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Wage Theft Criminalization

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Wage Theft Criminalization

Benjamin Levin*

Over the past decade, workers' rights activists and legal scholars have embraced the language of "wage theft" in describing the abuses of the contemporary workplace. The phrase invokes a certain moral clarity: theft is wrong. The phrase is not merely a rhetorical flourish. Increasingly, it has a specific content for activists, politicians, advocates, and academics: wage theft speaks the language of criminal law, and wage theft is a crime that should be punished. Harshly. Self-proclaimed "progressive prosecutors" have made wage theft cases a priority, and left-leaning politicians in the United States and abroad have begun to propose more criminal statutes to reach wage theft.

In this Article, I examine the drive to criminalize wage theft. In the literature on workers' rights, "wage theft" has been accepted uncritically as a distinct problem. But the literature fails to grapple with what makes wage theft clearly distinguishable from other abusive practices endemic to capitalism. For scholars concerned about worker power and economic

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inequality, does classifying one class of conduct “wage theft” actually serve to legitimate the other injustices of the labor market?

Further, the literature on wage theft has failed to reckon with the stakes of using criminal law and incarceration as the tools to remedy workplace violations. Absent from the discourse on wage theft is any engagement with one of the most vital contemporary movements to confront structural inequality: the fight to end mass incarceration. Despite insistence from proponents of wage theft criminalization that their focus is on society’s most marginalized, particularly poor people of color, these advocates have turned to a criminal system that is widely viewed as inimical to the interests of those same marginalized populations. Moreover, in calling for criminal prosecution, many commentators have embraced the same actors and institutions that have decimated poor communities and constructed a hyper-policed population. By resituating wage theft within the literature on mass incarceration, I examine the limitations of using criminalization to redress economic injustices. I frame pro-criminalization arguments within the growing literature and activist discourse on decarceration and abolition, examining why criminalization of wage theft is and might be particularly problematic.

TABLE OF CONTENTS

INTRODUCTION	1431
I. A GENEALOGY OF “WAGE THEFT”	1439
II. A THEORY OF WAGE THEFT CRIMINALIZATION	1446
A. Retributivism	1448
B. Deterrence	1455
C. Incapacitation	1463
D. Rehabilitation	1467
E. Expressivism	1468
III. A DISTRIBUTIONAL ANALYSIS OF WAGE THEFT CRIMINALIZATION	1476
A. Redistribution via Criminalization	1477
B. The Distributive Limits of Criminalization	1481
1. Cultural Narratives, Distributive Justice, and White-Collar Crime	1481
2. Legitimizing Capital and the Carceral State	1488
IV. CARCERAL PROGRESSIVISM	1496
CONCLUSION	1506

[A]s through this world I've wandered
I've seen lots of funny men;
Some will rob you with a six-gun,
And some with a fountain pen.¹

INTRODUCTION

Theft lies at the heart of capitalism. Bosses, not workers, own and sell the fruits of workers' labor. Employment contracts aren't entered into freely, as bosses are able to negotiate wages against a range of background legal rules that keep workers beholden, off-balance, and in a position of limited leverage. And once a worker actually earns her wage, she is taxed to pay for limited social services meted out by legislators who are highly responsive to the same industry forces that have depressed wages and worker power in the first place.

Or, at least, that's one way to frame the contemporary state of the market economy. Elite actors in the U.S. legal system don't see things that way. Judges and legislators who craft legal rules hardly view capitalism or wage labor as some sort of exploitative dystopia.² Rather, labor law, employment law, and a range of civil and criminal regulatory schemes purport to smooth out the sharp edges of the U.S. market economy. This web of laws emerged from the New Deal compromise: private markets and the primacy of private property persist, but, in exchange, some regulatory stopgaps have been put in place to check greed and recognize that freedom of contract could not necessarily be free in a world of unequal resource distribution.³

¹ WOODY GUTHRIE, *Pretty Boy Floyd, on FOLKWAYS: THE ORIGINAL VISION* (Smithsonian Folkways Recordings 1989).

