

## AGAINST CRIMINALIZING WAGE THEFT: LESSONS FROM THE ANTITRAFFICKING MOVEMENT

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*Criminalizing wage theft is a popular idea. This Article argues that—based on practitioners’ experience with human trafficking—workers’ rights groups, legislators, and prosecutors should reconsider embracing the criminalization of wage theft as an effective response to preventing this form of abuse. Twenty years of experience with trafficking cases and data show that criminalizing wage theft is likely not only to be ineffective but also to cause further harm to the victims and vulnerable communities who suffer the most from wage theft. A review of labor trafficking cases and data shows the frequent negative impacts on victims from criminal prosecutions that would be avoided if existing civil enforcement systems redressing wage theft violations were instead adequately resourced. Learning from the antiviolence and antitrafficking movement’s past carceral-focused approaches, workers’ rights advocates must reject intensified law enforcement-focused approaches for combating wage theft. Indeed, advocates have the greatest chance of shifting resources from failed law enforcement efforts and creating new pathways for accountability for emerging crimes and for crimes like wage theft that have not been*

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*traditionally subjected to prosecution. In heeding this call, the powerful organizing voice of workers' rights advocates will amplify those currently calling for criminal reform in the United States that rejects mass incarceration and its associated disproportionate impact on Black and Brown communities. Calling for redirecting resources away from our criminal system to fund innovative efforts for accountability more robustly is an effort that workers' rights advocates, with their long history of community organizing and momentous efforts in partnership with vulnerable communities, are exceptionally well suited to lead. At a minimum, investment in developing data-driven, evidence-based practices to deter wage theft and create a better model of accountability on workers' own terms is sorely needed and must be prioritized by advocates and scholars.*

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INTRODUCTION

In 2009, Kim Bobo’s book, *Wage Theft in America*, popularized the term “wage theft.”<sup>1</sup> By emphasizing that wage theft involves employers stealing workers’ labor or services by paying less than state and federal labor laws require, the term elevated the public’s understanding of the seriousness of this abuse and its devastating impact on our most vulnerable workers.<sup>2</sup> Bobo questioned why theft from a business has historically been viewed as more deserving of government resources and protections than theft of a worker’s wages, affecting their ability to pay rent, feed their children, or buy other necessities.<sup>3</sup> This shift in perspective was long overdue, given the many workers, primarily from the most

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<sup>1</sup> KIM BOBO, *WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT* (2009).

<sup>2</sup> The term can include not paying minimum wage or not paying overtime, not paying a final paycheck, or stealing tips that must be paid to workers. Workers can also be misclassified as independent contractors or be designated as “exempt” so that employers claim they can pay less than minimum wage. Employers also may “illegally deduct wages” for housing, transportation, or equipment or make workers pay recruitment fees. Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL’Y REV. 93, 98–99 (2018) (summarizing the forms that wage theft takes); see also Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429, 1443–44 (2021) (defining “wage theft” similarly based on a review of state and federal statutes).

<sup>3</sup> BOBO, *supra* note 1, at 6–22, 52–53.

disadvantaged communities, who suffer from this grave abuse.<sup>4</sup> The term “wage theft” was subsequently adopted and used by researchers, scholars, and advocates.<sup>5</sup> For example, in 2014, the left-leaning and employment-focused think tank the Economic Policy Institute (EPI)<sup>6</sup> published multiple articles documenting the \$50 billion annual loss to workers from this practice, highlighting that these losses far surpass those resulting from crimes such as robberies, burglaries, larcenies, and motor vehicle thefts.<sup>7</sup>

In 2000, almost ten years before the publication of Kim Bobo’s groundbreaking book on wage theft, the federal government passed the Trafficking Victims Protection Act (TVPA),<sup>8</sup> which included new definitions of the crimes of human trafficking, recognizing the extreme exploitation workers often experience in providing labor or sexual services.<sup>9</sup> This critical law created a framework for U.S. government

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4 ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES* 5 (2009), <https://www.nelp.org/app/uploads/2015/03/BrokenLawsReport2009.pdf> [<https://perma.cc/4LV3-6C52>] (documenting that two-thirds of low-wage workers suffer some form of wage theft).

5 See, e.g., Jennifer Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759 (2019); U.S. DEP’T OF LABOR, *THE SOCIAL AND ECONOMIC EFFECTS OF WAGE VIOLATIONS: ESTIMATE OF CALIFORNIA AND NEW YORK* (2014), <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/WageViolationsReportDecember2014.pdf> [<https://perma.cc/H555-F8T3>].

6 Ross Eisenbrey, *Wage Theft Is a Bigger Problem Than Other Theft—But Not Enough Is Done to Protect Workers*, ECON. POL’Y INST. (Apr. 2, 2014), <https://www.epi.org/publication/wage-theft-bigger-problem-theft-protect> [<https://perma.cc/H5VA-228J>] (“Wage theft is a far bigger problem than bank robberies, convenience store robberies, street and highway robberies, and gas station robberies combined. Employers steal billions of dollars from their employees each year by working them off the clock, by failing to pay the minimum wage, or by cheating them of overtime pay they have a right to receive. Survey research shows that well over two-thirds of low-wage workers have been the victims of wage theft, but the governmental resources to help them recover their lost wages are scant and largely ineffective.”).

7 E.g., Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL’Y INST. (Sept. 11, 2014), <https://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds> [<https://perma.cc/88T5-8T66>] (highlighting that these crimes cost their victims around \$14 billion in 2012, which was only “one-third of the estimated cost of wage theft nationwide”); Brady Meixell & Ross Eisenbrey, *Wage Theft Is a Much Bigger Problem Than Other Forms of Theft—But Workers Remain Mostly Unprotected*, ECON. POL’Y INST. (Sept. 18, 2014), <https://www.epi.org/publication/wage-theft-bigger-problem-forms-theft-workers> [<https://perma.cc/5YPT-MLHL>].

8 Trafficking Victims Protection Act (TVPA), Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended at 22 U.S.C. §§ 7101–7115). The TVPA was reauthorized in 2003, 2006, 2008, 2013 and 2023. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); Trafficking Victims Prevention and Protection Reauthorization Act of 2022, Pub. L. No. 117-348, 136 Stat. 6211 (2023).

9 22 U.S.C. § 7102



efforts to combat human trafficking domestically and internationally. It also generated the impetus for growing public awareness of this issue in the United States.<sup>10</sup> Despite the TVPA's avowed focus on the "Three P's"—prosecution, protection, and prevention—prosecutorial efforts have received the lion's share of time and resources as a means of preventing human trafficking.<sup>11</sup> The government, along with many advocates working on this issue, have taken this criminalization approach rather than relying on evidence-based, data-driven research documenting the known risk factors for victimization.<sup>12</sup> To this day, enhancing prosecutorial efforts to arrest and convict traffickers monopolizes the available resources, while services for survivors remain underfunded,<sup>13</sup> and alternative prevention efforts remain underexplored.<sup>14</sup>

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<sup>10</sup> *Human Trafficking: Key Legislation*, U.S. DEP'T OF JUST., <https://www.justice.gov/humantrafficking/key-legislation> [<https://perma.cc/RKK7-8HQJ>].

<sup>11</sup> *Id.*

<sup>12</sup> *Preventing Human Trafficking Using Data-Driven, Community-Based Strategies*, CMTY. PSYCH. (Sept. 17, 2018), <https://www.communitypsychology.com/preventing-human-trafficking> [<https://perma.cc/UPM4-6K9Q>]; see also *FNUSA Recommendations Highlighted in the 2023 Trafficking in Persons Report*, FREEDOM NETWORK USA (2023), <https://freedomnetworkusa.org/2023/06/21/fnusa-recommendations-highlighted-in-the-2023-trafficking-in-persons-report> [<https://perma.cc/78K2-3H6G>]; WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, *THE U.S. RESPONSE TO HUMAN TRAFFICKING: AN UNBALANCED APPROACH* (Michelle Brané & Kelly Hienrich eds., 2007) ("[A]t issue is the entire conceptual framework of trafficking as a law enforcement issue and only a law enforcement issue."); Stephanie Richard & Suzanne La Pierre, *A Restorative Justice Alternative for Trafficking Survivors: The Need for a Collaborative Approach in Establishing a Pilot Program Addressing Survivor-Articulated Needs*, 57 CONN. L. REV. 621 (2025).

<sup>13</sup> Additionally, a focus on prosecution to prevent trafficking has also resulted in a long history of marginalizing survivors' perspectives, despite their experiences being critical for developing effective policies for trafficking prevention and trafficker accountability. *E.g.*, NAT'L SURVIVOR NETWORK, *THE 2022 REPORT OF THE NSN: A NEW VISION FOR EMPOWERING SURVIVOR LEADERSHIP* (2022), <https://nationalsurvivornetwork.org/wp-content/uploads/2022/12/2022-NSN-Annual-Report.pdf> [<https://perma.cc/SQ4N-F567>]; U.S. ADVISORY COUNCIL ON HUMAN TRAFFICKING, *ANNUAL REPORT 2022* (2022), [https://www.state.gov/wp-content/uploads/2022/09/2022-Annual-Report-FINAL\\_Web-Version\\_508.pdf](https://www.state.gov/wp-content/uploads/2022/09/2022-Annual-Report-FINAL_Web-Version_508.pdf) [<https://perma.cc/YX5Z-MP8W>].

<sup>14</sup> *E.g.*, U.S. DEP'T OF STATE, *2024 TRAFFICKING IN PERSONS REPORT: UNITED STATES* (2024), <https://www.state.gov/reports/2024-trafficking-in-persons-report/united-states> [<https://perma.cc/7BFP-3F6W>] ("Advocates continued to call for the government to prioritize a more comprehensive and proactive approach to address the factors and conditions—including those created by government policies or structures like the criminal justice system, immigration system, housing, and healthcare—that increase vulnerabilities to human trafficking. Advocates again called for the government to further examine racism, discrimination, and poverty as root causes.").

On a continuum, forced labor and human trafficking<sup>15</sup> are the most severe forms of wage theft.<sup>16</sup> Trafficking entails stealing a victim's labor or services through force, fraud, or coercion.<sup>17</sup> The vulnerabilities that make someone susceptible to being trafficked, including discrimination against women, minorities, and the undocumented in the workplace, are similar to those afflicting individuals who most often experience wage theft.<sup>18</sup> Victims of human trafficking are forced to perform labor or commercial sexual services for traffickers through violence, physical restraint, or various forms of mental and emotional control.<sup>19</sup> Wage theft is another form of labor exploitation in which workers often remain in exploitative and abusive situations because of their limited access to alternative employment or other vulnerabilities.<sup>20</sup> Both human trafficking

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<sup>15</sup> The statutory definition of a victim of human trafficking under federal law includes both sex and labor trafficking. See 22 U.S.C. § 7102(11). This Article, when referring to "human trafficking," will focus on efforts that address both sex and labor trafficking. When using the term labor trafficking, this Article will focus exclusively on efforts as defined in 22 U.S.C. § 7102(11)(B) as "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." *Id.*

<sup>16</sup> Benjamin Harkins, *Base Motives: The Case for an Increased Focus on Wage Theft Against Migrant Workers*, 15 ANTI-TRAFFICKING REV. 42, 52 (2020) (highlighting research shows that the most common form of abuse within forced labor is related to wages and that "a large portion of even the most severe cases of exploitation are fundamentally linked to wage theft"); see also COLLEEN OWENS ET AL., URB. INST., UNDERSTANDING THE ORGANIZATION, OPERATION, AND VICTIMIZATION PROCESS OF LABOR TRAFFICKING IN THE UNITED STATES 76 (2014), <https://www.urban.org/sites/default/files/publication/33821/413249-Understanding-the-Organization-Operation-and-Victimization-Process-of-Labor-Trafficking-in-the-United-States.pdf> [<https://perma.cc/VL4J-4S58>] (explaining that trafficking victimization often involves "elements of both labor exploitation and labor trafficking"); Derek J. Marsh, *Understanding and Pursuing Labor Trafficking Cases Collaboratively*, 85 SOCIETIES 13 (2023) ("Labor trafficking is a subset of labor exploitation which is a subset of lawful labor practices.").

<sup>17</sup> See 22 U.S.C. § 7102(11)(B).

<sup>18</sup> IHNA MANGUNDAYAO, CELINE McNICHOLAS, MARGARET POYDOCK & ALI SAIT, ECON. POL'Y INST., MORE THAN \$3 BILLION IN STOLEN WAGES RECOVERED FOR WORKERS BETWEEN 2017 AND 2020 (2021), <https://www.epi.org/publication/wage-theft-2021> [<https://perma.cc/L8QM-42K4>]; see also BERNHARDT ET AL., *supra* note 4, at 5 (finding that all workers are vulnerable to wage theft, but women, African Americans, and immigrants are the most vulnerable); HEATHER J. CLAWSON, NICOLE DUTCH, AMY SOLOMON & LISA GOLDBLATT GRACE, U.S. DEP'T HEALTH & HUM. SERVS., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 7–9 (2009) (documenting the characteristics of those who most commonly are sex and labor trafficked which includes women, people of color, and immigrants).

<sup>19</sup> CLAWSON ET AL., *supra* note 18, at 7–9; see also 22 U.S.C. § 7102(3)(A)–(C) (broadly defining coercion to include "any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person").

<sup>20</sup> Fernanda Teixeira, *'It's Truly Exploitative': Labour Control and Exploitation in Domestic Work in Mexico*, 107 WOMEN'S STUD. INT'L F., Nov.–Dec. 2024, at 1, 5; see also CENTRO DE LOS

and wage theft take many forms and are common across all industries and workplaces in the United States.<sup>21</sup> However, unlike human trafficking, which impacts an unknown number of individuals in the United States, research shows that numerous low-wage workers will be the victims of wage theft at some point.<sup>22</sup> These data and the resulting political pressures have increasingly made wage theft an issue for some politicians to embrace.<sup>23</sup> Unfortunately, policymakers, much like those

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DERECHOS DEL MIGRANTE & U. PENN. L. SCH. TRANSNATIONAL LEGAL CLINIC, ENGENDERING EXPLOITATION: GENDER INEQUALITY IN U.S. LABOR MIGRATION PROGRAMS 6 (2017), <https://cdmigrante.org/wp-content/uploads/2018/01/Engendered-Exploitation.pdf>

[<https://perma.cc/P3L8-HXVP>] (quoting a representee worker interviewed: “We don’t like the work, but we don’t question it. Why should we, when it’s the only thing there is?”); RUTH MILKMAN, ANA LUZ GONZÁLEZ & VICTOR NARRO, UCLA INST. FOR RSCH. ON LAB. & EMPLOYMENT, WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES: THE FAILURE OF EMPLOYMENT AND LABOR LAW FOR LOW-WAGE WORKERS (2010), <https://irle.ucla.edu/old/publications/documents/LA wage theft-Milkman-Narro-110.pdf> [<https://perma.cc/NSQ2-FGZJ>] (documenting the characteristics and circumstances of almost 2,000 workers surveyed in Los Angeles and the labor violations they regularly experience).

<sup>21</sup> BERNHARDT ET AL., *supra* note 4, at 9; HUM. TRAFFICKING INST., 2020 FEDERAL HUMAN TRAFFICKING REPORT 29 (2020), <https://traffickinginstitute.org/wp-content/uploads/2022/01/2020-Federal-Human-Trafficking-Report-Low-Res.pdf> [<https://perma.cc/9DU4-88LS>]; REBECCA PFEFFER ET AL., RTI INT’L, UNDERSTANDING WHAT WORKS IN THE SUCCESSFUL IDENTIFICATION, INVESTIGATION, AND PROSECUTION OF LABOR TRAFFICKING CASES IN THE UNITED STATES 3-5-3-6 (2023), [https://www.rti.org/sites/default/files/documents/2024-03/What\\_Works\\_in\\_Addressing\\_Labor\\_Trafficking\\_Final\\_Report.pdf](https://www.rti.org/sites/default/files/documents/2024-03/What_Works_in_Addressing_Labor_Trafficking_Final_Report.pdf) [<https://perma.cc/FY6Y-S33R>].

<sup>22</sup> DAVID COOPER & TERESA KROEGER, ECON. POL’Y INST., EMPLOYERS STEAL BILLIONS FROM WORKERS’ PAYCHECKS EACH YEAR (2017), <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year> [<https://perma.cc/5Z9R-A7TP>] (showing that 2.4 million workers lose \$8 billion annually with wage theft—impacting 17% of all low wage workers—and “workers in all demographic categories [are] being cheated out of pay”).

<sup>23</sup> Abigail Swenstein & Kate Mogulescu, *Resisting the Carceral: The Need to Align Anti-Trafficking Efforts With Movements for Criminal Justice Reform*, ANTI-TRAFFICKING REV., 2016, at 118, 118–22; Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 J. WOMEN CULTURE & SOCIETY 45, 46–47 (2010); Timothy Kariotis & John Howe, *Mapping Wage Theft With Data Science*, PURSUIT (Feb. 9, 2021), <https://pursuit.unimelb.edu.au/articles/mapping-wage-theft-with-data-science> [<https://perma.cc/2K89-CGYC>] (“Many approaches are purely deterrent based, such as the criminal liability legislation . . . [T]hey focus on penalties for those who commit wage theft. . . . [B]ut there is also evidence to suggest that higher penalties are less of a deterrent compared to increasing the likelihood of detection . . . . [D]ata-driven tools . . . [can] increase the likelihood of wage theft detection.”); see also TESSA JOHNSON, FOREST PETERSON, MICHAEL MYERS, RUTH SILVER TAUBE & MARTIN FISCHER, CTR. FOR INTEGRATED FACILITY ENGINEERING, PREDICTING, ANALYZING, AND EDUCATING ON WAGE THEFT WITH MACHINE LEARNING TOOLS 2 (2016), <https://stacks.stanford.edu/file/druid:mx396wr3611/TR229.pdf> [<https://perma.cc/G7KJ-NEEE>]; *Announcement: Racial Equity in Anti-Trafficking Work*, NAT’L SURVIVOR NETWORK (Mar. 22, 2022), <https://nationalsurvivornetwork.org/racial-equity> [<https://perma.cc/F7C9-2NKC>] (highlighting through interviews with lived experts that many survivors wanted non-carceral

involved in antitrafficking efforts, have proposed “easy” solutions focusing on the traditional carceral response that primarily calls for increased criminal investigations and enforcement as the best way to deter wage theft instead of data-driven efforts focused on the root causes of this exploitation. Janos Marton, a 2020 Democratic candidate for Manhattan District Attorney, highlights this prosecutorial focus in his political messaging:

Across America, the economic harm from “wage theft” is billions of dollars per year—far greater than the annual sum of property crimes such as grand larceny or burglary. That is staggering. Our criminal justice system gives executives who steal from their own workers a pass, while showing no such mercy to their employees when they act out of economic desperation. . . . [I]t is unacceptable that more than half of minimum wage workers in New York City suffer from wage violations. Such pervasive economic loss is a societal problem, but it has not been treated as one. . . . That must change. As Manhattan District Attorney, I will dramatically transform the office with a proactive and robust approach to workers['] rights. . . . By designing a robust and aggressive series of investigations into Manhattan’s worst offenders, we will not only bring workers justice, but establish a deterrent effect among *all* industries who exploit their workers.<sup>24</sup>

In an effort to demonstrate the seriousness of employers’ failure to pay workers their wages, politicians have called for an increased carceral approach to wage theft.<sup>25</sup> Furthermore, as awareness of the prevalence and impact of wage theft on working people and their families has steadily grown, a concerning trend has also arisen: some workers’ rights groups

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responses focused on a public health approach to addressing trafficking that “already has a solid evidence-based framework for violence prevention” and further noting that survivors asked the antitrafficking movement to focus on long-term prevention efforts including “eradicating poverty, reducing childhood trauma, prevention of sexual and partner violence, and increasing labor protections. . . to help the general public and especially policy-makers better understand the connection between strong social and economic supports and reduction of trafficking”).

<sup>24</sup> Janos Marton, *Wage Theft: Protecting Workers and Holding Corporations Accountable*, MEDIUM (Sept. 8, 2020), <https://janosforda.medium.com/wage-theft-protecting-workers-and-holding-corporations-accountable-7da989c79c40> [https://perma.cc/CGB3-EEAR] (footnotes omitted).

<sup>25</sup> See, e.g., Press Release, Seth Magaziner, U.S. Representative, Magaziner Announces Bill to Crack Down on Wage Theft (Sept. 19, 2024), <https://magaziner.house.gov/media/press-releases/magaziner-announces-bill-crack-down-wage-theft> [https://perma.cc/8479-884Y]; Press Release, Kathy Hochul, Governor of N.Y., Governor Hochul Signs Legislation to Support Workers by Protecting Employees From Mandatory Political and Religious Meetings, Strengthening Wage Theft Penalties, and Increasing Benefits for Injured Workers (Sept. 6, 2023), <https://www.governor.ny.gov/news/governor-hochul-signs-legislation-support-workers-protecting-employees-mandatory-political-and> [https://perma.cc/Y3D6-TZUE].

and academics are also pushing politicians and prosecutors to embrace a policy of increasing criminal prosecutions.<sup>26</sup> For example, a 2021 report from the EPI provides concrete guidance on how prosecutors' offices and worker advocates can become involved in criminal wage theft cases.<sup>27</sup> Because human trafficking cases are one of the few workplace violations that have been criminally prosecuted and because human trafficking has long caught the public and politicians' attention, when advocates and academics call for increased prosecution of wage theft, they often use labor trafficking cases as concrete examples of how our criminal system can and should be used to prosecute workplace violations.<sup>28</sup> Indeed, the EPI's report states that labor trafficking has been "a pathway for prosecutors' offices to get involved in broader worker exploitation issues."<sup>29</sup>

Therefore, this Article chronicles the decades of experiences of anti-human trafficking practitioners, evidence-based data, and trafficking case examples to show why an increased focus on criminally prosecuting wage theft should be reconsidered. Part I provides a brief overview of the main arguments for and against the expanded prosecution of wage theft. Part II provides a data-driven analysis of human trafficking task forces, showing the failure of this collaborative structure to increase criminal prosecution for labor trafficking and demonstrating that these collaborative efforts generate unintended consequences for individuals in our most vulnerable communities. Part III further supports this argument, citing labor trafficking case examples and associated data showing the likely additional harms and limitations of increasing the prosecution of wage theft. Part IV then explores how carceral approaches advanced by feminists in the antiviolence movement further show why workers' rights advocates must learn from experience and firmly reject

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<sup>26</sup> Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 656 (2014) (reporting that workers' rights advocates "have turned to a novel tactic in the fight against employer exploitation: pushing for the criminalization of wage theft" and have also persuaded lawmakers in a number of jurisdictions to pass laws imposing imprisonment for "these bad acts").

<sup>27</sup> TERRI GERSTEIN, ECON. POL'Y INST., HOW DISTRICT ATTORNEYS AND STATE ATTORNEY GENERALS ARE FIGHTING WORKPLACE ABUSES (2021), <https://files.epi.org/uploads/224957.pdf> [<https://perma.cc/VME7-XKWA>]; see also Hallett, *supra* note 2, at 121–41 (providing recommendations on how to reform enforcement of wage theft laws, which have historically been underenforced).

<sup>28</sup> GERSTEIN, *supra* note 27, at 19–20. But see Lee, *supra* note 25. Lee's article cautions against increasing criminal focus on wage theft without additional research, especially regarding unknown consequences for immigrant communities. *Id.* Further, Lee highlights that enforcement efforts in the trafficking context have resulted in "prosecutors often focus[ing] on individual 'bad actors,'" which obscures complex global factors "contributing to and structuring these bad acts." *Id.* at 677.

<sup>29</sup> GERSTEIN, *supra* note 27, at 19.

the demonstrably ineffective carceral approach. Instead, they should embrace evidence-based preventive solutions grounded in public health, civil enforcement, and survivor-informed approaches to ending wage theft, which the workers' rights community, unlike the antitrafficking movement,<sup>30</sup> has historically been at the forefront of promoting in the first place.<sup>31</sup>

## I. A BRIEF OVERVIEW OF ARGUMENTS FOR AND AGAINST CRIMINALIZING WAGE THEFT

The initial impetus and justification by many groups or scholars supporting increased criminal focus on wage theft have broadly included three main drivers: (1) the widespread and entrenched violation of workplace laws,<sup>32</sup> (2) civil enforcement agencies being historically underfunded with labor enforcement agencies receiving a fraction of the support of criminal law enforcement,<sup>33</sup> and (3) the belief that criminal

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<sup>30</sup> See, e.g., CHRIS ASH ET AL., NAT'L SURVIVOR NETWORK, WE NAME IT SO WE CAN REPAIR IT 6–8 (2023), <https://nationalsurvivornetwork.org/wp-content/uploads/2023/04/We-Name-It-So-We-Can-Repair-It.pdf> [<https://perma.cc/35HR-HUDB>]. This report, written by human trafficking survivors, highlights that, historically, the infrastructure for addressing violence and workers' rights issues emerged out of advocacy by impacted people organizing to advance their needs. See *id.* In contrast, it highlights that the antitrafficking movement has often not been guided by those most impacted. See *id.*

<sup>31</sup> See, e.g., CTR. FOR POPULAR DEMOCRACY, A PRACTICAL GUIDE TO COMBATING WAGE THEFT: LESSONS FROM THE FIELD 17 (2017), [https://www.populardemocracy.org/sites/default/files/WTHandbook-web\\_output%20%281%29.pdf](https://www.populardemocracy.org/sites/default/files/WTHandbook-web_output%20%281%29.pdf) [<https://perma.cc/C4RW-LRHN>] (reviewing worker-led strategies and best practices for passing legislation to combat wage theft and examples focused on increasing civil enforcement); Lee & Smith, *supra* note 5, at 772–74 (chronicling that worker-led movements have sought to address the wage theft crisis, resulting in a total of 141 laws being enacted from 2005 to 2018, while further highlighting that “[l]ow-wage workers have directly led many of these efforts, along with the participation of community-based organizations, worker centers, legal services agencies, and unions”). Notably, at the time of this study, less than 73% of new provisions that were worker-driven created or increased penalties in the criminal system. *Id.* at 779.

