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## Policing Wage Theft in the Day Labor Market

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# Policing Wage Theft in the Day Labor Market

Stephen Lee\*

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## INTRODUCTION

The workplace is pervasively regulated. A variety of antidiscrimination,<sup>1</sup> labor,<sup>2</sup> immigration,<sup>3</sup> tax,<sup>4</sup> and healthcare<sup>5</sup> laws govern the relationships and transactions transpiring within this historically contested social institution.<sup>6</sup> But workplaces

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1. See Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012); Americans with Disabilities Act, 42 U.S.C. § 12101 (2012).

2. See Fair Labor Standards Act, 29 U.S.C. §§ 201–19 (2012).

3. See Immigration Reform and Control Act, 8 U.S.C. § 1324a (2012).

4. See 26 U.S.C. § 3402 (2012) (setting out various wage withholding requirements for tax purposes).

5. See Patient Protection and Affordable Care Act, 26 U.S.C. § 4980H (2012).

6. New institutionalist scholars argue that institutions provide frameworks that structure and give meaning to human interactions. See Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 15–20 (2005). In this vein, Catherine Albiston suggests that the workplace lends itself to new

operating within the informal labor economy—often referred to as the day labor market—consistently pass through this web of regulations.<sup>7</sup> Not surprisingly, many of these workers are immigrants (and often unauthorized immigrants), and perhaps even less surprisingly, a consistent problem confronting these workers is wage theft—the nonpayment of wages for work that has already been performed.<sup>8</sup>

Consider the following scenario: Like other day laborers, Nemelio Martinez waits at a parking lot every morning seeking work. One day he is hired to perform some landscaping work, to cut lawns for eight hours. At the end of the day, Martinez approaches the employer to receive his eighty dollars in payment. The employer begs off and promises to return the next day to hire him again. He will pay him then, he promises. Martinez never sees him again.<sup>9</sup> And it is unlikely that Martinez will find a lawyer willing or able to help him recover an amount of money that goes much further as remittances than it does as a contingent fee payment. This is wage theft. Promises of payment were made and then broken, leaving workers like Martinez with a civil right with no meaningful remedy.

In recent years, workers' rights advocates have turned to a novel tactic in the fight against employer exploitation: pushing for the criminalization of wage theft.<sup>10</sup> In a growing number of jurisdictions, advocates have persuaded lawmakers to pass laws imposing criminal sanctions—hefty fines and the possibility of imprisonment—onto employers for engaging in these bad acts.<sup>11</sup> For the most part, this quiet turn towards the criminal justice system has eluded the attention of labor law and other workplace scholars.<sup>12</sup> This may be, in part, because contemporary labor law has very little to say about the police. Modern labor law and policy is largely understood as a civil matter. Criminal law is largely seen as working at the margins of labor law enforcement.<sup>13</sup> Indeed, to the extent labor scholarship has

institutionalist analysis given the power inequalities and the historical importance of the workplace to the construction of gender and disability identities. *See id.* at 17.

7. Abel Valenzuela, Jr., *Day Labor Work*, 29 ANN. REV. SOC. 307, 315–16 (2003).

8. KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 6 (2011) (defining “wage theft” as “when an employer violates the law and deprives a worker of legally mandated wages”); NAT'L EMP'T LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE'S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT 11 (2011), available at <http://www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf?nocdn=1> (“Wage theft is a term of art that means cases in which an employer fails to pay a worker.”); Elizabeth Fussell, *The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery*, 52 SOC. Q. 593, 593, 597 (2011).

9. I lifted this fact pattern from Daniel González, *Phoenix Treats Cheating Laborers as a Criminal Act*, ARIZ. REPUBLIC, Feb. 11, 2006, at 1A, available at [http://members.tripod.com/phoenix\\_copwatch/mud/police-news/cw2564.html](http://members.tripod.com/phoenix_copwatch/mud/police-news/cw2564.html).

10. *See* NAT'L EMP'T LAW PROJECT, *supra* note 8, at 17–18.

11. *See State, County, City*, WAGE THEFT, [http://wagetheft.org/wordpress/?page\\_id=1634](http://wagetheft.org/wordpress/?page_id=1634) (last visited Mar. 29, 2014) (offering an interactive map marking where wage theft laws exist after successful campaigns and where other campaigns are underway).

12. One exception is Rita J. Verga, *An Advocate's Toolkit: Using Criminal “Theft of Service” Laws to Enforce Workers' Right to be Paid*, 8 N.Y. CITY L. REV. 283 (2005).

13. The most notable example is the enforcement of child labor laws. For example, the Fair Labor Standards Act subjects employers to the possibility of imprisonment for six months, but only for

addressed criminal law's role in regulating the workplace, it has largely offered up historical work examining the period leading up to and lasting through the New Deal.<sup>14</sup> Yet, the growing movement to criminalize wage theft demonstrates that criminal law is returning to the workplace after a long period of desuetude.

Those who advocate for the criminalization of wage theft often make two points. First, that existing channels for resolving wage theft can be costly, time-consuming, and confusing for workers—hence, the need for wage theft laws that enable advocates to marshal the relatively more accessible set of resources of the criminal justice system.<sup>15</sup> Calling the police to report the crime of wage theft takes much less time (and can be much more persuasive in the eyes of employers) than finding a lawyer to take the case or filing a claim with the relevant labor agency. A second point they often recognize is that unauthorized immigrant workers comprise a significant portion of the day labor pool.<sup>16</sup> These are the workers who fill jobs that citizens famously refuse to take.<sup>17</sup> Neither advocates nor scholars have adequately addressed whether or how these two points fit together. They have neglected to answer whether seeking out a criminal law solution designed to address the problems experienced generally by low-wage workers can help mitigate the same problems suffered specifically by unauthorized immigrant workers whose very presence in the United States renders them removable.

In this Essay, I focus on the challenges of enforcing wage theft laws within those industries dependent on unauthorized immigrant labor. I argue that federal immigration enforcement programs—ranging from funding inducements to information-sharing schemes to collateral penalties—dampen the promise of turning to the police as allies in the effort to eradicate wage theft. Specifically, local law enforcement agencies (LEAs) that consider protecting unauthorized immigrants (through the enforcement of wage theft laws) must do so amid competing pressures

repeat offenders. *See* 29 U.S.C. § 215(a)(4) (2012) (referencing § 212, which prohibits among other things “oppressive child labor”); *Id.* § 216(a) (creating the penalty of imprisonment for repeat offenders of § 215).

14. *See, e.g.,* VICTORIA C. HATTAM, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* 30–75 (1993) (examining the prosecution of criminal conspiracy violations to regulate workplace disputes during the nineteenth century); Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1, 6–24 (2010) (discussing the role that public and private police played in ousting workers engaging in sit-down strikes during the New Deal Era). *But cf.* Ahmed A. White, *The Crime of Staging an Effective Strike and the Enduring Role of Criminal Law in Modern Labor Relations*, 11 J. LAB. & SOC'Y 23, 23–26 (2008) (discussing the enduring role that criminal law plays in regulating labor disputes).

15. *See* Verga, *supra* note 12, at 286–90 (advocating the use of states' criminal laws, such as “theft of service” statutes, to criminalize wage theft, rather than federal and state wage protection laws because the wage protection laws lack enforcement).

16. ABEL VALENZUELA, JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES 17 (2006), available at [http://www.sscnet.ucla.edu/issr/csup/uploaded\\_files/Natl\\_DayLabor-On\\_the\\_Corner1.pdf](http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf) (finding that “[t]hree-quarters of the day-labor workforce are undocumented migrants”).

17. *Id.* at 9 (describing the kind of work done by day laborers, such as “a variety of manual-labor jobs, most of which involve difficult and tedious physical labor”).

to identify and detain unauthorized immigrants (through the enforcement of federal immigration laws). The structure and design of these federal immigration enforcement programs make it difficult for LEAs to fully withdraw from the larger enterprise of identifying and removing immigrants, which is necessary to effectively enforce wage theft laws in immigrant-dominated communities.

My point here is not to dissuade labor rights advocates from ever turning to the criminal justice system for help in the fight against workplace exploitation. I see the same limitations of the current civil labor regime, and I share their appreciation of the accessibility and leverage offered by criminal law. Rather, my point is to identify places where we might refine efforts to protect unauthorized day laborers against the crime of wage theft, which is why I conclude the Essay with a research agenda of sorts. To argue that federal immigration programs frustrate the enterprise of policing wage theft is not to argue that they render that enterprise impossible or undesirable. But assessing whether the police can solve the problem of wage theft in the day labor market requires further study. Here, I lay out further research trajectories to help answer the question of when policing wage theft can be both effective and desirable.