² See, e.g., David L. Gregory, *Labor Law and the Myth of a Value-Free Legal Doctrine*, 62 TEX. L. REV. 389, 394 (1983) (reviewing JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983)) ("In equating the interests of labor with those of ownership, purportedly to promote labor peace, judges have been either oblivious to historical reality or simply motivated by capitalist values to which they were personally committed."); Kunal M. Parker, *Context in History and Law: A Study of the Late Nineteenth-Century American Jurisprudence of Custom*, 24 LAW & HIST. REV. 473, 490 (2006) (arguing that "judges instrumentalize[] law to further capitalist development").

³ See, e.g., Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 268-69 (1978) [hereinafter *Judicial Deradicalization of the Wagner Act*] (describing the fraught place of labor law in legitimating capitalism); Seymour Martin Lipset, *Roosevelt and the Protest of the 1930s*, 68 MINN. L. REV. 273, 297 (1983) (arguing that President Roosevelt "helped preserve the basic integrity and legitimacy of American capitalism by his willingness to transform it by, as he once put it, making major changes that avoided a threat to the system itself"); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1516-17 (1981) (describing existing structures of labor law as

The rules of the game may not always be fair, but they have been set. And sometimes those rules are broken. Bosses overstep, and the inequalities that undergird the market are laid bare. The undocumented worker is not paid for weeks, while her employer threatens to call U.S. Immigration and Customs Enforcement if she dares to complain.⁴ The manual laborer is forced to endure unsafe working conditions with the assurance that she will finally get paid if she takes just one more shift.⁵ The worker sees the numbers on her paycheck dwindle as her boss deducts money for workers' compensation that never gets paid into the fund.⁶ These practices transcend the quotidian indignities of wage labor, scholars and activists tell us. These indignities constitute "wage theft."⁷

Workers' rights activists and legal scholars have embraced the language of "wage theft" in describing the inequities and abuses of the contemporary workplace, particularly in low-wage markets.⁸ The

"serv[ing] as a vehicle for the manipulation of employee discontent and for the legitimization of existing inequalities of power in the workplace"); cf. Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2034 (2009) (describing scholarly debates about just how radical federal labor law ever was).

⁴ See Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1, 7 (2013) ("In the 2009 study documenting wage theft in 3 major cities, nearly forty percent of the workers were undocumented, and such workers were nearly twice as likely to have experienced minimum wage violations.").

⁵ See, e.g., Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1571 (2015) (discussing reasons why undocumented laborers do not report unsafe labor conditions).

⁶ Cf. Catherine L. Fisk, *Sustainable Alt-Labor*, 95 CHI.-KENT L. REV. 7, 25 (2020) (discussing how "[u]nscrupulous, low-road employment agencies . . . engage in wage theft, charge exorbitant fees, [and] prevent workers from using unemployment insurance or workers' compensation").

⁷ See, e.g., Matthew W. Finkin, *From Weight Checking to Wage Checking: Arming Workers to Combat Wage Theft*, 90 IND. L.J. 851, 851 (2015) (describing different forms of wage theft); Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1545 (2016) ("Wage theft" is especially pervasive, as practices such as '[o]ff-the-clock work, meal and overtime violations, and time-shaving' by unscrupulous employers unfairly shortchange low-wage workers.").

⁸ See, e.g., Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1664-65 (2017) (noting concerns about wage theft in the ridesharing industry); Catherine L. Fisk, *The Anti-Subordination Principle of Labor and Employment Law Preemption*, 5 HARV. L. & POL'Y REV. 601, 607-08 (2011) (describing "community activism around wage theft and minimum wage violations in service industries and in light manufacturing"); Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 1 (2010) ("[W]orkers frequently experience wage-and-hour violations, or what the U.S. Government Accountability Office recently called 'wage theft.'"); Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage*

phrase invokes a certain moral clarity: theft is wrong. Rather than relying on more complicated or radical moves that challenge the sanctity of private property, “freedom of contract,” or the inherent unfreeness of the “free market,”⁹ wage theft conjures up bad actors and innocent workers. Workers have earned their wages, and bosses have stolen them.¹⁰ The phrase implies an easy (and uncritical) analogy to the realm of property crime, bringing with it the same certainty that bosses have taken what does not belong to them and have therefore offended community morality.

