

PICKING EMPTY POCKETS



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UNC IMMIGRATION/HUMAN RIGHTS POLICY CLINIC

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<http://www.law.unc.edu/documents/clinicalprograms/emtypocketsfinal.pdf>

The I/HRP report serves as a companion document to the North Carolina Justice Center's report,
Wage Theft in North Carolina: The Hidden Crime Wave Robbing Workers and Communities.

<http://www.ncjustice.org/sites/default/files/WAGE%20THEFT%20report%202013.pdf>.

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EXECUTIVE SUMMARY

This policy brief analyzes the state and national problem of wage theft through the stories of five North Carolina workers. It also reviews data compiled by the North Carolina Justice Center and the National Employment Labor Project (NELP) to provide an analysis of statewide legal remedies and an examination of national data and legal trends. In addition, this policy brief considers the most common types of wage theft and provides information on the industries where wage theft is most-reported.

What is wage theft and how does wage theft occur?

- Wage theft occurs when an employer does not pay a worker for the work she or he has performed—when an employer violates the law by depriving a worker of wages to which he is legally entitled. Employers steal wages in many ways, and the multitude of criminal tactics may make it difficult to develop policies broad and powerful enough to combat wage theft. However, the multifaceted nature of wage theft also makes it a wrongdoing ever more important to eradicate. The crime of wage theft can occur in small amounts over time, as with the employer that subtracts a few dollars from an employee’s weekly paycheck.

Who are the victims of wage theft?

- Wage theft may directly affect as many as three million workers of all earning levels, age ranges, immigration statuses, and races. Still, a worker’s socio-economic status, age, immigration status, and ethnic background may play a role in making him or her more likely to be victimized. One researcher reported that “[a]lthough some of the worst wage theft occurs when immigrant workers aren’t paid minimum wage or aren’t paid at all, the largest dollar amounts are stolen from native-born white and black workers in unpaid overtime.” Still, undocumented workers are uniquely vulnerable to exploitation in the workplace.
- Low-wage workers are more likely to be wage theft victims.
- Women are more likely to be wage theft victims.
- Farmworkers are disproportionately victims of wage theft.
- Most individuals we interviewed were unaware that wage theft is a crime in North Carolina. Most were also unaware that there are several avenues for recourse for a wage theft victim. Those workers who were aware of remedial measures encountered various obstacles to accessing those measures.

How prevalent is wage theft; where is it most likely to occur? Findings in this study show:

- In 2011 alone, the North Carolina Wage and Hour Bureau (WHB) received 74,816 calls, made 3,136 investigations following these complaints, and cited 1,651 employers.

- Employers stole upwards of \$4.7 million from workers. While this \$4.7 million figure is vast, it is likely a low estimate because it does not represent wage theft victims like those interviewed above, who did not know how to report that their due wages were stolen.
- Of the wage theft cases reported in 2011, the top four offending industries were retail and services (27%), eating and drinking places (16.6%), the home health care industry (15%), and the construction industry (12.5%).

What are the laws against wage theft and are they effective?

- Laws at the federal, state, and local level currently exist to combat wage theft and increasing numbers of workers are finding ways to assert their rights to wages. Additionally, increasing numbers of law enforcement officials are taking wage theft matters seriously. However, the problem is an epidemic, and the great majority of workers are unable to use available remedies or reside in jurisdictions where remedies fall short.
- Although in theory workers are covered by existing employment and labor laws, in practice, however, workers may effectively be deprived of power and autonomy in the workplace—whether for subjective or objective reasons, or both.
- In North Carolina, workers often do not seek remedies offered by current laws. For example, immigrant workers without proper work authorization are often threatened with or fear that their employer may call Immigration and Customs Enforcement (ICE) to disclose the workers' immigration status and whereabouts. Apart from fear of retaliation, workers often do not use current laws to assert their rights because they may not know that such laws exist. This study found that most of our interviewees did not file claims with either the Wage and Hour Bureau or small claims court.
- Worker misclassification is rampant, as employers labeling workers as independent contractors, consultants, or paying them off the books without any tax deductions which bar them from receiving wage and hour protections as employees. The most vulnerable victims of worker misclassification are undocumented workers. Misclassification makes remedies for wage theft more complicated to obtain
- Limited English proficiency (LEP) claimants must provide their own interpreter or proceed through trial without one, as small claims courts in North Carolina do not provide interpreters.
- Even when workers succeed in winning a favorable judgment, they are often unable to collect as employers become judgment-proof; they file for bankruptcy, hide their assets, shut down operations, or restructure themselves into new entities. Other employers simply avoid being found.

- At both the state and federal level, enforcement efforts are low. Although the labor force grew by 52% between 1980 and 2007, the number of inspectors enforcing wage and hour laws declined by 31%.
- Many states have not criminalized wage theft, and or have done so while making criminal penalties available only as tools for prosecutors and state agencies—not workers.

What can be done to combat wage theft? This report recommends a number of strategies to address these inadequacies and remedy wage theft including:

- Implement methods to protect against harassment and retaliation, such as allowing anonymous complaints or allowing third parties, such as work centers, to file complaints; allowing one worker to file claims on behalf of the rest of the workers affected by wage theft; and requiring the state enforcement agency to keep the identities of complaining workers confidential as long as possible during its investigation.
- Implement specific protections for undocumented workers as they are twice as likely as a US-born worker to suffer a wage theft violation. States can pass laws that provide all workers with the same protections and recourse under state wage laws, regardless of their immigration status. State governments should also urge their state departments of labor and their attorney general offices to issue certifications for U Visas for immigrants who are victims of work-related crimes as part of their investigative process.
- North Carolina should look to the various remedies other states have implemented to establish a model particular to the conditions in this state. Such strategies include enhancing enforcement, establishing state-community networks, and establishing study commissions to study and document the prevalence and impact of independent contractor misclassification.

Why should lawmakers prioritize remedying wage theft?

- Remedying wage theft is crucial for lawmakers and enforcers at the federal and state level, as it violates domestic legal norms at all levels. In addition to domestic legal norms, the current wage theft problem in North Carolina also violates the standards set forth by international human rights treaties and norms that protect workers, particularly undocumented workers who are vulnerable to exploitation by employers.
- Stealing workers' wages also offends a number of fundamental economic, political, and moral norms. Wage theft exacts a heavy toll on both individuals and communities; this toll is increased by low wage theft visibility, as low wage theft visibility only leads to more wage theft, thus perpetuating a vicious cycle.

INTRODUCTION

Freddy¹ paced around his apartment, sweat dripping from his forehead, barely able to make eye contact as he told his story of wage theft. Months had passed since he was robbed of both his dignity and his due wages, but it was clear that time had done little to heal Freddy's wounds. "I've read about it before in the newspaper, but never in [my] life did I think it would happen to me How do [I] go forward?" Freddy asked in disbelief.²

Freddy worked from sun up to sun down picking cilantro plants in the sweltering North Carolina sun. It was not the life he envisioned when he proudly earned his high school equivalency degree in his native Texas, but it was honest work, and the pay allowed him to continue to put food on his table and clothes on his back. Freddy, a United States citizen, was born and raised in the United States, but his treatment as a day laborer made him feel like less of a person. His employer paid him less than they agreed upon, paid him less than the legal minimum required, and ultimately stole wages from Freddy and his fellow workers. When Freddy asked about the missing wages, Freddy's employer fired him without further discussion. Freddy soon found himself unemployed, frustrated by his own powerlessness, and humiliated by his inability to prevent his employer's crime.

Freddy's experience is quickly becoming the rule, not the exception; reports of employers stealing workers' wages are on the rise in North Carolina. As the labor market swells with more vulnerable workers—including immigrants and native-born workers who suffer chronic unemployment because of harsh economic conditions—wage theft threatens to become a widespread problem in the labor market.

In North Carolina, the crime of wage theft transcends education, skill, and socio-

¹ All interviewees' names have been changed to protect confidentiality.

² Interview with Freddy, Wage Theft Victim, in Durham, N.C. (Feb. 3, 2012) [hereinafter Interview with Freddy] (on file with the UNC School of Law Immigration/Human Rights Policy Clinic).

economic levels. Wage theft is not a problem limited to workers without a work permit or legal documentation. The incidences are widely underreported, but it has been estimated that the amount of wages stolen from workers in North Carolina summed to \$4.7 million in 2011 alone.³ With only 3,136 employers investigated, however, the figure is likely to be a mere estimate of the true number of wage theft victims.⁴ The figure may also exclude wage theft among many undocumented workers. While trends among undocumented workers are difficult to identify because they often live in the shadows, undocumented workers are very much part of the wage theft crisis.

This policy brief analyzes the state and national problem of wage theft through the stories of five North Carolina workers. It also reviews data compiled by the North Carolina Justice

His employer paid him less than they agreed upon, paid him less than the legal minimum required, and ultimately stole wages from Freddy and his fellow workers. When Freddy asked about the missing wages, Freddy's employer fired him without further discussion. Freddy soon found himself unemployed, frustrated by his own powerlessness, and humiliated by his inability to prevent his employer's crime.

Center and the National Employment Labor Project (NELP) to provide an analysis of statewide legal remedies and an examination of national data and legal trends. In addition, the policy brief considers the most common types of wage theft and provides information on the industries where wage theft is most-reported. The overlap between the North Carolina and the national data is instructive, and

begs questions about redress and redressability that this policy brief later examines.⁵ This policy brief aims to catalyze more research into the current status of wage theft in North Carolina so

³ ALEXANDRA F. SIROTA & SABINE SCHOENBACH, N.C. JUST. CTR., WAGE THEFT: UNDERMINING THE VALUE OF WORK 1 (2012), *available at* http://www.ncjustice.org/sites/default/files/NCJC%20Brief%20-%20Wage%20theft_0.pdf.

⁴ *Id.*

⁵ For more information about possible methods of combating wage theft, see Part IV, *infra*. For information on the current legal status of wage theft in states' criminal and civil codes, see Part II, *infra*.

that legislators will take notice of the extent of the problem and develop policy initiatives to combat it. Because the wage theft that occurs in North Carolina is analogous to the wage theft that occurs nationwide,⁶ North Carolina may act as a laboratory for legislative initiatives for other states to follow or improve upon.

Four third-year law students at the University of North Carolina School of Law's Immigration/Human Rights Policy Clinic interviewed five workers who experienced wage theft in the Triangle area. The interview questions covered five broad areas of analysis: (1) current work experience and background; (2) specific violations and working conditions; (3) whether the interviewees had reported their wage theft, and if not, why not; (4) what impact their wage theft experience has had on their lives; and (5) the interviewees' ideas for improving working conditions. The interviews took place in a conversational style, but the questions were scripted, the interviews were recorded, and responses were later categorized and coded for analysis.⁷ Interviewees were also asked about whether they were victims of other crimes, such as trafficking, domestic violence, and sexual assault.⁸

Part I of the policy brief begins with a qualitative analysis of wage theft. It recounts the stories of five Triangle-area workers and how they were deprived of their rightful pay.⁹ Part I then describes different types of wage theft, and assesses the extent of wage theft abuses in North Carolina. Part I goes on to examine wage theft as it affects workers nationwide. Analyzing

⁶ See *infra* Part I.D.

⁷ For a detailed analysis of the coding results, see Figures 1–3 & Part I.B, *infra*.

⁸ Through these questions, we hoped to better understand whether and to what extent wage theft victims are also victims of U Visa-eligible crimes. See Part IV.B.2.d, *infra* (proposing that wage theft be made a qualifying crime for a U Visa). A U Visa gives temporary legal status and work eligibility in the United States for up to four years to a victim of an eligible crime if the victim was helpful in the investigation or prosecution of the crime. See *Questions & Answers: Victims of Criminal Activity, U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=1b15306f31534210VgnVCM100000082ca60aRCRD&vgnnextchannel=ee1e3e4d77d73210VgnVCM100000082ca60aRCRD> (last visited May 10, 2012).

⁹ See Part I.B, *infra*.

nationwide wage theft is necessary to better understand the problem of wage theft in North Carolina, and other states' solutions may be instructive in helping to identify solutions to the problem.

Part II of the policy brief lays out the laws that are available to help wage theft victims seek redress, including the North Carolina Wage and Hour Act and the federal Fair Labor Standards Act. Part III describes how these existing laws fall short because of cultural issues—workers fear retaliation and do not report—or structural issues—enforcement agencies are ill equipped to handle the problem. Part IV draws on numerous studies that have identified the policies and legislation governments have implemented throughout the country to address wage theft. Policy and legislative change is necessary at the federal, state, and local levels to remedy wage theft and other workplace violations. Part V addresses why robbing workers of their hard-earned wages is wrong. Stealing workers' wages violates legal, moral, political, and economic norms at the state, national, and international levels. Part V concludes by examining the ways in which these norms are violated by the current wage theft problem in North Carolina and assesses why this problem deserves our State's utmost attention.

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I. WAGE THEFT: A SNAPSHOT

A. An Introduction to Wage Theft Terminology

Employers steal wages in many ways, and the multitude of criminal tactics may make it difficult to develop policies broad and powerful enough to combat wage theft. However, the multifaceted nature of wage theft also makes it a wrongdoing ever more important to eradicate. The crime of wage theft can occur in small amounts over time, as with the employer that subtracts a few dollars from an employee's weekly paycheck. In this scenario, even though the employer steals a few dollars or cents with each paycheck, the total amount stolen over time may cumulate to hundreds or thousands of dollars. A single instance of stealing an employee's earnings can also constitute wage theft, as with the employer that fails to pay an employee for an entire week or month's work. Whether it occurs over time or just once, wage theft has an incremental and cumulative effect that harms workers' moral and financial health, damages the integrity of employers, and adversely affects the local economy.

What is Wage Theft?

Wage theft: occurs when an employer does not pay a worker for the work she or he has performed—when an employer violates the law by depriving a worker of wages to which the worker is legally entitled.

Each of the five interviewees was aware that not being paid their due wages was wrong. Some of the individuals with whom we spoke with did not know that wage theft can take many different forms. Thus, some of the interviewees may not have been aware of their victimization.

Types of Wage Theft

- *Deductions*: reducing an employee's paycheck
- *Minimum Wage Violations*: paying less than minimum wage. Most people are legally covered by minimum wage laws, either at the federal or state level.
- *Misclassifications*: incorrectly reporting that a worker is an independent contractor, so that she or he is not entitled to certain benefits.
- *Not Being Paid At All*
- *Not Being Paid On Time*
- *Not Being Paid the Promised Rate*
- *Overtime violations*: the Fair Labor Standards Act ("FLSA") requires that covered employees must be paid time and a half for all hours worked over forty hours during each week for a single employer. Employers steal wages from employees by misclassifying employees as not eligible for overtime, or simply (or at all) for the overtime worked.
- *"Off-the-clock" violations*: when workers must perform unpaid work that takes place before or after a regularly scheduled shift.
- *Meal break violations*: in states like New York, Illinois don't pay employees time and a half, and California, employers are required to give workers an uninterrupted meal break during their shift. The time required to work before workers are entitled to a meal break, along with the length of the meal break itself, varies by state. However, many employers truncate meal breaks, interrupt meal breaks, delay meal breaks, or deny meal breaks altogether.

In addition to asking interviewees about specific ways in which their employer failed to pay them their wages, the interview questions also included topics related to their workplace

environment. These questions were included so that we could better understand the types of setting in which wage theft most often occurs. In some interviews, workers told stories of their employers casting racial aspersions or giving more or better work to white workers and not to Latino workers.¹⁰ Workers also spoke of their employers raising their voices at them, treating them badly, or acting in a demeaning way. Almost all interviewees questioned their employer's method of arriving at the appropriate amount of tax deductions from their paychecks and expressed frustration with not having a clear record of how many hours they had worked.

Other Abuses Involving Poor Working Conditions

- *Exploitation, Abusive Work Environment*
- *Racism, Ethnicity-based Bias or Discrimination*
- *Culture of Fear*: Through actual or perceived threats, employees believe their employer will fire them, or threaten to report them or their families to Immigration and Customs Enforcement.
- *Information Asymmetries*: Employers often keep employees in the dark with respect to how payments are made, how many hours the worker works, and how tax deductions are made. This information asymmetry promotes a power imbalance in which the employer maintains control of the employee by controlling what he or she knows.

B. A Qualitative Analysis of Wage Theft in the Triangle: Five Case Studies

Five workers in North Carolina shared their insights about what it was like to experience wage theft and what might be done in the future to prevent it. Each worker described their experience differently; some became tearful, others showed bitterness or resentment, and still others expressed resignation about past harms and continued resolve to work hard in the future. Across the emotional spectrum, each interviewee felt sure that wage theft should be a crime and that

¹⁰ See *infra* Part I.B.

North Carolina should work hard to stop it.

The five interviewees were evenly divided between males and females. Two interviewees experienced wage theft in the house cleaning industry, but the other four interviewees worked in different industries: construction, landscaping, and farm work.

Figure 1: Demographics of Wage Theft Interviewees

	Age Group	Gender	Immig Status	Ethnicity	Occupation	Industry/Job Tenure
Carlos	35 to 40	Male	Undocumented	Latino/Mexican	Construction	In the industry for 15 years
Diego	35 to 40	Male	Undocumented	Latino/Mexican	Landscaping	In the industry for 1.5 years
Francesca	41 to 45	Female	Undocumented	Latina/Mexican	House Cleaning	
Freddy	30 to 34	Male	U.S. Citizen	Mexican-American	Farm work	New to farm work
Natalia	35 to 40	Female	Undocumented	Latina/Mexican	House Cleaning	With same company for 7 years

As shown in Figure 2, below, the wage theft victims experienced multiple types of wage theft.

Figure 2: Types of Wage Violations

	MW Violation	OT Violation	Misclassification	Non-payment	Underpayment	Not paid on time	Deductions
Carlos		◆	◆	◆	◆	◆	
Diego		◆	◆		◆		◆
Francesca	◆			◆			
Freddy	◆			◆			
Natalia		◆			◆	◆	◆

Figure 3 below shows that not one of the six interviewees was aware that they could have sought redress for their stolen wages through the Department of Labor, a local small claims court, or by filing a complaint with the Wage and Hour Bureau (WHB) of North Carolina. Half of the interviewees spoke out to their employer about their wage theft; one interviewee was fired, and two interviewees reported that speaking out did not help them recover their wages. One interviewee attempted to contact her employer about her missing wages, and after repeated attempts, her employer threatened her. Two interviewees did not confront their employers for fear of retaliation or other threats. All interviewees had no written employment contract and no record of their employment, and none of the interviewees felt they had control over record keeping, either with payment or hours worked.

Figure 3: Redress Attempts and Barriers to Redress

	Talking with Employer	DOL	Small Claims	Legal Representation	No Contract	No control over record-keeping	Fear of retaliation
Carlos	Threat of retaliation				◆	◆	◆
Diego	Threat of retaliation				◆	◆	◆
Francesca	Couldn't contact - threatened				◆	◆	◆
Freddy	Tried, but didn't help			◆	◆		
Natalia	Tried, but didn't help				◆	◆	◆

While each of the five interviewees has had a different experience with wage theft in their respective job industry, several common issues reflected their circumstances: each worker

was in a low-wage occupation, meaning that they work full time but still remain at or below the poverty level.¹¹ Low-wage workers also hold positions that grant them no or few benefits, such as health care.¹² All interviewees found their jobs through informal networks in the community or through friends. No one was given employee benefits like sick days, vacation time, or health insurance. Each wage theft victim's employer held primary control over the records accounting for the hours of a worker. No worker had a formal, written contract or agreement to perform his or her job; all agreements to work were oral in nature. Most interviewees were unaware that wage theft is a crime in North Carolina. Most were also unaware that there are several avenues for recourse for a wage theft victim. Those workers who were aware of remedial measures encountered various obstacles to accessing those measures. Each worker's story revealed insights about the experience of wage theft, specifically, and about the life of a low-wage earner, generally.

Even though the employer steals a few dollars or cents with each paycheck, the total amount stolen over time may cumulate to hundreds or thousands of dollars.

1. Carlos

Carlos, forty years old, was born in Mexico City and is currently undocumented.¹³ He works in construction and has perfected his woodworking skills for the past fifteen years as a master carpenter. He provides his own tools, but his employer provides all electric power tools that he uses on the job. Indeed, Carlos is paid less than other workers because he does not supply his own power tools.

Carlos has experienced financial hardship because of the recent economic downturn in the

¹¹ *Fact Sheets*, FAIRNESS INITIATIVE ON LOW-WAGE WORK, <http://www.lowwagework.org/factsheets>.

¹² *Id.*

¹³ Interview with Carlos, Wage Theft Victim, in Carrboro, N.C. (Feb. 9, 2012) [hereinafter Interview with Carlos] (on file with the UNC School of Law Immigration/Human Rights Policy Clinic).

United States; there are fewer houses being built, which means fewer construction opportunities for Carlos to do his work. In the last year, however, Carlos has worked on three or four construction sites. During some of these recent jobs, Carlos' bosses have claimed that Carlos has worked fewer hours and is entitled to less pay, but Carlos knows he deserves to be paid for all of the hours he worked. On another job, close to Christmas time, his boss failed to pay him for a full two weeks of work completed. Carlos has also worked under bosses who pay him a minimal amount before the job begins, promising to pay the remainder later. The owed amounts would accumulate, and Carlos' employer would never pay. Carlos knows of many people—mostly undocumented immigrants—who have had similar experiences with employers who refuse to pay them for the time they worked.

When asked about whether he took any steps to confront his boss or take legal measures, Carlos identified a key barrier to redress for someone in his position: "Once, three years ago, I wanted to find legal people to put in a complaint. But first I had to give \$80, and then another \$30 for something else. . . . [I]f one doesn't have any money because [one's boss] didn't pay you . . . it can't be done. Nothing can be done."

2. Diego

Diego is a forty-year-old native of Mexico City who identifies as Mestizo.¹⁴ His proficiency in English is low, and he is undocumented. Diego was nearly finished with his undergraduate education at UNAM, the premier university in Mexico, when he decided to emigrate to the U.S. seeking opportunity. He currently works in landscaping—he cares for the trees, shrubbery, and flowers around residences, and also installs lighting and other electrical installations in outdoor spaces. He believes he is a good landscaper and likes the work, even though his bosses manage

¹⁴ Interview with Diego, Wage Theft Victim, in Carrboro, N.C. (Feb. 14, 2012) [hereinafter Interview with Diego] (on file with the UNC School of Law Immigration/Human Rights Policy Clinic).

him and the other employees very closely. None of the workplace tools Diego uses are his own. When organizing the employees to complete a landscaping job, Diego's employers will divide the group along ethnic lines—"us . . . the Latinos . . . we make [one] group, and the Americans . . . are in another group." "But when all is said and done," Diego continued, "[my boss] was the one that gave me orders but in the end we were the ones that made it happen."

Each worker described their experience differently; some became tearful, others showed bitterness or resentment, and still others expressed resignation about past harms and continued resolve to work hard in the future. Across the emotional spectrum, each interviewee felt sure that wage theft should be a crime and that North Carolina should work hard to stop it.

Even though Diego takes pride in his work, he believes others regard him and his fellow employees as replaceable. When Diego once worked up the courage to ask his boss for a raise, his boss responded by inviting him to quit and reminding him, "like 1,000 Mexicans are at the border coming over here." Along these same lines, Diego has noticed a disparity in how Latinos are treated and compensated. "They pay the Americans well . . . but the heavy work and all that, only we [Latinos] do it."

Diego's employer routinely underpays him for the hours Diego works. "If we put five hours of overtime, he won't give us the five; he gives us two." Diego's paycheck stubs consistently underreport the time Diego works, but his boss does not doctor the paycheck stubs in an obvious way; instead, he does so incrementally. "Instead of putting an hour, he puts fifty minutes or half an hour . . . [During that extra time, we will have been] gathering the tools to store in the truck." This occurs every week. Diego identifies the problem as information and power asymmetry: "the problem is that we don't have control of the hours. . . . He takes them down however he wants. . . . [I]f he makes a 'mistake,' . . . there is nothing left for us but to

endure it.”

4. Natalia

Natalia cleans residential homes for a cleaning company.¹⁵ She is Mexican-born and came to the United States without documentation nine years ago. She has no formal occupational

“I wanted to find legal people to put in a complaint. But first I had to give \$80, and then another \$30 for something else. . . . [I]f one doesn’t have any money because [one’s boss] didn’t pay you . . . it can’t be done. Nothing can be done.”

training, but has worked at her current job long enough to have achieved the title of “Team Captain.” In spite of her seven years of dedication to the cleaning company, Natalia’s bosses have made her a victim of several types of wage theft. A few times in the last year, Natalia’s bosses have failed to pay her on time. In other instances, the employer paid Natalia less than what she was

promised by changing the payment terms.

Natalia has also experienced wage theft in the form of illegal deductions: when driving from home to home during the working day, using one of the employees’ personal vehicles, the company docks Natalia’s earnings to pay for gasoline. “For me, this is an abuse—a robbery. I shouldn’t be paying for the gasoline.” Relatedly, Natalia is also not paid for the time she spends traveling from house to house on the job. Natalia’s time log will read the full amount of hours, but she is not paid for all of those hours.

Natalia feels that her boss takes advantage of her and the other house cleaners because they are Hispanic. Once, Natalia complained about how her boss was treating her, and her boss told Natalia she was free to leave. “[The boss] has a way of [making us feel that] because we’re Hispanic, she yells at us and makes us feel like we’re not as worthy.”

