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The Ragged Edge of Rugged Individualism: Wage Theft and the Personalization of Social Harm

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THE RAGGED EDGE OF RUGGED INDIVIDUALISM: WAGE THEFT AND THE PERSONALIZATION OF SOCIAL HARM

By Matthew Fritz-Mauer*

ABSTRACT

Every year, millions of low-wage workers suffer wage theft when their employers refuse to pay them what they have earned. Wage theft is both prevalent and highly impactful. It costs individuals thousands each year in unpaid earnings, siphons tens of billions of dollars from low-income communities, depletes the government of necessary resources, distorts the competitive labor market, and causes significant personal harm to its victims. In recent years, states and cities have passed new laws to attack the problem. These legal changes are important. They are also, broadly speaking, failing the people they are supposed to protect.

This Article fills a significant gap in the literature by detailing the full scope of damage caused by wage theft and by critically examining the dominant approach to combatting it. Drawing on existing research and nearly 60 in-depth interviews about wage theft in the District of Columbia, this Article paints a thorough picture of wage theft's harms, explores why and how existing reforms are failing, and explains what must be done instead.

Enforcement schemes reflect the current view that wage theft is a personal harm properly addressed on a case-by-case basis in the civil justice system. As a result, reforms—both as written and implemented—generally attempt to empower and incentivize individuals to action. These approaches are failing. They misunderstand what wage theft is, how it plays out, and how it must be addressed. Wage theft is not an individual problem, but a social harm, and it therefore requires a broad, public response. Because low-wage workers live economically precarious lives and are so dependent on their jobs to survive, they almost never take formal legal action over violations of their rights. Government bodies cannot continue to rely on workers themselves to enforce their rights, but must take on a new role as robust, active, and strategic enforcers. Unless and until they do, millions of people will continue to suffer violations of their basic workplace rights with no meaningful recourse.

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INTRODUCTION

For eighteen months, Cora did all the grunt work at Eclectic Coif,¹ an upscale men's salon in Washington, D.C. that charges \$70 a haircut.² She cleaned the bathrooms, washed and folded the laundry, swept the floors, made coffee, and shampooed up to 80 clients a day. It was not glamorous work. Sometimes it was downright disgusting, actually, like when the basement flooded from a backed-up sewage line and she had to clean it up. But Cora was a Marine. She had gone through boot camp. She prides herself on her toughness, her willingness to go the extra mile to accomplish the mission. The work might have been undignified, but Cora was not a quitter. Besides, she needed the money.

It was not much money. Ten dollars an hour, plus tips. A far cry from where Cora had been a few years earlier, working at a large law firm and making \$56,000 a year plus benefits. Not bad for a single mom without a college degree. Not bad for a woman who, when we met, was \$10,000 behind on her rent and struggling to find a job.

What happened to Cora during the Great Recession of 2008 is what happened to a lot of people: her employer downsized. Her entire department moved to another state, and she was not invited along. Things took a turn after that. Cora's lifestyle and friends changed over time, and her old career was not calling her back. So, she moved away from the corporate legal world and into the jobs she could find, which is how she wound up working for \$10 an hour plus tips.

There was a problem, though: hardly anybody tipped her. In a given ten-hour shift, Cora washed 50 to 80 heads of hair. A few clients might tip, but sometimes an entire workday would go by without anything. Most of the time, Cora earned less than the minimum wage.³

1. Throughout this Article, I have given pseudonyms to low-wage workers, their employers, and their coworkers. The attorneys, workers' rights activists, employers, and government agents who participated typically chose to identify themselves. Where I use a person's first name only, it is a pseudonym; where I use a first and last name, it is not.

2. Interview with Cora, Low-wage Worker, in Washington, D.C. (2018) (transcript on file with author).

3. This is not how tipped jobs are supposed to work, especially at a place like Eclectic Coif. Businesses in the District of Columbia are allowed to pay their tipped employees below the regular minimum wage, as long as over the course of a workweek those employees earn, on average, at least the minimum wage for every hour that they work. *See Wage and Hour Laws*, D.C. OFF. ATT'Y GEN., <https://oag.dc.gov/workers-rights/wage-and-hour-laws> [<https://perma.cc/VK89-NY2K>]. When they do not, the employer is required to cut the worker a check for the difference between her actual hourly rate and what the minimum wage requires.

Cora tried talking to Charlotte, the salon's business manager, but it was a dead end. "The tips will come," Charlotte assured her. "Just keep doing the job." This was no solace, to say the least, and it did not pay the bills. The minimum wage violations were constant, but there were other violations, too. Cora never got paid overtime, and she sometimes got paid late. One time when her wages were late, she asked Charlotte where her money was. Charlotte threatened to fire her.

This wage theft took a toll on the former Marine. "It was just so frustrating," says Cora. Charlotte's response made her feel worthless, and dismissed.

I couldn't pay my rent. . . . [E]very two weeks I'd get paid, that check would go right to my landlord. So then my tips, my little bitty tips, were what I needed to eat, to literally go into the grocery store. . . . I would have to get on the train and go out to Maryland and shop because the prices were lower.

But transportation costs money. *Everything* costs money. Cora was working full time, supporting only herself, and every week she struggled to put food on the table.

At 45, Cora had had a career, she had raised a child, and she couldn't even make minimum wage. But what could she do? "I knew that I wasn't making enough and it wasn't fair," she says, "but I didn't have the knowledge or the strength to go after [my wages], to fight for myself." Depression settled in and got worse over time. "One day it was really bad. It was like suicidal thoughts, you know? And when I felt that, that cold from the knife on my wrist, I was like, 'Whoa! That's a little too far . . . you gotta, really gotta get some help.'" Finally, she began to see a therapist.

But after a year and a half of wage theft, Cora's work ethic finally cracked. "I think I basically just got myself fired because I had given up, you know? They weren't tipping me and they weren't paying me." Her work slipped. She stopped putting forth her Marine-best. When Charlotte terminated her, Cora felt relief. Seeing no other options, she just tried to move on.

* * *

As a journeyman plumber with 21 years of experience, Earl has real expertise.⁴ His skills are sought after in a constantly-growing

4. Interview with Earl, Journeyman Plumber, in Washington, D.C. (2018) (transcript on file with author).

city, and he is capable of earning a high hourly rate. In fact, he has at times brought home \$40 an hour, enough to provide a decent living.

Earl's ability to make middle-class wages is, unfortunately, often just theoretical. In Earl's experience, construction contractors undercut even their skilled workers. Throughout his career, employers have denied him overtime, misclassified him as an independent contractor, refused to pay him what they promised, and even refused to pay him anything at all. Once, for example, an employer told him he would be making \$40 an hour. That all changed when he started work. "I ended up getting somewhere around \$18," he explains, "[s]o it was either [a] take it or leave it thing." He took it. It was better than sitting at home collecting unemployment, and Earl is a man who takes pride in working.

In the grand scheme of things, these offenses are relatively rare. Most jobs pass without any drama. But because he can earn a high hourly rate, this wage theft costs Earl a lot of money. When his employers cut his hourly rate in half or refuse to pay overtime, he experiences a double-digit-per-hour dollar reduction. Beyond that, the principle bothers him. Earl knows his rights and he knows what is fair, and his employers' casual disregard of both is extremely frustrating.

When employers cheat him, though, Earl's only response is to argue and then, if he can, avoid working for them in the future. Only once has he tried to pursue legal action, and that was because a contractor refused to pay him anything. He cannot afford a lawyer, does not have any legal training, and does not know how to bring a wage claim. "Where do you take your complaint?" he asks. "Do you take it to the city? . . . Where do I go? Who do I complain to?"

But the lack of information isn't the *real* barrier. Earl is more than capable of figuring out where to go. In his view, the government is not interested in taking action unless somebody makes a report. When I ask whether he has ever considered doing that, he laughs. "Okay," he says patiently, "if you step forward, what are the odds? You're outnumbered with all the contractors here, and then you'll be scapegoated. You won't be able to get no work. You won't be able to find a job. You won't be able to get nothing. So how do you step forward?"

* * *

In early 2018, Arbalis offered Olivia a job in charge of the organization's programming.⁵ The salary was not great—\$35,000 a year, no benefits—but she believed in the non-profit's mission.

Though only 28, Olivia's resume is impressive. She speaks four languages (English, Bengali, Hindi, and some German), has two master's degrees, and carries herself with an air of professional competence. At first it seemed like the Arbalis Founder and President, Steven, recognized her value. He praised her effusively in the offer letter and spoke in idealistic, inspiring ways about the job.

Olivia's opinion of the job quickly soured. The days were longer than promised, and the low pay began to grate after 50 hours a week. Worse, though, Steven was hard to work for. He nitpicked her work, made condescending and racist comments, and blamed Olivia for things that she felt were not her fault. Olivia began to look for other jobs, but things came to a head when she took a sick day.

Steven responded badly. He insisted she was violating workplace rules and unlawfully demanded a doctor's note.⁶ Olivia refused, explaining that she could not afford to see a doctor. Steven fired her, refused to pay Olivia her final wages, and, when she demanded them, escalated his threats. He accused her of a litany of imagined offenses and threatened legal action. If Steven sued Olivia, he promised she would be liable for more than \$150,000 in damages. Worst of all, he told her she had committed an unnamed felony that, he claimed, carried a five-year prison term and \$250,000 fine.

These were stunning threats, especially for a recent immigrant with little savings and no knowledge of the American legal system. The experience was deeply upsetting and strained her relationship with her husband. "I'm depressed and unhappy because of this whole situation," Olivia says. "I don't really feel like going anywhere or doing anything."

Olivia found a new and better job, but Steven continued to refuse to pay her. She contacted several attorneys, but none would take her case. Her claim, worth about \$2,400 in unpaid wages, was just too small.

With nowhere else to turn, Olivia filed a wage claim with the District of Columbia Department of Employment Services (DOES). The experience was an exercise in frustration. She learned that the

5. Interview with Olivia, Non-profit Emp., in Washington, D.C. (2018) (transcript on file with author).

6. See D.C. CODE § 32-531.04(a)(1) (2020) (prohibiting employers from demanding doctor's certifications for leave of less than three days).

agency is disorganized, slow, and uncommunicative. DOES repeatedly lost evidence, like Olivia's paystubs and offer letter, forcing her to re-submit information. Her claims examiner often ignored her emails and phone calls, confused the details of her claim, and refused to provide her with a copy of her own complaint. It took two and a half months for DOES to even send notice of Olivia's wage claim to Arbalis and another month before the agency informed Olivia that it would be holding a factfinding and mediation conference. That conference, however, never got scheduled.

"It is getting ridiculous," Olivia said after several months. "[I am] really confused about why it is taking [DOES] so long to take every small step."⁷ After nine months, there had been no substantive movement on her claim. As far as she could tell, the agency had not collected any additional evidence, made any findings, or taken any meaningful action.⁸ Olivia gave up on the government. With the help of a pro bono attorney, she settled her claim with Arbalis. Although she did not recover the damages and penalties she was entitled to, she was happy to just have the experience behind her.⁹

* * *

Cora, Earl, and Olivia work in vastly different industries, have divergent skillsets, and run the gamut in age, background, and education. But, as with so many working people, the common thread that ties together the tapestry of their experiences is wage theft.

Wage theft occurs when an employer denies a worker the wages or benefits to which they are entitled.¹⁰ While wage theft affects workers of all backgrounds and in every industry, low-wage workers—and especially women, people of color, immigrants, and those with little formal education—are more susceptible to abuse than others.¹¹ Common forms of wage theft include not paying the minimum wage, denying overtime, misclassifying employees as independent contractors, and paying workers less than promised.¹² At best, wage theft reflects a lack of knowledge about the basic mandates of employment law; at worst, it is a casual and callous repudiation of the minimum workplace standards that society has

7. Text Message from Olivia, Non-profit Emp., to author (Jan. 2019) (on file with author).

8. *Id.*

9. *Id.*

10. KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 7 (2009).

11. DAVID COOPER & TERESA KROEGER, ECON. POL'Y INST., EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 8, 20 (2017).

12. Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers*, 20 EMP. RTS. & EMP. POL'Y J. 71, 72–73 (2016).

deemed necessary. In every instance, it is an unlawful and unacceptable denial of civil rights.

Over the past fifteen years, researchers, activists, commentators, and politicians have paid a significant amount of attention to this problem. The picture that emerges is stark. Wage theft is pervasive and highly impactful. Its most frequent victims are the working poor,¹³ who simultaneously need the money the most and are the least able to enforce their rights.¹⁴ It reduces personal incomes by thousands of dollars per year and collectively costs low-wage workers billions in unpaid earnings.¹⁵

Wage theft's harms reverberate beyond the individuals who experience it, depriving families, neighborhoods, and entire communities of a shocking amount of money. In doing so, it perpetuates the vicious cycle of poverty, dragging hundreds of thousands of families below the poverty line *despite* their hard work.¹⁶ The consequences are significant. Wage theft inflames a range of social problems, as poverty is linked with shorter lifespans,¹⁷ poor health,¹⁸ eviction,¹⁹ and unsafe neighborhoods.²⁰ Over time, wage theft creates a direct barrier to generational economic advancement.

But the harms of wage theft are far more than economic. For people living on the economic margins of society, who depend on every dollar in every paycheck just to make ends meet, wage theft presents a distinct threat to their way of being. Even being denied a hundred dollars can put a person on the wrong side of hunger, homelessness, and despair. Beyond that, low-wage workers are largely aware of their own mistreatment and frequently experience anger, frustration, and depression because of wage theft. In other words, Cora, Earl, and Olivia's stories are not especially egregious, offensive, or uncommon examples of what America's low-wage

13. See ANNETTE BERNHARDT, RUTH MILKMAN, NIK THEODORE, DOUGLAS HACKATHORN, MIRABAI AUER, JAMES DEFILIPPIS, ANA LUZ GONZÁLEZ, VICTOR NARRO, JASON PERELSHTYEN, DIANA POLSON & MARTIN SPILLER, *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES* (2009); COOPER & KROEGER, *supra* note 11, at 8.

14. Fritz-Mauer, *supra* note 12, at 102–05.

15. BERNHARDT ET AL., *supra* note 13, at 5–6; COOPER & KROEGER, *supra* note 11, at 1.

16. COOPER & KROEGER, *supra* note 11, at 13–14.

17. Raj Chetty, Michael Stepner, Sarah Abraham, Shelby Lin, Benjamin Scuderi, Nicholas Turner, Augustin Bergeron, & David Cutler, *The Association Between Income and Life Expectancy in the United States, 2001-2014*, 315 JAMA 1750, 1750 (2016); see also Christopher Mansfield & Lloyd F. Novick, *Poverty and Health*, 73 N.C. MED. J. 366, 367 (2012).

18. Mansfield & Novick, *supra* note 17, at 366.

19. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2015).

20. Travis C. Pratt & Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, 32 CRIME & JUST. 373, 406 (2005).

workers experience, but the *opposite*. Their stories are all too typical.

This increased attention to wage theft has not fallen on deaf ears. Recently, states and cities have broadly reformed their laws in response to emerging research and social pressure.²¹ These legal reforms commonly enhance civil and criminal penalties for wage theft, incentivize action by the private bar, expand the enforcement capabilities of government agencies, impose reporting requirements on employers, and provide new avenues for relief.²² These changes have been inspiring, timely, and important.

But the central thesis of this Article is that responses to wage theft, including the actions taken by some of the most progressive jurisdictions, are fundamentally inadequate. In both passage and implementation, anti-wage theft policies are broadly predicated on a misunderstanding of what wage theft is and how it works. The remedies we create and the ways we administer them are centered on the idea that wage theft is a personal problem that can be adequately addressed through laws and processes that encourage individuals to take action. It is not, and it cannot be.

This Article argues that wage theft is a *social* problem that cannot be meaningfully remedied through an enforcement scheme that emphasizes private causes of action and passive, complaint-based administrative processes. Until policymakers understand that wage theft is a widespread public problem that not only deserves but *requires* a broad, proactive social response, low-wage workers will continue to have their most basic rights violated—frequently, flagrantly, and to great harm.

This Article explores the problem of wage theft by tracing its contours, discussing existing solutions, and explaining the failures of these approaches. Part I defines wage theft and summarizes its scope and severity. In doing so, I rely on both existing quantitative research and my own in-depth analysis of wage theft among low-wage workers in the District of Columbia (D.C.). In the wake of D.C.'s own sweeping statutory reforms, I conducted approximately 60 semi-structured interviews with low-wage workers, workers' rights activists, employment lawyers, and a small number of employers and government actors. This research provides texture to the economic realities of wage theft and, for the first time, explores

21. See Marc Doussard & Ahmad Gamal, *The Rise of Wage Theft Laws: Can Community-Labor Coalitions Win Victories in State Houses?*, 52 URB. AFFS. REV. 780, 780 (2016); Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSP., ON POL. 324, 324 (2016).

22. See Galvin, *supra* note 21 at 325; D.C. CODE §§ 32-1308, 32-1308.01 (2017).

the personal and social consequences of basic workplace rights violations.