The phrase is not merely a rhetorical flourish. Increasingly, it has a specific content for activists, politicians, advocates, and academics: wage theft speaks the language of criminal law, and wage theft is a crime that should be punished. Harshly.¹¹ Self-proclaimed “progressive prosecutors” have made wage theft cases a priority;¹² left-leaning

Workers, 63 VAND. L. REV. 727, 728 (2010) (“[T]he United States is suffering a crisis of wage theft against its workers.”).

⁹ See, e.g., DUNCAN KENNEDY, *The Stakes of Law, or Hale and Foucault!*, in *SEXY DRESSING, ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 83, 89-92 (1993) [hereinafter *The Stakes of Law*] (examining several theories of economic distribution); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 21 (1927) (arguing in favor of state regulation of private property rights); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 478 (1923) (arguing that income is acquired through societal coercion); Gary Peller, *Privilege*, 104 GEO. L.J. 883, 895-96 (2016) (describing realist and post-realist critiques of “free markets”). See generally BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998) (describing realist critiques of the “free market”); BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011) (critiquing the notion of naturalized, “free” markets).

¹⁰ See KIM BOBO, *WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID — AND WHAT WE CAN DO ABOUT IT*, at xi (2011) (“Unscrupulous employers are stealing money from workers by cheating them of wages owed or not paying them at all and lying to public agencies about having employees.”).

¹¹ In Australia, for example, a new bill backed by the Labor Party would impose criminal penalties of up to ten years in prison for wage theft. See Anna Patty & Noel Towell, *Pressure Mounts on Federal Labor to Pledge to Criminalise Wage Theft*, SYDNEY MORNING HERALD (May 25, 2018, 7:36 PM), <https://www.smh.com.au/business/workplace/pressure-mounts-on-federal-labor-to-pledge-to-criminalise-wage-theft-20180525-p4zhjj.html> [https://perma.cc/JBC4-WV4B].

¹² See, e.g., Devon Magliozzi, *Wage Theft Is Criminal and Should Be Prosecuted*, *Tompkins DA Says*, ITHACA VOICE (Feb. 6, 2019), <https://ithacavoice.com/2019/02/wage-theft-is-criminal-and-should-be-prosecuted-tompkins-da-says/> [https://perma.cc/HWZ7-9EV7] (describing prosecutorial emphasis on wage theft); Chris Opfer, *Prosecutors Treating ‘Wage Theft’ as a Crime in These States*, BLOOMBERG LAW (June 26, 2018, 3:31 AM), <https://news.bloomberglaw.com/daily-labor-report/prosecutors-treating-wage-theft-as-a-crime-in-these-states> [https://perma.cc/AXX6-K7X6] (cataloging prosecutors who have prioritized wage theft); cf. Terri Gerstein, *The Shutdown Shows Why*

politicians in the United States and abroad have begun to propose more criminal statutes to reach wage theft;¹³ and attorneys and activists have embraced the rallying cry of #WageTheftIsACrime as a means of stressing the importance of their cause.¹⁴

This Article is the first to examine comprehensively the drive to criminalize wage theft. In the literature on workers' rights, "wage theft" has been accepted largely uncritically as a distinct problem in need of a

Progressives Need to Make Labor-Law Enforcement a Top Priority, SLATE (Jan. 23, 2019, 10:39 AM), <https://slate.com/news-and-politics/2019/01/shutdown-wage-theft-unpaid-federal-workers.html> [<https://perma.cc/GZ9J-X5KP>] (calling for greater attention to criminal prosecution of wage theft).