¹⁵ Interview with Natalia, Wage Theft Victim, in Carrboro, N.C. (Feb. 16, 2012) [hereinafter Interview with Natalia] (of file with the UNC School of Law Immigration/Human Rights Policy Clinic).

Natalia fears that if she complains further, her employer will fire her. She has considered leaving her job, but it is very difficult to find new employment, so she feels stuck. If she left, she would be frightened that her employer would call immigration authorities to have her deported. She also fears that her employer would blacklist her, ensuring that Natalia would never be hired again.

5. *Freddy*

Freddy is a U.S citizen born in Texas with his General Educational Development (GED) degree.¹⁶ He came to North Carolina in 2008, at the beginning of the Great Recession, hoping to earn money through short-term work so that he could return to Texas. “It didn’t happen,” Freddy said with his eyes cast downward.

Freddy took on work picking strawberries and cilantro, but the pay wasn’t as promised. At first, he and the other workers were paid between \$8.25 and \$8.50 per hour, but two weeks later, after what his employer called a “training period,” his employer announced that Freddy’s earnings would be based solely on the number of plants he picked. Freddy soon found out that it was nearly impossible to pick enough to earn a decent living wage, as he earned roughly \$4.00 per hour. When he did manage to pick a lot, Freddy’s boss would throw out many plants from his pickings, claiming they were unacceptable. “It was like slavery,” Freddy said. Farm work was backbreaking labor, from sun up to sun down, and Freddy had never done this kind of work before. He took the job because he had been unemployed for a long time, but now he just feels “stranded in a foreign state.”

Freddy’s employer also flatly refused to pay him on a number of occasions. “He was trying to justify us not getting paid because of what we do in our personal lives,” Freddy remembers. His employer pointed out that Freddy and the other field workers sometimes purchased alcohol after

¹⁶ Interview with Freddy, *supra* note 2.

working hours with their earnings. When Freddy pointed out to his boss that they should be able to do what they wished with the money they had earned, his boss fired him.

Freddy felt extreme isolation during his time as a field worker, and he still feels frustrated and humiliated about the way he was mistreated and the way his hard work was undervalued. While he was employed, Freddy sensed that he and the other workers were being taken advantage of because of their race. “This guy probably saw us all as Mexicans and said ‘well, these guys don’t know anything about the law,’ [and so he could just] abuse and use ‘em.” Freddy had heard stories about wages being stolen from workers, but never thought it would happen to him. “And then it happens to you,” Freddy said sadly. “And then you’re in a world of hurt now. Now what? How do you move forward?”

6. Francesca

When Francesca’s boss refused to pay her a full week’s wages and avoided her phone calls and requests to be paid, Francesca felt ashamed, deceived, and frightened about how she would make ends meet that month.¹⁷ She was unaware that she could report the theft, unaware that the theft was legally actionable, and unaware that she had a legal right to the past wages earned. Francesca believed her theft was simply an unfair fact of working life North Carolina.

Francesca is originally from Mexico City, Mexico, and she is forty-two years old. She is undocumented, and before her employer stole her wages, she held three jobs—she worked at a fast food restaurant, as a daytime caregiver for a young baby, and as a home cleaner for a cleaning service company. Francesca hears about job

“[The boss] has a way of [making us feel that] because we’re Hispanic, she yells at us and makes us feel like we’re not as worthy.”

¹⁷ Interview with Francesca, Wage Theft Victim, in Carrboro, N.C. (Feb. 21, 2012) [hereinafter Interview with Francesca] (on file with the UNC School of Law Immigration/Human Rights Policy Clinic).

opportunities through her community. “We’re always communicating . . . in the community, we help each other look and find jobs.” She also goes directly to restaurants or hotels to ask for work applications. Francesca found her home-cleaning position through a friend at the fast food restaurant she worked at who also cleaned homes.

For about three months, Francesca worked steadily as a home cleaner for her employer, who we will call “Alberto.” One Friday, Alberto told Francesca that he would not need her to work the next week. “But he hadn’t paid me for that week, and I thought he would pay me when he called me again,” Francesca recalled. After letting a few weeks go by, Francesca called and texted him, but received no response. “I soon ran into a friend who told me that [Alberto] was telling people I was a very slow worker, and that’s why he [fired me.]” This upset Francesca because she takes pride in her hard work, and she contacted Alberto again for payment. With no success, Francesca went to the *Centro Latino*, a support service for Latino residents in central North Carolina. The *Centro* helped contact Alberto, and Alberto agreed to meet Francesca to pay her. Alberto did not show up to the meeting.

It was not until Francesca had a chance encounter with Alberto in town that Francesca was able to speak with Alberto in person. Francesca told Alberto how much he owed her. He told Francesca to wait there at the bank while he retrieved money—he would be right back. Francesca waited a long time before she realized that Alberto was not coming back to pay her. He never came back.

Francesca ran into Alberto again more than a month later. She again asked to be paid, and he responded, “no, I will not pay you because there is a very big problem.” Alberto told Francesca there was a robbery in the house she last cleaned, and jewelry and electronics were stolen. He told her that the homeowner had called the police and made a police report naming

Francesca, specifically. Alberto also said that Francesca was videotaped committing the theft.

Although Francesca knew there could be no such videotape because she never stole anything,

she was still frightened by the possibility that someone made a false report about her to the

police, and the police would try to track her down. So

many questions raced through her mind: Alberto

accompanied her to each home Francesca cleaned, why

was this the first time she was hearing about this? She

never brought a purse or any property into the homes she

cleaned, so how could she carry out heavy electronics and

jewelry without Alberto noticing? If she had actually

stolen something, why would she keep pursuing Alberto

for one week's wages? Wouldn't she be more afraid of being caught for the robbery? Why

would she *need* one week's wages if she had stolen jewelry and electronics? No, Francesca

knew that this was just another trick to avoid paying her; she knew her employer was threatening

her in order to avoid having to pay her wages.

Freddy had heard stories about wages being stolen from workers, but never thought it would happen to him. "And then it happens to you," Freddy said sadly. "And then you're in a world of hurt now. Now what? How do you move forward?"

Francesca did not know she could report her wage theft to the Wage and Hour Bureau of

North Carolina or take Alberto to small claims court. She believed that she wouldn't have a

claim anyway because her contract with her employer was verbal and there was no written proof

of the contract. She also explained that "people without [immigration] papers have fear, so [we]

don't have a way to defend [our]selves—we are illegal." Even though Francesca knows she did

not do anything wrong, because of her employer's threats she worries that the police might be

looking for her as the perpetrator of the home robbery.

C. A Quantitative View of North Carolina's Wage Theft Problem

The stories of shame and hardship recounted above are far from isolated incidents in North Carolina. In 2011 alone, the North Carolina Wage and Hour Bureau (WHB) received 74,816 calls, made 3,136 investigations following these complaints, and cited 1,651 employers.¹⁸ Employers stole upwards of \$4.7 million from hard workers.¹⁹ While this \$4.7 million figure is vast, it is likely a low estimate because it does not represent wage theft victims like those interviewed above, who did not know how to report that their due wages were stolen. The data used to calculate the figure were based on employee complaints to the WHB, and because employees underreport or fail to report for fear of retaliation, or fail to report because of lack of knowledge that wage theft is a crime, the true figure is likely much higher.²⁰

The problem of workers not being paid their rightful wages in North Carolina affects a spectrum of workers in a range of industries. The breadth and depth of the wage theft problem challenges the assumption that wage theft victims can be identified by national origin, immigration status, gender, or skill level. Identifying a solution to end all incidences of wage theft in North Carolina will require us to recognize that wage theft can, and may affect, every employee in the state. Only when we understand the scope of the problem can we begin to develop actual solutions.

1. Who Are Wage Theft Victims?

Nationally, wage theft may directly affect as many as three million workers of all earning levels, age ranges, immigration statuses, and races.²¹ Still, a worker's socio-economic status,

¹⁸ SIROTA & SCHOENBACH, *supra* note 3, at 1.

¹⁹ *Id.*

²⁰ *Id.* at 1–2; *see also* BERNHARDT ET AL., NAT'L EMP. L. PROJ., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009), *available at* <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>.

²¹ KIM BOBO, WAGE THEFT IN AMERICA 7 (2009).

age, immigration status, and ethnic background may play a role in making him or her more likely to be victimized.²²

The stories of shame and hardship recounted above are far from isolated incidents in North Carolina.

The crime of stealing workers' wages is not solely perpetrated on undocumented workers. Data on United States Department of Labor dispute settlements and private wage and hour lawsuits reveals that a majority of wage theft victims, including those in North Carolina, are United States citizens.²³ One

researcher reported that "[a]lthough some of the worst wage theft occurs when immigrant workers aren't paid minimum wage or aren't paid at all, the largest dollar amounts are stolen from native-born white and black workers in unpaid overtime."²⁴ Still, undocumented workers are uniquely vulnerable to exploitation in the workplace.²⁵

Undocumented workers often have limited knowledge of English, so they are not eligible for many higher paying jobs. Employers in low-wage, low-skill industries "typically prefer immigrant workers, because their vulnerability keeps them silent about the abuses they endure."²⁶ Moreover, legal prohibitions on employers' ability to hire undocumented

Nationally, wage theft may directly affect as many as three million workers of all earning levels, age ranges, immigration statuses, and races.

immigrants foster this culture of silence between employer and employee.²⁷

²² While wage theft is more prevalent in low-paying jobs, wage theft also affects higher-paid workers. A recent lawsuit involved middle-income FedEx drivers in California who had been illegally misclassified as "independent contractors," thus denying them benefits they were actually entitled to as employees. BERNHARDT ET AL., *supra* note 20, at 8. A court-appointed official ordered FedEx to pay \$14.4 million to the plaintiff drivers. *Id.*

²³ BOBO, *supra* note 21, at 7, app. A (2009).

²⁴ *Id.*

²⁵ Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2182–85 (1994).

²⁶ *Id.* at 2182.

²⁷ See, e.g., 8 U.S.C. § 1324(a)(3)(A) (2006) (making it illegal and punishable by fine or prison time to knowingly hire for employment at least ten individuals with actual knowledge that the individuals are undocumented aliens).

Identifying just one causal factor among personal attributes like socio-economic status and immigration status, however, is extremely difficult because the attributes are often interconnected. For example, several studies have reported that women earn less money than men.²⁸ In turn, low-wage workers are more likely to be wage theft victims.²⁹ This syllogism suggests that women are more likely to be wage theft victims, and this fact has been confirmed; women are indeed more likely to be deprived of their due wages by their employers.³⁰

2. Which Types of Wage Theft Are Most Prevalent?

A national survey of 4,387 low-wage workers in various industries reported that the most common form of wage theft occurred when a worker was paid below the minimum wage in the week prior to the survey.³¹ Over 19% of workers surveyed said their employer denied them at least some overtime pay in the week prior to the survey.³² Nearly 17% of workers surveyed said they were not paid for off-the-clock work in the week before the survey was taken.³³ Over half the workers did not receive a paystub, and more than half of workers experienced some sort of meal break violation in the week prior to the survey.³⁴

[a]lthough some of the worst wage theft occurs when immigrant workers aren't paid minimum wage or aren't paid at all, the largest dollar amounts are stolen from native-born white and black workers in unpaid overtime.

These statistics exemplify both the prevalence and the magnitude of the wage theft

²⁸ See, e.g., GOV'T ACCOUNTABILITY OFF., WOMEN'S EARNINGS 29 (2003), available at <http://www.gao.gov/new.items/d0435.pdf>.

²⁹ See BERNHARDT ET AL., *supra* note 20, at 9.

³⁰ See *id.* at 48.

³¹ *Id.* at 20 (reporting that 25.9% of those surveyed reported being paid below minimum wage in the week prior to the survey).

³² *Id.*

³³ *Id.*

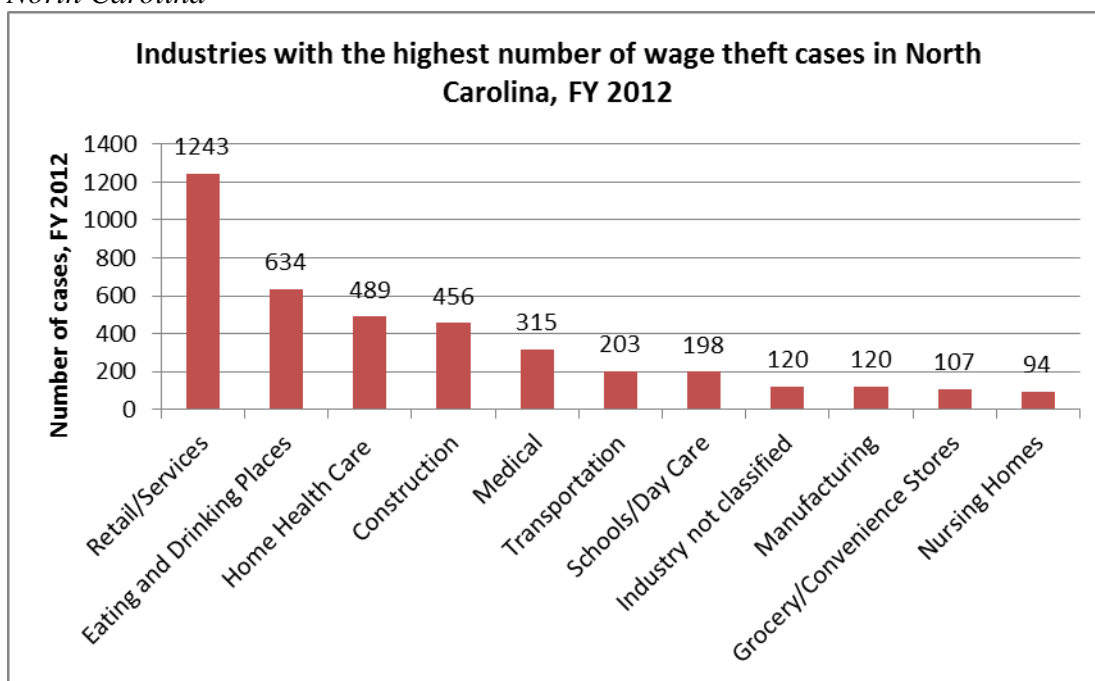
³⁴ *Id.* Meal break violations occur when an employer or supervisor denies a worker a meal break altogether, interrupts a meal break, shortens a meal break, and when a worker was made to work through a meal break. *Id.*

problem; the same workers are not only being exploited in numerous different ways, but the exploitation is frequent. The wage theft problem detailed in the national survey is likely a macrocosm of the wage theft problem in North Carolina.

3. In Which Industries Do Wage Theft Complaints Most Frequently Occur?

Based on the employee complaints registered with the WHB, abuses in the workplace may occur more frequently in some industries than in others.

*Figure 4: Industries with the Highest Number of Wage-theft Cases in FY2011 in North Carolina*³⁵



Of the wage theft cases reported in 2011, the top four offending industries were retail and services (27%), eating and drinking places (16.6%), the home health care industry (15%), and the construction industry (12.5%).

The data depicted in Figure 4 is based on complaints to the WHB; because the data is based on complaints, not actual occurrences, it may not accurately represent in which industries wage theft is most common. It is unknown whether the same industries with high reporting rates also

³⁵ SIROTA & SCHOENBACH, *supra* note 3, at 2.

have the highest number of actual wage theft cases. Employees might not report wage theft because they fear retaliation, such as firing or threatening or reporting an undocumented worker to Immigration and Customs Enforcement. For this reason, Figure 1 may be more accurately described as depicting the industries in which employees more frequently reported their wage theft experience. While there are myriad ways of explaining reported wage theft data in North Carolina,³⁶ the data is still important. It may lead to valuable insights into how to prevent and address wage theft in the future and it suggests the need to allocate additional resources to expand research about the problem.

This environment of downward economic mobility and deeply entrenched gender roles may create many opportunities for wage theft, where workers who are routinely exploited in other ways are also particularly susceptible to wage theft.

4. Industry-specific Violations in North

Carolina

Although there is some data on working conditions that seem to accompany wage theft, there is not much that focuses on the problem of wage theft in North Carolina. At least some of this research reviews the wage theft situation in eating and drinking places, one of the top industries identified as receiving the most wage theft complaints by the WHB. The other industries about which there is specialized research nonetheless provides a closer look at the

³⁶ The question of why employees in particular industries report wage theft more frequently requires further research. It may be that employees' ability to or impetus to report may mean something positive about the industry; employees who feel free to report wage theft may not work in a threatening or retaliatory environment, or may feel adequately protected by unions or worker organizations. In other words, the industries that appear to be the biggest wage theft offenders may in fact be the industries where the current reporting and oversight mechanisms are actually functioning. Alternatively, exploitation may be so severe in a particular industry that victims report widely, regardless of the consequences. In addition, workers may feel threatened and fearful to report, but are emboldened by a colleague or family member who reported, and thus, the impetus to report was not related to the industry, but instead, to the workers' individual circumstances. A final explanation may be that employees in the highest offending industries are not as vulnerable to the types of threats and retaliation that typifies wage theft victims. *See supra* text accompanying notes 21–30.

problem of wage theft and may illuminate the problem for all industries where wage theft is prevalent.

a. Industry Focus: Eating and Drinking Places

The food and drink service industry ranked second highest in reported cases to the WHD in North Carolina in 2011.³⁷ Restaurant workers in North Carolina experience wage theft in the form of tip misappropriation, for instance. In February 2012, the North Carolina Justice Center reported that there are 340,000 tipped workers in North Carolina.³⁸ All tipped restaurant workers in North Carolina earn a subminimum wage of \$2.13 per hour.³⁹ This minimum wage is much lower than the state minimum wage for non-tipped workers (\$7.25 per hour). Tipped workers are entitled to \$2.13 per hour so long as this wage plus tips equals \$7.25 per hour over the course of the workweek.⁴⁰ Despite the intended earning parity between tipped and non-tipped workers, tipped workers in North Carolina make an average of five dollars less than non-tipped workers per hour.⁴¹ One quarter of all tipped workers live at or below the federal poverty line.⁴² This disparity between tipped and non-tipped workers in North Carolina may in part be attributed to wage theft and the misappropriation of tips.⁴³

Tipped workers are often not entitled to paid sick days.⁴⁴ Four out of five workers in food service occupations are not given paid sick days, and federal and state law does not require

³⁷ SABINE SCHOENBACH, N.C. JUST. CTR., BRIEF: TIPPING THE SCALES TOWARD FAIR WAGES 1 (2012), available at <http://www.ncjustice.org/sites/default/files/NCJC%20Brief%20-%20Tipping%20the%20Scales.pdf>.

³⁸ *Id.*

³⁹ *Id.* at 2.

⁴⁰ *Id.*

⁴¹ *Id.* at 3. The average hourly wage of a worker in this industry in North Carolina is \$9.66, or \$20,100 per year. In 2011, the median wages for tipped workers was \$10.54 in North Carolina, whereas the median wages for non-tipped workers was \$15.61. *See id.* at 2.

⁴² *Id.* at 3. Approximately one third of waiters and waitresses live at or below the poverty line. *Id.*

⁴³ *Id.* at 2.

⁴⁴ *Id.* at 3.

that they be given paid sick days.⁴⁵ Tipped workers must often go to work ill, causing a health hazard to both the worker and the restaurant patron, or else lose wages. It is these circumstances where wage theft issues are often most prevalent.

National-level data provides further insight into the wage theft problem as it affects eating and drinking establishments in North Carolina. One recent study reported that a large

These statistics exemplify both the prevalence and the magnitude of the wage theft problem; the same workers are not only being exploited in numerous different ways, but the exploitation is frequent.

majority of workers in tipped occupations impacted by the subminimum wage of \$2.13 are women.⁴⁶ “A typical full-time, year-round restaurant worker is paid 79% of what her male counterpart is paid.”⁴⁷ Some theorize that the earnings gap is attributable to the fact that women are concentrated in lower-paying positions in quick-serve and family style restaurants.⁴⁸ Others contend that women are not able to

access the highest-paying positions in the industry.⁴⁹ This environment of downward economic mobility and deeply entrenched gender roles may create many opportunities for wage theft, where workers who are routinely exploited in other ways are also particularly susceptible to wage theft.

b. Industry Focus: The Tobacco-Picking Industry

During 2010 and 2011, Oxfam America and the Farm Labor Organizing Committee conducted 103 in-person interviews with North Carolina Tobacco farmworkers.⁵⁰ Of the 103 interviewed, 89 individuals were undocumented, 2 had expired visas, seven had H-2A visas, and

⁴⁵ *Id.*

⁴⁶ REST. OPPORTUNITIES CTRS. UNITED, *TIPPED OVER THE EDGE* 17 (2012), available at http://rocunited.org/wp-content/uploads/2012/02/ROC_GenderInequity_F1.pdf.

⁴⁷ *Id.* (internal citation omitted).

⁴⁸ *Id.* at 18–19.

⁴⁹ *Id.* at 19.

⁵⁰ OXFAM AM., *REPORT SUMMARY OF “A STATE OF FEAR: HUMAN RIGHTS ABUSES IN NORTH CAROLINA’S TOBACCO INDUSTRY”* 1 (2011), available at <http://www.oxfamamerica.org/files/a-state-of-fear-report-summary.pdf/view>.

5 had permanent-resident status or were United States citizens.⁵¹ The majority of interviewees were Mexican, but others were Guatemalan, Honduran, or American.⁵²

The report found that one in four farmworkers reported that they were paid less than the federal minimum wage of \$7.25 per hour.⁵³ Well over half of the farmworkers surveyed said that their pay was not enough to meet their basic needs. Workers also reported myriad on-the-job problems that made working—even surviving—difficult. They are afflicted by heat stroke, severe dehydration, and “green tobacco sickness,” the latter which occurs when workers become extremely ill after exposure to excessive amounts of nicotine.⁵⁴ Farmworkers often live in employer-provided housing, where conditions are substandard and sometimes unsanitary.

Many tobacco manufacturers do not include farmworkers in farm audits, so the many hardships that farmworkers experience, including wage theft, continue undetected. Lack of reporting also leads to lack of oversight—standards for labor management and farm safety do not account for farmworkers needs or wellbeing.

This diminishes the likelihood for employer accountability for crimes like robbing workers’ wages.

National wage theft data helps answer a number of difficult questions about wage theft in North Carolina: Do North Carolina employers commit wage theft more frequently or more egregiously than employers in other states? If so, why do employers feel more free to steal wages? If not, what about North Carolina’s labor or regulatory environment deters employers from committing wage theft? Comparing quantitative and qualitative information may not definitively answer these questions, but it may lead to valuable insights about why wage theft occurs and how to combat it.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 2.

⁵⁴ *Id.*

c. Industry Focus: The Poultry-Production Industry

One example where working conditions may accompany wage theft is the poultry industry. In 2010, the *Charlotte Observer* reported that Raeford Farms, a “poultry giant” in the state of North Carolina, misled regulators and “ignored, intimidated or fired workers who were hurt on the job.”⁵⁵ In the past, workers have been maimed or killed by factory machines.⁵⁶ Workers spared grave or fatal injury still experience daily pain. Poultry workers perform the same cutting motions up to 20,000 times daily, making workers more susceptible to nerve and muscle injury.⁵⁷ Workers who directly complained to their supervisors were told that there was nothing to be done about it.

By creating and perpetuating a culture of silence among workers, employers contribute to a culture of impunity among themselves. With employers ignoring serious injuries and stressing profit over people, it is unsurprising that 100% of poultry plants across the United States have been reported to steal wages.⁵⁸ Both wage theft and the act of ignoring workplace injuries continue to occur because employers believe there will be no, or few, repercussions. It is possible and probable that the same type of oversight that might prevent employers from hiding and silencing injured workers might also deter employers from stealing employees’ wages.

D. Wage Theft on a National Scale

The problem of wage theft in North Carolina is representative of the breadth and depth of the wage theft problem in the United States. In a 2009 study, *Broken Laws, Unprotected Workers*, researchers found that 26% of low-wage workers in Chicago, Los Angeles, and New York had

⁵⁵ Kerry Hall, Ames Alexander & Franco Ordoñez, *The Cruellest Cuts: The Human Cost of Bringing Poultry to your Table*, CHARLOTTE OBSERVER, Sept. 30, 2008, available at <http://www.charlotteobserver.com/595/story/223415.html>.

⁵⁶ *Id.*; see also, e.g., Valenzuela v. Pallett Express, __ N.C. App. __, 700 S.E.2d 76 (2010) (involving litigation about a pallet shredder operator who was killed).

⁵⁷ *Id.*

⁵⁸ BOBO, *supra* note 21, at 7.

been paid less than the minimum wage in the previous week.⁵⁹ Fully 76% had either been underpaid or not paid at all for their overtime hours.⁶⁰ This phenomenon is not new; in 1999 and 2000, the United States Department of Labor conducted audits of employers and found high rates of minimum wage, overtime, and other labor violations nationwide.⁶¹

National wage theft data helps answer a number of difficult questions about wage theft in North Carolina: Do North Carolina employers commit wage theft more frequently or more egregiously than employers in other states? If so, why do employers feel more free to steal wages? If not, what about North Carolina's labor or regulatory environment deters employers from committing wage theft? Comparing quantitative and qualitative information may not definitively answer these questions, but it may lead to valuable insights about why wage theft occurs and how to combat it.

Understanding the extent of the national wage theft epidemic may also lead to more and better policy solutions; if the pattern of wage theft found in North Carolina is similar to the pattern of wage theft found across the United States, it will be clearer where to focus our financial and legislative energies.⁶² As patterns emerge, researchers and worker organizations may be motivated to fund large surveys and studies, and policymakers may be inspired to create a comprehensive prevention and enforcement scheme that targets the worst-offending industries.⁶³

The national data on minimum wage violations presents a stark picture: over one quarter of low-wage employees reported not being paid minimum wage.⁶⁴ National violation rates

⁵⁹ BERNHARDT ET AL., *supra* note 20, at 2.