Two brief points on the scope of this Essay. First, my analysis largely focuses on the police and prosecutors, but the criminal justice system obviously contains a much broader cast of characters. Sentencing judges, parole boards, and probation officers all play a part in administering criminal justice to those caught up in the system, and by extension, all have varying degrees of power to thwart or facilitate the removal of the noncitizens they encounter. But to date, the police and prosecutors are those criminal law actors who have been most explicitly absorbed into the immigration bureaucracy, and probably for this reason, scholars have paid them the greatest attention.<sup>18</sup> Thus, the police and prosecutors provide the thickest descriptive context for analyzing the consequences of criminalizing wage theft. A second limitation I impose is to focus almost exclusively on immigrant workers without authorization, documentation, or anything else that might establish a legal right to enter the labor economy. Although the day labor pool is heterogeneous and comprised of individuals with a variety of citizenship and immigration statuses,<sup>19</sup> unauthorized immigrants live and work almost exclusively in the margins of society. Thus, this slice of the day labor pool enjoys the fewest legal protections and therefore has the most to gain in the successful implementation of these wage theft laws.

This Essay proceeds in three parts. Part I summarizes the recent turn towards criminalizing wage theft. Here, I explain what the temporary labor market is, why it tends to attract unauthorized immigrants, how wage theft occurs, and why labor

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18. See Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 132–33 (2013) (explaining that the effect on local officials of the federal Secure Communities program is to strip them of discretion in immigration screening for arrests, but finding that the officials still have discretion over whom to arrest).

19. VALENZUELA, JR. ET AL., *supra* note 16, at 17–18.

enforcement efforts have generally struggled to prevent such theft. Part II examines the challenges of enforcing wage theft within immigrant-dominated communities. Here, I explain how recent shifts in federal immigration enforcement programs greatly complicate the process by which local police might enforce wage theft laws given how much these programs rely on local police to effectuate immigration enforcement goals. In communities with more than a negligible immigrant population, asking police to enforce wage theft laws creates a conflict between local goals (which in wage theft jurisdictions are pro-labor) and federal goals (which in the immigration context is largely pro-deportation). Part III lays out a modest research agenda for future empirical and theoretical study, one that might aid the efforts of those interested in eradicating wage theft within the informal labor market. I then conclude.

### I. CRIMINALIZING WAGE THEFT

Immigrants are embedded in the U.S. labor market. Even a quick glance at the statistical picture confirms this. The percentage of immigrants in the workforce has tripled from 1970.<sup>20</sup> Today, immigrants account for sixteen percent of the domestic labor force.<sup>21</sup> Moreover, immigrant workers have a particularly strong presence in low-wage industries.<sup>22</sup> A higher percentage of foreign-born workers work within the service, transportation, and construction industries than do their native-born counterparts.<sup>23</sup> These trends are particularly pronounced with regards to unauthorized immigrants, roughly two-thirds of which are in the workforce.<sup>24</sup>

Unauthorized migrants have a particularly strong presence in the temporary job or day labor market.<sup>25</sup> A coarse definition of day labor is temporary work in

20. Emma Britz & Jeanne Batalova, Migration Pol'y Inst., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION INFO. SOURCE (Jan. 2013), <http://www.migrationinformation.org/USfocus/display.cfm?ID=931> (last visited Sept. 19, 2013).

21. According to the Migration Policy Institute, foreign-born workers accounted for sixteen percent (25.7 million) of the 156.6 million workers in the U.S. civilian workforce in 2011. *Id.* In 1970, foreign-born workers accounted for only five percent. *Id.*

22. See VALENZUELA, JR. ET AL., *supra* note 16, at 2.

23. Consider the following comparisons: service occupations (26% of foreign-born; 17% of native-born); production, transportation, and material moving occupations (15% of foreign-born; 11% native-born); and natural resources, construction, and maintenance (13% of foreign-born; 8% of native-born). See Britz & Batalova, *supra* note 20.

24. According to the Pew Research Center, as of 2010, eight million of the roughly 11.2 million unauthorized migrants are in the workforce. See JEFFERY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 1, 17 (2011), available at <http://www.pewhispanic.org/files/reports/133.pdf>. The Census Bureau estimates the total foreign-born population to be around 39.9 million. See ELIZABETH M. GRIECO ET AL., U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY REPORT 19: THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010, at 2 tbl.2 (2012), available at <http://www.census.gov/prod/2012pubs/acs-19.pdf>.

25. See VALENZUELA, JR. ET AL., *supra* note 16, at 17. Certain industries, like the restaurant industry, have steadily absorbed more and more foreign-born workers over the course of the last couple of decades. In New York City's restaurant industry, for example, the percentage of foreign-born workers in that industry's workforce jumped from 47.5% to 64.4% from 1980 to 2000, while birthright

which the work, and often the workers, lack documentation.<sup>26</sup> By “undocumented work” I mean work in which an employer fails to comply with a variety of documentation requirements imposed by tax, social security, and public benefits laws (among others).<sup>27</sup> By “undocumented workers” I mean workers who lack authorization under our nation’s immigration laws to engage in paid work.<sup>28</sup> Day laborers represent a significant percentage of the workforce,<sup>29</sup> and many are recent arrivals.<sup>30</sup> The overwhelming majority of day laborers are hired by homeowners, rental occupants, and construction contractors, and these homeowners, occupants, and contractors hire day laborers to perform cleaning, gardening, construction, and landscaping work.<sup>31</sup>

Like many forms of work, the significance and meaning of day labor extends beyond the tasks workers perform and the income they earn. Its social status, physical danger, and uncertainty set day labor apart from other forms of work. As Abel Valenzuela explains, “the term is mostly used to convey a type of temporary employment that is distinguished by hazards in or undesirability of the work, the absence of fringe and other typical workplace benefits (i.e., breaks, safety equipment), and the daily search for employment.”<sup>32</sup> Work is often imagined as a permanent, uninterrupted endeavor that structures people’s lives five days and forty hours per week, and work that does not fit this paradigm often gets labeled as deviant.<sup>33</sup> Day labor work in particular often gets stigmatized for the informal manner in which it gets allocated.<sup>34</sup>

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citizen workers dropped from 52.5% to 35.6% during the same period. See REST. OPPORTUNITIES CTR. OF N.Y. & N.Y.C. REST. INDUS. COAL., BEHIND THE KITCHEN DOOR: PERVERSIVE INEQUALITY IN NEW YORK CITY’S THRIVING RESTAURANT INDUSTRY 6 tbl.4 (2005). The industry witnessed significant jumps in the percentage of workers born in Mexico, Central America, and South America. See *id.*

26. See Valenzuela, Jr., *supra* note 7, at 308–10 (describing different definitions of day labor).

27. See Pierrette Hondagneu-Sotelo, *Affluent Players in the Informal Economy: Employers of Paid Domestic Workers*, 17 INT’L J. SOC. & SOC. POL’Y 130, 132 (1997) (finding that many employers of domestic workers fail to comply with Social Security, Medicare, and federal tax withholding requirements).

28. See 8 U.S.C. § 1324a(a) (2012).

29. A 2004 study estimated that 679,000 (or 15%) of the Los Angeles County workforce and 303,800 (or 16.4%) of the Los Angeles City workforce were day laborers. See DANIEL FLAMING ET AL., HOPEFUL WORKERS, MARGINAL JOBS: LA’S OFF-THE-BOOKS LABOR FORCE 17 tbl.1 (2005).

30. SCOTT MARTELLE, CONFRONTING THE GLOVES-OFF ECONOMY 13 (Annette Bernhardt et al. eds., 2009) (noting that one in four day laborers have lived in the United States less than a year, and that thirty percent have lived in the United States for more than five years).

31. See VALENZUELA, JR. ET AL., *supra* note 16, at 9.

32. Valenzuela, Jr., *supra* note 7, at 308; see also Manuel Castells & Alejandro Portes, *World Underneath: The Origins, Dynamics, and Effects of the Informal Economy*, in THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES 11, 13–15 (Alejandro Portes et al. eds., 1989) (listing status, work conditions, and management structure as defining characteristics of the informal economy).

