. 349, 351 (2008) [hereinafter Weil, *Labour Inspection*].

had one inspector per 75,000 workers, a ratio similar to Jamaica, Zambia, and Thailand.⁶² While troubling in any inspection regime, deploying insufficient inspectors in a punitive model undermines the primary deterrent effects that are essential to the model's operation.⁶³ If, recognizing how few inspectors an agency employs, the employer knows with reasonable certainty that he likely will not receive an inspection — let alone a costly punishment — he has little motivation to incur compliance costs under a traditional cost-benefit analysis.⁶⁴ For the U.S. punitive model that is predicated on the threat of inspection and subsequent penalties, this low likelihood of inspection is fatal.

The mismatch between the U.S. inspection system and the fissured economy goes beyond simply needing more inspectors to cover more employers: inspector specialization and division between agencies leads to severe enforcement gaps.⁶⁵ Because each inspector has a narrow purview, the inability of agencies to collaborate and share information cripples enforcement efforts for “multiple labor law violators.”⁶⁶ The consequences can be deadly. For example, in contrast to most of the world, the United States has decoupled statutory work hours from industrial hygiene,⁶⁷ meaning that the inspector for health and safety conditions does not monitor excessive work hours. Consequently, the U.S. has failed to adequately enforce involuntary overtime, which has contributed to serious industrial accidents like the Upper Big Branch Coal mine explosion that killed 29 miners in 2010.⁶⁸ Apart from the failure to share information, agencies rarely engage in joint enforcement against employers who violate multiple laws, which allows employers to limit their liability to

62. By way of contrast, Chile and Russia had roughly one per 20,000 workers, Argentina and Brazil one per 25,000, and Germany one per 10,000. *See* ILO Comm. on Emp. & Soc. Pol'y, *supra* note 8. Some scholars, by factoring in state inspectors and classes of employees covered by state laws, put the number even lower, at one inspector per 146,000 workers. *See* ZACH SCHILLER & SARAH DECARLO, POL'Y MATTERS OHIO, INVESTIGATING WAGE THEFT: A SURVEY OF THE STATES i (2010).

63. *See* David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMPAR. LAB. L. & POL'Y J. 59, 61–62 (2005).

64. *See id.* For the original enunciation of this theory of corporate compliance calculations, see Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

65. *See* PIORE & SCHRANK, ROOT-CAUSE REGULATION, *supra* note 16, at 30–40.

66. *See id.* at 37–38.

67. *See id.* at 36–37.

68. *See id.*

the specific laws a certain inspector enforces.⁶⁹ This failure to coordinate and collaborate is particularly troubling where employers exploit workers along multiple axes, a common practice.⁷⁰

In addition to insufficient numbers of inspectors with narrow mandates that do not effectively collaborate between agencies, de minimis monetary penalties for labor violations further erode the inspectorate's enforcement capacity in the U.S. deterrence regime.⁷¹ The maximum civil monetary penalty for a repeated or "willful" violation for contravention of minimum wage or overtime laws is just over \$2,000.⁷² Despite these low penalties, WHD inspectors typically levy them in less than half the cases in which they are entitled.⁷³ By way of comparison, Australia's penalty for "[d]eliberate and systematic contraventions" of workplace laws is \$630,000 per incident for companies and \$126,000 for individuals.⁷⁴ Additionally, the Fair Labor Standards Act (FLSA) also limits an employee's recovery to only two years of back wages — three in the case of willful violations.⁷⁵ Of the small number of workers who successfully obtain monetary awards or judgments, half never actually get collected by victims.⁷⁶

69. *See id.* at 37.

70. *See, e.g.*, BOBO *supra* note 1, at 173 (quoting the director of a Chicago worker center: "We almost never see a wage theft case in which there isn't also some kind of health and safety problem"); *see also* PIRE & SCHRANK, ROOT-CAUSE REGULATION, *supra* note 16, at 38.

71. *See* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 359–60 (2005).

72. *See* 29 C.F.R. § 579.1(a)(2) (2021).

73. *See* David Weil, *Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change*, 60 J. INDUS. REL. 1, 6 (2018) [hereinafter Weil, *Approach to Address Wage Theft*].

74. *See* ATT'Y-GEN.'S OFF., AUSTRALIAN GOV'T, IMPROVING PROTECTIONS OF EMPLOYEES' WAGES AND ENTITLEMENTS: STRENGTHENING PENALTIES FOR NON-COMPLIANCE 6 (2019), <https://www.ag.gov.au/sites/default/files/2020-03/strengthening-penalties-for-non-compliance-discussion-paper.pdf> [<https://perma.cc/TW4B-FS47>].

75. *See* 29 U.S.C. § 255.

76. *See* Galvin, *supra* note 13, at 328; *cf.* Lee & Smith, *supra* note 5, at 770 ("As a result of undercapitalizing their businesses, [employers who engage in wage theft] may either be judgment proof should a worker want to sue for their unpaid wages, or they may quickly dissolve their business in the face of a worker's legal action." (citation omitted)). For a discussion of why workers cannot collect on judgments, such as employer tactics to liquidate and shield assets, see generally CMTY. DEV. PROJECT AT URB. JUST. CTR., EMP. L. UNI AT LEGAL AID SOC'Y & NAT'L CTR. FOR L. & ECON. JUST., EMPTY JUDGMENTS: THE WAGE COLLECTION CRISIS IN NEW YORK (2015).

Apart from low monetary penalties, WHD inspectors lack the most punitive tools necessary to enforce the worst actors: suspending or revoking licenses, closing workplaces, or demanding payment for the entirety of wages stolen.⁷⁷ Criminal penalties are available under the FLSA only after the employer has been convicted once, but they are capped at six months in jail and \$10,000.⁷⁸ Criminal penalties are rarely, if ever, invoked.⁷⁹ Even where licenses are required for business operation, WHD inspectors do not have the power to suspend or revoke these licenses.⁸⁰ In the United States, only OSHA can close a business; the WHD lacks the independent authority to order an employer to do anything.⁸¹

The United States faces additional obstacles to enforce low-wage sectors, particularly given the rapid decline of union representation in, and fissuring of, these industries.⁸² A high percentage of immigrants work in the most at-risk industries,⁸³ like nursing homes, poultry processing plants, and restaurants.⁸⁴ Immigrants, particularly those who are undocumented, may be unaware of their rights or hesitant to invoke them,⁸⁵ which undermines an inspection system that depends heavily on worker-initiated complaints.⁸⁶ And even

77. Outside of the “hot goods” provision as discussed below, WHD inspectors are limited to recovering employees’ wages, imposing monetary fines, and prohibiting future employer retaliation. See WEIL, *IMPROVING WORKPLACE CONDITIONS*, *supra* note 52, at 11–14.

78. See 29 U.S.C. § 216.

79. See Galvin, *supra* note 13, at 328; Jeounghee Kim & Skye Allmang, *Wage Theft in the United States: A Critical Review* 11 (Rutgers Sch. of Mgmt. & Lab. Relations, Working Paper No. 2020-1, 2020) (“Criminal penalties are rarely used, even though the FLSA makes willful violations a misdemeanor punishable by up to 6 months in jail.” (citation omitted)).

80. See Fine & Gordon, *supra* note 10, at 562 (“[L]icense revocation must be a meaningful possibility . . .”). In the absence of federal-level tools, states and municipalities have begun to experiment with licensing schemes and other non-monetary penalties. See Hallett, *supra* note 2, at 115.

81. See Fine, *supra* note 33, at 403.

82. See Fine & Gordon, *supra* note 10, at 560.

83. See *id.* at 555 (“In 2008, the foreign-born made up about 15 percent of the U.S. civilian labor force and more than 20 percent of the low-wage workforce.” (citation omitted)).

84. See *id.* at 553.

85. See, e.g., *id.* at 556; Hallett, *supra* note 2, at 125.

86. Complaint-based investigations comprise 75% of all WHD and 30% of OSHA investigations. See WEIL, *THE FISSURED WORKPLACE*, *supra* note 51, at 247–48; see also Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1070 (2014) (“[P]rivate lawsuits vastly outnumber government enforcement actions against law-breaking employers . . . [G]overnment agencies depend in large part on worker complaints to direct their enforcement activity.” (citations omitted)).

where the employee knows her rights, employers often use sophisticated techniques to obfuscate labor law violations, especially wage theft.⁸⁷ Small firms with fewer than 20 employees predominate the low-wage sector, which is the hardest-to-police sector with the hardest-to-protect workers.⁸⁸ The explosive growth of smaller firms in low-wage settings not only correlates to higher violation rates but also undermines the traditional inspectorate design predicated on efficiencies of scale.⁸⁹ Additionally, low-wage industries feature a high use of subcontracting networks, often in supply chains that allow lead firms to further evade liability under the FLSA and other labor laws.⁹⁰

The combination of declining numbers of inspectors to enforce more workers and worksites, narrow inspector purview, and miniscule penalties imposed and recovered has proven profoundly ineffective in enforcing labor laws in this fissured economy, particularly for low-wage workers.⁹¹ Exactly how to remedy the problem, however, is the subject of significant scholarly debate.

II. CHANGING THE EQUATION: MAKING WAGE THEFT MORE EXPENSIVE

In studying noncompliance with minimum wage laws, economists have long sought to quantify employers' rational determination to pay sub-minimum wage rates. In their seminal 1979 article, Orley Ashenfelter and Robert Smith established a formula that scholars continue to use to measure both the costs and benefits an employer expects from noncompliance.⁹² To simplify a complicated equation,

87. See ESTLUND, *supra* note 19, at 62–63 (describing tactics like forcing workers to arrive 15 minutes early, refusing to pay for preparatory work, and misclassification of workers as independent contractors, which workers may not detect easily).