<sup>32</sup> GERSTEIN, *supra* note 27, at 5 (“The increased involvement occurs in the context of high rates of violations of workplace laws and inadequate enforcement resources[.]”); Hallett, *supra* note 2, at 98–120 (discussing the wage theft crisis); Anthony Damelio, Note, *Making Wage Theft Costly: District Attorneys and Attorneys General Enforcing Wage and Hour Law*, 49 FORDHAM URB. L.J. 109, 111–12 (2021) (arguing that the “enforcement gap” necessitates the involvement of district attorneys and attorneys general).

<sup>33</sup> Damelio, *supra* note 32, at 148; see also JEOUNGHEE KIM & SKYE ALLMANG, CTR. FOR WOMEN AND WORK, WAGE THEFT IN THE UNITED STATES: A CRITICAL REVIEW 9–11 (2000), [https://smlr.rutgers.edu/sites/default/files/Documents/Centers/CWW/Publications/wage\\_theft\\_in\\_the\\_united\\_states\\_a\\_critical\\_review\\_june\\_2020.pdf](https://smlr.rutgers.edu/sites/default/files/Documents/Centers/CWW/Publications/wage_theft_in_the_united_states_a_critical_review_june_2020.pdf) [<https://perma.cc/5RWQ->

penalties result in deterrence.<sup>34</sup> The above reasoning has led some workers' rights groups and scholars to conclude that prosecution for abuses committed against workers is an appropriate remedy to help strengthen workplace protections by establishing criminal consequences for employers exploiting workers.<sup>35</sup>

There is no question that wage theft runs rampant in the United States. Experts calculate the enforcement gap at \$15 billion per year in wages stolen.<sup>36</sup> Some have argued that it could be as large as \$50 billion.<sup>37</sup> Furthermore, there is no question that the resources provided to our criminal system far surpass the investments into our civil systems, where enforcement of wage theft abuses has traditionally been conducted by federal, state, and local labor agencies focusing on workplace regulation and violations.<sup>38</sup> However, the crux of the argument for involving law

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EMYK] (reviewing the underfunding of civil labor enforcement federally and across the states). Furthermore, a direct comparison of expenditures between the California Labor Commission (CALC) and the California Department of Justice (CA DOJ) demonstrates these gross disparities concretely. For example, in 2022, the CALC budget was \$166 million, which funded 840 positions. Alejandro Lazo, Jeanne Kuang & Julie Watts, *Agency Battling Wage Theft in California Is Too Short-Staffed to Do Its Job*, CAL MATTERS (Oct. 17, 2022), <https://calmatters.org/california-divide/2022/10/agency-battling-wage-theft> [https://perma.cc/PD83-3ECK]. In the 2023 to 2024 budget year, CA DOJ was allocated \$1.347 billion, which funded 5,900 positions. LABOR AND WORKFORCE DEVELOPMENT (2024), <https://ebudget.ca.gov/2023-24/pdf/BudgetSummary/LaborandWorkforceDevelopment.pdf> [https://perma.cc/H9Y4-FRPF]; LEGIS. ANALYST'S OFF., THE 2024–25 BUDGET: DEPARTMENT OF JUSTICE (2024), <https://lao.ca.gov/Publications/Report/4831> [https://perma.cc/N4RE-S8JZ]. Furthermore, federally, the Department of Justice budget was \$35.3 billion for the fiscal year 2022, with 117,954 positions funded, whereas the Federal Department of Labor budget for 2022 was \$14.6 billion, with just 16,855 full-time employees. U.S. OF DEP'T JUST., FY 2022 BUDGET SUMMARY (2022), [https://www.justice.gov/d9/pages/attachments/2021/05/27/fy\\_22\\_budget\\_performance\\_summary\\_5.25.21.pdf](https://www.justice.gov/d9/pages/attachments/2021/05/27/fy_22_budget_performance_summary_5.25.21.pdf) [https://perma.cc/RA2Z-AE7F]; U.S. DEP'T OF LAB., FY 2022 BUDGET IN BRIEF 1 (2022), <https://www.dol.gov/sites/dolgov/files/general/budget/2022/FY2022BIB.pdf> [https://perma.cc/T8KN-MMSH].

<sup>34</sup> GERSTEIN, *supra* note 27, at 11 (“[C]riminal prosecutions are likely to have a significant deterrent impact on employer misconduct.”); Hallett, *supra* note 2, at 120 (concluding based on research not specific to wage theft that “[i]mposing criminal liability has the potential to provide a strong deterrent effect”).

<sup>35</sup> See GERSTEIN, *supra* note 27, at 1.

<sup>36</sup> COOPER & KROEGER, *supra* note 22, at 2.

<sup>37</sup> BRADY MEIXELL & ROSS EISENBREY, ECON. POL'Y INST., AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR 2 (2014), <https://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds> [https://perma.cc/KX9E-96JF].

<sup>38</sup> See, e.g., Hallett, *supra* note 2, at 120 (“[D]espite the laws on the books, very few wage theft prosecutions have occurred. One study found only eleven wage theft prosecutions between 2011 and 2013 in the entire country. With millions of noncomplying employers in the country, the odds of getting convicted for committing wage theft are similar to the odds of getting hit by lightning—in other words, not high enough to change anyone’s behavior.” (footnote omitted) (first citing *Winning Wage Justice: A Summary of Criminal Prosecutions of Wage Theft in the United States*,

enforcement—that increased prosecution will deter other employers from committing wage theft—lacks research showing its effectiveness.<sup>39</sup> Even those advocating for this approach have acknowledged that no data shows that criminal prosecutions in the wage theft context will actually deter other employers from committing similar crimes.<sup>40</sup> Indeed, in promoting this policy in their 2021 article, the EPI highlights the lack of any research:

One set of key research questions relates to the impact of criminal prosecution. Does prosecution of one employer deter violations by others? If so, how can such deterrence be measured, and how does it compare with that of civil enforcement? Does deterrence stem from the greater likelihood of detection resulting from more enforcers addressing labor issues, from publicity and reputational harm, from the gravity of potential consequences, or from all of the above?<sup>41</sup>

Equally concerning as ignoring the lack of deterrence data available is that some proponents seemingly disregard the potential harm to vulnerable workers that could result from increased Law Enforcement Agency (LEA) engagement by proposing solutions that also lack any evidence-based efficacy data.<sup>42</sup> The proponents of increasing

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NAT'L EMP. L. PROJECT (2013), <http://www.nelp.org/content/uploads/2015/03/Crim-Prosecutions-WWJ.pdf> [<https://perma.cc/SYF2-3HSN>]; then citing *Flash Facts About Lightning*, NAT'L GEOGRAPHIC, [http://news.nationalgeographic.com/news/2004/06/0623\\_040623\\_lightningfacts.html](http://news.nationalgeographic.com/news/2004/06/0623_040623_lightningfacts.html) [<https://perma.cc/4WF4-LB3U>]).

<sup>39</sup> See, e.g., Damelio, *supra* note 32, at 124 (arguing that involving District Attorneys and Attorney Generals increases the “the likelihood of getting caught” and raises the cost of noncompliance by increasing penalties); Hallett, *supra* note 2, at 135 (“[T]he possibility of criminal penalties, including imprisonment, will send the message to employers that they cannot violate the law and get off with a slap on the wrist.”). *But see* Lee & Smith, *supra* note 5, at 793–94 (questioning whether criminal penalties can have any impact in preventing wage theft after reviewing the limited research in this area).

<sup>40</sup> See KIM & ALLMANG, *supra* note 33, at 23 (highlighting the need for empirical research “to demonstrate which anti-wage theft measures or combinations of multiple measures help reduce wage theft incidences in a particular industry”); *see also* Lee, *supra* note 26, at 658 (questioning whether “police can solve the problem of wage theft in the day labor market” and concluding that there is a greater need for study and laying out the research that should be performed to “answer the question of when policing wage theft can be both effective and desirable”); Lee & Smith, *supra* note 5, at 793 (concluding that strategies to prevent wage theft dependent on “[p]enalties are problematic because they rely on command and control strategies that are often ineffective at changing the behavior of the regulated entities [w]ithout a sufficient threat of real enforcement”).

<sup>41</sup> GERSTEIN, *supra* note 27, at 29.

<sup>42</sup> See GERSTEIN, *supra* note 27, at 25–27; Hallett, *supra* note 2, at 135; Wayne A. Comstock, Note, *Wage Theft Prosecution: How Prosecutors Can Help Workers and Create More Widespread Adoption*, 31 GEO. J. POVERTY L. & POL'Y 419, 446 (2024) (supporting increasing prosecution of wage theft if prosecutors enact four directives: “(1) implementing an office-wide policy, (2) creating dedicated units, (3) collaborating with other institutions, and (4) targeting specific industries”).



criminalization agree that wage theft is disproportionately borne by workers of color and their communities.<sup>43</sup> Furthermore, those who support this approach have even raised the concern that vulnerable workers, especially workers of color and immigrant workers, have been harmed by the criminal system and face risks from the criminalization of wage theft. For example, in her 2018 article reviewing the history of wage theft and calling for increased targeted enforcement, including criminal prosecution, Professor Nicole Hallett recognizes this concern: “There is the risk that criminal law enforcement against employers will ensnare workers as well.”<sup>44</sup> In her 2021 report, Terri Gerstein warns that “[r]acial and economic inequities in the criminal justice system and vulnerabilities of immigrant workers raise important concerns about these criminal prosecutions.”<sup>45</sup> However, despite raising these concerns, scholars have asserted, though with no data to support their position, that the potential harms of engaging law enforcement can be mitigated by collaboration with law enforcement, workers’ rights groups, agencies that traditionally work with labor crimes, and through the creation of specialized prosecution units and task forces.<sup>46</sup> The lack of data for their proposed solution is especially concerning given the well-documented evidence of law enforcement’s history of violence against workers, especially in conservative districts and against immigrant workers.<sup>47</sup> Furthermore, as early as 2014, Professor Stephen Lee raised nuanced concerns around the complex dynamics of policing immigrant communities—looking not just at the affected worker but the consequences for immigrant business

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<sup>43</sup> See, e.g., IHNA MANGUNDAYAO, CELINE McNICHOLAS, MARGARET POYDOCK & ALI SAIT, ECON POL’Y INST., MORE THAN \$3 BILLION IN STOLEN WAGES RECOVERED FOR WORKERS BETWEEN 2017 AND 2020 (2021), <https://files.epi.org/uploads/240542.pdf> [<https://perma.cc/XHJ3-7FTP>]; see also Hallett, *supra* note 2, at 99 (noting that “women, minorities, and those without legal authorization to work in the United States are particularly vulnerable” to wage theft).

<sup>44</sup> Hallett, *supra* note 2, at 135; see GERSTEIN, *supra* note 27, at 26; Damelio, *supra* note 32, at 139 (“Engaging with law enforcement presents clear risks for vulnerable workers, as well, particularly but not exclusively for undocumented workers.”).

<sup>45</sup> GERSTEIN, *supra* note 27, at 26. Gerstein qualifies her support for criminal enforcement by cautioning that she does “not suggest that all cases should be handled criminally, of course; criminal prosecutions should be reserved for the most serious violations and, of course, brought in situations in which intent and acts can be proven beyond a reasonable doubt.” *Id.* at 5. However, she does so without providing a framework or guidance for how District Attorneys and Attorneys General can possibly make these complex assessments. See *id.*

<sup>46</sup> Hallett, *supra* note 2, at 135 (“[L]ocal police departments are often resistant to enforcing laws against wage theft to the same extent they enforce laws against other types of theft, states might need to create task forces to do this work.”); GERSTEIN, *supra* note 27, at 24, 30 (“DA and AG offices without dedicated workers’ rights units should consider creating such units.”).

<sup>47</sup> Damelio, *supra* note 32, at 139–40.

owners.<sup>48</sup> In his thoughtful paper *Policing Wage Theft in the Day Labor Market*, he concludes that policing wage theft comes with risks “and its success depends on the lengths to which police departments are willing to go in resisting federal overtures to participate in immigration enforcement programs.”<sup>49</sup> The additional research he proposes as essential in assessing the effectiveness of engaging the police before advocating for their increased engagement in wage theft has not been addressed by scholars and advocates promoting a criminal approach in the ten years since his article was published.<sup>50</sup> Furthermore, the concern he raises regarding the cost of drawing attention away from the “larger structural forces that created the opportunities for wage theft in the first place” has also seemingly been ignored by those who advance carceral approaches to wage theft.<sup>51</sup>

Finally—and perhaps most concerning—those promoting the criminalization of wage theft are doing so precisely when criminal reform efforts are strengthening across the United States.<sup>52</sup> This movement, which has been driven by evidence-based data, shows both the ineffectiveness of the carceral approach and its disproportionate impact on minority and other vulnerable communities.<sup>53</sup> Nonetheless, the

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<sup>48</sup> Lee, *supra* note 26, at 674–75.

<sup>49</sup> *Id.* at 678.

<sup>50</sup> See *id.* at 677–78.; GERSTEIN, *supra* note 27, at 29–30. Gerstein highlights that unaddressed questions with these partnerships remain:

There are also questions related to partnerships between prosecutors and other government and nongovernmental actors. What partnerships can and should be built with labor enforcement agencies, unions, or worker organizations? How should roles in partnerships with labor enforcement agencies be defined to ensure compliance with respective ethical obligations and agency priorities?

*Id.*

<sup>51</sup> Lee, *supra* note 26, at 678.

<sup>52</sup> *Turning the Tide on Mass Incarceration*, FWD.US (May 15, 2024), <https://www.fwd.us/news/turning-the-tide-on-mass-incarceration> [<https://perma.cc/36ES-KQ2S>].

<sup>53</sup> Specific emerging research also raises questions about additional negative impacts for immigrants and minorities when focusing on criminalizing wage theft. For example, Bennett Capers has documented how minorities are overwhelmingly arrested for misdemeanors and also explores how nonminorities are undercriminalized and underenforced. Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589, 591–92, 595 (2016). This evidence-based analysis raises the question that in the wage theft context, immigrant and minority businesses may similarly be disproportionately targeted. See *id.* Further researchers have recently looked more deeply into the prevalence of police-related fear by race and unsurprisingly found that personal fear of the police among Black respondents and other racial and ethnic minorities is common but uncommon with white respondents. See Justin Pickett, Amanda Graham & Francis T. Cullen, *The American Racial Divide in Fear of the Police*, 60 CRIMINOLOGY 291, 302–03 (2021). This disparity raises questions about the potential disproportionate emotional harm to victims in engaging in wage theft criminal investigations and prosecutions for Black and minority workers. See *id.*

supporters of criminalizing wage theft directly deny or ignore that their efforts will have a contrary impact on this movement.<sup>54</sup> In a 2018 blog post, Benjamin Levin questioned labor rights groups and scholars embracing criminalizing wage theft because of its impact on the movement against mass incarceration in the United States.<sup>55</sup> He argued: “the impulse to use criminal law for “progressive” ends is dangerous; it serves to bolster the carceral state and all of its deep structural flaws. Wage theft is a serious problem. There can and should be solutions that don’t feed the ravenous social appetite for more criminal punishment.”<sup>56</sup>

In 2021, Levin wrote a detailed article offering a critique of the criminalization of wage theft. In this article, he reflects:

Troublingly, the literature and activism relating to wage theft have failed to reckon with the stakes of using criminal law and incarceration as the tools to remedy workplace violations. Strangely absent from the discourse on wage theft is any engagement with one of the most vital contemporary movements to confront structural inequality: the fight to end mass incarceration.<sup>57</sup>

Critics of Levin’s position contend that his arguments are “purely theoretical,”<sup>58</sup> and that he ignores the “need for alternatives to an enforcement infrastructure that routinely fails to serve workers’ and society’s needs.”<sup>59</sup> Specific responses echo those raised in EPI’s 2021 report<sup>60</sup> and include:

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<sup>54</sup> See Terri Gerstein & David Seligma, *A Response to “Rethinking Wage Theft Criminalization,”* ONLABOR (Apr. 20, 2018), <https://onlabor.org/a-response-to-rethinking-wage-theft-criminalization> [https://perma.cc/Q7A4-WEBA] (“[W]e don’t think that bringing the criminal law to bear on predatory employers who take advantage of vulnerable workers exacerbates the injustices of our criminal justice system.”); see also Michael Migiel-Schwartz, *Why District Attorneys Should Take Up Wage Theft Criminalization*, ONLABOR (Feb. 22, 2021), <https://onlabor.org/why-district-attorneys-should-take-up-wage-theft-criminalization> [https://perma.cc/2FLW-32HA] (arguing, paradoxically, that, given that the “crisis of wage theft under-enforcement exists now,” “prosecutors can and should take immediate steps to redirect efforts toward wage theft” and that this action “helps to reimagine the role of prosecutors and police and gives momentum to movements calling to redirect resources that now go to funding the police”).

<sup>55</sup> Benjamin Levin, *Rethinking Wage Theft Criminalization*, ONLABOR (Apr. 13, 2018), <https://onlabor.org/rethinking-wage-theft-criminalization> [https://perma.cc/8GHF-KGDT].

<sup>56</sup> *Id.*

<sup>57</sup> Levin, *supra* note 2, at 1435–36 (footnote omitted).

<sup>58</sup> Damelio, *supra* note 32, at 142.

<sup>59</sup> *Id.*

<sup>60</sup> GERSTEIN, *supra* note 27, at 26–27.

- (1) The focus of criminalizing wage theft need not be on seeking jail time as punishment but ensuring, employers pay workers and criminal penalties;<sup>61</sup>
- (2) Prosecutors can enforce workplace crimes more broadly as they have distinct tools that civil enforcement agencies and plaintiff's attorneys do not;<sup>62</sup> and
- (3) Using prosecution as an alternative to civil enforcement fills the current enforcement gaps.<sup>63</sup>

To help resolve the questions raised by these opposing views and to provide guidance for reform efforts, this Article catalogs the disappointing results over the last twenty years of efforts to curtail labor and sex trafficking through increased criminal prosecution. Experience in these related areas provides concrete examples of how “criminal tools to solve public ills”<sup>64</sup> in workplaces fail the people they are supposed to protect—those most vulnerable, including communities of color and immigrants.

## II. EXPERIENCE WITH HUMAN TRAFFICKING TASK FORCES DEMONSTRATES THAT EVEN WITH COLLABORATIVE MODELS, INCREASED FOCUS ON PROSECUTION CONTINUES TO HARM VULNERABLE COMMUNITIES

### A. *Human Trafficking Collaborative Task Forces*

Some proponents of wage theft criminalization contend that the deep-seated racial inequities inherent in law enforcement and vulnerable community interactions can be mitigated by LEA partnering with worker's rights groups, fostering close collaboration between agencies,<sup>65</sup>

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<sup>61</sup> Damelio, *supra* note 32, at 217–18.

<sup>62</sup> *Id.* at 130–31.

<sup>63</sup> *Id.* at 132–37.

<sup>64</sup> *E.g., id.* at 141–43. Despite criticizing Levin, scholars in this area agree with Levin's warning in one key area: “[T]he 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.” *Id.* at 143.

<sup>65</sup> See César F. Rosado Marzán, *Wage Theft as Crime: An Institutional View*, 20 J.L. IN SOC. 300, 301 (2020) (arguing for increasing the criminalizing wage theft but “urg[ing] a significant caveat: the right institutional framework must exist before worker advocates entrust the police and prosecutors to investigate and prosecute this workplace crime”); GERSTEIN, *supra* note 27, at 24 (“[P]rosecutors wishing to receive referrals should build relationships with a number of

working with collaborative task forces, or a combination of these practices.<sup>66</sup> A 2021 evaluation of the human trafficking task forces, however, shows that collaboration cannot adequately eliminate racial equity concerns or the problematic treatment of victims engaged with law enforcement.<sup>67</sup> In fact, the study reveals persistent over-arrest rates in communities of color, including the arrest of victims themselves, even after almost twenty years of active collaboration.<sup>68</sup> The study further shows that the collaborative model did not even meet law enforcement's goal of increasing referrals and prosecution of human trafficking for labor trafficking cases.<sup>69</sup>

The 2021 report documents that, at the time of their evaluation in 2020, there were forty-seven active, federally funded "Enhanced Collaborative Model to Combat Human Trafficking" (ECM) task forces in the United States.<sup>70</sup> Ten task forces participated in the evaluation, all of which had received special funding for at least three years.<sup>71</sup> The ECM funding model requires each jurisdiction to have a local law enforcement

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organizations and offices. These relationships should be ongoing and systematic . . ."); Damelio, *supra* note 32, at 144 ("DAs and AGs must pursue this work under specific conditions. Many of the best practices identified for inspectorate reform have already 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." (footnote omitted)).

<sup>66</sup> See, e.g., Hallett, *supra* note 2, at 135; Comstock, *supra* note 42, at 441–42.

<sup>67</sup> WILLIAM ADAMS ET AL., U.S. DEP'T OF JUST., TECHNICAL REPORT 300863, EVALUATION OF THE ENHANCED COLLABORATIVE MODEL TO COMBAT HUMAN TRAFFICKING (2021), <https://www.ojp.gov/pdffiles1/nij/grants/300863.pdf> [<https://perma.cc/79UK-53Z9>].

<sup>68</sup> *Id.* at 43–44.

<sup>69</sup> *Id.* at 24–25.

<sup>70</sup> *Id.* at 2. This number does not include the specially funded eighty-six law enforcement task forces for sex trafficked minors, which, to date, have not been evaluated. These task forces are also supposedly based on a collaborative model focusing on child exploitation and child sex trafficking and were launched by the FBI in 2003 and named the Child Exploitation and Human Trafficking Task Forces ("CEHTTFs"). Press Release, Fed. Bureau of Investigation, Innocence Lost National Initiative and Operation Independence Day 2019 (Aug. 6, 2019), <https://www.fbi.gov/contact-us/field-offices/washingtondc/news/press-releases/innocence-lost-national-initiative-and-operation-independence-day-2019> [<https://web.archive.org/web/20241008185208/https://www.fbi.gov/contact-us/field-offices/washingtondc/news/press-releases/innocence-lost-national-initiative-and-operation-independence-day-2019>]. These task forces partner with the Department of Justice's Child Exploitation and Obscenity Section, and the National Center for Missing and Exploited Children to investigate child sex trafficking. Other members of the CEHTTFs include local, state, and federal law enforcement and victim services organizations. *Human Trafficking*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/violent-crime/human-trafficking> [<https://web.archive.org/web/20250105073419/https://www.fbi.gov/investigate/violent-crime/human-trafficking>].

<sup>71</sup> *Id.* at 50.

lead agency and lead victim service provider organization.<sup>72</sup> The funding terms require grantees to implement the ECM model by functioning as “a comprehensive, multidisciplinary task force” and coordinating their “goals, objectives, and activities.”<sup>73</sup> ECM task force-led organizations must also coordinate with local, state, and relevant federal agencies, service providers, and community-based groups.<sup>74</sup>

Historically, there have been between forty-two and forty-seven DOJ-funded human trafficking task forces across the United States.<sup>75</sup> The ECM model evaluated in the 2021 study began in 2010, but the first money-supporting collaborative task force models in the human trafficking context were available as early as 2004.<sup>76</sup> The 2022 report documents that, before their study, “[r]elatively little research on federally funded, multidisciplinary anti-human trafficking task forces (including the ECM task forces) ha[d] been conducted.”<sup>77</sup> The little available research came from a 2008 study that only provided initial findings suggesting “that federally funded task forces may be helpful in increasing the number of prosecutions of human trafficking.”<sup>78</sup> This

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<sup>72</sup> *Id.* at 7, 50; see also OFF. FOR VICTIMS OF CRIME, U.S. DEP’T OF JUST., OMB NO. 1121-0329, FY 2023 ENHANCED COLLABORATIVE MODEL (ECM) TASK FORCE TO COMBAT HUMAN TRAFFICKING 9 (2023), <https://ovc.ojp.gov/funding/o-ovc-2023-171656.pdf> [<https://perma.cc/AM6X-P9MW>]. The purpose of the ECM Task Force to Combat Human Trafficking, as stated in the 2023 funding solicitation, is to “develop, expand, or strengthen a multidisciplinary approach to better respond to human trafficking.” *Id.*

This collaborative approach must include victim and social service providers; law enforcement; prosecution personnel (local, state, and federal); individuals with lived experience; and a range of other governmental and nongovernmental partners that work together to provide access to a diverse set of services for trafficking victims and to seek justice on their behalf. ECM task forces also train law enforcement and other stakeholders in how to identify victims of trafficking in persons and related offenses, and conduct victim-centered and trauma-informed investigations to prosecute traffickers.