33. Albiston, *supra* note 6, at 18.

34. For example, the Ninth Circuit invalidated on First Amendment grounds an anti-day labor ordinance, which prohibited the solicitation of business and employment on streets and highways. *Comite De Jornaleros De Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 951 (9th Cir. 2011)

Although a culture of informality pervades much of the day labor market, some markets do rely on formal hiring centers to connect employers to potential workers.<sup>35</sup> Hiring centers offer the benefit of monitoring employer workplace practices, higher wages, and a greater opportunity for entry into more permanent and regularized positions.<sup>36</sup> Still, most day laborers continue to be hired through informal hiring sites, such as at parking lots for home improvement stores, gas stations, near on-ramps, and in other public spaces.<sup>37</sup> Immigrant workers are strongly represented within the day labor workforce,<sup>38</sup> and in California the vast majority of day laborers are immigrants from Mexico or Central America.<sup>39</sup> Not surprisingly, many of these workers find themselves locked out of the formal economy for lack of work authorization or lack of English proficiency.<sup>40</sup>

Within the day labor market, many workers struggle with the problem of wage theft—the nonpayment of wages for work performed.<sup>41</sup> Sometimes, wage theft can occur through the blatant withholding of payment at the end of workday.<sup>42</sup> Other times, it happens in subtler ways and for perhaps more understandable reasons, like delaying the payment of wages in order to pay impending and rising rent and utility bills.<sup>43</sup> But whether the wage theft occurs on blatant or subtle terms, the reason why an employer can withhold the wage is because enforcing wages can prove to be quite difficult. Indeed, day laborers often face grim choices when pursuing the

(en banc). Chief Judge Kozinski dissented, defending the ordinance as necessary to deter the parade of horrors caused by day labor:

For years, the city of Redondo Beach has had a serious problem with day laborers—sometimes as many as seventy-five—crowding sidewalks and street-corners, soliciting work from passing motorists. As might be expected when large groups of men gather at a single location, they litter, vandalize, urinate, block the sidewalk, harass females and damage property. Cars and trucks stop to negotiate employment and load up laborers, disrupting traffic.

*Id.* at 957 (Kozinski, C.J., dissenting) (citation omitted).

35. These hiring centers tend to benefit workers by allowing employers and workers to settle upon the terms of employment before work is undertaken. *See* VALENZUELA, JR. ET AL., *supra* note 16, at 6–8.

36. *See* MARTELLE, *supra* note 30, at 14.

37. *See* VALENZUELA, JR. ET AL., *supra* note 16, at 4 (noting that more than three-fourths of all day laborers congregate at informal hiring sites). Valenzuela notes that the number of worker-centered hiring centers has increased during the 2000s. *See id.* at 7 fig.1.

38. *See* Saskia Sassen-Koob, *New York City's Informal Economy*, in *THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES*, *supra* note 32, at 60, 63.

39. According to a 1999 study, only 2.4% of day laborers in California were U.S.-born or immigrated from Africa or South America. The remaining 97.6% hailed from Mexico or Central America. *See* Abel Valenzuela, Jr., *Controlling Day Labor: Government, Community, and Worker Responses*, CAL. POL'Y OPTIONS, Jan. 1, 2001, at 41, 44 tbl.1, available at <http://escholarship.org/uc/item/24q8554j>.

40. *See id.* at 46–47.

41. BOBO, *supra* note 8, at 6.

42. *See* Jennifer Mena, *2 Policeman Hailed for Effort to Get Wages that Day Laborers Are Owed*, L.A. TIMES, Sept. 20, 2001, at B6 (reporting on an employer who had denied wages to day laborers and “dared them to contact police to get their money”).

43. *See* REST. OPPORTUNITIES CTR. OF N.Y. & N.Y.C. REST. INDUS. COAL., *supra* note 25, at 25.



recovery of wages. Their relatively low wages often deter private attorneys from taking on those cases given the contingency fee model under which many of them operate.<sup>44</sup> And while day laborers may proceed on their own through administrative or civil channels in some states, such a choice can be daunting because of language barriers, bad information, or the fear of immigration-related consequences.<sup>45</sup>

Moreover, federal protections often cannot reach into the crevices nestled at the bottom of the economy where much of the nation's day labor work is negotiated and carried out. Federal protections often impose threshold requirements, putting those protections out of day laborers' reach.<sup>46</sup> And as is true of many areas of public regulation, wage theft enforcement must grapple with the reality that there are simply not enough resources to go around. This is true despite the Obama administration's reallocation of significant resources to the Department of Labor to facilitate the inspection of workplaces for wage and hour violations.<sup>47</sup> Yet, the reality remains that the number of workplaces likely engaging in wage and hour violations are simply too numerous for federal labor enforcement agencies to adequately investigate.<sup>48</sup>

In recent years, advocates have pressured state legislators and local lawmakers to address the problem of wage theft through a jurisdiction's criminal laws.<sup>49</sup> In many instances, jurisdictions have passed new laws that specifically target wage

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44. There have been some notable exceptions. For example, the Mexican American Legal Defense and Educational Fund (MALDEF) brought a suit on behalf of four workers in 2012. Sam Quinones, *Carnash Owners Sued by Workers*, L.A. TIMES, May 22, 2012, at AA3. The MALDEF lawyers anticipated more than 100 past employees joining the suit, bringing the damages "into the seven figures." *Id.* But such suits are less feasible in industries with more isolated workforces, like construction, landscaping, and gardening.

45. See SHANNON GLEESON, *CONFLICTING COMMITMENTS: THE POLITICS OF ENFORCING IMMIGRANT WORKER RIGHTS IN SAN JOSE AND HOUSTON* 79–80 (2012); Fussell, *supra* note 8, at 607–09.

46. For example, Title VII of the Civil Rights Act covers only those workplaces employing more than fifteen employees, and the Fair Labor Standards Act is limited to establishments grossing more than \$500,000. See Fair Labor Standards Act, 29 U.S.C. § 203 (2012); Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012).

47. During the first year of the Obama administration, the Government Accountability Office issued a report documenting the various shortcomings in the Department of Labor's wage and hour enforcement division. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-629, *DEPARTMENT OF LABOR: WAGE AND HOUR DIVISIONS NEEDS IMPROVED INVESTIGATIVE PROCESSES AND ABILITY TO SUSPEND STATUTE OF LIMITATIONS TO BETTER PROTECT WORKERS AGAINST WAGE THEFT*, 3–10 (2009), available at <http://www.gao.gov/assets/300/291496.pdf>; Steven Greenhouse, *Labor Agency Is Failing Workers, Report Says*, N.Y. TIMES, Mar. 25, 2009, at A16. Thereafter, then Secretary of Labor, Hilda Solis, announced a plan to hire 250 additional investigators at the start of her appointment. Press Release, U.S. Dep't of Labor, Statement of U.S. Secretary of Labor Hilda L. Solis on GAO Investigation Regarding Past Wage and Hour Division Enforcement (Mar. 25, 2009), available at <http://www.dol.gov/opa/media/press/esa/esa20090324.htm>.

48. Despite this increase, the Department of Labor still must work against serious resource constraints, especially in relation to those industries that tend to hire unauthorized workers. See Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 554–55 (2010) (listing various obstacles to investigating low-wage industries for wage and hour violations).

49. See NAT'L EMP'T LAW PROJECT, *supra* note 8, at 34–36; *State, County, City*, *supra* note 11.

theft,<sup>50</sup> holding employers accountable for withholding payment.<sup>51</sup> For example, Interfaith Worker Justice, a network of interfaith groups and workers' centers, manages a website that provides a variety of resources for victims of wage theft.<sup>52</sup> The website offers an interactive map marking where wage theft laws exist, where campaigns are underway, and where such campaigns have failed.<sup>53</sup> In other instances, advocates have pressured law enforcement officials to interpret and redirect existing laws to mitigate wage theft. For example, "theft of service" laws can often be traced to a legislative impulse to regulate consumer transactions involving theft—think of "dining and dashing"—but have since been expanded to cover employment transactions and to target employers who steal a worker's labor.<sup>54</sup> At least thirty-three state criminal codes include such laws.<sup>55</sup>

As a movement designed to address a problem of national importance,<sup>56</sup> the movement to criminalize wage theft has harnessed state and local lawmaking mechanisms. Among advocates, the problem of wage theft is often framed in terms of leveraging stronger and more robust worker protections developed by localities.<sup>57</sup> In this sense, the criminalization of wage theft helps fill out a vision of worker-friendly localities: so committed are local officials that they are willing to subject employers to police and prosecutorial discretion.<sup>58</sup>

The movement to criminalize wage theft also builds on the recent work of legal scholars who have turned their attention to the local regulation of the workplace.<sup>59</sup> Although these scholars have not addressed the specific issue of wage theft, the movement to criminalize wage theft fits within the spirit of this trend. For example, the National Labor Relations Act (NLRA) has sustained a steady barrage

50. See, e.g., NAT'L EMP'T LAW PROJECT, *supra* note 8, at 67–68 (citing the Trafficking Victims Protection Act (TVPA) as a means to combat employer exploitation).