88. See Fine & Gordon, *supra* note 10, at 554–55.

89. See *id.* at 555.

90. See *id.*; see also WEIL, IMPROVING WORKPLACE CONDITIONS, *supra* note 52, at 9–10. “Lead firms” have shed many of the activities and services that formerly were accomplished by employees and instead have sought to meet these needs through sub-contractors, causing a host of ripple effects for both working conditions and labor law enforcement. See *id.* at 9–10. “Lead [f]irms” are “firms at the top of the industry structure.” See *id.* at 79.

91. See WEIL, IMPROVING WORKPLACE CONDITIONS, *supra* note 52, at 1.

92. See Orley Ashenfelter & Robert S. Smith, *Compliance with the Minimum Wage Law*, 87 J. POL. ECON. 333, 335–36 (1979). This equation includes the traditional, quantifiable economic considerations of a profit-maximizing employer. See *id.* There may be other “soft” costs associated with noncompliance, such as loss of good will or reputational risks. See, e.g., Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and*

the benefits are the difference between actual pay and legal wage rates, and the costs are calculated by multiplying the probability of detection by the amount of expected damages if an employer is caught.⁹³ Under this economic analysis, “employers will not comply with the law if the expected penalties are small either because it is easy to escape detection or because assessed penalties are small.”⁹⁴ So, to increase employer compliance with wage and hour laws, an effective remedy must make wage theft more expensive — raising the cost of noncompliance — by significantly increasing the likelihood of getting caught, elevating penalties substantially, or both.

A. Raising Noncompliance Costs: Increasing the Likelihood of Getting Caught

Beyond the obvious step of hiring many more inspectors, scholars have proposed several approaches to increase the likelihood of catching employers.⁹⁵ At the risk of oversimplification, two primary approaches can be classified as (1) deploying existing inspectorate resources more effectively and efficiently, like targeting particular industries or using a wider array of pedagogical and punitive tools;⁹⁶

Health Laws, 110 AM. ECON. REV. 1866 (2020) (discussing the use of shaming strategies by OSHA to improve health and safety compliance); see also Sharon Yadin, *Regulatory Shaming*, 49 ENV'T L. 407, 441 (2019) (“Research shows that corporations are threatened and motivated not only by the risk of classic legal penalties but also by informal social and economic sanctions, stemming from negative publicity.” (citation omitted)); Lee & Smith, *supra* note 5, at 812–13 (“[E]mployers [whose business model is built on wage theft] may be more likely deterred if there is a credible threat of severe penalties, such as having their business shut down or facing criminal charges.”).

93. See Ashenfelter & Smith, *supra* note 92, at 335–36; see also Hallett, *supra* note 2, at 103; Galvin, *supra* note 13, at 327.

94. See Ashenfelter & Smith, *supra* note 92, at 336.

95. Scholars and advocates have proposed a variety of private solutions outside reforming public inspectorates. For an overview of corporate codes of responsibility, see generally James J. Brudney, *Envisioning Enforcement of Freedom of Association Standards in Corporate Codes: A Journey for Sinbad or Sisyphus?*, 33 COMPAR. LAB. L. & POL'Y J. 555 (2012). Worker-driven social responsibility, another private regime that does not rely on public inspectorates, is a compliance system developed and implemented by workers. See WORKER-DRIVEN SOC. RESP. NETWORK, FACT-SHEET: WHAT IS WORKER-DRIVEN SOCIAL RESPONSIBILITY (WSR)? (2017), https://wsr-network.org/wp-content/uploads/2017/10/What_is_WSR_web.pdf [<https://perma.cc/K4AY-BL9A>]. Worker groups also engage in strategies alongside or outside of government enforcement. See Lee & Smith, *supra* note 5, at 819.

96. Michael Piore and Andrew Schrank argue for a “root-cause regulation” that allows the inspector to use wide discretion and breadth of vision to develop creative solutions that fit within changing business structures, all under a mechanism to manage discretion to avoid undesirable outcomes like bribes or unpredictable regulation. See PIORE & SCHRANK, ROOT-CAUSE REGULATION, *supra* note 16, at 12.

and (2) multiplying inspector capacity by partnering with worker groups and other third-party actors.⁹⁷

Deploying existing inspector resources more effectively must be a primary concern of repairing the enforcement gap, especially in a fissured economy. Scholars have coalesced around a multi-pronged strategy dubbed “strategic enforcement,” which encourages using a broader range of inspector tools in collaboration with third parties.⁹⁸ Instead of relying on complaints and interventions against isolated employers, strategic enforcement uses data to prioritize target industries and employers.⁹⁹ With these targets, inspectors work closely with key third parties — not just worker groups but anyone with influence over the employer or industry — to brainstorm

Ian Ayres and John Braithwaite describe a “responsive regulation” in which the inspectorate adapts to industry conduct and structure in both form and degrees, escalating interventions through an enforcement period that begins with persuasion and ends with license revocation. *See* IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 4, 35 (1992). David Weil proposes “strategic enforcement” in which inspectors move away from a reactive, complaint-based model and toward proactive steps that engage more with networks of employees in order to craft a particular industry structure. *See generally* Weil, *Labour Inspection*, *supra* note 61. Similarly, the ILO proposes a “strategic compliance” model, in which proactive, targeted, and tailored interventions engage multiple stakeholders to help inspectorates maximize their limited resources in an ever-evolving world of work. *See ILO Approach to Strategic Compliance Planning for Labour Inspectorates*, INT’L LAB. ORG. [hereinafter *ILO Approach*], <https://www.ilo.org/global/topics/labour-administration-inspection/resources-library/training/strategic-compliance/lang-en/index.htm> [https://perma.cc/8RCM-LLT8] (last visited Oct. 21, 2021).

97. *See, e.g.*, ESTLUND, *supra* note 19 (arguing for co-regulation as a way of integrating worker groups into self-regulation movements); Andrew Elmore, *Collaborative Enforcement*, 10 NE. U.L. REV. 72 (2018) (advocating for public-private regulatory experimentation); Fine, *supra* note 8 (elaborating on traditional cooperation between inspectors and public interest organizations). Collaboration with worker groups, while not common the United States, is a feature of other countries’ enforcement strategies. *See, e.g.*, INT’L LAB. ORG., *LABOUR ADMINISTRATION AND LABOUR INSPECTION*, *supra* note 9, at 66–68 (reviewing country examples from Spain, South Africa, and Laos, among others).

98. *See generally* WEIL, *IMPROVING WORKPLACE CONDITIONS*, *supra* note 52; *see also* Eric Tucker et al., *Carrying Little Sticks: Is There a ‘Deterrence Gap’ in Employment Standards Enforcement in Ontario, Canada?*, 35 INT’L J. COMPAR. LAB. L. 1, 5 (2019). This strategy is also called “strategic compliance” on the international stage, especially by the ILO. *See ILO Approach*, *supra* note 96.

99. *See* Weil, *Labour Inspection*, *supra* note 61, at 372; *see also* Int’l Labour Conference, *Application of International Labour Standards 2020: Report of the Committee of Experts on the Application of Conventions & Recommendations*, 461–62, ILC.109/III(A) (2020) (ILO).

creative responses to noncompliance.¹⁰⁰ In this model, inspectors seek to deploy stiff penalties on top-level violators to create downward deterrence throughout an entire industry.¹⁰¹

In the most successful U.S. example of strategic enforcement, the WHD's use of the FLSA "hot cargo" or "hot goods" provision in the apparel industry shows how strategic enforcement can penetrate a supply chain and drive labor law compliance that benefits workers at the bottom of the chain.¹⁰² Employing this long-ignored statutory provision in the apparel industry, the WHD embargoes apparel goods that are found to have been manufactured in violation of the FLSA.¹⁰³ The WHD refuses to release the embargoed goods unless the manufacturer agrees to create a compliance program with its subcontractors, including a monitoring system operated by the manufacturer.¹⁰⁴ Given the rapid turnaround expected by retailers, these embargo delays significantly raise the compliance costs for retailers and their manufacturers through lost shipments and lost contracts.¹⁰⁵ Under the specter of these elevated costs, top-level firms are forced to collaborate with the WHD to ensure that their suppliers comply with the law.¹⁰⁶ This example represents a novel tactic for an agency that has historically shied away from a coordinated approach and industry-specific training for inspectors.¹⁰⁷ Unfortunately, the DOL under the Obama Administration ran into fierce opposition when deploying the provision in the agricultural industry.¹⁰⁸

100. See *ILO Approach*, *supra* note 96, at 7 (These third parties "can wield influences that are more powerful and more sustainable than those of the labour inspectorate to combat particular compliance issues for specific targets.").

101. See Tucker et al., *supra* note 98, at 5–6; see also WEIL, *THE FISSURED WORKPLACE*, *supra* note 51, at 222.

102. See Weil, *Labour Inspection*, *supra* note 61, at 370; see also Tess Hardy, *Who Should Be Held Liable for Workplace Contraventions and on What Basis?*, 29 AUSTRALIAN J. LAB. L. 78, 99 (2016).

103. See 29 U.S.C. § 215(a)(1); see also WEIL, *THE FISSURED WORKPLACE*, *supra* note 51, at 227 ("[The 'hot goods' provision] allows the Labor Department to enjoin the transportation, shipment, delivery, or sale across state lines of goods that have been produced by any employee who has not been paid the minimum wage or overtime compensation as required by the FLSA.").