⁶⁰ *Id.* at 21.

⁶¹ *See id.* at 5–6 & n.3.

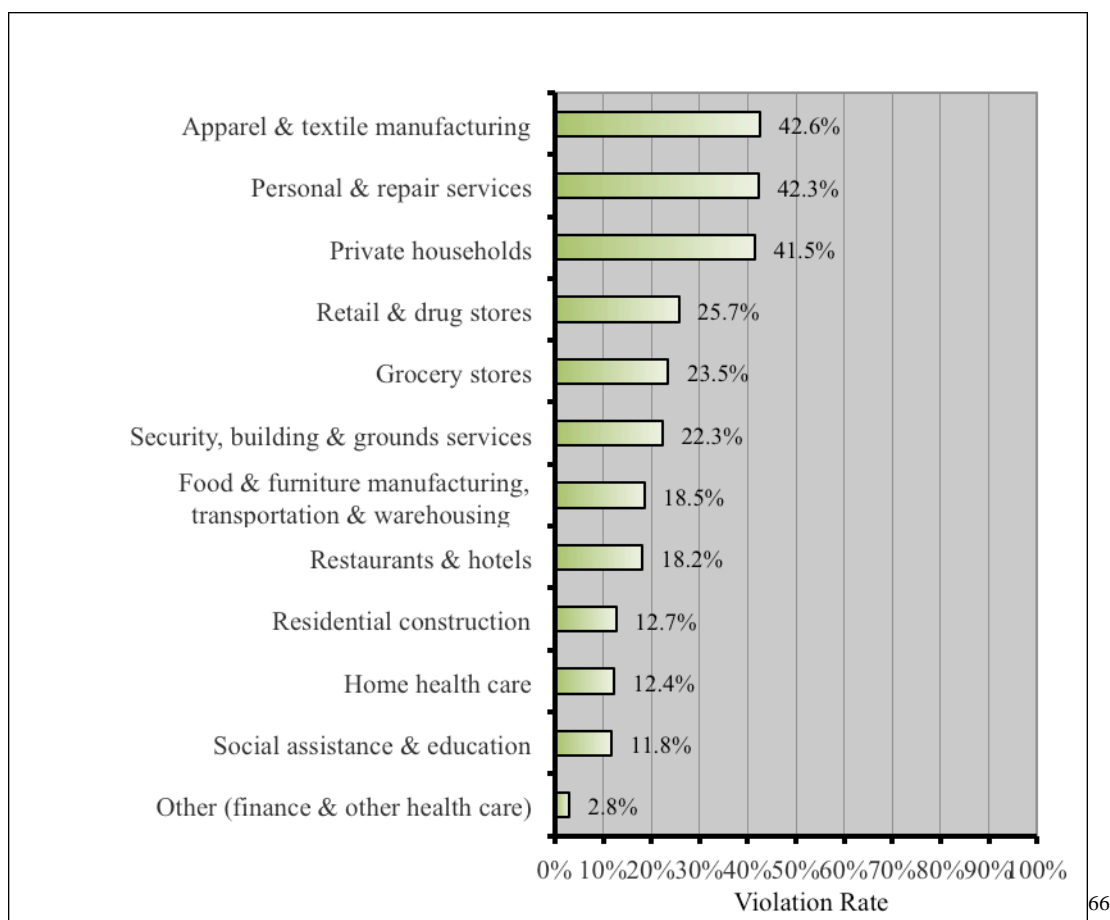
⁶² *See infra* Part IV.

⁶³ *See infra* Part IV.

⁶⁴ *SEE BERNHARDT ET. AL., supra* note 20, at 30–33.

varied significantly by industry and occupation, as was seen with the North Carolina data.⁶⁵

Figure 5: Minimum Wage Violation Rates by Industry



While the 2009 national data and the 2011 North Carolina data were drawn from different methodology and were categorized differently, a rough comparison of the statistics is illuminating. Looking at the NC DOL's WHD cases, 27 percent were in the retail and services industry..⁶⁷ Survey data on the national level showed that minimum wage violation rates were also among the most common in retail and drug stores, at 25.7%.⁶⁸

⁶⁵ See *supra* Part I.C.

⁶⁶ BERNHARDT ET AL., *supra* note 20, at 31, fig.4.2.

⁶⁷ See *supra* fig.1.

⁶⁸ The three highest offending national industries were also retail related, including apparel and textile manufacturing, personal and repair services, and in private households. Over 40% of employees in each of these industries reported being paid less than minimum wage. See BERNHARDT ET AL., *supra* note 20, at 31.

As seen above in Figure 5 above, the North Carolina and national data are, on the whole, relatively commensurate. The overall trend is fascinatingly similar: retail industries are the highest offenders on the national level, and employees in retail positions reported the most wage theft complaints in North Carolina. Whereas the previous section suggested that the retail and services industries in North Carolina may not be the highest offending industries, but instead, the

By creating and perpetuating a culture of silence among workers, employers contribute to a culture of impunity among themselves. With employers ignoring serious injuries and stressing profit over people, it is unsurprising that 100% of poultry plants across the United States have been reported to steal wages.

industries in which employees more frequently made official complaints about wage theft.⁶⁹ Because the national data is based on a survey, and not a self-selecting sample of formal complainants, the national data reveal is more revealing; it demonstrates that the retail industry may indeed be the industry where employees experience the most wage theft through minimum wage violations.

While the North Carolina and national data were roughly commensurate as between industries of the same type, the variation across different industries is still unexplained. The variation may denote either that it is more

tempting for employers in certain industries to commit wage theft, or that it is easier for employers in certain industries to get away with wage theft. Either explanation begs further questions about why this might occur, and further, what regulation or oversight initiatives may be employed to deter wage theft behavior.

⁶⁹ See *supra* note 36 and accompanying text.

Employee demographics may further explain why wage theft occurs with more frequency in some industries. Employers who steal wages may hire employees who belong to demographic groups that are particularly vulnerable to labor abuses.⁷⁰ However, the national survey data challenges this explanation. In the national study, the median hourly wage was \$8.02, meaning the workers were considered low-wage earners.⁷¹ Consistent with trends in the low-wage labor market, immigrants comprised a large proportion of interviewees, more women and persons of color reported wage theft, and about three-quarters had reached only a high school level of education or less.⁷² The national survey demographics indicate that the employee population surveyed was vulnerable to the types of intimidation and threats that deter many wage theft victims from reporting, or prevent wage theft victims from knowing about any available remedies at all.

Despite the existence of the WHA and the remedies it offers, these remedies are only practically available to some workers; the likelihood of obtaining relief is not equal for all. Only when we understand the dynamics of the WHA and its remedies will we be able to fully understand which groups are being marginalized and denied the legal protections they are owed.

This part of the policy brief described and analyzed the current wage theft situation in North Carolina, considered the state situation through the lens of the national wage theft crisis, and demonstrated that North Carolina may be representative of a greater growing wage theft problem. The next parts of this policy brief explore what other states are currently doing to combat the wage theft problem, how North Carolina can improve its laws and policies to inhibit wage theft, and why wage theft is at once a social, moral, and legal blight that harms all communities.

⁷⁰ See *supra* notes 21–30 and accompanying text.

⁷¹ See BERNHARDT ET AL., *supra* note 20, at 14, 16.

⁷² *Id.*

II. LAWS AGAINST WAGE THEFT

A. State Level Enforcement in North Carolina

1. The Wage and Hour Act

There are laws on the books—both on the state and national levels—to assist workers to enforce their rights against wage theft. Specifically, in North Carolina, this enforcement occurs via the 1979 Wage and Hour Act (WHA) and its corresponding administrative rules by the WHB.⁷³ This Act applies to all North Carolina workers who are not employees of the federal, state, or local government.⁷⁴ Any of these applicable North Carolina workers who feels that she or he has been treated unfairly by their employer with respect to “minimum wages; overtime; wage payments; and payments of promised wages and benefits, such as vacation, holiday, and sick pay,” is “invited to avail [him or herself] to the services of the Wage and Hour Bureau.”⁷⁵ The WHA’s minimum wage and overtime provisions, moreover, are generally applicable to all North Carolina employers who are not subject to the federal Fair Labor Standards Act (FLSA).⁷⁶

As part of its services, the WHB investigates workers’ complaints and collects any back wages from employers.⁷⁷ Unduly interfering with, hindering, or delaying such an investigation is punishable by criminal sanctions.⁷⁸ The WHA enables workers to remedy their wage theft situation by filing an administrative complaint with the WHB, or by filing a private right of

⁷³ WAGE AND HOUR BUREAU, N.C. DEP’T OF LABOR, WAGE AND HOUR PACKET iii (2010), http://www.nclabor.com/wh/Wage_Hour_Act_Packet.pdf [hereinafter WAGE AND HOUR PACKET]; see also N.C. GEN. STAT. §§ 95-25.1-.25 (2011); 13 N.C. ADMIN. CODE §§ 12.0100-.0807 (2010).

⁷⁴ WAGE AND HOUR PACKET, *supra* note 73.

⁷⁵ N.C. GEN. STAT. §§ 95-25.3-.4, .6, .12.

⁷⁶ WAGE AND HOUR PACKET, *supra* note 73. The FLSA establishes federal guidelines for minimum wage and overtime. While most employees in the United States fall under FLSA protection, some workers do not fall within the statute. Among the unprotected are farm workers employed on small farms, homeworkers or those who are employed to care for the elderly or infirm, employees of seasonal recreational establishments, employees who work in fishing operations, workers who deliver newspapers, and more. *Employment Law Guide*, U.S. DEP’T OF LABOR, <http://www.dol.gov/compliance/guide/minwage.htm> (last visited May 10, 2012). Other employees may be fully or partially exempt from only FLSA overtime pay requirements. *Id.* See also *infra* notes 217–222 and accompanying text.

⁷⁷ N.C. GEN. STAT. §§ 95-25.15, .22.

⁷⁸ *Id.* § 95-25.21.

action.⁷⁹ Any worker who has not already availed her or himself to a private right of action may file a complaint by contacting the WHB's complaint desk.⁸⁰ However, if the worker's claim is less than \$50, then filing a complaint is the exclusive remedy, as a private right of action is not a permitted method of recourse under this circumstance.⁸¹

In addition to filing an administrative complaint with the WHB to enforce her or his right to due wages, a worker can avail her or himself to a private right of action in any North Carolina General Court of Justice.⁸² While the North Carolina General Court of Justice has subject matter jurisdiction to hear a worker's case for unpaid wages, small claims court is the most common venue for such actions.⁸³ Small claims courts are less formal and involve civil disputes less than \$5,000, resolved by magistrates.⁸⁴

Employers who steal wages may hire employees who belong to demographic groups that are particularly vulnerable to labor abuses.

Despite the existence of the WHA and the remedies it offers, these remedies are only practically available to some workers; the likelihood of obtaining relief is not equal for all. Only when we understand the dynamics of the WHA and its remedies will we be able to fully understand which groups are being marginalized and denied the legal protections they are owed.⁸⁵

⁷⁹ *Building Integrated Communities in North Carolina*, UNC SCHOOL OF LAW IMMIGRATION/HUMAN RIGHTS POLICY CLINIC 101 (2012) <http://www.law.unc.edu/documents/clinicalprograms/buildingcommunitiesfullreport.pdf>.

⁸⁰ *See id.*

⁸¹ *Id.*

⁸² N.C. GEN. STAT. § 95-25.22(b). A worker can take advantage of this option whether or not the worker files a complaint with the WHB.

⁸³ *Building Integrated Communities in North Carolina*, *supra* note 79, at 105-108.

⁸⁴ *See id.*

⁸⁵ *See supra* Part III.

2. Alternative Remedy in Criminal Law

In addition to civilly available remedies under the WHA, North Carolina also criminalizes the act of obtaining property by false pretenses.⁸⁶ Under this law, persons who

knowingly and designedly by means of any kind of false pretense whatsoever . . . obtain or attempt to obtain from any person within this State any money, goods, property, services, . . . or other things of value with intent to cheat or defraud any person of such . . . thing of value . . . shall be guilty of a felony.⁸⁷

While this criminal law may enable a worker to obtain relief for stolen wages, it is unlikely to be successful. The requisite criminal intent to prove one guilty of this crime is extraordinarily high such that even if an employer has not paid the worker according to an agreed upon time or manner, the employer cannot be found guilty if she or he intends to eventually pay the worker.⁸⁸

B. Federal Statutory Enforcement

1. The Fair Labor Standards Act and its Guiding Light

The FLSA provides a federal minimum for labor protections which states can then augment through legislation.⁸⁹ The FLSA and other labor laws date back to the New Deal Era, when the first minimum wage laws were established and enforced.⁹⁰ Serving as a guide for many of the states' own wage and hour laws, the FLSA requires covered employers to pay all workers, regardless of their citizenship status, "at least the applicable minimum wage for all hours worked regardless of whether the worker is paid by the hour, the day, or at a piece rate."⁹¹

2. Federal Administrative Complaint vs. Private Right of Action

Workers protected by the FLSA may file an administrative complaint with the United States Department of Labor's Wage and Hour Division or file a private suit in federal court to recover

⁸⁶ N.C. GEN. STAT. § 14-100 (2011).

⁸⁷ *Id.* § 14-100 (a).

⁸⁸ *Building Integrated Communities in North Carolina*, *supra* note 79, at 93.

⁸⁹ *Id.* at 97.

⁹⁰ *See id.*

⁹¹ *See, e.g.*, 13 N.C. ADMIN. CODE § 12.0103 (2010); *see also Building Integrated Communities in North Carolina*, *supra* note 79, at nn.111–12; *supra* note 76 (listing a few categories of exempted employees).

back pay and liquidated damages from employers.⁹² Worker administrative complaints made with the Wage and Hour Division, which is often the front-line access point for most workers, are the primary way violations of wage and hour laws are brought to the forefront.⁹³

C. National Overview: A Look at Enforcement by the States

1. Administrative Complaints

Several states, including Arizona, Illinois, Indiana, Texas, Washington, Michigan, and Tennessee, address wage violations exclusively through administrative complaints. Of those that

Whereas the previous section suggested that the retail and services industries in North Carolina may not be the highest offending industries, but instead, the industries in which employees more frequently made official complaints about wage theft.

provide the option to workers to file either administrative complaints or private rights of action, 95% or more of wage theft claims are initiated through individual administrative complaints.⁹⁴ For example, 940 administrative wage complaints were filed with the Ohio Department of Commerce's Division of Industrial Compliance and Labor in 73 of Ohio's 88 counties, with the highest number of complaints coming from the accommodations and food services industries.⁹⁵ In a Chicago study, 25% of workers

who suffered wage theft chose to file administrative complaints.⁹⁶ These complaints addressed a range of wage theft issues, including not being paid for all hours worked, being paid below the

⁹² See *Handy Reference Guide to the Fair Labor Standards Act*, 17 (2010). A worker may not file suit, however, if she has accepted back wages under the supervision of the Wage and Hour Division, or if the Secretary of Labor has already filed a lawsuit to recover such wages. *Id.*

⁹³ See NIK THEODORE ET AL., CTR. FOR URBAN ECON. DEV., U. OF ILL. AT CHI., *UNREGULATED WORK IN CHICAGO* 16 (2010); NAT'L EMPLOYMENT LAW PROJECT, *WINNING WAGE JUSTICE: AN ADVOCATE'S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE* 46, 55 (2011) [hereinafter *WINNING WAGE JUSTICE*].

⁹⁴ JACOB MEYER & ROBERT GREENLEAF, COLUMBIA LAW SCHOOL NAT'L STATE ATTORNEYS GEN. PROGRAM, *ENFORCEMENT OF STATE WAGE AND HOUR LAWS* 26 (2011).

⁹⁵ ZACH SCHILLER, POLICY MATTERS OHIO, *PROTECTING PAY: MINIMUM WAGE CLAIMS IN OHIO* 1, 5 (2011).

⁹⁶ THEODORE ET AL., *supra* note 93, at 16.

minimum wage, not being paid on time, and not being paid for overtime.⁹⁷ In a similar study, which sampled workers in Los Angeles, 14.7% of workers who suffered wage theft either complained to their employers directly or filed administrative complaints, with 98.6% of these complaints fitting in the former category.⁹⁸ In New York City, 23% of workers reported filing administrative complaints about a workplace issue.⁹⁹

Some states have established an intake process for screening worker complaints.¹⁰⁰ New York's Department of Labor offers a three-tiered triage system for handling complaints with incoming worker claims categorized and prioritized into high, medium, and low priority levels based on specific enforcement priorities. New York's screening program represents an attempt to maximize a tight operating budget while still investigating the most egregious cases of workplace abuse. Other states have yet to achieve such order in their administrative processes, depleting the few resources that they have.¹⁰¹

Nonpayment of wages
is stealing.

2. *Private Rights of Action*

Although administrative complaints are the popular method for workers to enforce their rights against wage theft, most states' minimum wage laws (along with the FLSA) allow private actions to be brought directly by workers against their employers.¹⁰² These actions are typically

⁹⁷ *Id.*

⁹⁸ RUTH MILKMAN ET AL., UCLA INST. FOR RESEARCH ON LABOR AND EMPLOYMENT, WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES 7 (2010).

⁹⁹ BERNHARDT ET AL., *supra* note 20, at 22.

¹⁰⁰ *See* WINNING WAGE JUSTICE, *supra* note 93, at 46.

¹⁰¹ *See id.* at 48–49. This Part references New York's ideal system of processing complaints in order to contrast it with the way in which the majority of states' departments of labor process their claims, which, in effect, contributes to the de facto disenfranchisement of workers. *See infra* Part III.B.2.

¹⁰² *See supra* note 92 and accompanying text; *see also* WINNING WAGE JUSTICE, *supra* note 93, at 31.

commenced in small claims courts.¹⁰³ However, workers are increasingly seeking remedies through class action lawsuits. The employers sued are big-name companies, including Fortune 500 companies. This demonstrates that wage theft does not solely affect periphery of the economy or marginal employers.¹⁰⁴ In 2008, Wal-Mart settled 63 cases in 42 states concerning allegations that the company forced workers to work off the clock without pay after their official shifts.¹⁰⁵ The settlement totaled a whopping \$352 million in unpaid wages for hundreds of thousands of current and former Wal-Mart hourly employees nationwide.¹⁰⁶ In another lawsuit against Wal-Mart that went to trial, the jury awarded the workers \$172 million as compensation for being forced to miss their meal breaks.¹⁰⁷ Similarly, in October 2008, a California court awarded more than 200 Federal Express drivers \$14.4 million for their illegal misclassification as independent contractors.¹⁰⁸ This misclassification meant that workers received no benefits, were denied the protection of employment and labor laws, and were forced to pay out of pocket for on the job expenses like fuel, vehicle maintenance, uniforms, and insurance.¹⁰⁹ The next year, in October 2009, a lawsuit—alleging failure to pay employees for hours worked, not paying the legally required overtime or providing breaks, and keeping workers off the clock while they traveled between job sites and awaited materials—was initiated against a builder employing residential construction workers in California, Nevada, and Arizona.¹¹⁰ The case settled, providing over \$242,000 in unpaid wages to 85 workers.¹¹¹

¹⁰³ See IMMIGRANTS' RIGHTS/ INT'L HUMAN RIGHTS CLINIC, CTR. FOR SOCIAL JUSTICE, SETON HALL UNIVERSITY SCHOOL OF LAW, ALL WORK AND NO PAY 10 (2011) [hereinafter ALL WORK AND NO PAY]; see also *Building Integrated Communities in North Carolina*, *supra* note 79, at nn.162–63.

¹⁰⁴ See BERNHARDT ET AL., *supra* note 20, at 43.

¹⁰⁵ See MILKMAN ET AL., *supra* note 98, at 6–7.

¹⁰⁶ See *id.* at 7.

¹⁰⁷ See *id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.*

These lawsuits, moreover, are not limited to large corporations and builders; they also extend to small businesses and agencies that hire workers on a temporary basis. In 2007, a temporary staffing agency in Illinois settled a class action lawsuit with over 25,000 workers for \$11 million.¹¹² For more than seven years, the agency failed to provide workers with itemized statements of earnings and had an unlawful vacation policy that denied workers vested vacation time and pay.¹¹³ The agency unfairly stipulated that workers needed to be on the payroll in December to receive their vacation pay and as they worked throughout the year, workers were not permitted to accrue their vacation time proportionally.¹¹⁴ Another temporary staffing agency settled a class action suit with over 3,300 workers for approximately half a million dollars.¹¹⁵ This time the agency hired day laborers, assigning them to minimum wage jobs such as assembly, packaging, and janitorial work.¹¹⁶ The laborers were not given overtime when they accumulated more than 40 hours in a week doing jobs for different client companies.¹¹⁷ Rather, the temp agency avoided triggering the mandatory overtime pay by “splitting” their checks, and regardless of the actual amount of hours worked in a given day, the agency rounded down the laborer’s time to eight hours.¹¹⁸

In North Carolina, workers often do not seek remedies offered by current laws due to fear of retaliation.

Small businesses are no exception to this growing class action phenomenon. In a report on violations of laws protecting workers published by the Center for Urban Economic Development, the National Employment Law Project, and the UCLA Institute for Research on

¹¹² See THEODORE ET AL., *supra* note 93, at 1.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.*

Labor and Employment, the authors reviewed the outcome of a number of these lawsuits.¹¹⁹ In early 2008, an owner of a small grocery store in Illinois settled an action with a dozen workers denying them full minimum wage and overtime pay.¹²⁰ In February 2009, a leading chain of gourmet grocery stores in New York City, Amish Markets, settled a suit for \$1.5 million in unpaid wages to 550 workers.¹²¹ The grocery chain denied its workers overtime pay despite requiring them to work more than 40 hours a week and some workers were paid only \$300 for a 60 to 70 hour work week, which equals four to five dollars an hour—an amount well below New York’s minimum wage. Similarly, in August 2008, a car wash chain in New York settled with 1,187 of its employees by agreeing to pay \$34 million in lost wages and, later, in October, a federal judge ordered the restaurant, Saigon Grill, to pay its delivery workers \$4.6 million in back wages and damages.¹²²

However, workers are increasingly seeking remedies through class action lawsuits. The employers sued are big-name companies, including Fortune 500 companies. This demonstrates that wage theft does not solely affect periphery of the economy or marginal employers.

The increase in class action suits may demonstrate that workers have found inadequate the existing administrative and private right of action remedies. Instead, workers who have banded together have found strength in numbers to demonstrate that their employers commit patterns of abuse.

3. Other Remedies: Criminalizing Wage Theft

Nonpayment of wages is stealing, and many states have imposed criminal penalties apart from civil damages paid to workers or fines that employers are ordered to pay as a result of the

¹¹⁹ BERNHARDT ET AL., *supra* note 20, at 7-8.

¹²⁰ *See id.*

¹²¹ *See* BERNHARDT ET AL., *supra* note 20, at 7.

¹²² *See id.*

traditional remedies of filing worker complaints and initiating private rights of actions.¹²³ Penalties in some states include possible jail time for violation of wage and hour laws.¹²⁴ States either have criminal penalties for unpaid wages in their state wage and hour laws, or have a theft of services provision in their criminal law.¹²⁵ To illustrate: New Jersey has a criminal wage theft statute that states an “employer who has agreed with an employee . . . to pay wages . . . commits a disorderly persons offense if the employer fails to pay wages when due,” and in at least two major cities—New York and Los Angeles—employers who violate wage and hour laws are criminally prosecuted.¹²⁶ A criminal case in Los Angeles provides an example of the use of the criminal justice system as a way to curb wage theft. In February 2009, the Los Angeles city attorney indicted two car wash owners who failed to pay 250 workers the minimum wage while denying them legally required meal and rest breaks.¹²⁷ The indictment contained 176 separate counts alleging that, in violation of minimum wage laws, workers were paid a flat rate of \$35 to \$40 for more than eight-hour work days, that only as little as 15 minutes were provided for lunch breaks, that workers received no overtime pay, and that no medical compensation was provided for on the job burns and lacerations caused by work machinery and chemicals.¹²⁸ In total, the

¹²³ See WINNING WAGE JUSTICE, *supra* note 93, at 34. Examples of national criminal penalties referenced in this section merely provide background for how—in spite of these laws—workers are disenfranchised from asserting their wage and hour rights. See *infra* Part III.B.2. For an analysis of model laws or current laws as positive examples to help solve the wage theft crisis, see *infra* Part IV.

¹²⁴ See WINNING WAGE JUSTICE, *supra* note 93, at 34.

¹²⁵ See WINNING WAGE JUSTICE, *supra* note 93, at 35. The twenty-seven states which fit the former category are: Alaska, California, Colorado, Georgia, Hawaii, Illinois, Indiana, Maryland, Mississippi, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Rhode Island, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. See *id.* The thirty-seven states belonging in the latter category include: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming. See *id.*

¹²⁶ See ALL WORK AND NO PAY, *supra* note 103, at 10; see also WINNING WAGE JUSTICE, *supra* note 93, at 34.

¹²⁷ See MILKMAN ET AL., *supra* note 98, at 6.

¹²⁸ See *id.*

owners were held accountable for failing to pay \$450,000 in back wages due over a five-year period.¹²⁹

This employer retaliation sends a powerful message to other workers—that if they complain, they do so at their own peril, which, coupled with poor economic conditions, heightens a chilling effect on the entire work place.