¹³ See Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 662-63 (2014) ("In recent years, advocates have pressured state legislators and local lawmakers to address the problem of wage theft through a jurisdiction's criminal laws. In many instances, jurisdictions have passed new laws that specifically target wage theft, holding employers accountable for withholding payment."); see, e.g., Keith Ellison, Opinion, *Time to Address Wage Theft Is Now*, WORKDAY MINN. (Apr. 29, 2019), <https://www.workdayminnesota.org/articles/op-ed-keith-ellison-time-address-wage-theft-now> [<https://perma.cc/AB3E-TX5E>] ("I strongly support a bill at the Legislature – HF 6, authored by Rep. Tim Mahoney, a union pipefitter, and SF 1933, authored by Sen. Bobby Joe Champion – that will give us more tools and resources to charge people with the crime of wage theft and prosecute it more aggressively."); Anna Patty, *Criminalisation of Wage Theft Likely to Backfire, Say Experts*, SYDNEY MORNING HERALD (Jan. 3, 2019, 12:05 AM), <https://www.smh.com.au/business/workplace/criminalisation-of-wage-theft-likely-to-backfire-say-experts-20181212-p50lto.html> [<https://perma.cc/H5MZ-AGVK>] (discussing Australian proposals to criminalize wage theft); Chase Woodruff, *Colorado Lawmakers Advance Bill to Crack Down on Wage Theft*, WESTWORD (Apr. 3, 2019, 9:47 AM), <https://www.westword.com/news/colorado-lawmakers-advance-bill-to-crack-down-on-wage-theft-11296675> [<https://perma.cc/AY48-AYCW>] (discussing a Colorado proposal to "crack down on wage theft").

¹⁴ See, e.g., Margot Roosevelt, *Anaheim-Based Tow Truck Company Assessed \$4.9 Million in Back Wages, Penalties*, ORANGE COUNTY REG. (July 26, 2017, 4:50 PM), <https://www.ocregister.com/2017/07/26/anaheim-based-tow-truck-company-assessed-4-9-million-in-back-wages-penalties/> [<https://perma.cc/79GS-BNGY>] ("The state commissioner has launched a website, wagetheftisacrime.com, to inform workers of their rights and employers of their responsibilities."); Cal. Domestic Workers Coal. (@CADomesticWrkr), TWITTER (Sept. 7, 2018, 8:50 AM), <https://twitter.com/CADomesticWrkr/status/1038092255435751424> [<https://perma.cc/2A73-52XD>] ("In California domestic workers are also organizing for dignity in the homecare industry and to ensure that their rights are respected! . . . #WageTheftIsACrime."); Hand in Hand: The Domestic Emp'rs Network (@HiHemployers), TWITTER (Aug. 8, 2017, 12:51 PM), <https://twitter.com/HiHemployers/status/895009629004062720> [<https://perma.cc/5KQK-DGXN>] ("#DefendDignity of domestic workers in CA! #WageTheftIsACrime."); Sw. Reg'l Council of Carpenters (@SouthwestCarps), TWITTER (May 18, 2018, 4:37 PM), <https://twitter.com/SouthwestCarps/status/997622210847166464> [<https://perma.cc/JMS7-MERD>] ("All across the southwest hardworking middle class families are being cheated and respectable businesses are being forced out of business. #WageTheftIsACrime.").

solution. But the literature fails to grapple with what makes wage theft clearly distinguishable from a range of other abusive practices that characterize workplace relations. For scholars concerned about worker power and economic inequality, does classifying one class of conduct “wage theft” actually serve to legitimate the other injustices of the labor market?¹⁵ Does framing other bosses or companies as victims of wage theft further naturalize the market and market orderings?¹⁶

Troublingly, the literature and activism relating to wage theft have failed to reckon with the stakes of using criminal law and incarceration as the tools to remedy workplace violations.¹⁷ Strangely absent from the discourse on wage theft is any engagement with one of the most vital contemporary movements to confront structural inequality: the fight to end mass incarceration.¹⁸ Despite insistence from proponents of wage theft criminalization that their focus is on society’s most marginalized, particularly poor people of color and undocumented immigrants,¹⁹

¹⁵ See generally *infra* Part III.B.2.