*Id.*

<sup>73</sup> ADAMS ET AL., *supra* note 67, at 7.

<sup>74</sup> *Id.* at 6–7.

<sup>75</sup> See ADAMS ET AL., *supra* note 67, at 2, 7.

<sup>76</sup> *Id.*

<sup>77</sup> EVELYN F. MCCOY ET AL., URB. INST., FINDINGS FROM AN EVALUATION OF THE ENHANCED COLLABORATIVE MODEL TASK FORCES TO COMBAT HUMAN TRAFFICKING 4, 8 (2022), <https://www.urban.org/sites/default/files/publication/105326/findings-from-an-evaluation-of-the-enhanced-collaborative-model-task-forces-to-combat-human-trafficking.pdf> [<https://perma.cc/PLJ5-F6KD>].

<sup>78</sup> *Id.* at 4 (citing AMY FARRELL, JACK MCDEVITT & STEPHANIE FAHY, DEP’T OF JUST., UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING: FINAL REPORT (2008), <https://www.ojp.gov/pdffiles1/nij/grants/222752.pdf> [<https://perma.cc/5RSE-DB2P>]). A 2012 study also found that “sites with federally funded task forces were more likely

study surveyed almost 2,000 law enforcement officers.<sup>79</sup> Specifically, it found that LEAs participating in a human trafficking task force were more likely to perceive human trafficking as a problem, have human trafficking training and protocols in place, make more arrests for trafficking, and follow through with formal charges following arrests.<sup>80</sup> However, the 2008 study also revealed substantive barriers to LEAs engaging in human trafficking issues.<sup>81</sup> The majority of law enforcement did not even perceive human trafficking as a problem in their communities.<sup>82</sup> Furthermore, the report documented that law enforcement required extensive specialized training and protocols as a baseline for increasing arrests and ensuring charges following arrests.<sup>83</sup> Based on these findings, the 2008 study recommended an increased focus on a collaborative task force model to increase the prosecution of human trafficking.<sup>84</sup> The report, however, said nothing about this model being an effective means of serving vulnerable communities or preventing human trafficking in the first place.

In reviewing the literature addressing collaborative efforts in the human trafficking context, the 2021 report, like the 2008 report, indicates that “coordinated efforts to address human trafficking across service providers and law enforcement have historically been challenging”<sup>85</sup> despite a funding framework that requires collaboration and purportedly

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to have prosecutors attend a training or conference on human trafficking but were not more likely to have greater institutional infrastructure . . .” *Id.* (citing AMY FARRELL ET AL., NORTHEASTERN UNIV. INST. ON RACE & JUST. & URB. INST. JUST. POL’Y CTR., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 133 (2012)).

<sup>79</sup> AMY FARRELL, JACK MCDEVITT & STEPHANIE FAHY, DEP’T OF JUST., UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING: FINAL REPORT 2 n.1 (2008), <https://www.ojp.gov/pdffiles1/nij/grants/222752.pdf> [<https://perma.cc/5RSE-DB2P>].

<sup>80</sup> *Id.* at 9.

<sup>81</sup> *Id.* (“Task forces struggle to overcome a number of obstacles, some endemic to multi-agency partnerships themselves, and others specifically tied to human trafficking.”).

<sup>82</sup> *Id.* at 3.

<sup>83</sup> *Id.* at 114–16.

<sup>84</sup> *Id.* at 10.

<sup>85</sup> ADAMSET AL., *supra* note 67, at 6; *see* FARRELL ET AL., *supra* note 78.

equally emphasizes ensuring that victims receive trauma-informed services<sup>86</sup> and that there are increased human trafficking prosecutions.<sup>87</sup>

B. *Extensive Training Provided to Human Trafficking Task Forces  
Has Not Worked*

Advocates for criminalizing wage theft have highlighted the need for additional training for law enforcement and dedicated units to increase the prosecution of wage theft from workers in vulnerable communities hesitant to report crimes. For example, the EPI endorses the following approach:

By creating a dedicated unit, DAs and AGs enable assigned lawyers to develop expertise in the subject matter and handling of these cases, which require a different approach than many other criminal cases. These cases often entail building relationships with worker organizations, conducting extensive interviews with workers who may be reluctant witnesses for a variety of reasons (including fear of retaliation or potential immigration consequences for themselves or family members) . . . . Creation of a dedicated unit also allows for lawyers to build relationships with other government agencies (for example, state and local labor departments) and stakeholders (such as unions and other worker organizations) that are potential sources of cases.<sup>88</sup>

The EPI report further highlights research from Professor César Rosado Marzán, who “specifically recommended specialized prosecutors

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<sup>86</sup> See INT’L ASS’N OF CHIEFS OF POLICE, MULTIDISCIPLINARY COLLABORATIVE MODEL FOR ANTI-HUMAN TRAFFICKING TASK FORCES: DEVELOPMENT & OPERATIONS ROADMAP 5 (2020), <https://www.theiacp.org> [<https://perma.cc/6T4G-D9D3>] (stating that a dual purpose of the task forces is “ensuring that all trafficking victims are identified and receive access to a comprehensive array of supportive services and that the crimes of human trafficking are successfully investigated and prosecuted at the local, state, tribal, and federal levels”).

<sup>87</sup> See ADAMSET AL., *supra* note 67, at 17. Based on interviews with law enforcement, the 2022 evaluation found that they could not effectively embrace the dual goals of task forces. See *id.* Despite the dual-stated goals of the task force for almost twenty years, the report found that “law enforcement and prosecutors most frequently cited the overarching goal of the task force as implementing traditional criminal justice responses to human trafficking, i.e., arresting and prosecuting cases of human trafficking.” *Id.* at 16. Strikingly, the study concluded that law enforcement, despite being part of the ECM collaborative model, still only focused on “criminal justice goals.” *Id.* at 17. Only the victim service providers interviewed as part of the collaborative model focused on services and survivor goals. *Id.*

<sup>88</sup> GERSTEIN, *supra* note 27, at 4; see also César F. Rosado Marzán, *Wage Theft as Crime: An Institutional View*, 20 J.L. & SOC’Y 300 (2020) (supporting the increased prosecution of wage theft but only if specialized police and prosecutors exclusively handle these cases).



for this work, given ‘the vulnerable nature of the workers who seek their aid’ and potential immigration and other consequences that could result from nonspecialized prosecutors handling such cases.”<sup>89</sup>

Virtually the same justifications have been used to support ECM human trafficking collaborative task force models.<sup>90</sup> However, despite the ECM task forces being initially funded to develop more specialized knowledge on human trafficking within law enforcement, the evaluators in the 2021 report—almost twenty years after the task force model launched—recommended additional training to simply ensure victims of trafficking were not arrested and to build relationships with impacted communities.<sup>91</sup>

Task forces should be encouraged to not arrest survivors because this can lead to further trauma, negative interactions with law enforcement, and destabilization for survivors. Additional training on victim-centered and trauma-informed approaches for investigating human trafficking may be needed, as well as training on survivor perceptions of safety for task forces that rely on arresting and incarcerating survivors as a means of keeping them “safe”.... Additionally, a disproportionate number of individuals arrested for trafficking in this study were Black or African American. Task forces should be encouraged to examine their relationships with

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<sup>89</sup> GERSTEIN, *supra* note 27, at 4 (citation omitted); see also Rosado Marzán, *supra* note 88, at 314.

<sup>90</sup> See FARRELLET AL., *supra* note 78, at 90–91; see also Susan Mapp, Emily Hornung, Madeleine D’Almeida & Jessica Juhnke, *Local Law Enforcement Officers’ Knowledge of Human Trafficking: Ability to Define, Identify, and Assist*, 2 J. HUM. TRAFFICKING 329 (2016) (concluding, based on a survey of 175 local law enforcement officers, that “results strongly support the need for formal training of local law enforcement officers and provision of knowledge from law enforcement sources in order to be able to effectively combat human trafficking”); Theresa Nietzel, *Notes from the Field: Collaboration Is Key in Human Trafficking Investigations*, NAT’L INST. OF JUST. (Mar. 27, 2020), <https://nij.ojp.gov/topics/articles/notes-field-collaboration-key-human-trafficking-investigations> [<https://perma.cc/E4VE-AJ34>]; OFF. FOR VICTIMS OF CRIME, U.S. DEP’T OF JUST., BUILDING EFFECTIVE COLLABORATIONS TO ADDRESS HUMAN TRAFFICKING (2015), [https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/HT\\_Building\\_Effective\\_Collab\\_fact\\_sheet-508.pdf](https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/HT_Building_Effective_Collab_fact_sheet-508.pdf) [<https://perma.cc/94YA-YATF>]; Charles Hounmenou & Sachi Toepp, *Exploring Private Investigation Agencies’ Experience of Collaboration with Law Enforcement in Investigations of Human Trafficking Cases*, 13 SOCIETIES, Nov. 2022, at 1, 1–2.

<sup>91</sup> NAT’L INST. OF JUST., FEDERALLY BACKED HUMAN TRAFFICKING TASK FORCE MODEL YIELDS PROGRESS, AND OPPORTUNITIES FOR CONTINUED GROWTH (2022), <https://nij.ojp.gov/topics/articles/federally-backed-human-trafficking-task-force-model-yields-progress> [<https://perma.cc/FEH5-UN7D>]. These recommendations come despite NIJ “noting that between FY2015 and FY2019, BJA funded just over \$3.5 million in training and technical assistance support for ECM task forces, a majority of which covered development and delivery of trainings.” *Id.*

communities of color and engage meaningfully with communities in which trafficking is occurring.<sup>92</sup>

As seen by the above recommendations, the need for what seems like the most basic training on not arresting victims, being trauma-informed, and working more collaboratively with the communities most affected is still a baseline need for the ECM task forces.

The evaluators' recommendation for basic additional training comes despite the fact that their 2021 report highlights that training for collaborative human trafficking task forces has been a priority of funding for the Department of Justice (DOJ) since 2004 and that training of individuals associated with this specialized model has been ongoing since then.<sup>93</sup> Furthermore, there is plenty of additional evidence showing that increasing specialized training for law enforcement on human trafficking has been recommended and supported for years.<sup>94</sup> For example, as early as 2008, a report documented that "[91%] of the task force's law enforcement agencies [had] received human trafficking training and 77[%] had a specialized unit to investigate trafficking cases."<sup>95</sup> A 2012 study of law enforcement human trafficking task forces and non-task force sites also found that sites with federally funded human trafficking task forces were more likely to have law enforcement trained and prosecutors who had gone to a training or conference on human trafficking.<sup>96</sup> In 2016, the DOJ's Office of Victims of Crime (OVC) updated the ECM funding proposal requirements to require extensive training practices and protocols be in place for task forces to receive continued funding as an existing ECM task force.<sup>97</sup> Further training

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<sup>92</sup> ADAMSET AL., *supra* note 67, at 63.

<sup>93</sup> *Id.* at 7–8.

<sup>94</sup> See, e.g., U.S. DEP'T OF JUST., OMB No. 1121-0329, FY 2015 ENHANCED COLLABORATIVE MODEL TO COMBAT HUMAN TRAFFICKING COMPETITIVE SOLICITATION 6 (2015), <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/OVC-2015-4069.pdf> [<https://perma.cc/H3BV-NQ6L>]. The 2015 solicitation for the ECM task forces highlights that, in 2014, the Office of Victims of Crime (OVC) "dedicated time and resources to assess the effectiveness of the Enhanced Collaborate Model program" by conducting internal assessments as well as a literature review, in-person meetings, and providing support through OVC's technical assistance and training teams. *Id.*

<sup>95</sup> FARRELL ET AL., *supra* note 78, at 5 fig. 2.

<sup>96</sup> AMY FARRELL ET AL., NAT'L INST. OF JUST., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 10 (2012), <https://nij.ojp.gov/library/publications/identifying-challenges-improve-investigation-and-prosecution-state-and-local-0> [<https://perma.cc/D3UC-LN9M>].

<sup>97</sup> U.S. DEP'T OF JUST., *supra* note 94, at 6, 9. In the updated OVC funding requirements, new ECM task forces had a full three years of funding and support to institute appropriate training and

efforts have been well-resourced. For example, in 2020, the OVC invested an additional \$5 million in funding over three years to support technical assistance and training for ECM task forces.<sup>98</sup>

Because ECM task forces have received twenty years of funding supporting specialized training and support for a collaborative model on human trafficking,<sup>99</sup> the following question must be asked: Is additional training of the ECM task forces a useful suggestion and a good continuing use of resources? The data raises the more fundamental question: Given the demonstrated failures of ECM task forces in ensuring victim-centered treatment, should academics, community groups, and workers' rights organizations continue to endorse increased collaboration with law enforcement in the human trafficking or wage theft context as a viable solution for supporting vulnerable communities?

### *C. Research Further Shows Collaborative Human Trafficking Task Forces Failed to Investigate Labor Trafficking Even with Long-Term Training and Support*

Some proponents of involving law enforcement in wage theft cases have also asserted that LEA's broader enforcement abilities support this approach:

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. Consequently, where inspectors are functionally unable to address the full scope of illegal employer activity that harms workers, prosecutors

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protocols as a new task force. *Id.* at 9. OVC also provided specific guidance requiring that "[l]aw enforcement and victim service provider applicants from each task force must jointly develop and submit an identical 'Plan for Delivering Training and Accessing Professional Development Opportunities' as a separate attachment within their application." *Id.*

<sup>98</sup> See U.S. DEP'T OF JUST., FY 20 HUMAN TRAFFICKING TRAINING AND TECHNICAL ASSISTANCE PROGRAM (2020), <https://ovc.ojp.gov/funding/opportunities/ovc-2020-18814> [<https://perma.cc/XG8T-M66S>] (documenting that three awards were made totaling \$4.999 million to provide technical assistance and training for the ECM task forces).

<sup>99</sup> PAIGE S. THOMPSON ET AL., URB. INST., RECOMMENDATIONS FOR PRACTITIONERS ENGAGED IN ANTITRAFFICKING TASK FORCES 2 (2022), <https://www.urban.org/sites/default/files/2022-06/Recommendations%20for%20Practitioners%20Engaged%20in%20Antitrafficking%20Task%20Forces.pdf> [<https://perma.cc/KKZ3-SWUS>]; OFF. FOR VICTIMS OF CRIME & BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., FY 2004 LAW ENFORCEMENT AND SERVICE PROVIDER MULTIDISCIPLINARY ANTI-TRAFFICKING TASK FORCES 5 (2004), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/04humtraff.pdf> [<https://perma.cc/KV8N-LQ9V>].

can enforce a range of this unlawful conduct within specific industries.<sup>100</sup>

Supporters make this argument despite their explicit recognition that law enforcement and prosecutors traditionally do not have experience with employment-based cases involving vulnerable workers.<sup>101</sup> Thus, the argument that District Attorneys (DAs) and Attorneys General (AGs) can more broadly address workplace crimes is questionable on its face.<sup>102</sup> This is also supported by direct evidence collected by evaluating the ECM human trafficking task forces.<sup>103</sup> The 2021 evaluation documents that, in twenty years, LEAs did not learn how to investigate or prosecute labor trafficking cases.<sup>104</sup> This evidence-based data must be considered by wage theft proponents because labor trafficking investigation and prosecution almost always includes some form of wage theft. The 2021 ECM task force evaluation reported the following:

- “Nearly all of the evaluated ECM task forces were having difficulty with responses to labor trafficking. . . . Law enforcement components of task forces were generally not well-positioned to address labor trafficking effectively.”<sup>105</sup>
- “The task forces desire more targeted training on labor trafficking.”<sup>106</sup>

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<sup>100</sup> Damelio, *supra* note 32, at 146 (footnote omitted).

<sup>101</sup> See, e.g., GERSTEIN, *supra* note 27, at 2; INST. FOR INNOVATION IN PROSECUTION, PROTECTING WORKERS: WAGE THEFT ENFORCEMENT FOR THE LOCAL PROSECUTOR 2–3, 10 (2022), <https://static1.squarespace.com/static/63865b7996058b7822aa193d/t/639759d85d7bec08ce70ebc9/1670863326381/Protecting%2BWorkers%2BWage%2BTheft%2BEnforcement%2Bfor%2Bthe%2BLocal%2BProsecutor.pdf> [<https://perma.cc/K99W-GCCJ>].

<sup>102</sup> See, e.g., Marsh, *supra* note 16, at 3. In this article, written by a former law enforcement officer who worked with the human trafficking collaborative task forces, the author states that “[i]nvestigating and prosecuting labor violations has not been a traditional local law enforcement function.” *Id.* Similarly, scholars and workers’ rights advocates recommending increased prosecution of wage theft have pointed out that dedicated units within state District Attorney and Attorneys General are needed to handle wage theft cases as these cases “require a different approach than many other criminal cases” and that units need “to develop legal expertise in the overlap between labor and criminal law, as well as knowledge regarding common violations and problematic industries.” GERSTEIN, *supra* note 27, at 4.

<sup>103</sup> ADAMS ET AL., *supra* note 67, at 19.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> NAT’L INST. FOR JUST., FEDERALLY BACKED HUMAN TRAFFICKING TASK FORCE MODEL YIELDS PROGRESS, AND OPPORTUNITIES FOR CONTINUED GROWTH (2022), <https://nij.ojp.gov/topics/articles/federally-backed-human-trafficking-task-force-model-yields-progress> [<https://perma.cc/FEH5-UN7D>]; see also PFEFFER, *supra* note 21, at 3–10 (“Labor trafficking was almost universally described by study respondents as more difficult to detect and identify than sex trafficking.”).

These findings echo similar law enforcement requests for more specialized training to handle labor trafficking cases since 2012, almost ten years earlier.<sup>107</sup> Data collected by the evaluators in 2021 confirm that, despite the focus of the task forces since 2004 being on the identification of both sex and labor trafficking, all ten law enforcement task forces reported that most of their investigations focused only on sex trafficking. In fact, 96% of their reported investigations were for sex trafficking only.<sup>108</sup> Another recent study further documents local law enforcement's inability to investigate labor trafficking.<sup>109</sup> After reviewing statewide cases, this study determined that "thirty states had no arrest reports of labor trafficking during the four-year study period, and ten states had fewer than four arrests."<sup>110</sup>

Even more telling, the 2021 ECM evaluation shows that most of the task forces did not even investigate or prosecute sex trafficking charges.<sup>111</sup> Arrests premised on human trafficking charges comprised only 44% of arrests by specialized human trafficking task forces.<sup>112</sup> Only 33% were actually prosecuted using human trafficking charges.<sup>113</sup> In most cases, law enforcement task forces relied on non-human trafficking charges, using statutes with which they were more familiar. The researchers documented that most arrests by the specialized human trafficking task forces involved arrests for commercial sexual exploitation—an area that law enforcement had been addressing through its vice units before ECM task force funding began.<sup>114</sup>

The 2021 evaluation documents even worse results for labor trafficking prosecution for all ten of the task forces evaluated.<sup>115</sup> From October 2015 to December 2019, 99% of prosecutions were for sex

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<sup>107</sup> NAT'L INST. FOR JUST., *supra* note 91, at 96; FARRELL ET AL., *supra* note 96, at 10; *see also* Amy Farrell, Monica J. DeLateur, Colleen Owens & Stephanie Fahy, *The Prosecution of State-Level Human Trafficking Cases in the United States*, ANTI-TRAFFICKING REV., May 2016, at 48, 66 (highlighting the additional need for law enforcement and prosecutor training to support human trafficking prosecutions).

<sup>108</sup> *See* ADAMS ET AL., *supra* note 67, at 18 tbl. 3.

<sup>109</sup> Kristen Bracy, Bandak Lul & Dominique Roe-Sepowitz, *A Four-Year Analysis of Labor Trafficking Cases in the United States: Exploring Characteristics and Labor Trafficking Patterns*, 7 J. HUM. TRAFFICKING 35, 41 (2019).

<sup>110</sup> *Id.* at 41.

<sup>111</sup> ADAMS ET AL., *supra* note 67, at 42.

<sup>112</sup> *Id.* Compelling or promoting prostitution comprised 31% of all suspects charged in task force cases. *Id.* Other charges included "prostitution/engaging in prostitution (10%)," "sexual exploitation offenses (4%)," and "an 'other' category of charges, which included a mix of different offense types such as assault, child abuse, kidnapping, drug, and weapon charges (9%)." *Id.*

<sup>113</sup> *Id.* at 61.

<sup>114</sup> *Id.*

<sup>115</sup> *See id.*

trafficking, and only 1% of prosecutions were for labor trafficking.<sup>116</sup> In addition, 40% of the specialized task forces evaluated did not prosecute a *single labor trafficking case in the almost five years* of the data reviewed.<sup>117</sup> In contrast, the 2021 ECM evaluators found that victims of labor trafficking comprised a significant part of all individuals served by the service providers connected to each task force.<sup>118</sup> Eight out of ten providers reported serving a substantial number of labor trafficking survivors, with data showing that 30% served were labor trafficking clients.<sup>119</sup> This sharply contrasts with the 1% of labor trafficking prosecutions reported by the ECM task forces.<sup>120</sup>

Further belying wage theft proponents' arguments that DAs and AGs can and will prosecute wider ranges of wage theft violations than are done civilly, data from the ECM task force evaluation indicated that the most reported barriers to law enforcement investigating and prosecuting labor trafficking were: (1) a "lack of knowledge among law enforcement and prosecutors about labor trafficking—prosecutors from 9 of the 10 task forces [said] they had little to no experience prosecuting cases of labor trafficking;" (2) "the complexity of labor trafficking cases;" and (3) "lack of survivor identification and cooperation" with LEA "because of fears of deportation."<sup>121</sup> Law enforcement interviewed by the evaluators in the 2021 study stated their reasons for focusing more on sex trafficking and targeting its investigative resources toward those cases was "that law enforcement lacks the proper infrastructure, expertise, or training to fully investigate labor trafficking."<sup>122</sup>

Although not highlighted by the ECM task force evaluators, an additional documented reason why law enforcement has not focused on labor trafficking cases is that law enforcement remains unwilling to prioritize labor trafficking cases. A 2014 report concluded: "By and large, labor trafficking investigations were not prioritized by local or federal law enforcement agencies. This lack of prioritization was consistent across all

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<sup>116</sup> *Id.* at 18.

<sup>117</sup> *Id.* at 18 tbl. 4. "In 4 of the 10 task forces studied, 100% of the prosecutions were for sex trafficking." *Id.*

<sup>118</sup> *See id.*

<sup>119</sup> *Id.* at 19.

<sup>120</sup> *Id.* at 20 tbl. 5. One task force service provider even served 47% labor trafficking victims. *Id.*

<sup>121</sup> *Id.* at 57.

<sup>122</sup> *Id.* at 20.

study sites and across all industries in which labor trafficking occurred.”<sup>123</sup>

Research conducted in 2023 highlights this same issue.<sup>124</sup> Whatever the reason law enforcement has been unable or unwilling to investigate and prosecute labor trafficking, the fact remains that the stated purpose of the ECM task forces and the funding provided to them has been to focus on all forms of trafficking.<sup>125</sup> However, even the OVC has directly acknowledged the collaborative task force’s failure over twenty years to ensure that law enforcement focuses on both sex and labor trafficking.<sup>126</sup> In its 2023 proposal for new ECM task force funding, the OVC stated that ongoing efforts to increase the investigation of labor trafficking in the United States have failed despite “its funding, training and technical assistance, and collaboration with federal partners.”<sup>127</sup> In this same proposal, labor trafficking is characterized as remaining “misunderstood, under-identified, underreported, and often unaddressed.”<sup>128</sup>

Thus, the results from the ECM task force model directly call into question the arguments by those pushing for the increased criminalization of wage theft that LEAs will prosecute a broader range of crimes in the wage theft context and should be leveraged because civil enforcement systems are traditionally underfunded. In fact, advocates have needed to recommend and call for increased investments to LEAs to support these efforts when promoting increased criminalization of wage theft.<sup>129</sup> For example, in 2023 the historically underfunded California Labor Enforcement Agency actually granted over \$8.55 million to local DA offices to prosecute wage theft cases.<sup>130</sup>

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<sup>123</sup> COLLEEN OWENS ET AL., URB. INST., UNDERSTANDING THE ORGANIZATION, OPERATION, AND VICTIMIZATION PROCESS OF LABOR TRAFFICKING IN THE UNITED STATES viii (2014), <https://www.urban.org/research/publication/understanding-organization-operation-and-victimization-process-labor-trafficking-united-states> [<https://perma.cc/VL4J-4S58>].

<sup>124</sup> PFEFFER ET AL., *supra* note 21, at 3-20.

<sup>125</sup> OFF. FOR VICTIMS OF CRIME, U.S. DEP’T OF JUST., OVC FY24 ENHANCED COLLABORATIVE MODEL (ECM) TASK FORCE TO COMBAT HUMAN TRAFFICKING 7 (2024), <https://ovc.ojp.gov/funding/o-ovc-2024-172001.pdf> [<https://perma.cc/Z7QA-AD4K>].

<sup>126</sup> *Id.* at 10–11.

<sup>127</sup> U.S. DEP’T OF JUST., *supra* note 72, at 12.