104. See Weil, *Labour Inspection*, *supra* note 61, at 370.

105. See *id.*

106. See WEIL, *IMPROVING WORKPLACE CONDITIONS*, *supra* note 52, at 29–30; see also Hardy, *supra* note 102, at 100.

107. See Weil, *Approach to Address Wage Theft*, *supra* note 73, at 7.

108. The U.S. District Court for the District of Oregon held that use of the "hot goods" provision was economically coercive where the products were perishable produce. See *Perez v. Pan-Am. Berry Growers, LLC*, 6:12-cv-1474-TC, 2014 U.S. Dist. LEXIS 5602, at *14–18 (D. Or. Jan. 15, 2014), *report and recommendation*

In addition to increasing inspector efficiency through strategic enforcement, academics have emphasized how sustained collaboration between inspectors and worker groups can multiply inspector capacity and increase enforcement effectiveness, particularly in the hardest-to-reach industries.¹⁰⁹ Janice Fine and Jennifer Gordon describe a model relationship in which worker groups directly facilitate inspectors' work within their industries.¹¹⁰ In such a partnership, worker groups can do outreach to employees to detect violations and file complaints, and they can identify leverage points against target employers to help inspectors fashion proactive strategies.¹¹¹ Fine and Gordon emphasize the need for partnerships to be “formalized,” “sustained,” and “vigorous” — that, in order for them to function effectively, partnerships must not be ad hoc, temporary, or mere window dressings.¹¹² Importantly, to ensure a formal, continuing relationship and to enable worker group participation, the government must fund the project adequately.¹¹³

This model has borne fruit in both industry-specific and geographically-limited contexts, even with non-union worker groups.¹¹⁴ One particularly successful example is the collaboration between an industry-specific inspectorate — the Janitorial Enforcement Team (JET) of the California Division of Labor Standards Enforcement — and the Maintenance Cooperation Trust Fund (MCTF), a janitorial watchdog organization founded by a

adopted, No. 6:12-cv-1474-TC, 2014 U.S. Dist. LEXIS 56989 (D. Or. Apr. 24, 2014); see also Abbie Fentress Swanson, *'Hot' Oregon Blueberry Fight Prompts Farm Bill Changes*, NPR (Apr. 3, 2014, 11:15 AM), <https://www.npr.org/sections/thesalt/2014/04/03/298537746/hot-oregon-blueberry-fight-prompts-farm-bill-changes> [<https://perma.cc/7YD3-2857>]. For more on the opposition the DOL has faced in using this provision, see generally Stephanie A. Koltookian, *Some (Don't) Like It Hot: The Use of the "Hot Goods" Injunction in Perishable Agriculture*, 100 IOWA L. REV. 1841 (2015).

109. See *supra* note 97.

110. See Fine & Gordon, *supra* note 10, at 560–63 (describing the role of worker groups not as between employers and regulators but as facilitating the inspectors' work by designing proactive strategies, facilitating worker complaints, and more).

111. See *id.* at 561–62; see also BOBO, *supra* note 1, at 125–27 (citing successes like \$1.3 million in back wages collected in Houston and \$1.2 million in back wages secured in Las Vegas through complaint programs developed between worker groups and the DOL).

112. See Fine & Gordon, *supra* note 10, at 561.

113. See ESTLUND, *supra* note 19, at 120 (“Formal monitoring requires staff and money, which are in short supply among many worker organizations other than unions . . .”); see also Fine & Gordon, *supra* note 10, at 561.

114. For an overview of different “tripartism” strategies, see Fine, *supra* note 8, at 823–26.

Service Employees International Union local.¹¹⁵ The MCTF, whose inspectors were longtime janitors, quadrupled the investigative capacity of the JET and provided state inspectors with critical industry knowledge.¹¹⁶ In assisting JET to assemble the information necessary to bring cases, MCTF inspectors knew to visit worksites at night (when janitors worked) and how to systematically reconstruct what workers should have been paid through detailed interviews with workers, a skill that state JET inspectors lacked.¹¹⁷ This partnership, according to state officials, encouraged JET inspectors to prioritize investigations begun by the MCTF and prompted agency attorneys to take a more aggressive posture.¹¹⁸ In four years, the partnership helped create administrative, civil, and criminal actions against bad actor employers that resulted in more than \$38 million in back pay for janitors.¹¹⁹

The strategies outlined above provide ways for the inspectorate to make the best use of its limited resources. The scholars advocating for these tactics, however, offer them not as a substitute for drastically increasing inspector numbers but as a small bandage on a much bigger wound.¹²⁰ Without such an increase in the inspectorate, these strategies on their own will not sufficiently increase the likelihood of employers getting caught. During the 1970s, when numbers of WHD inspectors were at their highest,¹²¹ minimum wage compliance was

115. See Fine & Gordon, *supra* note 10, at 566. The MCTF is a partnership between “law-abiding contractors” and the California janitors’ union, SEIU Local 1877, that seeks to “combat the underground economy, level the playing field, and protect workers.” See *Our History*, MAINT. COOP. TR. FUND, <http://www.janitorialwatch.org/history/> [<https://perma.cc/GL7C-4V4G>] (last visited Dec. 9, 2020).

116. See Fine & Gordon, *supra* note 10, at 566; see also ESTLUND, *supra* note 19, at 117–20.

117. See Fine & Gordon, *supra* note 10, at 566–67; see also MATTHEW AMENGUAL, *POLITICIZED ENFORCEMENT IN ARGENTINA: LABOR AND ENVIRONMENTAL REGULATION* 228 (2016).

118. See Fine & Gordon, *supra* note 10, at 567.

119. See *id.*

120. See WEIL, *IMPROVING WORKPLACE CONDITIONS*, *supra* note 52, at 5 (“The fundamental challenge facing the WHD and most workplace regulatory agencies arises from limitations in resources available to them relative to the size and scope of U.S. workplaces covered by relevant statutes.”); see also Fine & Gordon, *supra* note 10, at 576 (“The bottom line is that marginal increases in the wage and hour inspectorate alone will be insufficient to solve the problem.”).

121. During the Carter Administration, the DOL had 1,600 wage and hour inspectors. President Reagan cut the number to 700. See Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 *YALE L.J.* 2179, 2204 (1994).

still estimated at 69%.¹²² To return to that level of inspection, the U.S. DOL would need to more than double the number of inspectors it deploys.¹²³ The above interventions certainly allow inspectors to be more effective with existing resources; but to really impact employers' compliance calculations by significantly increasing the likelihood of getting caught, Congress must commit to funding and staffing the inspectorate at remarkable levels. Without such congressional action, the other way to impact the compliance equation is to drastically increase penalties.¹²⁴

B. Raising Noncompliance Costs: Increasing Penalties

Apart from not reaching enough employers, inspectors do not have the tools to hold them accountable when they catch them violating the law. At the federal level, fines remain appallingly low, around \$2,000 per violation.¹²⁵ Alongside this amount, the WHD has historically levied civil money penalties in less than half of the cases in which they were entitled to do so.¹²⁶ Typically, the *worst* that an employer can expect for a wage theft violation is to pay the bare amount of the wages owed to an employee within the three-year statute of limitations.¹²⁷ Because of its limited resources, the DOL “routinely settles cases on workers’ behalf for pennies on the dollar.”¹²⁸ Additionally, the DOL lacks the capacity to revoke business licenses or seek the full amount of back wages beyond three years.¹²⁹ And while criminal penalties are available for “willful” and

122. See Ashenfelter & Smith, *supra* note 92, at 343.

123. The number of inspectors increased to over one thousand during the Obama Administration, but “[o]n a per capita basis, the U.S. DOL would need 2,232 investigators to have the same enforcement power as it did in 1975.” Hallett, *supra* note 2, at 122 (citation omitted).

124. See *id.* at 113 (“[T]hese two factors — enforcement and penalties — must be thought of in relation to each other If enforcement rates are very low then penalties must be very severe to reach the same result.”).

125. Civil monetary penalties are only available for repeat or willful violators of minimum wage and overtime laws, and in 2021, the penalty is \$2,074. See 29 C.F.R. § 578.3(a) (2021). The amount is adjusted annually for inflation. See *Civil Money Penalty Inflation Adjustments*, *supra* note 14.

126. See WEIL, IMPROVING WORKPLACE CONDITIONS, *supra* note 52, at 14; see also Galvin, *supra* note 13, at 328 (“Civil or criminal penalties are rare . . .”).

127. See NAT’L EMP. L. PROJECT, *supra* note 28, at 17; see also Hallett, *supra* note 2, at 109.

128. Hallett, *supra* note 2, at 109.

129. See Fine & Gordon, *supra* note 10, at 562 (calling for license revocation and extension or abolishment of statutes of limitation).

repeat offenders,¹³⁰ there is little evidence they are invoked by inspectors.¹³¹

In an ideal world, Congress would not only substantially increase the number of inspectors but also grant inspectors the tools that would allow them to hold accountable bad actor employers. Recognizing the unlikelihood of worker-friendly federal-level change, workers' rights advocates have spent the last decade driving state and municipal reforms to increase the tools available to state-level inspectors, advocates, and workers.¹³² These reforms range from extending the statute of limitations and granting workers private rights of action to authorizing treble damages, much higher monetary fines, and criminal penalties.¹³³ Scholarly analysis demonstrates that the laws that "most dramatically increased punitive damages saw the greatest declines in the incidence of minimum wage violations."¹³⁴ While state-level efforts provide real, important benefits to workers in those jurisdictions, they do not address the federal-level failures that affect workers nationwide.