51. See, e.g., *id.* at 34–36; *State, County, City, supra* note 11.

52. See WAGE THEFT: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT, <http://wagetheft.org/wordpress/> (last visited Mar. 29, 2014).

53. See *State, County, City, supra* note 11.

54. See Verga, *supra* note 12, at 284 n.5 ("It is possible to use 'theft of service' laws to prosecute employers because almost all such laws explicitly define 'service' to include 'labor.'").

55. See *id.* at 284 n.4 (listing various state criminal codes).

56. See Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1, 6 (2013) (noting that the number of Fair Labor Standards act claims have more than quadrupled from 1996).

57. For example, in 2011, the National Employment Law Project published an "advocate's guide" to fighting wage theft and said the following about wage theft:

States and cities have a central role to play in scaling up the fight against wage theft. . . . [I]n more than a dozen states, minimum wage and overtime protections are stronger under state law than federal law, and so should be enforced at that level in order to give maximum legal benefits to workers.

See NAT'L EMP'T LAW PROJECT, *supra* note 8, at 12.

58. See *id.* at 35–36 (describing efforts in New Orleans, Los Angeles, and Illinois to involve police in enforcing wage theft laws).

59. See, e.g., Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1117, 1120–22 (2007); Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1172–74 (2011).

of criticism for its failure to accommodate and support organizing in the workplace.<sup>60</sup> Labor scholars have lamented the NLRA's inability to meaningfully support workers in their attempts to form and join unions or to engage in collective bargaining, and have derided Congress for its unwillingness to reform or amend the statute.<sup>61</sup> Benjamin Sachs observes that state and local governments have found creative ways to work around this static legal landscape.<sup>62</sup> Sachs explains that states and localities have been willing to use nonlabor sources of power to resolve labor disputes, which effectively allow localities to set organizing rules that deviate from the federal baseline.<sup>63</sup> Similarly, Richard Schragger suggests that labor organizing has "gone local" by focusing its resistance efforts on "local land use approvals for big-box retailers."<sup>64</sup>

In sum, the movement to criminalize wage theft tries to marshal criminal justice resources to supplement cost-prohibitive legal services and inaccessible federal labor protections. And because these laws all arise within state and local schemes, the turn to the criminal justice system sets the workplace on a course to confront a particular set of law enforcement officials. Should a dispute over wages materialize between employers and day laborers, the dispute will be resolved not by Federal Bureau of Investigation agents, U.S. attorneys, or Article III judges, but rather by police officers, district attorneys, and superior court judges.

## II. ENFORCING WAGE THEFT

Conceptually, the criminalization of wage theft provides worker rights advocates with a relatively low-cost tactic that adds heft to their advocacy efforts. The benefits of such an arrangement are relatively straightforward in many day labor transactions. Where, for example, a subcontractor refuses to pay a day laborer for a day spent laying asphalt, wage theft laws empower that worker to call the police, thereby injecting a bit of urgency, discomfort, and fear into the process of recovering lost wages. But what if that day laborer is an immigrant who lacks any authorization to be or work in the United States? In that instance, the wage theft fix becomes much more complicated, and in fact, the fix may end up making a bad situation worse.

The movement to criminalize wage theft has not unfolded in a vacuum. While wage theft statutes saddle the police with labor enforcement duties, federal

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60. See Sachs, *supra* note 59, at 1162.

61. *Id.* at 1162–63.

62. See *id.* at 1172–74 (describing a "tripartite lawmaking" model as one way for state and local governments to avoid federal preemption and yet achieve local labor goals).

63. In one instance, a hospital and its employees had locked horns in an acrimonious negotiation over organizing rules and neither side was willing to budge. Once the hospital announced plans to build a new cancer center, the city refused to issue building permits unless the employer agreed to the organizing rules the union sought, and, more relatedly for purposes of this Essay, that deviated from the federal baseline. *Id.* at 1174–75.

64. Richard C. Schragger, *Is a Progressive City Possible? Reviving Urban Liberalism for the Twenty-First Century*, 7 HARV. L. & POL'Y REV. 231, 245 (2013).

programs have simultaneously piled on a wide range of immigration enforcement responsibilities, exacerbating the rift that has traditionally separated the police and immigrant communities. This distrust of the police effectively neutralizes the potential of wage theft statutes when enforced against employers who hire unauthorized immigrant workers. In this Part, I briefly explain how recent shifts in immigration enforcement strategy constrain the enterprise of policing wage theft within immigrant-dependent industries.

To start with, police departments have tremendous discretion over whom and how they police. In theory, any given department could harmonize wage theft laws and immigration enforcement duties. After all, roughly speaking, the former targets *employers* while the latter targets *workers*.<sup>65</sup> But gaining the trust of immigrant communities can be difficult, and it is a task that is made even more difficult when it appears that public officials have some link to the enterprise of immigration enforcement.

This leads to the first point. A police department could, as a matter of policy, insulate itself from immigration officials in order to fully commit itself to the task of policing wage theft, but in many instances, doing so may be difficult given the strong federal preference for local participation in the enforcement of immigration law.<sup>66</sup> As is well-known among immigration scholars, a number of federal enforcement programs expressly enlist the aid of localities in the pursuit of removable immigrants, and the nature of this enlistment puts pressure on localities to embrace federal enforcement priorities.<sup>67</sup> This is a point that often gets lost within discussions of *Arizona v. United States*,<sup>68</sup> the 2012 Supreme Court decision invalidating most of Arizona's local immigration enforcement law.<sup>69</sup> The United States' position was not that Arizona could not participate in the enforcement of immigration law, but rather that the state could not do so on terms different from those set by the Executive.<sup>70</sup>

Many localities stand to gain significant remunerative benefits by assisting the federal government. Consider the example of immigration-related detention.<sup>71</sup> Many immigrants who are deportable by virtue of a criminal conviction are subject

65. Federal immigration laws also target employers, but the Obama administration has steered its workplace enforcement resources away from immigrant workers and towards the employers who knowingly hire and exploit those workers. See Stephen Lee, *Screening for Solidarity*, 80 U. CHI. L. REV. 225, 227–32 (2013).

66. See Cox & Miles, *supra* note 18, at 92–93 (describing federal programs involving local law enforcement in enforcing immigration laws).

67. *Id.*

68. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

69. *Id.* at 2510.

70. See *id.* at 2501, 2503.

71. See, e.g., Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 181 n.101 (2008). But cf. Rachel R. Ray, *Insecure Communities*, 10 SEATTLE J. SOC. JUST. 327, 366 (2011) (painting a more complicated picture of federal government repayment of state and local detentions of undocumented immigrants).

to mandatory detention provisions.<sup>72</sup> And because the kinds of crimes triggering deportation are so broadly defined, the immigrant detention population has ballooned over the last several years.<sup>73</sup> Federal immigration officials had to contend with the reality that there were not enough beds to accommodate the number of noncitizen bodies in custody.<sup>74</sup> To meet this problem, federal officials began paying local officials to detain immigrants for immigration purposes pursuant to intergovernmental service agreements (IGSAs).<sup>75</sup> These are similar to the kinds of contracts given to private companies to carry out similar services.<sup>76</sup>

Many LEAs rely on the funding provided through these detention contracts.<sup>77</sup> For example, the Orange County Sheriff's Department had been forced to slash over \$50 million in its budget when it came across the opportunity to participate in a "beds for feds" program.<sup>78</sup> According to the department's estimates, the program stands to bring in about \$30 million a year.<sup>79</sup> Such a significant source of funding creates incentives for the police to facilitate immigration enforcement goals and to resist participating in goals that might irritate or annoy federal officials.<sup>80</sup>

72. See 8 U.S.C. § 1101(a)(48)(B) (2012); *Id.* § 1227(a)(2)(A)(i)(II); see also Amy Langenfeld, Comment, *Living in Limbo: Mandatory Detention of Immigrants Under the Illegal Immigration Reform and Responsibility Act of 1996*, 31 ARIZ. ST. L.J. 1041, 1048–50 (1999) (discussing the mandatory detention provisions immigrants are subject to under the Reform Act).