<sup>128</sup> *Id.*

<sup>129</sup> Press Release, Dep’t of Indus. Relations, California Awards 17 Prosecutors \$8.55 Million to Prosecute Wage Theft (May 24, 2024), <https://www.dir.ca.gov/DIRNews/2024/2024-38.html> [<https://perma.cc/UYX3-38UF>]. The stated reason for this award was to “deter employers from engaging in unlawful labor law practices in the workplace.” *Id.*

<sup>130</sup> *Id.*; see GERSTEIN, *supra* note 27, at 2 (“State legislatures should . . . ideally create funding mechanisms for pursuing criminal cases against lawbreakers.”).

Workers' rights groups have engaged collaboratively with civil labor enforcement agencies for years and know from first-hand experience these civil enforcement agencies already have the skill-set to work with vulnerable communities and extensive training and knowledge in complex workplace legal issues: it is at the very core of their work. Accordingly, we must ask what progress could have been made in preventing labor trafficking if monies given to ECM task forces for the past twenty years had instead been given to these expert state actors. The data showing the inability of LEAs to prosecute labor trafficking cases should also serve as evidence-based data that calls into question workers' rights groups promotion of increased criminal prosecution of wage theft.

D. *The Efforts of Human Trafficking Task Forces Have Neither Reduced Racial Bias in Criminal Enforcement nor Protected Trafficking Victims from Arrest*

Although the researchers in the 2021 task force report found evidence that task forces lead to increased investigations and prosecutions of human trafficking and victim identification, they disturbingly document that task forces also (1) perpetrated racist rates of arrest and (2) normalized arresting victims as part of increasing prosecution of trafficking cases.<sup>131</sup> These data undercut the premise that collaboration with community groups, victim service providers, and agencies mitigates racial bias in the criminal system. Indeed, analysis of the ECM task force data shows the opposite:

In terms of suspect demographics [for the ECM task forces], only one statistically significant relationship emerged: race and arrest. Black or African American suspects were more likely to be arrested than

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<sup>131</sup> ADAMS ET AL., *supra* note 67, at 40–41; see also HANNAH GARRY & MAURA REINBRECHT, UNIV. S. CAL. GOULD INT'L HUM. RTS. CLINIC, OVER-POLICING SEX TRAFFICKING: HOW U.S. LAW ENFORCEMENT SHOULD REFORM OPERATIONS 1, 15 (2021), <https://humanrightsclinic.usc.edu/2021/11/15/over-policing-sex-trafficking-how-u-s-law-enforcement-should-reform-operations> [https://perma.cc/27TP-FVB4]. Critics of operations and task force models have questioned if they actually lead to increased identification of victims as:

[T]he literature suggests law enforcement operations are primarily motivated by a focus on fighting crime, with victim service providers and advocates often looped in as an afterthought. Operations are likely to measure their success by the number of arrests, charges, prosecutions, and convictions, rather than the number of victims who received services and successfully left their trafficking situation. As a result, efforts to build a prosecutable criminal case take center stage, and the wellbeing of the victim is frequently de-prioritized.

*Id.* at 15 (footnotes omitted).



[w]hite suspects or suspects of other races. All the other suspect characteristics examined (ethnicity, gender, citizenship, criminal history) were not statistically related to whether the suspect was arrested.<sup>132</sup>

The evaluators further document that the percentage of human trafficking suspects was far higher than the share of Black residents or African Americans in the overall population of the jurisdiction covered by the task force.<sup>133</sup> Further evaluators of the ECM task forces report the following:

Half of the ECM task forces included in this study indicated that they may arrest a survivor as part of the investigation. Task forces who arrest survivors indicated that the practices were used as a strategy for ensuring survivor safety and leverage for cooperation in investigations. Two of the task forces indicated that individuals must identify as a victim of trafficking in order to not be arrested, released from jail, or to receive services.<sup>134</sup>

No specific data from the task force on the background and demographics of the victims of human trafficking who were arrested had to be reported by the task force, but the report provides overall victim demographics. Because, overall, at least 63% of the victims identified were people of color (with 41% identified as Black or African American),<sup>135</sup> it

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<sup>132</sup> ADAMS ET AL., *supra* note 67, at 43–44.

<sup>133</sup> *Id.* at 40. “Black or African American (66%) was considerably higher than the share of Black or African Americans in the overall population of the jurisdictions covered by the ECM task forces, which was 14%.” *Id.* Although the researchers note that only ten task forces were involved in the study and these task forces are not necessarily representative of the other task forces, the study evaluates task forces in the north, south, east, and west; hence, arguably, this issue exists across the country. *Id.* at 59. Further, because the study covered ten of forty-seven funded task forces, it evaluated over 20% of task forces, which is a sizable percentage. *Id.* at 2.

<sup>134</sup> *Id.* at 25; see also U.S. DEP’T OF STATE, 2023 TRAFFICKING IN PERSONS REPORT: UNITED STATES (2023), <https://www.state.gov/reports/2023-trafficking-in-persons-report/united-states> [<https://perma.cc/GAR8-99X8>] (“Advocates . . . noted instances where state and local prosecutors threatened to charge victims if they did not assist with the prosecution of traffickers.”); Farrell et al., *supra* note 107 (reviewing state human trafficking prosecutions from 2000 to 2010 revealed that victims were arrested in an astonishing 59% of cases). The police interviewed for this study admitted that they “often” arrested victims, “particularly minors,” describing child victims as “‘evidence’ that needed to be secured and stabilized.” *Id.* Shockingly, the study indicates that arresting the victim was a statistically significant predictor of actual prosecution in human trafficking cases. *Id.* The report ultimately concludes that securing victims’ cooperation through arrest or threat of an arrest is a primary driver of state-level human trafficking prosecution. *Id.*

<sup>135</sup> ADAMS ET AL., *supra* note 67, at 37 (“Half of all survivors in the human trafficking investigations reviewed were White, while 41% were Black or African American, 4% were Asian, and 4% were of other races. In terms of ethnicity, 18% of the survivors were of Hispanic, Latinx, or Spanish origin . . .”).

can logically be assumed that Black and Brown victims are also likely disproportionately being arrested by the ECM task forces, given their disproportional status as victims of this crime and ample evidence documenting that Black individuals are not treated similarly by the criminal system to white individuals.<sup>136</sup> Furthermore, those arrested could likely be Black or Brown children because the 2021 ECM study reports that the average age of victims was just twenty-one years.<sup>137</sup>

Because the task forces do not report the arrest data of a victim to the DOJ, this author can only speculate about the prevalence of victim arrests in the law enforcement task forces based on the 2021 ECM report. However, it is highly disturbing that such arrests were documented as part of their standard practice in at least 50% of the specially trained and funded task forces.<sup>138</sup> Because this practice was self-reported by law

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<sup>136</sup> See, e.g., Ian F. Haney López, *Post Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 124, 125 (2010) (“The public security system in the United States produces shocking racial disparities at every level, from stops to arrests to prosecutions to sentencing to rates of incarceration and execution.”); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2, 219 (rev. ed. 2012) (“It is fair to say we have witnessed an evolution in the United States from a racial caste system based entirely on exploitation (slavery), to one based largely on subordination (Jim Crow), to one defined by marginalization (mass incarceration).”); BECCA CADOFF, OLIVE LU, SARAH MONAGHAN & MICHAEL REMPEL, DATA COLLABORATIVE FOR JUST., *CRIMINAL CONVICTIONS IN NEW YORK STATE, 1980–2021*, DATA COLLABORATIVE FOR JUST. iv (2023), <https://datacollaborativeforjustice.org/wp-content/uploads/2023/04/ConvictionsReport-2.pdf> [<https://perma.cc/JWK3-Y9HD>] (“The conviction rate per 100,000 people in 2019 was 3.1 times higher for Black than white people, 1.5 times higher for Hispanic than white people, and 0.3 times lower for Asian than white people.”); NAZGOL GHANDNOOSH & CELESTE BARRY, SENTENCING PROJECT, *ONE IN FIVE: DISPARITIES IN CRIME AND POLICING* 5 (2023), <https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing> [<https://perma.cc/J38J-HDSH>] (“African Americans represent 14% of the U.S. population. But in 2019, this population comprised 36% of arrests for serious violent crimes . . . and 30% of arrests for property crimes.” (footnote omitted)) (first citing *Quick Facts*, U.S. CENSUS BUREAU (2023); then citing *Crime in the United States, 2019*, FBI tbl. 43 (2020), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-43> [<https://perma.cc/3PDM-HMAK>])).

<sup>137</sup> ADAMS ET AL., *supra* note 67, at 37–39 (“In terms of the distribution of age, over half (54%) of sex trafficking survivors were under age 20, while 35% were between ages 20 and 29, and 11% were age 30 or older.”). The study also found that 21% of sex trafficking suspects were under 21 years of age. *Id.*

<sup>138</sup> OFF. FOR VICTIMS OF CRIME, *supra* note 72, at 11. The fact that OVC is aware of this issue can be seen in its 2023 grant proposal that explicitly says:

OVC will give priority consideration to applications from task forces that attest explicitly in their proposal narrative that ECM task force funds will—be used to take reasonable, affirmative measures to avoid arresting, charging, or prosecuting victims of human trafficking for any offense that is the direct result of their victimization; and not be used to require a victim of human trafficking to collaborate with law enforcement officers as a condition of access to any shelter or other direct services.

enforcement, it would not be surprising if an even larger number of the task forces engaged in this practice and were just not as forthright about reporting it as a standard practice as other evidenced-based research documenting the prevalence of victim arrest.<sup>139</sup> In a study of 130 survivors conducted by the National Survivor Network, 90.8% reported being arrested, and over 40% reported being arrested over nine times.<sup>140</sup> A 2021 report by the University of Southern California (USC) Gould School of Law, based on Freedom of Information Act (FOIA) requests to local and federal law enforcement about operations related to human trafficking, indicates the following:

Anti-sex trafficking operations identify few victims or traffickers and instead result in the arrests of many victims and sex workers—a disproportionate number of whom are people of color, particularly Black women and minors. . . . Law enforcement officers frequently forgo a victim-centered approach and instead traumatize and criminalize, arresting, threatening to arrest, interrogating, doubting, blaming, and misgendering suspected victims.<sup>141</sup>

Although the report notes that eleven of their sixteen FOIA requests were denied,<sup>142</sup> USC concludes, “Based on literature and [its] qualitative and quantitative research, . . . operations are a form of over-policing that re-traumatizes victims, perpetuates systemic racism, and undermines the aims of the TVPA.”<sup>143</sup> Because operations chronicled in the 2021 ECM evaluation and USC 2021 study involved federally funded human trafficking task forces,<sup>144</sup> it is fair to conclude that collaboration with law enforcement, even with formalized structures in place, does not mitigate

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<sup>139</sup> SABRINA THULANDER & CAREN BENJAMIN, IN HARM’S WAY: HOW SYSTEMS FAIL HUMAN TRAFFICKING SURVIVORS 41 (2023), <https://polarisproject.org/wp-content/uploads/2023/07/In-Harms-Way-How-Systems-Fail-Human-Trafficking-Survivors-by-Polaris-modified-June-2023.pdf> [<https://perma.cc/MC67-BNKD>].

<sup>140</sup> NAT’L SURVIVOR NETWORK, NATIONAL SURVIVOR NETWORK MEMBERS SURVEY: IMPACT OF CRIMINAL ARREST AND DETENTION ON SURVIVORS OF HUMAN TRAFFICKING 2–3 (2016), <https://nationalsurvivornetwork.org/wp-content/uploads/2017/12/VacateSurveyFinal.pdf> [<https://perma.cc/N72P-39ZC>].

<sup>141</sup> GARRY & REINBRECHT, *supra* note 131, at 2 (footnote omitted) (citing Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1499 (2015)).

<sup>142</sup> *Id.* at 7.

<sup>143</sup> *Id.* at 2.

<sup>144</sup> *Id.* at 29 (describing the raids multi-agency approach, including federal law enforcement—such as the FBI, Homeland Security Investigations (HSI), Immigration and Customs Enforcement (ICE), and the U.S. Attorneys’ Offices—local law enforcement, and victims service providers); ADAMS ET AL., *supra* note 67, at 8 n.29.

criminal harm.<sup>145</sup> Accordingly, workers' rights advocates and scholars should be mindful of the failure of the collaboration approach to mitigate known harms to the criminal system in the trafficking context. This data shows that racial justice issues inherent in law enforcement involvement are not mitigated by community collaboration and cross-agency work.<sup>146</sup>

E. *Funding for Human Trafficking Collaborative Task Forces Has Been Diverted from Essential Victim Resources*

The concomitant diversion of resources from human trafficking victim services programs provides even more cautionary evidence to those advocating for increased collaboration around the criminal prosecution of wage theft. Under the ECM model, law enforcement agencies actually receive money earmarked for victim services.<sup>147</sup> In 2004, when the human trafficking task forces first launched, this money came from the limited OVC victims' service monies authorized by the TVPA of 2000.<sup>148</sup> As of 2006, forty-two multidisciplinary task forces were funded by the OVC victims' service money, while none came from law

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<sup>145</sup> See ADAMSET AL., *supra* note 67, at 39. There are not only criminal consequences that may occur for victims because of the work of collaborative task forces due to arrest but immigrant consequences as well for noncitizen victims. See *id.* The 2021 ECM study reported that almost 26% of the survivors identified by the collaborative task forces were noncitizens. *Id.* This means that, if task forces commonly operate on models that arrest victims, immigrant survivors of trafficking likely suffer immigrant consequences as well.

<sup>146</sup> But see Damelio, *supra* note 32, at 144–48 (arguing that workers can be protected from inherent harms in the criminal system through collaboration). “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.” *Id.* at 147. “[I]n order to both protect vulnerable workers and ensure successful prosecutions, DAs, and AGs must pursue this work under specific conditions” including “best practices” such as “[c]ollaboration with worker groups” and “target[ing] specific industries.” *Id.* at 144. “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.” *Id.* at 148.

<sup>147</sup> *Id.* at 131; OFF. FOR VICTIMS OF CRIME & BUREAU OF JUST. ASSISTANCE, *supra* note 99, at 4.

<sup>148</sup> See OFF. FOR VICTIMS OF CRIME, *supra* note 72, at 5 (stating that the OVC and Bureau of Just. Assistance (BJA) in 2004 utilized funds appropriated through the TVPA to implement a multidisciplinary task force model that was designed to “combat human trafficking by identifying, rescuing, and restoring victims . . . investigating and prosecuting trafficking crimes, and building awareness around trafficking in the surrounding community”). But see 22 U.S.C. § 7105(b)(2) (indicating that grants by the attorney general are to “develop, expand, or strengthen victim service programs for victims of human trafficking including programs that provide trauma-informed care or housing options to such victims” (emphasis added)). The statute does not include language that indicates this money should be used to increase investigation or prosecution of trafficking cases. See *id.*

enforcement-directed monies.<sup>149</sup> Instead, the OVC subgranted its limited, specialized human trafficking victim services monies to the Bureau of Justice Administration (BJA).<sup>150</sup> In 2010, when the task force model evolved to the enhanced collaborative model, forty-seven task forces were funded from victim services monies transferred once again from the OVC to BJA.<sup>151</sup> This funding structure continues to this day.<sup>152</sup> In the 2021 evaluation of the ECM task force model, the researchers conclude the following: “The ECM model has helped task forces obtain resources needed to support the work they are doing to address human trafficking, including augmented law enforcement staff (i.e., more detectives and support staff dedicated exclusively to human trafficking).”<sup>153</sup>

The 2021 evaluation demonstrates that law enforcement’s spending of the task force money directly supports “investigations and staff time of law enforcement personnel.”<sup>154</sup> Securing this funding from limited victims’ services resources when law enforcement and criminal justice allotments are already almost 20% of county budgets is unjustified.<sup>155</sup> For

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<sup>149</sup> U.S. GOV’T ACCOUNTABILITY OFF., HUMAN TRAFFICKING: A STRATEGIC FRAMEWORK COULD HELP ENHANCE THE INTERAGENCY COLLABORATION NEEDED TO EFFECTIVELY COMBAT TRAFFICKING CRIMES 3, 29–30 (2007), <https://www.gao.gov/assets/gao-07-915.pdf> [<https://perma.cc/9XQD-XAS3>] (describing the nature of the BJA-sourced grants to law enforcement human trafficking task forces and noting that the grants were appropriated in part through the TVPA).

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

<sup>151</sup> PAIGE S. THOMPSON ET AL., *supra* note 99, at 2; OFF. FOR VICTIMS OF CRIME, U.S. DEPT. OF JUST., NO. 1121-0329, OVC FY 10 ENHANCED COLLABORATIVE MODEL TO COMBAT HUMAN TRAFFICKING 5–6 (2010), [https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/10\\_bjaovc\\_humantraffickingsol.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/10_bjaovc_humantraffickingsol.pdf); 22 U.S.C. § 7105(b)(2)(A) (authorizing the Attorney General to make grants to units of local government and nongovernmental victims’ service organizations to fund human trafficking victim service programs); *see also* Letter from Jean Bruggeman, Exec. Director, Freedom Network USA, to Kris Rose, Director, Off. for Victims of Crime, & Katherine Chon, Director, ACF Off. on Trafficking in Persons (Dec. 17, 2021), <https://freedomnetworkusa.org/app/uploads/2021/12/FY22FNUSAFundingRecs.pdf> [<https://perma.cc/Z9QN-5NWY>]. Eighty members of Freedom Network U.S., in a joint letter to OVC and ACF, called on DOJ to no longer divert funding from victims services to the EMC taskforces but to support community partnerships. *Id.* In this letter, Freedom Network highlights that “Congress has appropriated these funds to ‘develop, expand, or strengthen victim service programs for victims of human trafficking,’ and the funds must not be diverted to activities that are unrelated to victim services.” *Id.* at 4 (citing 22 U.S.C. § 7105(b)(2)).

<sup>152</sup> U.S. DEPT OF JUST., *supra* note 65, at 8 (“The statutory authority for this program is 22 U.S.C. § 7105(b)(2) and 34 U.S.C. § 20705.”).

<sup>153</sup> ADAMS ET AL., *supra* note 67, at 60.

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

<sup>155</sup> *Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST. (Apr. 26, 2024), <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures>

example, in Los Angeles alone, the Sheriff's Department, which is a current ECM-funded task force recipient, receives \$4 billion in funding from the county.<sup>156</sup> In 2017, the most recent year for which national data is available, local police received \$30 billion in federal funding.<sup>157</sup> Yet in FY 2022, the OVC provided the BJA \$10.8 million of victim services money to support the work of fifteen state and local law enforcement agencies under the ECM model.<sup>158</sup> In stark contrast to the billions of dollars LEAs traditionally receive in federal funding, funding for human trafficking victims' services across the nation at its peak amount has only been \$90 million.<sup>159</sup> This means that, under the ECM model, law enforcement often received almost 12% of all federal money directed for specialized human trafficking victim services.<sup>160</sup> The diversion of specialized victims' services money to law enforcement is even more egregious given the well-documented finding that "funding for victim services remained inadequate to cover the high cost of providing services and the increased demand for services."<sup>161</sup> The amount of funds redirected to law enforcement from victims' services money is even more striking when reviewing the specific amounts redirected to law enforcement over the almost twenty years of existence of the law enforcement task forces.

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[<https://perma.cc/GG66-KLK8>]. This review found that in 2021 state and local criminal justice expenditures for counties across the country spent on average 19% of their total budget on police, corrections, and court costs. *Id.*

<sup>156</sup> Ashley Orna, *LA County Supervisors Pass \$43.4 Billion Budget, Give \$4 Billion to Sheriff's Dept.*, L.A. PUB. PRESS (Aug. 11, 2023, 11:43 AM), <https://lapublicpress.org/2023/06/los-angeles-county-supervisors-pass-43-billion-budget> [<https://perma.cc/5B6U-U822>].

<sup>157</sup> *Criminal Justice Expenditures: Police, Corrections, and Courts*, *supra* note 155 ("The federal government directly spent \$30 billion on police, \$7 billion on corrections, and \$15 billion on courts in 2017.").

<sup>158</sup> Press Release, U.S. Dep't of Just., Off. of Just. Programs, Justice Department Awards Over \$90 Million to Combat Human Trafficking and Support Victims (Oct. 26, 2022), <https://www.ojp.gov/files/archives/pressreleases/2022/justice-department-awards-over-90-million-combat-human-trafficking-and-support-victims> [<https://perma.cc/NM9B-J773>]. In its press release, the DOJ announced that, of the ninety million dollars awarded for human trafficking victims services for 2023, \$21.6 million was provided to the ECM human trafficking task forces collaborative model, which, under its funding structure, means that local and state law enforcement agencies received \$10.8 million in funding. *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> U.S. DEP'T OF STATE, *supra* note 134.

**Table 1: Summary of Funding Provided to LEA 2004–2023**

Funding Year	Number of LEA Task Forces Funded	Funding Amount ECM (Total to LEA for Year)
FY2004	32	\$13,000,000 <sup>162</sup>
FY2006	10	\$4,500,000 <sup>163</sup>
FY2008	17	\$4,574,035 <sup>164</sup>
FY2010 (ECM)	3	\$1,362,330 <sup>165</sup>
FY2010 (Task force)	29	\$3,967,900 <sup>166</sup>
FY2011 (ECM)	6	\$2,846,159 <sup>167</sup>
FY2012 (ECM)	7	\$3,491,834 <sup>168</sup>
FY2013 (ECM)	7	\$3,250,000 <sup>169</sup>
FY2015 (ECM)	16	\$11,024,626 <sup>170</sup>

<sup>162</sup> BUREAU OF JUST. ASSISTANCE, FY 2004 LAW ENFORCEMENT AND SERVICE PROVIDER MULTIDISCIPLINARY ANTI-TRAFFICKING TASK FORCES 5 (2004), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/04humtraffic.pdf> [<https://perma.cc/S2EH-UDDQ>]; OFF. FOR VICTIMS OF CRIME, LAW ENFORCEMENT TASK FORCES AND SERVICES FOR HUMAN TRAFFICKING VICTIMS 6 (2006), <https://ovc.ojp.gov/funding/opportunities/ovc-2006-1352> [<https://perma.cc/6F2G-LWBW>] (noting that thirty-two task forces were funded in FY 2004).

<sup>163</sup> U.S. DEP'T OF JUST., OVC FY 06 TRAFFICKING TASK FORCES AND VICTIM SERVICES (2006), <https://www.ovc.ojp.gov/funding/opportunities/ovc-2006-1352> [<https://perma.cc/8RE5-AXX2>].

<sup>164</sup> *BJA FY 08 Law Enforcement Task Forces for Human Trafficking Victims Continuation Grant Program*, BUREAU OF JUST. ASSISTANCE (May 12, 2008), <https://bja.ojp.gov/funding/opportunities/bja-2008-1907> [<https://perma.cc/7XQA-VMXC>]; *BJA FY 08 Law Enforcement Task Forces for Human Trafficking Victims New Grant Program*, BUREAU OF JUST. ASSISTANCE (May 12, 2008), <https://bja.ojp.gov/funding/opportunities/bja-2008-1910> [<https://perma.cc/YL7V-ETKL>].

<sup>165</sup> *BJA FY 10 Enhanced Collaborative Model to Combat Human Trafficking*, BUREAU OF JUST. ASSISTANCE (Aug. 2, 2010), <https://bja.ojp.gov/funding/opportunities/bja-2010-2791> [<https://perma.cc/L4SK-88PX>].

<sup>166</sup> *BJA FY 10 Human Trafficking Task Force*, BUREAU OF JUST. ASSISTANCE (May 6, 2010), <https://bja.ojp.gov/funding/opportunities/bja-2010-2738> [<https://perma.cc/X6YU-YYDN>].

<sup>167</sup> *BJA FY 11 Enhanced Collaborative Model to Combat Human Trafficking*, BUREAU OF JUST. ASSISTANCE (Mar. 16, 2011), <https://bja.ojp.gov/funding/opportunities/bja-2011-2873> [<https://perma.cc/8RD3-96QA>].

<sup>168</sup> *BJA FY 12 Enhanced Collaborative Model to Combat Human Trafficking*, BUREAU OF JUST. ASSISTANCE (Feb. 1, 2012), <https://bja.ojp.gov/funding/opportunities/bja-2012-3182> [<https://perma.cc/JVN5-QU2W>].

<sup>169</sup> *BJA FY 13 Enhanced Collaborative Model to Combat Human Trafficking*, BUREAU OF JUST. ASSISTANCE (Jan. 13, 2013), <https://bja.ojp.gov/funding/opportunities/bja-2013-3482> [<https://perma.cc/7UDA-NT5W>].

<sup>170</sup> *BJA FY 15 Enhanced Collaborative Model to Combat Human Trafficking: Enhancement of Established Human Trafficking Task Forces*, BUREAU OF JUST. ASSISTANCE (June 23, 2015), <https://bja.ojp.gov/funding/opportunities/bja-2015-4304> [<https://perma.cc/6VKJ-EV76>]; *BJA FY*

FY2016 (ECM)	11	\$7,830,717 <sup>171</sup>
FY2017 (ECM)	2	\$1,462,500 <sup>172</sup>
FY2018 (ECM)	17	\$11,807,809 <sup>173</sup>
FY2019 (ECM)	13	\$10,918,230 <sup>174</sup>
FY2020 (ECM)	14	\$9,676,105 <sup>175</sup>
FY 2021 (ECM)	15	\$11,154,708 <sup>176</sup>
FY2022 (ECM)	15	\$10,803,290 <sup>177</sup>
FY2023 (ECM)	10	\$7,402,606 <sup>178</sup>
TOTAL		\$119,073,599

LEAs have received almost \$120 million in designated victim services monies.<sup>179</sup> During this same time, no other federal enforcement agency

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15 *Enhanced Collaborative Model to Combat Human Trafficking: Development of Human Trafficking Task Forces*, BUREAU OF JUST. ASSISTANCE (June 3, 2015), <https://bja.ojp.gov/funding/opportunities/bja-2015-4291> [<https://perma.cc/FFT8-FADG>].