Although laws currently exist to combat wage theft and increasing numbers of workers are finding ways to assert their rights to their wages, and although even some law enforcement officials are taking wage theft matters seriously, the problem is an epidemic and the great majority of workers are unable to use available remedies or reside in jurisdictions where remedies fall short. The next section examines this

epidemic and considers why most workers are unable to obtain redress for wage theft.¹³⁰

III. DE FACTO DISENFRANCHISEMENT

In theory, and as described above, workers are covered by existing employment and labor laws. In practice, however, workers may effectively be deprived of power and autonomy in the workplace—whether for subjective or objective reasons, or both.

A. Subjective Disenfranchisement: Fear and Retaliation

1. North Carolina

a. Retaliation

In North Carolina, workers often do not seek remedies offered by current laws due to fear of retaliation. Workers fear that their employer may call, or threaten to call Immigration and Customs Enforcement (ICE) to disclose the workers' immigration status and whereabouts.¹³¹ Workers may also fear that their employer will reduce work hours, require them to do harder or

¹²⁹ *See id.*

¹³⁰ *See infra* Part III.

¹³¹ *See* WINNING WAGE JUSTICE, *supra* note 93, at 55.

less preferable work, or terminate their employment altogether.¹³² Some employers harass or assault workers, or even confiscate their passports.¹³³ Often, employers report complaints against workers on trumped-up charges of theft to the police or file frivolous lawsuits.¹³⁴

Retaliation may also take on more subtle forms.¹³⁵ For example, as a pretext of claiming that business is slow, an employer may reduce the complaining worker's hours, making it difficult to prove the actual retaliatory intent.¹³⁶ Such fear is not unfounded. Most of our interviewees who complained to their employers about wage and hour violations were threatened with retaliation.¹³⁷

Natalia, working in the house cleaning industry, confronted her supervisor about this unfair treatment. Her supervisor responded, "If you don't like it, you can go."¹³⁸ Similarly,

Carlos says, "the tiredness comes from calling so much that it's better not to seek them.... [W]hat's the point? [My boss] didn't pay."

Diego, working in landscaping, asked his supervisor about receiving the raise to which he was entitled.¹³⁹ Rather than giving Diego's request a simple "No," the supervisor responded: "One thousand Mexicans are at the border coming over here... [So] if you want to leave, leave."¹⁴⁰

These threats of termination are not empty; in the past, Diego's supervisor, for example, has fired many of Diego's colleagues for complaining. He tells the workers, "[t]omorrow, there is no work anymore," and the workers are never seen or heard from again. The supervisor further maintains this unfair bargaining power amongst the workers by reducing their hours, ensuring that no one thinks twice about complaining.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See id.* at 56.

¹³⁶ *See id.*

¹³⁷ *See fig.3, Part I.*

¹³⁸ Natalia Case Study, (interview notes on file with authors).

¹³⁹ *See* Diego Case Study, (interview notes on file with authors).

¹⁴⁰ Interview with Diego, *supra* note 14.

Interviewees were also subjected to various forms of harassment. In spite of working for the same house cleaning company for seven years, Natalia's employer often yelled at her and her colleagues, diminishing their self-worth.¹⁴¹ Diego, too, experienced such treatment. His native language is Spanish and he knows very little English.¹⁴² His supervisor, on the other hand, knows very little Spanish. Diego's supervisor made an effort to intimidate Diego by shouting Spanish vulgarities in his face while standing over him. Francesca's employer retaliated against her in a way that could have true legal consequences for her. After struggling to recoup a full week's wages from her house cleaning work, Francesca's employer falsely accused her of theft—of robbing

Although laws currently exist to combat wage theft and increasing numbers of workers are finding ways to assert their rights to their wages, and although even some law enforcement officials are taking wage theft matters seriously, the problem is an epidemic and the great majority of workers are unable to use available remedies or reside in jurisdictions where remedies fall short.

one of the homes she was charged with cleaning for which he claimed a police report had been filed.¹⁴³ Francesca still fears being contacted by the police, even though she knows she has done nothing wrong.

This employer retaliation sends a powerful message to other workers—that if they complain, they do so at their own peril, which, coupled with poor economic conditions, heightens a chilling effect on the entire work place.¹⁴⁴ Thus, workers are discouraged from ever complaining or asserting their rights at all. Diego asks, “With answers like [those given to me], how is one

¹⁴¹ See Natalia Case Study (interview notes on file with authors).

¹⁴² See Diego Case Study (interview notes on file with authors).

¹⁴³ See Francesca Case Study (interview notes on file with authors).

¹⁴⁴ See WINNING WAGE JUSTICE, *supra* note 93, at 56; see also MEYER ET AL., *supra* note 94, at 20.

going to feel comfortable [complaining]?”¹⁴⁵ Employers inculcate a sort of fear amongst their workers—fear of losing their jobs.¹⁴⁶ Diego says, “[i]f one was by himself, one would say, ‘Let him fire me,’ but . . . one has a family . . . there are people behind you.”¹⁴⁷

Fear of retaliation silences workers. In order to keep their life and livelihood, a worker feels forced to endure poor working conditions and tolerate wage theft without complaint.

b. Lack of Knowledge About and Faith in Legal Remedies

Apart from fear of retaliation, workers often do not use current laws to assert their rights because they may not know that such laws exist. We found that roughly most of our interviewees did not file claims with either the Wage and Hour Bureau or the small claims court.¹⁴⁸ None of these workers had ever seen or heard of such places. However, even if workers do know that they can make complaints and how to do so, many workers believe that it is not worth the cost. Diego understands that the current system has functioned for years, and he is skeptical that it will ever change.¹⁴⁹ Carlos says, “the tiredness comes from calling so much that it’s better not to seek them.... [W]hat’s the point? [My boss] didn’t pay.”¹⁵⁰

Even if workers do complain, their complaints fall on deaf ears. Natalia says that her employer pays no attention to her and her colleagues’ complaints.¹⁵¹ “[W]hen someone stands up to her, . . . she doesn’t care.” After a while, workers become accustomed to their situation, wanting to avoid the creation of more problems. “Because one is undocumented, one can have

¹⁴⁵ Interview with Diego, *supra* note 14.

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*; Interview with Carlos, *supra* note 13; Interview with Natalia, *supra* note 15; Interview with Francesca, *supra* note 17.

¹⁴⁹ *See* Diego Case Study (interview notes on file with authors).

¹⁵⁰ *See* Interview with Carlos, *supra* note 13.

¹⁵¹ Interview with Natalia, *supra* note 15.

more problems than what the other is going to pay,” says Carlos.¹⁵² For many workers, a little bit of money is better than no money.

2. National Level

a. Retaliation

North Carolina’s situation is not unique. Rather, it is a small pixel in the larger picture of the wage theft crisis happening across the country. Given the

Natalia, working in the house cleaning industry, confronted her supervisor about this unfair treatment. Her supervisor responded, “If you don’t like it, you can go.” Similarly, Diego, working in landscaping, asked his supervisor about receiving the raise to which he was entitled. Rather than giving Diego’s request a simple “No,” the supervisor responded: “One thousand Mexicans are at the border coming over here... [So] if you want to leave, leave.”

similarities, an examination of the phenomenon of wage theft nationally and in other states and localities helps to illuminate the breadth and depth of the problem in North Carolina. Just as in North Carolina, workers on the national level are hesitant to come forward and challenge employer abuses out of fear of retaliation. A national study found that 43% of workers, who made complaints to their employer about wages, were the subject of retaliation.¹⁵³ In a Los Angeles-based study, 47.7% of respondents who complained to their employers or supervisors experienced retaliation.¹⁵⁴ Similarly, in a Chicago study, out of the 26% of workers who reported making a complaint to their employers or supervisors, 35% experienced one or more forms

of the illegal retaliation discussed above.¹⁵⁵ Of the 23% of workers who reported making a complaint in New York, 42% experienced one or more forms of illegal retaliation and in a New

¹⁵² Carlos Case Study, (interview notes on file with authors).

¹⁵³ See WINNING WAGE JUSTICE, *supra* note 93, at 55.

¹⁵⁴ See MILKMAN ET AL., *supra* 98, at 3.

¹⁵⁵ See THEODORE ET AL., *supra* note 93, at ii.

Jersey study, 26% of respondents interviewed experienced similar retaliation.¹⁵⁶ Workers in the above-mentioned studies, specifically, cited experiencing forms of retaliation such as hours and/or pay cuts, firings or suspensions, and threats to call immigration authorities.¹⁵⁷

b. Lack of Knowledge about and Faith in Legal Remedies

Workers nationally also understand the powerful message of employer retaliation which often dissuade them from seeking remedies such as administrative complaints and legal recourse.

Natalia says that her employer pays no attention to her and her colleagues' complaints. "[W]hen someone stands up to her, . . . she doesn't care."

In San Francisco, many Chinatown restaurant workers routinely fall victim to wage theft and abusive treatment in the work place but are afraid to speak up for fear of losing their jobs.¹⁵⁸ These sentiments are not limited to Chinatown's restaurant workers, but rather are part and parcel of the larger, national wage theft crisis. According to a national survey, 20% of surveyed workers never made complaints at all.¹⁵⁹ In a Los Angeles-based study,

20.1% of respondents reported not complaining even though they had experienced serious wage theft during the previous year.¹⁶⁰ More than a majority of respondents in this group (59.7%) reported not complaining out of fear of losing their jobs, while another 13.6% were afraid of having hours or wages cut.¹⁶¹ Similarly, in Chicago, 15% of workers did not make a complaint to their employer or supervisor in the past year in spite of experiencing serious wage theft.¹⁶² Over half were afraid of losing their jobs while 12% feared having their hours or wages cut.¹⁶³

¹⁵⁶ See BERNHARDT ET AL., *supra* note 20, at 3; see also ALL WORK AND NO PAY, *supra* note 103, at 9.

¹⁵⁷ See e.g., BERNHARDT ET AL., *supra* note 20, at 3.

¹⁵⁸ See HU LING ET AL., THE WORKERS COMMITTEE OF THE CHINESE PROGRESSIVE ASSOCIATION, CHECK PLEASE!: HEALTH AND WORKING CONDITIONS IN SAN FRANCISCO CHINATOWN RESTAURANTS 7 (2010).

¹⁵⁹ See WINNING WAGE JUSTICE, *supra* note 20, at 55.

¹⁶⁰ See MILKMAN ET AL., *supra* note 98, at 3.

¹⁶¹ See *id.*

¹⁶² See THEODORE ET AL., *supra* note 93, at iii.

¹⁶³ See *id.*

In a New Jersey study, a mere 2.6% filed complaints with the New Jersey Department of Labor and Workforce Development and only 3.4% filed complaints in small claims courts.¹⁶⁴ One worker articulated that, “[e]mployers usually promise they will pay them soon, and sometimes pay a small amount here and there to keep stringing workers along.”¹⁶⁵ In other words, workers continue to work without pay because they feel that if they leave, they will lose any chance of recouping their owed wages.¹⁶⁶ Like the workers in North Carolina, workers nationally believe that their only option is to remain silent and continue working for their abusive employer.¹⁶⁷

Diego’s supervisor made an effort to intimidate Diego by shouting Spanish vulgarities in his face while standing over him. Francesca’s employer retaliated against her in a way that could have true legal consequences for her. After struggling to recoup a full week’s wages from her house cleaning work, Francesca’s employer falsely accused her of theft—of robbing one of the homes she was charged with cleaning for which he claimed a police report had been filed.

Workers are also deprived of access to information about their rights under the law and are not educated about how to assert their rights. A New Jersey study found that there were workers who, despite being robbed of their wages, did not file claims with either the New Jersey Department of Labor and Workforce Development or the courts.¹⁶⁸ When asked why they did not do so, more than half of these workers responded that they did not know the remedy existed or did not know how to use it.¹⁶⁹

¹⁶⁴ See ALL WORK AND NO PAY, *supra* note 103, at 9.

¹⁶⁵ See HU LING ET AL., *supra* note 158, at 11.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.* at 19.

¹⁶⁸ See ALL WORK AND NO PAY, *supra* note 103, at 9.

¹⁶⁹ See *id.*

In spite of working for the same house cleaning company for seven years, Natalia's employer often yelled at her and her colleagues, diminishing their self-worth.

Workers who are aware that they can make complaints believe that doing so is not worth the time and money required to make the complaint.¹⁷⁰ Fully 31.4% of workers sampled in Los Angeles thought that it would make no difference if they complained.¹⁷¹ Likewise, in Chicago and New York, 36% and 40% of workers, respectively, believed the same.¹⁷² One study of workers in

San Francisco's Chinatown, especially in the restaurant industry noted that wage theft is so commonplace that workers have accepted it as "inevitable."¹⁷³ They say, "[t]here is no minimum wage in Chinatown," that "that's just how Chinatown is," forcing them to conclude that "there is no other way."¹⁷⁴ They have accepted the conditions of their employment as the cost of doing business in America.¹⁷⁵

B. Objective Disenfranchisement: Structural and Practical Problems

Employers deprive their employees of power and autonomy through more concrete methods than threats of retaliation or punishment. There also exist objective structural and practical reasons for why workers cannot use current laws and/or enforcement mechanisms to assert their rights against wage theft.

Employers inculcate a sort of fear amongst their workers—fear of losing their jobs.¹ Diego says, "[i]f one was by himself, one would say, 'Let him fire me,' but . . . one has a family . . . there are people behind you."

¹⁷⁰ *See id.*

¹⁷¹ *See* MILKMAN ET AL., *supra* note, 98, at 3.

¹⁷² *See* THEODORE ET AL., *supra* note 93, at iii; BERNHARDT ET AL., *supra* note 20, at 3.

¹⁷³ *See* HU LING ET AL., *supra* note 158, at 8.

¹⁷⁴ *See id.*

¹⁷⁵ *See id.*; *see also* ALL WORK AND NO PAY, *supra* note 103, at 7.

1. North Carolina

a. Resource Shortage

The North Carolina Department of Labor's Wage and Hour Bureau cannot adequately respond to employee complaints due to limited resources and staff.¹⁷⁶ Currently, the WHB receives an average of 95,000 calls concerning employee complaints per year.¹⁷⁷ In 2010 alone, while the Wage and Hour Bureau opened 5,647 cases, it was only able to recover wages for 2,248 of those employees.¹⁷⁸ Recently, our research pointed out that the WHB may be shying away from its responsibilities by referring deserving claimants to small claims court even though its services should provide an equally available remedy.¹⁷⁹ One of the interviewees echoed this sentiment.

Perhaps causing even greater difficulty, Spanish-speaking, limited English proficiency (LEP) workers must provide their own interpreter or go through the trial without one, as small claims courts in North Carolina do not provide interpreters.

b. Statute of Limitations

The statute of limitations on workplace violations and labor-related crime presents an additional obstacle for workers asserting their rights against wage theft.¹⁸⁰ “A statute of limitations is a deadline within which to bring a legal action,” with the deadline within which to bring an action under the Wage and Hour Act being two years.¹⁸¹ Workers are often unaware of their legal rights, keeping them from knowing when those rights have been violated.¹⁸² Yet, the statute of limitations tolls despite a victim's ignorance. In addition, workers

¹⁷⁶ See *Building Integrated Communities in North Carolina*, *supra* note 79, at n.157.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at n.158.

¹⁷⁹ See *supra* Part II.A.

¹⁸⁰ See WINNING WAGE JUSTICE, *supra* note 93, at 21.

¹⁸¹ See *id.*; see also N.C. GEN. STAT. § 95-25.22(f) (2011).

¹⁸² See WINNING WAGE JUSTICE, *supra* note 93, at 21.

may also be slow to act out of fear from retaliation.¹⁸³ Employers also string workers along, claiming not to have money at the moment and promising to pay later.¹⁸⁴ For example, after working a forty hour workweek at \$10 per hour, Carlos would only receive part of his pay. “[My employer] would come by and give me \$380, \$300, or \$280, and then he would give me the rest another week and I would say okay.”¹⁸⁵ Payday was delayed from Friday to Monday to Tuesday, and sometimes payday never arrived. Francesca experienced one of the more extreme cases that demonstrate how workers are “strung along.” After some time working in housecleaning, her employer told her not to come in next week, but that he would call her when

He tells the workers, “[t]omorrow, there is no work anymore,” and the workers are never seen or heard from again.

he needed her.¹⁸⁶ The employer never called nor did he deliver her final paycheck. Francesca called him and sent him text messages, but to no avail. A total of three months went by before Francesca saw her former supervisor again. She ran into him at a bank and inquired about her paycheck. Rather

than paying her right then and there, he promised to return after dropping off an employee to a house cleaning job and retrieving her payment from another bank. Half an hour went by before Francesca realized that this man was not coming back.

The informal working arrangement between workers and their employers further hinders their ability to file a timely complaint.¹⁸⁷ They do not have documentation of promises made by their employers.¹⁸⁸ Employers often have sole control over workers’ hours, causing disagreement amongst workers; even though the employer may be counting correctly, there is no way to be

¹⁸³ See *id.*

¹⁸⁴ See *id.*; see also HU LING ET AL., *supra* note 158, at 11.

¹⁸⁵ Carlos Case Study (interview notes on file with authors).

¹⁸⁶ Francesca Case Study (interview notes on file with authors).

¹⁸⁷ See *Building Integrated Communities in North Carolina*, *supra* note 79, at n.160.

¹⁸⁸ See *id.*

sure.¹⁸⁹ Almost all of the workers we interviewed had oral employment arrangements.¹⁹⁰ No formal contract or recordkeeping took place. This means employees may find it difficult to establish that an employer-employee relationship existed at all, since there is no written record of an employment agreement. While oral agreements are enforceable, it is much more difficult to file an administrative claim without any documented proof of employment or payment irregularities. For example, workers who work for businesses must know if they are employed by a registered corporation and if they are suing a registered corporation and the complaint form requires that workers know the correct name of the corporate entity.¹⁹¹ Workers may even have to contact the Secretary of State or browse the register of deeds for this contact information.¹⁹²

Even if workers have the necessary documents to file a timely complaint, they often cannot

Often times, these workers end up “searching for [their] wages from a guy named Joe who drove a white pickup.”

afford to do so. Carlos sought legal redress, but as he explains, he was required to pay an \$80 filing fee “and then another \$30 for who knows what.”¹⁹³ It is as if legal redress has become a cruel joke for these workers because the very reason that they are seeking out legal remedies is that they

have very little to no money in the first place. By the time workers understand their rights and gather the appropriate documents with the proper filing fees, time on the statute of limitations clock has run, which leaves workers without recourse for receiving the wages to which they are entitled.

c. Misclassification

¹⁸⁹ See, e.g., Diego Case Study(interview notes on file with authors).

¹⁹⁰ Interview with Diego, *supra* note 14; Interview with Carlos, *supra* note 13; Interview with Natalia, *supra* note 15.

¹⁹¹ See *Building Integrated Communities in North Carolina*, *supra* note 79, at n.171.

¹⁹² See *id.* at n.172.

¹⁹³ Interview with Carlos, *supra* note 13.

Worker misclassification presents another common barrier preventing workers from claiming their rights against wage theft. Misclassification takes place when an employer improperly classifies a worker as an independent contractor at hiring.¹⁹⁴

Employers can direct the means, methods, and outcome of an employee's work but not those of an independent contractor, who is in business for himself.¹⁹⁵ The independent contractor is hired to complete certain tasks set out by the employer, but it is the independent contractor who has the right to control how the task will be accomplished.¹⁹⁶ Our interviewees in the construction and landscaping business in our study were

In fact, the United States Department of Justice's Civil Rights Division has recently found that these practices and policies of the court discriminate on the basis of national origin in violation of federal law.

susceptible to misclassification in the construction and landscaping industries, where misclassification is common and often goes undetected.¹⁹⁷ Workers often are unaware of their proper designation as either employees or independent contractors. For example, one interviewee was willing to work for less because he did not have his own tools even though his employer is responsible for making decisions as to how his work was to be done.¹⁹⁸

d. Challenges for Limited-English Speaking Claimants

The majority of workers who suffer from wage theft are Latino.¹⁹⁹ 800,000 people in North Carolina, comprising roughly eleven percent of the state's population, are Hispanic, and this number continues to grow.²⁰⁰ However, of the five individuals who collect information in the

¹⁹⁴ See LINDA H. DONAHUE ET AL., CORNELL UNIVERSITY ILR SCHOOL, THE COST OF WORKER MISCLASSIFICATION IN NEW YORK STATE 3 (2007).

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

¹⁹⁷ See figs.1 & 2, *supra* Part I.

¹⁹⁸ Interview with Carlos, *supra* note 13.

¹⁹⁹ See *Building Integrated Communities in North Carolina*, *supra* note 79, at n.175.

²⁰⁰ See *id.*

Wage and Hour Bureau’s call center, only two speak Spanish.²⁰¹ There is one Spanish language document on the North Carolina Department of Labor’s website explaining the WHA and its enforcement under the WHB. However, even this document has not been updated with the current minimum wage and it fails to mention the right to make a complaint, let alone any procedure for how to file a wage and hour complaint.²⁰²

There is also limited guidance for filing complaints in the realm of small claims court. The Wake County small claims court provides that the clerk’s office may not instruct potential litigants on how to fill out complaint forms, while the Mecklenburg County small claims court website directs visitors to the Legal Aid of North Carolina’s “Guide to Small Claims Court.”²⁰³

“[My employer] would come by and give me \$380, \$300, or \$280, and then he would give me the rest another week and I would say okay.” Payday was delayed from Friday to Monday to Tuesday, and sometimes payday never arrived.

These complaint forms, moreover, are available only in English.²⁰⁴ Perhaps causing even greater difficulty, Spanish-speaking, limited English proficiency (LEP) workers must provide their own interpreter or go through the trial without one, as small claims courts in North Carolina do not provide interpreters.²⁰⁵ This places an additional financial burden on potential claimants. Judges may rely on volunteers to assist litigants in language interpretation, but these volunteers

“alter the statements they are interpreting” and deny

individuals the opportunity to fully and completely communicate with the court.²⁰⁶ In fact, the

United States Department of Justice’s Civil Rights Division has recently found that these

²⁰¹ See *id.* at n.160.

²⁰² See *id.* at nn.161–63.

²⁰³ See *id.* at nn.166–67.

²⁰⁴ See *id.* at nn.166, 170.

²⁰⁵ See *id.* at n.174.

²⁰⁶ See *id.*

practices and policies of the court discriminate on the basis of national origin in violation of federal law.²⁰⁷

e. Obstacles to Collecting Judgments

Even if workers come up with the courage to assert their rights against wage theft, overcome the hurdles for filing an administrative complaint or a private right of action, and gather enough evidence to win a favorable judgment, workers are unable to collect on their unpaid wage judgments.²⁰⁸ Employers become judgment-proof; they file for bankruptcy, hide their assets, shut down operations, or restructure themselves into new entities.

Other employers simply avoid being found.²⁰⁹ With the current precarious state of the economy, short-term, subcontracted jobs are becoming standard business for many workers. Workers may not know the name or contact information of their true employer.²¹⁰ When Diego asked his employer for a raise, he did not realize that the employer was a middleman with pay decisions being made

by another individual named Mark.²¹¹ Often times, these workers end up “searching for [their] wages from a guy named Joe who drove a white pickup.”²¹² Where neither the court nor the

Even if workers have the necessary documents to file a timely complaint, they often cannot afford to do so. Carlos sought legal redress, but as he explains, he was required to pay an \$80 filing fee “and then another \$30 for who knows what.” It is as if legal redress has become a cruel joke for these workers because the very reason that they are seeking out legal remedies is that they have very little to no money in the first place.

²⁰⁷ Letter from Thomas E. Perez, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to the Honorable John W. Smith, Dir. N.C. Admin. Office of the Courts (Mar. 8, 2012).

²⁰⁸ See WINNING WAGE JUSTICE, *supra* note 93, at 111.

²⁰⁹ See *id.*

²¹⁰ See WINNING WAGE JUSTICE, *supra* note 93, at 111.

²¹¹ Interview with Diego, *supra* note 14.

²¹² See WINNING WAGE JUSTICE, *supra* note 93, at 111.

victim can identify the offending employer, a court judgment serves no practical meaningful purpose.²¹³

2. Federal Level: Tepid Enforcement and Unprotected Workers

Studies that examine wage theft at the federal level suggest that the laws are not vigorously enforced. Although the labor force grew by 52% between 1980 and 2007, the number of inspectors enforcing wage and hour laws declined by 31%.²¹⁴ Between 2001 and 2007, the United States Occupational Safety and Health Administration's budget was cut by \$25 million, and at its present staffing and inspection levels, it would take 133 years to inspect each employer once only.²¹⁵ Neither is the federal government prepared to accommodate LEP workers even though federal law acknowledges LEP workers' right to access public services and benefits for federally funded activities.²¹⁶

Furthermore, many workers cannot use federal law and its enforcement mechanisms to enforce their rights against wage theft because they are exempted from minimum wage and overtime protections, which states often look to as a guide in interpreting their own labor laws.²¹⁷ The FLSA, for

Because most states have limited resources, they do not investigate all individual complaints fully and completely, further debilitating the fight against wage theft.

example, contains exemptions for agricultural workers, domestic workers, and home care workers.²¹⁸ Agricultural workers, who are exempt from overtime protections, consist of hired farm workers as opposed to self-employed farmers and their family members who are not

²¹³ See *id.* While there is the option of hiring collection agencies to enforce judgments, it is not worth the trouble since the cost of collection may be just as much as the recovery itself. See *id.* at 111–12.