Part II summarizes how we think about and have responded to this social problem. We conceive of wage theft as a civil offense, a personal issue that should be dealt with on an individual, case-by-case basis, much like a dispute over a car accident or a contract. Both the laws designed to combat wage theft and the actual approach of government actors reflect this thinking. Legal reforms emphasize private action and individual empowerment, while government agencies have overwhelmingly adopted a passive, lenient, complaint-based approach to workplace standards enforcement.

Part III explores why current legal reforms and enforcement strategies are failing. Statutory changes are crucially important. Standing alone, however, existing countermeasures are inadequate. They are premised on the idea that individual empowerment can present a meaningful response to this social problem, but this misses *the* key fact: the vast majority of low-wage workers who suffer wage theft will never take formal action, so a plan that overwhelmingly relies on expanding private causes of action is destined to fail. As my research from D.C. shows, even with robust laws, wage theft still plagues working people.

Finally, Part IV provides a summary of best practices regarding wage theft. Because this issue is a complex and widespread public problem, it requires a strategic, thoughtful, and multifaceted social response. The final section details the requirements of an effective enforcement scheme, explaining why this approach is necessary.

I. THE SOCIAL HARM OF WAGE THEFT

We typically think about wage theft as a problem that is properly addressed on an individual basis. To that end, reforms—both as written and applied—largely focus on empowering aggrieved workers to bring legal claims and collect unpaid wages and penalties.²³

This section directly challenges this underlying premise through a review of the practical realities of wage theft. It is not a personal issue. It is—and must be treated as—a social problem because wage theft is pervasive and highly impactful. It costs affected workers thousands of dollars per year,²⁴ undermining society's most basic workplace protections. Its harms are not purely economic, howev-

23. See Galvin, *supra* note 21, at 325 (discussing various anti-wage theft interventions).

24. BERNHARDT ET AL., *supra* note 13, at 5; COOPER & KROEGER, *supra* note 11, at 1.

er. Frequently, its victims experience devastating cascading harms, including hunger, homelessness, lasting anger, and deep depression. Even beyond these personal impacts, wage theft broadly hurts society, siphoning billions from low-income communities and trapping families in the vicious cycle of poverty.²⁵ It also denies billions in revenue to the government.²⁶ Finally, wage theft harms employers, distorting the labor market and depriving honest businesses of the opportunity to fairly compete.

A. *The Economic Costs of Wage Theft*

A wealth of quantitative research paints a clear picture: violations of bedrock employment laws are part and parcel of America's capitalist economic landscape and cost people and society an extraordinary amount of money.

1. Minimum Wage Violations

Minimum wage violations are significant in both size and scope. Utilizing broad surveys and large-scale data sets from the Census Bureau, researchers estimate that roughly seventeen to 26% of low-wage workers experience minimum wage violations each year.²⁷ These abuses are generally significant to individuals and low-wage workers. A 2009 survey of almost 4,400 low-income people in Los Angeles, Chicago, and New York City found that almost 60% of those who experienced minimum wage violations were underpaid by more than \$1 per hour.²⁸ Analyses of Census Bureau data estimate that minimum wage violations cost affected workers about *one-quarter* of their earnings.²⁹ In real dollars-and-cents terms, the average affected low-income person who works year round has about \$3,300 stolen per year, reducing their take-home earnings to only about \$10,500.³⁰ These costs add up; collectively, low-wage

25. See COOPER & KROEGER, *supra* note 11, at 1.

26. FRANÇOISE CARRE, ECON. POL'Y INST., (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION 2 (2015).

27. See BERNHARDT ET AL., *supra* note 13, at 2 (26% of workers in their sample); COOPER & KROEGER, *supra* note 11, at 1 (estimate of 17% of workers); Galvin, *supra* note 21, at 330 (estimating 16.9% of workers).

28. BERNHARDT ET AL., *supra* note 13, at 2.

29. Galvin, *supra* note 21, at 331 (finding that minimum wage violations cost affected workers twenty-three percent of their income, and noting that this is "toward the lower end of other published estimates"); COOPER & KROEGER, *supra* note 11, at 36 (noting overall losses of 23.9% of earned wages).

30. COOPER & KROEGER, *supra* note 11, at 2.

workers are estimated to lose \$15 billion per year to minimum wage violations alone, artificially placing hundreds of thousands of families below the federal poverty line.³¹

2. Independent Contractor Misclassification

Independent contractor misclassification is one of the most common and damaging kinds of wage theft. Misclassification occurs in every sector, but it is particularly flagrant where it will be most profitable, like the construction industry,³² and where the work is relatively isolated, like the cleaning and trucking industries.³³

Nearly all workers in the United States fall into two categories: employees and independent contractors. Generally speaking, employees labor for a single employer who exercises control over them.³⁴ The true independent contractor, on the other hand, is someone with a particular skill who runs their own business, enjoys considerable autonomy, and has a number of clients.³⁵ Independent contractors, then, do not depend on one particular entity for their wages, nor are they closely directed and controlled by their employers. Here is a classic example: servers at a restaurant are employees, but a plumber who fixes a leaky pipe at the restaurant is an independent contractor. There is no ongoing relationship, the restaurant does not control the plumber's work, and the plumber has expertise.³⁶

It is almost always more beneficial to be classified as an employee. Employees are protected by wage and hour laws, have the right to form unions, enjoy access to workers' compensation and unemployment insurance, and pay fewer taxes on their earnings.³⁷ Businesses, in turn, are required to pay a variety of taxes for each of their employees, including Social Security, Medicare, and unem-

31. *Id.* at 2–3.

32. The construction industry, for example, has high workers' compensation premiums, but contractors are able to reduce their costs by as much as 30% percent through misclassification. CARRÉ, *supra* note 26, at 2.

33. *Id.*

34. *See, e.g.*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., FACT SHEET 13: AM I AN EMPLOYEE?: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2014) (discussing differences between independent contractors and employees).

35. *Id.*

36. Courts also like to use this example. *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 37 (Cal. 2018) (describing a retail store hiring an outside plumber or an outside electrician as an example of independent contracting).

37. Fritz-Mauer, *supra* note 12, at 93–94.

ployment insurance.³⁸ Additionally, anti-discrimination laws only cover employees.³⁹

Businesses often wrongly label their employees as independent contractors to save money on labor costs. Studies repeatedly find that at least eleven to 30% of businesses misclassify at least one worker.⁴⁰ Overall, there may be several million misclassified workers nationally.⁴¹

Misclassification is also called payroll fraud because, often, the point is to lie to the government to avoid taxes.⁴² These taxes include contributions to the crucial programs that form the social safety net. Every year, as workers are paid off the books or misclassified, billions of dollars of payroll are never reported to the government.⁴³ The cost to society is enormous, “robbing unemployment insurance and workers’ compensation funds of billions.”⁴⁴ And when wrongly-classified workers do attempt to take advantage of these entitlements—as many eventually do—they are either denied the benefits or else society is forced to absorb the costs.

3. Overtime, Time Shaving, Illegal Deductions, and Tip Stealing

Research on other kinds of wage theft has been much more limited. There are no studies evaluating the rates at which employers unlawfully deny their employees access to workers’ compensation, unemployment, and guaranteed sick leave. Nor have there been studies examining how often employers misclassify their workers as exempt from minimum wage and overtime protections. For many kinds of wage theft, the landmark survey of 4,400 low-wage workers discussed above provides the best—and only—information we have on violation rates. Those findings are summarized in Table 1.1.⁴⁵

38. CARRÉ, *supra* note 26, at 1–2.

39. Coverage, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/employers/coverage.cfm> [<https://perma.cc/P5YY-GW4B>].

40. CARRÉ, *supra* note 26, at 9.

41. CATHERINE RUCKELSHAUS & CEILIDH GAO, NAT’L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 2 (2017).

42. See MARK ERLICH & TERRY GERSTEIN, CONFRONTING MISCLASSIFICATION AND PAYROLL FRAUD: A SURVEY OF STATE LABOR STANDARDS ENFORCEMENT AGENCIES 5 (2019).

43. RUCKELSHAUS & GAO, *supra* note 41, at 7.

44. *Id.* at 1.

45. BERNHARDT ET AL., *supra* note 13, at 2–3.

TABLE 1.1: FINDINGS ON OTHER FORMS OF WAGE THEFT

Form of Wage Theft	Violation Rate*
Failure to pay overtime	76%
Unpaid off-the clock work	70%
Illegal deductions	41%
Tip stealing	12%

* among eligible workers in the week prior to being surveyed.

B. *The Personal Costs of Wage Theft*

The overwhelming majority of wage theft research has been quantitative. As discussed, researchers tend to use large data sets to analyze and estimate the trends and economic consequences of various types of wage theft. Although incredibly useful, this body of research is missing a strong representation of the viewpoints and experiences of low-wage workers themselves. While the raw statistics are damning, they do not fully describe the texture of the economic and social hardships caused by wage theft.

Over the course of eighteen months, I conducted an in-depth, qualitative study on wage theft. I focused on wage theft among low-wage workers in the District in the wake of the city passing one of the most robust and progressive anti-wage theft laws in the country.⁴⁶ One key finding is that wage theft imposes significant personal costs on those who experience it, and these costs are of great concern. To reiterate, I interviewed approximately 60 people. Most were low-wage workers (n=33), but I also spoke with policy stakeholders, including workers' rights activists (n=12), employment lawyers (n=10), and a small number of employers and government actors. The takeaway is this: wage theft causes significant harm that goes beyond the dollars-and-cents of it all and is rarely something that can simply be absorbed or ignored.

1. Cascading Economic Harms

To grasp the full range of economic harm caused by wage theft, it is necessary to understand the crime in context. For the low-wage workers who experience it, wage theft is about more than just an immediate loss of money. Low-wage workers do not have signifi-

46. See Wage Theft Prevention Amendment Act, 20 D.C. Stat. 4458 (2014) (codified as D.C. Code § 20-157 (2015)).

cant savings to fall back on.⁴⁷ Most live paycheck to paycheck, making for a tenuous existence, and there is a thin, blurry line between survival and tragedy.

Being denied payment often cascades into other escalating harms. If wages are late, short, or entirely unpaid, the whole fragile scheme holding together a person's life can be put in jeopardy. This is because the real experience of being poor does not come from just one aspect of poverty, like bad housing, food insecurity, or a lack of healthcare. The essence of poverty lies in how a person's hardships coalesce, interact, and build upon one another.⁴⁸ It is this interaction that defines the lives of the working poor, and the danger of wage theft's overflowing harms is what threatens the delicate balance of a person's existence. When the money workers expect and need suddenly is not there, they are forced to navigate a maze of hard choices. Making it through becomes a question of strategy. Who to call? Who to borrow money from? What is the best approach to take with utility companies, the phone company, and the landlord? Does rent get prioritized? Heat? Food?

Jonathan Tucker, a DC-area employment lawyer who primarily represents underpaid immigrants, knows well the problems that his clients suffer:

[T]he fundamental issue that we're dealing with, wage theft, is if people were just paid the wages that they work [and] that they earn, well, you no longer have a failure to pay rent, which is what I was dealing with [when I worked] at Legal Aid. You no longer have credit card debt collection, which is what I was dealing with at Legal Aid, or a foreclosure case. . . . All these other problems that are generated by a failure to pay wages are resolved.⁴⁹

According to Jonathan, wage theft lawsuits are "a way to attack the cancer" at the heart of misfortune.⁵⁰

47. This statement is self-obvious, since poor people by definition do not have significant assets. In addition, a 2018 survey by the Federal Reserve found that almost 40% of adults in this country would not have the money to pay for a hypothetical \$400 emergency. *BD. OF GOVERNORS OF THE FED. RESRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 2* (2019).

48. *See generally* DESMOND, *supra* note 19; DAVID K. SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* 11 (2005) ("Isolating the individual problems [of poverty], as a laboratory would extract specific toxins, would be artificial and pointless. They exist largely because of one another, and the chemical reaction among them worsens the overall effect.").

49. Interview with Jonathan Tucker, Att'y, DCWageLaw, in Washington, D.C. (2018) (transcript on file with author).

50. *Id.*

As Jonathan knows, low-wage workers struggle to meet their most basic needs when they are not paid properly. Harriet, for example, is a DC government employee who has an acrimonious relationship with her supervisor.⁵¹ On two occasions, the agency she works for held up her paycheck without explanation, which Harriet blames on her supervisor's animosity.⁵² Once, she went unpaid for several weeks. "I had to make arrangements with the rent," she says, her frustration apparent. "[My landlady] was getting tired, because nobody wants to hear that your job is holding your pay. You're a government employee! They don't believe that! So I had to show proof, you know, that I've been begging for money [from my employer]."⁵³

This is a common theme. Workers frequently tell of managing their wage theft by borrowing money to pay for necessities. Often, they must choose among those necessities, picking between rent and food, utilities and transportation. Some things are easier to cut out, like trips to the movies or new clothes. It is far more difficult to choose among the basic and common requirements of modern life.

The more severe or chronic the wage theft, the harder it becomes to balance competing obligations. For many, trouble eventually strikes in the form of an unanticipated hardship. While Ameen was struggling to get his former employer to pay him his earned wages, for example, he got sick and had to go to the emergency room.⁵⁴ This is an expensive stopgap at best, and cost him about \$1,500.⁵⁵ Manageable if he had been paid the more than \$40,000 his former employer owed him.⁵⁶ Unmanageable because he had not. His car was repossessed, and when we met, he was being evicted.⁵⁷

Eviction is a looming threat in the lives of the working poor, and researchers increasingly recognize it as a significant social problem. In *Evicted: Poverty and Profit in the American City*, sociologist Matthew Desmond reveals the stark ways in which eviction is both a consequence *and* a driver of poverty.⁵⁸ Poor people struggle with bills and face homelessness as a result. This threat of homelessness,

51. Telephone Interview with Harriet, Admin. Assistant, D.C. Mun. Gov't (2018) (transcript on file with author).

52. *Id.*

53. *Id.*

54. Interview with Ameen, Rideshare Driver, in Washington, D.C. (2018) (transcript on file with author).

55. *Id.*

56. *Id.*

57. *Id.*

58. DESMOND, *supra* note 19, at 295–303

in turn, leads to a slew of negative outcomes, including joblessness, hunger, trauma, and unstable communities.⁵⁹ When working people are denied their earned wages, the threat of eviction—among others—looms larger and larger over time. Many people, like Ameen, quickly face homelessness after falling behind.⁶⁰ Others are lucky enough to have charitable or understanding landlords, but patience runs thin over time. Beyond that, the reality of debt and the prospect of eviction is itself difficult. Carol, for example, is tens of thousands of dollars in debt to her landlord.⁶¹ “What judge do you think that won’t tell me to get out, and I won’t even give you 30 days?” she asks.⁶² Like many, the piling bills threaten to overwhelm Carol, and as the next section explains, the strain of such circumstances is itself harmful.

2. Mental Costs

Most wage theft research discusses its economic consequences. There are also significant human costs, however. Wage theft presents high economic stakes for the working poor, but it is also personally offensive and can lead to severe emotional and psychological strain.

This is not true for every low-wage worker. But those who do not express strong negative feelings about their wage theft are typically unaware of their rights violations. Ashna and Sabbir, for example, did not know that their former employers had illegally denied them overtime, thinking instead that this practice simply reflected a lawful business decision.⁶³ But stories like this present the exception to the rule. Most workers are generally aware, or at some point become aware, of their own mistreatment,⁶⁴ and their feelings of injustice combined with the stress of wage theft’s cascading economic harms elicits powerful reactions.

59. *Id.*

60. Interview with Ameen, *supra* note 54.

61. Interview with Carol, Unemployed, in Washington, D.C. (2018) (transcript on file with author).

62. *Id.*

63. Interview with Ashna, Low-wage Worker, in Washington, D.C. (2018) (transcript on file with author); Telephone Interview with Sabbir, House Cleaner (2018) (transcript on file with author).

64. This is something of a contested point. Research reveals that low-income people—and Americans in general—do not have a strong understanding of what their rights are. *E.g.*, Charlotte Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement*, 89 *IND. L.J.* 1069, 1093–95 (2014); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers’ Legal Knowledge*, 1999 *U. ILL. L. REV.* 447, 506 (1999). But, broadly speaking, I found that most eventually do become aware of their rights violations, as discussed in more detail *infra* Section III.B.

Low-wage workers frequently express anger, frustration, and depression over their wage theft. These feelings are understandable. The situation is defined by their illegal exploitation, directly harms their financial security, and offers few opportunities for redress. Miranda, for example, worked for a large department store that frequently shaved time off of her paycheck.⁶⁵ She began to track her hours, and each time she confronted her supervisors, the store admitted its fault and paid her at least some of her money.⁶⁶ But the delay carried costs, and the act itself deeply offended her. “[There] was one time that my lights almost got turned out,” she says, clearly frustrated. “I would have to borrow money to pay my gas or my electric bill, you know, because [my employer] was messing up! And I told them that, you know? I’ve earned this!”⁶⁷

These expressions of anger are common. “It used to be a saying about work, how people go postal,” says Kira, who consistently fights to have her employer follow D.C.’s paid sick days law. “I clearly now understand that meaning”⁶⁸ Kira is not going to actually attack people, but she is describing the intense frustration that many feel as a result of having to address pay-related inconsistencies and aggravations that, in their mind, should both not exist and be easily resolved.