73. See Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 376 (1999) ("[T]he [criminal-alien] population has certainly exploded since 1980, multiplying perhaps ten-fold."); Abby Sullivan, Note, *On Thin ICE: Cracking Down on the Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy*, 6 HASTINGS RACE & POVERTY L.J. 101, 117 (2009) (providing statistics showing "notable leap" in immigrants serving federal prison terms).

74. Schuck & Williams, *supra* note 73, at 385 ("[The INS] still removes fewer than twenty percent of the criminal aliens who are currently under law enforcement supervision. Its performance is even worse when one takes into account several other considerations. First, the vast majority of removable criminal aliens are at large in the community, either on probation or parole or free from criminal justice supervision altogether. Second, the problem is not simply one of removing the stock of criminal aliens already in the country. New immigration flows constantly replenish and augment the stock of such aliens, while those not removed before the end of their sentences are simply released into the population at large.")

75. See, e.g., Lasch, *supra* note 71.

76. See, e.g., Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 552 (2009) ("DHS . . . contracted out the administration of the Varick Facility to a private prison company, ATSI, though it remains under the jurisdiction of DHS's Detention and Removal Operation office located in the same building as the detention facility.")

77. See, e.g., Lasch, *supra* note 71.

78. Kimberly Edds, *Sheriff Rents Out More Jail Beds*, ORANGE COUNTY REGISTER (May 10, 2011, 11:53 AM), <http://www.ocregister.com/totalbuzz/inmates-468655-department-sheriff.html>.

79. *Id.*

80. None of this is unique to immigration law. For example, Congress has long relied on civil forfeiture laws as a way of enlisting the help of state and local LEAs in the war on drugs. See generally William Carpenter, *Reforming the Civil Drug Forfeiture Statutes: Analysis and Recommendations*, 67 TEMP. L. REV. 1087 (1994) (discussing the controversy, legislative background, and specific provisions surrounding civil forfeiture laws). Under these forfeiture laws, LEAs were entitled to retain a portion of whatever assets they seized during a drug-related investigation. See 21 U.S.C. § 881(c)(1)(A) (2012) (empowering the Attorney General to transfer seized property "to any State or local law enforcement

Other immigration enforcement programs make it difficult for local police and LEAs to opt out of immigration enforcement duties even if they are so inclined. In other words, even if a locality wanted to refrain from participating in the enterprise of identifying and removing immigrants, federal programs make it difficult for them to do so. Under the Secure Communities (S-Comm) program, every set of fingerprints that police upload into the National Crime Information Center (NCIC) (which is housed in the FBI) is automatically cross-checked against a Department of Homeland Security (DHS) database with immigration-related information.<sup>81</sup> An important feature of S-Comm is that immigration officials do not need the consent of local police in order to gain the screening benefit.<sup>82</sup> Thus, unlike other programs, which allow police to opt in or opt out of policing immigration violations, S-Comm makes police participation virtually mandatory at least at the arrest and booking stages.<sup>83</sup> When an officer decides to book an arrestee for local criminal justice purposes, that booking decision automatically doubles as an immigration screening decision—an officer cannot cross-check an arrestee’s fingerprints against the FBI database without simultaneously doing so with the DHS database.<sup>84</sup> Programs like S-Comm strip police of the ability to credibly present themselves as operating independently of federal immigration officials. The police can redistribute labor resources only if immigrant workers believe that contact with the police will not lead to collateral immigration consequences, and the federal co-optation of local enforcement resources for obvious reasons unsettles such a belief.

One final point: IGSA and S-Comm obviously represent just two types of arrangements through which localities participate in the enterprise of immigration enforcement. There are many such arrangements,<sup>85</sup> and all of them make it hard for police to credibly present themselves to immigrants as separate entities from federal immigration agencies. But I have highlighted these two examples because they illustrate a subtler point. They illustrate that while police in (relatively conservative)

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agency which participated directly in the seizure or forfeiture of the property?”; see also Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 44–56 (1998) (summarizing the various forfeiture laws); Brent D. Mast et al., *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285, 287 (2000); John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, in THE ADMINISTRATION AND MANAGEMENT OF CRIMINAL JUSTICE ORGANIZATIONS: A BOOK OF READINGS 91, 91–94 (Stan Stojkovic et al. eds., 4th ed. 2004).

81. Cox & Miles, *supra* note 18, at 94.

82. *Id.* at 97.

83. Federal immigration officials rely on a variety of programs that harness the unique vantage point of local LEAs. Many of these programs rely on LEAs to volunteer in carrying out immigration-related duties. See Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1582–86 (2010) (summarizing the 287(g) program, which deputizes local LEAs interested in participating in immigration enforcement). By contrast, S-Comm requires no such consent. See Ray, *supra* note 71, at 377–78.

84. The DHS Database is called the Automated Biometric Identification System, or IDENT. The DHS manages this database and inputs the fingerprints of every noncitizen fingerprinted pursuant to immigration-related activities. Cox & Miles, *supra* note 18, at 94.

85. For a good overview of such arrangements, see Chacón, *supra* note 83, at 1579–98.

Orange County and (relatively liberal) San Francisco County might possess very different attitudes towards immigrants, a mere attitudinal difference will often not be enough to allow police to effectively enforce wage theft and other labor laws. The effective policing of wage theft in immigrant-dominated industries requires contending with the reality that even minimal contact with the police may lead to removal.

### III. STUDYING WAGE THEFT

Thus far, I have (1) described a novel new tactic in the fight against worker exploitation in the day labor market, namely the criminalization of wage theft; and (2) explained why enforcing wage theft laws in immigrant-dominated industries might fail to produce the desired outcome. In developing these observations, my primary goal has been to show that actually policing wage theft in immigrant-dominated industries will not be as easy as simply rerouting claims away from existing civil and administrative channels and towards the criminal justice system over which the police stand watch.

Yet, to argue that enforcing wage theft in immigrant-dominated workplaces is difficult is not to argue that it is impossible; neither is it to argue that it is undesirable. But reaching definitive conclusions about whether such enforcement is either possible or desirable requires immigration scholars to address a variety of questions of the empirical and theoretical sort. In this Part, I set out a research agenda for those of us concerned with the welfare of unauthorized immigrants, and especially unauthorized workers.

#### *A. The Evolving Nature of Police Discretion*

In light of the increasingly harsh and unforgiving nature of immigration law, an encounter with the police marks the beginning of the removal process for many unauthorized immigrants whose only violations of law relate to unauthorized entry or visa overstay. Given this reality, Hiroshi Motomura has argued that in many cases a police officer's decision to arrest at the front-end, and not the immigration officer's decision to initiate removal proceedings at the back-end, is the "discretion that matters."<sup>86</sup> The rise of S-Comm as the federal government's primary means of harnessing local resources gives texture to this astute observation. Thus, an important question concerns how the police exercise this discretion when encountering immigrant workers.

Recent empirical work suggests that the mission and structure of the police is malleable enough to accommodate both (local) labor enforcement goals and (federal) immigration goals. But the rapidly evolving nature of the immigration

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86. See Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1836 (2011).

enforcement landscape minimizes the lessons we might otherwise be able to infer.<sup>87</sup> For example, Paul Lewis and Karthick Ramakrishnan found that the majority of elected city officials in California cities did not know whether or how police officials in their districts approached basic policing decisions in relation to unauthorized immigrants.<sup>88</sup> These elected officials, for example, did not know whether police accepted Mexican consular ID cards as a valid form of identification (most police departments did), nor did they know whether police officials would contact federal authorities if they had a suspected unauthorized immigrant in custody (most said they would not).<sup>89</sup> Thus, Lewis and Ramakrishnan's findings suggest that the presence of an anti-immigrant public would not necessarily preclude a police department from creating and implementing immigrant-friendly policies, policies that might sideline concerns with identifying and removing immigrants in favor of concerns with exploitation in the day labor market.