²¹⁴ See THEODORE ET AL., *supra* note 93, at 41; see also MILKMAN ET AL., *supra* note 98, at 56.

²¹⁵ See THEODORE ET AL., *supra* note 93, at 41.

²¹⁶ See WINNING WAGE JUSTICE, *supra* note 93, at 50.

²¹⁷ See *id.* at 71; see, e.g., N.C. GEN. STAT. § 95-25.14 (2011); 13 N.C. ADMIN. CODE § 12.0103 (2010).

²¹⁸ See WINNING WAGE JUSTICE, *supra* note 93, at 71. Because North Carolina looks to federal law in interpreting its own wage and hour act, this section can also be seen as applicable in the North Carolina worker context. See N.C. GEN. STAT. § 95-25.14 (2011); see also 13 N.C. ADMIN. CODE § 12.0103 (2010).

paid.²¹⁹ Domestic workers, subject to lower-level employee standards, include nannies, babysitters, housekeepers, and other workers, who cook, clean, and care for children and the elderly in private homes.²²⁰ Home care workers, exempt from both minimum wage and overtime protections, refer to those who work in private homes as caregivers for the elderly, sick, and disabled.²²¹ “[They] may be employed directly by private households, home care agencies, public entities, or jointly by some combination of these.”²²²

There are serious ramifications as a result of these exemptions. Many agricultural workers are

There are over one million agricultural workers across the country whose poverty rate is more than double that of other workers, averaging only 59% of the national median income.¹ By working on farms and living in camps outside of major cities and towns, these agricultural workers are physically isolated from access to legal and administrative resources.

undocumented immigrants with limited English skills, living on the fringes of society.²²³ There are over one million agricultural workers across the country whose poverty rate is more than double that of other workers, averaging only 59% of the national median income.²²⁴ By working on farms and living in camps outside of major cities and towns, these agricultural workers are physically isolated from access to legal and administrative resources.²²⁵ Wages for the 1.8 million domestic workers across the country, whose work is marked by low wages, weak labor standards, and physical isolation in private homes, are only one-half the national median income.²²⁶

A 2008 study surveying low-wage workers found that 41% of

workers in private households experienced both minimum wage and overtime violations, with at

²¹⁹ See WINNING WAGE JUSTICE, *supra* note 93, at 71–72.

²²⁰ See *id.*

²²¹ See *id.*

²²² See *id.* at 72.

²²³ See *id.* at 73.

²²⁴ See *id.*

²²⁵ See *id.* at 74.

²²⁶ See *id.* at 76.

Between 2001 and 2007, the United States Occupational Safety and Health Administration's budget was cut by \$25 million, and at its present staffing and inspection levels, it would take 133 years to inspect each employer once only.

least 90% of child care workers and 82.7% of home health care workers suffering from violations.²²⁷ With respect to home care workers, their median wages came at just \$9.34 an hour in 2009.²²⁸ Many home care workers “earn less than self-sufficiency for a single adult” and far less than the income necessary to support a family.²²⁹ Their exemption from minimum wage and overtime protections means that employers need not compensate home care workers for the time spent

traveling to and from clients' homes or for gas or other transportation costs, decreasing their net pay to well below the minimum wage.²³⁰

3. *Sister States*

As in North Carolina and on the federal level, workers across the country can neither enjoy current laws and/or enforcement mechanisms to assert their rights against wage theft. Tepid enforcement also weakens the efficacy of many states' wage and hour laws.²³¹

a. Deficient Processing Mechanisms

Unlike New York, which employs the structured three-tiered triage system of handling complaints, most states use the first in, first out method—resolving complaints as they are received.²³² This method tends

Employers become judgment-proof; they file for bankruptcy, hide their assets, shut down operations, or restructure themselves into new entities. Other employers simply avoid being found.

²²⁷ *See id.*

²²⁸ *See id.* at 79.

²²⁹ *See id.*

²³⁰ *See id.*

²³¹ *See id.* at 17.

²³² *See id.* at 46.

to have adverse results when enforcement resources are scarce; it elevates low-priority cases with limited impact to the disadvantage of other worker complaints that may involve more critical issues or have wider influence.²³³ Because most states have limited resources, they do not investigate all individual complaints fully and completely, further debilitating the fight against wage theft.²³⁴

b. Resource Shortage

In spite of debilitating consequences associated with the first in, first out approach, states are inclined to rely on it due to the low upfront costs since several of these states are experiencing budget shortages.²³⁵ These reductions in budget correspond to the reductions in staff.²³⁶ In recent years, most states have seen reductions for full-time employees in their wage and hour departments.²³⁷ Workers themselves are hit the hardest by this weak enforcement, breathing life into these statistics. In New Jersey, workers who complain to the New Jersey Department of Labor experience considerable delays in having their claims resolved.²³⁸ Workers from San Francisco's Chinatown, who file complaints at either the city or state level, often wait months or even years

The construction industry is the most susceptible to worker abuse via misclassification.¹ According to studies conducted by the federal government, the “construction industry stands out both as the industry with the highest percentage of independent contractors [(22%)] but also as the industry with the highest incidence of misclassification.”

²³³ *See id.*

²³⁴ *See id.* The states that have been found to lack resources include: Arizona, Illinois, Indiana, Texas, Washington, Michigan, and Tennessee. *See MEYER ET AL., supra* note 94, at 26. However, this list is not exhaustive; it only rather reflects those states where studies have been done.

²³⁵ *See WINNING WAGE JUSTICE, supra* note 93, at 26, 22.

²³⁶ *See id.* at 22.

²³⁷ *See id.* Several states, such as Rhode Island, Kentucky, Wisconsin, Hawaii, Arkansas, and Utah, have cited staff shortages as reasons for delays and longer processing times. *See id.* at 34.

²³⁸ *See ALL WORK AND NO PAY supra* note 103, at 12.

to have their cases resolved.²³⁹

The power to effectuate wage and hour laws rests with the various administrative agencies charged with enforcement of these laws.²⁴⁰ When agency power is stayed by scarce resources, employers understand that if they fail to pay wages, paying the bare amount of wages owed is the worst that can happen to them.²⁴¹ They have no meaningful incentive to comply with the law because “there are no consequences for violating the law beyond nominal penalties.”²⁴² Instead, employers have incentives to facilitate wage and hour violations, making it more difficult for workers to assert their rights under the law.²⁴³ Employers use non-hourly pay arrangements or pay in cash without providing any statement of earnings and deductions to conceal pay-related violations.²⁴⁴ Attrition and hiring freezes have taken such a toll on the wage theft crisis that noncompliance with wage and hour laws have contributed to an employer culture

Employers outsource their workers to middleman entities and use temporary agencies or leasing firms to payroll their staff. This dynamic enables worksite employers to blame the subcontractor for wage and hour violations.

where workers are expendable and easily replaced.²⁴⁵

c. Statute of Limitations

The statute of limitations is also a major obstacle for workers asserting their rights in North Carolina’s sister states, especially in seeking administrative review. Labor departments experience long delays and processing times when addressing worker complaints.²⁴⁶ According to a U.S. Government Accountability Office report on the U.S.

Department of Labor’s enforcement of wage and hour laws, there have been “significant delays

²³⁹ See HU LING ET AL., *supra* note 158, at 7.

²⁴⁰ See MILKMAN ET AL., *supra* note 98, at 56.

²⁴¹ See WINNING WAGE JUSTICE, *supra* note 93, at 17.

²⁴² *Id.*

²⁴³ See *id.*

²⁴⁴ See BERNHARDT ET AL., *supra* note 20, at 35.

²⁴⁵ See *id.* at 47; see also THEODORE ET AL., *supra* note 93, at 31.

²⁴⁶ See WINNING WAGE JUSTICE, *supra* note 93, at 22.

in investigating complaints, complaints not recorded in the Wage and Hour Department database, and a poor complaint intake process.”²⁴⁷ Such inefficiencies and backlogs keep both federal and state agencies from investigating complaints until 6 months or later after the complaint is received.²⁴⁸ This passage of time, though no fault of the worker, does not toll the statute of limitations.²⁴⁹ Rather, the worker is doubly penalized; not only has the worker lost her unpaid wages, but she has also lost the time, money, and spirit it required to file the complaint that now languishes on an agency worker’s desk.²⁵⁰

d. Cost of Legal Counsel

The high cost of legal representation also prevents a worker from asserting her or his rights against wage theft via private right of action.²⁵¹ Low-wage workers are rarely ever able to pay such costs and although there are lawyers willing to accept cases for a contingency fee, accepting a percentage of the damages recovered, the amount of money at stake is usually so small that it is not enough to compensate the lawyer for his or her time adequately.²⁵² In Washington State, the state Bar Association performed a civil needs assessment, which

With respect to home care workers, their median wages came at just \$9.34 an hour in 2009.¹ Many home care workers “earn less than self-sufficiency for a single adult” and far less than the income necessary to support a family.

found that only one-half of low-wage workers could get advice or representation from a lawyer.²⁵³ According to a New Jersey based study, pursuing civil cases in small claims court without an attorney may not be worth the effort, as the process is too complicated.²⁵⁴

²⁴⁷ *See id.*

²⁴⁸ *See id.* at 21.

²⁴⁹ *See id.*

²⁵⁰ *See id.*

²⁵¹ *See id.* at 31.

²⁵² *See id.*

²⁵³ *See id.*

e. Challenges for Limited-English Speaking
Claimants

Not only are workers priced out of obtaining adequate legal representation, but a worker's low English abilities may prevent them from representing themselves *pro se*.²⁵⁵ Few court staff speak other languages and, as in North Carolina, rarely print forms in languages other than English.²⁵⁶ Vulnerable workers, including immigrants, cannot access the very agencies charged with helping them enforce their rights.²⁵⁷ Limited LEP access extends to private rights of action as well. A study conducted by New York University's Brennan Center for Justice found that seventeen states either restrict the use of interpreters

to certain types of civil proceedings or do not recognize the right to interpreters in the civil context at all.²⁵⁸ It also found that twenty-five states have a mandatory, written requirement for interpreters to be provided in all civil actions, but, in effect, workers cannot make use of this mandate.²⁵⁹ Many states lack an established, uniform procedure to ensure compliance and in spite of a right to an interpreter, the costs generally fall on the litigant.²⁶⁰

The power to effectuate and wage and hour laws rests with the various administrative agencies charged with enforcement of these laws.¹ When agency power is stayed by scarce resources, employers understand that if they fail to pay wages, paying the bare amount of wages owed is the worst that can happen to them.¹ They have no meaningful incentive to comply with the law because "there are no consequences for violating the law beyond nominal penalties."

²⁵⁴ See ALL WORK AND NO PAY, *supra* note 103, at 10.

²⁵⁵ See WINNING WAGE JUSTICE, *supra* note 93, at 50.

²⁵⁶ See *id.*

²⁵⁷ See *id.*

²⁵⁸ See EMILY KIRBY ET AL., UNC SCHOOL OF LAW IMMIGRATION/HUMAN RIGHTS POLICY CLINIC, AN ANALYSIS OF THE SYSTEMIC PROBLEMS REGARDING FOREIGN LANGUAGE INTERPRETATION IN THE NORTH CAROLINA COURT SYSTEM AND POTENTIAL SOLUTIONS 18 (2010).

²⁵⁹ See *id.* at 19.

²⁶⁰ See *id.* at 19–20.

f. Misclassification

Employers in North Carolina's sister states also use convoluted arrangements to classify workers in ways that bar them from receiving wage and hour protections as employees.²⁶¹ Such arrangements include labeling workers as independent contractors, consultants, or paying them off the books without any tax deductions.²⁶² Employers outsource their workers to middleman entities and use temporary agencies or leasing firms to payroll their staff. This dynamic enables worksite employers to blame the subcontractor for wage and hour violations.²⁶³ Workers often sign independent contractor agreements as a condition for obtaining work, misleading them to believe that they have no rights against wage theft.²⁶⁴ However, even well intentioned employers may misclassify workers due to the confusion associated with complex, inconsistent, and varying standards.²⁶⁵ According to a study conducted by the U.S. Department of Labor in 2000, at most 30% of companies misclassify their workers as independent contractors.²⁶⁶ At the state level, studies estimate that the number of misclassified workers goes beyond 700,000 in New York, 550,000 in Pennsylvania, and 350,000 in Illinois.²⁶⁷

Data collected for this policy brief demonstrates that North Carolina has a vulnerable, fearful, and exploited workforce.

Not only are workers priced out of obtaining adequate legal representation, but a worker's low English abilities may prevent them from representing themselves *pro se*.

²⁶¹ See WINNING WAGE JUSTICE, *supra* note 93, at 83.

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ See *id.*

²⁶⁵ See DONAHUE ET AL., *supra* note 194, at 3.

²⁶⁶ See WINNING WAGE JUSTICE, *supra* note 93, at 85.

²⁶⁷ See *id.*

The construction industry is the most susceptible to worker abuse via misclassification.²⁶⁸ According to studies conducted by the federal government, the “construction industry stands out both as the industry with the highest percentage of independent contractors [(22%)] but also as the industry with the highest incidence of misclassification.”²⁶⁹ For example, roughly 45,474, or 14.8% of construction workers in New

The U.S. Department of Labor should shift to a proactive, “investigation-driven” strategy in low-wage industries, rather than relying on worker complaints to combat labor law violations.

York, are misclassified in a given year.²⁷⁰ Because the construction industry is highly competitive, employers are inclined to cut labor costs through worker misclassification at the risk of being caught and penalized, especially since enforcement of proper worker classification is unlikely.²⁷¹ A study of the cost of worker misclassification in New York State characterizes the construction industry as small to medium size firms that operate at slim profit margins and high injury and compensation rates, and whose number and size place them beyond the reach of state enforcement agencies.²⁷² The report found that these employers enjoy substantial savings and unfair market advantage by failing to make required payments and other expenses including “the administrative costs for withholding taxes and making payments for Social Security, Medicare, unemployment insurance, paying overtime and minimum wages [with which this study is primarily concerned], and including workers in employee benefit programs.”²⁷³ Moreover, employers use worker misclassification as a way to avoid costs associated with lawsuits.²⁷⁴ In the typical employer-employee relationship, employers are liable for the torts committed by their

²⁶⁸ See DONAHUE ET AL., *supra* note 194, at 8.

²⁶⁹ See *id.*

²⁷⁰ See *id.* at 2.

²⁷¹ See *id.* at 7.

²⁷² See *id.* at 8.

²⁷³ See *id.* at 7.

²⁷⁴ See *id.* at 8.

employees within the scope of their employment.²⁷⁵ Employers are not, however, liable for the torts committed by independent contractors, and the substantial savings mentioned above pale in comparison to the elimination of tort liability.²⁷⁶

The most vulnerable victims of worker misclassification are undocumented workers. The construction industry, for example, is a labor-intensive industry with temporary jobs broken into piecework.²⁷⁷ Construction employment opportunities are plentiful for immigrant workers, often undocumented, and unfortunately, as noted in the New York study of misclassification of workers, there are opportunist employers who use their workers' independent contractor classification as a way to get around their obligations under federal immigration laws.²⁷⁸

Therefore, these workers' immigration status, combined with their false independent contractor status, makes them even less likely to challenge their employer's designation.²⁷⁹

g. Failure to Criminalize Wage Theft

Many states have officially adopted criminal penalties as a way to enforce wage and hour protections.²⁸⁰

Although these criminal penalties are codified, they are rarely used.²⁸¹ New Jersey has a criminal wage theft statute, which states that an "employer who has agreed with an employee . . . to pay wages . . . commits a disorderly persons offense if the

Rather, the worker is doubly penalized; not only has the worker lost her unpaid wages, but she has also lost the time, money, and spirit it required to file the complaint that now languishes on an agency worker's desk.

²⁷⁵ *See id.*

²⁷⁶ *See id.*

²⁷⁷ *See id.* at 7–8.

²⁷⁸ *See id.* at 8.

²⁷⁹ *See id.* at 7.

²⁸⁰ *See* WINNING WAGE JUSTICE, *supra* note 93, at 34.

²⁸¹ *See* MEYER ET AL., *supra* note 94, at 37.

employer fails to pay wages when due.”²⁸² Nevertheless, this statute may have fallen into disuse.²⁸³ Twelve New Jersey prosecutors were interviewed and none recalled ever prosecuting a wage theft crime.²⁸⁴ Even though criminal penalties are available, they are available only as tools for prosecutors and state agencies—not workers.²⁸⁵ State prosecutors, not workers, have discretion to issue criminal penalties. Because proving violations of the law is much more difficult in the criminal context than the civil, there tends to be a widespread belief on the part of law enforcement that wage theft should remain a civil matter.²⁸⁶

It is clear that the current laws and administrative remedies fall far short of their intended scope. What, then, can we do when current laws fail to provide the wage and hour protections they are meant to guarantee? The next section raises a number of legislative and policy responses to the wage theft crisis.

IV. REMEDYING THE WAGE THEFT PROBLEM

The prevalence of wage theft is an issue that has received an increasing amount of national attention, and numerous studies have been undertaken throughout the United States to document the extent of this issue. These studies have also identified myriad policies that federal, state, and local governments have implemented, and could implement, to address the ever-increasing incidence of wage theft. This section builds on these studies, which serve as a wealth of information about what can be done to remedy the wage theft situation. Drawing on these studies, we have identified three fundamental principles that are critical to driving the development of a new policy agenda at the federal, state, and local

The most vulnerable victims of worker misclassification are undocumented workers.

²⁸² See ALL WORK AND NO PAY, *supra* note 103, at 10.

²⁸³ See *id.*

²⁸⁴ See *id.*

²⁸⁵ See WINNING WAGE JUSTICE, *supra* note 93, at 35.

²⁸⁶ See *id.*

levels that is aimed at combating wage theft: strengthen enforcement of employment and labor laws, update legal standards for the twenty-first century workplace, and establish equal status for immigrants in the workplace through comprehensive immigration reform.²⁸⁷

Data collected for this policy brief demonstrates that North Carolina has a vulnerable,

Even though criminal penalties are available, they are available only as tools for prosecutors and state agencies—not workers.

fearful, and exploited workforce.²⁸⁸ Many North Carolina workers that fall victim to wage theft do not seek remedies available to them under current laws due to fear of retaliation and lack of information about their rights.²⁸⁹ Legislation must be adopted to strengthen current wage theft laws and to

eliminate many of the obstacles to redress that prevent North Carolina workers from asserting their right to just remuneration. Such legislation has the potential to motivate vulnerable workers to bring valid legal claims against their employers and in turn deter employers from violating laws that provide our state's workers with fundamental protections.

A. Federal Level: Strengthen Government Enforcement of Wage Theft Laws

Federal government oversight and enforcement is essential to addressing wage theft and other workplace violations. For public policy purposes, it is essential that both employers and workers are aware of the substantial power and resources held by the government agencies responsible for enforcing wage and hour laws.²⁹⁰ In order to remedy the current wage theft problem, it is critical that the federal government intensify its investigative efforts in low-wage industries, strengthen penalties for stealing workers' wages, and increase the funding and number of investigators and staff allocated to enforcement agencies.

²⁸⁷ See BERNHARDT ET AL., *supra* note 20; MILKMAN ET AL., *supra* note 98; THEODORE ET AL., *supra* note 93.

²⁸⁸ See *supra* Part I.

²⁸⁹ See *supra* Parts II & III.

²⁹⁰ BERNHARDT ET AL., *supra* note 20, at 46.

1. Policy Changes

a. Enhanced Enforcement Strategies

The U.S. Department of Labor should shift to a proactive, “investigation-driven” strategy in low-wage industries, rather than relying on worker complaints to combat labor law violations.²⁹¹ Such a strategy identifies industries in which violations are prevalent, conducts industry sweeps and audits of target violators, publicizes the successful resolution of violations and punishment of violators, and cracks down on employers who are repeat offenders as well as those who misclassify their workers.²⁹² The desired effect of a proactive, “investigation-driven” strategy is to send a clear message to employers that the government will pursue wage theft violations and actively engage in inspections.²⁹³ Interagency coordination and collaboration is also imperative to identify employers who are robbing workers of their rightful wages.²⁹⁴

2. Legislative Change

Strengthening penalties for violations and creating new preventative measures are effective tools the government could use to curtail wage theft.²⁹⁵

Though enforcement agencies must enforce current penalties, stronger enforcement measures must be implemented; current penalties for wage theft violations are simply too weak to deter many employers.²⁹⁶ Stronger enforcement measures that would improve outcomes for victims of wage theft include: increased penalties for repeat offenders;

Strong wage theft laws are needed to deter employers from stealing workers' wages and to combat many of the obstacles to redress faced by victims of wage theft.

²⁹¹ HU LING ET AL., *supra* note 158, at 20; *see also* MILKMAN ET AL., *supra* note 98, at 56; THEODORE ET AL., *supra* note 94, at 40–41.

²⁹² *See* HU LING ET AL., *supra* note 158.

²⁹³ MILKMAN ET AL., *supra* note 98, at 56; *see also* THEODORE ET AL., *supra* note 94, at 41.

²⁹⁴ HU LING ET AL., *supra* note 158, at 20.

²⁹⁵ *Id.* at 20; *see also* MILKMAN ET AL., *supra* note 98, at 57; THEODORE ET AL., *supra* note 94, at 41.

²⁹⁶ *See* MILKMAN ET AL., *supra* note 98, at 57; THEODORE ET AL., *supra* note 94, at 41.

implementation of a wage-bond system to stop runaway employers; stronger citation powers; and requiring mandatory wage and hour law education for employers.²⁹⁷

3. Increase Resource Allocations

If the federal government is to enact such changes, it must adequately fund enforcement agencies and increase the number of investigators and other staff.²⁹⁸ Currently, staffing is inadequate for the enforcement of laws that ensure worker protections.²⁹⁹ Between 1980 and 2007, the number of inspectors enforcing federal minimum wage and overtime laws decreased by 31%; similarly, the budget of the U.S. Occupational Safety and Health Administration (OSHA) was cut by \$25 million between 2001 and 2007.³⁰⁰ Though the U.S. Department of Labor has recently increased its investigator staff, many more investigators are needed to match the growth in the number of workplaces that has occurred over the last few decades.

B. State Level: Strengthen Government Enforcement of Wage Theft Laws

1. Policy Changes

Policy and legislative change at the federal level alone is insufficient to remedy wage theft violations. State and local governments have a pivotal role to play as well. Many of the above suggested federal policy changes suggested above are equally applicable to the state level.

a. Enhanced Enforcement Strategies

State governments too must also engage in proactive investigations in low wage-industries instead of relying solely on complaints. State enforcement agencies should affirmatively target and investigate high-violation industries, regardless of whether individual workers complain.

The New York State Department of Labor has begun to prioritize incoming wage theft claims,

²⁹⁷ HU LING ET AL., *supra* note 158, at 20.

²⁹⁸ THEODORE ET AL., *supra* note 94, at 41; *see also* MILKMAN ET AL., *supra* note 98, at 56; HU LING ET AL., *supra* note 158, at 20.

²⁹⁹ HU LING ET AL., *supra* note 158, at 20.

³⁰⁰ MILKMAN ET AL., *supra* note 98, at 56; *see also* THEODORE ET AL., *supra* note 94, at 41.

which allows it to concentrate its limited resources on the most pressing cases.³⁰¹ The same Department has recently targeted the car wash industry and has conducted high-profile sweeps in the construction and racetrack sectors.³⁰² In Massachusetts, the state attorney general has targeted numerous industries over the years for stealing workers' pay, including the construction, temporary service, and building services industries.³⁰³

b. State Community Networks

Recently, the New York State Department of Labor has implemented a range of innovative reforms to protect the wages of its state's workers.³⁰⁴ It has created state-community organization partnerships by reaching out to immigrant worker centers, unions, service providers, legal advocates, and employers to enhance enforcement.³⁰⁵ The New York State Department of

Fear of employer harassment and retaliation is a significant obstacle that prevents many workers from bringing wage theft claims against their employers.

Labor has also established the Bureau of Immigrant Workers' Rights to build and foster relationships with immigrant communities.³⁰⁶

Government alone will never have sufficient manpower and resources to oversee every wage theft violation on a continued basis. Thus, state governments can draw on

the expertise of community organizations to choose high-impact enforcement targets.³⁰⁷ State governments should partner with community groups whose members can aid in identifying high-violation industries and train workers to educate their communities about the state's enforcement

³⁰¹ BERNHARDT ET AL., *supra* note 20, at 46.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ BERNHARDT ET AL., *supra* note 20, at 46.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 47.

efforts.³⁰⁸ State labor departments should also consider creating a program in which community organizations are trained and utilized to investigate stolen wage claims and to assist in the preparation of wage theft complaints.³⁰⁹ These proposed efforts can help to ease the burden faced by government enforcement agencies while increasing their efficiency in enforcing vital worker protection laws.

c. Establishing Study Commissions

In recent years, many states have adopted a policy of encouraging state legislatures and agencies to create task forces or commissions to study and document the prevalence and impact of independent contractor misclassification, a common method of wage theft.³¹⁰ According to a study commissioned by the U.S. Department of Labor, in 2000

up to 30% of employers misclassified their workers as independent contractors.³¹¹ By designating workers as “independent contractors” or “consultants,” or by treating them as non-employees by paying them off the books with no tax withholdings, employers have been able to evade minimum wage and overtime rules.³¹² Misclassified workers, especially those in the low-wage sector, are often immigrants

States can alleviate the fear experienced by undocumented immigrant workers who want to assert wage theft claims by ensuring status-blind enforcement of workplace laws.

and are often paid in cash; this makes the offending employer difficult to identify or track down.³¹³ In the following states, government officials, advocacy organizations, or academics have undertaken research studies to document the prevalence and cost of independent contractor

³⁰⁸ *Id.* at 46.