Even absent sweeping federal change, however, tools to increase penalties for employer noncompliance are available throughout the country — but not to labor inspectors. Prosecutors at state and municipal levels have access to the most punitive tools that federal inspectors lack: arrest, threats of jail time, seizing assets, barring employer access to government contracting, and more.¹³⁵ They can pursue violations under not only labor laws but also other civil and criminal statutes that affect workers, like intentional misclassification, failure to obtain workers' compensation insurance, health and safety violations, insurance fraud, financial crimes, and other creative approaches.¹³⁶

Some scholars and advocates in the United States have argued that AGs and DAs can help fill a portion of the enforcement gap, particularly regarding the epidemic of wage theft.¹³⁷ Scholars

130. See 29 U.S.C. § 216(a).

131. See Galvin, *supra* note 13, at 328.

132. See Lee & Smith, *supra* note 5, at 761.

133. See *id.* at 776.

134. Galvin, *supra* note 13, at 326.

135. See discussion *infra* Section II.C.

136. See Terri Gerstein & David Seligman, *A Response to "Rethinking Wage Theft Criminalization,"* ONLABOR (Apr. 20, 2018), <http://www.onlabor.org/a-response-to-rethinking-wage-theft-criminalization> [<https://perma.cc/Z9Z8-EWAU>].

137. See, e.g., Jane R. Flanagan, *Alt-Enforcers: The Emergence of State Attorneys General as Workplace Rights Enforcers*, 95 CHI-KENT L. REV. 103, 108 (2020) ("[T]raditional wage enforcement agencies, namely state departments of labor and

typically approach the intervention of DAs and AGs from a place of resource deprivation: where the number of inspectors to workers remains perilously low, any other help looks good.¹³⁸ In that analysis, AGs and DAs are complementary to labor inspectorates¹³⁹ or “alternative or supplemental workplace rights enforcers.”¹⁴⁰ These prosecutors cannot replace inspectors and their power to make routine inspections, use non-punitive strategies to encourage employer compliance, or take primary ownership over labor law enforcement.¹⁴¹

But until federal inspectors are plentiful enough *and* possess the high-level tools necessary to hold employers accountable, AGs and DAs should be understood not merely as complementary but rather as necessary in our current inspector framework — without requiring any further legislative action.¹⁴² Where, at the federal level, both the likelihood of inspection and punishment for contravention of labor laws remain painfully low, the tools wielded by AGs and DAs can shift that equation for scofflaw employers. With their broad purview to prosecute crimes¹⁴³ and a host of effective tools at their disposal, AGs and DAs in a variety of jurisdictions have shown that they can hold bad actor employers accountable.¹⁴⁴

the U.S. Department of Labor, do not have the resources to adequately enforce employment laws.”); Gerstein & Seligman, *supra* note 136 (arguing that criminal prosecutions of wage theft, in particular, can address a scope of violations outside the purview of one single inspector in the U.S. context); TERRI GERSTEIN & MARNI VON WILPERT, ECON. POL’Y INST., STATE ATTORNEYS GENERAL CAN PLAY KEY ROLES IN PROTECTING WORKERS’ RIGHTS 3 (2018) (arguing that, as distinct from other government agencies, state AGs have “a range of potential tools”).

138. See Flanagan, *supra* note 137, at 108 (arguing for the intervention of state attorneys general given the under-resourced nature of labor agencies: “On the state level, one recent study estimated that there is one state investigator for every 146,000 workers in the United States . . . [And] an estimated one [federal] investigator for every 135,000 workers” (internal citations omitted)).

139. See TERRI GERSTEIN, ECON. POL’Y INST., WORKERS’ RIGHTS PROTECTION AND ENFORCEMENT BY STATE ATTORNEYS GENERAL 4 (2020) [hereinafter GERSTEIN, WORKERS’ RIGHTS].

140. See, e.g., Flanagan, *supra* note 137, at 103 (describing the general discretionary authority of the New York State Attorney General).

141. See GERSTEIN, WORKERS’ RIGHTS, *supra* note 139, at 3.

142. This Note does not posit that such reforms of the federal inspectorate are impossible; if such reforms are implemented, AGs and DAs arguably would not be as necessary to hold bad actor employers accountable.

143. See Flanagan, *supra* note 137, at 111.

144. For a full list of recent attorney general interventions into labor law enforcement, see GERSTEIN, WORKERS’ RIGHTS, *supra* note 139, at 5. For a review of district attorney actions, see *infra* Section II.C.

C. How DAs and AGs Have Increased Enforcement of Labor Laws

In the last 15 years, state AGs have begun to enforce labor laws.¹⁴⁵ As of 2020, eight states and Washington, D.C. have dedicated workers' rights units within AG offices, six of which were initiated in the last five years.¹⁴⁶ While many units exercise existing legal authority, in several states, legislatures have granted AGs general jurisdiction to protect workers, often concurrent with state departments of labor.¹⁴⁷ These AGs have brought cases to protect workers across a range of abuses: from wage theft and health and safety violations to employee misclassification and sexual harassment.¹⁴⁸ They have pursued both large national corporations and small employers in the underground economy.¹⁴⁹ Some AG offices have institutionalized relationships with community and worker organizations.¹⁵⁰

State AGs play a complementary role to state labor departments, which are the primary enforcement body for state labor laws.¹⁵¹ While labor departments employ investigators and have jurisdiction to enter and inspect workplaces, AG lawyers have the power to issue subpoenas and file lawsuits with a strategic focus.¹⁵² Most states allow AGs to bring both civil and criminal suits.¹⁵³ To pursue wage theft violations, state AGs have achieved significant results for workers using both civil and criminal prosecutions. For example, in 2019, New York AG James secured \$450,000 for 100 home health aides who had been cheated out of wages and unlawfully threatened with deportation for complaining.¹⁵⁴ In 2020, Washington, D.C. AG Racine secured \$500,000 in payments from two employers who stole

145. See generally GERSTEIN & VON WILPERT, *supra* note 137.

146. See GERSTEIN, WORKERS' RIGHTS, *supra* note 139, at 4.

147. See *id.*

148. For a list of AG employment-related actions, separated by type and state, see generally *id.*

149. See GERSTEIN & VON WILPERT, *supra* note 137, at 4–7.

150. See Flanagan, *supra* note 137, at 116–21. For examples of these partnerships, see discussion *infra* Section III.B.

151. For a comprehensive review of AG intervention by state and labor law area, see GERSTEIN, WORKERS' RIGHTS, *supra* note 139, at 3.

152. See *id.* at 3–4.

153. See *id.* at 15.

154. See Press Release, N.Y. Att'y Gen., Attorney General James Secures \$450,000 for 100 Home Health Aides Threatened with Deportation (Sept. 13, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-secures-450000-100-home-health-aides-threatened> [<https://perma.cc/R3UE-S8XV>].

from drywall workers and home healthcare workers.¹⁵⁵ In Fiscal Year 2020, Massachusetts AG Healey secured more than \$12.3 million in restitution and penalties against employers who violated wage and hour laws, covering nearly 13,000 impacted employees.¹⁵⁶

District attorneys have also entered the labor law enforcement space. The most prominent examples are the Manhattan DA and the Alameda County DA.¹⁵⁷ Recently, the Queens DA and Boulder DA have also formed offices dedicated to workers' rights,¹⁵⁸ and varied municipalities have begun to prosecute wage theft. Philadelphia recently created the Economic Crimes Unit to investigate and prosecute crimes against workers, hiring an experienced labor attorney to run the unit.¹⁵⁹ El Paso, Texas, created a wage theft task force in 2011, which includes the police department, county DAs, and a grassroots workers' rights non-profit.¹⁶⁰ Taking advantage of legislation that closed a loophole that had allowed employers to avoid prosecution by paying a small amount of wages owed to a worker, the El Paso DA brought charges against an employer who refused to pay the entire \$2,295 he owed to an employee.¹⁶¹ The employer was

155. See Justin Wm. Moyer, *Two D.C. Employers to Pay Almost \$500,000 in Wage Theft Cases*, WASH. POST (Jan. 2, 2020), https://www.washingtonpost.com/local/public-safety/two-dc-employers-to-pay-almost-500000-in-wage-theft-cases/2020/01/02/9aa3e168-2d7c-11ea-9b60-817cc18cf173_story.html [<https://perma.cc/JAS2-ABFQ>].

156. See OFF. OF MASS. ATT'Y MAURA HEALEY, LABOR DAY REPORT 2020: PROTECTING MASSACHUSETTS WORKERS 3–4 (2020) [hereinafter LABOR DAY REPORT 2020], <https://www.mass.gov/doc/ags-labor-day-report-2020/download> [<https://perma.cc/J2VN-8K3J>].

157. See *infra* notes 163–83 and discussion.

158. See Press Release, Queens Dist. Att'y, Queens Contractor and His Business Plead Guilty to Violating Prevailing Wage Labor Laws and Stealing More than \$1.5 Million from Workers (Sept. 22, 2020); *Human Rights Ordinance*, CITY BOULDER, <https://bouldercolorado.gov/services/human-rights-ordinance> [<https://perma.cc/Z36G-Y3CX>] (last visited Nov. 7, 2020).

159. See Press Release, Phila. Dist. Att'y's Off., District Attorney Krasner Announces New Labor Liaison to Bolster Protections for Workers (Oct. 8, 2019), <https://medium.com/philadelphia-justice/release-district-attorney-krasner-announces-new-labor-liaison-to-bolster-protections-for-workers-62159359ddca> [<https://perma.cc/9QKX-EGEC>].

160. See Priscila Mosqueda, *El Paso Becomes Second City to Indict Employer for Wage Theft*, TEX. OBSERVER (Apr. 26, 2013, 4:04 PM), <https://www.texasobserver.org/el-paso-becomes-second-city-to-indict-employer-for-wage-theft/> [<https://perma.cc/98GV-3PZ4>]. For a description of the Labor Justice Committee/Comité de Justicia Laboral, see *About*, LAB. JUST. COMM., <https://laborjusticecommittee.wordpress.com/about/> [<https://perma.cc/2YWQ-VYRM>] (last visited Nov. 5, 2020).