Yet, S-Comm has undeniably changed the policing landscape. While Lewis and Ramakrishnan's findings suggest that the robust, or at least nontrivial, enforcement of wage theft is possible, their conclusions rely on pre-S-Comm data—their study was published in 2007<sup>90</sup> and was based on data gathered in 2003,<sup>91</sup> well before the national S-Comm rollout in 2008.<sup>92</sup> In particular, S-Comm puts pressure on two different stages of the policing process, and we need to learn more about these two stages to evaluate the feasibility of a wage theft regime that depends on police enforcement.<sup>93</sup> The first is the arrest stage. S-Comm's immigration identification function is triggered only once an arresting officer uploads an individual's fingerprints into the NCIC database, which typically happens at booking.<sup>94</sup> As I've written about elsewhere, S-Comm effectively sets up a race between a bad actor employer and an unauthorized immigrant worker to see who can contact the police first.<sup>95</sup> Consider the Martinez example I discussed earlier. If the employer in that case suspects that Mr. Martinez will report him to the police, the employer can preemptively contact the police about Mr. Martinez, and as long as the police make an arrest, Mr. Martinez will almost certainly end up in the removal pipeline vis-à-vis

87. See, e.g., Irene Bloemraad, *The Limits of de Tocqueville: How Government Facilitates Organisational Capacity in Newcomer Communities*, 31 J. ETHNIC & MIGRATION STUD. 865, 875–78 (2005).

88. Paul G. Lewis & S. Karthick Ramakrishnan, *Police Practices in Immigrant-Destination Cities: Political Control or Bureaucratic Professionalism?*, 42 URB. AFF. REV. 874, 886–88 (2007).

89. See *id.* at 886–87.

90. *Id.* at 874.

91. *Id.* at 882.

92. The rollout began in 2008. Cox & Miles, *supra* note 18, at 96.

93. Legal scholars have begun this immense project. See *id.* at 87 (examining “the role of discretion in policing” by “providing the first large-scale empirical evaluation of Secure Communities”); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1126 (2013) (offering an “empirical study of how local criminal process is organized around immigration enforcement and citizenship status”).

94. Cox & Miles, *supra* note 18, at 94.

95. See Stephen Lee, *Workplace Enforcement Workarounds*, 21 WM. & MARY BILL OF RIGHTS J. 549, 564–67 (2012).



S-Comm.<sup>96</sup> Such a scenario puts pressure on police officers to decide relatively quickly and with little information whom to arrest—the worker, the employer, or both? S-Comm also foists upon those officers a difficult choice: upload fingerprints into the NCIC database and risk alienating immigrant members of your community, or forgo the NCIC database and invite the possibility that you might let a hardened criminal slip through your fingers.

S-Comm also impacts the postarrest detention stage. Assuming an individual's fingerprints trigger a request from ICE to hold that individual, then localities must decide whether to comply with that request. Unlike arresting decisions, over which individual officers have tremendous discretion, detainer requests invite some disagreement. Not surprisingly, ICE insists that such requests flow from a valid exercise of federal regulatory power, which therefore requires localities to comply with such requests.<sup>97</sup> Although most state and local LEAs have remained silent on the issue, a few notable exceptions have articulated noncompliance policies. Perhaps the most notable exception is California, which passed the TRUST Act, prohibiting local law enforcement officers from complying with federal requests to detain immigrants who have been identified as removable under S-Comm.<sup>98</sup> The TRUST Act instructs LEAs to disregard detainer requests for noncitizens who have engaged in no or only minor criminal conduct.<sup>99</sup> Tying the conditions of compliance to the severity of the underlying criminal conduct alleviates the pressure on police of having to choose between two unsatisfying choices.<sup>100</sup> The NCIC database provides a valuable resource to law enforcement officers by enabling them to learn about a person's prior criminal history relatively quickly. S-Comm extends this exercise to include immigration violations as a part of the data mining process. The TRUST Act helps solve this dilemma by enabling police to verify the criminal background

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96. The University of California, Irvine School of Law's Immigrant Rights Clinic worked on a case involving a worker with nearly identical facts. For a more detailed discussion, see *id.* at 551–52.

97. See *ICE Detainers: Frequently Asked Questions*, U.S. DEPT' HOMELAND SEC., ICE, <http://www.ice.gov/news/library/factsheets/detainer-faqs.htm> (last visited Mar. 15, 2014) (“By issuing a detainer, ICE requests that a law enforcement agency notify ICE before releasing an alien and maintain custody of the subject for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays, to allow ICE to assume custody. This request flows from federal regulations at 8 C.F.R. § 287.7, which arises from the Secretary’s power under the Immigration and Nationality Act § 103(a)(3), 8 U.S.C. 1103(a)(3), to issue ‘regulations . . . necessary to carry out [her] authority’ under the INA, and from ICE’s general authority to detain individuals who are subject to removal or removal proceedings.”) (alteration and ellipses in original). The Third Circuit recently held that states and localities were not required to honor immigration detainers, that is, detainer requests are not mandatory. See *Galarza v. Szalczyk*, 745 F.3d 634, 639–41 (3d Cir. 2014).

98. See TRUST Act, CAL. GOV'T CODE § 7282.5 (West Supp. 2014).

99. *Id.*

100. See Brooks Barnes, *California Sheriffs Oppose Bill on Illegal Immigrants*, N.Y. TIMES, Aug. 29, 2012, at A19 (“[T]he bill would require police officers to ignore requests from Immigration and Customs Enforcement to detain immigrants for deportation, except when suspects are charged with serious or violent crimes.”).

of an investigative target, while maintaining credibility with immigrant communities officers hope to serve and protect.<sup>101</sup>

### B. Disaggregating the Local

The last several years have witnessed a surge in scholarship on “the new immigration federalism,”<sup>102</sup> but much of this has treated states, counties, and localities as analytically interchangeable. No doubt, a part of this is because “the local” is often defined in relation to “the federal” (as preemption doctrine often dictates), but immigration scholars and immigrant rights advocates would be well-served by disaggregating the local and generating a second wave of immigration federalism scholarship.

Rick Su has quietly made just such a contribution by pointing out the localist implications of S.B. 1070,<sup>103</sup> the law at issue in *Arizona v. United States*.<sup>104</sup> Su points out that S.B. 1070 represented an attempt by the State legislature to constrain the exercise of police discretion, which typically falls within the purview of county and local level decision making.<sup>105</sup> As he observes,

[T]he purpose of S.B. 1070 is not to *allow* state and local law enforcement officials to enforce federal immigration laws. Rather it *requires* such officials and their departments to do so, even if—perhaps especially if—they would ordinarily refrain out of concerns about relations with immigrant neighborhoods, competing local priorities, or lack of fiscal resources.<sup>106</sup>

Although Su was writing before the Court issued its decision in *Arizona* invalidating much of S.B. 1070, his larger point about state-local relations endures, particularly in light of the TRUST Act, which stands as another attempt by a state to influence local law enforcement decision making (albeit in a manner that helps rather than hurts immigrant interests).

County-level enforcement in particular is crying out for greater attention. Recent work by scholars outside of immigration law has begun to fortify this traditionally undertheorized level of government. For example, Michelle Wilde Anderson has drawn attention to the problem of “municipal underbounding,” which describes “annexation policies and practices in which municipalities grow around low-income minority communities, leaving them outside the reach of city

101. See Patrick McGreevy & Anthony York, *Gov. Acts on Deportation, License Bills*, L.A. TIMES, Oct. 1, 2012, at A1.

102. See, e.g., Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2074 (2013) (discussing “how the current spate of state and local regulation is changing the way elected officials, scholars, courts, and the public think about the constitutional dimensions of immigration law and governmental responsibility for immigration enforcement”).

103. See Rick Su, Commentary, *The Overlooked Significance of Arizona’s New Immigration Law*, 108 MICH. L. REV. FIRST IMPRESSIONS 76, 79 (2010).

104. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

105. Su, *supra* note 103, at 77.

106. *Id.*

voting rights and municipal services.”<sup>107</sup> While poverty and racial subordination is often tied to city centers, Anderson suggests that similar stories could be told about communities of color outside of city centers where those communities have the benefit of only county rule.<sup>108</sup> A key part of the municipal underbounding story, according to Anderson, is governmental neglect and the lack of vital public services counties make available to their residents.<sup>109</sup> Beyond local governmental law, David Ball has focused on the role that counties play in the administration of criminal justice.<sup>110</sup> He argues that counties play an underappreciated role in contributing to California’s prison overcrowding problem.<sup>111</sup> County officials, not state officials, control the inflow into prison through their enforcement priorities and prosecutorial charging decisions.<sup>112</sup> Thus, Ball argues, any reform efforts must account for the ways in which counties distort criminal justice policy.<sup>113</sup>

Both the neglect and policy distortion account of counties could profitably inform the development of immigration scholarship. On the point of neglect, one way to conceptualize wage theft statutes is as an attempt to tap into policing as a social good.<sup>114</sup> Within this formulation, police services represent a social good akin to other social services, like fire protection or social security.<sup>115</sup> Although proponents of this view acknowledge the difficulty of identifying an optimal level of police enforcement,<sup>116</sup> they argue that democratic commitments demand that police pay attention to questions of minimally adequate policing and practices that

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107. Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1113 (2008).