<sup>171</sup> *Enhanced Collaborative Model to Combat Human Trafficking*, BUREAU OF JUST. ASSISTANCE (Mar. 8, 2016), <https://bja.ojp.gov/funding/opportunities/bja-2016-9114> [<https://perma.cc/M7BH-3TFY>].

<sup>172</sup> *FY 17 Enhanced Collaborative Model to Combat Human Trafficking*, BUREAU OF JUST. ASSISTANCE (Jan. 4, 2017), <https://bja.ojp.gov/funding/opportunities/bja-2017-13240> [<https://perma.cc/J9X8-JZ6X>].

<sup>173</sup> *BJA FY 18 Enhanced Collaborative Model to Combat Human Trafficking Program*, BUREAU OF JUST. ASSISTANCE (Sept. 3, 2018), <https://bja.ojp.gov/funding/opportunities/bja-2018-13606> [<https://perma.cc/3A2X-6JGV>].

<sup>174</sup> *BJA FY 19 Enhanced Collaborative Model (ECM) Task Force to Combat Human Trafficking: Supporting Law Enforcement's Role*, BUREAU OF JUST. ASSISTANCE (Apr. 11, 2019), <https://bja.ojp.gov/funding/opportunities/bja-2019-15230> [<https://perma.cc/7GU4-J2MM>].

<sup>175</sup> OFF. FOR VICTIMS OF CRIME, *ENHANCED COLLABORATIVE MODEL TASK FORCE TO COMBAT HUMAN TRAFFICKING* 11 (2020).

<sup>176</sup> *OVC FY 2021 Enhanced Collaborative Model Task Force To Combat Human Trafficking*, OFF. FOR VICTIMS OF CRIME (Apr. 30, 2021), <https://ovc.ojp.gov/funding/opportunities/o-ovc-2021-96004> [<https://perma.cc/4BED-7H76>]. The amount of funding in the summary chart only includes money that went to LEAs, not victim services also included in the \$17,156,743. Since law enforcement received 15 of the 30 grants awarded, the total for LEAs is \$11,154,708.

<sup>177</sup> *OVC FY 2022 Enhanced Collaborative Model Task Force to Combat Human Trafficking*, OFF. FOR VICTIMS OF CRIME (Apr. 18, 2022), <https://ovc.ojp.gov/funding/opportunities/o-ovc-2022-171264> [<https://perma.cc/6BJ8-B4KX>]. The amount of funding in the summary chart only includes money that went to LEAs, not victim services also included in the \$21,606,580. *Id.* Since law enforcement received fifteen of the thirty grant awards, the total for LEAs is \$10,803,290. See *id.*

<sup>178</sup> OFF. FOR VICTIMS OF CRIME, *supra* note 72. The amount of funding in the summary chart only includes money that went to LEAs, not victim services, which are also included in the \$14,915,564. *Id.* Since law enforcement received ten of the twenty grant awards, the total for LEA is \$74,02,606. See *id.*

<sup>179</sup> See *infra* tbl.1.



besides the DOJ has ever received specialized human trafficking money.<sup>180</sup> Although the Department of Labor (DOL)<sup>181</sup> and the Equal Employment Opportunity Commission (EEOC) reportedly “continued to be a significant component of the government’s antitrafficking efforts,” in twenty years, these agencies with deep knowledge of workers’ rights issues have received no federal funding.<sup>182</sup> Because the ECM federally funded task forces had an average of less than 1% of their efforts devoted to labor trafficking charges, this empirical data again raises the question of why calling for a collaborative model in the wage theft context could be an effective approach.<sup>183</sup> Indeed, human trafficking victims’ service providers, based on their on-the-ground experience working with the ECM collaborative task force model, are calling for a redirection of these funds.<sup>184</sup> The 2023 Trafficking in Persons Report, which is compiled yearly by the Department of State, reports the following:

Advocates called on federal, state, and local governments to redirect funding from law enforcement to community-led organizations to better support Black and Brown communities. According to these advocates, law enforcement was more likely to perceive people of color as criminals rather than trafficking victims, inhibiting proper identification.<sup>185</sup>

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<sup>180</sup> See U.S. DEP’T OF JUST., ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS ON U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 110–217 (2021), <https://www.justice.gov/d9/2023-04/AG%20HT%20Report%20FY21FINALPDF.pdf> [<https://perma.cc/2N5M-MDPP>].

<sup>181</sup> The lack of DOL funding for domestic antitrafficking work is in sharp contrast to funding DOL’s Bureau of International Labor Affairs (ILAB) has received to address human trafficking internationally. See, e.g., U.S. DEP’T OF STATE, U.S. GOVERNMENT FUNDS OBLIGATED FOR ANTI-TRAFFICKING IN PERSONS PROJECTS, FISCAL YEAR 2006 (2006), <https://2001-2009.state.gov/g/tip/rls/rpt/83374.htm> [<https://perma.cc/4GU6-QEWS>] (showing that DOL ILAB in 2006 received 27% of all U.S. government allocated funds for antitrafficking); see also U.S. DEP’T OF JUST., *supra* note 180, at xiv (stating that to assist in global prevention of forced labor DOL provided \$28.9 million in support for four new projects and five ongoing projects).

<sup>182</sup> U.S. DEP’T OF STATE, *supra* note 134. The U.S. Department of State’s 2023 Trafficking in Persons Report indicates that the Department of Labor and Equal Employment Opportunity Commission “continued to be a significant component of the government’s anti-trafficking efforts.” *Id.* However, in twenty years, these agencies that have deep expertise in workers’ rights issues have received no specialized federal funding for United States-based programs. See ALLIANCE TO END SLAVERY AND TRAFFICKING, FY 2018 APPROPRIATIONS BRIEFING BOOK (2017), <https://endslaveryandtrafficking.org/wp-content/uploads/2018/04/ATESTGuide-2018-FINAL.pdf> [<https://perma.cc/5JG6-9W3J>] (summarizing all of the funding received and requested from the federal government to combat human trafficking from 2014 to 2018).

<sup>183</sup> ADAMS ET AL., *supra* note 67, at 18–19.

<sup>184</sup> See Letter from Jean Bruggeman, Exec. Director, Freedom Networks USA, to Cindy Dyer, Ambassador, U.S. Dep’t of State, at 27 (Feb. 1, 2023), <https://freedomnetworkusa.org/app/uploads/2023/02/FNUSA-2023-TIP-Report-Input.pdf> [<https://perma.cc/2LKY-M9WE>].

<sup>185</sup> U.S. DEP’T OF STATE, *supra* note 134.

Thus, exactly when the antitrafficking community is calling for a change in a law enforcement-focused approach based on their on-the-ground experience and emerging data of the impacts of the ECM task forces, workers' rights groups are promoting strategies that call for more resources for law enforcement to prosecute wage theft based on a similar collaborative model.

### III. LABOR TRAFFICKING DATA CONFIRMS THAT INCREASING PROSECUTION OF WAGE THEFT WILL NEITHER MITIGATE THE HARM SUFFERED BY VULNERABLE COMMUNITIES NOR INCREASE DETERRENCE

The potential harms of adopting a criminal approach to wage theft, as revealed by the experiences of ECM human trafficking task forces, are also confirmed by looking closely at labor trafficking examples cited in EPI's article.<sup>186</sup> A close look reveals that they show the exact harm that even EPI raises as a concern for this approach.<sup>187</sup> These case examples demonstrate the potential harm and hurdles workers face when criminal prosecutions are used, given the higher standard of proof compared with civil enforcement proceedings. Labor trafficking case examples and data further show that workers are less likely to receive compensation for lost wages in the criminal system, given the complexities in securing restitution in that forum. Finally, labor trafficking case data shows that these efforts cannot easily be scaled, challenging the assertion that increasing criminal prosecution of employers will actually deter wage theft.<sup>188</sup>

#### A. *Low-Level Managers, Not Major Business Owners, Will Remain Those Most Likely to Be Criminally Prosecuted*

In promoting the increased criminalization of wage theft, the EPI cautions against prosecutors focusing on low-level managers or

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<sup>186</sup> GERSTEIN, *supra* note 27. The EPI report covers a wide range of criminal case examples involving workplace violations outside this author's area of expertise in labor trafficking. *Id.* However, a close analysis of these other cases focusing on who is actually criminally prosecuted, the victim's experience, recovery of restitution, and a true cost analysis of the results of the criminal case (law enforcement investigation, civil agency support to law enforcement, court costs, and the cost of probation and/or prison time ordered) would also benefit the practical understanding of pursuing workplace cases in criminal court versus the civil context. See GERSTEIN, *supra* note 27, at 14–21 (listing a wide range of case examples).

<sup>187</sup> See GERSTEIN, *supra* note 27.

<sup>188</sup> See *infra* Section III.F.

facilitators.<sup>189</sup> However, in her own example of a successful labor trafficking prosecution, the author highlights a 2018 Fresno County, California case where a low-level manager was convicted of a felony and sentenced to eight years in prison.<sup>190</sup> In this case, a crew leader at a large agricultural farm in California was charged with labor trafficking.<sup>191</sup> Notably, the farm owners were never charged.<sup>192</sup>

The charging of low-level managers or small businesses, not larger businesses or parent companies, is common in cases of labor trafficking.<sup>193</sup> An example highlighting the large parent company never being charged involves Trillium Farms in Ohio.<sup>194</sup> Trillium Farms is one

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<sup>189</sup> GERSTEIN, *supra* note 27, at 26 (“Charging only low-level supervisors may fail to punish those with real responsibility for and authority over workers’ conditions.”).

<sup>190</sup> *Id.* at 20. The EPI summary provided a labor trafficking case in 2018 from Fresno County, California which only mentions the jury found the individual guilty of human trafficking and did not include the length of the prison sentence or the defendant’s background. *Id.* Media reports provide this additional background. See Pablo Lopez, *Man Says He’s Innocent of Labor Trafficking. Judge Says He Turned Three Women into Slaves*, FRESNO BEE (Oct. 29, 2018, 5:53 PM), <https://www.fresnobee.com/news/local/crime/article220799270.html> [<https://web.archive.org/web/20210617125112/https://www.fresnobee.com/news/local/crime/article220799270.html>]. Later that same year, Alvarez was sentenced to eight years in prison. *People v. Alvarez*, No. F078551, 2021 WL 1382275, at \*1, \*11 (Cal. Ct. App. Apr. 13, 2021) (affirming the trial court’s judgment after not finding ineffective assistance of counsel, and describing Alvarez as “a crew leader for a farm labor contractor . . . [and] the ‘bottom’ rung of the supervisory hierarchy is a ‘crew leader’”).

<sup>191</sup> *Fresno County Labor Crew Supervisor Convicted in Rare Human Trafficking Case*, ABC30 NEWS (Sept. 3, 2018), <https://abc30.com/fresno-county-human-trafficking-farm-workers-worker/4139036> [<https://perma.cc/4PTW-FATD>] (depicting Efren Alvarez as a “crew supervisor” convicted of felony labor trafficking charges).

<sup>192</sup> See *People v. Alvarez*, No. F078551, 2021 WL 1382275, at \*11 (Cal. Ct. App. Apr. 13, 2021) (“The vast majority of farm workers are employed by farm labor contractors, rather than the farm owner-operator.”).

<sup>193</sup> See *Human Trafficking Prosecution Unit (HTPU)*, U.S. DEP’T OF JUST. C.R. Div. (May 22, 2023), <https://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu> [<https://perma.cc/857Q-XCF9>] (summarizing labor trafficking cases recently federally prosecuted, such as restaurants, bars, cantinas, homes, a bridal shop, and contractors for cleaning crews); LINDSEY LANE, ANGELA GRAY, ALICEN RODOLPH & BRITTANY FERRIGNO, HUM. TRAFFICKING INST., 2023 FEDERAL HUMAN TRAFFICKING REPORT 26 (2024), <https://data.traffickinginstitute.org/wp-content/uploads/2024/06/2023-Federal-Human-Trafficking-Report-WEB-Spreads-LR.pdf> [<https://perma.cc/YZ2M-BMMT>] (“No corporations were criminally charged in 2023. Since 2008, 12 entities have been criminally charged: five hotels, two farms, one manufacturer, one construction company, and three employment agencies.”); see also OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., RECENT LABOR TRAFFICKING CASES AND TRENDS 3–7 (2023) (noting trends of forced labor prosecutions against organizations claiming to have a religious mission, residential programs for minors, and marijuana farms, among others).

<sup>194</sup> *Trillum Farms*, VERSOVA, <https://www.versova.com/trillum-farms> [<https://perma.cc/GQ54-7K7K>]; Roy Graber, *Trillum Says in Documentary It Was Naïve to Trafficking*, WATTPOULTRY: BLOG (May 1, 2018), <https://www.wattagnet.com/blogs/blog/15525060/trillum-says-in-documentary-it-was-naive-to-trafficking-wattagnet> [<https://perma.cc/T2MB-YGNC>].

of the country's largest egg producers. Extensive cases of labor trafficking of teens were found on their egg plants, but only the labor recruiters were charged, with some receiving long sentences—fifteen and ten years, respectively.<sup>195</sup> A more recent labor trafficking case example from 2023 involves a father and son who owned two restaurants in Massachusetts and were charged with forced labor, attempted forced labor, and a forced labor conspiracy.<sup>196</sup> They faced a sentence of up to twenty years in prison.<sup>197</sup> In 2024, an owner of a chain of pizza shops in Boston was convicted of felony forced labor charges and currently faces up to twenty years in prison.<sup>198</sup> These cases show how common it is for low-level managers, recruiters, or small business owners to be charged rather than upper-level or large company actors. In fact, a 2022 article highlights that only nine companies have ever been charged in human trafficking cases, despite prosecutors having this authority federally for over twenty years:

The TVPA authorizes prosecutors to charge both individuals and entities as traffickers. However, since 2000, prosecutors have charged only nine entities—less than one per cent of all defendants. In contrast, every year, plaintiffs sue hundreds of corporations, hotels, websites, farms, and other entities for sex trafficking and forced labour . . . .<sup>199</sup>

If so few corporate entities have been charged in criminal prosecutions for labor trafficking cases over twenty years, prosecutors likely cannot—or will not—take a different approach when prosecuting criminal wage theft.

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<sup>195</sup> Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Two Defendants Plead Guilty to Forced Labor Scheme that Exploited Guatemalan Migrants at Ohio Egg Farms (Aug. 25, 2015), <https://www.justice.gov/opa/pr/two-defendants-plead-guilty-forced-labor-scheme-exploited-guatemalan-migrants-ohio-egg-farms> [<https://perma.cc/Y373-FWBM>]. In this case, six defendants were charged and sentenced to jail time. *Id.* Two individuals from Guatemala received fifteen- and ten-year sentences. *See id.*; Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Leader of Human Trafficking Organization Sentenced to Over 15 Years for Exploiting Guatemalan Migrants at Ohio Egg Farms (June 27, 2016), <https://www.justice.gov/opa/pr/leader-human-trafficking-organization-sentenced-over-15-years-exploiting-guatemalan-migrants> [<https://perma.cc/BUJ6-CJ2L>].

<sup>196</sup> Press Release, U.S. Dep't of Just., U.S. Att'y's Off., Dist. of Mass., Three Indicted for Forced Labor and One Charged with Labor Trafficking at Woburn Restaurants (Apr. 4, 2023), <https://www.justice.gov/usao-ma/pr/three-indicted-forced-labor-and-one-charged-labor-trafficking-woburn-restaurants> [<https://perma.cc/4MRU-43UC>].

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

<sup>198</sup> Press Release, U.S. Dep't of Just., U.S. Att'y's Off., Dist. of Mass., Owner of Boston Pizzeria Chain Convicted of Forced Labor (June 7, 2024), <https://www.justice.gov/usao-ma/pr/owner-boston-pizzeria-chain-convicted-forced-labor> [<https://perma.cc/8K5U-QVU5>].

<sup>199</sup> Alyssa Currier Wheeler, *Trafficker Profile According to US Federal Prosecutions*, 18 ANTI-TRAFFICKING REV. 185, 186 (2022) (footnote omitted) (citing 18 U.S.C. §§ 1589, 1591).

B. *Criminal Prosecution Results in Felony Convictions and Imprisonment, Adding to Burden and Cost of Our Criminal System*

Advocates for increasing criminalization of wage theft sidestep concerns about increasing incarceration by recommending that prosecutors consider alternatives to incarceration, such as increased tracking and compliance<sup>200</sup> or focusing on “innovative approaches to sentencing.”<sup>201</sup> However, the argument for why the criminal system increases deterrence over civil systems is inherently based on the threat of prison sentences. The main difference between our criminal and civil legal systems is that the criminal system focuses on putting defendants in jail, while the civil system focuses on making individuals whole through monetary damages or other proactive measures provided through settlement or injunctive relief ordered by the court.<sup>202</sup> As the cases reviewed in the previous section show, all those charged with labor trafficking have or face felony convictions.<sup>203</sup> Furthermore, data in the 2023 Trafficking in Persons (TIP) Report indicate that, of the 291 individuals sentenced to prison under trafficking-specific criminal statutes, in 86% of cases, judges imposed a prison sentence of five or more years.<sup>204</sup> The norms inherent in the design of our criminal system promote a cultural understanding that longer prison sentences are needed to show

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<sup>200</sup> See, e.g., GERSTEIN, *supra* note 27, at 27–28 (“Our country is undergoing an extensive national conversation about systemic racial inequities involved in mass incarceration. While a discussion of the problem of mass incarceration is beyond the scope of this report, prosecutors may want to consider alternatives to incarceration in resolving these cases. They may also want to consider whether innovative approaches to sentencing might be more effective. Finally, some criminal prosecutions of workers’ rights violations have been brought against corporations, not individuals; while such prosecutions are often seen as having less of an impact, they obviously raise no concerns about incarceration. . . . In addition, prosecutors may want to consider whether a restorative justice approach may be warranted or appropriate in these cases.”).

<sup>201</sup> GERSTEIN, *supra* note 27, at 27.

<sup>202</sup> See, e.g., Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 290 (2009) (“Individual benefits largely come in the form of monetary damages compensating the plaintiff for his or her actual losses and awarding punitive damages for a defendant’s willful or malicious conduct. There may be additional individual gains such as a plaintiff’s empowerment from directly holding perpetrators accountable and the ability to exercise control over the legal case.”); Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 115 (2009) (“Imprisonment is the most severe punishment in democratic societies except for capital punishment, which is used only in the United States. Crime prevention is its primary rationale.”); *id.* at 187 (“[I]t is remarkable that so many democratic societies, most especially the United States, incarcerate so many people without good estimates of the effects of this very expensive sanction on macro-level and individual-level crime rates.”).

<sup>203</sup> See *supra* Section III.A.

<sup>204</sup> U.S. DEP’T OF STATE, *supra* note 134.

that criminal offenses are taken seriously. Therefore, scholars' arguments that the focus of wage theft prosecutions can be on alternative methods of accountability in a criminal context discussed in Part I are not only the antithesis of the standard legal practice in criminal courts, but also face large cultural barriers to our collective public understanding of what should be the result of a criminal case.<sup>205</sup> When cases are prosecuted criminally and jail sentences are not long or not given, the system is seen as too lenient or not in line with the exploitation and abuse generated by the crime. For example, in a case cited by the EPI as an example of a successful criminal case, a businessperson was convicted of insurance fraud and labor trafficking construction workers in Minnesota and then sentenced to only 270 days in jail and five years of probation.<sup>206</sup> In another case highlighted by the EPI report, the owner of a New York gas station was given three years of probation when he pled to misdemeanor charges, not the felony labor trafficking charges on which he was originally indicted.<sup>207</sup> In these cases, advocates and victims who went through the criminal process expressed concern.<sup>208</sup> In the Minnesota case, reporters documented that "victims and advocates" felt disappointed that the criminal sentence was "too lenient."<sup>209</sup>

Further, advocates must consider the actual political results of the movement to increase prosecution of wage theft. The push to criminalize wage theft has already led to states making theft of workers' wages—traditionally misdemeanor crimes that do not result in jail time—felony

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<sup>205</sup> See GERSTEIN, *supra* note 27, at 27; Damelio, *supra* note 32, at 142.

<sup>206</sup> GERSTEIN, *supra* note 27, at 19.

<sup>207</sup> *Id.*; Press Release, Suffolk Cnty. Dist. Att'y's Off., Labor Law Unit Recovers Nearly \$800K in Restitution Owed to Workers And New York State (Mar. 2, 2023), <https://suffolkcountynyny.gov/districtattorney/Newsroom/Press-Releases/ArtMID/2343/ArticleID/10146/LABOR-LAW-UNIT-RECOVERS-NEARLY-800K-IN-RESTITUTION-OWED-TO-WORKERS-AND-NEW-YORK-STATE> [<https://perma.cc/B2ME-T3MJ>].

<sup>208</sup> See GERSTEIN, *supra* note 27, at 19.

<sup>209</sup> Gordon Severson, *Man Sentenced to 270 Days, 5 Years Probation in Labor Trafficking Case*, KARE 11 (Jan. 15, 2020, 7:04 PM), <https://www.kare11.com/article/news/crime/man-sentenced-to-270-days-5-years-probation-in-labor-trafficking-case/89-197df081-6f5c-4789-a194-b7fd5560717d> [<https://perma.cc/2FKQ-Q33A>]; see also Max Nesterak, *Dairy Workers After Wage Theft Settlement: Where Are the Criminal Charges?*, MINN. REFORMER (Nov. 13, 2024, 6:00 AM), <https://minnesotareformer.com/2024/11/13/dairy-workers-after-wage-theft-settlement-where-are-the-criminal-charges> [<https://perma.cc/MA2R-5T77>] (discussing a wage theft case where only civil charges were brought and victims expressed that they felt "shortchanged" when there was no criminal prosecution). After a two-year prosecution of wage theft charges on a dairy farm the case settled for \$250,000 with no jail time. *Id.* Workers and the nonprofit supporting their case expressed "disappointment in the paltry penalties for dairy owner." *Id.*

offenses.<sup>210</sup> Further, limited data available shows how these efforts come at a great cost to the state. For example, in 2022, California passed a law making grand theft of wages a felony and increasing criminal sentences to one to three years in prison.<sup>211</sup> The legislature enacted this new felony provision in California, despite the state legislative analysis documenting “[u]nknown, potential increase[s] in state costs for new commitments to state prison that otherwise would not have resulted in criminal conduct absent this measure.”<sup>212</sup> In assessing the cost, the California Senate analysis highlights that, in FY 2020 to 2021, the per capita cost of incarcerating a person in a state prison in California was \$112,691 annually.<sup>213</sup> The analysis further documents “significant workload cost pressures to the courts to process and decide charges of wage theft that would not have been filed or used as much court resources to adjudicate absent this measure.”<sup>214</sup> The California Assembly analysis provided the only concrete cost estimate, highlighting that if just “two people are [charged], convicted, and sentenced to the middle term of two years in state prison for wage theft, the costs to [California Department of Corrections and Rehabilitation] would be \$336,000.”<sup>215</sup>

The above analysis shows that advocates’ recommendations to increase criminal prosecutions of wage theft but not to use prison

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<sup>210</sup> H.R. 7677, 2022 Gen. Assemb., Jan. Sess. (R.I. 2022); see also Press Release, Peter F. Neronha, Att’y Gen., State of Rhode Island, Attorney General Neronha and State Labor Leaders Seek to Strengthen Penalties for Wage Theft and Worker Misclassification (Apr. 13, 2022), <https://riag.ri.gov/press-releases/attorney-general-neronha-and-state-labor-leaders-seek-strengthen-penalties-wage> [<https://perma.cc/K3AT-RD7Z>] (documenting that state labor leaders supported the need to change the wage theft crime from a misdemeanor to felony); see Comstock, *supra* note 42, at 429–30 (highlighting three states that created new felony provisions for wage theft in 2019 alone); see also Michael J. Westwood-Booth, *Employers Beware: New Jersey Enacts One of the Toughest “Wage Theft” Laws in the Country*, OGLETREE DEAKINS (Aug. 14, 2019), <https://ogletree.com/insights-resources/blog-posts/employers-beware-new-jersey-enacts-one-of-the-toughest-wage-theft-laws-in-the-country> [<https://perma.cc/3C9L-JGMW>] (summarizing New Jersey’s 2019 wage theft law and highlighting that, under the new law, repeat offenders face three to five years in prison and that “[c]ritically, there is no presumption of non-imprisonment”).

<sup>211</sup> Assemb. 1003, 2021–22 Leg., Reg. Sess. (Cal. 2021).