161. See Scott Braddock, *First Reported Conviction Under Texas' New Wage Theft Law*, CONSTR. CITIZEN (Sept. 16, 2015),

convicted in 2015 and sentenced to a suspended prison sentence, a \$5,000 fine, and full restitution to the employee.¹⁶² In 2019, after Colorado enacted an anti-wage theft statute,¹⁶³ the Boulder County DA negotiated a plea deal with an employer who repeatedly stole undocumented workers' wages and then threatened to report them to immigration authorities.¹⁶⁴ In exchange for a suspended sentence, the employer agreed to pay restitution to the workers or else serve up to three years in prison.¹⁶⁵ These cases highlight two important facets of DA prosecutions: they can successfully prosecute small employers who blatantly violate the law, and they can obtain restitution for workers merely by threatening jail time — and avoid the collections challenges facing civil plaintiffs and inspectors alike in recovering from employers.¹⁶⁶

The Alameda County DA has demonstrated how prosecutors can avoid these collection problems to ensure workers receive restitution. In one large wage theft case, 56 restaurant workers toiled 11 to 12 hours per day, six days per week, for as little as \$2 per hour with no overtime premium.¹⁶⁷ The two defendant restaurateurs, upon hearing of the lawsuit, promptly shuttered the businesses and registered new companies under different owners to avoid paying their workers.¹⁶⁸ The DA, however, successfully seized \$1.7 million of

<https://constructioncitizen.com/blog/first-reported-conviction-under-texas-new-wage-theft-law/1509161> [<https://perma.cc/V3TF-BZV3>].

162. *See id.*

163. *See* Colorado Wage Act, COLO. REV. STAT. § 8-4-101 (2019).

164. *See* Mitchell Byars, *Boulder Man Sentenced for Threatening Undocumented Workers*, DENVER POST (Nov. 12, 2019, 9:34 PM), <https://www.denverpost.com/2019/11/12/boulder-man-sentenced-for-threatening-undocumented-workers/> [<https://perma.cc/7NW5-LXCC>].

165. *See id.*

166. Even if employees win their civil case, collecting on the judgment can be very challenging or impossible. *See* Chris Fuchs, *Wage Theft Cases Can Be Easy to Win. Collecting Is a Different Story*, NBC NEWS (June 19, 2019, 1:15 PM), <https://www.nbcnews.com/news/asian-america/wage-theft-cases-can-be-easy-win-collecting-different-story-n1018306> [<https://perma.cc/274J-9BW3>]; *see also* Hallett, *supra* note 2, at 110–12. For stories of tactics that employers use to avoid paying workers even when civil judgments are issued against them (like declaring bankruptcy or transferring assets to a family member), *see* generally CMTY. DEV. PROJECT AT URB. JUST. CTR. ET AL., *supra* note 76.

167. *See* Pres Release, Off. of the Alameda Cnty. Dist. Att'y., \$1.7 Million in Assets Seized after Restaurant Owners Are Sentenced (Jan. 10, 2019) [hereinafter Alameda Cnty. Press Release], https://www.alcoda.org/newsroom/2019/jan/17_million_in_assets_seized_after_restaurant_owner [<https://perma.cc/XCD6-P9JU>].

168. *See* Ashley McBride, *Two Bay Area Restaurant Owners Ordered to Pay More Than \$1 Million to Cheated Workers*, S.F. CHRON. (Jan. 13, 2019, 5:31 PM),

assets and ultimately distributed more than \$1 million to the workers and the rest to fines and penalties.¹⁶⁹ Notably, despite felony convictions, these defendants avoided jail time by paying the entire amount owed to workers.¹⁷⁰

The Manhattan DA has focused on prosecuting employers who use wage theft schemes among a suite of illegal practices, largely in the construction industry.¹⁷¹ In 2015, an undocumented Ecuadorean construction worker, Carlos Moncayo, was fatally interred when unreinforced excavation walls collapsed at his Manhattan worksite.¹⁷² The general contractor was convicted at trial of manslaughter, criminally-negligent homicide, and reckless endangerment for the worker's death.¹⁷³ The maximum fine for an employer in this situation is a mere \$10,000¹⁷⁴ — an insignificant amount for both a large company and a worker's death.¹⁷⁵ In the course of its homicide investigation, however, the DA discovered that one of the contractors routinely failed to pay overtime to its employees in addition to misclassifying employees to lower his workers' compensation

<https://www.sfchronicle.com/crime/article/Two-Bay-Area-restaurant-owners-must-pay-1-7-13524870.php> [<https://perma.cc/52CR-AWXJ>].

169. See Alameda Cnty. Press Release, *supra* note 167.

170. See *id.*

171. See *Our Work: Construction & Development*, MANHATTAN DIST. ATT'Y'S OFF., <https://www.manhattanda.org/our-work/construction-development/> [<https://perma.cc/K5FC-WD2V>] (last visited Nov. 3, 2020).

172. See David W. Chen, *Manslaughter Charges for Construction Managers After Queens Worker Dies in Pit Collapse*, N.Y. TIMES (Aug. 5, 2015), <https://www.nytimes.com/2015/08/06/nyregion/construction-managers-to-face-manslaughter-charges-in-death-of-queens-worker.html> [<https://perma.cc/T9SW-3CBD>].

173. See John Riley, *Contractor Fined \$10,000 in Cave-In Death of Carlos Moncayo*, NEWSDAY (Dec. 20, 2016), <https://www.newsday.com/news/new-york/contractor-fined-10-000-in-cave-in-death-of-carlos-moncayo-1.12783179> [<https://perma.cc/737S-MNMB>]; see also Trevor Kapp & Danielle Tcholakian, *Supervisor Convicted in Worker's Death Sentenced to Up to 3 Years in Prison*, DNAINFO (Dec. 15, 2016, 2:06 PM), <https://www.dnainfo.com/new-york/20161215/meatpacking-district/supervisor-convicted-death-prison-wilmer-cueva-carlos-moncayo/> [<https://perma.cc/8BY5-5A3W>].

174. See Corinne Ramey, *Construction Company Convicted of Manslaughter Fined \$10,000*, WALL ST. J. (Dec. 20, 2016, 3:34 PM), <https://www.wsj.com/articles/construction-company-convicted-of-manslaughter-fined-10-000-1482265875> [<https://perma.cc/493K-F4XV>].

175. Similarly, the average fine that OSHA issued in a fatality case in 2018 was \$25,178. See CHARLENE OBERNAUER, N.Y. COMM. FOR OCCUPATIONAL SAFETY & HEALTH, *DEADLY SKYLINE: AN ANNUAL REPORT ON CONSTRUCTION FATALITIES IN NEW YORK STATE 8* (2020), <https://nycosh.org/wp-content/uploads/2020/03/2020-Deadly-Skyline-Report.pdf> [<https://perma.cc/FYD7-NT3K>].

insurance payments.¹⁷⁶ By securing guilty pleas for the wage theft and insurance fraud violations, the DA successfully obtained full restitution of \$500,000 stolen from workers.¹⁷⁷ The DA's recognition that the same employers who expose workers to fatal health and safety conditions also routinely steal their wages and engage in tax and workers' compensation fraud led to the formation of the Construction Fraud Task Force.¹⁷⁸ Housed in the Rackets Bureau, which historically has prosecuted organized crime,¹⁷⁹ the Task Force brings together different government agencies to identify and prosecute corruption in the construction industry that affects workers and the general public alike.¹⁸⁰

The Construction Fraud Task Force also organized the Wage Theft Initiative, a collaborative effort of DAs in New York City and surrounding counties as well as the New York City Comptroller, the New York State Department of Labor, and the New York State AG.¹⁸¹ From 2015 through 2017, the Wage Theft Initiative recovered more than \$2.5 million in stolen wages for more than 400 workers.¹⁸² District attorneys in New York City and neighboring counties have pursued wage theft by prosecuting employers under charges of grand larceny, offering a false instrument, criminal possession of stolen property, fraudulent schemes, and failure to pay prevailing wages.¹⁸³

Considering the scope of the enforcement gap, these interventions are minor in scale but important in practice: they exemplify how state and local prosecutors have used their powerful tools to enforce labor

176. See Michael Sachs, Chief of the Investigation Div. & Diana Florence, Att'y-in-Charge of the Constr. Fraud Task Force, New York County District Attorney's Office Testimony before City Council Committee on the Justice System (Apr. 16, 2018), <https://www.manhattanda.org/wp-content/uploads/2018/04/4.16.18-Wage-Theft-City-Council-Hearing-Written-submission-.pdf> [<https://perma.cc/CZ69-5TWH>].

177. See *id.*

178. See *id.*

179. See *About the Office: Bureaus and Units*, MANHATTAN DIST. ATT'Y'S OFF, <https://www.manhattanda.org/about-the-office/bureaus-and-units/> [<https://perma.cc/2YR4-E6JH>] (last visited Nov. 3, 2020).

180. See Sharon O'Malley, *Manhattan DA Launches Task Force to Investigate Corruption in Construction Industry*, CONSTR. DIVE (Aug. 6, 2015), <https://www.constructiondive.com/news/manhattan-da-launches-task-force-to-investigate-corruption-in-construction/403552/> [<https://perma.cc/9EPE-3LM3>].

181. See *New York City and State Partners Announce Joint Effort to Combat Wage Theft in the Construction Industry*, MANHATTAN DIST. ATT'Y'S OFF. (Dec. 4, 2017), <https://www.manhattanda.org/new-york-city-and-state-partners-announce-joint-effort-combat-wage-theft-construction/> [<https://perma.cc/35C6-HG9U>].

182. See *id.*

183. See *id.*

laws. They show that the tools inspectors lack — stiff fines, asset seizure, business closure — or too often fail to employ — criminal penalties — can be used by prosecutors to punish labor law violators and provide restitution to workers. Even more, some DAs and AGs have adapted best practices of inspectorate reform by collaborating with worker groups and targeting particular industries.