These feelings do not just flow from a loss of money. The *principle* matters. “I’ve been cheated for a long time,” says Will, who discovered that for years his employer had been paying him less than he had been promised.⁶⁹ “His refusal to pay has even made it worse, knowing that he’s wrong. . . . I think I’m more upset because of his refusal to honor what he’s owed.”⁷⁰ Others echo Will’s thoughts. Being paid late “makes you feel degraded, like you’re useless,” Harriet says.⁷¹ “Worthless,” agrees Cora.⁷²

As these conversations suggest, many also express a deep sadness when talking about their experiences with wage theft. Just under half of the workers I interviewed (16 of 33) expressed feeling depressed, embarrassed, or ashamed over the violations of their workplace rights, including both their treatment by employers and their perceived and practical inability to do anything about it. It

65. Interview with Miranda, Dep’t Store Emp., in Washington, D.C. (2018) (transcript on file with author).

66. *Id.*

67. *Id.*

68. Interview with Kira, Dep’t Store Emp., in Washington, D.C. (2018) (transcript on file with author).

69. Interview with Will, Pool Manager, in Oxon Hill, Md. (2018) (transcript on file with author).

70. *Id.*

71. Telephone Interview with Harriet, *supra* note 51.

72. Interview with Cora, *supra* note 2.

was upsetting for these people to have to grapple with the reality that they were being wronged and that there was no easy, clear, or reliable path to justice.

Wrapped up in work is pride, a sense that a person is a part of the broader American economic landscape, capable of supporting themselves and the ones they love. When this is suddenly not the case, and when it is because of another person's unlawful acts, the experience can be deeply upsetting. Caleb's former employer, for instance, underpaid him for more than four years, often drastically so.⁷³ Conservatively, his employer owes him tens of thousands of dollars. Because of this, he lives with his sister and cannot afford to buy birthday presents for his grandchildren. "I don't feel [like] a man," he says. "I ain't a grandfather!"⁷⁴

The consequences of wage theft can spiral out of control, as the confluence of economic insecurity and mental distress drive some to contemplate suicide. The combined strain of these factors helps explain why suicide is linked to poverty and periods of economic hardship,⁷⁵ and why raising the minimum wage reduces suicide rates.⁷⁶ Recall Cora, whose story began this Article. She attempted to kill herself, and only, at the last moment, diverted from that path and entered into therapy.⁷⁷ Like Cora, James—a grocery store worker—is also in therapy. "I get at the point where I want to kill myself sometimes, you know?" he says. "It's really rough. It's already hard enough, and to have to fight just to get the money [] . . . it's rough."⁷⁸

Harriet did not herself attempt suicide, but her father did. He is sick and moved in with her when her mother died. "My father was getting depressed because he was worried about me getting fired, and it was just a mess," she says. She speaks quickly, clipping her words with anger. "He would try to commit suicide . . . [H]e was trying to take pills so he wouldn't be a burden."⁷⁹

Although this study has been the first to deeply explore the personal and social consequences of wage theft, these conclusions find support in others' research. In studying how well Californians are

73. Interview with Caleb, Unemployed, in Md. (2018) (transcript on file with author).

74. *Id.*

75. *See generally* David C. Purselle, Michael Heninger, Randy Hanzlick & Steven J. Garlow, *Differential Association of Socioeconomic Status in Ethnic and Age-defined Suicides*, 167 *PSYCHIATRY RES.* 258, 262 (2009).

76. *See generally* John A. Kaufman, Leslie K. Salas-Hernández, Kelli A. Komro & Melvin D. Livingston, *Effects of Increased Minimum Wages by Unemployment Rate on Suicide in the USA*, 74 *J. EPIDEMIOLOGY & CMTY. HEALTH* 219, 221 (2020).

77. Interview with Cora, *supra* note 2.

78. Telephone Interview with James, Grocery Store Clerk, in Washington, D.C. (2018) (transcript on file with author).

79. Telephone Interview with Harriet, *supra* note 51.

able to collect on their favorable wage judgments, researchers interviewed low-wage workers who had experienced wage theft and attempted to assert their rights.⁸⁰ They reported feeling frustrated, angry, and depressed over their treatment, the material hardships caused by wage theft, and the inefficacy of the legal system. One explained that “[t]here were even days where I had nothing to eat, and I had to go look for donations to find food for my family,” which “made me feel very depressed.”⁸¹ Another said she “felt upset and powerless not to collect” the money she earned.⁸²

In short, although wage theft research has tended to focus on monetary costs, it also threatens its victims with significant emotional trauma, both because it causes cascading economic consequences and because many of its victims find it personally offensive.

3. Health Consequences

Wage theft also contributes to poor physical health by exacerbating poverty, which has long been linked to negative health outcomes.⁸³ Researchers estimate that minimum wage violations alone artificially force hundreds of thousands of people into poverty.⁸⁴ Even those victims who do not technically fall below the poverty line suffer a loss to their economic well-being.

Less money leads to a harder life. Poor people, adults and children alike, are more likely to experience a variety of chronic health conditions, including diabetes, heart disease, obesity, stress, headaches, and ear infections.⁸⁵ Because most of those without health insurance are poor or near-poor, they are also far less likely to seek treatment.⁸⁶

80. EUNICE HYUNHYE CHO, TIA KOONSE & ANTHONY MISCHEL, NAT’L EMP. L. PROJECT, HOLLOW VICTORIES: THE CRISIS IN COLLECTING UNPAID WAGES FOR CALIFORNIA’S WORKERS 1–2 (2013).

81. *Id.* at 4.

82. *Id.*

83. Mansfield & Novick, *supra* note 17.

84. COOPER & KROEGER, *supra* note 11, at 2, 13–14.

85. See Mansfield & Novick, *supra* note 17, at 366–70; see also Claire Conway, *Poor Health: When Poverty Becomes Disease*, U.C.S.F.: NEWS & MEDIA (Jan. 6, 2016), <https://www.ucsf.edu/news/2016/01/401251/poor-health-when-poverty-becomes-disease> [<https://perma.cc/89EW-4K46>].

86. JENNIFER TOLBERT, KENDAL ORGERA & ANTHONY DAMICO, KEY FACTS ABOUT THE UNINSURED POPULATION, KAISER FAM. FOUND.: UNINSURED (Dec. 13, 2019), <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population> [<https://perma.cc/6VCY-VTnk>].

Like eviction and wage theft, poor health both derives from and worsens poverty. Low-income people live in substandard housing,⁸⁷ are exposed to more pollution, have less access to healthy food, and tend to live more sedentary lifestyles because fewer safe recreational activities are available.⁸⁸ Poor neighborhoods experience more violent crime,⁸⁹ which has devastating long-term effects. Children who grow up in violent communities have lower grades, less interest in school, and do poorly on standardized tests.⁹⁰ They simply do not have the same opportunities to flourish, grow, and succeed.

These consequences add up and create stark outcomes. On average, “[i]mpoverished adults live seven to eight years less than those who have incomes four or more times the federal poverty level.”⁹¹ Put simply, the chronic and costly nature of wage theft exacerbates the vicious cycle of poverty, imposing severe costs not just on immediate victims, but also on their family members, neighbors, and communities.

C. *Economic Costs Revisited: Wage Theft, Market Distortion, and High-Road Employers*

Finally, one other group suffers as a result of wage theft: honest employers. Although the issue is often cast in terms of workers versus employers, this is a limited way to think about it. The fact is, many people genuinely seek to run law-abiding businesses. But when they are forced to compete in industries where wage theft is rampant, the struggle of starting and managing a business becomes that much more difficult as they find themselves undercut by their unscrupulous competitors. In many industries, the corrupted nature of the market itself creates a powerful incentive to violate the law.

Aaron Seyedian is one such legitimate employer. He owns Well-Paid Maids, a cleaning service in the D.C. and Boston metropolitan

87. See DESMOND, *supra* note 19.

88. Mansfield & Novick, *supra* note 17, at 366–67.

89. ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT 143–48 (2012).

90. Larissa A. Borofsky, Ilana Kellerman, Brian Baucom, Pamela H. Oliver & Gayla Margolin, *Community Violence Exposure and Adolescents' School Engagement and Academic Achievement Over Time*, 3 PSYCH. VIOLENCE 381, 390–91 (2013); Adam J. Milam, C. Debra Full-Holden & Philip J. Leaf, *Perceived School and Neighborhood Safety, Neighborhood Violence and Academic Achievement in Urban School Children*, 42 URB. REV. 458, 463–65 (2010).

91. Conway, *supra* note 85. When Conway wrote this article, the federal poverty line was \$11,770 for a single person. *Id.*

areas.⁹² Well-Paid Maids is an anomaly in the home cleaning business, which features high wage theft rates.⁹³ Aaron's employees earn \$17 an hour, have health care, get 22 paid days off per year, and have 100% employer-paid short-term disability leave, among other benefits.⁹⁴

"Most of my competitors lack valid business licenses, do not pay sales tax, and misclassify workers," Aaron says.⁹⁵ These illegal practices are very profitable. "Typical margins for a 1099 company in the cleaning industry [are] 40, 45%," Aaron explains.⁹⁶ "Our profit margin[] oscillates month-to-month. . . . [B]asically, on paper it's 20%. After emergencies and crises are added in, it's around 16 or 17%."⁹⁷ That is a stunning difference, to say the least. The only reason Aaron has been able to make it work is because he did not take a salary for the first year he was in business and because he operates only in places where there are enough affluent, social-justice minded people willing to pay his significantly higher rates.⁹⁸ "[I]f you book a weekly cleaning with some other service in D.C., you can very easily get your one bedroom, one bathroom clean for like \$89 each time," he says.⁹⁹ "Whereas from us, it's going to cost \$149 or \$139, depending on what time you book, right? So, people see that and they balk. Not all people, but a substantial contingent of people, and it's because they're used to prices that are set by illegal practices. . . . [.]"¹⁰⁰

There is an important takeaway here. Wage theft is widespread, its victims are rarely able to find vindication,¹⁰¹ and government enforcement is uncommon and inadequate.¹⁰² For employers like Aaron Seyedian, wage theft distorts the competitive market. In many industries, legal guarantees for workers have become liabilities for employers who wish to be decent but are torn between the moral imperative of following basic workplace laws and the realities of running a business.

92. Interview with Aaron Seyedian, Owner, Well-Paid Maids, in Washington, D.C. (2018) (transcript on file with author).

93. See CARRÉ, *supra* note 26, at 2 (noting misclassification is especially prevalent in housecleaning); BERNHARDT ET AL., *supra* note 13, at 31 (finding 29.5% of maids and housekeepers were paid less than minimum wage the week prior).

94. Interview with Aaron Seyedian, *supra* note 92.

95. Email from Aaron Seyedian to author (Apr. 19, 2018) (on file with author).

96. Interview with Aaron Seyedian, *supra* note 92.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. See, e.g., CHO ET AL., *supra* note 80, at 1–3; Alexander & Prasad, *supra* note 64, at 1098.

102. See Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-Enforcement Succeed Where the State Alone Has Failed?*, 45 POL. & SOC'Y 359, 360–61 (2017).

The research presented here illustrates the central thesis of this Article: wage theft is not an *individualized* issue, but one that causes broad and lasting harm to society generally. Violations of our nation's bedrock employment laws are common and cause significant financial and emotional harm to workers, high-road employers, and labor markets in general.

Because wage theft is a broad, multi-faceted *social* problem, effectively attacking it requires a concerted, *social* approach. As discussed in the next Part, however, legal interventions generally do not reflect this idea. Rather than focus on public-driven systemic change, popular reforms instead attempt to empower individuals.

II. WAGE THEFT REFORMS AND ENFORCEMENT STRATEGIES

Over the last fifteen years, activists and workers have mobilized to demand action from elected officials.¹⁰³ Because of partisan divides and powerful special interests, federal workplace protections such as the Fair Labor Standards Act and National Labor Relations Act have atrophied through congressional inaction.¹⁰⁴ Consequently, reformers have turned their energy to state legislatures and courthouses. In many ways, they have been extremely successful. States and cities across the country have reformed and updated existing laws to better attack wage theft.

This Part provides an overview of these legal changes and their implementation. Reforms generally fall into four categories:

1. Laws broadening the definition of “employment”;
2. Laws enhancing civil and criminal penalties;
3. Laws creating or expanding causes of action and avenues for relief; and
4. Laws imposing more stringent recordkeeping requirements.

In both design and implementation, however, these reforms largely reflect the common misconception that wage theft is an individual problem that can and *should* be solved through personal empowerment and individual mobilization.

103. See Fritz-Mauer, *supra* note 12, at 123–26.

104. JACOB HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS 52–54 (2010).

A. “Employment” Redefined

The first type of reform broadens the definition of “employment” to empower more people to invoke protective laws. As discussed in Part I, whether a person is classified as an employee or an independent contractor has an enormous impact on their legal status. Independent contractors pay a higher tax rate and are explicitly exempt from bedrock labor, employment, and anti-discrimination laws,¹⁰⁵ and cannot access key social safety net protections.¹⁰⁶

Whether a worker is an employee or independent contractor depends on how a jurisdiction defines “employment.” Every jurisdiction has legal tests to analyze this issue. Adding to this confusion, different statutes often have different tests.¹⁰⁷

One way to address misclassification is to change the legal standard to more clearly include more workers under the umbrella of “employee.” In doing so, people gain both legal protections and the right to sue to enforce those rights.

Most tests analyzing whether a worker is an employee or independent contractor evaluate a number of issues. Common factors include whether the worker is closely controlled, paid hourly, in a long-term relationship with the putative employer, and competes in the marketplace.¹⁰⁸ These multi-factor tests can be confusing and difficult to apply. This creates a significant amount of uncertainty, and the grey area provides employers with broad opportunities to (mis)classify workers as independent contractors.

Lately, another test has become increasingly popular. In contrast to traditional analyses, the “ABC Test” is simple. It places the burden on the employer to prove that a worker is an independent contractor by showing that they:

- A. are free from the employer’s control, both in writing and in fact;
- B. perform work that is outside of the employer’s usual course of business; *and*
- C. are engaged in an independently established business of their own.¹⁰⁹

105. See *supra* Section I.A.2.

106. *Id.*

107. See, e.g., *Independent Contractor Versus Employee*, CAL. DEP’T INDUS. RELS., https://www.dir.ca.gov/dlse/faq_independentcontractor.htm [https://perma.cc/TTW6-MZL8] (discussing applicability of various tests).

108. E.g., U.S. DEP’T OF LAB., WAGE & HOUR DIV., *supra* note 34.

109. Rebecca Smith, *Washington State Considers ABC Test for Employee Status*, NAT’L EMP. L. PROJECT (Jan. 28, 2019), <https://www.nelp.org/blog/washington-state-considers-abc-test->

This test represents a significant shift. For example, under many analyses, Uber drivers are independent contractors.¹¹⁰ Under the ABC test, they are almost certainly employees.¹¹¹ Because both gig work and franchising arrangements have become fixtures of the American economy,¹¹² the ABC test has the potential to drastically change the nature of work in America.

While present in one form or another in many states,¹¹³ the ABC test shot to prominence in 2018 when the California Supreme Court adopted the test for wage and hour purposes.¹¹⁴ Then, in 2019, California expanded on this decision by legislatively adopting the ABC test more broadly and applying it to the entire Labor Code with only a few exceptions.¹¹⁵ Given California's status as both a progressive trendsetter¹¹⁶ and a large economy,¹¹⁷ this decision made waves. Other states are now considering adopting the ABC test in whole or in part,¹¹⁸ potentially re-classifying millions of people.¹¹⁹

B. *Enhancing Civil and Criminal Penalties*

Perhaps the most popular type of reform enhances civil and criminal penalties for wage theft. This approach relies on the criminological theory of deterrence, reasoning that harsher punish-

employee-status [<https://perma.cc/S3L5-N6YS>]; *see also* *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 7 (Cal. 2018).

110. *E.g.*, Uber Technologies, Inc. Advice Memorandum from Jayme L. Sophir, Assoc. Gen. Couns., Div. of Advice, Off. of the Gen. Couns., NLRB, to Jill Coffman, Reg'l Dir., Region 20, NLRB, at 14 (Apr. 16, 2019), <https://www.laborrelationsupdate.com/files/2019/05/NLRB-Uber-memo.pdf> [<https://perma.cc/SZ7L-Y6J3>]; U.S. Dep't of Lab., Wage & Hour Div., Opinion Letter FLSA 2019-6 (Apr. 29, 2019).

111. Catherine L. Fisk, *Those Gig Drivers Aren't Independent Contractors – They're Employees*, AM. PROSPECT (May 4, 2018), <https://prospect.org/justice/gig-drivers-independent-contractors-employees> [<https://perma.cc/998Z-KREY>]. In the case of Uber drivers, the fact that the job they perform is the primary work of what Uber does is probably the key factor that makes them employees.

112. *See generally* DAVID WEIL, *THE FISSURED WORKPLACE* (2014).

113. Smith, *supra* note 109.

114. *Dynamex*, 416 P.3d at 1.