³⁰⁹ *See* ALL WORK AND NO PAY, *supra* note 103, at 15.

³¹⁰ WINNING WAGE JUSTICE, *supra* note 93, at 85.

³¹¹ *See* PLANTAMICS, INC., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS (2000).

³¹² WINNING WAGE JUSTICE, *supra* note 93, at 83.

³¹³ *Id.*

misclassification: Illinois, Massachusetts, Minnesota, New York, Ohio, and Texas.³¹⁴ States that have established task forces or commissions to coordinate the investigation and enforcement efforts of state agencies, publicize the issue of misclassification, and recommend further legislative reforms include: California, Connecticut, Iowa, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New York, Oregon, Rhode Island, Utah, and Washington.³¹⁵

2. Legislative Changes

Though strong enforcement is essential, stronger legal standards are necessary to accomplish the policy changes mentioned above. “The strength of laws and the strength of their enforcement are deeply intertwined: weak employment and labor laws send the wrong signal, opening the door to low-road business strategies to cut labor costs by violating employment and labor laws.”³¹⁶ Strong wage theft laws are needed to deter employers from stealing workers’

Policy and legislative change at the federal level alone is insufficient to remedy wage theft violations. State and local governments have a pivotal role to play as well.

wages and to combat many of the obstacles to redress faced by victims of wage theft.

a. Treble Damages

Meaningful compensation of workers who have experienced wage theft is a way for states to deter violations wage theft violations. Many victims of wage theft find it financially unworthy to pursue claims against their employers because of the relatively small amounts of money that are often at stake when workers are underpaid or not paid at all. Laws of treble, or

³¹⁴ *Id.* at 87.

³¹⁵ *Id.*

³¹⁶ THEODORE ET AL., *supra* note 93, at 42.

triple, damages make employers pay workers three times the amount of wages owed.³¹⁷ Triple damages not only deter employers from committing wage theft violations; they also have the added benefit of motivating victims of wage theft to bring forth claims against their employers. Currently, five states impose triple damages in minimum wage claims: Arizona, Idaho, Massachusetts, New Mexico, and Ohio.³¹⁸ Ten states allow for triple damages in other wage theft claims: Arizona, Idaho, Maine, Maryland, Massachusetts, Michigan, Nebraska, North Dakota, Vermont, and West Virginia.³¹⁹

b. Modify and Extend the Statute of Limitations

Given that workers in low-wage industries are often hesitant to file claims for fear of retaliation and are often unaware of their legal rights or when their rights have been violated, the statute of limitations for wage theft claims has considerably hindered victims pursuing legal remedies for unpaid wages.³²⁰ Other obstacles to filing timely claims include the employer practice of “stringing along” workers by promising to pay them “later,” as well as delays by the U.S. Department of Labor in investigating complaints.³²¹ When workers fail to assert their rights before the statute of limitations runs out they are rendered unable to attain legal redress and cannot recover the unpaid wages and damages they are owed.

Government alone will never have sufficient manpower and resources to oversee every wage theft violation on a continued basis. Thus, state governments can draw on the expertise of community organizations to choose high-impact enforcement targets.

³¹⁷ WINNING WAGE JUSTICE, *supra* note 93, at 19.

³¹⁸ *Id.* at 20.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

Extending or suspending the statute of limitations for wage theft claims ensures that workers have time to bring the claims. While in the majority of states the statute of limitations for minimum wage and wage payment laws is two to three years, some states have extended the statute of limitations to give workers a longer period of time to assert a claim for stolen wages.³²² States that have extended the statute of limitations to four to six years for wage theft violations include California, Florida, New York, Oregon, and Washington.³²³ Some states have also suspended the statute of limitations when a worker files a wage theft claim with the state department of labor to allow for time to investigate the case.³²⁴ Arizona, New Mexico, Ohio, and Washington allow for tolling or suspending of the statute of limitations for investigation into complaints of stolen wages.³²⁵

c. Protecting Against Harassment and Retaliation

As mentioned above, fear of employer harassment and retaliation is a significant obstacle that prevents many workers from bringing wage theft claims against their employers. There are several measures states can employ to protect the identities of workers who file administrative wage claims with state departments of labor or bring private lawsuits. Such methods include: allowing anonymous complaints or allowing third parties, such as work centers, to file complaints; allowing one worker to file claims on behalf of the rest of the workers affected by wage theft; and requiring the state enforcement agency to keep the identities of complaining workers confidential as long as possible during its investigation.³²⁶ Colorado, New Jersey, California, Connecticut, Illinois, and New York permit workers to file anonymous claims with

³²² *Id.* at 21.

³²³ *Id.* at 23.

³²⁴ *Id.* at 21.

³²⁵ *Id.* at 23.

³²⁶ *Id.* at 57.

the agencies responsible for wage theft enforcement.³²⁷ Arizona, Arkansas, Kentucky, Ohio, Illinois, Nebraska, New Jersey, North Carolina, and New York keep the identity of a complaining worker confidential to the extent possible during the investigation and resolution processes.³²⁸ In addition, several states, including Arizona, Arkansas, California, Colorado, New York, Ohio, and Rhode Island, allow organizations or individuals, including fellow workers in the same workplace, to file administrative complaints on behalf of affected workers. Likewise, sixteen states allow workers to designate another person to bring an unpaid wage lawsuit on their behalf.³²⁹

States can alleviate the fear experienced by undocumented immigrant workers who want to assert wage theft claims by ensuring status-blind enforcement of workplace laws.³³⁰ Agencies enforcing wage theft laws should create a firewall between themselves and immigration authorities so that workers do not fear they will be deported by immigrant authorities when bringing claims against their employer.³³¹ Without such protections, many workers will be deterred by fear.³³² The United States government has recognized the vital importance of such protections in the enforcement process and has established firewalls between ICE and the U.S. Department of Labor during the enforcement activities of the latter.³³³

By designating workers as “independent contractors” or “consultants,” or by treating them as non-employees by paying them off the books with no tax withholdings, employers have been able to evade minimum wage and overtime rules.

³²⁷ *Id.* at 58.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ MILKMAN ET AL., *supra* note 98, at 58; *see also* THEODORE ET AL., *supra* note 93, at 43.

³³¹ *Id.*

³³² *Id.*

³³³ Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011).

Employer threats of retaliation against complaining workers may also be curtailed by revising state anti-retaliation law to include the presumption that any adverse or discriminatory action taken by an employer against a worker within a specified period of time after the worker complains is retaliatory.³³⁴ This type of legal presumption may discourage employer backlash against complaining workers because it shifts the burden of proof in retaliation claims to employers.³³⁵ Such a provision motivates wage theft victims to bring valid claims against employers because it fosters an environment in which workers can come forward to inquire or complain about their unpaid wages.³³⁶ Arizona is one such state that currently provides for a presumption of retaliation in its laws.³³⁷

d. Specific Protections for Undocumented Immigrant Workers

Immigrant workers are particularly vulnerable to employer abuse and are twice as likely as US-born workers to suffer wage theft violations.³³⁸ However they fear that any effort to protest wage theft will result in their undocumented status being brought to the attention of Immigration and Customs Enforcement. They are generally reluctant to pursue legal remedies because of concern that they will be required to divulge information that may disclose their immigration status.³³⁹ As one study has recommended, “[a] guiding principle for reform must be that immigrant workers receive equal protection and equal status in the workplace.”³⁴⁰ States can pass laws that provide all workers with the same protections and recourse under state wage laws, regardless of their immigration status.³⁴¹ Several states provide such laws that protect immigrant workers. For example, the California state labor code provides that immigration

³³⁴ WINNING WAGE JUSTICE, *supra* note 93, at 60.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.* at 61.

³³⁸ *Id.* at 50.

³³⁹ *Id.* at 63.

³⁴⁰ MILKMAN ET AL., *supra* note 98, at 58; *see also* THEODORE ET AL., *supra* note 93, at 43.

³⁴¹ WINNING WAGE JUSTICE, *supra* note 93, at 63.

status is not relevant to pursuing wage and hour claims and that workers are entitled to all rights and remedies available under state law.³⁴² Similarly, the Washington State Labor and Industries and Human Rights Commission issued statements that undocumented immigrants have access to all remedies available under Washington Law.³⁴³

Undocumented immigrant wage theft victims are often also victims of other workplace-related crimes under state law.³⁴⁴ The U visa classification, enacted in October 2000, was created by the United States Congress to provide eligible noncitizens with authorized stay in the United States and employment authorization.³⁴⁵ The U visa was created for noncitizen victims who suffered substantial mental and physical abuse as a result of criminal activity and who are willing to assist government officials in the investigation and prosecution of that criminal activity.³⁴⁶ The creation of the U nonimmigrant classification not only provides benefits for noncitizen victims of crimes but it also helps law enforcement agencies to better serve and protect this

Many state laws exempt key groups of low-wage workers from minimum wage and overtime protections.

Paid meal and rest breaks assure workers the basic rights to have the time they need to eat, rest, and take care of personal needs.

underrepresented community. Enumerated crimes that are often committed by employers include: abusive sexual contact, blackmail, false imprisonment, assault, involuntary servitude, obstruction of justice, peonage, perjury, trafficking, witness tampering, unlawful criminal restraint, or other

³⁴² CAL. LAB. CODE § 1171.5 (West 2003).

³⁴³ WINNING WAGE JUSTICE, *supra* note 93, at 63.

³⁴⁴ *Id.* at 67.

³⁴⁵ Victims of Trafficking and Violence Protection Act of 2000 § 1513(a)(1)(A), Title V: Battered Immigrant Women (Pub. L. No. 106-386, 114 Stat. 1464).

³⁴⁶ *Id.*

substantially similar activity.³⁴⁷ U visa legislation allows federal, state, and local law enforcement agencies and prosecutors to certify victims of crimes as eligible for U visas.³⁴⁸ State governments should urge their state departments of labor and their attorney general offices to issue such certifications as part of their investigative process because certification is a significant way to encourage undocumented workers to report crimes and assist law enforcement in investigation and prosecution of such crimes.³⁴⁹

e. Revoke Business Licenses

Employer compliance with wage and hour laws may be enhanced if the state compels employers to disclose and pay any outstanding wages owed and judgments or orders of unpaid wages as a condition for issuance or renewal of business licenses or registrations.³⁵⁰ This policy may be effective in changing the behavior of employers in industries where a license or registration is required for operation, or where a license is a significant source of revenue for the business.³⁵¹ There are scattered examples of states where license issuance or renewal is conditioned on compliance with wage and hour laws, but many businesses operate at the city level, not the state level.³⁵²

f. Language Access

Limited English proficiency (LEP) is another significant hurdle that must be surmounted by many wage theft victims pursuing legal redress through government enforcement agencies. The majority of state agencies have few staff members who speak other languages and the agencies rarely print forms in languages other than English.³⁵³ Legislatures should pass laws

³⁴⁷ WINNING WAGE JUSTICE, *supra* note 93, at 67.

³⁴⁸ 8 C.F.R. § 214.14(a)(2).

³⁴⁹ WINNING WAGE JUSTICE, *supra* note 93, at 68.

³⁵⁰ *Id.* at 25.

³⁵¹ *Id.*

³⁵² *Id.* at 26.

³⁵³ *Id.*

that require agencies to accommodate LEP persons; such legislation will help ensure that these vulnerable workers have access to wage theft enforcement agencies.³⁵⁴

Many states have passed comprehensive state laws that require a range of affirmative policies that ensure access for LEP persons to the resources provided by government agencies.³⁵⁵

California amended its Bilingual Services Act to require that all state agencies and departments

Even after workers overcome the fear of asserting their legal right to be paid, file a wage theft claim or suit, and receive a winning judgment, they often are unable to collect their unpaid wage judgments

establish procedures for accepting and resolving complaints from LEP persons.³⁵⁶ In Hawaii, the LEP access law created the Office of Language Access.³⁵⁷ This Office is charged with overseeing state agencies' development of a language access plan that must reasonably accommodate non-English speakers. It is also charged with providing for oral interpretation and translation of vital documents when reasonably necessary.³⁵⁸

Massachusetts' unemployment compensation law requires that

all notices and materials be available in any language that is the primary language of at least 10,000, or 0.5% of all residents of Massachusetts.³⁵⁹ Maryland law requires that all state agencies provide services to LEP individuals and that all vital documents be translated into any language spoken by at least three percent of the state's population.³⁶⁰ Also, New Jersey and Texas have statutes explicitly addressing bilingual services for Spanish-speaking claimants.³⁶¹

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 51.

³⁵⁶ Dymally-Alatorre Bilingual Services Act, CAL. GOV. CODE § 7290-7299.8 (2010).

³⁵⁷ HAW. CODE R. § 371.31-37 (1985).

³⁵⁸ *Id.*

³⁵⁹ MASS. GEN. LAWS ANN. ch. 151A, § 62A (West 2003).

³⁶⁰ MD. CODE ANN. STATE GOV'T § 10-1101-1105 (West 2002).

³⁶¹ N.J. STAT. ANN. § 34:9A-7.2 (1971); TEX. LAB. CODE ANN. § 301.064 (West 1993).

g. Amend Workplace Laws to Protect All Workers

Many state laws exempt key groups of low-wage workers from minimum wage and overtime protections.³⁶² Agricultural workers, domestic workers, and home care workers are often affected by these gaps in state law protections, which place the workers at a significant disadvantage because the state law is often more favorable to workers than federal law.³⁶³ The FLSA exempts home care workers from both minimum wage and overtime protections, exempts agricultural workers from overtime protection, and applies a lower level of standards to domestic workers.³⁶⁴ Also at the federal level, the National Labor Relations Act (NLRA), which protects workers' rights to organize, exempts agricultural and domestic workers.³⁶⁵

Immigrant workers are particularly vulnerable to employer abuse and are twice as likely as US-born workers to suffer wage theft violations.

Extending wage and hour protections to agricultural, domestic, and home care workers arms such workers with enforcement remedies and signals to employers and workers in these sectors that these vulnerable groups of workers are entitled to basic workplace standards. Fourteen states extend state minimum wage protections to agricultural workers:

Arizona, California, Colorado, Michigan, Connecticut, Hawaii, Minnesota, Montana, New Jersey, New York, North Dakota, Rhode Island, South Dakota, and Texas.³⁶⁶ Massachusetts is the only state that provides full minimum wage and overtime coverage to all categories of domestic workers.³⁶⁷ While California and Maryland extend minimum wage coverage to all domestic workers, these states exclude certain categories of domestic workers from overtime

³⁶² WINNING WAGE JUSTICE, *supra* note 93, at 71.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 74.

³⁶⁷ MASS. GEN. LAWS ANN. ch. 151 § 1A(1) (West 2008).

protections.³⁶⁸ Roughly half of all states currently provide at least some domestic workers with either minimum wage protections, overtime protections, or both.³⁶⁹ In the case of home care workers, six states provide minimum wage protections: Arizona, California, District of Columbia, Nebraska, Ohio, and South Dakota.³⁷⁰ Home care workers receive overtime pay for working more than forty hours in a workweek in the following states: Colorado, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, North Dakota, Pennsylvania, Washington, and Wisconsin.³⁷¹

h. Amend Workplace Laws: Include Meals and Breaks

States can increase worker protections by amending their workplace laws to ensure workers are paid for all of the hours they work. Meal and rest break requirements, as well as daily overtime requirements, are two major sets of protections which should be present in state workplace laws, but frequently are not.³⁷² These laws provide low-wage workers with a measure of protection against employers' efforts to avoid paying them for all the hours they work.³⁷³ Paid meal and rest breaks assure workers the basic rights to have the time they need to eat, rest, and take care of personal needs.³⁷⁴ Likewise, daily overtime laws discourage employers from overworking their workers or creating unbalanced schedules with workdays of very different lengths.³⁷⁵

Many states have passed legislation that ensures that workers are being paid for the hours they worked. California, Colorado, Illinois, Kentucky, Minnesota, Nevada, Oregon, Vermont, and Washington require some form of paid rest breaks, while twenty-two states require employers to

³⁶⁸ Cal. Wage Order 15-2001 § 1(b), 2(j), 3(A)–(C) (2006); MD. CODE ANN. LAB. & EMPL. § 3-415 (West 2001).

³⁶⁹ WINNING WAGE JUSTICE, *supra* note 93, at 77.

³⁷⁰ *Id.* at 81.

³⁷¹ *Id.*

³⁷² *Id.* at 99.

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

count meal breaks as time worked.³⁷⁶ Also, thirteen states (Alabama, California, Connecticut, Illinois, Maryland, Massachusetts, New Hampshire, New York, North Dakota, Oklahoma, South Carolina, Texas, and Wisconsin) have provisions that require a day of rest for certain jobs.³⁷⁷ Currently, only five states provide for daily overtime: Alaska, California, Colorado, Nevada, and New York.³⁷⁸

i. Facilitate the Collection on Judgments for Wage Theft

Even after workers overcome the fear of asserting their legal right to be paid, file a wage theft claim or suit, and receive a winning judgment, they often are unable to collect their unpaid wage judgments.³⁷⁹ For example, in 2009 the California Division of Labor Standards Enforcement assessed nearly \$22.4 million in due wages, but was only able to collect fifty-eight percent of those wages.³⁸⁰ Employers are able to avoid paying judgments through several methods, such as filing for bankruptcy, hiding their assets, or shutting down operations and reorganizing as a new business entity.³⁸¹

Many victims of wage theft find it financially futile to pursue claims against their employers because of the relatively small amounts of money that are often at stake when workers fall victim to wage theft.

Several states have enacted laws in response to unpaid wage collection problems. The majority of states have lien statutes that allow workers to make a claim on the real property where they have worked, which makes it extremely difficult for a property owner to sell the real property until it is paid off.³⁸² These statutes are effective for workers whose work involves improvements to real property, such as construction. Many states also require

³⁷⁶ *Id.* at 102–03.

³⁷⁷ *Id.* at 103.

³⁷⁸ *Id.* at 105.

³⁷⁹ *Id.* at 111.

³⁸⁰ ANGELA BRADSTREET, DEP'T OF INDUS. RELATIONS 2009, ANNUAL REPORT ON THE EFFECTIVENESS OF THE BUREAU FIELD ENFORCEMENT 3.

³⁸¹ WINNING WAGE JUSTICE, *supra* note 93, at 111.

³⁸² *Id.* at 112.

employers to post a wage bond to ensure that the employer has sufficient capital to responsibly engage in business and cover potential claims if the employer fails to pay its workers.³⁸³ Thirty-eight states require that employers post bonds for at least some jobs or industries, nine states require bonds for employment agencies, and six states require farm labor contractors to post bonds as a condition of licensing.³⁸⁴ Several states have also helped workers who are left without legal recourse for unpaid wages by creating a wage fund from which workers can collect their wage claim judgments.³⁸⁵ Maine and Oregon have a similar fund of last resort. Workers can use the fund to recover their wage claim judgments where their offending employer has ceased doing business, does not have sufficient assets to pay the wage claim, and the claim cannot otherwise be fully and promptly paid.³⁸⁶

North Carolina should look to the various remedies other states have implemented to establish a model particular to the conditions in this state.

j. Empower Municipalities to Adopt a Higher Minimum Wage

Throughout the country, cities are using local minimum wage laws as a way to adopt a minimum wage for the local economy.³⁸⁷ States can and should empower their localities with the authority to establish a local minimum wage that better reflects local economic conditions.³⁸⁸

3. Increase Resource Allocations

As at the federal level, additional enforcement agency funding, investigators, and staff are needed at the state level in order to implement the policy changes that are needed to combat wage theft. Many state enforcement agencies are under-resourced, with low budgets and an

³⁸³ *Id.* at 117.

³⁸⁴ *Id.* at 117–18.

³⁸⁵ *Id.* at 120.

³⁸⁶ *Id.* at 121.

³⁸⁷ BERNHARDT ET AL., *supra* note 20, at 51.

³⁸⁸ *Id.* at 51.

insufficient number of investigators.³⁸⁹ One strategy that has been used by states to increase funding for enforcement agencies is to require a mandatory minimum civil penalty or fine for committing wage theft that is not tied to the amount of the claim; the penalties collected can then be dedicated to increased funding for enforcement.³⁹⁰ Arizona is an example of a state that has an ordinance that employs such a strategy.³⁹¹

C. Local Level: Strengthen Government Enforcement of Wage Theft Laws

Local governments can also play a pivotal role in remedying wage theft. The studies reviewed in this part of the policy brief identify some of the steps that can be taken by municipalities to limit and deter wage theft violations. Below are some of the local level policy and legislative changes that have been suggested by these studies.

1. Policy Changes

a. Municipality-Community Network

Like state governments, local governments should draw on the expertise of their communities. Cities have established or supported the establishment of formal work centers, which are often formed through alliances between community organizations and local governments.³⁹² Such centers can aid in monitoring workplace standards and informing workers of their right to be paid.³⁹³

2. Legislative Changes

a. Ordinances to Enhance Civil and Criminal Penalties

³⁸⁹ WINNING WAGE JUSTICE, *supra* note 93, at 44.

³⁹⁰ *Id.*

³⁹¹ *Id.* at 45.

³⁹² 2011 Policy Brief on Building Integrated Communities in North Carolina, Part Two: Application – Community Integration and Day Laborers in North Carolina (on file with the UNC School of Law Immigration/Human Rights Policy Clinic).

³⁹³ *Id.* at 6–7 (citing ABEL VALENZUELA, JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES 4 (2006), available at http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf).

Cities have responded to the frequent employment abuses faced by low wage workers by increasing civil penalties for stealing workers' wages, passing wage theft ordinances, and strengthening the enforcement of existing employment laws.³⁹⁴ A few cities, including Denver and Austin, have taken the additional step of creating ordinances that criminalize the practice of wage theft.³⁹⁵ As mentioned above, many victims of wage theft find it financially futile to pursue claims against their employers because of the relatively small amounts of money that are often at stake when workers fall victim to wage theft. Such legislation not only deters employers from violating wage theft laws, but it may also have the added effect of encouraging victims of wage theft to assert their rights and file claims against their employers.

b. Enforce Current Labor Standards

Though progressive policies and legislation are necessary, it is also imperative for local governments to vigorously enforce the labor standards that currently fall under their authority. This includes enforcing the city's living wage law and applicable prevailing wage laws, criminally charging employers who commit egregious workplace violations, and conducting audits to identify and hold responsible abusive employers.³⁹⁶

Thou shalt not steal.

3. Leveraging Municipal Resources

Such direct enforcement efforts may be supplemented by leveraging other city resources to encourage compliance with workplace laws.³⁹⁷ This can be accomplished in a variety of ways, including: dedicating city resources to support non-government enforcement efforts

³⁹⁴ *Id.* at 7 (citing WINNING WAGE JUSTICE, *supra* note 93 (providing recommendations for advocates working to protect low-wage workers and suggestions for reform at the state and local level)).

³⁹⁵ MILKMAN ET AL., *supra* note 98, at 57; *see also* THEODORE ET AL., *supra* note 93, at 43.

³⁹⁶ *See* BERNHARDT ET AL., *supra* note 20, at 49; *see also* MILKMAN ET AL., *supra* note 98, at 50; *see also* THEODORE ET AL., *supra* note 93, at 41.

³⁹⁷ BERNHARDT ET AL., *supra* note 20, at 49.

through community-based organizations, worker centers, and legal service providers; launching public media campaigns to educate workers and employers; denying or suspending city permits and licenses to applicants with records of workplace violations; and adopting “responsible contractor” standards for procurement contracts and economic development subsidies such as those in Los Angeles.³⁹⁸

D. Specific Recommendations for North Carolina

The research in this paper clearly indicates that wage theft is prevalent in North Carolina. Public policies protecting vulnerable workers, strong workplace laws, and government enforcement of those laws are all necessary to combat the wage theft crisis in North Carolina. These changes are needed at both the state and local level.

Promising practices to address the issue of wage theft have been identified and/or implemented in other states. North Carolina should look to the various remedies other states have implemented to establish a model particular to the conditions in this state. Enhancing enforcement strategies, establishing state-community networks, and establishing study commissions are examples of policy changes North Carolina should employ. National examples of legislative change include: treble damages; modifying and extending the statute of limitations; creating statutes that protect workers from harassment and retaliation; creating specific protections for immigrant workers; enhancing language access to enforcement agencies; amending wage and hour laws to include meals and breaks; facilitating the collection of judgments for wage theft; and empowering municipalities to adopt a higher minimum wage. North Carolina may participate on the federal level by asking the National Governors’ Association to make recommendations to the federal government on how to

The law must be enforced.

³⁹⁸ BERNHARDT ET AL., *supra* note 20, at 49–50 (internal citation omitted).

remedy wage theft on the national level. North Carolina must develop strategies and solutions to protect the basic employment rights of its most vulnerable workers.

E. Going Forward

The prevalence of wage theft is a growing concern throughout the country. This section draws on numerous studies that have identified the policies that federal, state, and local governments have implemented to address wage theft. These studies have also surveyed the legislation that has been enacted to strengthen current wage theft laws and to remove many of the obstacles to redress encountered by workers who are too afraid to assert their workplace rights. Nonetheless, this section discusses only a few of the many policy and legislative changes that governments can use to remedy wage theft. The discussed changes are meant to serve as examples of ways governments can deter employers from stealing workers' wages and also to give exploited workers the knowledge and confidence to assert their rights.