III. PROSECUTORS ENFORCING LABOR LAWS: CRITIQUES AND BEST PRACTICES

Labor law enforcement by DAs and AGs is not without its challenges, particularly where undocumented workers are involved. The final Part of the Note will address both critiques of this model and best practices to ensure that these powerful tools are being leveraged safely and effectively. In particular, this Note advocates for DAs and AGs to partner explicitly with worker groups and to focus their investigations and prosecutions in particular industries or on specific employer tactics. This Note highlights these two interventions because, in the limited sample size of prosecutions, they have proven most effective. Additionally, given the elevated risk to undocumented workers in engaging with law enforcement officials, worker groups can not only benefit the investigation and prosecution but also provide security for vulnerable workers who engage agents of the criminal justice system.

A. Critiques of DAs and AGs Enforcing Labor Laws

Encouraging DAs and AGs to enforce labor laws presents three core concerns: whether and how they can undertake this work in this first place, how to protect vulnerable workers from the possible negative consequences of engaging law enforcement, and how to ensure that DAs and AGs pursue workers' interests, not simply punishment of employers. Additionally, one commentator employs a criminal justice lens to critique, as a foundational matter, the use of criminal law to solve the problem of wage theft. The following subsection will take each of these in turn.

A fundamental need for AGs and DAs to prosecute wage theft is the jurisdictional authority,¹⁸⁴ and political will, to do so. Some states have enacted laws that create criminal penalties for wage theft,

184. States give a range of criminal enforcement authority to their AGs. Some, like Connecticut, offer them no criminal authority; others, like Delaware and Rhode Island, give state AGs exclusive criminal jurisdiction. Most states are somewhere in the middle. See GERSTEIN, *WORKERS' RIGHTS*, *supra* note 139, at 15.

explicitly empowering AGs and DAs to pursue these employers.¹⁸⁵ In other jurisdictions, enforcement agents must creatively prosecute under fraud or theft of services laws to interrupt these employers' criminal business practices.¹⁸⁶ In 33 states, for example, criminal codes allow for theft of services law prosecution.¹⁸⁷ Realistically, some DAs or AGs simply may not have clear paths to pursuing bad actor employers or may simply refuse to undertake the creative investigations to hold these employers accountable. Unlike inspectors with a clear list of potential punishments for discrete violations, this model depends more heavily on the individual initiative and priorities of these law enforcement lawyers and the context in which they work. Additionally, because many DAs and AGs are elected officials or are in the public eye, they are subject to greater political pressure than inspectors.¹⁸⁸ This may cause shifting priorities and approaches as political whims change. Some might attribute recent prosecutorial involvement in labor law as a political fad,¹⁸⁹ but the core need for actors with their tools and purview will persist in the absence of profound inspectorate reforms.

Beyond the question of jurisdiction, DAs and AGs may struggle to obtain the right number and types of cases. Under the current enforcement regime, worker complaints are directed primarily to state and federal departments of labor, not to police or prosecutors. Consequently, interested prosecutors may not receive sufficient numbers of complaints to generate cases that are either appropriate for criminal prosecution or have the potential impact they desire.¹⁹⁰ Additionally, even where they may be sufficient in number, complaints that prosecutors receive may not represent the full scope of workplace problems, which arguably inhibits a systematic selection of cases to bring.¹⁹¹

185. See Lee & Smith, *supra* note 5, at 777–80.

186. See Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 663 (2014); see also Rosado Marzán, *Wage Theft as Crime*, *supra* note 2, at 303.

187. See Lee, *supra* note 186, at 663.

188. See Lee & Smith, *supra* note 5, at 796 (“Where prosecutors are elected rather than appointed, they, too, may be reluctant to prosecute local businesses — particularly popular or influential ones — fearing that such action will harm their chances of reelection.”).

189. See Flanagan, *supra* note 137, at 124.

190. See *id.* at 116 (arguing that state AGs may struggle to identify vulnerable workers). Given the elevated burden of proof required for a finding of criminal guilt, not every case of wage theft is appropriate for criminal prosecution.

191. See Lee, *supra* note 186, at 677 (“[E]nforcing wage theft laws against bad actor employers may serve only to cut off low-hanging fruit . . . [W]e might miss out

Engaging with law enforcement presents clear risks for vulnerable workers, as well, particularly but not exclusively for undocumented workers. Critics correctly identify this model's dependence on prosecutorial discretion,¹⁹² which is cause for concern given the history of law enforcement intervention on the side of employers. In the first half of the twentieth century, police frequently used violence to put down worker strikes in favor of employers, with workers left wounded or dead.¹⁹³ More recently, the collaboration between local police and federal immigration authorities has led to severe consequences for some workers who have exercised their workplace rights.¹⁹⁴ Particularly in more conservative jurisdictions, workers' attempts to reclaim these rights can result in the employer calling the police and/or immigration authorities to intervene.¹⁹⁵ Even if only local police arrive, any engagement with law enforcement has the very real potential to trigger adverse immigration consequences as severe as deportation.¹⁹⁶

Further, critics highlight that DAs and AGs traditionally do not seek to make the victim whole; rather, they pursue justice on behalf of society.¹⁹⁷ This does not preclude seeking restitution for workers, however, as demonstrated above.¹⁹⁸ In fact, in the criminal labor law prosecutions that have occurred, employers have largely avoided jail time by pleading guilty and making restitution payments to affected

on the structural factors creating the opportunities for wage theft.”). Additionally, complaint-driven approaches are also inherently *reactive* and may not represent the full scope of — or even the worst — problems on the ground. See WEIL, *THE FISSURED WORKPLACE*, *supra* note 51, at 361. See generally Weil & Pyles, *supra* note 63 (examining the workers who are most likely to complain and how that limits enforcement effectiveness).

192. See Ben Levin, *Prosecutorial Power, Prisons, and the Problem with Wage Theft Criminalization: A Reply*, ONLABOR (Apr. 30, 2018), <https://www.onlabor.org/prosecutorial-power-prisons-and-the-problem-with-wage-theft-criminalization-a-reply/> [https://perma.cc/GZ4A-KPTG].

193. See generally Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1 (2010) (overviewing public and private police involvement in putting down worker strikes).

194. See generally Lee, *supra* note 186.

195. For stories of employers calling Immigration and Customs Enforcement (ICE) after workers assert their rights, see REBECCA SMITH, ANA AVENDAÑO & JULIE MARTÍNEZ ORTEGA, *ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS' RIGHTS* 15–27 (2009).

196. For a discussion of the ways local police affirmatively collaborate with ICE or are otherwise obliged to share information with them, see generally Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Law Enforcement*, 88 N.Y.U. L. REV. 1126 (2013). See also Lee, *supra* note 186.

197. See Flanagan, *supra* note 137, at 103–04.

198. See discussion *supra* Section II.C.

workers.¹⁹⁹ Critics argue that criminalizing employment violations may encourage prosecutors to seek the harshest punishment possible, regardless of the worker's interest.²⁰⁰ In the limited sample size for this work, however, DAs and AGs have not ignored workers' pleas for restitution in favor of stiffer jail sentences.²⁰¹ On the contrary, jail time has largely been used as a backstop for failure to pay restitution.²⁰² Instead of seeking the harshest punishments possible, prosecutors have deployed their tools to compel compliance in ways that inspectors and private litigants cannot,²⁰³ like seizing assets or suspending a sentence of incarceration contingent on the payment of full restitution.

In contrast to critics of criminal labor law enforcement, some scholars argue that wage violations, in particular, should be prosecuted as a "serious social hazard."²⁰⁴ For many, wage theft should be understood as real theft, even if the employee has not yet come into possession of the property.²⁰⁵ Unlike civil courts or government agencies, the criminal justice system is uniquely situated

199. See discussion *supra* Section II.C; see also *CPR's Crimes Against Workers Database*, CTR. FOR PROGRESSIVE REFORM, <https://progressivereform.org/lists/incidents/> [<https://perma.cc/5EKX-YYZB>] (last visited Mar. 18, 2021).

200. See, e.g., Ben Levin, *Rethinking Wage Theft Criminalization*, ONLABOR (Apr. 13, 2018), <http://www.onlabor.org/rethinking-wage-theft-criminalization/> [<https://perma.cc/U7V7-YX9U>].

201. For a comprehensive overview of AG involvement in labor law enforcement, see GERSTEIN, *WORKERS' RIGHTS*, *supra* note 139, at 4.

202. See *id.* at 5. But see Dave Jamieson, *Papa John's Franchisee Gets Jail Time for Failing to Pay Full Wages*, HUFFINGTON POST (Nov. 19, 2015), https://www.huffpost.com/entry/papa-johns-wage-theft_n_564a16e9e4b045bf3df02826 [<https://perma.cc/4DU2-9PSZ>] (describing a franchisee employer's sentence of 60 days in jail, restitution to workers, and civil money penalties).