115. Alexia Fernández Campbell, *California Just Passed a Landmark Law to Regulate Uber and Lyft*, VOX (Sept. 18, 2019, 2:13 PM), <https://www.vox.com/2019/9/11/20850878/california-passes-ab5-bill-uber-lyft>.

116. *See* Fritz-Mauer, *supra* note 12, at 76–94.

117. *See California Now Has the World's 5th Largest Economy*, CBS NEWS (May 4, 2018, 6:40 PM), <https://www.cbsnews.com/news/california-now-has-the-worlds-5th-largest-economy/>.

118. Smith, *supra* note 109.

119. In fact, in early 2020, the United States House of Representatives passed the PRO Act, which incorporates the ABC test into the National Labor Relations Act. Protecting the Right to Organize Act, H.R. 2474, 116th Cong. § 2(2) (2020).

ments will result in fewer crimes.¹²⁰ Jurisdictions frequently allow workers to recover significant damages on top of unpaid wages and empower the government to impose costly fines and penalties.¹²¹ Many places now also threaten criminal sanctions.¹²²

There is good reason to support penalty enhancements. They compensate aggrieved workers for their added time and effort and can fund government anti-wage theft initiatives.¹²³ Crucially, penalty enhancements also reduce minimum wage violations. To evaluate the efficacy of different kinds of anti-wage theft laws, political scientist Daniel Galvin used United States Census Bureau data to analyze minimum wage violations before and after legal reforms.¹²⁴ He found that penalty enhancements *do* reduce violation rates; in particular, allowing workers to recover treble (triple) damages causes a meaningful and statistically significant reduction in minimum wage violations.¹²⁵ Other civil and criminal penalty enhancements might also reduce wage theft, but the evidence is weaker.¹²⁶

Crucially, it is not enough to just pass these laws. Actual enforcement matters. If the government signals to employers that it is not that interested in meaningfully punishing wage theft, then statutory protections lose much of their power. For example, after Ohio voters amended the state constitution to allow unpaid workers to collect treble damages, minimum wage violation rates significantly declined.¹²⁷ But when Ohio's governor issued an executive order waiving imposition of these penalties for first-time or isolated violations, violation rates returned to their pre-reform levels.¹²⁸

"Enforcement strategies matter" is a common-sense idea, but it has found empirical support elsewhere as well. Florida has an "unusually high" rate of minimum wage abuse, which researchers at the Economic Policy Institute attribute in part to the fact that the state got rid of its labor standards enforcement agency in 2002.¹²⁹ When employers have little reason to fear punishment for wage theft, they are emboldened to steal from their workers.

120. For an overview of deterrence theory, see RONALD L. AKERS, CHRISTINE S. SELLERS & WESLEY G. JENNINGS, *CRIMINOLOGICAL THEORIES* 15–34 (7th ed. 2012).

121. See Galvin, *supra* note 21, at 329.

122. *Id.*

123. *E.g.*, D.C. CODE § 32-1307.01(a), 01(b) (2017).

124. Galvin, *supra* note 21, at 330.

125. *Id.* at 339.

126. *Id.*

127. *Id.* at 340.

128. *Id.*

129. COOPER & KROEGER, *supra* note 11, at 12.

C. Expanding Avenues for Relief

While unpaid employees have always had the power to sue to enforce their rights in court, this is far easier said than done. The civil justice system is hard to navigate for the vast majority of people. In particular, low-wage workers do not have legal training, familiarity with the civil justice system, or the ability to hire a lawyer.¹³⁰ Even if a person does gather the resources to file a lawsuit, they are usually outmatched by their employers, who tend to have more economic and social power and, therefore, greater access to key resources like time, knowledge, and legal representation.

In an effort to address this imbalance, reforms attempt to make it easier to take formal action. This approach includes both expanding administrative paths to legal action and incentivizing attorneys to take on wage theft cases.

Many states (and some large cities) have local equivalents of the federal Department of Labor (DOL) that monitor employment and enforce workplace laws.¹³¹ Across the country, workers are increasingly able to file legal complaints with these agencies, which may then investigate claims, hold hearings, and issue judgments.¹³² In practice, however, the power and efficacy of these agencies varies widely. The D.C. DOES, for example, may investigate all allegations of wage theft and retaliation and order the same remedies as a court, including fines, liquidated damages, attorney's fees, and injunctions.¹³³ In contrast, Colorado's Department of Labor and Employment may only investigate claims worth \$7,500 or less.¹³⁴

Workers can also sue their employers in small claims court, although there are upper limits on the value of such cases.¹³⁵ This is not a heavily-studied forum for addressing wage theft, but recently some scholars have begun to urge reforms to streamline and encourage unpaid wage claims.¹³⁶

In theory, at least, these alternative paths should provide people with an easy, fast, and accessible avenue for rights enforcement. In

130. See Fritz-Mauer, *supra* note 12, at 102–03.

131. See Marianne Levine, *Behind the Minimum Wage Fight, a Sweeping Failure to Enforce the Law*, POLITICO (Feb. 18, 2018, 10:40 AM), <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644>.

132. See, e.g., Fritz-Mauer, *supra* note 12, at 103 (discussing administrative hearings in California); D.C. CODE § 32-1308.01 (2017).

133. D.C. CODE § 32-1308.01 (2017).

134. COLO. REV. STAT. § 8-4-111(1)(a) (2014).

135. See, e.g., CAL. CIV. PRO. CODE § 116.220(1) (Deering 2010) (establishing a \$5,000 limit); D.C. CODE § 11-1321 (2016) (establishing a \$10,000 limit).

136. E.g., Llezlie Green, *Wage Theft in Lawless Courts*, 107 CALIF. L. REV. 1303 (2019).

practice, most low-wage workers are unsure where to even begin.¹³⁷ Many also lack the confidence to act.¹³⁸

Finally, the District has had some success experimenting with generous attorney's fees as a way to induce lawyers to take on wage theft suits. While successful plaintiffs have long been entitled to recover fees and costs under the Fair Labor Standards Act,¹³⁹ the District's Wage Theft Prevention Amendment Act of 2014 enshrined high hourly rates for attorneys.¹⁴⁰ For example, attorneys with up to three years of experience have a statutory rate of almost \$375 per hour.¹⁴¹

According to worker-side employment lawyers in the D.C. area, this fee-shifting provision has expanded access to legal representation by making a broader range of cases financially feasible. As Michael Amster, a partner at a local employment law firm, explains, the law "allow[s] us to take cases that we otherwise wouldn't take. It allows us to be able to justify taking smaller cases Because frankly, in a lot of these cases you're dealing with people who are making very little money and sometimes what is owed to them is not that much."¹⁴² Those smaller cases are now more viable because the law has created a higher return for lawyers.

High hourly rates can only help so many people obtain representation, because private attorneys are unwilling to take on claims with an uncertain payday. There are two main reasons why somebody with a strong wage theft claim will nevertheless be unable to find an attorney. First, many low-wage workers toil for fly-by-night employers who operate on the margins of the system. They regularly skirt labor laws and have few assets, and because of this, they are hard to nail down and collect money from.¹⁴³

Second, most wage claims are still just too small. Two attorneys privately told me that they refuse to take on clients whose unpaid wages are less than \$10,000, a high threshold for workers to meet. The reason this matters is because fee-shifting provisions allow victorious plaintiffs to recover "reasonable" attorney's fees; this means

137. See Alexander & Prasad, *supra* note 64, at 1095.

138. *Id.* at 1073 (discussing retaliation and a lack of belief in the efficacy of making a claim); Shannon Gleeson, *Brokered Pathways to Justice and Cracks in the Law: A Closer Look At the Claims-Making Experiences of Low-Wage Workers*, 18 WORKINGUSA 77, 90–93 (2015).

139. 29 U.S.C. § 216(b).

140. D.C. CODE §§ 32-1308(b)(1), 32-1308.01(m)(1) (2017) (establishing that successful plaintiffs' attorneys are entitled to fees calculated "pursuant to the matrix approved in *Salarzar v. District of Columbia*, 123 F. Supp. 2d 8 (D.D.C. 2000)). This matrix is also referred to as the Laffey Matrix. See LAFFEY MATRIX, <http://www.laffeymatrix.com/sec.html> (last visited Jan. 18, 2021).

141. LAFFEY MATRIX, *supra* note 140.

142. Interview with Michael Amster, Partner, Zipin, Amster & Greenberg, LLC, in Silver Spring, Md. (2018) (transcript on file with author).

143. See CHO ET AL., *supra* note 80, at 10–11.

that such fees are usually proportionally related to the value of the underlying claim. In reality, most low-wage workers cannot reach these implied threshold requirements to obtain representation.

D. *Recordkeeping Requirements*

Finally, anti-wage theft laws often impose new or more stringent recordkeeping and transparency requirements on employers.¹⁴⁴ This places the burden on the party with the best ability to preserve the kind of evidence (e.g. paychecks) that is crucial to determining whether wage and hour laws were violated. Typically, employers are subject to fines and penalties for not keeping accurate records.¹⁴⁵ In some cases, a failure to preserve records reduces the burden of proof for plaintiffs, making it easier to win wage claims.¹⁴⁶

In addition, new laws require employers to provide key information in writing to new hires, including the legal name of the employer, rate of pay, and regular payday.¹⁴⁷ Finally, many states empower government agencies to proactively investigate wage theft allegations, requiring employers to make their records available for investigators to review.¹⁴⁸ Although this right is limited to some extent by the Fourth Amendment,¹⁴⁹ it still has the potential to be a powerful enforcement tool.

E. *The Realities of Wage Theft Enforcement*

This collection of reforms reflects the current gold standard for anti-wage theft laws. On paper, they fairly compensate workers, significantly sanction employers, and smooth the legal process by creating new ways to bring claims, incentivize representation, and ensure the preservation of evidence. These laws also make the government a more active participant in the employment relationship by meaningfully enhancing the power of administrative agencies and prosecutors.

In practice, though, these powers go unused.

144. See, e.g., D.C. CODE § 32-1306(d)(1) (2018); see also CAL. LAB. CODE § 226(a) (2018).

145. Lori P. Benton, *An Employer's Duty to Preserve Documents Beyond the FLSA's Record Keeping Requirements*, LEXOLOGY (Oct. 17, 2018), <https://www.lexology.com/library/detail.aspx?g=474cd2c1-f251-4cb8-9267-d3500e63ceeb> [https://perma.cc/8RLH-QHM7].

146. E.g., *Furry v. East Bay Publ'g*, 30 Cal. App. 5th 1072, 1078-80 (2018); *Holaway v. Stratasys, Inc.*, 771 F.3d 1057, 1059 (8th Cir. 2014).

147. E.g., D.C. CODE § 32-1008(c) (2018).

148. E.g., D.C. CODE § 32-1331.05(a) (2013); CAL. LAB. CODE § 90 (1984).

149. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451-54 (2015).

Criminal penalty enhancements, for example, draw upon the belief that we should treat wage theft like “regular” theft.¹⁵⁰ These reforms satisfy a visceral sense of justice and have made some waves in popular media, but they are largely hollow because few prosecutors pursue criminal sanctions.¹⁵¹ Nationally, the Fair Labor Standards Act has criminalized “willful” minimum wage and overtime violations for decades.¹⁵² In some parts of the country, wage theft has long been a criminal offense under state law.¹⁵³ And yet, prosecution is and always has been extremely rare.¹⁵⁴

Likewise, very few labor standards enforcement agencies actually invoke their mandates by engaging in proactive investigations. Instead, the vast majority rely on a passive, complaint-based approach to enforcement. They wait for workers to come forward with complaints and then work to bring a particular employer into compliance.¹⁵⁵

Part of the problem stems from the government not investing enough resources in these agencies. The DOL, for instance, had as many wage and hour investigators in 2014 as in 1948, despite the fact that the agency now covers a workforce *six times* the size.¹⁵⁶ Many state agencies are even worse off. Six states have no labor standards enforcement agency and 26 have fewer than 10 investigators.¹⁵⁷ And these weaknesses show. A 2009 audit by the Government Accountability Office found significant flaws in the DOL’s complaint process, including “delays in investigating complaints, complaints not recorded in the WHD database, failure to use all available enforcement tools because of a lack of resources, failure to follow up on employers who agreed to pay, and a poor complaint intake process.”¹⁵⁸ Similar problems exist even in progressive bastions.¹⁵⁹

But a lack of resources is not the only reason why the government fails to utilize the tools available to it. Agencies’ passive, wait-and-see approach to wage theft enforcement reflects the broader social belief that wage theft is, fundamentally, a personal problem.

150. Fritz-Mauer, *supra* note 12, at 93.

151. *Id.* at 118.

152. 29 U.S.C. § 216(a).

153. *E.g.*, CAL. PENAL CODE § 484(a) (2014); 1913 Cal. Stat. 636.

154. *See* NAT’L EMP. L. PROJECT, *Winning Wage Justice: An Advocate’s Guide to State and City Policies to Fight Wage Theft* (2011); Fritz-Mauer, *supra* note 12, at 118.

155. Fine, *supra* note 102, at 361.

156. Galvin, *supra* note 21, at 325.

157. Levine, *supra* note 131.

158. GREGORY D. KUTZ & JONATHAN T. MEYER, U.S. DEP’T OF LAB., WAGE & HOUR DIVISION’S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT 4 (2009).

159. *E.g.*, CHO ET AL., *supra* note 80, at 4.

Many government actors are unwilling to act proactively and aggressively because doing so would upset the status quo and run contrary to broadly-held beliefs about wage theft.¹⁶⁰

The above reforms, while able to make some difference, are premised on the belief that empowering individuals is an effective way to broadly attack this social problem and achieve justice for low-wage workers. As the next section illustrates, this belief is entirely wrong.

III. BARRIERS TO ACTION AND THE FAILURES OF REFORM

For almost a year, Maynor worked at Eastern Flavors, a mid-range restaurant in the District.¹⁶¹ As with many restaurants, though, the attractive exterior gilded ugly inner truths.¹⁶² Maynor's employers only paid him about half of the minimum wage, and he never got overtime despite working up to 70 hours a week. When Maynor eventually complained about the conditions, they fired him. "They even tried to fight me when I left," he says. "They threw soy sauce at me."

Some of Maynor's friends told him about an attorney they trusted. When Maynor went to talk to this lawyer, he realized just how badly he had been mistreated. Over the course of the year, Eastern Flavors underpaid Maynor by about \$25,000—money he sorely needed to support himself and his family in one of the most expensive places in the country.¹⁶³

Maynor and two of his former co-workers sued. Eastern Flavors refused to settle, and the case went to a four-day trial. Maynor and his friends prevailed, and the judge ordered the restaurant to pay them more than \$150,000, plus attorney's fees.¹⁶⁴ Maynor alone won almost \$100,000, an extraordinary amount of money for a

160. For a more detailed discussion of this mindset, see *infra* Section IV.C.5.

161. Interview with Maynor, Line Chef, Washington D.C. (2018) (transcript on file with author).

162. Studies consistently find that wage theft is common in the food service industry. *See, e.g.*, BERNHARDT ET AL., *supra* note 13, at 31; Galvin, *supra* note 21, at 331 (finding a 22% violation rate for food services and drinking place industries).

163. To compare costs of living between different places, economists rank states and cities based on their "Regional Price Parities," or RPPs. These RPPs measures the differences in prices across state and city lines, and the analysis covers all consumption goods and services, including rent. The Bureau of Economic Analysis determined that in 2017, D.C. had the second highest RPP in the country. BUREAU OF ECON. ANALYSIS, BEA 19-21, REAL PERSONAL INCOME FOR STATES AND METROPOLITAN AREAS, 2017 (2019), <https://www.bea.gov/news/2019/real-personal-income-states-and-metropolitan-areas-2017> [<https://perma.cc/F9LU-NWCJ>].

164. I verified these numbers, but I have not cited those sources to preserve Maynor's anonymity.

man who had been making \$5 an hour just a year earlier. When we spoke more than fifteen months later, Maynor had only recovered a third of this judgment. This was still enough to change his life, and he and his attorneys were preparing to place a lien on his former employer's property to recover the rest.

Maynor speaks glowingly of his lawyers and the process. "It's an example for everyone because so many people are afraid to go talk to a lawyer," he says. "And so they just suffer, and they suffer. They live in fear with their arms crossed, but afterwards I felt really good because the law is the law, and what's correct is correct."

* * *

Maynor's story is the one we like to tell. It represents the best that anti-wage theft reforms have to offer. It is inspiring, a David-and-Goliath tale of hardship, struggle, and vindication. Maynor's employers violated his basic rights and exploited his vulnerabilities, and he was abused even beyond the basic degradation inherent in wage theft. But through dedication and courage, he brought to bear the full weight of the law and found justice. In the end, it did not matter that Maynor speaks almost no English, has little money, is almost certainly undocumented, dropped out of school in the second-grade, and has no legal knowledge. Because of the District's recent anti-wage theft reforms, he received compensation not only for his lost wages, but for the trouble he had to go through to get them, and he did not have to pay any money for the outcome. Maynor simply reached out, placed his hands on the levers of power that the law made available, and walked away much better for it.