<sup>212</sup> *Wage Theft: Grand Theft: Hearing on Assemb. 1003 Before the S. Comm. on Appropriations*, 2021–22 Leg., Reg. Sess. 1–2 (Cal. 2021) (contradicting advocates’ justification that criminal proceedings can cover a broader range of behaviors, the bill analysis notably found that “[i]t appears that most of the conduct, except for potentially the theft of gratuity, could be prosecuted as a misdemeanor under existing law or could be pursued civilly”).

<sup>213</sup> *Id.* at 1.

<sup>214</sup> *Id.*

<sup>215</sup> *Hearing on Assemb. 1003 Before the Assemb. Comm. on Appropriations*, 2021–22 Leg., Reg. Sess. 1 (Cal. 2021) (documenting court costs) (“If 15 new crimes are filed annually statewide and proceed to trial resulting in two days of court time, at an estimated cost of approximately \$7,644 for an eight-hour court day, the approximate annual cost to the trial courts would be \$229,320.”).

sentences are paradoxical. Trafficking case results and current policy approaches confirm that this increased focus will likely generate more individual felony convictions and jail sentences at a great cost to state taxpayers.

C. *Practical Realities and Complexities of Criminal Prosecution at Best Yield Mixed Results for Workers*

Supporting increased prosecution of wage theft cases also ignores the practical fact that, in the civil context, workers must only prove wage theft by a preponderance of the evidence, but if the case is brought criminally, the Fifth Amendment's Due Process Clause requires the standard of proof to be beyond a reasonable doubt for a criminal conviction. It is only after this higher burden has been met in the criminal case that restitution can be ordered.<sup>216</sup> The fact that in civil cases, the burden of proof is so much lower—only 51%—or more likely than not—means that employers are more likely to settle quickly. Furthermore, the standards in civil cases are well-developed and known to the employer's defense counsel. For example, even though vulnerable workers are unlikely to have precise documentary evidence, civil case law is clear that approximate evidence can be sufficient when presented by a worker.<sup>217</sup> Then, the burden falls on the employer to prove otherwise.<sup>218</sup> This is not the case in criminal matters. The increased burden of proof in criminal matters and the complexities of criminal prosecutions in a new legal area are bound to result in difficult cross-examination of victims, lengthy trials, and extended wait times for workers.<sup>219</sup> Research on human

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<sup>216</sup> See CAL. CONST., art. I, § 28, subd. (b)(13)(A) (constitutionalizing the right of persons who suffer losses as a result of criminal activity to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer); *In re Winship*, 397 U.S. 358, 364 (1970) (holding explicitly for the first time that the Due Process Clause of the Fifth Amendment requires "proof beyond a reasonable doubt"); U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .").

<sup>217</sup> See *Hernandez v. Mendoza*, 199 Cal. App. 3d 721, 727 (1988) (finding that the failure on the defendant's part to produce evidence that counters the employees' testimonial evidence means "the court may then award damages to the employee, even though the result may be only approximate." *Id.* (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946))).

<sup>218</sup> See, e.g., *id.* (stating that when an employer fails to comply with California's requirements to keep accurate written contemporaneous time and pay records, the employee's credible testimony estimating time worked is sufficient to shift the burden to the employer to disprove the testimony with specific evidence).

<sup>219</sup> See BRIAN J. OSTROM, LYDIA E. HAMBLIN, RICHARD Y. SCHAUFFLER & NIAL RAAEN, NAT'L CTR. FOR STATE CTS. & EFFECTIVE CRIMINAL CASE MGMT., *TIMELY JUSTICE IN CRIMINAL CASES*:



trafficking cases shows this to be true. Research has documented that human trafficking cases are long, can “involve numerous motions and hearing[s],”<sup>220</sup> and that labor trafficking cases, in particular, are complex for juries to understand.<sup>221</sup> Because the criminal focus on wage theft is also an emerging criminal area, it is reasonable to assume similar results. Examples highlighted in the EPI report on wage theft confirm these difficulties, including a labor trafficking and wage theft case brought in 2018. In this case, the Massachusetts AG’s office charged an employer with labor trafficking and wage theft.<sup>222</sup> At the same time, the AG also charged the parent business, Martins Maintenance, Inc.<sup>223</sup> The case

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WHAT THE DATA TELLS US 5, [https://www.ncsc.org/\\_data/assets/pdf\\_file/0019/53218/Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf](https://www.ncsc.org/_data/assets/pdf_file/0019/53218/Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf) [https://perma.cc/Y57C-AUFG] (pertaining to a study of court timeliness in criminal cases found that no court consistently met the recommended timeframes defined by the Model Time Standards); OFF. FOR VICTIMS OF CRIME, U.S. DEP’T OF JUST., NEW DIRECTIONS FROM THE FIELD: VICTIMS’ RIGHTS AND SERVICES FOR THE 21ST CENTURY 21 (1997), [https://www.ncjrs.gov/ovc\\_archives/directions/pdf/txt/direct.pdf](https://www.ncjrs.gov/ovc_archives/directions/pdf/txt/direct.pdf) [https://perma.cc/ZM4H-2C7M] (“One of the greatest hardships victims endure in the criminal justice process is the delay of scheduled proceedings. . . . Repeated continuances cause serious hardships and trauma for victims as they review and relive their victimization in preparation for trial, only to find the case has been postponed.”); Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Mexico’s Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 121–22 (2020) (describing the psychological and emotional harms that victims suffer from delays in the criminal justice process); Mary Beth Ricke, Note, *Victims’ Right to a Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection*, 41 WASH. U. J.L. & POL’Y 181, 183, 193 (2013) (observing that crime victims who “are already heightened emotionally with anxiety and anticipation of the impending trial” suffer “further and unnecessary trauma” waiting for the resolution of a criminal case and noting that “the delay of the trial increases the risk that PTSD symptoms will reappear in the victim, thus impeding the victim’s [emotional] recovery . . . .”); 150 CONG. REC. 7303 (2004) (statement of Sen. Jon Kyl) (“[D]elays in criminal proceedings are among the most chronic problems faced by victims. Whatever peace of mind a victim might achieve after a crime is too often inexcusably postponed by unreasonable delays in the criminal case.”).

<sup>220</sup> VANESSA BOUCHE, AMY FARRELL & DANA WHITTMER, IDENTIFYING EFFECTIVE COUNTER TRAFFICKING PROGRAMS AND PRACTICES IN THE U.S.: LEGISLATIVE, LEGAL, AND PUBLIC OPINION STRATEGIES THAT WORK ii (2015), <https://www.ojp.gov/pdffiles1/nij/grants/249670.pdf> [https://perma.cc/CX6Q-V5BR]; see Harkins, *supra* note 16, at 60 (concluding that “migrants are reluctant to participate in criminal prosecutions of trafficking cases because they tend to be time-consuming, legalistic, and focus primarily on achieving penal sanctions against offenders, which is typically not the outcome migrants are concerned with”).

<sup>221</sup> See PFEFFER ET AL., *supra* note 21, at 3–18.

<sup>222</sup> *Id.* (“In 2018, the Massachusetts attorney general’s office charged an employer with labor trafficking, among other offenses, in a case in which the defendant was accused of recruiting a worker from abroad and requiring her to perform cleaning work, for which she was paid subminimum wages . . . .”).

<sup>223</sup> Press Release, Massachusetts Off. of the Att’y Gen., New Bedford Man and East Providence Cleaning Company Charged in Connection With Labor Trafficking (May 7, 2018), <https://www.mass.gov/news/new-bedford-man-and-east-providence-cleaning-company-charged->

against Martins Maintenance took over seven years to be criminally prosecuted. The employer charged in this case received a five-year prison sentence in 2023, but the criminal case against Martins Maintenance, did not conclude until November 2024 largely because of appellate challenges filed by the parent business.<sup>224</sup> A press release from the Attorney General's office in 2023 documented that the case against the parent company was expected to move forward in 2024.<sup>225</sup> A November 11, 2024, news report documents that Martins Maintenance was sentenced to pay a \$20,000 fine and \$42,000 in restitution for two victims, a pretty paltry amount for seven years of litigation.<sup>226</sup>

Another case highlighted in the EPI report,<sup>227</sup> filed in 2018, was resolved only in 2023.<sup>228</sup> The Department of Labor first investigated the case and referred it for criminal prosecution in 2014.<sup>229</sup> This means that the case took over ten years to conclude after first being reported to the

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in-connection-with-labor-trafficking [<https://perma.cc/3NBU-AH3H>]. Both the East Providence cleaning company, Martins Maintenance, and a sixty-year-old man who worked for Martins were charged with wage theft and trafficking-related offenses. *Id.*

<sup>224</sup> See *Commonwealth v. Martins Maint. Inc.*, 190 N.E. 3d 1099, 1111 (Mass. App. Ct. 2022) (“Viewed in the light most favorable to the Commonwealth, the grand jury heard sufficient evidence to establish probable cause that Martins committed the crime of labor trafficking in violation of G.L. c. 265, § 51 (a), under a collective knowledge theory. Accordingly, the orders dismissing the labor trafficking indictments are vacated and are remanded to the Superior Court for proceedings consistent with this opinion.”); see also Jenifer B. McKim, *New Bedford Man Sentenced to 5 Years in Prison in State’s First Known Labor Trafficking Conviction*, GBH (Dec. 21, 2023), <https://www.wgbh.org/news/local/2023-12-21/new-bedford-man-sentenced-to-5-years-in-prison-in-states-first-known-labor-trafficking-conviction> [<https://perma.cc/MRR2-RRCX>] (reporting that Martins’ employee received a five-year prison sentence for human trafficking in 2023 and that the case against Martins Maintenance was not scheduled to go to trial until 2024).

<sup>225</sup> McKim, *supra* note 224.

<sup>226</sup> Ken Palva, *Rhode Island and Massachusetts Cleaning Company Sentenced Over Forced Labor, Failure to Pay Minimum Wage and Overtime*, FALL RIVER REP. (Nov. 12, 2024), <https://fallriverreporter.com/rhode-island-and-massachusetts-cleaning-company-sentenced-over-forced-labor-failure-to-pay-minimum-wage-and-overtime> [<https://perma.cc/MT9V-5C42>]; see also Massachusetts Appeals Court, *February 2, 2022, Oral Arguments (A4vc)*, YOUTUBE (Feb. 2, 2022), [https://www.youtube.com/watch?v=eWQWqYd\\_ohs](https://www.youtube.com/watch?v=eWQWqYd_ohs) [<https://perma.cc/6VJU-8TYN>] (capturing oral argument related to the sentencing of Martins’ employee in connection with the 2014 human trafficking charge).

<sup>227</sup> GERSTEIN, *supra* note 27.

<sup>228</sup> Palva, *supra* note 226 (reporting that, in December 2023, a Martins Maintenance employee was sentenced in connection with his conviction for human trafficking).

<sup>229</sup> Kimberly Bonvissuto, *Prison Sentences Don’t Reflect ‘Horror’ Doled Out to Workers by Residential Care Facility Owners, AG Says*, MCKNIGHTS SENIOR LIVING (Feb. 10, 2023), <https://www.mcknightsseniorliving.com/news/prison-sentences-dont-reflect-horror-doled-out-to-workers-by-residential-care-facility-owners-ag-says> [<https://perma.cc/6HRA-B6XN>].

Department of Labor.<sup>230</sup> In this case, it is also notable that the criminal proceedings took nearly five years, and the criminal trial itself took seven months.<sup>231</sup> At the sentencing in 2023, reports document the trial court gave lenient sentences to all three defendants<sup>232</sup> and awarded criminal restitution to only testifying victims, when many more victims had been identified by the Office of the Attorney General of California (OAGC).<sup>233</sup> The OAGC and victims' rights attorneys appealed this determination, but financial justice for the majority of victims in this case is still pending ten years after the case was identified.<sup>234</sup> Finally, a case filed by the DOJ, which at the time was identified as the largest labor trafficking case in the country, demonstrates the concrete results of the higher burden of proof in criminal cases.<sup>235</sup> After filing the case, a government spokesperson

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<sup>230</sup> GERSTEIN, *supra* note 27, at 19–20 (“In 2018, the California attorney general’s office brought human trafficking and other charges against four individuals who ran an adult residential and child care company.”).

<sup>231</sup> See *People v. Gamos*, No. 18-sf-14404 (Super. Ct. Cal. San Mateo Cnty. June 7, 2022); Press Release, Rob Bonta, Att’y Gen., Cal. Dep’t of Just., Attorney General Bonta Announces Sentences for Rainbow Bright Defendants in Bay Area Human Trafficking Case (Feb. 8, 2023), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-sentences-rainbow-bright-defendants-bay-area> [<https://perma.cc/79JW-Q45E>]. The trial began on November 3, 2021, in the County of San Mateo Superior Court, Department 17, before the Honorable Elizabeth K. Lee. *Gamos*, No. 18-sf-14404. The jury did not return a guilty verdict until June 7, 2022. *Id.*

<sup>232</sup> Press Release, Rob Bonta, Att’y Gen., State of California Dep’t of Just., Attorney General Bonta Announces Sentences for Rainbow Bright Defendants in Bay Area Human Trafficking Case (Feb. 8, 2023), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-sentences-rainbow-bright-defendants-bay-area> [<https://perma.cc/JJE7-GV42>].

“[T]oday’s sentencing did not recognize the level of horror that the Rainbow Bright victims experienced at the hands of the Gamos Family,” Bonta said. “And after ten years of abuse and nearly five years of court proceedings, today’s sentencing only put them through more trauma. The victims showed resilience and courage throughout the proceedings.”

*Id.*

<sup>233</sup> Minute Order, *People v. Gamos*, No. 18-sf-14404 (Super. Ct. Cal. San Mateo Cnty. Mar. 28, 2023); see also Wayne Freedman & Brandon Behle, *Owners of Rainbow Bright Daycare and Senior Centers Along Peninsula Charged With Human Trafficking, Employee Violations*, ABC 7 NEWS (Sept. 7, 2018), <https://abc7news.com/rainbow-brite-daycare-bright-human-trafficking-in-california-ring-bay-area/4174628> [<https://perma.cc/C28L-W4ZU>] (documenting in 2018 the AG’s office had identified “hundreds of victims” in the case and expected to identify more).

<sup>234</sup> *People v. Gamos*, No. A168007 (Cal. Ct. App., 1st App. Div. June 12, 2023).

<sup>235</sup> *Feds Drop Human Trafficking Charges*, UNITED PRESS INT’L, INC. (July 20, 2012, 10:05 PM), [https://www.upi.com/Top\\_News/US/2012/07/20/Feds-drop-human-trafficking-charges/93261342836303](https://www.upi.com/Top_News/US/2012/07/20/Feds-drop-human-trafficking-charges/93261342836303) [<https://perma.cc/Y3KZ-TDBY>]. United Press International reported that the U.S. Justice Department, in what it had called the “biggest human trafficking case in U.S. history,” dropped its human trafficking charges in the criminal case against Global Horizons Manpower Inc. *Id.* The reason reported by Justice Department spokeswoman Nanda Chitre was that “[a] team of

indicated that it was “unable to prove the elements of the charged offenses beyond a reasonable doubt.”<sup>236</sup> It then dropped the case.<sup>237</sup> This result must be contrasted with the EEOC, which brought federal civil charges in the same matter and secured a default judgment of \$8.1 million for workers.<sup>238</sup> Although advocates promoting the increased criminalization of wage theft may reject the analogies discussed in the above cases by claiming that prosecution for labor trafficking cannot be compared with wage theft, some of these cases also involved criminal wage theft charges, and they all dealt with complex workplace issues.<sup>239</sup> Similar dynamics are bound to arise in the criminal prosecution of wage theft cases, delays, increased motion practice, the higher burden of proof, and other factors in the criminal process increase victims’ trauma.<sup>240</sup> These are the practical, negative consequences that victims are likely to experience when scholars and advocates push for the increased criminalization of wage theft.

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attorneys and agents determined the government [was] unable to prove the elements of the charged offenses beyond a reasonable doubt, the high standard applied in criminal prosecutions.” *Id.* Chitre reportedly stated that the criminal dismissal “[did] not apply to any ongoing civil litigation being conducted by the Equal Employment Opportunity Commission.” *Id.*

<sup>236</sup> *Id.*

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

<sup>238</sup> Press Release, U.S. Equal Emp. Opportunity Comm’n, EEOC Collects Over \$4.8 Million on Judgment in Labor Trafficking Case Against Maui Pineapple for Thai Farmworkers (May 18, 2021), <https://www.eeoc.gov/newsroom/eeoc-collects-over-48-million-judgment-labor-trafficking-case-against-maui-pineapple-thai> [<https://perma.cc/83CZ-JGKJ>].

<sup>239</sup> See, e.g., *People v. Gamos*, No. 18-sf-14404 (Super. Ct. Cal. San Mateo Cnty. Mar. 28, 2023); see also Harkins, *supra* note 16, at 60 (arguing that an increased focus on criminal prosecution in the labor trafficking context has not worked in part because they are “time-consuming” and focus on “penal sanctions against offenders” when workers want “financial remedies so they can move on with their lives”).

<sup>240</sup> See, e.g., Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy’s Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 121–22 (2020) (describing the psychological and emotional harms that victims suffer in the criminal justice process); Ricke, *supra* note 219, at 183, 193 (observing that crime victims, who “are already heightened emotionally with anxiety and anticipation of the impending trial,” suffer “further and unnecessary trauma” waiting for the resolution of a criminal case and noting that “the delay of the trial increases the risk that PTSD symptoms will reappear in the victim, thus impeding the victim’s recovery from the violent action taken against [them]”).

D. *Practical Experience with Trafficking Cases Shows that Restitution Is Commonly Not Paid and Not Even Ordered in Criminal Cases While Workers Recover Billions from Civil Enforcement Efforts*

Advocates for criminalizing wage theft further argue that criminal prosecution can ensure broader enforcement and recovery for workers, thus effectively supplementing civil enforcement efforts.<sup>241</sup> However, this is also belied by data available from trafficking cases. Although restitution is required in federal human trafficking criminal cases,<sup>242</sup> “research leads to the troubling conclusion that restitution is rarely awarded.”<sup>243</sup> As in past years,<sup>244</sup> the Department of State’s 2023 TIP Report notes the following:

Advocates continued to call for federal prosecutors to consistently seek, and for courts to consistently award, mandatory restitution for both sex and labor trafficking cases, citing concerns about both the low number of cases in which it was ordered and the low rate of payment of restitution to trafficking victims consistent with restitution orders.<sup>245</sup>

The Human Trafficking Pro Bono Institute reports that, from 2009 to 2012, restitution was ordered in just 36% of trafficking cases where it was required.<sup>246</sup> Furthermore, the total amount of restitution awarded in federal criminal human trafficking cases over four years totaled just \$11,279,009.51.<sup>247</sup>

Workers’ rights advocates should carefully consider this relatively meager amount in contrast to the \$1.156 billion in back wages that the

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<sup>241</sup> See, e.g., Damelio, *supra* note 32, at 132 (discussing the “significant results for workers using both civil and criminal prosecutions” achieved by state attorneys general).

<sup>242</sup> The Trafficking Victims Protection Act (TVPA) mandates that a defendant convicted of a crime under Title 18, chapter 77, pay restitution to the victim. Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 196-386 § 112, 114 Stat. 1464 (codified as amended at 18 U.S.C. § 1593(a)) (“[T]he court shall order restitution for any offense under this chapter.”).

<sup>243</sup> ALEXANDRA F. LEVY, MARTINA E. VANDENBERG & LYRIC CHEN, WHEN “MANDATORY” DOES NOT MEAN MANDATORY: FAILURE TO OBTAIN CRIMINAL RESTITUTION IN FEDERAL PROSECUTION OF HUMAN TRAFFICKING CASES IN THE UNITED STATES 3 (2014), <https://htlegalcenter.org/wp-content/uploads/HTProBono-Trafficking-Restitution-Report.pdf> [<https://perma.cc/7CBR-D3WB>].

<sup>244</sup> U.S. DEP’T OF STATE, 2022 TRAFFICKING IN PERSONS REPORT: UNITED STATES (2022), <https://www.state.gov/reports/2022-trafficking-in-persons-report/united-states> [<https://perma.cc/RB2H-3LUH>].

<sup>245</sup> U.S. DEP’T OF STATE, *supra* note 134.

<sup>246</sup> LEVY ET AL., *supra* note 243, at 3.

<sup>247</sup> *Id.* (“This amount reflects the \$3,568,842.35 awarded in 15 labor trafficking cases and \$7,834,696.30 ordered to victims in 52 sex trafficking cases.”).

U.S. Department of Labor actually collected for workers over a similar period, and the more than \$3 billion for workers the U.S. Department of Labor, state labor agencies, and civil class actions further recovered.<sup>248</sup> In fact, the California Judgement Enforcement Unit collected \$13,068,238.06 in citations and unpaid wages in FY 2020 and FY 2021 alone.<sup>249</sup> In one year, this single agency, in one state, reported collections greater than the \$11 million awarded (but not necessarily recovered) by federal prosecutions for human trafficking across the whole country over a four-year period.<sup>250</sup>

Advocates should also compare the amount of restitution ordered in trafficking cases with the number of victims/workers compensated in civil cases. For example, in one 2022 case, the CA Labor Commission reported reaching a \$2.2 million settlement for 317 workers.<sup>251</sup> In a 2023 case, it reached a \$1.5 million wage theft settlement for 300 workers.<sup>252</sup> However, in the EPI criminal example previously discussed, the Attorney General first reported that \$8.5 million in wages had been stolen from 120

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<sup>248</sup> Mangundayao et al., *supra* note 18, at 4 (“Our analysis shows that \$3.24 billion in stolen wages was recovered for workers from 2017 to 2020 by the U.S. Department of Labor, state agencies, and class action litigation.”).

<sup>249</sup> CAL. LABOR COMM’R’S OFFICE, DEP’T OF INDUS. RELATIONS, 2020-2021 THE BUREAU OF FIELD ENFORCEMENT FISCAL YEAR REPORT 12 (2021), [https://www.dir.ca.gov/dlse/BOFE\\_LegReport2021.pdf](https://www.dir.ca.gov/dlse/BOFE_LegReport2021.pdf) [<https://perma.cc/A835-228C>].

<sup>250</sup> *Id.* at 5; see also Press Release, Kathy Hochul, Gov. of N.Y., Two Years After Major Wage Theft Crackdown, Governor Hochul Celebrates More Than \$63 Million Recovered for Nearly 65,000 Workers Across New York State (July 1, 2024), <https://www.governor.ny.gov/news/two-years-after-major-wage-theft-crackdown-governor-hochul-celebrates-more-63-million> [<https://perma.cc/SP5X-WA2A>] (documenting that in two years NYSDOL’s Division of Worker Protection has “recovered \$63.5 million in wages and damages for nearly 65,000 workers”).

<sup>251</sup> Press Release, State of Cal. Dep’t of Indus. Relations, California Labor Commissioner’s Office Reaches \$2.2 Million Settlement Securing Unpaid Wage for Hundreds of Bay Area Restaurant Workers (Oct. 21, 2022), <https://www.dir.ca.gov/DIRNews/2022/2022-89.html> [<https://perma.cc/W5Y2-LBRW>] (demonstrating the creative preventive measures civil case outcomes can require). The press release also indicates that in addition to payment to workers, requirements included that “the restaurants’ owners personally apologize to workers for the violations, allow a one-hour training about labor laws on paid time [in multiple languages], and post a notice about employees’ rights regarding tips.” *Id.*

<sup>252</sup> Press Release, State of Cal. Dep’t of Indus. Relations, California Labor Commissioner Reaches \$1.47 Million Wage Theft Settlement with Poultry Businesses Affecting more than 300 Workers (Apr. 26, 2023), <https://www.dir.ca.gov/DIRNews/2023/2023-33.html> [[perma.cc/B2UC-JDTT](https://perma.cc/B2UC-JDTT)].

workers.<sup>253</sup> At sentencing, only testifying workers recovered any funds, totaling about \$2 million.<sup>254</sup>

Given the difficulty of recovering restitution in trafficking cases,<sup>255</sup> experts have concluded that civil actions against corporations are a better method for recovering damages from the businesses involved in trafficking.<sup>256</sup> Recent examples of successful civil cases have involved major hotel franchisees, including owners and operators, brand managers, and the parent companies of big-name hotel chains, being sued instead of low-level managers of private hotels.<sup>257</sup> Further experts have discussed that civil cases can often be a better option than criminal cases because more damages can be ordered, including “compensatory damages for loss, injury or harm suffered. In some jurisdictions, courts may also award punitive damages to hold traffickers financially

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<sup>253</sup> Kiki Intarasuwan, *Rainbow Bright Daycare Trafficked Workers, Stole \$8.5 Million in Wages*, NBC UNIVERSAL NEWS BAY AREA (Sept. 7, 2018), <https://www.nbcbayarea.com/news/local/california-attorney-general-announces-arrests-in-bay-area-human-trafficking-case/208920> [<https://perma.cc/K3EX-Q3Y4>].

<sup>254</sup> Minute Order, *People v. Gamos*, No. 18-sf-14404 (Super. Ct. Cal. San Mateo Cnty. Mar. 28, 2023); see also *People v. Gamos*, No. A168007 (Cal. Ct. App., 1st App. Div. June 12, 2023).

<sup>255</sup> See LEVY et al., *supra* note 243, at 4. Even if restitution is included in a plea bargain, calculating and receiving restitution on a victim’s behalf can be complex. For example,

Following a conviction, a court calculating restitution may only consider the restitution provision corresponding to the crime charged . . . . Although a plea agreement need not contain a specific restitution amount, it must contain at least an estimate. Otherwise, a defendant may be allowed to appeal the plea agreement, even if he signed a waiver of appeal.