V. WHY FIX THE WAGE THEFT PROBLEM?

To begin to assess why the current wage theft problem in North Carolina must be remedied, one need not look much further than the Ten Commandments, which state in part: "Thou shalt not steal."³⁹⁹ One could argue that these four words, which form the normative basis of many of

Many state enforcement agencies are under-resourced, with low budgets and an insufficient number of investigators.

our nation's state and federal laws, provide ample justification for why the current wage theft problem in North Carolina must be rectified. It is important to consider this fundamental mandate and to explore other legal and policy norms that wage theft contravenes to understand why North Carolina should

consider the remedying of wage theft as an urgent matter. As demonstrated below, wage theft violates legal, moral, political, and economic norms at the state, national, and international level.

³⁹⁹ *Exodus* 20:15 (King James Version).

Prior to setting forth those norms that are violated when workers are robbed of their pay, it is important to consider demographic context and review, as noted in Part I of this policy brief, the populations that are the most vulnerable to, and therefore most likely to be victims of, wage theft.⁴⁰⁰ Women are more likely to experience wage theft than men.⁴⁰¹ Foreign-born workers are more likely than their U.S.-born counterparts to experience wage theft, undocumented immigrants are more likely to be victims of wage theft than U.S. citizens, and workers with limited-English proficiency are more likely to experience wage theft than native English speakers.⁴⁰² Non-whites are more likely to be victims of wage theft than whites.⁴⁰³ Further, low-income workers are more likely to experience wage theft than high-income workers and workers with lower levels of education are more likely to experience wage theft than workers with higher levels of education.⁴⁰⁴ This section of the policy brief will largely focus on the exacerbated vulnerability of low-income workers and undocumented workers to wage theft, as all of the North Carolina victims we interviewed are low-income workers and two-thirds of them are undocumented workers.⁴⁰⁵ It is both a legal and moral responsibility for North Carolina to pass and enforce laws that prohibit wage theft, to enact adequate remedies, and to ensure that such remedies are readily available to the vulnerable populations that most often fall victim to wage theft.

A. Domestic Legal Norms

An employer's refusal to pay workers their due wages violates a number of the domestic legal norms that have been established by both the North Carolina General Assembly and the

⁴⁰⁰ Even though certain populations are more vulnerable to wage theft, "everyone is at risk." BERNHARDT ET AL., *supra* note 20, at 5.

⁴⁰¹ See *supra* Part I.C.1; BERNHARDT ET AL., *supra* note 20, at 4–6.

⁴⁰² See *supra* Part I.C.1; BERNHARDT ET AL., *supra* note 20, at 4–6.

⁴⁰³ See *supra* Part I.C.1; BERNHARDT ET AL., *supra* note 20, at 4–6.

⁴⁰⁴ See *supra* Part I.C.1; BERNHARDT ET AL., *supra* note 20, at 4–6.

⁴⁰⁵ See fig.1, *supra* Part I.

United States Congress. The failure to enforce the laws that establish these legal norms cripples the Rule of Law in North Carolina. Likewise, inadequate and inaccessible avenues for claiming stolen wages under North Carolina law and federal law contravene the purpose for establishing these laws in the first place and render these laws useless.

1. The Substance of North Carolina Law and Federal Law Must Be Enforced

Simply put, “the law must be enforced.”⁴⁰⁶ Wage theft is prohibited by North Carolina law and federal law.⁴⁰⁷ As previously discussed in Part II of this policy brief, the North Carolina Wage and Hour Act, North Carolina General Statute § 14-100, and the Fair Labor Standards Act all prohibit wage theft.⁴⁰⁸ As long as these laws are intact and on the books they must be enforced without exception. Otherwise, the laws will lose their force. Indeed, the failure to enforce these laws contributes to creating a culture of employer impunity from wage theft sanctions.⁴⁰⁹ If employers feel as though they can disregard wage theft laws, they may also feel as though they can disregard other essential laws that protect North Carolina’s workers.

Everyone, without any discrimination, has the right to equal pay for equal work.

Given the ease of exploitation of workers and employer practices designed to maximize profit through the practice of stealing workers’ wages, employers that engage in wage theft may

⁴⁰⁶ *Tharington v. Tharington*, 99 N.C. 118, 124 (1888) (stating that, “until the General Assembly shall provide otherwise, the law must be enforced”); *see also* *Dupre v. Mansur*, 214 U.S. 161 (declaring that, “the law must be enforced”).

⁴⁰⁷ *See supra* Part II.

⁴⁰⁸ *See supra* Part II.

⁴⁰⁹ The creation of a culture of impunity is often discussed in the context of gross violations of international human rights. *See, e.g.,* Madeline H. Morris, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Guidelines Against Impunity: Facilitating Accountability*, 59 LAW & CONTEMP. PROBS. 29 (1996) (suggesting guidelines to facilitate accountability and limit impunity in the context of gross violations of international human rights law). Nonetheless, the general principles are applicable to the wage theft context.

begin to see themselves as beyond the reach of wage theft laws.⁴¹⁰ Workers may not complain about stolen wages for fear of retaliation or job loss. Diego explained, and other workers echoed: “If I go complain, he is going to fire me.... It’s that the feeling he wants to transmit to us is that of fear.”⁴¹¹ Some workers experience wage theft as a customary practice; that is, they become “accustomed” to it. Carlos stated: “one thinks ‘No, it’s never going to happen again.’ That is what one says. And in the end, they do it to one again and again.”⁴¹² Others may simply come to expect that their employers will violate the law when it comes to their right to be paid.⁴¹³ Thus, a culture of employer impunity from wage theft penalties results as employers have little concern that they will be reprimanded for cheating workers out of their wages.⁴¹⁴ Indeed, as Natalia explained, when workers inquire about unpaid wages “the employer doesn’t pay attention.”⁴¹⁵

This culture of employer impunity may lead to an erosion of worker protections generally.⁴¹⁶ Once wage theft laws become easy to ignore, it is not unreasonable to consider whether employers may commit greater civil and criminal offenses against their workers due to

⁴¹⁰ See Cristina Sanidad, *Stories from Immigrant Workers in the Valley of the Sun: Status, Wage Theft, Recourse, and Resilience* 62 (Apr. 2011) (Master of Arts Thesis, Arizona State University) (on file with authors). Sanidad conducted a wage theft study in Arizona similar to this North Carolina study. Sanidad states: “What was striking about the workers’ stories was the sense of impunity and security employers felt while knowingly violating the law, and the ease with which employers prioritized profits over employee wellbeing despite having mutually trusting and affectionate personal relationships, in some cases.” *Id.* at 64.

⁴¹¹ Interview with Diego, *supra* note 14.

⁴¹² Interview with Carlos, *supra* note 13.

⁴¹³ See Sanidad, *supra* note 410, at 66; *supra* Part III.

⁴¹⁴ See *id.* at 62–63.

⁴¹⁵ Interview with Natalia, *supra* note 15.

⁴¹⁶ The Supreme Court’s decision in *Hoffman Plastics Compound, Inc. v. NLRB*, 535 U.S. 137 (2002) may reinforce this culture of employer impunity and the resulting erosion of labor protections among undocumented workers in particular. See Mariel Martinez, *The Hoffman Aftermath: Analyzing the Plight of the Undocumented Worker Through a “Wider Lens”*, 7 U. PA. J. LAB. & EMP. L. 661, 661 (2005) (reflecting on the Court’s decision and asking “If you can exploit with impunity workers who have no rights, then why not hire someone you can freely refuse to pay after a week’s work? Why not hire someone you can sexually harass, who has no right to be protected from that harassment? Why not hire people to work in unsafe conditions who, if they are injured or fall ill, have no place to go, no basis for protest?” (internal citations omitted)).

lack of fear of worker complaints, government oversight, or sanctions.⁴¹⁷ These civil and criminal employment-related offenses include vital worker protection laws such as those related to discrimination, taxes, safety, and sexual harassment. North Carolina law and federal law must be enforced to prevent the creation of a culture of employer impunity in the workplace and the deterioration of other worker safeguards that may result from this culture.

2. Avenues for Claiming Stolen Wages Must Be Adequate and Accessible

As noted above, currently workers may seek redress for stolen wages through administrative procedures with the U.S. Department of Labor and the Wage and Hour Bureau (WHB) of the North Carolina Department of Labor (NCDOL) and by filing a complaint in small claims court.⁴¹⁸ These remedies have been determined to be both inadequate and inaccessible.⁴¹⁹ For example, when asked about whether he had ever contacted the WHB, Diego responded: “I don’t know where it’s at.”⁴²⁰ Carlos lamented that he “[c]an’t make the ‘claims,’ make the complaint in court because one knows it’s too much money.”⁴²¹ Without meaningful access to remedies for unpaid wages these laws are rendered useless and individuals may be discouraged from relying on the law.

The very cornerstone of our nation’s democracy is weakened when wage theft victims are denied adequate access to redress.

Marginalized and outside of the social contract, workers discouraged from depending on the law are left with a situation in which they must rely on the “goodwill” of their employers to comply with wage theft laws.⁴²² This is an inadequate substitute, particularly where workers are

⁴¹⁷ See Sanidad, *supra* note 410, at 63.

⁴¹⁸ See *supra* Part II.

⁴¹⁹ See *supra* Part III.

⁴²⁰ Interview with Diego, *supra* note 14.

⁴²¹ Interview with Carlos, *supra* note 13.

⁴²² Sanidad, *supra* note 410, at 62.

commonly cheated out of their rightful wages.⁴²³ The wage theft victims we interviewed unanimously conveyed that talking with their employers did not or would not inspire their employers' goodwill and compliance with wage theft laws.⁴²⁴ When workers have to rely on voluntary employer compliance while being deprived of meaningful avenues for reclaiming stolen wages, they are placed in a precarious position.

Procedural justice is also violated when North Carolina workers fall victim to wage theft

It is both a legal and moral responsibility for North Carolina to pass and enforce laws that prohibit wage theft, to enact adequate remedies, and to ensure that such remedies are readily available to the vulnerable populations that most often fall victim to wage theft.

and are unable to surmount the significant hurdles that must be overcome to recoup their unpaid wages. Procedural justice affords individuals a sense of fairness. Research demonstrates that how people and their problems are managed by the courts has more influence on whether they accept and abide by the decisions made by the court than the actual outcome of their case.⁴²⁵ Studies find that people are generally more committed to obeying the law when they experience procedural justice.⁴²⁶ When employers cannot be

brought to court for stealing workers' wages there is no opportunity to call upon them to commit to obeying the law, and no opportunity for victims to experience a fair and balanced process of justice. In an era of eroding employer compliance with worker protection laws, opportunities to heighten employer commitment to the law must not be taken for granted.⁴²⁷

⁴²³ *See id.*

⁴²⁴ *See fig.3, supra Part I.*

⁴²⁵ Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 26 (2007) (citing E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117 (2000)).

⁴²⁶ *Id.* at 28.

⁴²⁷ *See supra Part I.*

Lack of process undermines the concept of the Rule of Law, which promises equality for all, protection from both private and public abuse, and the capacity for justice in the resolution of disputes.⁴²⁸ Indeed, the very cornerstone of our nation's democracy is weakened when wage theft victims are denied adequate access to redress.⁴²⁹ Lack of meaningful avenues for recovering stolen wages withholds from North Carolina workers the promised benefits of the Rule of Law.⁴³⁰

B. International Human Rights Treaties and Norms

In addition to domestic legal norms, the current wage theft problem in North Carolina also violates the standards set forth by international human rights treaties and norms. These treaties include, among others, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights

Wage theft withholds from workers dignity and fair wages, as well as the opportunity for themselves and their families to pursue the educational opportunities, proper nutrition, and adequate housing that constitute a decent standard of living.

(ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Conventions of the United Nations International Labour Organization (ILO), the Charter of the Organization of American States (OAS), and the American Declaration of Rights and Duties of Man (American Declaration). All of these treaties are binding upon the United States.⁴³¹ The application of these laws and the norms that they create as they pertain to all

⁴²⁸ See Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 739 (2002) [hereinafter Weissman, *Law as Largess*].

⁴²⁹ See *id.*

⁴³⁰ See *supra* Part III.

⁴³¹ In addition, although not binding, the norms created by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which should have influence on U.S. legal standards, are violated by the current wage theft problem in North Carolina.

North Carolina workers and to undocumented immigrant workers as a particularly vulnerable segment of the population is discussed in detail below.

1. Application of International Law to North Carolina

The U.S. Supreme Court has recognized that, “international law is part of our law and must be ascertained and administered by the courts of justice.”⁴³² The “Supremacy Clause” of the United

If employers feel as though they can disregard wage theft laws, they may also feel as though they can disregard other essential laws that protect North Carolina’s workers.

States Constitution provides that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁴³³

Through the Supremacy Clause, signed and ratified treaties become equivalent in legal importance to enacted federal

laws.⁴³⁴ The U.S. Supreme Court explicitly articulated a state’s responsibility to comply with signed and ratified treaties in *Missouri v. Holland*.⁴³⁵ Thus, the international treaties mentioned above bind state constitutions, state laws, and state courts, and require compliance with binding international human rights laws that protect our state’s workers.⁴³⁶

⁴³² *The Paquete Habana*, 175 U.S. 677, 700 (1900).

⁴³³ U.S. CONST. art. VI, cl. 2.

⁴³⁴ United States of America, *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 55, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000).

⁴³⁵ 252 U.S. 416 (1920). *Holland* dealt with Missouri’s ability to regulate the killing and sale of certain birds protected by the signed and ratified Migratory Bird Treaty Act of July 3, 1918 (MBTA). *Id.* at 430. The Supreme Court found that Missouri was required to abide by the MBTA’s protection of the birds, despite Missouri’s preferences to disregard the Treaty’s protections. *Id.* at 432.

⁴³⁶ For further discussion of the application of international law to North Carolina and North Carolina’s affirmative obligation to protect workers, see 2012 Policy Brief on North Carolina’s Responsibilities for Extraordinary Rendition (on file with the UNC School of Law Immigration/Human Rights Policy Clinic).

2. Application of International Human Rights Law to All Workers

To begin to assess the ways in which the current wage theft problem in North Carolina violates international human rights law, one must first look to the Universal Declaration of Human Rights (UDHR).⁴³⁷ The Universal Declaration of Human Rights was adopted by the United Nations General Assembly in 1948 and is considered part of customary international law.⁴³⁸ As part of customary international law, the UDHR is binding upon all nations.⁴³⁹

a. Universal Declaration of Human Rights

The current wage theft problem in North Carolina violates three important articles of the UDHR. Article 23 of the UDHR unequivocally declares:

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection...⁴⁴⁰

When employers cheat workers out of their wages, the pay received by the workers, if any, is not equal, just, or favorable. When low-income workers are victims of wage theft, their ability to ensure for themselves and their families an existence worthy of human dignity is eliminated.⁴⁴¹ Further, the hostile workplace conditions created by wage theft are neither just nor favourable.⁴⁴²

⁴³⁷ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR].

⁴³⁸ See RICHARD B. LILICH, HURST HANNUM, S. JAMES ANAYA, & DINAH L. SHELTON, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 50 (4th ed. 2006).

⁴³⁹ See *id.* at 50 (“Many international lawyers now say that, ... the [UDHR] is now binding as part of customary international law.”).

⁴⁴⁰ UDHR, *supra* note 437, art. 23.

⁴⁴¹ See *infra* Part V.C.

⁴⁴² See *infra* Part I.

The current wage theft problem in North Carolina also offends Article 25 of the UDHR.⁴⁴³ Article 25 states in part:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and has the right to security in the event of unemployment, sickness, disability, widowhood, old age or *other lack of livelihood in circumstances beyond his control.*⁴⁴⁴

Employers, not workers, control the pay that sustains workers' livelihood, and thus incidents of wage theft are beyond a worker's control.⁴⁴⁵ The inadequate and inaccessible remedies available to wage theft victims in North Carolina violate Article 25 because they leave the victims without security in the event of lack of livelihood in circumstances beyond their control.⁴⁴⁶ Likewise, low-income workers are robbed of their ability to provide a standard of living adequate for the health and well-being of themselves and their families when their wages are stolen.⁴⁴⁷

The violation of Article 23 and Article 25 of the UDHR contravenes Article 28 of the UDHR. Article 28 provides that all are "entitled to a social and international order in which the rights and freedoms set forth in [the UDHR] can be fully realized."⁴⁴⁸ The current lack of enforcement of wage theft laws in North Carolina and meaningful remedies for those whose rights are violated under these laws does not permit the full realization of a social order in which the rights found in Article 23 and Article 23 can be fully realized.⁴⁴⁹

Workers discouraged from depending on the law are left with a situation in which they must rely on the "goodwill" of their employers to comply with wage theft laws.

⁴⁴³ UDHR, *supra* note 437, art. 25.

⁴⁴⁴ *Id.* (emphasis added).

⁴⁴⁵ *See supra* Part I.

⁴⁴⁶ *See supra* Parts I, III.

⁴⁴⁷ *See supra* Parts I, V.C.

⁴⁴⁸ UDHR, *supra* note 437, art. 28.

⁴⁴⁹ *See supra* Parts I, III.

b. International Covenant on Civil and Political Rights

The current wage theft problem in North Carolina also violates the International Covenant on Civil and Political Rights (ICCPR).⁴⁵⁰ The United States is a party to the ICCPR.⁴⁵¹ The Preamble to the ICCPR recognizes the essential connection between economic rights and enjoying freedom from fear and want; it states:

[I]n accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his *economic*, social and cultural rights.⁴⁵²

In recognition of this principle, Article 1 provides: “All peoples have the right of self-determination.”⁴⁵³ By virtue of that right, all peoples have the right to “freely pursue their *economic*, social and cultural development.”⁴⁵⁴ Workers whose employers refuse to pay them their rightful wages cannot freely pursue their economic development, and wage theft’s social exclusion of its victims prevents them from freely pursuing their social development.⁴⁵⁵

c. International Labour Organization

The Conventions of the United Nations International Labour Organization (ILO) are also violated by the current wage theft problem in North Carolina. The ILO was established by the Treaty of Versailles for the purpose of promulgating international labor standards as a method of ensuring international peace.⁴⁵⁶ The United States is a member of the ILO.⁴⁵⁷ In 1998, the ILO

⁴⁵⁰ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter ICCPR].

⁴⁵¹ For a list of treaties the United States is a party to, see *Treaties in Force*, U.S. DEPARTMENT OF STATE (last visited May 10, 2012), <http://www.state.gov/s/l/treaty/tif/index.htm>.

⁴⁵² ICCPR, *supra* note 450, pmbl. (emphasis added).

⁴⁵³ *Id.* art. 1.

⁴⁵⁴ *Id.* (emphasis added).

⁴⁵⁵ See *infra* Part V.C.

⁴⁵⁶ See Janice R. Bellace, *Achieving Social Justice: The Nexus Between the ILO’s Fundamental Rights and Decent Work*, 15 EMPL. RTS. & EMPLOY. POL’Y J. 5, 7–8 (2011).

⁴⁵⁷ *Alphabetical List of ILO Member Countries*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/public/english/standards/relm/country.htm> (last visited May 10, 2012).

adopted a Declaration of Fundamental Principles and Rights at Work (1998 Declaration).⁴⁵⁸ The 1998 Declaration recognizes that economic growth alone is not sufficient to ensure equity and social progress; “strong social policies, justice and democratic institutions” are also necessary.⁴⁵⁹

Based upon this principle, the 1998 Declaration sets forth:

[I]n seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity *their fair share of the wealth which they have helped to generate*, and to achieve fully their human potential.⁴⁶⁰

The Declaration declares that all Members of the ILO are obligated to respect, promote, and realize this principle and the others that it lays out.⁴⁶¹ The current wage theft problem in North Carolina contravenes this Declaration because workers robbed of their wages do not receive their fair share of the wealth that they have helped to generate and because the insufficient remedies available to these workers hinder the realization of the 1998 Declaration.⁴⁶²

d. Organization of American States Charter and the American Declaration

The Articles of the Charter of the Organization of American States (OAS)⁴⁶³ call for workers to receive remuneration for their labor, and thus are violated by the current wage theft problem in North Carolina. The United States is a member of the OAS and a party to its Charter.⁴⁶⁴ Article 34 of the OAS Charter requires that Members of the OAS “devote their utmost efforts” to fair wages, equal employment opportunities, acceptable working conditions,

⁴⁵⁸ Int'l Labour Conference, Declaration on Fundamental Principles and Rights at Work, International Labour Organisation [ILO], 37 I.L.M. 1233 (June 18, 1998) [hereinafter 1998 Declaration].

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* (emphasis added).

⁴⁶¹ *Id.*

⁴⁶² See *supra* Parts I, III.

⁴⁶³ Organization of American States Charter, adopted April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, O.A.S.T.S. Nos. 1-C and 61 (A-41) and 119 U.N.T.S. 3 (entered into force Dec. 13, 1951), available at www.oas.org/juridico/english/charter.html [hereinafter OAS Charter].

⁴⁶⁴ See *Signatories and Ratifications*, CHARTER OF THE ORGANIZATION OF AMERICAN STATES, http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States_sign.htm (last visited May 10, 2012).

expansion of education opportunities, proper nutrition, and adequate housing for all.⁴⁶⁵

Similarly, Article 45 recognizes the important benefits that work provides.⁴⁶⁶ It states: “Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, *including a system of fair wages*, that ensure life, health, and a decent standard of living to the worker and his family.”⁴⁶⁷ Wage theft withholds from workers dignity and fair wages, as well as the opportunity for themselves and their families to pursue the educational opportunities, proper nutrition, and adequate housing that constitute a decent standard of living.⁴⁶⁸

The current wage theft problem in North Carolina also violates the American Declaration of Rights and Duties of Man (American Declaration),⁴⁶⁹ which was promulgated by the OAS. Article XIV of the American Declaration provides that “[e]very person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit.”⁴⁷⁰ Further, “[e]very person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.”⁴⁷¹ Wage theft does not allow for proper employment conditions.⁴⁷² In addition, an employer’s refusal to pay their workers denies workers, especially

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family

⁴⁶⁵ OAS Charter, *supra* note 463, art. 34.

⁴⁶⁶ *Id.* art. 45.

⁴⁶⁷ *Id.* art. 45 (emphasis added).

⁴⁶⁸ *See infra* Parts I, V.C.

⁴⁶⁹ Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. G.A. Res. XXX, art. I, O.A.S. Doc. OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1948) [hereinafter American Declaration].

⁴⁷⁰ *Id.* art. XIV.

⁴⁷¹ *Id.*

⁴⁷² *See supra* Parts I, III.

low-income workers, their right to receive remuneration that allows for a suitable standard of living for themselves and their families.⁴⁷³

e. International Covenant on Economic, Social and Cultural Rights

The current wage theft problem in North Carolina also violates the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁷⁴ The United States has signed the ICESCR, but has yet to ratify it;⁴⁷⁵ nonetheless, that does not discount the importance of the norms the ICESCR sets forth.⁴⁷⁶ The Preamble to the ICESCR is nearly identical to that of the ICCPR, and Article 1, Section 1 of the ICESCR is the same word for word as that of the ICCPR.⁴⁷⁷ The ICESCR differs, though, in its additional measures that address wage issues. Article 6 of the ICESCR provides that States: “recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses, and will *take appropriate steps to safeguard this right.*”⁴⁷⁸ Article 7 guarantees the right of all workers to the enjoyment of just and favourable work conditions, including:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant.⁴⁷⁹

⁴⁷³ See *infra* Parts I, V.C.

⁴⁷⁴ International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

⁴⁷⁵ See *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtmsg_no=IV-3&src=TREATY (last visited May 10, 2012).

⁴⁷⁶ Having signed the ICESCR, the United States is prohibited by international law from acting in a manner contrary to the object and purpose of the Treaty. Article 18 of the Vienna Convention provides that a state is obliged to refrain “from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.” Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The Vienna Convention “codified the law of treaties.” ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 52 (2005).

⁴⁷⁷ ICESCR, *supra* note 474, pmbl., art. 1.

⁴⁷⁸ *Id.* art. 6 (emphasis added).

⁴⁷⁹ *Id.* art. 7.

Wage theft withholds from workers fair wages, equal remuneration, and a decent living for themselves and their families, and thus it violates Article 7.⁴⁸⁰

Likewise, the current wage theft problem in North Carolina contravenes Articles 10-13 of the ICESCR. These articles require the “widest possible protection and assistance” to workers and their families;⁴⁸¹ an adequate standard of living for workers and their families, including sufficient food, clothing, and housing;⁴⁸² that everyone enjoy “the highest attainable standard of physical and mental health” through healthcare that is made accessible to all;⁴⁸³ and the right of all persons to education, including accessible higher education.⁴⁸⁴ When workers, especially low-income workers, are not paid the wages they are due, none of these rights can be realized. By ignoring the plight of workers whose wages are stolen, the United States is acting in a manner inconsistent with the ICESCR in violation of its obligations as a signor of the treaty.

3. Application to Undocumented Immigrant Workers As a Particularly Vulnerable Population

As previously discussed, undocumented workers comprise a segment of the population that is particularly vulnerable to wage theft.⁴⁸⁵ The vulnerability of undocumented workers to wage theft stems from a number of factors, including their status as undocumented immigrants, their fear of deportation, and employers’ willingness to exploit their vulnerability.⁴⁸⁶ Carlos explained: “Because one is undocumented, one can have more problems than what [their employer] is going to pay.”⁴⁸⁷ When workers are faced with the threat of deportation, real or

⁴⁸⁰ See *infra* Parts I, V.C.