108. *See id.* at 1123–24.

109. *See id.* at 1101–02.

110. *See* W. David Ball, *Tough on Crime (on the State’s Dime): How Violent Crime Does Not Drive California Counties’ Incarceration Rates—and Why It Should*, 28 GA. ST. U. L. REV. 987, 987 (2012) (arguing that “California’s prison overcrowding is due in large part to county decisions about how to deal with crime”).

111. *Id.* at 1002–03.

112. *Id.* at 991 (“Local officials, not state officials, control the inflow into prison, through decisions about which crimes to investigate, whom to arrest, and whom to prosecute.”).

113. *See id.* at 992–93, 1003.

114. The police are often criticized for overpolicing. The current controversy over the New York Police Department’s “stop and frisk” policy is a classic example of such a critique. *See* Joseph Goldstein, *Trial to Start in Class-Action Suit on Constitutionality of Stop-and-Frisk Tactic*, N.Y. TIMES, Mar. 18, 2013, at A15. By contrast, some scholars have drawn attention to the harms flowing from underpolicing. *See, e.g.*, RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19–21 (1997); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717–22 (2006).

115. *See* DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 122–23 (2008) (describing policing as a form of redistribution); Natapoff, *supra* note 114, at 1719 (suggesting that underenforcement reflects one way in which the state participates in “social contests over resources, power, and legitimacy”).

116. And denying or withholding this social good—typically in the form of failing to adequately respond to pleas for help—can generate subordinating effects for communities of color, just as stopping and frisking a disproportionate number of Black and Latino men does.

exacerbate social inequality (whether through over- or underenforcement).<sup>117</sup> Asking police to negotiate workplace disputes in the temporary labor market fits snugly within the “social good” account of policing. The informal nature of day labor often leaves workers with little recourse when employers fail to deliver on promised wages. And because many day laborers are immigrants and often unauthorized, redirecting policing resources to their needs helps correct the resource deprivations these workers experience.

In terms of policy distortion, examining county-level immigration enforcement draws our attention to the relationship between detention decisions and enforcement practices. Local jails tend to be operated by county officials, which are usually sheriffs, whereas most investigative services are provided by city officials, like police.<sup>118</sup> Thus, residents of cities often receive two layers of law enforcement services—those provided by the police and those by sheriffs. But residents of unincorporated rural communities often receive only one layer of government—the county.<sup>119</sup> This means that for county residents, the same law enforcement entity is sometimes responsible for both investigative *and* detention services. Such a dynamic raises questions about whether and how these dual responsibilities affect each type of decision. Do IGSA contracts affect the types of crimes sheriffs investigate? How about the rates of arrest? Are counties complying with the TRUST Act in meaningfully different ways than cities?

Beyond the police and traditional LEAs, harnessing criminal law to regulate wage theft invites us to consider other interesting design questions. One important function served by the police is gathering information and records upon which a prosecutor can make a charging decision. But these duties can be carried out by entities not subject to S-Comm. If local labor enforcement goals conflict with federal immigration enforcement goals, another question is whether reassigning one set of duties or agency splitting might help harmonize the two goals. Agency splitting is a common course of action within the federal administrative law tradition.<sup>120</sup> In this case, localities could choose to keep immigration enforcement duties with the police (*vis-à-vis* S-Comm or IGSA) and to transfer labor enforcement duties to other entities wielding criminal investigative authority. If the primarily benefit of the police in the wage theft context is to investigate and build a

117. See SKLANSKY, *supra* note 115, at 117 (cautioning against police practices that reinforce “unjustifiable forms of hierarchy”); Natapoff, *supra* note 114, at 1719 (explaining that fairness concerns are at their height where underenforcement implicates socially vulnerable groups).

118. See Richard A. McGee, *Our Sick Jails*, 35 FED. PROBATION 3, 5 (1971) (“The most common practice is for local jails to be a part of county government and to be operated by the county sheriff. . . . [T]here is substantial movement away from the practice of placing the jail management function under the city police.”).

119. William L. Waugh, Jr., *Regionalizing Emergency Management: Counties as State and Local Government*, 54 PUB. ADMIN. REV. 253, 255 (1994) (“Counties typically provide a wider range of services for residents in unincorporated rural areas.”).

120. See Eric Biber, *Too Many Things To Do: How to Deal With the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 33–35 (2009); Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1110–13 (2011).

record for prosecutors to consider, then it seems that other agencies could be empowered to do precisely that.

Just such a transformation seems to be underway in California, where the California Labor Commissioner has created a Crime Investigation Unit (CIU) comprised of peace officers who carry out police-like investigative functions for allegations of wage theft.<sup>121</sup> For example, in 2013, the California Labor Commissioner conducted several investigations of restaurant owners suspected of engaging in workers' compensation fraud and forgery.<sup>122</sup> The case was eventually referred to the CIU, which partnered with the San Diego District Attorney's office to indict these employers.<sup>123</sup> Such a design choice creates alternative sources of policing without having to rely on the police who are subject to conflicting mandates vis-à-vis programs like S-Comm.<sup>124</sup>

### C. *The Costs of Criminalization*

A third and final set of questions goes to whether the benefits offered by a criminal law solution might prove to be too costly for immigrant communities. In many cases, a stern lecture from a police officer may be sufficient to scare a wayward employer into paying owed wages.<sup>125</sup> But consider a case where an employer actually gets prosecuted. Presumably, the employer would pay wages owed, perhaps a fine, and maybe even serve a relatively short period of jail time. Depending on the circumstances of the underlying wage theft, any of these outcomes could be deemed fair. But what if the employer also received an order of deportation? What if an immigrant worker recovered his wages but only at the cost of seeing his employer receive a conviction for which immigration consequences attach? Does enforcing wage theft laws against immigrant employers provide a ham-handed approach to a situation demanding a lighter touch? Turning to the criminal justice system enables immigrant communities to solve one problem (the theft of wages), but only at the cost of exacerbating another (the decimation of communities through deportation).

In this Essay, much of my analysis has operated under the assumption that only the "worker" half of the employer-worker dyad lacks citizenship. But this is not invariably the case. A significant percentage of businesses in the day labor

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121. See Press Release, Cal. Dep't of Indus. Relations, California Labor Commissioner Launches Criminal Investigation (Feb. 27, 2012), available at <http://www.dir.ca.gov/DIRNews/2012/IR2012-09.html>.

122. See Press Release, Cal. Dep't of Indus. Relations, California Labor Commissioner Investigation Results in Criminal Forgery, Fraud Charges Against Restaurant Owners (Feb. 19, 2013), available at <https://www.dir.ca.gov/DIRNews/2013/IR2013-09.html>.

123. See *id.*

124. At the same time, creating agencies that are separate from the police but empowered to carry out police-like functions still leaves open the question of whether immigrant communities can appreciate such a distinction. See Ian Lovett, *Driver's License Program in California Hits a Snag*, N.Y. TIMES, Mar. 5, 2014, at A14.

125. See BOBO, *supra* note 8, at 226.

market are immigrant owned.<sup>126</sup> And these businesses often operate as important institutions within immigrant communities, not only as an important source of income for new arrivals but also as institutions and meeting places that help establish and develop norms and cultural practices within immigrant communities.<sup>127</sup> Because a common business practice within these sectors is to hire family members or members of one's community or "hometown,"<sup>128</sup> employer-worker relationships in these sectors represent more than the conjoining of economic interests; they also evince a shared sense of social and cultural space, perhaps an awkward attempt to recreate a sense of home. These dynamics can be particularly robust (not to mention gendered) within the homecare and other caretaking sectors, where workers, such as domestic workers, nannies, and au pairs, assume responsibilities traditionally associated with the family.<sup>129</sup> The nature of these employer-worker relationships does not neatly fit into the adversarial management-labor paradigm that defines much of labor and employment law.