This tale fits neatly into the belief that private legal remedies can effectively solve social problems. But this story is also extremely rare, the strong exception to a stark truth: under the current system, the overwhelming majority of low-wage people who experience wage theft have no real avenues for recourse.

The reforms discussed in Part II have been broadly accompanied by a sense of accomplishment among those who pass them. In some ways, this feeling is well-deserved. This new wave of laws reflects an earnest desire to address wage theft, to grant working people the tools they need to enforce their own rights, and to create fair and dignified workplaces. When invoked and enforced, anti-wage theft reforms upend the age-old power dynamic and provide aggrieved workers with a real path to redress.

But there is a crippling problem with an approach that depends—and in fact *requires*—low-wage workers to drive enforcement. The fact is, low-wage workers overwhelmingly lack—or at

least *believe* they lack—the practical ability to hold their employers accountable for violations of their rights. As this Part explains, an enforcement regime based on the misconception that individual empowerment is an acceptable way to address a problem like wage theft is fundamentally flawed because the vast majority of low-wage workers do not take formal legal action over their rights violations. There is no question that the statutory reforms discussed in Part II are important. But, as long as remedies emphasize personal empowerment and a complaint-based approach to enforcement, they will fail, afflicting little more than a surface-level attack on the problem.

A. *Wage Theft, Disputing, and the Safe Path of Silence*

To fully grasp why the standard approach to fighting wage theft is destined to fail, it is crucial to understand when, why, and how people take action over their own mistreatment. Or, in this case, why so many do not.

Sociolegal scholars who study the civil justice system have spent a great deal of time analyzing the process through which people “name,” “blame,” and “claim”—that is, when and how people recognize an injury (name), assign responsibility (blame), and take action (claim).¹⁶⁵ This research has revealed that there are many potential legal disputes that people never act upon.¹⁶⁶

Disputes are social constructs. Whether a given situation will evolve into a legal claim depends heavily on social context and personal understandings.¹⁶⁷ An extensive body of research on disputing shows that the ability and willingness to name a problem, blame somebody for it, and bring a claim depends heavily on who somebody is and how their thinking has been influenced.¹⁶⁸ As sociologist Rebecca Sandefur explains, “studies frequently . . . reveal powerful influences of local social context on how disputes are understood and pursued.”¹⁶⁹

This “local social context” can greatly impact how a person thinks about and responds to their experiences. Many factors mat-

165. See, e.g., KITTY CALAVITA & VALERIE JENNESS, *APPEALING TO JUSTICE: PRISONER GRIEVANCES, RIGHTS, AND CARCERAL LOGIC* (2015); Catherine Albiston, Lauren B. Edelman & Joy Milligan, *The Dispute Tree and the Legal Forest*, 10 ANN. REV. L. & SOC. SCI. 105 (2014); William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & SOC'Y REV. 631 (1981).

166. Albiston et al., *supra* note 165, at 106.

167. See *id.* at 114–17.

168. See *id.*

169. Rebecca Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 342 (2008).

ter, including widespread cultural beliefs, a person's own background and upbringing, socioeconomic status, and race.¹⁷⁰ Also important are "agents of transformation"—people and organizations, including nonprofits, friends, and government officials, who shape, guide, and manage beliefs and expectations.¹⁷¹

This analysis really boils down to questions of power and influence. If a person who is wronged has more social power and resources and has been encouraged to think about an experience as a *legal* problem, then they are more likely to take action. Members of groups that are lower in the social hierarchy (like poor people, those without much formal education, and minorities) perceive fewer problems and make fewer claims.¹⁷² For example, we would expect an upper-class white person whose mother is a lawyer to be more likely to file a lawsuit or administrative complaint than a low-income person of color who does not know any attorneys. To some extent, this divergence is about resources and the kinds of problems people have. Wealthier people are better equipped to pursue legal action and are also more likely to have disputes with higher stakes. But these factors do not fully explain the entire relationship between class position and action. Lower-income people are also less likely to pursue disputes because of a general sense of powerlessness and a lack of faith in the system.¹⁷³

Wage theft represents a potential dispute, which workers may recognize (name), assign responsibility for (blame), and pursue through a variety of formal and informal processes (claim). In light of the attention that wage theft has received, we might expect low-wage workers to regularly take legal action over their pay-based rights violations. After all, there has been a growing social movement dedicated to empowering these people, both legally and personally, and the interventions discussed in Part II of this Article have been designed for just that purpose.

But this is far from the case. Overwhelmingly, people who suffer wage theft do not take any legal action.¹⁷⁴ Despite the harm of the crime and its (often flagrant) illegality, almost no low-wage workers step forward.

Unlike some other potential disputes—e.g., a faulty product involving multiple potential responsible parties—"blaming" for wage theft is straightforward. People understand that their employers

170. For an empirical discussion of these various factors, see generally Albiston et al., *supra* note 165.

171. *See id.* at 106.

172. *Id.* at 124; Sandefur, *supra* note 169, at 346.

173. *See* Sandefur, *supra* note 169, at 347.

174. *See* Alexander & Prasad, *supra* note 64, at 1089.

are responsible for paying, or not paying, their wages. Instead, the real problems for disputing wage theft arise at the “naming” and “claiming” phases.

B. Naming Wage Theft

Naming an act of wage theft as an injury is a crucial first step to action. Before a person will assert their rights, they must understand what those rights are and how they have been violated. A wealth of empirical research supports the idea that “inaccurate or incomplete knowledge of the law can limit one’s willingness and ability to assert their rights.”¹⁷⁵ For example, in her study of the Family and Medical Leave Act, sociological scholar Catherine Albiston found that people who had basic information about their rights felt more empowered.¹⁷⁶ Rights awareness itself provided workers with both a legal and moral justification for speaking up.¹⁷⁷

Research concludes that many low-wage workers do not have a clear understanding of their workplace rights. One analysis found that almost 60% “misunderstood their minimum wage and overtime rights,” with people frequently overestimating and underestimating the applicable minimum wage.¹⁷⁸ Significant gaps in understanding exist even among undocumented workers, for whom law is particularly salient and who are frequently the targets of know-your-rights outreach efforts.¹⁷⁹ A survey of day laborers determined that 45% did not know the applicable minimum wage and 21% did not realize it is illegal to pay less than minimum wage. Fewer than half knew both of these facts.¹⁸⁰

Confusion over substantive rights commonly arises in conversations with low-wage workers. Jack, for example, has been embroiled in a dispute with his former employer, a large and successful restaurant.¹⁸¹ Jack played two roles, working as both a server and a caterer. “In catering I was probably putting in about 20 hours a week,” he explains, and “[w]ith the waiting tables I was probably

175. Mary Nell Trautner, Erin Hatton & Kelly E. Smith, *What Workers Want Depends: Legal Knowledge and the Desire for Workplace Change Among Day Laborers*, 35 L. & POL’Y 319, 320 (2013).

176. See Catherine Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 L. & SOC’Y REV. 11, 13–14 (2005).

177. *Id.* at 28–29.

178. Alexander & Prasad, *supra* note 64, at 1072.

179. See *id.* at 1093–95.

180. Trautner et al., *supra* note 175, at 330–31.

181. Interview with Jack, Artist & Server, in Washington, D.C. (2018) (transcript on file with author).

putting in 30 hours a week.”¹⁸² Separately, that is. Working 50 hours a week for a single employer means that Jack should have been paid for ten hours of overtime. He was not, but Jack did not realize that this was illegal. Instead, he viewed his two roles as independent of one another, even though both his basic job duties and his employer stayed the same.¹⁸³ As a result, he never pursued a claim for unpaid overtime.

Not knowing the law is not the only barrier to naming. Workers must also understand that their particular situations are illegal. Even some who know their rights fail to realize that their own experiences constitute mistreatment. It is not easy or convenient for people to track their hours, check their own records against their paystubs, and do the weekly math required to verify that they are being paid correctly.¹⁸⁴

In short, lack of knowledge is a significant problem in a system reliant on worker complaints. But there is also a great deal of nuance missing from this discussion. Despite the research presented here, it is also the case that—at least in D.C.—low-wage workers are largely aware of their own wage theft. This might sound contradictory. How can a group of people with poor knowledge of their rights also be generally aware of their own mistreatment? The answer lies in the fact that wage theft is usually nothing more than a violation of a person’s most basic entitlements. Although “wage theft” is an umbrella term that covers many different offenses, the most common forms violate our country’s oldest and most rudimentary workplace laws.¹⁸⁵ These laws are longstanding and also coincide with our own cultural and moral understandings of how things *should* be. In other words, it does not take much knowledge to understand the wrongness of the broad range of violations that low-income people suffer. Beyond that, even if workers do not immediately identify that their rights are being violated, they often become aware after the fact.

Most of the time, then, the real barrier to action is not a lack of knowledge, especially in a place as progressive and socially active as D.C., where there are many sources of information available to teach people about their rights, including radio and bus advertisements, non-profit and advocacy organizations, and friends and coworkers. Even as the details of these laws escape workers, who

182. *Id.*

183. *Id.*

184. This is especially true for tipped workers, who have to deal with the added difficulty of tracking their tips. Tips are usually a mix of cash and credit and often come in on a delay, which makes it hard to line them up with particular paychecks and workweeks.

185. See, for example, Fritz-Mauer, *supra* note 12, at 78–82, for a discussion of the inception of minimum wage and overtime laws.

sometimes misstate the applicable minimum wage or fail to understand how quickly they accrue paid sick days, most people who have been cheated eventually learn of it.

This discussion raises questions. People who experience wage theft are deeply affected by it. In many places, like the District, there are also powerful, pro-worker laws designed to ease the path to civil justice, send a powerful message about the wrongness of wage theft, and provide redress. And yet, working people do not take formal legal action. They do not pursue the remedies enshrined in law. Across the board, complaint rates are extremely low.¹⁸⁶ One study found that almost 98% of workers who perceive workplace rights violations (consisting mainly of wage theft) do not pursue their claims through the civil justice system.¹⁸⁷ Why? In the age of an ascendant left-wing in Democratic politics with growing pro-worker grassroots movements, economic inequality and the experiences of working people are the focus of a national conversation, and this attention has resulted in sweeping reforms. So why, then, do workers fail to take action? As the next section explains, the real barriers to individualized enforcement arise at the claiming phase.

C. *Barriers to Claiming: Retaliation, Lack of Confidence, and Power Dynamics*

The majority of low-wage workers who name their legal injuries give up at the claiming phase. During the claiming phase, a worker confronts the person or entity who they blame for their wage theft and demands a remedy.¹⁸⁸ Claiming can take a variety of forms and includes everything from talking to a supervisor to filing a lawsuit.¹⁸⁹

Analyzing data from the 2008 survey of 4,400 low-wage workers, Charlotte Alexander and Arthi Prasad concluded that only 57% of those who felt their rights had been violated at work made any

186. David Weil, *Creating a Strategic Enforcement Approach to Wage Theft: One Academic's Journey in Organizational Change*, 60 J. INDUS. REL. 1, 8 (2018); David Weil & Amanda Pyles, *Why Complain-Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'YJ. 59, 69 (2005).

187. See Alexander & Prasad, *supra* note 64, at 1085–86, 1089. Although the authors did not do this math themselves, it is straightforward: Out of 4,387 workers total, 33% perceived rights violations, 57% of those made a claim of any kind, and 4% of those who made a claim did so formally. $(4387) \times (.33) \times (.57) \times (.04) = 33$ workers who made a formal claim out of 1,447 who perceived rights violations, yielding a formal complaint rate of about 2.3%.

188. Albiston et al., *supra* note 165, at 106.

189. *Id.* at 106–09.

kind of claim in the year prior to the survey.¹⁹⁰ Of those who did speak up, 96% did so *informally* by speaking to their employers.¹⁹¹ Only four percent of those who made claims, then, tried to take the kind of formal legal action envisioned by the reforms discussed in Part II. Parsed out, this means that of all the low-income workers in the survey who believed their employers broke the law, only about two percent went to the government or a private attorney for help.¹⁹²

There are three significant “barriers to claiming” that effectively prevent low-income people from taking legal action. Working people frequently report that what stops them from really pursuing rights enforcement is: 1) fear of retaliation; 2) concern about navigating the system successfully; and 3) a lack of personal power and faith in the government.

These barriers to claiming are not mutually exclusive but overlapping. Fearing retaliation, for example, is inherently linked to a perceived lack of power and faith in government. After all, if a person believed they had the power to enforce their own rights, or had confidence that the government could and would protect them, they would not be afraid of employer reprisal. What these issues, discussed in more detail below, have in common is that they are all inextricably tied to workers’ low positions on the social and economic hierarchies that structure society.

1. Fear of Retaliation

The biggest explanation for why low-wage workers do not attempt to assert their rights, either at all or to a significant degree, is because they are afraid of retaliation.¹⁹³ Retaliation can take many forms. Supervisors bully and intimidate workers who complain, cut their hours, adjust their schedules without warning, contact immigration authorities, and find excuses to terminate, suspend, or otherwise discipline them.

While all retaliation is intimidating and unpleasant, the worst—and most effective—is the kind that reduces earnings. Especially for those who live in poverty or just on the edge of it, income is an

190. Alexander & Prasad, *supra* note 64, at 1084.

191. *Id.* at 1089.

192. This statistic worsens once one accounts for the fact that some people fail to understand when their employers violate their rights. Given that many low-wage workers lack rights knowledge, the best empirical evidence suggests that far fewer than 2% of those who suffer wage theft take formal legal action over it.

193. The problems with retaliation are well-documented, as are workers’ concerns. See *supra* note 138.

overriding concern. Low-wage workers have little—if anything—in the way of savings,¹⁹⁴ and, as discussed in Part I, even a temporary loss of income can have a devastating impact on a person’s way of life. Many times, even a bad employer who steals wages is better than no employer and the looming prospect of debt, hunger, and homelessness.

Workers, wage theft attorneys, and workers’ rights activists well understand these facts. Joanna Blotner, an advocate at Jews United for Justice in Washington, D.C., speaks for many when she explains that

for most people, the most important thing is keeping whatever the bare minimum income is, keeping that job. It’s much worse to be out of a job and start that search process over again and scramble for income in the in-between. . . . Losing a job is almost guaranteed losing housing, losing whatever other supports and bills you’ve got to pay in your life.¹⁹⁵

Fear of retaliation reflects the power imbalance inherent in employer-employee relationships and is also justified by data. Approximately 43% of respondents in the landmark study of 4,400 low-wage workers reported suffering employer retaliation as a result of their most recent workplace-related claim.¹⁹⁶ Many workers in the District also speak at length about their experiences with retaliation and how they have learned that enduring wage theft can cost less than fighting it. In total, just under half of my respondents expressed being afraid of retaliation.

Ruben, for example, was used to long hours at the Homeless Youth Retreat, a non-profit organization.¹⁹⁷ A large, cheerful man, he speaks passionately about the mission of the organization and his willingness to put forth time and effort. “[W]ithin a two-week period, I was knocking out hours, like 88, 96, 104, 112,” he says. “I was crushin’ ‘em!”¹⁹⁸ Ruben, however, earned the same rate for every hour he worked,¹⁹⁹ no overtime, even though he was not exempt. At first, he tried to talk to his supervisors about it. “Fuck

194. *Supra* note 47.

195. Interview with Joanna Blotner, Legis. Dir., D.C. Fam. & Econ. Sec. Campaigns, Jews United for Just., in Washington, D.C. (2018) (transcript on file with author).

196. Alexander & Prasad, *supra* note 64, at 1073.

197. Interview with Ruben, Security Guard & Couns., in Washington, D.C. (2018) (transcript on file with author).

198. *Id.*

199. *Id.*

you,” one of them told him. “We not paying you, man. You lucky we paying you that!”²⁰⁰

For many, this would have been the end of it. But Ruben could not let it go. He is college-educated, a veteran, and he knew he was right. He filed a wage claim with the D.C. DOES, which eventually determined that his employer owed him about a thousand dollars, plus penalties.²⁰¹ After some negotiations mediated by the agency, Ruben walked away with about \$2,500 before taxes.²⁰²

That was still not the end of his saga, though. “[N]ow that all the smoke has cleared, I’m not getting more hours,” Ruben says.²⁰³ He has gone from working more than 80 hours every two weeks to only a single shift. “I want to play it off, but one day?” Ruben asks, incredulous. “Just *one* day? I got scheduled two days a month? I’ve been with you more than fifteen years and that’s all I get called for? Is this retaliation behind me going to court?” Ruben does not think he can prove it, but he got the message: “I don’t argue no more. I stopped arguing.”²⁰⁴

Others have similar stories. James, a grocery store employee, noticed his paychecks were missing hours. He spoke up multiple times, and although his employer repeatedly paid him back, his supervisors became increasingly hostile. They cut his hours; transferred him to a store far from his home; and cooked up reasons to yell at, abuse, and punish him. “I’m almost afraid to ask for my money, and it shouldn’t be like that!” he says, his frustration plain. Would he speak up again? “[I]t does discourage you. . . . I got my check that’s coming up next week, it’s going to be messed up And I’m not going to say anything. I’m going to leave it alone.”²⁰⁵

Retaliating against a single outspoken employee can have a powerful ripple effect. Targets get the message, but so too do their coworkers. Like James, Miranda’s employer began to cut her hours after she complained that her paycheck was short.²⁰⁶ Some of her coworkers wanted to take action over the same problem but ultimately did not. “[T]hey was scared of the backlash,” Miranda explains, “[like] how they shortened my hours.”²⁰⁷

We think of low-wage jobs as ubiquitous and therefore easy to find because they require few skills, have a high turnover rate, and

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. Telephone Interview with James, *supra* note 78.