⁴⁸¹ ICESCR, *supra* note 474, art. 10.

⁴⁸² *Id.* art. 11.

⁴⁸³ *Id.* art. 12.

⁴⁸⁴ *Id.* art. 13.

⁴⁸⁵ See *supra* Parts I, V.

⁴⁸⁶ See MILKMAN ET. AL., *supra* note 98, at 5.

⁴⁸⁷ Interview with Carlos, *supra* note 13.

perceived, for complaining about stolen wages, “[t]he money doesn’t matter.”⁴⁸⁸ The discriminatory nature of the current wage theft problem among undocumented workers in North Carolina violates multiple international human rights treaties and norms in ways that are specific to their immigrant status. These treaties and the ways in which their provisions are being violated are examined in detail below.

a. Universal Declaration of Human Rights

Article 7 of the UDHR states: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”⁴⁸⁹ Article 23 of the UDHR expands upon Article 7; it states: “Everyone, *without any discrimination*, has the right to equal pay for equal work.”⁴⁹⁰ Article 26 of the ICCPR provides: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”⁴⁹¹ Article 26 then clarifies: “In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴⁹² Discrimination based upon a worker’s immigration status constitutes discrimination on the ground of national origin. The argument could also be made that discrimination based upon a worker’s immigration status is tantamount to discrimination on other grounds prohibited by Article 26.

Workers robbed of their wages do not receive their fair share of the wealth that they have helped to generate.

⁴⁸⁸ *Id.*

⁴⁸⁹ UDHR, *supra* note 437, art. 7.

⁴⁹⁰ *Id.* art. 23 (emphasis added).

⁴⁹¹ ICCPR, *supra* note 450, art. 26.

⁴⁹² *Id.*

b. International Convention on the Elimination of All Forms of Racial Discrimination

The United States has signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).⁴⁹³ Parties to the CERD “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone,

Wage theft withholds from workers fair wages, equal remuneration, and a decent living for themselves and their families,

without distinction as to race, colour, or national or ethnic origin, to equality before the law.”⁴⁹⁴ Further, they undertake to prohibit and to eliminate racial discrimination in the enjoyment of “[t]he rights to work, ... to just and favourable conditions of work, ... to equal pay for equal work, [and] to just and favourable remuneration.”⁴⁹⁵ Depriving workers of their hard-earned wages based upon their immigration status constitutes discrimination based upon national origin and is inconsistent with the CERD.

c. International Labour Organization

The Conventions of the United Nations International Labour Organization (ILO) address discrimination in the workplace. The previously mentioned Declaration of Fundamental Principles and Rights at Work (1998 Declaration) obligates ILO member countries, including the United States, “to respect, to promote and to realize” a number of fundamental rights for workers.⁴⁹⁶ These fundamental rights include “the elimination of discrimination in respect of

⁴⁹³ See Risa E. Kaufman & JoAnn Kamuf Ward, *Using Human Rights Mechanisms of the United Nations to Advance Economic Justice*, 45 CLEARINGHOUSE REV. 259, 260 (2011).

⁴⁹⁴ International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD]. Racial discrimination is defined as:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. *Id.* art. 2.

⁴⁹⁵ *Id.* art. 5.

⁴⁹⁶ 1998 Declaration, *supra* note 458.

employment and occupation.”⁴⁹⁷ The current wage theft problem among undocumented workers in North Carolina, a byproduct of discriminatory practices, thus violates the 1998 Declaration.

d. Organization of American States Charter and the American Declaration

The Charter of the Organization of American States (OAS)⁴⁹⁸ and the American Declaration of Rights and Duties of Man (American Declaration)⁴⁹⁹ also prohibit discrimination

Wage theft takes a toll on the worker who is paid less than the already minimal minimum wage, the worker whose employer relentlessly shaves his hours each week, the worker who receives no remuneration two weeks of backbreaking work

in the employment context. Article 45 of the OAS Charter provides that Member States will devote their utmost efforts to achieve the goal that all workers be “equally protected.”⁵⁰⁰

Article II of the American Declaration states: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex,

language, creed or *any other factor*.”⁵⁰¹ As previously mentioned, one of the rights established in the American Declaration is the right of workers to receive remuneration.⁵⁰²

Failing to make the greatest efforts possible to ensure that all

workers are equally protected contravenes the OAS Charter. Likewise, continuing to deprive workers of remuneration based upon any other factor, specifically their immigration status, violates both the OAS Charter and the American Declaration.

⁴⁹⁷ *Id.*

⁴⁹⁸ See OAS Charter, *supra* note 463.

⁴⁹⁹ American Declaration, *supra* note 469.

⁵⁰⁰ OAS Charter, *supra* note 463, art. 45.

⁵⁰¹ American Declaration, *supra* note 469, art. II (emphasis added).

⁵⁰² *Id.* art. XIV.

e. International Covenant on the Economic, Social and Cultural Rights

The Preamble to the ICESCR requires that its parties “undertake to guarantee that the rights enunciated in the [ICESCR] will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵⁰³ As with the ICCPR and the UDHR, discrimination based upon a worker’s immigration status is equivalent to discrimination based upon national origin.

f. Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁵⁰⁴ also applies to the current wage theft problem in North Carolina. More than ninety percent of the United Nations’ 186 member states are parties to the CEDAW; the United States has signed it, but has yet to ratify it.⁵⁰⁵ As with the ICESCR, though, this does not diminish the importance of the legal norms the CEDAW sets forth.⁵⁰⁶ The CEDAW calls on States to condemn all forms of discrimination against women and lays out important norms that are contravened by the disparate impact of wage theft on undocumented female workers.⁵⁰⁷ Indeed, female undocumented workers are even more vulnerable to wage theft than their male counterparts.⁵⁰⁸

The vulnerability of undocumented workers to wage theft stems from a number of factors, including their status as undocumented immigrants, their fear of deportation, and employers’ willingness to exploit their vulnerability.

Article 11 of the CEDAW provides that its parties “shall take all appropriate measures to

⁵⁰³ ICESCR, *supra* note 474, pmb1.

⁵⁰⁴ Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 19 I.L.M. 33, U.N. DOC. A/34/180 [hereinafter CEDAW].

⁵⁰⁵ Darren Rosenblum, *Unisex CEDAW, Or What’s Wrong With Women’s Rights*, 20 COLUM. J. GENDER & L. 98, 100 (2011) (stating that this figure is correct as of March 2011).

⁵⁰⁶ See *supra* note 476 and accompanying text.

⁵⁰⁷ CEDAW, *supra* note 504, art. 1.

⁵⁰⁸ See *supra* Parts I.C.1., V.

eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights,” including the right to equal pay and benefits.⁵⁰⁹

[A]ll major faith traditions believe that workers have a right to be paid a living wage. The world’s religions have long denounced the “unethical, illegal and immoral” practice of wage theft.

The increased vulnerability of female undocumented workers in North Carolina to wage theft thus contravenes this provision and the gender equality norms set forth by the CEDAW.

C. Economic, Political, and Moral Norms

The current wage theft problem in North Carolina violates more than just domestic and international legal norms. Stealing workers’ wages also offends a number of fundamental economic, political, and moral norms. Wage theft exacts a heavy

toll on both individuals and communities; this toll is increased by low wage theft visibility, as low wage theft visibility only leads to more wage theft, thus perpetuating a vicious cycle.⁵¹⁰ In addition to the individual and community toll of wage theft, cheating workers out of their rightful wages is also inconsistent with the prevailing political and moral principles upon which the United States was founded—principles that value self-sufficiency and reward for hard work.

Low wage theft visibility only leads to more wage theft, thus perpetuating a vicious cycle

1. Individual Toll

The most obvious impact of wage theft is on the individual. Wage theft takes a toll on the worker who is paid less than the already minimal minimum wage, the worker whose employer relentlessly shaves his hours each week, the worker who receives no remuneration two weeks of backbreaking work, and the worker who suffers any

⁵⁰⁹ CEDAW, *supra* note 504, art. 11.

⁵¹⁰ *See infra* Part V.C.

of the other wage theft violations discussed in this policy brief.⁵¹¹ In addition to the financial costs, individuals whose wages go unpaid are robbed of the ability to pursue the so-called “American Dream,” they cannot “pull themselves up by their own bootstraps,” they cannot leverage their social capital, and they experience social exclusion.

Given that complaints about stolen wages are more likely to occur in low-income industries, uncollected wages undoubtedly have an adverse impact on North Carolina workers.⁵¹² When asked about whether wage theft affected his ability to pay for basic necessities, Carlos responded: “Yes, even to eat.”⁵¹³ Wage theft depresses the already insufficient earnings of low-income workers.⁵¹⁴ It also results in decreased or unavailable

Wage theft is wholly inconsistent with a thriving North Carolina economy.

Wage theft takes a toll on the worker who is paid less than the already minimal minimum wage, the worker whose employer relentlessly shaves his hours each week, the worker who receives no remuneration two weeks of backbreaking work.

Earned Income Tax Credit (EITC) payments, to which many low-income workers are entitled because of their meager earnings.⁵¹⁵ In fiscal year 2011, nearly \$3 million due to victims of wage theft went uncollected.⁵¹⁶ This number only begins to paint a picture of the detrimental impact of stolen wages in North Carolina.⁵¹⁷

Living in a market-based capitalist society, few will debate the premise that workers deserve to be paid for their labor. Our nation’s “social contract” provides exactly that:

⁵¹¹ See *supra* Part I.

⁵¹² See *supra* Part I (all of the victims of wage theft we interviewed were low-income workers).

⁵¹³ Interview with Carlos, *supra* note 13.

⁵¹⁴ MILKMAN ET. AL., *supra* note 98, at 54.

⁵¹⁵ Pascale Joassart-Marcelli & Daniel Flaming, *Workers Without Rights: The Informal Economy in Los Angeles*, ECONOMIC ROUNDTABLE 16 (2002), available at <http://www.economicrt.org/download/form.html>.

⁵¹⁶ SIROTA & SCHOENBACH, *supra* note 3, at 1–2 (citing Communication with the NC Department of Labor, Wage and Hour Division, December 2011).

⁵¹⁷ See *id.* at 2 (citing BERNHARDT ET AL., *supra* note 20).

those who work deserve to be paid.⁵¹⁸ Wage theft undermines this contract by denying those who abide by it the expected benefits of work.⁵¹⁹ People who work but are robbed of their pay

are thrown out of our nation's social contract through no fault of their own.⁵²⁰

When low-income workers and their families struggle in the face of poverty and economic insecurity, their local communities also suffer.

The prevailing economic, political, and moral principles upon which the United States was established value the notions of self-sufficiency and reward for work. The concept of self-sufficiency is generally based upon the premise

that if one works hard enough he or she can obtain a worthy occupation and become economically stable, regardless of his or her background.⁵²¹ If an individual worker is never paid or is paid less than promised, these goals are out of reach. Indeed, when workers' rightful wages are stolen, even their own industry and economy are not enough to ensure their success and self-sufficiency, idealized in the American Dream.⁵²²

Wage theft is a hindrance to North Carolina workers' ability to "pull themselves up by their own bootstraps" notwithstanding the socio-cultural mandate that they do so.⁵²³

Wage theft leaves North Carolina communities with unpaid taxes that would otherwise contribute to their social safety nets.

Further, in the United States, economic inequality is generally considered to be a function of the failure of individuals to work hard and take advantage of economic opportunities. We say

⁵¹⁸ See, e.g., E. Clinton Gardner, *John Locke: Justice and the Social Compact*, 9 J. OF L. & RELIGION 347, 355–56 (1992) (discussing John Locke's theory that all men have a right to the property that results from their own labor).

⁵¹⁹ See *id.*

⁵²⁰ See *supra* Part I; BERNHARDT ET AL., *supra* note X, at 4 ("Workplace violations are ultimately the result of decisions made by employers.").

⁵²¹ See generally Jennifer L. Hochschild, *The Word American Ends in "Can": The Ambiguous Promise of the American Dream*, 34 Wm. & Mary L. Rev. 139, 141 (1992) (providing an extended definition of the American Dream).

⁵²² See *id.* at 139.

⁵²³ See, e.g., HORATIO ALGER, *RAGGED DICK; OR, STREET LIFE IN NEW YORK WITH THE BOOT-BLACKS* (1868).

that paying some workers less than others is made tolerable by the abundant opportunities that are available to them to improve their own circumstances.⁵²⁴ When workers are not paid what they are promised, though, the justification for economic inequality no longer remains a viable position.

In addition to lost wages and opportunities for improvement, workers whose wages are stolen are also robbed of the ability to fully leverage their social capital.⁵²⁵ In the workplace, workers develop contacts, networks, and information channels as a form of social capital.⁵²⁶

Failing to make the greatest efforts possible to ensure that all workers are equally protected contravenes the OAS Charter.

When workers are paid they receive essential financial resources.⁵²⁷ These essential financial resources, together with social capital, can be used by workers to pursue economic stability and security.⁵²⁸ However, with decreased wages or no wages at all, a victim of wage theft has lost opportunities to advance economically and achieve economic well-being. As Carlos observed, “there’s no way out.”⁵²⁹

Just as victims of wage theft in North Carolina are deprived of opportunities to leverage their social capital, they are also subject to social exclusion. Work provides people with a sense of dignity and self-worth.⁵³⁰ Wage theft withholds from workers that sense of dignity and self-worth.⁵³¹ When asked about the impact of being robbed of his wages, Carlos told us: “I feel bad because one thinks ‘No, it’s never going to happen again.’ That is what one says. And in the

⁵²⁴ Joassart-Marcelli & Flaming, *supra* note 524, at 18–19.

⁵²⁵ See generally Deborah M. Weissman, *The Personal Is Political – And Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387 (2007) [hereinafter Weissman, *The Personal Is Political*] (discussing the formation of social capital in the workplace).

⁵²⁶ See *id.* at 411–12.

⁵²⁷ See *supra* Part I.

⁵²⁸ See *supra* note 525 and accompanying text.

⁵²⁹ Interview with Carlos, *supra* note 13.

⁵³⁰ See Joassart-Marcelli & Flaming, *supra* note 524, at 18.

⁵³¹ See *id.*

end, they do it to one again and again. Yes, and you feel it again. Nothing can be done.”⁵³² Because wage theft depresses the earnings of low-income workers, wage theft reinforces sub-poverty employment. A career spent at the fringes of our nation’s economy due to sub-poverty employment and a lack of dignity and self-worth is a form of social exclusion.⁵³³ Workers at the margins of our nation’s job-scarce, intensely competitive, skill-driven economy can all too easily become “unwanted people.”⁵³⁴

Wage theft depresses the already insufficient earnings of low-income workers.

2. Community Toll

The toll of wage theft is not just limited to the individual North Carolina worker; its ramifications can also be felt in communities across North Carolina. Families, programs supported by workers’ tax dollars, and local economies, institutions that are vital to the success of both our state and nation, all suffer when an individual worker is not paid.

North Carolina employers that steal workers’ wages may actually produce net costs for the state.

North Carolina workers who are deprived of their rightful wages have fewer economic resources; consequently, the North Carolina families, communities, and local economies that rely upon these workers have fewer economic resources. As previously stated, low-income workers are most vulnerable to wage theft.⁵³⁵ The families of low-income workers spend the majority of their earnings on basic necessities such as food, clothing, and housing.⁵³⁶ These expenditures circulate through local economies, which support local businesses and jobs.⁵³⁷ Wage theft robs families of the ability to pay for these

⁵³² Interview with Carlos, *supra* note 13.

⁵³³ See Joassart-Marcelli & Flaming, *supra* note 524, at 18.

⁵³⁴ *Id.*

⁵³⁵ See *supra* Parts I.C.1, V.

⁵³⁶ See MILKMAN ET. AL., *supra* note 98, at 54.

⁵³⁷ See *id.* at 54.

basic necessities, deprives local communities of this spending, and in turn ultimately limits economic growth.⁵³⁸ When low-income workers and their families struggle in the face of poverty and economic insecurity, their local communities also suffer.⁵³⁹

The community toll exacted by wage theft can also be seen in the way in which wage theft leaves North Carolina communities with unpaid taxes that would otherwise contribute to their social safety nets. Roughly 19.8% of a worker's compensation goes to payroll taxes and insurance that benefit a number of vital programs.⁵⁴⁰ These programs include:

Social Security and Medicare, which sustain workers in their old age; Disability Insurance, which provides partial wage-replacement for workers who suffer loss of wages due to a non-work-related medically disabling condition; Unemployment Insurance, which provides partial wage replacement for unemployed workers while they search for a new job; and Workers Compensation Insurance, which provides benefits to employees who are injured or become ill during the course of employment.⁵⁴¹

For every dollar stolen from a worker, 19.8 cents that would otherwise go to these programs is lost.⁵⁴² Thus, in fiscal year 2011, nearly \$1 million that should have been paid to these programs by North Carolina employers was not paid due to wage theft.⁵⁴³ The failure of North Carolina employers to contribute what they ought to these essential programs adversely impacts communities across North Carolina.

⁵³⁸ *Id.* at 54.

⁵³⁹ *Id.* at 55.

⁵⁴⁰ See Joassart-Marcelli & Flaming, *supra* note 524, at 15 (“The estimate is the sum of the following rates: employers and employees each contribute 6.2% of wages to Social Security and 1.45% of wages to Medicare; employees contribute 0.9% of wages to Disability Insurance; and employers contribute approximately 1% of wages to Unemployment Insurance and 1.7 [percent] of wages to Workers Compensation Insurance (these rates vary based on industry and employer cost history). The total amount of these rates is approximately 19.8% of wages.”).

⁵⁴¹ *Id.*

⁵⁴² See *id.*

⁵⁴³ See *id.*; & SCHOENBACH, *supra* note 3, at 1 (citing Communication with the NC Department of Labor, Wage and Hour Division, December 2011). As stated previously, though, this number is likely a conservative estimate. *Id.* at 2 (citing BERNHARDT ET AL., *supra* note 20). Further, there “may be additional tax evasion from firms that are not reporting parts of their profits (generated by informal labor), which ought to be taxed.” Joassart-Marcelli & Flaming, *supra* note 524, at 15. If these taxes were paid, a “significant portion ... would be returned by the state and federal governments to provide badly needed funding for schools, hospitals, welfare, roads, infrastructure, parks, and public safety.” *Id.*

When workers are not paid what they are promised, though, the justification for economic inequality no longer remains a viable position.

Wage theft is wholly inconsistent with a thriving North Carolina economy. Natalia explained it this way: “[w]orkers get as little as possible with the company getting as much profits as they can.”⁵⁴⁴ Refusing to pay workers due wages allows employers to gain short-term competitive advantages and profits at the cost of long-term economic growth.⁵⁴⁵

From a public balance sheet perspective, North Carolina employers that steal workers’ wages may actually produce net costs for the state.⁵⁴⁶ When public expenses for the health and welfare of workers and their families are balanced against their employers’ small tax contributions and the workers’ limited expenditures, the former may outweigh the latter.⁵⁴⁷

When workers do not receive their rightful remuneration, their communities are robbed of the financial resources that could otherwise be leveraged through workplace wages.

Communities benefit from the exchange of social capital between individuals.⁵⁴⁸ This exchange of social capital further facilitates increased leveraging of resources, economic development, and civic and political engagement and reduced unemployment and crime rates.⁵⁴⁹ Wage theft deprives North Carolina communities of these benefits, and thus contributes to a weakened economy with the consequences that flow from economic instability.

When workers’ rightful wages are stolen, even their own industry and economy are not enough to ensure their success and self-sufficiency, idealized in the American Dream.

⁵⁴⁴ Interview with Natalia, *supra* note 15.

⁵⁴⁵ Joassart-Marcelli & Flaming, *supra* note 524, at 1.

⁵⁴⁶ *See id.* at 19.

⁵⁴⁷ *See id.*

⁵⁴⁸ Weissman, *The Personal Is Political*, *supra* note 525, at 412 (internal citation omitted).

⁵⁴⁹ *Id.* (internal citation omitted).

3. Moral Principles

Wage theft not only offends the prevailing economic and political principles throughout North Carolina and the United States. Wage theft also violates moral principles that span all major religions. A recent publication by the North Carolina Council of Churches, an organization comprised of eighteen denominations with about 1.5 million North Carolinian congregants as members, highlights the application of religious principles to wage theft issues in North Carolina.⁵⁵⁰ Beginning in the Pentateuch and continuing through the Prophets, the Old Testament gives a clear prohibition of withholding workers' pay and the exploitation of those in financial need.⁵⁵¹ The New Testament of the Christian Bible is also "very clear" when it comes to respecting the right of workers to remuneration.⁵⁵²

The unequivocal condemnation of wage theft is not just limited to Jewish and Christian principles. As stated by Interfaith Worker Justice, an organization that spans both the United States and all major religions, "[a]ll major faith traditions believe that workers have a right to be

⁵⁵⁰ See NORTH CAROLINA COUNCIL OF CHURCHES, WORKERS ARE WORTH THEIR KEEP 1–2 (2011). See also *Members*, NORTH CAROLINA COUNCIL OF CHURCHES, <http://www.nccouncilofchurches.org/about/members/> (last visited May 10, 2012). The denominations that form the North Carolina Council of Churches include: Alliance of Baptists, African Methodist Episcopal Church, African Methodist Episcopal Zion Church, Christian Methodist Episcopal, Christian Church (Disciples of Christ), Episcopal Church, Evangelical Lutheran Church in America, General Baptist State Convention, Metropolitan Community Churches, Mennonite Church USA, Moravian Church in America, Presbyterian Church (U.S.A.), Reformed Church in America, Religious Society of Friends, Roman Catholic Church, United Church of Christ, Unity Fellowship Church Movement, and United Methodist Church. See *id.*

⁵⁵¹ *Id.* at 3.

⁵⁵² See *id.* A number of biblical passages explicitly condemn wage theft. *Id.* Leviticus 19:13 provides: "Do not defraud or rob your neighbor. Do not hold back the wages of a hired worker overnight." Jeremiah 22:13 cautions: "Woe to him who builds his palace by unrighteousness, his upper rooms by injustice, making his own people work for nothing, not paying them for their labor." Romans 4:4 states: "Now to the one who works, wages are not credited as a gift but as an obligation." 1 Timothy 5:18 proclaims: "The worker deserves his wages." These biblical passages are just a few of the many that denounce wage theft.

paid a living wage.”⁵⁵³ The world’s religions have long denounced the “unethical, illegal and immoral” practice of wage theft.⁵⁵⁴

CONCLUSION

“[N]o part of the property of any individual can, with justice, be taken from him . . .” Wage theft—the practice of robbing workers of their hard earned money offends this fundamental principle upon which our nation was founded.⁵⁵⁵ Wage theft is certainly a national problem but, as set out in this policy brief, it is very much a North Carolina problem.

In 2011, North Carolina workers most frequently reported wage theft in the industries of retail and services, eating and drinking places, home health care, and construction. Similarly, on the national level, retail, restaurants and grocery stores, home health care, and construction were also some of the highest violating industries. Although laws dating back to the New Deal Era were enacted to prevent wage theft, these laws are largely inaccessible and insufficient. Workers have neither access to information about their rights under the law nor know of the necessary steps to take in order to assert those rights. On the rare occasion that workers are aware of their

Workers at the margins of our nation’s job-scarce, intensely competitive, skill-driven economy can all too easily become “unwanted people.”

rights, they do not assert them out of fear of retaliation.

Laws that are designed to protect workers from wage theft are weakened as a result of tepid enforcement.

Employers have no meaningful incentive to comply with them. In order to disrupt this culture of impunity that has developed, enforcement agencies must adopt proactive,

⁵⁵³ *Mission & Values*, INTERFAITH WORKER JUSTICE, <http://www.iwj.org/about/mission-values> (last visited May 10, 2012). The Qur’an also condemns wage theft: “And O my people! Give just measure and weight, nor withhold from the people the things that are their due.” *Qur’an* 11:85.

⁵⁵⁴ David A. Love, *Wage Theft: Thou Shalt Not Steal From Your Workers*, THE HUFFINGTON POST, http://www.huffingtonpost.com/david-a-love/wage-theft-thou-shalt-not_b_790260.html (Dec. 9, 2010).

⁵⁵⁵ JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS Chapter i (C. Brady Thompson, ed., Indianapolis Liberty Fund 2000) (1763), available at <http://oll.libertyfund.org/title/592/76861>.

investigative approaches and affirmatively target these high-violation industries. With budget cuts and resource shortages as looming realities, enforcement agencies are wise to look to the expertise of community organizations, such as worker centers, which have experience with monitoring labor standards and informing workers of their rights.

Employers who do not pay their workers act in ways that are incompatible with a prosperous, thriving economy that benefits all of North Carolina's workers and communities. This policy brief provides valuable insights into how to prevent and address wage theft. However, more resources and research are needed in order to properly gauge the extent of the problem and determine the best methods by which to protect workers and hold employers who violate wage theft laws accountable. Available data is insufficient to measure the true scope of wage theft. For researchers going forward, it would be useful to develop a uniform system of categorizing industries and/or occupations, as the authors for this study found it challenging to compare North Carolina data with its national counterpart since the industries in both were grouped differently. It also would be helpful for researchers to expand on this study's methodology and conduct more in-person interviews, similar to the 2011 study on North Carolina Tobacco farmers conducted by Oxfam America and the Farm Labor Organizing Committee.

It is the authors' hope that this study, coupled with further research, aids North Carolina legislators in taking up the fight against wage theft. Only then can North Carolina encourage a more enterprising and innovative labor market, one where workers enjoy the fruits and dignity associated with their work.