LEVY ET AL., *supra* note 243, at 7. Finally, compliance with restitution orders can be a term of probation for criminal claims but once probation ends, restitution must be transferred to civil case. Henry Wu, *Civil Litigation on Behalf of Trafficking Survivors: A New Approach to Accountability?*, FORCED MIGRATION REV., June 2020, at 53, <https://www.fmreview.org/issue64/wu> [<https://perma.cc/WWC8-C4LV>]; MERRICK M. BLACK, HUM. TRAFFICKING LEGAL CTR., USING CIVIL LITIGATION TO COMBAT HUMAN TRAFFICKING 24 (2021), <https://htlegalcenter.org/wp-content/uploads/Civil-Litigation-2021-Data-Update.pdf> [<https://perma.cc/FK26-VWJX>] (noting civil litigation is especially important in labor trafficking cases as the “federal government continues to fail to prosecute forced labor cases”).

<sup>256</sup> See PFEFFER ET AL., *supra* note 21, at 3–19 (reporting that stakeholders experienced with labor trafficking cases believed that civil remedies were a better method of accountability given the complexity of criminally prosecuting labor trafficking cases).

<sup>257</sup> See Sarah Meo & Louise Shelley, *Sex Trafficking and Hotels: Why There Is a Need for Effective Corporate Social Responsibility*, GLOB. POL’Y (Nov. 11, 2021), <https://www.globalpolicyjournal.com/blog/11/11/2021/sex-trafficking-and-hotels-why-there-need-effective-corporate-social-responsibility> [<https://perma.cc/K6EE-PLUQ>] (finding that in 2019 and 2020, 189 private civil cases were filed against hotels allegedly involved in sex trafficking). But such suits can also be brought by government actors if they have resources to take this action. See *id.* For example, in 2017, the Los Angeles City Attorney filed a case and received a \$250,000 settlement from the owners of Motel 6. *Id.*

accountable and deter similar acts.”<sup>258</sup> They also highlight that civil cases not only maximize recovery but also, because civil cases are survivor-led and proceed only when the survivor is ready, they better recognize survivor autonomy and support their journey to recovery.<sup>259</sup>

Therefore experts, relying on their on-the-ground experience in trafficking cases, have concluded that the civil process optimizes the chances of significant recovery of damages for victims on their own terms. Their findings not only undermine the argument that the criminal system can successfully support wage theft cases, but also show that focusing on criminal prosecution may actually lead to fewer workers recovering lost wages, lesser amounts from their exploitation, and additional trauma for workers.<sup>260</sup>

E. *Advocates’ Call to Use Existing Law Enforcement Resources for Deterrent Purposes Ignore the Failure of Such Measures and the Associated True Costs*

Advocates supporting the increased criminal prosecution of wage theft further argue that faced with the grave underfunding of traditional civil enforcement approaches, leveraging law enforcement resources will result in greater overall deterrence of wage theft.<sup>261</sup> Yet it is well-documented in the labor trafficking context that investigation and prosecution require additional specialized funding and resources.<sup>262</sup>

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<sup>258</sup> Wu, *supra* note 255.

<sup>259</sup> *Id.*; PFEFFER ET AL., *supra* note 21, at 3-17–3-18 (summarizing stakeholder input that “civil remedies were useful for balancing survivor interests, accountability, and the complexity of labor trafficking cases” given complexities in criminal prosecution).

<sup>260</sup> Meo & Shelley, *supra* note 257; see also Wu, *supra* note 255 (reviewing that civil cases are often a better option than criminal cases because more damages can be ordered, the process is survivor-led, and civil cases require a lower standard of proof); DANIEL WERNER & KATHLEEN KIM, CIV. LITIG. ON BEHALF OF VICTIMS OF HUM. TRAFFICKING, CIVIL LITIGATION ON BEHALF OF VICTIMS OF HUMAN TRAFFICKING 1 (2008), [https://www.splcenter.org/wp-content/uploads/files/d6\\_legacy\\_files/downloads/splc\\_human\\_trafficking.pdf](https://www.splcenter.org/wp-content/uploads/files/d6_legacy_files/downloads/splc_human_trafficking.pdf) [<https://perma.cc/9JNM-RESS>] (discussing the pros and cons of civil litigation versus criminal prosecution and highlighting that civil “litigation can provide forms of relief that may not be available through a restitution order”).

<sup>261</sup> See, e.g., PFEFFER ET AL., *supra* note 21.

<sup>262</sup> See, e.g., *id.* at 3-15 (documenting that law enforcement reported “[i]nsufficient resources” as a barrier to law enforcement investigating more labor trafficking cases); see also *id.* at 4–20 (discussing the importance of funding the Department of Labor to increase the identification of labor trafficking cases); *id.* at 3-15 (“Insufficient resources were described as a barrier to instigating more proactive investigations, which would likely lead to the identification of more labor trafficking cases.”).



Furthermore, a practical look at what prosecuting a criminal case entails in the context of wage theft undermines this argument.

First, it is hard to see how criminal prosecution helps leverage existing additional resources when cases involving the prosecution of wage theft, as reported by government agencies and the media, almost always document close collaboration with local or federal agencies already working on civil enforcement.<sup>263</sup> For example, in California in 2018 news reports documented that a case criminally prosecuted for wage theft by the DA's Office was jointly investigated by "the California Department of Industrial Relations, the California Department of Insurance, the California Employment and Development Department, and the State Franchise Tax Board."<sup>264</sup> In this case, one defendant was

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<sup>263</sup> See, e.g., Tracy DeFore, *New Grant Bolsters County's Fight Against Wage Theft*, County News Ctr. (Aug. 1, 2024), <https://www.countynewscenter.com/new-grant-bolsters-countys-fight-against-wage-theft> [<https://perma.cc/6YDZ-5XAL>] (noting the San Diego D.A.'s office's partnership with the CA Labor Commission Office to criminally prosecute wage theft cases); Press Release, D.A. Bragg Announces Creation of Office's First "Worker Protection Unit" to Combat Wage Theft, Protect New Yorkers from Unsafe Work Conditions (Feb. 16, 2023), <https://manhattanda.org/d-a-bragg-announces-creation-of-offices-first-worker-protection-unit-to-combat-wage-theft-protect-new-yorkers-from-unsafe-work-conditions> [<https://perma.cc/GJK7-W96G>] (highlighting New York DA's Office partnering with Office of the New York State Labor Commissioner to create first wage theft unit); Press Release, Attorney General Bonta Announces 31 Criminal Charges Against US Framing West and Its Employees for Wage Theft, Tax Evasion (Nov. 26, 2024), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-31-criminal-charges-against-us-framing-west-and> [<https://perma.cc/6YFZ-ME32>] (reporting that CA DOJ supported by the California Department of Insurance, California Department of Industrial Relations and California Employment Development Department conducted a joint investigation into a wage theft case being criminal prosecuted); Press Release, D.A. Bragg Announces Wage Theft Indictment Against Owners of Grimaldi's Pizzeria (Mar. 21, 2024), <https://manhattanda.org/d-a-bragg-announces-wage-theft-indictment-against-owners-of-grimaldis-pizzeria> [<https://perma.cc/7JP2-7K3X>] (highlighting in a press release for criminal wage theft that the investigation was begun by the Manhattan DA's Office after the New York Labor Commission received multiple complaints about alleged wage theft at a pizzeria); Jasmin Hansohm, *First Criminal Prosecution for Wage Theft in California Garment Sector*, DUE DILIGENCE DESIGN (Aug. 11, 2023), <https://duediligence.design/first-criminal-prosecution-for-wage-theft-in-california-garment-sector> [<https://perma.cc/6F4X-QHP8>] (announcing a joint case between the California Labor Commissioner and the Los Angeles District Attorney's Office seeking felony criminal charges against a garment manufacturer and contractor in California, which was the first criminal case under California's new grand theft of wages provision).

<sup>264</sup> 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), <https://www.sfchronicle.com/crime/article/Two-Bay-Area-restaurant-owners-must-pay-1-7-13524870.php> [<https://web.archive.org/web/20210116211742/https://www.sfchronicle.com/crime/article/Two-Bay-Area-restaurant-owners-must-pay-1-7-13524870.php>]; Caleb Pershan, *Bay Area Restaurant Owner Ordered to Pay \$1 Million to Workers in Wage Theft Case*, EATER S.F. (Jan. 10, 2019, 7:56 PM), <https://sf.eater.com/2019/1/10/18177701/alameda-district-attorney-wage-theft-lawsuit-mango-garden-restaurant> [<https://perma.cc/BL5M-4PAR>].

convicted of a felony and another a misdemeanor.<sup>265</sup> Fifty-six restaurant workers were identified as having been impacted and restitution was ordered in the amount of \$1,006,455 based on the wage theft convictions.<sup>266</sup> A press release by the Attorney General's office reports that in the same case, the Labor Commissioner's Office secured \$2.6 million in compensation for the workers.<sup>267</sup> Since the civil award was more than double than that ordered in the criminal matter, this result raises the obvious question of why criminal prosecution was even necessary. As this example shows, the criminal proceeding recovered less than the civil enforcement action and, in requiring the support of multiple civil enforcement agencies, likely took resources away from their ability to work on other cases. Further news reports do not just document the need for these joint investigations in 2018, which were early wage theft criminal filings in California, but that need for joint investigation has continued, six years later.<sup>268</sup>

Second, the proposed use of prosecution to leverage existing enforcement resources must consider the exorbitant costs of our prison system. Using trafficking data for incarcerated defendants shows a concrete example of these astronomical costs to taxpayers. In 2020, the latest data available, the Uniform Crime Report (UCR) documents that 1,564 people were in state custody for trafficking offenses.<sup>269</sup> Although the length of their prison term was not reported, in its annual TIP Report, the U.S. Department of State reports that, on average, over 86% of those convicted of human trafficking received a prison sentence of five years or more.<sup>270</sup> Estimating five years as an average sentence length and using the average amount of what states spend per prisoner per year—\$72,558.56—provides a conservative estimate of the long-term cost of criminal

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<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> Press Release, Rob Bonta, Att'y Gen., Cal. Dep't of Just., Attorney General Bonta Announces Guilty Plea in Bay Area Restaurant Tax Evasion and Wage Theft Scheme (Nov. 8, 2023), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-guilty-plea-bay-area-restaurant-tax-evasion-and> [<https://perma.cc/B49T-PEDJ>].

<sup>268</sup> *Id.*; see also Press Release, Dep't of Indus. Relations, State of Cal., California Labor Commissioner Partners with Los Angeles District Attorney's Office on First Criminal Prosecution of Garment Manufacturing Business Owner for Felony Wage Theft (Oct. 12, 2023), <https://www.dir.ca.gov/DIRNews/2023/2023-75.html> [<https://perma.cc/MCJ9-E2XU>] (the Labor Commissioner partnered with Los Angeles District Attorney's office in 2023 seeking felony wage theft charges).

<sup>269</sup> BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., HUMAN TRAFFICKING DATA COLLECTION ACTIVITIES, 2022 5 (2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/htdca22.pdf> [<https://perma.cc/R72W-A2B8>].

<sup>270</sup> U.S. DEP'T OF STATE, *supra* note 134.

prosecution for trafficking charges in the United States.<sup>271</sup> For those convicted of trafficking in 2022 alone, it cost taxpayers an estimated \$113,481,587.84 annually, and over five years, their incarceration would ultimately cost taxpayers a staggering \$567,407,939.20.<sup>272</sup>

Given the exorbitant costs associated with the results of criminal prosecutions, efforts to increase criminal prosecution ensure money remains in the carceral system, supporting continued mass incarceration in our country, while civil enforcement mechanisms remain woefully underfunded. As the public becomes increasingly aware of the seriousness of wage theft and its impact on vulnerable communities, workers' rights advocates could use this momentum to help redirect resources away from our carceral system. Because workers' rights groups have a deep history of leading powerful organizing efforts, a stance that impacted workers are best served through civil remedies, not criminal enforcement, could significantly amplify the voices of those calling to end mass incarceration in the United States.<sup>273</sup>

F. *Criminal Prosecution Cannot Be Rapidly Scaled and Can Address Only a Fraction of the Cases Civil Enforcement Agencies Currently Handle*

One final argument promoted by those seeking to encourage the prosecution of wage theft is the overwhelming number of victims. Indeed, data show that one in three workers may suffer wage theft in the United States.<sup>274</sup> Scholars estimate that workers are underpaid about \$15 billion

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<sup>271</sup> *How Much Do States Spend on Prisoners?*, USA FACTS (Apr. 17, 2024), <https://usafacts.org/articles/how-much-do-states-spend-on-prisons> [<https://perma.cc/T5JT-P9Y3>] (providing expenditure per prisoner under state jurisdiction based on 2021 data adjusted for inflation based on 2023 dollars).

<sup>272</sup> *Id.* (providing cost estimate not adjusted for inflation).

<sup>273</sup> Colette Perold & Eric Dirnbach, *A Brief History of the Growth of Unions*, EMERGENCY WORKPLACE ORGANIZING COMM. (Nov. 12, 2024), <https://workerorganizing.org/premajority-unionism/unions/history> [<https://perma.cc/UG7C-WKUS>]; see also ASH ET AL., *supra* note 30, at 6 (arguing that the antitrafficking movement, unlike workers' rights movements, has historically not been shaped by impacted people organizing to advocate for their needs); Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 AM. POL. SCI. ASS'N 324, 342 ("Alt-labor groups have also sought to fuse workplace justice, social justice, and civil rights campaigns in the hopes of building 'a new brand of social justice unionism . . . aimed at broad social transformation.'").

<sup>274</sup> Cooper & Kroger, *supra* note 21, at 9.

per year and that wage theft is born mainly by workers of color.<sup>275</sup> They argue that criminal enforcement as a punitive measure will help solve this problem:

The punitive tools to change an employer's compliance equation do exist right now, just not with [Civil Wage] 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.<sup>276</sup>

However, even experienced practitioners offer no evidence-based data showing that prosecuting business actors for labor trafficking or wage theft provides any type of deterrence.<sup>277</sup> Moreover, it has been well documented that, for the criminal system to have any deterrent effect, it must include "certainty and celerity of punishment."<sup>278</sup> Practical experience in trying to increase trafficking criminal investigations and prosecutions shows that these cases cannot be easily scaled, undermining the argument that criminal prosecutions will have any deterrent effect. Given the breadth of this well-documented problem, there is simply no way that any "certainty" of punishment will result.<sup>279</sup>

In 2020, twenty years after the TVPA was first passed and fifteen years after all states passed new crimes designed to prevent human trafficking, the Uniform Crime Reporting System documented that nationwide, only 2,198 human trafficking cases were referred for criminal prosecution.<sup>280</sup> Of those cases, only 1,343 were prosecuted.<sup>281</sup> In fact, approximately 70% of all cases referred by law enforcement for human

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<sup>275</sup> Damelio, *supra* note 32, at 148; GERSTEIN, *supra* note 27, at 2; Terri Gerstein & David Seligman, *A Response to "Rethinking Wage Theft Criminalization,"* ONLABOR (Apr. 20, 2018), <https://onlabor.org/a-response-to-rethinking-wage-theft-criminalization> [https://perma.cc/E8QV-6MJV].

<sup>276</sup> Damelio, *supra* note 32, at 148.

<sup>277</sup> Gerstein & Seligman, *supra* note 275 (arguing for criminal prosecution of wage theft but readily acknowledging that research has not been conducted on its deterrent impact and relaying on the "common-sense notion that fear of arrest" changes employers' conduct).

<sup>278</sup> NAT'L RSCH. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 156 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014), <https://nap.nationalacademies.org/read/18613/chapter/1> [https://perma.cc/F34M-CURQ].

<sup>279</sup> See *id.*; see also Capers, *supra* note 53, at 591–92 (documenting that mass incarceration actually increases crime and incurs direct costs of at least \$52 billion annually, which does not even include indirect costs).

<sup>280</sup> BUREAU OF JUST. STATS., *supra* note 269, at 3.

<sup>281</sup> *Id.*

trafficking were never criminally charged.<sup>282</sup> Further, this same data show that, ultimately, only 389 individuals were admitted to state prison on human trafficking charges and that, federally, 658 defendants of human trafficking were convicted.<sup>283</sup> Compiling this data shows that, in 2020, only 1,047 people were convicted or started jail terms related to human trafficking at the federal and state levels.<sup>284</sup> Averaging these numbers across the fifty states means that only about twenty-one individuals faced criminal consequences in each state.<sup>285</sup> Furthermore, even after decades of work, the data shows law enforcement's inability to scale its trafficking investigations. Over ten years, trafficking cases referred federally for criminal prosecution increased by about 6% per year across the country.<sup>286</sup> Those prosecuted increased by about 8% per year.<sup>287</sup> Finally, those cases where traffickers were convicted and workers and victims actually saw any benefit went up from only 464 people to 658 people nationally.<sup>288</sup>

Given these low numbers and the twenty years the antitrafficking movement has taken to scale these efforts,<sup>289</sup> this author cannot believe that the threat of criminal consequences will change any employer's behavior regarding the risk of engaging in human trafficking and, by analogy, wage theft. This is the case, especially when you consider the enormous number of targeted businesses. For example, from January 2021 through January 2022, over 5.8 million applications for new businesses were filed in the United States.<sup>290</sup> Further, in California alone,

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<sup>282</sup> *Id.* at 3–4. In 2020, there were only 658 convictions for human trafficking by the United States Attorney's office, despite there being 2,198 arrests and 1,343 criminal prosecutions. *Id.* This is a success rate for criminal prosecution of only about 30% overall. These lackluster success rates mean that 70% of victims who reported their crime saw no form of justice either because their case was never criminally prosecuted because of a lack of sufficient evidence or when it was criminally prosecuted, the case was eventually dismissed, or the defendant was found not guilty.

<sup>283</sup> *Id.* at 4–5.

<sup>284</sup> *Id.*

<sup>285</sup> *See id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> See Press Release, Off. for Victims of Crime, Twenty Years of Progress in the Anti-Trafficking Movement (Oct. 28, 2020), <https://ovc.ojp.gov/news/announcements/twenty-years-progress-anti-trafficking-movement> [<https://perma.cc/76PN-K8PP>] (documenting that 2020 marked twenty years of the government's coordinated antitrafficking efforts, including criminal prosecutions).

<sup>290</sup> Samuel Stebbins, *Here's How Many New Business Applications California Received in 2021*, CTR. SQUARE (Feb. 28, 2022), [https://www.thecentersquare.com/california/here-s-how-many-new-business-applications-california-received-in-2021/article\\_344c1ae9-de7a-5384-965f-b97222dbe673.html](https://www.thecentersquare.com/california/here-s-how-many-new-business-applications-california-received-in-2021/article_344c1ae9-de7a-5384-965f-b97222dbe673.html) [<https://perma.cc/SNL2-UMLP>].

in 2022, the Small Business Association reported that there were 4.2 million small businesses.<sup>291</sup>

Other data demonstrating law enforcement's likely inability to create any significant deterrent effect in the wage theft context can be seen when reviewing data showing the difficulty law enforcement has in investigating and prosecuting new areas of crime that have not traditionally been its focus.<sup>292</sup> Although, nationally, the number of arrests by law enforcement is enormous, with 7.36 million arrests made in 2022 alone, this does not mean that law enforcement can quickly transition to making arrests in wage theft cases.<sup>293</sup> Again, looking at human trafficking cases, specifically in the labor trafficking context—which is most similar to wage theft—after twenty years, in FY 2022, the DOJ opened just fifty-five cases nationally involving predominantly labor trafficking.<sup>294</sup> Furthermore, in FY 2022, only seven criminal prosecutions involved predominantly labor trafficking charges. Finally, of the limited number of trafficking convictions obtained by the DOJ in 2022, less than 3% were for labor trafficking.<sup>295</sup> Although less specific data is available at the state

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<sup>291</sup> Jason Coles, *How Many Small Businesses Are There in California?*, FOREIGN USA (Dec. 15, 2022), <https://foreignusa.com/small-businesses-in-california> [<https://perma.cc/CNR7-8LZT>] (showing that small businesses equate to over 99.8% of all businesses in California).

<sup>292</sup> Aside from new crimes, historically, prosecutions for long-standing crimes like rape further demonstrate the dismal ability of our current carcel approach to handle significant numbers of cases and further calls into question the criminal system's supposed deterrent effect on an employer's calculation of facing criminal consequences. In 2022, there were 140,384 reported rape cases in the United States. See *Number of Reported Forcible Rape Cases in the United States from 1990 to 2023*, STATISTA (Nov. 19, 2024), <https://www.statista.com/statistics/191137/reported-forcible-rape-cases-in-the-usa-since-1990> [<https://perma.cc/PPD4-K8AQ>]. The National Network to End Rape (RAINN) reports that 31% of those who are raped even choose to report the case for criminal investigation. RAINN's data also shows that of those cases reported only 16% result in arrest. Only 2.5% of sexual assaults result in criminal conviction and incarceration. Nat'l Network to End Rape, *The Criminal Justice System: Statistics*, RAINN, <https://rainn.org/statistics/criminal-justice-system> [<https://perma.cc/WKN8-VKXF>]. Therefore, if we apply these statistics to estimate the annual number of rapes across the country that actually result in a criminal conviction and incarceration, it means that in only about 8% of rape cases annually are defendants actually incarcerated under the traditional criminal system. See *id.*

<sup>293</sup> Veera Korhonen, *Number of Arrests for All Offenses in the United States from 1990 to 2022*, STATISTA (May 22, 2024), <https://www.statista.com/statistics/191261/number-of-arrests-for-all-offenses-in-the-us-since-1990> [<https://perma.cc/QQ7N-AYJ8>] (explaining there were over 7.36 million arrests for all offenses in the United States in 2022).

<sup>294</sup> U.S. DEP'T OF STATE, *supra* note 134 ("Of DOJ's FY 2022 investigations, 613 involved predominantly sex trafficking and 55 involved predominantly labor trafficking, compared with 573 and 26, respectively, in FY 2021. In FY 2022, DOL's inspector general opened 24 criminal investigations into allegations involving labor trafficking.").

<sup>295</sup> *Id.* ("DOJ initiated 162 federal human trafficking prosecutions in FY 2022 . . . DOJ charged 310 defendants in FY 2022 . . . Of these FY 2022 prosecutions, 155 involved predominantly sex

level, the Uniform Crime Reporting system indicates that a mere 294 labor trafficking cases were reported—or less than six cases per state.<sup>296</sup>

This low number of criminal prosecutions for labor trafficking cases after twenty years of investment must be compared with the concrete results and numbers of civil enforcement efforts.<sup>297</sup> In 2021, the Department of Labor reported that each year, the “Wage and Hour Division concludes approximately 21,000 Fair Labor Standards Act cases, impacting over 200,000 workers.”<sup>298</sup> Over the past five years, “Wage and Hour has collected more than \$1 billion in back wages for workers in America.”<sup>299</sup> In 2021, California workers filed nearly 19,000 individual claims totaling more than \$338 million in stolen wages.<sup>300</sup> These numbers show that civil claims involving stolen wages in just one state and federally total 40,000 individual claims yearly.<sup>301</sup> This large number

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trafficking and seven involved predominantly labor trafficking . . . During FY 2022, DOJ secured the convictions of 256 traffickers . . . Of these, 248 involved predominantly sex trafficking and eight involved predominantly labor trafficking . . .”).

<sup>296</sup> Bureau of Just. Stat., U.S. Dep’t of Just., *Human Trafficking Data Collection Activities, 2022* 5 (Oct. 27, 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/htdca22.pdf> [<https://perma.cc/6Q6J-6UD8>].

<sup>297</sup> *Human Trafficking Task Force e-Guide*, OFF. FOR VICTIMS OF CRIME, <https://www.ovcttac.gov/taskforceguide/eguide> [<https://web.archive.org/web/20241215011545/https://www.ovcttac.gov/TaskForceGuide/eguide>] (“The U.S. Department of Justice (DOJ) has . . . grant-funded multidisciplinary anti-trafficking teams since 2004 when BJA and OVC first funded local law enforcement agencies and local victim service providers (VSPs) . . .”).

<sup>298</sup> Cynthia Marcotte Stamer, *Wage & Hour Takes Aim at Restaurant & Other Hospitality Employers*, SOLUTIONS L. PRESS (Feb. 8, 2024), <https://slphrbenefitsupdate.com/tag/fair-labor-standards-act> [<https://perma.cc/J4HN-EQPE>].

<sup>299</sup> Jessica Looman, *Liquidated Damages in Settlements in Lieu of Litigation*, U.S. DEP’T OF LAB. BLOG (Apr. 9, 2021), <https://blog.dol.gov/2021/04/09/liquidated-damages-in-settlements-in-lieu-of-litigation> [<https://perma.cc/VD4L-ZWNE>]; see also U.S. GOV’T ACCOUNTABILITY OFF., *FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED* 16 (2018), <https://www.gao.gov/assets/gao-18-203.pdf> [<https://perma.cc/R6QH-6GVR>]. This number can be compared federally with the 214,578 federal offenders who were sentenced from 2014 to 2016—or about 71,526 annually. *Id.* The GAO reports courts ordered restitution in 15% of these cases and ordered offenders to pay \$33.9 billion in restitution, or about \$11.9 billion annually. *Id.* During this same period, the DOJ collected \$2.95 billion in restitution debt, or about 1 billion per year. *Id.* This is similar to the amount collected federally by DOL annually, however, to engage in a similar number of cases involving criminal wage theft based on the above data, the DOJ would have to turn at least one-fourth of all of its federal resources to criminally prosecuting wage theft, which, of course, we know will never logically be the case.