206. Interview with Miranda, *supra* note 65.

207. *Id.*

there is a low barrier to entry.²⁰⁸ This way of thinking implicitly assumes that if a worker loses their job, they can easily find another similar one. Broadly speaking, this might be true. It might be the case that in the aggregate, low-wage people are able to find new jobs relatively quickly. But the interim between leaving one job and starting a new one is frightening, even if it only lasts a week or two, and many report that economic insecurity buys silence. Marcos, for instance, spent years working as a dishwasher, and explains that although he felt “terrible” about his wage theft, he had to put up with it because he “didn’t know where else to look for work.”²⁰⁹

This generalized fear worsens when people have particular points of vulnerability that leave them especially open to exploitation. Being older, having dependents, or having a criminal conviction are all the kinds of qualities that make a person particularly vulnerable. Marion, for example, was convicted of a sex offense and also struggles to support her son.²¹⁰ “It’s hard because I have a record now, and sometimes I don’t get [interviews], sometimes I get interviews that go well, sometimes they be like ‘I can’t hire you because of your background.’”²¹¹ At her last job, Marion was not exempt from overtime under either D.C. or federal law, but her employer only paid her for 40 hours a week, even though she worked about 60.²¹² She sometimes went hungry and often had to scrounge or borrow bus money so she could go to work.²¹³ Although Marion knew she could file a complaint with the D.C. DOES, she did not. “I was like, ‘I’ll take the experience because I need it on my resume,’” she explains.²¹⁴

Perhaps the biggest inflection point for worker exploitation is immigration status, which helps explain why foreign-born workers are especially susceptible to wage theft.²¹⁵ In *Wage Theft in America*, author and activist Kim Bobo discusses this issue:

208. See, e.g., Matthew Castillon, *70% of Workers Are Likely to Quit at Current \$7.25 Federal Minimum Wage in ‘Brutal’ Turnover Cycle*, CNBC (Sept. 25, 2019, 8:30 AM), <https://www.cnbc.com/2019/09/25/70percent-of-workers-are-likely-to-quit-at-current-federal-minimum-wage.html> [<https://perma.cc/QZ8G-K64J>]. An analysis by CNBC determined that turnover rate is more than twice the national average when employees are paid the federal minimum wage of \$7.25. *Id.*

209. Interview with Marcos, Dishwasher, in Washington, D.C. (2018) (transcript on file with author).

210. Interview with Marion, Unemployed, in Washington, D.C. (2018) (transcript on file with author).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. COOPER & KROEGER, *supra* note 11, at 20; BERNHARDT ET AL., *supra* note 13, at 5.

Because our nation has no rational immigration system providing a path to citizenship and no strong worker protections for immigrants, many immigrants find themselves in vulnerable situations. They are desperate to work to support themselves and their families; at the same time, they face enormous backlash from communities that are scapegoating the nation's economic woes on immigrants (not a new approach in U.S. history), and they are terrified of being deported. This creates a context that makes it easy for employers to exploit undocumented workers.²¹⁶

For an unscrupulous employer, the cheapest labor comes without papers. Undocumented immigrants can be—and frequently are—paid less than the minimum wage, or nothing at all, because employers understand that many of these people live in fear of the law. This situation constitutes what Professor Elizabeth Fussell dubs the “deportation threat dynamic,” where employers assume, often correctly, that the Spanish-speaking people they hire will not report wage theft because they are afraid of government authorities.²¹⁷

Concerns over retaliation exist even in places with powerful anti-retaliation laws. The District, for instance, prohibits “any person acting on behalf of the employer” from threatening or punishing any person who has made a complaint or “is believed to have made a complaint” to any person alleging that they have not been paid properly.²¹⁸ This is a broad prohibition. Read plainly, it covers not only workers who go to the government or file a lawsuit, but also those who informally complain to their supervisors that they have been underpaid.

But retaliation is a hard thing to prove. Along with almost every state, the District practices at-will employment, which means that employers can fire workers for almost any reason or for no reason at all.²¹⁹ It is easy for employers to come up with alternative, plausible excuses for why somebody has been let go or had their hours reduced, understanding that the real reason can be shrouded behind the logic of at-will employment. Even when the District government finds out about alleged retaliation, it is slow to act. In fis-

216. BOBO, *supra* note 10, at 46.

217. Elizabeth Fussell, *The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery*, 52 SOC. Q. 593, 593–96 (2011); *see also* Gleeson, *supra* note 138, at 91, 97.

218. D.C. CODE § 32-1311(a)–(b) (2017).

219. *At-Will Employment – Overview*, NAT'L CONF. STATE LEGISLATURES (Apr. 15, 2008), <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> [<https://perma.cc/C9YB-2FWL>].

cal year 2019, the DOES took an average of 42 days to even contact employers accused of retaliation and 117 days to resolve those complaints.²²⁰ Many times, this is too little, too late. Given the precarious nature of low-wage workers' lives, the damage has already been done before the agency reaches out to the employer.

2. Concerns Over Navigating the System

"I live in a world of fear. So, I haven't really worked steady in a while," says Agda, who moonlights as a bartender while pursuing an advanced degree.²²¹ "I have a kid to support and bills to pay. The stress level is insurmountable some days, you know? It's really hard."²²² As is common in the service industry,²²³ Agda's employers have, over the years, stolen her tips, paid less than promised, and paid less than minimum wage.²²⁴ Like many, Agda is aware of her rights and expresses anger over these acts. But despite this, she has never taken formal legal action.

[I]t's a lot of work . . . a lot of follow up. They want this, they want that, then they want to call the employer and then it's like, you know, either you've moved on from that job and you just don't want to deal with it anymore, you don't want to see them anymore, or it didn't end well anyway [Y]ou just don't want to deal with it, you know? There's a lot of mental aspects to it.²²⁵

These feelings are common. Legal claims are time consuming and intimidating, and many low-wage workers report that they do not pursue their legal claims because they feel ill-equipped to navigate the legal system. Among those I spoke to, more than half (55%) named this barrier to claiming, which has two aspects: workers lack the procedural knowledge of how and where to assert their rights, and they are also—like Agda—intimidated by the prospect of legal action.

Many ordinary people do not understand even the basics of how to bring a lawsuit or make an administrative claim. For most, a law-

220. Letter from Tony A. Robinson, FOIA Officer, Dep't of Emp. Servs., to author (Dec. 2, 2019) [hereinafter D.C. FOIA Data 2019] (on file with author) (unpublished response to Freedom of Information Act Request).

221. Interview with Agda, Bartender & Student, in Washington, D.C. (2018) (transcript on file with author).

222. *Id.*

223. See Galvin, *supra* note 21, at 331.

224. Interview with Agda, *supra* note 221.

225. *Id.*

suit is out of the question. Even *filing* one is complicated, to say nothing of the many processes that follow.²²⁶ The confusing nature of the legal system, after all, is a big part of the reason why people hire lawyers.

In theory, agencies like the DOES are supposed to provide a softer and more accessible avenue for rights enforcement. In practice, many workers are unsure of how to even take the first step to trigger these agency procedures. Charlotte Alexander and Arthi Prasad found that 77% of surveyed low-wage workers did not know how or where to file a complaint about their workplace issues.²²⁷ In short, “low-wage, front-line workers often lack the legal knowledge” to meaningfully enforce their own rights.²²⁸

This is partly due to the confusing and sprawling nature of the administrative state. There are multiple federal agencies that regulate workplace civil rights, including the DOL, the Equal Employment Opportunity Commission (EEOC), and the National Labor Relations Board (NLRB). To make things more confusing, there are also parallel state- and city-level agencies. In the District, there is the DOES, the Public Employee Relations Board, and the Office of Human Rights.

As with low-wage workers in general, many people in the District do not know where to begin to figure out how to assert their rights. “I don’t know where I should go or to whom I should talk,” says Sabbir, a former fast food worker who never got overtime.²²⁹ “And maybe there’s a way we can fight about it, but I don’t know the way, how I should start, or how to do it.”²³⁰ Even those who are familiar with, for example, the DOES express confusion. Cora, who we met in the Introduction, speaks well of DOES and has participated in a variety of agency-run programs designed to help out-of-work residents. But when asked whether she might file a wage claim, she expresses confusion: “I don’t know. And I wouldn’t know how to do it.”²³¹

But workers who know what they *can* do are nevertheless reluctant to take formal legal action because they are not confident that they can successfully navigate the system. Like Agda, these workers are not held back by a lack of procedural knowledge but a desire to avoid a process that is intimidating, confusing, time-consuming, and emotionally draining. The path of least resistance often in-

226. See Fritz-Mauer, *supra* note 12, at 102–03 (2016).

227. Alexander & Prasad, *supra* note 64, at 1095.

228. *Id.* at 1098.

229. Telephone Interview with Sabbir, *supra* note 63.

230. *Id.*

231. Interview with Cora, *supra* note 2.

volves ignoring the problem or moving on. In many ways, and for many people, it is easier to swallow the frustration and pain of wage theft than to deal with the hassle of fighting an uphill battle.

For example, Miranda worked at a large department store that frequently underpaid her.²³² After it happened once, she started to carefully track her hours in a notebook. Four or five times, she used her own records to confront her supervisor; four or five times, her employer cut her a check.²³³ Not surprisingly, Miranda was not alone. “[My supervisor] gave me a check, and after I did it, four other people had to get checks!” Miranda says.²³⁴ The employees got together and talked about filing a group complaint with DOES, but ultimately gave up the idea. “I thought about going to the wage and labor board,” she explains,

because a lot of people were complaining about it and I thought, ‘there’s power in numbers.’ If a group of us feel that we’ve been treated unfairly, then probably it’d be quicker than it just being one person. But of course, mostly everybody at that point that was going through the same injustice I was going through just wanted to get the hell out of there.²³⁵

Eventually, that is what Miranda herself did, deciding it would be simpler and easier to just move on to a new job.²³⁶

3. Lack of Power, Lack of Faith

The last major barrier to claiming is that many low-wage workers do not believe that speaking up will do any good. Agitating at work or filing a complaint is not likely to achieve justice, and worse, could carry significant costs. There are also two aspects to this barrier to claiming: First, low-wage workers have a keen understanding of the stark power imbalance that exists between them and their employers; second, they lack faith in the government, and do not believe that it will protect or advocate for them.

As discussed in Section III.C.1, this imbalance is amplified when a person is economically or socially vulnerable, which explains why wage theft is more pronounced among the working poor, undoc-

232. Interview with Miranda, *supra* note 65.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

umented immigrants, non-unionized employees, women, and minorities.²³⁷ As Maria, a cleaner, puts it, “[employers] have the money, they have the power, and it’s your word against their word so I don’t think there’s anything you can really do about it.”²³⁸

Employers understand this power imbalance, and many use it to their advantage. When Ameen’s former boss, an ambassador to the United States, taunted him by inviting him to file a lawsuit over his unpaid wages,²³⁹ the ambassador was relying on the fact that Ameen has very little money and no legal knowledge. When Cora’s supervisor threatened to fire her after Cora demanded her wages,²⁴⁰ she was sending a clear message about speaking up. Employers like these, who refuse to comply with the most basic workplace laws, do so confidently because they can do so with impunity. It is a theme that activists and attorneys see repeatedly. Allen Cardenas, who coordinated a legal clinic that focuses heavily on wage theft complaints, explains that:

Fear and intimidation [are] what threaten[] workers the most. . . . They usually have family to support, they have bills, and they don’t have the time to stop working and find a new job if they raise hell at their current job. Stability’s important for them, and I understand why you’re scared to ruffle some feathers, because it could cost you your job and it might mean that your kids can’t eat.²⁴¹

Workers hear these messages loud and clear, and they understand how employers strategize around this power dynamic. “[W]hen people know they can take advantage of others to their own benefits, and they know the other person is kind of scared to even reach out or even find information, they have what they want,” says Naomi, summing up the perspective of many.²⁴² This power imbalance, of course, also feeds into the fear of retaliation that many people have. As discussed above, retaliation can take many forms and be hard to prove, and workplace disputes often come down to one person’s word against another’s. This is thin proof upon which

237. COOPER & KROEGER, *supra* note 11, at 8, 21–28; BERNHARDT ET AL., *supra* note 13, at 41–48.

238. Telephone Interview with Maria, Cleaner, in Washington, D.C. (2018) (transcript on file with author).

239. Interview with Ameen, *supra* note 54.

240. Interview with Cora, *supra* note 2.

241. Interview with Allen Cardenas, Clinic Coordinator, Washington Laws.’ Comm. for Civ. Rts. and Urb. Affs., in Washington, D.C. (2018) (transcript on file with author).

242. Interview with Naomi, Low-wage Worker, in Washington, D.C. (2018) (transcript on file with author).

to risk a claim and, perhaps even worse, retaliation. One stakeholder describes a typical retaliatory event:

When you're told you'll be taken off the schedule, it's not like you're getting a formal e-mail in writing where you have any proof of this. It's an interpersonal conversation, oftentimes with nobody else around to hear. It's your word against theirs, so workers have very little power to react against it, to push back, to prove offensive retaliation where it is happening in the workplace.²⁴³

This present lack of power that many people feel is compounded by the second aspect to this barrier to claiming: many low-income people lack faith in the government and do not trust it to serve them well. In D.C.—as well as many other places—this belief is justified by the poor job that the government does at enforcing basic wage and hour laws. This might sound surprising. After all, the District recently passed one of the most powerful anti-wage theft laws in the country.²⁴⁴ But the fact is, D.C. and many other governments are largely inactive.²⁴⁵ Responsible agencies fail to build lasting relationships around the issue, investigate wrongdoing, process complaints quickly, and vigorously apply the law.

The numbers from the District tell the story of a government agency failing its mandate. In the District, the sub-agency responsible for investigating and remediating wage theft is the Office of Wage-Hour (OWH), which is contained within DOES. OWH has about 30 full-time employees and an annual budget of approximately \$3.6 million.²⁴⁶

These might sound like large numbers, but they are inadequate compared to the frequency and impact of wage theft. OWH simply does not have the staff or money that it should. Beyond that, though, the agency itself does a poor job of enforcement. In particular, there are three serious problems with OWH, which are likely repeated in dozens of places across the country, and which contribute to workers' lack of faith in the government.

First, OWH misses the overwhelming majority of instances of wage theft. By its own numbers, it does not learn of more than 99.5% of all minimum wage violations, receiving fewer than 100 complaints while conservatively estimating that there are nearly

243. Interview with Joanna Blotner, *supra* note 195.

244. See *infra* Section IV.A.

245. See *supra* Section II.E.

246. GOV'T OF D.C., FY 2020 APPROVED BUDGET AND FINANCIAL PLAN B-94 (2019).

40,000 violations per year.²⁴⁷ And although employers commit wage theft in all its various forms with stunning frequency, the agency receives only 700–800 wage theft-related complaints total each year.

Second, workers who go to OWH experience significant delays and problems, leaving many feeling cast aside and ill-served. To be fair, OWH has made improvements to its timeline in recent years, and in fiscal year 2019 even adhered to the statutory requirement that it issue an initial ruling within 60 days of serving an employer with a complaint.²⁴⁸ In crucial ways, though, it is slow and inefficient. It takes about 51 days to serve an employer. Worst of all, retaliation complaints languish. On average, it takes the agency about 117 days to resolve complaints—including six weeks to even make initial contact with the employer.

Olivia experienced these delays firsthand. After she filed a claim for unpaid wages using DOES' online form, she heard nothing for three weeks.²⁴⁹ Eventually, she contacted OWH, who put her in touch with the investigator in charge of her case. Over the next several weeks, he asked her questions she had already answered and requested documents she had already submitted—in some cases more than once.²⁵⁰ In particular, it was clear that the agency had lost the key pieces of evidence she had attached to her initial complaint, including her offer letter, pay stubs, and termination letter.²⁵¹ It took the agency seven weeks to even issue a complaint to her former employer, and for the next six months she saw almost no movement on her claim.²⁵²

There are real costs to this beyond the aggravation of slow-moving justice. A great deal can happen in a short amount of time, especially to vulnerable people. For example, after Lisa, a counselor at a transitional living facility for teen moms, successfully pursued a claim for unpaid overtime through OWH, her employer, a faith-based non-profit, suddenly and illegally evicted her from the apartment complex that the organization housed its employees in.²⁵³ Lisa wound up living in her car, depressed, hungry, and des-

247. In a study commissioned by DOES, researchers used Census data to estimate the frequency of minimum wage violations in the District, and predicted that in 2015, 39,502 were paid less than the minimum wage. YE ZHANG, MASON MILLER & PAULA MIAN, MINIMUM WAGE IMPACT STUDY 39 (2017). The office, however, receives fewer than 100 complaints annually involving “minimum wage/overtime.” D.C. FOIA Data 2019, *supra* note 220, at 3.