203. See Hallett, *supra* note 2, at 136 ("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.").

204. See Vosko et al., *supra* note 32, at 259.

205. See Rosado Marzán, *Wage Theft as Crime*, *supra* note 2, at 303. In New York, for example, stealing more than \$3,000 of "property" can land you in prison for up to seven years and a fine up to *double the amount of the offender's gain* from the theft. See N.Y. PENAL LAW §§ 70.00, 80.00, 155.35 (McKinney 2010). Questions exist whether wages are properly understood as "property" for purposes of larceny, because they have not yet come into the worker's "possession." See N.Y. PENAL LAW § 155.00 (McKinney 2010). Even where prosecutors choose not bring larceny charges, other options, like theft of services, are available to prosecute employers in some jurisdictions. See generally Rita J. Verga, *An Advocate's Toolkit: Using Criminal "Theft of Service" Laws to Enforce Workers' Right to Be Paid*, 8 N.Y.C. L. REV. 283 (2005) (outlining where and how prosecutors can use theft of service laws to pursue employers).

to issue moral condemnation for these wrongful takings.²⁰⁶ Apart from questions of enforcement efficacy, for many advocates, wage theft is indeed criminal behavior and should be enforced accordingly.²⁰⁷

Additionally, some advocates argue that because wage theft harms not only individual employees and their families but also wider society, prosecutors are well-suited to pursue justice on behalf of the people.²⁰⁸ Left unchecked, this employer behavior “contributes to . . . a gloves-off labour market in which public decency is sacrificed to the drive to maximise profits at any cost.”²⁰⁹ The costs of wage theft are externalized not only to workers and their communities but throughout society in the form of lost tax revenue and increased strain on social welfare programs.²¹⁰ A landmark study of wage theft in major U.S. cities found that failure to pay the minimum wage increased poverty rates among workers experiencing wage theft by 22.9% in California and 40.6% in New York.²¹¹ For prosecutors seeking to enforce laws whose contravention has wide-ranging societal impacts, wage theft is a natural fit.

Alongside structural concerns about *how* prosecutors would undertake this work, one criminal justice reformer has criticized worker advocates’ embrace of the tools of the criminal justice system — the same system that has decimated communities of color and undocumented immigrants. In his recent article, written from his position as an advocate for decarceration,²¹² Benjamin Levin

206. See Lee, *supra* note 186, at 676 (“[T]he criminalization of wage theft creates unique opportunities to debate the moral dimensions of a labor market . . .”).

207. See, e.g., Diana Florence & Catalina Cruz, *Opinion: Wage Theft Is a Criminal Act. Treat It as Such*, CITYLIMITS (July 16, 2020), <https://citylimits.org/2020/07/16/opinion-wage-theft-is-a-criminal-act-treat-it-as-such/> [<https://perma.cc/H24B-4J36>]; Terri Gerstein, *Stealing from Workers Is a Crime. Why Don't More Prosecutors See It That Way?*, NATION (May 24, 2018), <https://www.thenation.com/article/archive/stealing-from-workers-is-a-crime-why-dont-prosecutors-see-it-that-way/> [<https://perma.cc/5769-52YS>]; see also Rosado Marzán, *Wage Theft as Crime*, *supra* note 2, at 308.

208. See Hatch & Gerstein, *supra* note 13; see also Florence & Cruz, *supra* note 207.

209. See Vosko et al., *supra* note 32, at 259 (citation omitted).

210. See COOPER & KROEGER, *supra* note 5, at 8.

211. See *id.*

212. For more on decarceration and prison abolition, see, e.g., ANGELA DAVIS, ARE PRISONS OBSOLETE? (2003); Robert H. Ambrose, *Note: Decarceration in a Mass Incarceration State: The Road to Prison Abolition*, 45 MITCHELL HAMLINE L. REV. 732 (2019); John Washington, *What Is Prison Abolition?*, NATION (July 31, 2018), <https://www.thenation.com/article/archive/what-is-prison-abolition/> [<https://perma.cc/G3EP-G5AV>].

questions the effectiveness of wage theft prosecutions and cautions against progressive advocates' desire to criminalize objectionable conduct as a policy solution.²¹³ Levin argues that advocates' calls to prosecute wage theft serve to perpetuate the existence of a criminal justice system.²¹⁴ He also questions the theoretical legitimacy of criminalizing wage theft along retributive and deterrent justifications.²¹⁵

Levin's critique, however, misses the mark in several key ways. First, Levin elides criminal prosecution and incarceration.²¹⁶ In doing so, he fails to acknowledge that advocates have *not* consistently sought jail time as a required punishment.²¹⁷ Additionally, by not reviewing the wage theft prosecutions that have taken place, Levin overlooks how employers have largely avoided incarceration by paying workers and penalties.²¹⁸ Further, by conflating prosecution and incarceration, Levin fails to appreciate the distinction in tools available to prosecutors that both enforcement agencies and plaintiffs' attorneys lack, like seizing assets or enforcing a broad array of workplace conduct.²¹⁹ Secondly, by remaining on a purely theoretical plane, Levin refuses to reckon with the practical need for alternatives to an enforcement infrastructure that routinely fails to serve workers' and society's needs. In so doing, Levin misses the thrust of advocates' arguments: not that they would *prefer* that prosecutors pursue criminal penalties for wage theft but that

213. See generally Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429 (2021).

214. See *id.* at 1495.

215. See *id.* at 1450 (“[I]t is not at all clear to me that retributivism requires (or justifies) any sort of carceral punishment for wage theft.” (citation omitted)); see also *id.* at 1459 (questioning the “assumptions” that employers are “rational actors” and that “prison or jail sentences are an effective way to prevent employers from stealing wages”).

216. See *id.* at 1462 (“By embracing an argument that caging people is an acceptable approach if it deters bad conduct, workers’ rights advocates have accepted and embraced a core component of our harshly punitive system.”). Notably, Levin fails to cite any advocates who argue for *incarceration* as a required punishment for successful wage theft prosecutions. *Id.*

217. See GERSTEIN, WORKERS’ RIGHTS, *supra* note 139, at 4.

218. See discussion *supra* Section II.C.

219. See discussion *supra* Section II.B. In other countries, these tools are not restricted to prosecutors; labor inspectors have them, too. Chilean labor inspectors can subpoena employers, conduct mandatory conciliations, and levy heavy fines that compel employer compliance. See Rosado Marzán, *Punishment and Work Law Compliance*, *supra* note 10. French inspectors have wide-reaching abilities to examine any part of the employer’s operations that “deals with the applications of legal provisions.” See Vericel, *supra* note 33, at 306. In cases of wage theft, French inspectors can demand that employers pay wages immediately. See *id.* at 323.

prosecutors *can* fill some of the enforcement gap and effectively enforce bad actor employers where inspectors have failed.²²⁰ Properly understood, advocates' cries that "wage theft is a crime"²²¹ do not seek criminal penalties instead of a robust inspectorate enforcement system or even that bad actor employers should be incarcerated.²²² Rather, when confronted with scofflaw employers who steal a worker's wages combined with the sustained enforcement gap, advocates have developed creative approaches and sought new legal tools to find justice for and with exploited workers.²²³

Levin's warnings about the use of criminal tools to solve public ills are important to consider, given how communities of color, immigrants, and working-class individuals have suffered disproportionately from the criminal justice system.²²⁴ Along with other advocates, this Note, however, does not propose AG and DA prosecution of labor laws as a replacement for other enforcement regimes or as an unrestrained use of criminal justice powers. Instead, prosecutors' intervention should be configured specifically to ensure that workers are protected and that resources are used responsibly to pursue the true bad actor employers that abuse their workers.

220. Wage theft is one of many strategies bad actor employers use to exploit workers, and advocates have sought criminal penalties for many of them. See OBERNAUER, *supra* note 175, at 22; see also Michael Gannon, *Peralta Pushing to Pass Carlos' Law*, QUEENS CHRON. (May 10, 2018), https://www.qchron.com/editions/queenswide/peralta-pushing-to-pass-carlos-law/article_64006adc-7caa-5407-b2b1-4aa6df50c8eb.html [https://perma.cc/5E5C-JLVR] (quoting the Executive Director of New Immigrant Community Empowerment, a worker center, advocating for new criminal penalties for employers in cases of a worker death or serious injury).

221. See Levin, *supra* note 213, at 1446.

222. Levin also argues that by singling out wage theft for criminal penalties, advocates "risk legitimating other employer behaviors and structures of economic inequality." See *id.* at 1488 (citations omitted). Worker advocates, however, seek criminal penalties for a range of employer conduct. See, e.g., Gannon, *supra* note 220 (health and safety); NAT'L EMP. L. PROJECT, EXPOSING WAGE THEFT WITHOUT FEAR: STATES MUST PROTECT WORKERS FROM RETALIATION 24–25 (2019), <https://s27147.pcdn.co/wp-content/uploads/Retal-Report-6-26-19.pdf> [https://perma.cc/3FVB-U294] (employer retaliation).

223. For examples of the range of approaches taken by advocates, including criminal penalties, see generally Lee & Smith, *supra* note 5.

224. See, e.g., Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [https://perma.cc/6UN3-T8UF].

B. Best Practice: Collaboration with Worker Groups

Given the above challenges and critiques, in order to both protect vulnerable workers and ensure successful prosecutions, DAs and AGs must pursue this work under specific conditions.²²⁵ Many of the best practices identified for inspectorate reform have been adopted already by some DAs and AGs who pursue this work: partnering with worker groups, targeting particular industries in which worker abuse spans a multiplicity of violations, and collaborating with other agencies to multiply resource efficiency.

Collaboration with worker groups is critical to the success of DA and AG labor law enforcement, both to protect workers' interests in the legal process and to assist prosecutors in receiving complaints and targeting the right employers.²²⁶ Because prosecutors cannot proactively inspect workplaces, they need a way to identify pressing issues on the ground and surface complaints from vulnerable workers.²²⁷ Worker groups can fill this gap.²²⁸ They can also serve as a buffer between workers and law enforcement,²²⁹ which is particularly critical where vulnerable workers are involved. Because prosecutors often have little experience with labor violations and specific industry practices, worker groups can guide their investigations and secure witnesses for case development while also accompanying workers throughout the case.²³⁰ Additionally, worker

225. For one description of the ideal circumstances under which criminalization of wage theft might operate, see Rosado Marzán, *Wage Theft as Crime*, *supra* note 2, at 310–14.

226. See Hatch & Gerstein, *supra* note 13 (“Workers’ rights enforcement requires extensive collaboration and partnership with civil society — worker centers, unions, advocacy groups — because these groups are based in communities, know conditions on the ground, and have the trust of workers who may be unlikely to reach out to the government.”).