In some cases, the prosecution of wage theft and the ensuing conviction may trigger immigration consequences leading to the employer's deportation. Determining which kinds of crimes lead to immigration consequences can be challenging and counterintuitive, but one factor that can serve as a rough indicator is sentence length. A number of provisions tie removability and ineligibility from equitable relief to sentences exceeding one year.<sup>130</sup> Wage theft statutes tend to straddle the line separating misdemeanors and felonies, which means that they impose sentences that run less than and greater than a year. For example, under the Texas wage theft statute, convictions for stealing in excess of \$1500 are treated as felonies.<sup>131</sup> And those who have committed multiple theft offenses can be treated

126. According to one study, 54% of dry cleaning and laundry services, 49% of grocery stores, 37% of restaurants, and 28% of leisure and hospitality small businesses are owned by immigrants. See DAVID DYSEGAARD KALLICK, FISCAL POLICY INST., IMMIGRANT SMALL BUSINESS OWNERS: A SIGNIFICANT AND GROWING PART OF THE ECONOMY 2 (2012), available at <http://www.fiscalspolicy.org/immigrant-small-business-owners-FPI-20120614.pdf>.

127. See Lisa Sun-Hee Park, *Asian Immigrant Entrepreneurial Children*, in CONTEMPORARY ASIAN AMERICAN COMMUNITIES: INTERSECTIONS AND DIVERGENCES 161, 161–62 (Linda Trinh Vò & Rick Bonus eds., 2002).

128. See Jimmy M. Sanders & Victor Nee, *Immigrant Self-Employment: The Family as Social Capital and the Value of Human Capital*, 61 AM. SOC. REV. 231, 233 (1996) (discussing "common ethnicity as a source of economically productive social capital" amongst immigrants and describing how, amongst immigrant business-owners, "[t]he family supports self-employment by furnishing labor and enabling the pooling of financial resources").

129. See Hina Shah & Marci Seville, *Domestic Worker Organizing: Building a Contemporary Movement for Dignity and Power*, 75 ALB. L. REV. 413, 415–18 (2012); Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1390, 1397 (2008).

130. See, e.g., 8 U.S.C. § 1227(a)(2)(A)(i) (2012) (listing as a ground for deportability a "crime involving moral turpitude" in which "a sentence of one year or longer may be imposed"); *Id.* § 1229b(b)(1)(C) (listing as a requirement for cancellation of removal that the removable immigrant not have been convicted of a criminal offense, which includes a crime involving moral turpitude).

131. TEX. PENAL CODE ANN. § 31.04(e)(4) (West 2011).

as felons no matter the amount stolen.<sup>132</sup> Wage theft statutes therefore create a real possibility of deportation.

Although it is difficult to conclude precisely how many of these business owners are actually subject to deportation—immigrants who have naturalized are legally protected against deportation by virtue of their citizenship—the continued growth of some of these sectors suggest that the pool is being replenished with new immigrants and noncitizens. Thus, noncitizen small business owners would certainly take seriously a visit by the police. In fact, they would likely take such a visit much more seriously than their citizen counterparts given that they face the possibility of not only paying what they owe (which is the point of wage theft criminal statutes), but also deportation (which is increasingly a consequence of contact with the criminal justice system).

On the one hand, the criminalization of wage theft creates unique opportunities to debate the moral dimensions of a labor market in which both the employers' and workers' hands are not entirely clean. The criminal justice system is uniquely situated to issue moral condemnation on those subject to its regulatory powers.<sup>133</sup> As Emile Durkheim observes: “[I]t is always to the collective consciousness that we must return. From it, directly or indirectly, all criminality flows.”<sup>134</sup> In this case, the “collective consciousness” to which Durkheim refers maps onto city, county, and state boundaries. And, for the most part, immigrants have been excluded from the process by which these norms are established. Most noncitizens are excluded from the political and other civic processes.<sup>135</sup> And because immigrants have long been blamed for a variety of social ills, public discourse surrounding immigrants has remained largely one-sided for long stretches of this country's history.<sup>136</sup> Marshaling wage theft laws to combat employer exploitation therefore injects a bit of nuance into discussions of unauthorized work.

On the other hand, it seems odd that an unauthorized immigrant's claim to membership is through the expulsion of another immigrant. Of course, such arrangements already exist in immigration law (the U and T visas are good examples),<sup>137</sup> but those pathways to membership are regulated by immigration officials.<sup>138</sup> In the case of wage theft, whether an employer will meet or avoid the

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132. *Id.* § 31.03(e)(4)(D).

133. *See Verga, supra* note 12, at 289 (“Criminal charges often have a shaming function and result in negative publicity.”).

134. *See* EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 43 (1984).

135. *See* April Chung, Comment, *Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 *ASIAN PAC. AM. L.J.* 163, 164 (1996); Amy R. Motomura, Note, *The American Jury: Can Noncitizens Still Be Excluded?*, 64 *STAN. L. REV.* 1503, 1515–16 (2012).

136. Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 *IOWA L. REV.* 707, 711 (1996).

137. *See* Coleman, *supra* note 56, at 10–12, 10 n.45.

138. *See generally* 8 C.F.R. § 214.11 (2014) (T Visa); *Id.* § 214.14 (U Visa).

fate of deportation will largely turn on the charging decision of the local prosecutor, a decision-making process that reflects local rather than national preferences.

Moreover, enforcing wage theft laws against bad actor employers may serve only to cut off low-hanging fruit. This is the danger of drawing attention to a problem using criminal justice resources: by individualizing blame, we might miss out on the structural factors creating the opportunities for wage theft. Consider the parallel example of antitrafficking enforcement efforts. Trafficking is a global phenomenon. It provides products and services to a consuming public and federal and state officials are empowered to seek penalties against a wide array of actors.<sup>139</sup> Yet, prosecutors often focus on individual “bad actors” while obscuring the complex set of global forces contributing to and structuring these bad acts.<sup>140</sup> This characterization, in turn, obscures the ways in which ordinary citizens and corporations also contribute to the trafficking phenomenon.<sup>141</sup> A similar point could be made about anti-wage theft efforts in the day labor market. Just as traffickers usually comprise just one part of a larger criminal trafficking enterprise,<sup>142</sup> subcontractors often fit within a larger network of business relationships, a point that can be easy to miss when focused on individual bad actor employers. Focusing on individual bad actor employers may distract us from larger structural forces contributing to immigrant worker exploitation. Many of the industries dependent on day labor were traditionally dominated by larger businesses, which employed large numbers of workers.<sup>143</sup> But the last several decades have witnessed the reorganization of these industries.<sup>144</sup> As contracting out, outsourcing, and subcontracting have emerged as a standard part of industry practice, the number of workers in a single workplace shrank.<sup>145</sup> As David Weil observes, this “fissuring” of the employment relationship has generated “workplaces with a high propensity of violations but opacity in terms of who is responsible for conditions.”<sup>146</sup>

139. See Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 4 (2004) (“Until recently, trafficked persons could rely on sundry federal and state labor and employment laws and tort laws related to forced labor conditions in order to seek remedies from their traffickers. Now they can also use the TVPA directly as the basis for a claim against those who trafficked them and against other liable third parties.” (footnote omitted)).

140. As Jennifer Chacón astutely observes, trafficking has been characterized as “a foreign evil perpetrated by minorities and migrants” that has left “the large demand for trafficking labor unaffected and unnamed.” Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1628 (2010).

141. *Id.* at 1632.

142. See Dina Francesca Haynes, *Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers*, 26 HUM. RTS. Q. 221, 229 (2004) (“Traffickers are often extremely savvy transnational organized criminals.”).

143. See David Weil, “Broken Windows,” *Vulnerable Workers, and the Future of Worker Representation*, 10 FORUM (SPECIAL ISSUE) 1, 3–4 (2012).

144. *Id.*

145. *Id.*

146. *Id.*; see also DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 9–10 (2010), available at



In sum, prosecuting wage theft may increase deportations and may end up skewing public perception. Criminal law metes out moral blame, which can aid the cause of immigrants for all the reasons laid out in this Essay. But assigning blame can also be reductive. It often provides stark answers where nuance and subtlety are called for. In other words, calling upon the police and prosecutors to stigmatize and punish an individual bad actor employer may come at the cost of drawing attention away from the larger structural forces that created the opportunities for wage theft in the first place.

#### CONCLUSION

Immigrant workers in the temporary labor market are vulnerable and cannot take for granted what many of us do: the right to get paid for services rendered. The movement to criminalize wage theft is creative, and it reminds us that policing can be a social good allocated in the service of social equality. But this tactic does not come without risks, and its success depends on the lengths to which police departments are willing to go in resisting federal overtures to participate in immigration enforcement programs. Whether and under what conditions police are willing to go these great lengths are still unknown, which is why this Essay calls for more empirical and theoretical work in the area.