248. See D.C. FOIA Data 2019, *supra* note 220, at 3.

249. Text Message from Olivia, *supra* note 7.

250. *Id.*

251. *Id.*

252. *Id.*

253. Interview with Lisa, Couns., in Washington, D.C. (2018) (transcript on file with author).

perate.²⁵⁴ She filed a retaliation complaint with OWH, but it never went anywhere.²⁵⁵ She saw some movement early on, but only in the face of Lisa's "persistent persistence."²⁵⁶ "I would push it [forward]," Lisa explains, "then I would stand back because I didn't want to go through the pain" of having to constantly pursue justice.²⁵⁷ Almost two years after the fact, Lisa had given up on the agency resolving her retaliation claim one way or the other. "There's no driving force from their end . . .," she says.²⁵⁸

The third crippling problem with OWH is that the agency imposes light judgments and collects little money. District law states that the government "shall" (meaning *must*²⁵⁹) require employers who steal wages to pay aggrieved workers liquidated damages equal to triple their unpaid wages.²⁶⁰ The only way employers can avoid this mandate is by admitting their fault when the agency first contacts them, which reduces the liquidated damages from 300% of unpaid wages to just 100%.²⁶¹ Realistically, few employers take this route. Instead, the strong majority ignore the agency or contest the claims, meaning it is reasonable to expect that if OWH is applying the law as written, aggregate liquidated damages imposed by the agency will land much closer to 300% than to 100% of unpaid wages.

This is far from the case. OWH does not seriously sanction the bad actors who come before it. Last year, through its complaint-based process, the agency assessed about \$483,000 in unpaid wages but only about \$451,000 in liquidated damages.²⁶² In other words, the agency does not even impose liquidated damages of 100% of unpaid wages against recalcitrant employers, much less the treble damages envisioned by the Wage Theft Prevention Act. Nor does OWH collect much money: During the same period of time, the agency took in about \$194,000 in unpaid wages (40% of the total assessed that year) and only \$70,500 in liquidated damages (15.5% of the total assessed).²⁶³

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. D.C. Bd. of Elections & Ethics v. D.C., 866 A.2d 788, 796 (D.C. 2005).

260. D.C. CODE §§ 32-1308.01(c)(6)–(7) (2017).

261. *Id.* § 1308.01(c)(4) (2017).

262. D.C. FOIA Data 2019, *supra* note 220, at 3.

263. *Id.* OWH also has the authority to level fines and penalties, which flow to the government rather than the aggrieved worker. D.C. CODE § 32-1307.01(b) (2017). The agency's collection rate for these sanctions are even worse. In FY 2019, it collected less than 5% of what it assessed. D.C. FOIA Data 2019, *supra* note 220, at 3.

To summarize: DOES is unaware of the overwhelming majority of instances of wage theft that take place in the District. Because it, like many enforcement bodies, eschews proactive enforcement strategies in favor of passive processes,²⁶⁴ it rarely takes any action on behalf of those who suffer wage theft. This includes—by the government’s own estimates—more than 99.5% of workers whose employers pay them less than minimum wage. When people do complain, the agency is slow to contact their employers, process their cases, and protect them from retaliation. Finally, once OWH does process a person’s claim, it gives employers far more lenient punishments than are required by the law, failing to either impose meaningful judgments or enforce penalties and collect money.

The slow burn of this process breeds resentment among the class of people who have nowhere to turn but to the government for help. Frequently, those who go to DOES feel frustrated, disregarded, and ill-served. “It’s no good,” says Caleb, speaking about the agency’s employees. “[Y]ou come to work, but you don’t go to work! [I]t looks like, down DOES, looks like you’re going to church. Everybody dressed up, looking good, but you ain’t doing nothing!”²⁶⁵

Some people view the government and its employees as inefficient and unmotivated, if not outright lazy. But others take a much more cynical view. It is not just that the government is inefficient. The system itself is designed to favor the Haves at the expense of the Have-Nots.²⁶⁶ Earl, the journeyman plumber we met in the Introduction, is one such cynic. He describes a race to the bottom in the construction industry, where contractors refuse to hire District residents, deny overtime, pay unfairly low wages, and engage in rampant misclassification. “[T]hese companies that have come into this city to do work have no licenses to do work, but it’s okay for them to work,” he says.²⁶⁷ He does not mean that they are operating legally. Far from it. Earl’s point is that the city’s leadership is not interested in taking meaningful action. “There’s definitely a lack of political will! There’s something in it for them. I mean, every politician wants something out of it. If I’m gonna do something for you, what do I get out of it?”²⁶⁸

The notion that wage theft may be effectively attacked through policies of individual empowerment is consistent with the idea that

264. See Fine, *supra* note 102, at 361; see also Weil, *supra* note 186, at 4–5.

265. *Id.*

266. See Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974).

267. Interview with Earl, *supra* note 4.

268. *Id.*

wage theft is a personal harm best addressed through the passive enforcement mechanisms of the civil justice system. But the fact is, workers who have their wages stolen do not come forward, even when the law reflects the gold standard of anti-wage theft reforms.

The barriers to claiming are serious, effectively precluding the vast majority of low-wage workers—even well-educated ones—from pursuing formal legal action. The common thread tying these impediments together is the low status that these people have on the social and economic hierarchies of society. But while these problems are significant, they are not insurmountable. There *are* concrete policy changes that would effectively address these concerns. The next Part details what changes must be implemented if jurisdictions want to do more than just attack wage theft at the margins.

IV. REFORMS IN CONTEXT

This Article has debunked two key ideas about wage theft. First, that it is rightly understood as an individual harm; and second, that wage theft can be and *should* be addressed through policy choices that, on their face, empower or incentivize private actors to enforce the law. Although workers' rights advocates broadly understand that these premises are false, they are still powerful and influential, and drive both formal legal reform and how the government enforces workplace laws.

“Bottom-up workplace law enforcement,”²⁶⁹ which necessarily depends on low-wage workers holding employers accountable, is destined to fail in its current form. Because of the significant barriers that effectively preclude the vast majority of low-wage workers from bringing formal claims, this approach will only ever, at most, attack wage theft on the margins. By and large, the workers who do come forward and pursue formal rights enforcement fall into two groups. First, they are people who have experienced wage theft that is, to them, uniquely severe or offensive. Ameen, for instance, did not pursue formal legal action until his unpaid wages crested \$40,000 and threatened him with homelessness.²⁷⁰ Lisa stayed silent until one egregious week where she worked dozens of hours of overtime and still received only her base salary.²⁷¹

The second group consists of those workers who have left their jobs. At that point, the calculus of risk changes dramatically; retaliation stops being an overriding concern, and for some, the poten-

269. Alexander & Prasad, *supra* note 64.

270. Interview with Ameen, *supra* note 54.

271. Interview with Lisa, *supra* note 253.

tial monetary and emotional benefits of bringing a claim start to outweigh the expected costs. Recall Maynor, whose eventual wage claim ultimately resulted in a \$100,000 judgment in his favor.²⁷² Although his wage theft was blatant and damaging, he did not take action until his employer fired him.

Despite these practical realities, most government agencies rely on a passive, complaint-based approach to enforcement.²⁷³ This is an inherently reactive strategy: the government waits for workers to report their employers for wage theft, and then acts to bring those specific employers into compliance. It is also ineffective.

But this situation is neither hopeless nor intractable. To meaningfully attack wage theft, jurisdictions must re-orient how they think about and address it. They must understand, first, that wage theft is a widespread *social* problem that requires a *public* response. Statutory legal reforms are important, but they must reflect this fact and, in recognition of the practical barriers to private enforcement, empower *institutions* to action—not just private individuals. Those institutions must also recognize the inadequacy of passive, private enforcement schemes and adopt a model of strategic enforcement, which focuses on shifting entire industries by cost-effectively bringing justice *to* workers instead of waiting for them to step forward. This Part outlines the bare minimum of legal and strategic reforms that jurisdictions should implement if they hope to meaningfully address this problem.

A. *Statutory Changes: Adopting the District of Columbia's Enforcement Regime*

Standing alone, the District's statutory reforms are insufficient. But they are still a crucial first step, and any jurisdiction concerned about wage theft must, at a minimum, adopt them.

To reiterate, D.C. created a legal framework that, on paper, promises aggressive rights enforcement. It imposes significant fines and penalties and entitles claimants to recover three times their unpaid wages as damages. Furthermore, the District's recordkeeping requirements and generous fee-shifting provisions make it easier for a larger class of people to find legal representation and prove their claim. Perhaps most importantly, D.C.'s recent reforms significantly expanded the power of the government to find and punish wage theft. The Office of the Attorney General has inde-

272. Interview with Maynor, *supra* note 161.

273. Galanter, *supra* note 266.

pendent enforcement authority,²⁷⁴ and the DOES has broad power to investigate, punish, and remediate wage theft.²⁷⁵

The quantitative and qualitative facts about wage theft in the District underscore how these reforms have not, for many, lived up to their promise. But the city's legal framework has the potential to be incredibly effective and contains tools that could be—and sometimes have been—wielded to great effect. Jurisdictions that wish to meaningfully enforce basic workplace standards should, at a minimum, adopt these same reforms.

B. *Additional Reforms: Misclassification and Private Institutional Action*

Because individuals are extremely unlikely to even *attempt* formal rights enforcement, reforms should empower institutions with new authority. This institutional response should come primarily from public entities, which are able to collect, distribute, and leverage resources in a way that most private actors cannot. But there are also non-governmental institutions that can and do play an important role in labor standards enforcement.

In particular, workers' rights-based non-profit organizations and labor unions are naturally incentivized to find and prosecute wage theft. These institutions are ideologically motivated to protect the rights of working people and, additionally, unions are directly threatened by employers whose labor practices are illegal. This is especially true in the construction industry because contracts are typically assigned to the lowest bidder, and contractors can cut their costs by nearly one-third just by misclassifying their employees.²⁷⁶ Legal reforms should do more to leverage these institutional actors by creating *qui tam* causes of action regarding independent contractor misclassification.

As discussed in Part I, misclassification is a common form of wage theft. In addition to the problems already discussed, independent contractors are responsible for paying a higher tax rate on their earnings than employees. Employees and employers share the burden of payroll taxes, with each paying 7.65%; in contrast,

274. D.C. CODE § 32-1306(a)(2) (2018) (stating that “[t]he Attorney General, acting in the public interest, including the need to deter future violations, may bring a civil action . . . against an employer or other person” who violates various wage and hour laws).

275. See D.C. CODE § 32-1308.01 (2017).

276. Tom Juravich, Essie Ablavsky & Jake Williams, *The Epidemic of Wage Theft in Residential Construction in Massachusetts* 1–2 (UMass-Amherst Lab. Ctr., Working Paper, 2015).

independent contractors, must pay the entire 15.3% themselves.²⁷⁷ These costs quickly add up: a misclassified worker making just \$20,000 per year can expect to pay an extra \$1,530 in taxes.

In most jurisdictions, it is too difficult for private actors to recover the cost of these extra taxes from employers because they cannot sue for them. There simply is not a cause of action.²⁷⁸ A misclassified worker's only real option is to fill out various forms with the IRS.²⁷⁹ The IRS is then supposed to investigate the situation and determine whether the filer is an employee or independent contractor.²⁸⁰ After that, the IRS might adjust the worker's tax liability.²⁸¹

This process is less direct and more complicated than it should be. Future legislative changes should both 1) enable misclassified employees to directly sue their employers for overpaid taxes and 2) incentivize institutions to action through *qui tam* provisions.

Qui tam provisions empower private actors to file civil lawsuits to enforce a government interest.²⁸² They are most commonly associated with the federal False Claims Act, although they harken back to thirteenth century England.²⁸³ Under the False Claims Act, either the Attorney General or a private party (called a "relator") may sue a third party who has (allegedly) defrauded the government by making a false claim for payment.²⁸⁴ After the relator files suit, the government has 60 days to investigate and decide whether it will prosecute the case.²⁸⁵ If it does, then the relator may still participate as a party and is entitled to recover up to 25% of the final damages plus reasonable attorney's fees.²⁸⁶ If the government pass-

277. Randy Gardner et al., *Independent Contractor or Employee?*, 26 J. FIN. PLAN. 31, 31–32 (2013).

278. See *Glanville v. Dupar*, 727 F. Supp. 2d 596, 599–602 (S.D. Tex. 2010) (explaining that the broad trend in federal courts is to find there is no private cause of action to sue employers for unpaid payroll taxes).

279. In particular, people can assert their employer has unpaid payroll taxes by filing Form 8919 with their taxes. See *About Form 8919, Uncollected Social Security and Medicare Tax on Wages*, IRS, <https://www.irs.gov/forms-pubs/about-form-8919> [https://perma.cc/HVM7-27BE] (last updated Sept. 22, 2020). Workers may also request a classification determination from the IRS by filing Form SS-8. *About Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, IRS, <https://www.irs.gov/forms-pubs/about-form-ss-8> [https://perma.cc/83QR-RRBD] (last updated Sept. 20, 2020).

280. I.R.S. Notice 989 (Rev. 8-2015) (2015), <https://www.irs.gov/pub/irs-pdf/n989.pdf>.

281. *Id.*

282. Christina Orsini Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 951 (2007).

283. *Id.* at 951–52.

284. 31 U.S.C. § 3729; 31 U.S.C. § 3730(b)(1).

285. *Id.* § 3730(b)(2).

286. *Id.* § 3730(c)(1), (d)(1).

es on the case, the relator may pursue it and, if successful, recover up to 30% of damages plus attorney's fees.²⁸⁷

Applying these same principles and procedures to the issue of independent contractor misclassification would serve the public interest in three ways. First, it would fill a gap in the law, creating a way for workers to recover for a distinct harm. Second, it would provide a powerful tool for attacking and redressing bad behavior by further incentivizing *institutions* to bring charges. Not only would the government learn about viable cases, but non-profit organizations, labor unions, and private law firms have knowledge, resources, and power that individual victims of wage theft do not, and therefore have power that ordinary working people lack. Finally, such suits would recover unpaid taxes.

C. *Strategic Enforcement: Moving Beyond A Passive Approach*

Written legal reforms can only do so much. As important as protective statutes are, it is just as crucial that policymakers adopt enforcement strategies that acknowledge the realities of wage theft and account for the barriers that, for all practical purposes, prevent individual rights enforcement. Most government agencies do not do this, however. As discussed in Part II, wage and hour enforcers largely employ a passive, complaint-based approach.

This is a fundamentally inadequate way to combat wage theft, but it is not the only one. In the ongoing conversation about policing labor standards, there is a concept known as “strategic enforcement.” In summary, strategic enforcement is about the effective use of limited resources to achieve the long-term goal of enhancing compliance with basic workplace laws.²⁸⁸ It is “a deliberate approach to change the practices of wage violation that have become commonplace in certain industries,” and it does so by “tak[ing] account of industry-specific business models, dynamics, and regulations with the goal of creating ripple effects that will influence the compliance behavior of a number of employers at once.”²⁸⁹

In part, strategic enforcement requires government agencies to adopt new enforcement strategies. But they must also adopt a long-term mindset, with the goal being to create ongoing, sustainable compliance.²⁹⁰ To that end, agencies must do three things: 1) allo-

287. *Id.* § 3730(d)(2).

288. Weil, *supra* note 186, at 1.

289. D.C. JUST PAY COAL., MAKING OUR LAWS REAL 4 (2018).

290. Weil, *supra* note 186, at 12–19.

cate resources where they will have the most impact; 2) focus on changing the behaviors that result in legal violations in the first place; and 3) find mechanisms and implement strategies that create ongoing compliance.²⁹¹ This requires agencies to shed their long-held passive habits in favor of *proactive* enforcement efforts, shifting resources toward active strategies with the specific goal of establishing a robust presence and creating industry-wide cultures of compliance. As Professor Janice Fine explains, however, “[t]he crisis of compliance in low-wage industries will not be solved by the state alone.”²⁹² To be successful, strategic enforcement “require[s] creative collaboration between government, workers, organizations, and—where they exist and are willing to participate—high-road firms.”²⁹³

These ideas might seem intuitive and obvious. But in practice, the idea of strategic enforcement stands in stark contrast to how most government agencies tasked with remedying wage theft operate,²⁹⁴ including DOES and similar entities across the country. As discussed above, most agencies essentially play whack-a-mole with bad employers, only going after them when workers volunteer information. But low-income people almost never file complaints with agencies.

Reactive approaches do not prevent wage theft as effectively as proactive ones. They also leave workers open to harm because, by definition, the government enters the equation only after employers violate the law and workers put themselves at risk. While this is also true of the civil justice system, unlike courts, many government agencies have the explicit authority to seek out violations and proactively protect workers’ rights.²⁹⁵ Unless and until they do so, wage theft will continue to run rampant in and wreak havoc on the lives of working people.

The remainder of this Part outlines the most important strategic efforts that government agencies can make to achieve long-term deterrence. As discussed below, a smart and systematic strategy requires these entities to: 1) build confidence among stakeholders, including workers, community organizations, advocates, and em-

291. *Id.* at 2.