<sup>300</sup> Alejandro Lanzo, Jeanne Kuang & Julie Watts, *Agency Battling Wage Theft in California Is Too Short-Staffed to Do Its Job*, CAL MATTERS (Oct. 17, 2022), <https://calmatters.org/california-divide/2022/10/agency-battling-wage-theft/?series=unpaid-wages-california-workers> [<https://perma.cc/TMG9-UHKW>].

<sup>301</sup> See *id.* (noting that there were over 19,000 individual claims in California alone in 2023); Marcotte Stamer, *supra* note 298 (detailing over 21,000 federal cases in 2023).

starkly contrasts with the 301 criminal cases for labor trafficking reported by all the states and federal agency efforts combined.<sup>302</sup>

A practical look at the numbers handled within our current civil enforcement system compared with law enforcement's ability to scale criminal prosecutions in the labor trafficking context must lead advocates to question the assumption that increased criminal prosecution of wage theft will generate any deterrent effect.

#### IV. ADVOCATES FOR PREVENTING WAGE THEFT MUST NOT REPEAT THE MISTAKES OF CARCERAL FEMINISTS BUT RATHER DRAW A BRIGHT LINE REJECTING CARCERAL APPROACHES

With the best of intentions, scholars, worker's rights advocates, prosecutors, and politicians are mistakenly following in the footsteps of carceral feminists in sexual assault, domestic violence, and sex trafficking<sup>303</sup> cases in calling for increased wage theft and labor trafficking prosecutions.<sup>304</sup> Similar to calls from the violence against women's movement in the 1980s and 1990s, some workers' rights advocates view the criminal justice system as failing to treat labor violations as "serious offenses" against vulnerable individuals.<sup>305</sup> However, instead of focusing

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<sup>302</sup> See Lanzo, Kuang & Watts, *supra* note 300.

<sup>303</sup> See Swenstein & Mogulescu, *supra* note 22, at 120 ("Trying to arrest our way out of a multifaceted problem has failed before. Even where trafficking efforts may be understood as well-meaning, we will lose the 'war' on trafficking if we continue to fight it the same way we fought the war on drugs.").

<sup>304</sup> See Hallett, *supra* note 2, at 144–45. In her article, Hallett compares the focus of criminalizing wage theft to work done by the gender-based violence movement: "Criminalizing conduct, even if penalties remain low, can give rise to stronger social deterrence because of the expressive function of declaring something a criminal act. Social movements have often relied on the criminalization or decriminalization of conduct to advance social causes. For example, advocates for gender equality have pushed for affirmative consent laws in part on the theory that they will change social norms about sexual assault." (footnote omitted). *But see* Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK 219, 220 (2018) (noting that "carceral feminism" was initially used to describe the efforts of anti-sex trafficking feminists but is now used more broadly to criticize the push for more aggressive law enforcement measures for perpetrators of domestic violence, sexual assault, rape, and sex trafficking despite the long history of inherent bias against vulnerable communities—especially people of color—who the anti-violence movement was supposedly championing).

<sup>305</sup> Catherine Rampell, *Treat Wage Theft As a Criminal Offense*, WASH. POST (Apr. 17, 2014), [https://www.washingtonpost.com/opinions/catherine-rampell-punish-wage-theft-as-severely-as-robbery/2014/04/17/234bf84a-c648-11e3-9f37-7ce307c56815\\_story.html](https://www.washingtonpost.com/opinions/catherine-rampell-punish-wage-theft-as-severely-as-robbery/2014/04/17/234bf84a-c648-11e3-9f37-7ce307c56815_story.html); Catalina Cruz & Diana Florence, Opinion, *Wage Theft Is a Criminal Act. Treat It As Such*, CITY LIMITS (July 16, 2020), <https://citylimits.org/2020/07/16/opinion-wage-theft-is-a-criminal-act-treat-it-as-such> [<https://perma.cc/99ZD-F3HP>]; Levin, *supra* note 2, at 1432–33.



on the cultural shifts necessary to truly prevent this crime from occurring and bring resources to underfunded civil prevention frameworks to address the complex root causes, advocates' arguments reinforce carceral practices that have long been documented to perpetuate harm to the very communities they serve.<sup>306</sup> They are doing this even while raising concerns about the need for criminal reform and recognizing that the inequities in this system directly impact vulnerable workers. In her book *Progressive Dystopia*, Savannah Shange coins the term "carceral progressivism" to capture this paradoxical dynamic, and notes that the common experience of those working within progressive movements is that social justice "wins" often reinforce the carceral state and its disregard for Black lives.<sup>307</sup> Levin highlights this disconnect in the context of wage theft. He notes that "our contemporary criminal system rests on a belief that prosecutors vindicate the interests of the vulnerable and that accountability and incarceration are synonymous."<sup>308</sup> Feminists have been similarly criticized in the domestic violence context since the 1990s, when scholars began raising concerns about advocates seeking the required involvement of law enforcement and the domestic violence movement's focus on having intimate partner violence criminalized.<sup>309</sup> Jennifer Musto raises the same concerns regarding those working in the antitrafficking movement in her book *Control and Protect*; she highlights how criminal system-focused solutions have been promoted to end sex trafficking in the United States while ignoring law enforcement's longstanding history and mistreatment of those most directly impacted by trafficking.<sup>310</sup> Musto discusses how antitrafficking efforts have helped to consolidate state power and carceral control, despite the needs of the

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<sup>306</sup> See Levin, *supra* note 2, at 1496–1506 (discussing "carceral progressivism" and warning that those promoting criminalizing wage theft are employing arguments similar to those raised by "carceral feminism" in the antiviolence movement).

<sup>307</sup> SAVANNAH SHANGE, *PROGRESSIVE DYSTOPIA: ABOLITION ANTI-BLACKNESS & SCHOOLING IN SAN FRANCISCO* 3, 14–15 (2019) (examining a "series of successful progressive reforms, and what they cost Black communities [critiques] the dominant logic of social justice work"). Shange demonstrates that, often, advocates who understand the racialized injustice of the U.S. criminal system continue to rely on it. She names this "carceral progressivism." *Id.*

<sup>308</sup> See Levin, *supra* note 2, at 1506.

<sup>309</sup> See, e.g., Sabrina Balamwalla, *Trafficking Rescue Initiatives as State Violence*, 122 PENN. STATE L. REV. 171 (2017) (arguing that, in the last several years, the anti-domestic violence movement has gradually moved away from initial state response policies mandating arrest and prosecution as scholars and advocates have argued that these forms of state intervention, which were intended to protect survivors, in fact deprived them of meaningful choices and potentially put them in greater danger).

<sup>310</sup> See generally JENNIFER MUSTO, *CONTROL AND PROTECT: COLLABORATION, CARCERAL PROTECTION, AND DOMESTIC SEX TRAFFICKING IN THE UNITED STATES* (2016).

affected communities.<sup>311</sup> Similar concerns have been raised about the efforts of the #MeToo Movement around sexual violence<sup>312</sup> and by community groups working to end child sexual abuse.<sup>313</sup>

Perhaps most telling, at exactly the time when advocacy by workers' rights groups and scholars to criminalize wage theft has been growing, in a June 2020 letter entitled *Moment of Truth*, antiviolence groups openly acknowledged for the first time that, in promoting a criminal response for the vulnerable communities they serve, their efforts have perpetrated harm.<sup>314</sup> Antiviolence advocates called themselves out for significantly investing in a criminal legal system when they knew that "the vast

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<sup>311</sup> Jennifer Musto, *Wellesley Professor Explains Why It's Time to Address the Limitations of Current Anti-Trafficking Efforts*, WELLESLEY COLL. (Aug. 6, 2020), <https://www1.wellesley.edu/news/2020/stories/node/180711> [<https://perma.cc/99VZ-ZAJS>]; see also U.S. ADVISORY COUNCIL ON HUMAN TRAFFICKING, ANNUAL REPORT 2022 25 (2022), [https://www.state.gov/wp-content/uploads/2022/09/2022-Annual-Report-FINAL\\_Web-Version\\_508.pdf](https://www.state.gov/wp-content/uploads/2022/09/2022-Annual-Report-FINAL_Web-Version_508.pdf) [<https://perma.cc/9N84-5S38>] (calling for change to address root causes, including "[s]upport[ing] state and local restorative justice approaches that focus on rehabilitation, education, and employment and training opportunities for youth who become involved with the justice system to decrease the likelihood of them experiencing trafficking").

<sup>312</sup> See, e.g., Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 1, 7–14 (2020) (reviewing how the #MeToo Movement's success in broadening public understanding of the harms caused by sex offenses has encouraged more prosecution of sex offenders and generated state responses creating new crimes and increasing penalties. The article also compares these results to earlier reform efforts in the 1970–1990s supposedly designed to help victims of sexual assault by focusing predominantly on punishing offenders and proposing that criminal trials were a forum where victims of sexual assault regained their voices).

<sup>313</sup> See, e.g., GENERATION FIVE, ENDING CHILD SEXUAL ABUSE, A TRANSFORMATIVE JUSTICE HANDBOOK 3 (2017), [https://transformharm.org/tj\\_resource/ending-child-sexual-abuse-eng](https://transformharm.org/tj_resource/ending-child-sexual-abuse-eng) [<https://perma.cc/H6PT-A3XC>]. Concerns similar to those expressed by Levin around wage theft have also been raised by community advocates around the current approach to dealing with child sexual abuse. *Id.* In 2007, a growing movement of child sexual abuse survivors and community partners started calling for a different approach than the traditional criminal focus to ending child sexual abuse. *Id.* In 2017, a comprehensive handbook for practitioners was released advocating that child sexual abuse cases adopt restorative justice practices as opposed to incarceration. *Id.* In this comprehensive manual, the authors argue that the "dominant" story protects society from having to confront the prevalence of child sexual abuse in our communities, leaving us with very few tools for preventing it. *Id.* at 2. In the manual, they also specifically highlight the issue of economic exploitation of children as a reason why our society continues to allow the sexual abuse of children to continue. *Id.* at 24. They argue that the carceral approach that deals with only approximately 12% of child sexual abuse cases takes resources away from treatment and support that would stop the harm. *Id.* at 29. Generation Five's vision and mission is to end the sexual abuse of children within five generations. *Generation FIVE*, TRANSFORM HARM (2024), [https://transformharm.org/resource\\_author/generation-five](https://transformharm.org/resource_author/generation-five) [<https://perma.cc/AZS3-FZ37>]. Through survivor leadership, community organizing, and public action, Generation Five works to interrupt and mend the intergenerational impact of child sexual abuse on individuals, families, and communities. *Id.*

<sup>314</sup> Letter from N.J. Coalition to End Domestic Violence, *Moment of Truth* (June 2020), <https://njcedv.org/wp-content/uploads/2020/07/Moment-of-Truth-final-002.pdf> [<https://perma.cc/3ZX8-MMSK>].

majority of survivors choose not to engage with it and that those who do are re-traumatized by it.”<sup>315</sup> They further acknowledged that their work dismissed differing approaches to accountability and repair created and promoted by BIPOC leaders.<sup>316</sup> In this letter, forty-six statewide sexual assault and domestic violence coalitions committed to “[r]efram[ing] the idea of “public safety” [] to promote and utilize emerging community-based practices that resist abuse and oppression and encourage safety, support, and accountability” and “[i]nvest[ing] in care, not cops [] to shift the work, resourcing, and responsibility of care into local communities.”<sup>317</sup>

Workers’ rights advocates must heed this message and learn from the experience of the antiviolence movement to ensure their own advocacy work does not “invest in cops” and take power from local communities. Indeed, this is the antithesis of their established models of worker organizing and community empowerment. As a start, workers’ rights advocates across the country should coordinate a similar letter reaffirming investment in worker organizing, a public health approach to prevention, and community models of accountability while firmly rejecting the current growing movement advocating for increasing criminal prosecution of wage theft. Workers’ rights groups can—and should—create a cultural shift to acknowledge the seriousness of the crime of wage theft against vulnerable workers—but that accountability must not be grounded in a carceral system where evidence-based data has conclusively documented this system as being racist and harmful to vulnerable populations while engulfing enormous state resources.

Based on this author’s experience working in the antitrafficking movement for twenty years, a “middle ground” that promotes using the current carceral system now while promoting future reform is misplaced. Clare McGlynn, an antiviolence scholar, argues for this approach, which she calls “continuum thinking.”<sup>318</sup> She cites the successes of battered women, antirape, and, more recently, the anti-sex trafficking movements in stimulating monumental changes in public awareness and state policies responding to gender violence that were barely recognized forty

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.* The letter was signed by forty-six domestic violence and sexual assault coalitions documenting that in the past they “have ignored and dismissed transformative justice approaches to healing, accountability, and repair, approaches created by BIPOC leaders” and confirming future support for community-based restorative and transformative justice practices. *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> See generally Clare McGlynn, *Challenging Anti-Carceral Feminism: Criminalisation, Justice and Continuum Thinking* 93 WOMEN’S STUDS. INT’L F. 3 (2022).

years ago.<sup>319</sup> Although she recognizes that members of the “mainstream antiviolence sector have [now] begun a period of reflection, investigating the consequences of its long-term investments in criminalization and its negative impacts, particularly on communities most targeted by state violence,”<sup>320</sup> she disagrees with anticarceral feminists who call for rejection of law enforcement approaches overall, arguing:

[W]hile we must continue to be alive to law’s contradictions, unforeseen consequences, and capacity to oppress, marginalise and exclude, ‘continuum thinking’ may help us to have a more complex debate on the benefits and harms of criminalisation and the criminal law, as well as options for redress and justice, prioritising non-punitive and non-carceral prevention and education.<sup>321</sup>

Based on this premise, McGlynn argues that antiviolence advocates need to engage with the carceral system to ensure that new crimes of violence against women are criminalized.<sup>322</sup> Her analysis is strikingly similar to those advocating for the increased prosecution of wage theft.<sup>323</sup> In line with those voices, she argues that, in strengthening or creating new criminal protections, the focus need not be on prison sentences but alternatives to imprisonment.<sup>324</sup> McGlynn’s and wage theft scholars’ arguments, however, ignore the practical realities of antitrafficking work discussed in this Article that show that (1) an investment in new criminal

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<sup>319</sup> See *id.*

<sup>320</sup> See *id.*

<sup>321</sup> *Id.* at 4 (arguing for critical intersectional analysis as the basis for introducing and evolving new criminal justice policies); see also Aviah Sarah Day & Aisha K. Gill, *Applying Intersectionality to Partnerships Between Women’s Organizations and the Criminal Justice System in Relation to Domestic Violence*, 60 BRIT. J. CRIMINOLOGY 830, 850 (July 2020) (urging applying intersectionality to partnerships between women’s organizations and the criminal justice system in relation to domestic violence).

<sup>322</sup> McGlynn, *supra* note 318, at 6. The examples she provides include criminalizing coercive control in the domestic violence movement, nonconsensual sharing of sexual images, and certain types of online harassment of women. *Id.* She argues that these types of newly emerging crimes must be criminalized to “recogni[ze] the potentially serious harms of such abuse” and not “reproducing [the] stereotypes and a hierarchy of harms.” *Id.*

<sup>323</sup> See *id.*

<sup>324</sup> *Id.* at 6–7. McGlynn argues:

While defending some criminalisation efforts, my argument is also based on reimagining the implications of criminalisation, shifting away from conventional understandings of punishment. In essence, this is an argument about breaking the bind between criminal law and punitivism. . . . For those linked to criminal justice processes, more innovative approaches that do not focus on imprisonment, and that may shift the emphasis away from retribution and punitivism, towards recognition, rehabilitation and victim participation may also encourage new ways of understanding harm.

*Id.* (citations omitted).

areas for law enforcement not only takes new resources but has failed and (2) even when understanding the harms of the carceral system and implementing best practices to prevent them through collaborative approaches, as seen in the example of ECM human trafficking task forces, harms continue to persist, even with significant investment of resources.

For over twenty years, the antitrafficking movement has focused on carceral policies, creating the groundwork for new investment of resources into law enforcement efforts. Because of its focus on creating new crimes and punishment,<sup>325</sup> which is the easier policy approach than dealing with this crime's complex and intersectional nature, broader, preventive, and educative initiatives have remained unfunded.<sup>326</sup> Given the practical results of continued investment in working within our current carceral system, this Article asks that advocates start drawing a bright line and stop supporting legislative efforts to increase criminal penalties or create new crimes because evidence-based data shows these approaches do not work.<sup>327</sup> Further, it is exactly for the crimes that law enforcement does not have a traditional role in enforcing, where advocates have the best chance to call for evidence-based research and new approaches for accountability. Here, workers' rights groups have perhaps the most powerful starting point because they already have a robust civil enforcement system that can be more easily built on than the frameworks available to the antiviolence movement.<sup>328</sup> Workers' rights

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<sup>325</sup> *Id.* at 6. McGlynn's article highlights that new anti-violence laws have been enacted or strengthened through increased criminal protections following high-profile campaigns lead by community-based groups and survivors. *Id.* This is also similar to what has occurred with wage theft.

<sup>326</sup> See AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION* (2020); Kate D'Adamo, *Can Anti-Trafficking Be Rescued?*, MEDIUM (June 17, 2020), <https://reframehealthandjustice.medium.com/can-anti-trafficking-be-rescued-5688c3221173> [<https://perma.cc/P85G-4AH6>]; ALLIANCE FOR SAFETY AND JUSTICE, *CRIME SURVIVORS SPEAK 2022: NAT'L SURVEY OF VICTIMS' VIEWS ON SAFETY AND JUSTICE 5* (2022), <https://allianceforsafetyandjustice.org/wp-content/uploads/2022/09/Alliance-for-Safety-and-Justice-Crime-Survivors-Speak-September-2022.pdf> [<https://perma.cc/7AGY-5SGJ>]; K. AGBEYI, KIRA SHEPHERD & DANIELLE SERED, *SOLUTIONS TO VIOLENCE: HOW TO CREATE SAFETY WITHOUT POLICING OR PRISONS* (2021), [https://d3n8a8pro7vhmx.cloudfront.net/commonjustice/pages/477/attachments/original/1630695014/Solutions\\_to\\_Violence\\_final.pdf?1630695014](https://d3n8a8pro7vhmx.cloudfront.net/commonjustice/pages/477/attachments/original/1630695014/Solutions_to_Violence_final.pdf?1630695014) [<https://perma.cc/SGB4-TJX3>].

<sup>327</sup> See NAT'L INST. OF JUST., U.S. DEP'T OF JUST., *FIVE THINGS ABOUT DETERRENCE* (2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf> [<https://perma.cc/J72H-E8PU>] (summarizing research that shows that increasing the severity of punishment or sending an individual convicted of a crime to prison is not an effective way to deter crime).

<sup>328</sup> Indeed, a more recent report from EPI has outlined the benefits of "community enforcement programs." See RACHEL DEUTSCH & TERRI GERSTEIN, *POWER IN PARTNERSHIP: HOW GOVERNMENT AGENCIES AND COMMUNITY PARTNERS ARE JOINING FORCES TO FIGHT WAGE*

advocates can—and should—continue to seek a cultural shift so that wage theft is seen as a serious offense causing long-term harm to vulnerable people. However, they must not use this cultural shift to promote increased criminal prosecution, but to promote new systems of accountability, divestment of resources from our carceral system, and investment of resources into community-based approaches.

McGlynn argues that if newly emerging crimes are not allowed to be criminalized, “it risks reifying the criminal law status quo, without opportunity for change or reform.”<sup>329</sup> However, the opposite is true. Newly emerging crimes for which advocates create momentum are the best starting point for promoting new systems of redress. Whether it be wage theft, unidentified and prosecuted labor trafficking crimes, or new emerging harms based on shifting cultural understanding or new technology, these areas let advocates promote and design systems for redress that have not been built yet. However, if, instead of leveraging these emerging areas to create new approaches, advocates and scholars continue to call for creating new crimes and increasing prosecution, resources will simply not be available for other promising approaches. Politicians will continue to have the political support necessary from community groups and scholars to take the easy approach of policy focused on increased criminalization instead of dealing with the complex intersectional issues and investment of significant new resources needed to provide true deterrence and prevention efforts. Progressive prosecutors, scholars, and community advocates must join in firmly rejecting a criminal approach to emerging issues, such as wage theft, and focus their energies on designing evidence-based models for new approaches to accountability.

## CONCLUSION

Over ten years ago, Professor Stephen Lee astutely warned that “calling upon the police and prosecutors to stigmatize and punish an individual bad actor employer may come at the cost of drawing attention away from the larger structural forces that created the opportunities for wage theft in the first place.”<sup>330</sup> Those promoting the criminalization of wage theft should not continue this approach without the additional

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THEFT (June 8, 2023), <https://files.epi.org/uploads/267794.pdf> [<https://perma.cc/E62S-28QM>]. It is these types of novel approaches that deserve funding and support, given that they are worker-driven and led. *See id.*

<sup>329</sup> McGlynn, *supra* note 318, at 6.

<sup>330</sup> Lee, *supra* note 26, at 678.

research they acknowledge is necessary to show any purported deterrent impact. At a minimum, the requisite additional research must include (1) the impact on victim-witnesses' physical and mental health from their participation in criminal proceedings and (2) the true cost of these prosecutions versus those associated with the civil system. A comprehensive assessment of the cost of prosecution must include law enforcement's investigative costs, the cost of support needed by civil agencies for a criminal case, court costs, and the cost of probation or prison sentences ordered because of a criminal workplace conviction. Only in understanding the full long-term cost to society in practical terms can we conclude that using the criminal system actually helps leverage existing state resources and creates effective deterrence measures in the wage theft context.

Furthermore, advocates embracing a policy of criminalization for new or emerging crimes in the name of "justice" for victims must first consult the survivors of these crimes to learn the form of justice they prefer. Surprisingly, this essential, supporting research about whether workers want to see their employer criminally prosecuted is missing in a movement with such close ties to the community of individuals most impacted. Evidence-based data gathered in 2018 from sex and labor trafficking survivors reveal that over 75% of survivors prefer alternatives to the penological approach of the criminal justice system.<sup>331</sup> Additionally, surveys of a wide range of crime victims in 2016 and 2022 have documented the same results.<sup>332</sup> Implementing wage theft victims'

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<sup>331</sup> JEANETTE HUSSEMAN ET AL., BENDING TOWARDS JUSTICE: PERCEPTIONS OF JUSTICE AMONG HUMAN TRAFFICKING SURVIVORS 13 (2018), <https://www.ojp.gov/pdffiles1/nij/grants/251631.pdf> [<https://perma.cc/XT9L-MEQL>] ("Only 24 percent of the survivors interviewed for this study, including 10 labor trafficking survivors, 7 sex trafficking survivors, 1 survivor who experienced both labor and sex trafficking, and 1 survivor with an unknown trafficking experience, defined justice in terms of seeing their trafficker incarcerated."); see also PFEFFER ET AL., *supra* note 21, at 3-11 (documenting that a prosecutor working on trafficking cases has concluded that labor trafficking victims do not want criminal investigations: "What I'm seeing is that the labor trafficking victims aren't necessarily wanting law enforcement interaction or participation as part of their process . . ."); *id.* at 3-21 (suggesting movement away from criminal prosecutions of labor trafficking and considering "case resolution from the perspective of survivors" which would include prioritizing securing restitution of unpaid wages, resources for survivor stability, and work authorization for survivors); Harkins, *supra* note 16, at 60 ("Research has shown that many migrants experiencing abuse seek financial remedies so that they can move on with their lives.").

<sup>332</sup> ALLIANCE FOR SAFETY AND JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS' VIEWS ON SAFETY AND JUSTICE 13 (2016), <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> [<https://perma.cc/JMQ5-VL86>]. The data contained in the report reflected findings from a broad cross-section of 800 crime survivors around the country. *Id.* at 6; ALLIANCE

preferences should be one of the paramount goals for advocates. Given the existing data surrounding other crime survivors' desires, researchers also must prioritize conducting evidence-based studies that include the voices of affected workers to determine their goals for accountability. Worker advocates must insist on relying on this data before further promoting the criminalization of wage theft.

This author hopes that the experiences of the antitrafficking movement and a careful review of the twenty years of data available strengthen Levin's warning to workers' rights advocates that investing in a system that has created documented harm to the very communities they serve must be reconsidered. The political energy some workers' rights groups and politicians currently spend in promoting the prosecution of wage theft may be better spent in strengthening the growing movement in the United States, calling for an end to the failed carceral approach, and redistribution of its enormous resources. Advocacy coming from informed workers' rights groups and the overwhelming prevalence of wage theft in vulnerable communities can—and should—be a powerful call to action that resources must be invested in non-law enforcement approaches focusing on evidence-based prevention efforts deployed through public health, community organizing, and civil enforcement efforts. Workers' rights groups and their advocates are already deeply invested in these efforts and, by firmly rejecting a carceral approach, could help lead efforts to create different means of accountability and expenditure of government resources across the United States.