227. See Flanagan, *supra* note 137, at 116.

228. Janice Fine proposes partnerships with worker groups to address the enforcement gap by detecting violations, conducting outreach, collecting evidence, and convening partnerships. See Fine, *supra* note 8, at 825–26. For a broad description of worker centers, which serve and organize non-union workers (particularly low-wage and immigrant workers), see Héctor R. Cordero-Guzmán, *Worker Center Networks, and the Promise of Protections for Low-Wage Workers*, 18 J. LAB. & SOC’Y 31 (2015).

229. See Rosado Marzán, *Wage Theft as Crime*, *supra* note 2, at 312; see also Fine & Gordon, *supra* note 10, at 561 (describing how worker groups could allow workers to file claims anonymously, “triggering an investigation without putting specific workers at risk”).

230. See Flanagan, *supra* note 137, at 120; see also Fine, *supra* note 8, at 825; Alameda Cnty. Press Release, *supra* note 167 (“The Asian Americans Advancing

groups can assist in locating impacted workers in instances of large settlements and alert the prosecutor if the employer is violating the terms of the settlement or court order or otherwise has reverted to breaking the law.²³¹

This collaboration between prosecutors and worker groups should mirror the best practices for inspector partnerships with these organizations: “formalized,” “sustained,” and “vigorous.”²³² As an example of such a configuration, the Manhattan DA has funded a partnership with NYC-based worker centers and other worker advocates, creating the Manhattan Justice for Workers Collaborative (MJWC).²³³ Along with goals of promoting outreach to immigrant workers and training them on their rights, the MJWC seeks to increase reporting of employers’ criminal activities against low-wage workers, particularly regarding wage theft and dangerous health and safety practices.²³⁴ The MJWC funding allows worker groups to expand their outreach and services to immigrant workers in the construction industry, and it increases the two-way flow of information between these groups and the Manhattan DA.²³⁵

Collaboration between worker groups and DAs and AGs exists in many jurisdictions. In Massachusetts, the AG partners with civil legal service providers and worker centers, which assist the AG in hosting monthly wage theft clinics in four different cities.²³⁶ To resolve the large wage theft case discussed above, the Alameda County DA worked with a community-based organization and led a joint investigation with state agencies.²³⁷ The New York AG recently partnered with a worker center in Westchester County to bring

Justice-Asian Law Caucus (AAAJ-ALC) originally referred this case to local authorities and represented several workers who cooperated in the investigation.”).

231. See Flanagan, *supra* note 137, at 120–21.

232. See discussion *supra* Section II.A.

233. See *Manhattan Justice for Workers Collaborative*, N.Y. COMM. FOR OCCUPATIONAL SAFETY & HEALTH, <https://nycosh.org/initiatives/manhattan-justice-for-workers-collaborative/> [<https://perma.cc/2YM2-9ADT>] (last visited Nov. 3, 2020).

234. See *id.*

235. E-mail from Sara Feldman, Worker & Immigr. Rts. Dir., New Immigrant Community Empowerment (NICE), to author (Sept. 2, 2021) (on file with author).

236. Partners include Boston Legal Services, the Brazilian Worker Center, Justice at Work, and others. See *Free Wage Theft Legal Clinic*, MASS. OFF. ATT’Y GEN., <https://www.mass.gov/service-details/free-wage-theft-legal-clinic> [<https://perma.cc/DT3F-C8RB>] (last visited Dec. 7, 2020); see also OFF. OF THE MASS. ATT’Y GEN. MAURA HEALEY, LABOR DAY REPORT 2019: PROTECTING MASSACHUSETTS WORKERS 10 (2019), <https://www.mass.gov/doc/ags-labor-day-report-2019/download> [<https://perma.cc/KAG9-BG3Z>].

237. See Alameda Cnty. Press Release, *supra* note 167.

criminal charges against employers who steal wages from day laborers.²³⁸ Through a collaboration with D.C. Jobs with Justice and other labor organizers, in 2020, the D.C. AG recovered \$2.75 million from an electrical contractor for stealing wages from hundreds of electrical workers.²³⁹

C. Best Practice: Targeting Particular Industries and Employer Tactics

Similar to scholars' proposals for maximizing inspectorate resources,²⁴⁰ DAs and AGs should target particular industries for focused interventions. Concentrating prosecution efforts on industries with a high percentage of vulnerable workers who suffer from a variety of labor law violations can drive change where other enforcement has been insufficient, particularly where employers engage in a panoply of illegal behavior.²⁴¹ In contrast to specialist U.S. inspectors who enforce a narrow set of laws, DAs and AGs have a broad enforcement purview that allows them to pursue a variety of civil and criminal violations.²⁴² Consequently, where inspectors are functionally unable to address the full scope of illegal employer activity that harms workers, prosecutors can enforce a range of this scofflaw conduct within specific industries.²⁴³ Additionally, the

238. See *Workers' Advocates in Westchester Unite Against Rampant Wage Theft*, DON BOSCO WORKERS INC. (Jan. 30, 2018), <http://donboscoworkers.org/workers-advocates-in-westchester-unite-against-rampant-wage-theft/> [<https://perma.cc/3JK7-EYZU>].

239. See Natalie Delgadillo, *Electrical Contractor Reaches \$2.75 Million Settlement in D.C. Wage Theft Lawsuit*, DCIST (Jan. 16, 2020, 1:44 PM), <https://dcist.com/story/20/01/16/electrical-contractor-reaches-2-75-million-settlement-in-d-c-wage-theft-lawsuit/> [<https://perma.cc/26FW-G8WZ>].

240. See discussion of "strategic enforcement" *supra* Section II.A.

241. See Flanagan, *supra* note 137, at 118–19 (describing industry-level enforcement efforts by the N.Y. and D.C. AGs).

242. See generally GERSTEIN, WORKERS' RIGHTS, *supra* note 139, at 5 (discussing the scope of civil and criminal law enforcement by state AGs for workers); Hatch & Gerstein, *supra* note 13 (describing DA prosecutions "for crimes including wage theft (under, for example, larceny, theft of services, or explicit wage theft statutes), payroll fraud, human trafficking, workplace sexual assault, and predictable and preventable workplace fatalities").

243. For examples of prosecutions of employers who violate multiple laws that affect workers, see generally GERSTEIN, WORKERS' RIGHTS, *supra* note 139. Employer conduct includes schemes not only to avoid paying not only wages but also payroll taxes, workers' compensation premiums, and unemployment insurance taxes. See *id.*

industry-level focus often aligns with worker groups, who tend to organize workers employed in specific industries.²⁴⁴

Prosecutors at the state and local level have demonstrated the effectiveness of focusing on either industry or particular employer tactics that employers use. The Manhattan DA's targeting of the construction industry shows the possibilities of prosecuting bad actor employers whose abusive behavior extends across different labor laws.²⁴⁵ The Massachusetts AG also targets specific industries, including construction, hospitality, home healthcare, and employment agencies.²⁴⁶ In the construction industry, in particular, the Massachusetts AG formed a multilingual Construction Site Field Team that collaborates with worker groups to monitor sites, ensure better compliance, and engage with workers.²⁴⁷ The D.C. AG has elected to focus on illegal worker misclassification for its wide-ranging impacts on workers and society,²⁴⁸ which has allowed its specialized attorneys to uncover and prosecute the complex schemes employers use to cheat workers, pay lower taxes, and undercut competitors.²⁴⁹

These prosecutions are highly contextual: whether and how city and state prosecutors want to engage this work; which partners are willing to collaborate; and which industries or employer tactics are most pressing to enforce. Additionally, available resources clearly affect the extent to which prosecutors can pursue the above strategies. Though not feasible in every jurisdiction, AG and DA wage theft prosecutions have proven effective under specific conditions. This work is not without guardrails, as illustrated by both the critiques and limitations mentioned. Because the criminal justice system's consequences can be severe, particularly for communities of color, this approach must be undertaken carefully and strategically — and in partnership with worker groups.

244. See Cordero-Guzmán, *supra* note 228, at 42–44 (describing sector-based networks and individual organizations).

245. For example, the Construction Fraud Task Force pursues “‘wrongdoing and unsafe practices’ at construction sites, including fraud, bribery, extortion, money laundering, bid rigging, larceny and safety violations.” See O’Malley, *supra* note 180.

246. See LABOR DAY REPORT 2020, *supra* note 156, at 4–8.

247. See *id.* at 4.

248. See ATT’Y GEN. FOR THE D.C., ILLEGAL WORKER MISCLASSIFICATION: PAYROLL FRAUD IN THE DISTRICT’S CONSTRUCTION INDUSTRY 1 (2019).

249. See *id.* at 5–7.

CONCLUSION

For the foreseeable future, the U.S. inspectorate will remain hobbled: underfunded, fragmented, and unable to effectively enforce low-wage industries where wage theft runs rampant. Accordingly, this enforcement gap — \$15 billion per year in wages stolen, disproportionately borne by workers of color and their communities — will continue to detrimentally impact vulnerable workers and our society. In the absence of transformative policy change to the U.S. inspectorate, employers will continue to exploit workers and otherwise avoid compliance with the law. Just because U.S. inspectors lack both sufficient numbers and adequate tools to influence employers' compliance decisions does not mean that workers should suffer the consequences of our policy choices and political failures. The punitive tools to change an employer's compliance equation do exist right now, just not with inspectors: stiff fines, asset seizure, criminal penalties, and more. Under the right circumstances and while the inspectorate remains inadequate to enforce our labor laws, DAs and AGs can and should use these powerful tools to prosecute wage theft and protect vulnerable workers. By following the lead of the state and local prosecutors who have paved the way in partnership with worker groups and by targeting particular industries or employer behavior, more DAs and AGs can help abate the epidemic of wage theft by making it much more costly for employers to steal from their workers.