292. Fine, *supra* note 102, at 382.

293. *Id.* “High-road” employers are those who not only follow labor and employment laws, but also actively work to provide decent jobs with good wages and benefits. *See Principles of High-Road Employers*, AM. SUSTAINABLE BUS. COUNCIL, <https://www.asbcouncil.org/principles-high-road-employers> [<https://perma.cc/Z7U9-AYPH>]. They are often outspoken about the importance of fair and dignified workplaces, and many would be willing to work with the government to reduce wage theft.

294. Alexander & Prasad, *supra* note 64, at 1093–95.

295. *See, e.g.*, D.C. CODE § 32-1331.05(a) (2013) (establishing that the Mayor may investigate wage and hour violations “on his or her own initiative”).

ployers; 2) engage in proactive investigations; 3) educate workers about their substantive and procedural rights; 4) utilize all available enforcement tools and publicize such activity; and 5) adopt an express anti-wage theft mindset.

1. Building Confidence Among Stakeholders

An effective attack on wage theft necessarily requires workers, advocates, and employment lawyers to have confidence in the government agencies responsible for labor standards enforcement. Many low-income people, however, express a lack of faith in government, viewing it as a distant thing defined by ineptitude or, worse, corruption.²⁹⁶ Others, especially those undocumented, are afraid to go to the government for help.²⁹⁷ To address these issues, government agencies must strive to forge close working relationships with local actors, including community organizations, advocates, and employment lawyers.

Whether low-wage workers distrust or are afraid of the government, stakeholder organizations can serve as trusted intermediaries between authorities and community members. Community leaders, labor unions, and advocates interact closely with working people, and often have credible knowledge of wage theft. These actors are able to conduct outreach, collect information, lend the government some measure of their earned trust and prestige, and help low-wage workers navigate administrative processes. By tapping into the energy and knowledge of these stakeholders, enforcement agencies could vastly improve and increase their reach without expending significant additional resources.

Relatedly, government agencies should actively encourage administrative participation by educated activists and attorneys. In some jurisdictions, this might require legislative reforms entitling agency-litigants to recover reasonable attorney's fees. But even in D.C., where there is administrative fee-shifting,²⁹⁸ attorneys and activists are reluctant to engage with DOES because they report that the agency is unwelcoming and hard to work with.²⁹⁹ Lawyers and

296. See *supra* Section III.C.3.

297. See Fussell, *supra* note 217, at 593–96.

298. D.C. CODE § 32-1308.01(c)(4), 01(c)(6)–(7) (2017).

299. For example, two plaintiff-side attorneys named Owen and Steve shared with me a story about their efforts to access DOES' administrative process on behalf of their clients. Owen explained that they attempted to invoke the agency process for some clients, but "[DOES] put up so many barriers to actually using it [T]he net result was that we didn't feel comfortable at all." Steve added that he "also felt that there was some hostility, frankly, to our entreaties or our attempts to invoke it!" Interview with Owen and Steve, Att'ys, in Washington, D.C. (2018) (transcript on file with author).

law school clinics, however, can play an important role. Their participation could improve efficiency and justice by helping to ensure that proof and arguments meet a high standard. If done right, it would also build governmental prestige over time as these stakeholders become more confident in referring workers.

Finally, agencies should build relationships with high-road employers, who typically have both a financial and ideological interest in wage and hour enforcement. In many industries, these people are aware of which of their competitors operate in violation of the law, and many would gladly share that information with the government.

2. Disputing and the Power of Education

As discussed, the vast majority of low-wage people who experience employment rights violations do not approach the government for help. Many of these people stay silent because they do not understand their rights, do not know where to go for help, or do not believe that the government will be willing or able to help them. Agencies could address these key issues through widespread education campaigns. These campaigns must teach people about their rights, including where to go for help, *and* draw publicity to the problem of wage theft in general.

Standing alone, education is not enough. After all, many of the barriers to claiming analyzed in Part III preclude people from speaking up even when they are fully aware of both their mistreatment and their legal options. But when almost 80% of low-wage workers report that they do not know who to talk to when their rights are violated,³⁰⁰ there is obviously much more work to do.

Enforcement agencies should engage in broad and sustained campaigns to inform low-income people of their wage-related rights. To be successful, agencies must understand the lives of working people and make appropriate outreach efforts. Because many low-wage workers do not own cars and rely on public transit, agencies should place posters and signs on buses and trains. Advertisements should play on local radio stations, including in Spanish and other prominent local languages. Most importantly, representatives from enforcement agencies should directly engage with their constituents by going into community spaces, including churches, shelters, and legal clinics. Face-to-face interactions are key to making government processes and actors seem accessible,

300. Alexander & Prasad, *supra* note 64, at 1095.

dedicated, and caring. So too are communications through the kinds of intermediaries whom community members tend to trust, like social service non-profits and neighborhood leaders.

Similarly, the government must engage with and educate employers. A significant amount of wage theft occurs not out of malice but because of employer ignorance. Agencies should work with employer-side organizations to develop materials that can be used to quickly and easily inform employers and managers about their legal obligations and the consequences for violating them. Although this kind of information is available online, it is not always easy to find and understand. It could, however, be disseminated cost-effectively through existing processes. For example, each time an employer applies for or renews a business license, they should receive key information about their workplace obligations.

Finally, education campaigns must also draw attention to wage theft itself, explaining what it is and why it is wrong. In light of its realities, the government should call wage theft what it is: a crime, a violation of workers' fundamental rights, an attack on fair competition, and an affront to the way things should be.

California and Seattle provide models for how the issue should be framed. The California Labor Commissioner's Office has created a dedicated, attractive, easy-to-navigate web page about wage theft.³⁰¹ This website has clear information about workers' rights, promises protection from retaliation (even for undocumented workers), and has simple directions for filing a variety of complaints.³⁰² Similarly, the Seattle Police Department actively encourages victims of wage theft to file *criminal* complaints and makes it easy to do so through a basic online form.³⁰³ These jurisdictions have both made rights knowledge easily accessible and defined wage theft appropriately.

3. Adopting a Model of Proactive Investigations

Perhaps most importantly, administrative bodies *must* move beyond their one-off, complaint-based approach to enforcing basic workplace laws. The empirical realities presented in this Article lead to only one conclusion: the standard, passive approach is destined to fail. Agencies must be proactive. They must bring to bear

301. See WAGE THEFT IS A CRIME, www.wagetheftisacrime.com [<https://perma.cc/DC52-K7LT>].

302. *Id.*

303. *Wage Theft*, SEATTLE POLICE DEP'T, <https://www.seattle.gov/police/need-help/wage-theft> [<https://perma.cc/48FX-PCRJ>].

all of their tools, manpower, and authority to pursue comprehensive investigations. This will require both expanding the frequency of directed (agency-initiated) investigations and changing how the government responds to individual complaints.

First, all enforcement bodies must prioritize actions and investigations in industries that are rife with noncompliance, including service, manufacturing, cleaning, construction, and retail.³⁰⁴ These businesses often employ undocumented or otherwise transient workers who are especially vulnerable and unlikely to go to the government for help. The demographics make investigations that much more difficult, but there are clear examples of agencies finding success through smart strategies.

During the Obama Administration, the Wage and Hour Division (WHD) of the DOL made significant efforts to conduct more directed investigations in high-risk industries.³⁰⁵ By partnering with worker centers, workers' rights organizations, and labor unions, the WHD was able to learn about and take action over schemes that otherwise might have flown under the radar.³⁰⁶

Similarly, California's Bureau of Field Enforcement has adopted new and unique strategies. Agents surveil businesses suspected of wage theft to gain an understanding of who works there, what typical shifts look like, and how the businesses are run.³⁰⁷ In recognition of the insecurity and fear that low-wage workers often have, they also conduct off-site interviews with workers prior to physical inspections, both to protect these people and to obtain critical information in a context free of employer coercion and intimidation.³⁰⁸

Government agencies have limited resources, so it is imperative that efforts be focused at the greatest points of leverage. A proactive model will include both random audits, like those undertaken by departments of health across the country, and vigorous investigations based on credible information about violations. Significant weight should be placed on tips provided by worker-friendly organizations, as these groups have credibility in the community and can serve as effective intermediaries.³⁰⁹

Finally, complaints that suggest broader problems should trigger employer-wide investigations. When multiple people complain, agencies should respond decisively by examining the entire busi-

304. See BERNHARDT ET AL., *supra* note 13, at 31; CARRÉ, *supra* note 26, at 2.

305. Weil, *supra* note 186, at 9–10, 19–20.

306. *Id.* at 19–20.

307. Julie Su, *Enforcing Labor Laws: Wage Theft, the Myth of Neutrality, and Agency Transformation*, 37 BERKELEY J. EMP. & LAB. L. 143, 151 (2016).

308. *Id.* at 151–52.

309. *Id.* at 153; Weil, *supra* note 186, at 9.

ness. But even some *individual* complaints should spark broad action. Both Ruben and Lisa, for example, complained to the D.C. DOES that they were working long hours without receiving overtime. DOES found in their favors. Ruben and Lisa also had coworkers with the exact same job titles and duties, strongly suggesting that their employers were violating the law across the board.³¹⁰ After all, why would a business classify only one of its employees with a particular title as exempt from overtime? The agency should have requested *all* of their employers' records for similarly situated employees. It did not. Ruben and Lisa toiled alone, which not only decreased the power and the effect of the agency's sanction, but also left them exposed to the retaliation they later experienced.

4. Utilizing and Publicizing Enforcement Tools

Passing robust statutes is a crucial first step to addressing wage theft, but unused laws are only worth the paper they are printed on. Administrative agencies should invoke their full repertoire of tools and sanctions, but many do not.

The District illustrates this point. As discussed, the government has broad enforcement authority. It may impose significant civil and criminal sanctions; workers are entitled to treble damages;³¹¹ the Attorney General can criminally prosecute wage thieves;³¹² the government may deny business licenses to those who commit "willful" acts of wage theft;³¹³ and, most importantly, DOES has the explicit authority to proactively initiate investigations.³¹⁴

But these powers do not get used. Overall, DOES assesses liquidated damages equal to *less* than 100% of assessed unpaid wages.³¹⁵ The Attorney General has not brought any criminal prosecutions for wage theft, and the District has not denied business licenses to any unscrupulous employers. Proactive investigations are unheard of.

Given the widespread prevalence of wage theft and the anemic enforcement of wage and hour laws in general, these patterns are almost certainly repeated across the country. Utilizing the full range of enforcement powers might be a controversial idea to some. In particular, the idea of criminal prosecution is conten-

310. Interview with Ruben, *supra* note 197; Interview with Lisa, *supra* note 253.

311. D.C. CODE § 32-1308(a)(1)(A)(ii) (2017).

312. D.C. CODE §§ 32-1306(a)(1) (2018); D.C. CODE § 1307(a) (2017).

313. D.C. CODE § 32-1308(i) (2017).

314. D.C. CODE § 32-1331.05(a) (2013).

315. D.C. FOIA Data 2019, *supra* note 220, at 3.

tious.³¹⁶ But while criminal prosecutions probably cannot be the silver bullet to the heart of wage theft, they can be an important and necessary aspect of a thorough and effective enforcement plan. First, sometimes they are simply appropriate, either because employers engage in such egregious schemes that they deserve a harsher-than-normal punishment, or because employers are judgment-proof and cannot be effectively punished by monetary sanctions. The kinds of fly-by-night operators who frequently steal wages in the underground economy are, often, effectively immune to civil judgments because they simply do not have real assets. Private attorneys will not sue them, and even government agencies have a hard time leveling monetary sanctions. As Paul DeCamp, the former head of the WHD under President George W. Bush explains:

[I]t's a little bit like whack-a-mole. Because a lot of these companies, they pop up, somebody hears about a problem, that company goes away. The person flees, opens up a new company under a different name, maybe in a different state, and you can expend an extraordinary amount of . . . resources trying to track down these folks with [a] questionable return at the end.³¹⁷

In these circumstances, there cannot be justice or deterrence unless there are criminal sanctions. Prosecutions send a powerful message: wage theft is a crime and the government takes it seriously. Bringing and publicizing criminal charges would help inspire low-wage workers to trust and cooperate with the government and would also signal to employers that they cannot expect to freely violate the law.

5. Adopting an Anti-Wage Theft Mindset

Finally, strategic enforcement requires agencies to adopt smart strategies *and* the right mindset. They must always keep overall goals in mind and think carefully about how to best apply limited resources to achieve long-term, industry-wide compliance. A failure to embrace this mode of thinking and to understand the lives and experiences of low-income victims of wage theft has led govern-

316. See Fritz-Mauer, *supra* note 12, at 118–20 (discussing the issue of criminalizing wage theft).

317. Interview with Paul DeCamp, Member of the Firm, Epstein Becker & Green P.C., in Washington, D.C. (2018) (transcript on file with author).

ment bodies to adopt enforcement strategies that are complaint-driven and ineffective.

To an extent, the standard approach is understandable. Responding to complaints yields short-term successes, and evaluating investigators based on how quickly they dispose of complaints is an easy metric by which to measure progress. But a complaint-driven orientation does not create the kinds of cultural shifts necessary for long-term deterrence. The best strategy for attacking wage theft is not always the one that yields the fastest or most easily-measured results. The best strategy is one that builds long-term relationships and creates ongoing compliance in an industry as a whole. The suggestions in this Part will help accomplish those goals.

For these changes to truly be successful, however, wage and hour agencies must also institute organizational shifts. They must adopt a clear-eyed and empathetic understanding of what the lives of low-wage workers are actually like. Many of the people who work at enforcement bodies might already have this knowledge, but, broadly speaking, that is not reflected in how their organizations operate. Simply put, it is entirely unrealistic to expect a passive, individualized strategy to be effective when it is a fact that the vast majority of workers whose wages are stolen will never go to the government for help.

Some would assert that when agencies adopt the reforms suggested here, they actually *hinder* their overall mission. The argument is this: government agencies are supposed to be neutral, unbiased, and fair. Bureaucratic processes were created, in part, to impose neutrality and avoid conflicts of interest. Forging close connections with workers' rights organizations, conducting focused investigations, declaring wage theft to be a "crime"—all of these tactics will decrease the political capital and overall credibility of an agency by marking it as a partisan and biased actor. This mindset is what former California Labor Commissioner Julie Su calls the "myth of neutrality."³¹⁸ As she explains, the myth consists of two underlying premises: first, the government should not appear to take sides, and second, it should not disrupt the status quo, because the normal way of doing things is neutral in some way.³¹⁹

This is the wrong way to think about the role of an agency like DOES or the DOL, and so long as decisionmakers adopt this mindset, wage theft will continue to be a widespread and deeply harmful social problem. The government bodies responsible for enforcing workplace standards are, fundamentally, on the side of the law.

318. Su, *supra* note 307, at 148–49.

319. *Id.*

That means they are on the same side as workers who experience wage theft, and they are also on the side of high-road employers who do not commit wage theft but must suffer the unfair competitive consequences. But these agencies are not, and should not even *appear* to be, sympathetic to employers who violate the law. Nor should they seem to be neutral regarding those businesses or the topic of wage theft itself.

This does not mean that the government should not be fair and evenhanded in its enforcement of the law. Far from it. Like the police, wage and hour bodies are charged with finding, punishing, and stopping a crime, and they must do so vigorously. In other words, a serious policy solution to this problem does not include administrative enforcement agencies accepting wage claims as gospel; it requires only that the agency treat such claims as legitimate, serious, worthy of robust investigation and, if credible, deserving of all available legal sanctions. Embracing this approach will lead to the kinds of institutional cultural shifts that are necessary for strategic enforcement to work as it should.

CONCLUSION

Wage theft is a pressing problem. It inflames the evils of poverty, violates society's most basic workplace standards, and creates devastating cascading harms. For working people, every dollar matters, and the loss of even a relatively small amount of money can threaten hunger, homelessness, and the loss of the basic necessities of modern life. Workers frequently report powerful feelings of anger and depression, as they feel frustrated by and helpless to do anything about their workplace rights violations. These are the facts even in the District, which has some of the most robust anti-wage theft laws in the entire country.

Individuals are not the only victims of wage theft, though. Every year, wage theft siphons billions of dollars away from communities, rendering millions more desperate, poor, and vulnerable than they would and should otherwise be. It warps labor markets, denies legitimate employers the right to fair competition, weakens key social safety net programs, and hides billions of dollars from all levels of government. It is so frequent, flagrant, and costly that it can only be understood as a social problem.

But by and large, our response to wage theft has not accounted for its empirical realities. While statutory reforms have been important and inspiring, they largely rely on individual empowerment as the primary means of attacking the problem. Even where

the government has the authority to take significant action, enforcement agencies rarely invoke the power of their mandates.

Wage theft is a complex problem, an act that preys upon vulnerabilities and an ill that plagues society at large. It is old, it is common, and it will never go away—not entirely. But much more can be done. Wage theft *can* be effectively confronted with thoughtful policy solutions. With the right reforms and an understanding that public problems require public solutions, institutions can build frameworks that much more effectively deter the crime, bring justice to low-wage workers like Cora, Earl, and Olivia, and make real the economic promise that undergirds our system: that an honest day's work deserves an honest day's pay.