¹⁶ See generally *infra* Part III.B.2.

¹⁷ One outlier here is a symposium piece by Stephen Lee which raises important concerns about interactions between police and undocumented workers who might have been victims of wage theft. See Lee, *supra* note 13, at 664-68. In a recently published essay that directly responds to an earlier version of arguments raised in this Article, César Rosado Marzán has defended the use of criminal law and criminal legal institutions as desirable vehicles for addressing wage theft. See César F. Rosado Marzán, *Wage Theft as Crime: An Institutional View*, 20 J.L. & Soc’y 300, 300 (2020) [hereinafter *Wage Theft as Crime*].

¹⁸ This absence is even more striking given the increasing attention paid to the political economy of criminal law among critics of mass incarceration. See, e.g., HADAR AVIRAM, *CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* (2015) (discussing the fiscal history of mass incarceration); DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* (2015); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007) (discussing “how, why, where, and to what effect one of the planet’s richest and most diverse political economies had organized and executed a prison-building and -filling plan”); HARCOURT, *supra* note 9 (recognizing a “fundamental duality between punishment and political economy”); NICOLA LACEY, *THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009).

¹⁹ See, e.g., REBECCA GALEMBA & RANDALL KUHN, UNIV. OF DENVER JOSEF KORBEL SCH. OF INT’L STUDIES, *WAGE THEFT AND ITS VICTIMS IN COLORADO: RESEARCH 2* (2019), <https://alightnet.org/wp-content/uploads/2019/12/Wage-Theft-Long-Version-2.pdf> [https://perma.cc/XB58-AH9S] (providing a breakdown of the wage and work profiles of day laborers); Shaun Boyd, ‘Put the Exploiters in Jail’: Wage Theft Bill Cracks Down on Employers, CBS DENVER (Apr. 2, 2019, 11:59 PM), <https://denver.cbslocal.com/2019/04/02/wage-theft-bill-colorado/> [https://perma.cc/UP5Z-NKJK] (quoting a

these advocates have turned to an institution (the criminal legal system) that is widely viewed as inimical to the interests of those same marginalized populations.²⁰ Moreover, in calling for criminalization and criminal prosecution, many commentators have embraced the same actors and institutions that have decimated poor communities and used criminal law to construct a hyper-policed, hyper-incarcerated population.

This Article teases out this tension by situating the drive to criminalize wage theft within a broader literature on “governing through crime.”²¹ Criminal justice scholarship has long grappled with the question of when criminalization and state violence are justified. Indeed, the dominant position of criminal justice commentators has been that criminal law has overflowed its banks, reaching too much conduct and authorizing punishments that are draconian and indefensible. Increasingly, discussions about criminal law and policy focus more on whether the system should be downsized or abolished than on what new areas it should address.²² Yet the drive to criminalize wage theft has — for the most part — ignored conversations and concerns about criminal law and its administration. The limited literature on wage theft has drawn largely from employment (and occasionally immigration) law, with scant attention to the details of criminal enforcement.²³ In the workers’ rights narrative, prosecutors are

legislative sponsor as stating that “[w]age theft is perpetrated against the most vulnerable workers”).

²⁰ On criminal law as reinforcing race-, class- and other status-based hierarchies, see, for example, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); FRANK DONNER, *PROTECTOR OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA* (1990); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); MARY LOUISE FRAMPTON, IAN HANEY LÓPEZ & JONATHAN SIMON, *AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION* (2008); GILMORE, *supra* note 18; ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (2011); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2007); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019) [hereinafter *Abolition Constitutionalism*].

²¹ See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) [hereinafter *GOVERNING THROUGH CRIME*] (arguing that criminal law has become the dominant governance paradigm); see also GILMORE, *supra* note 18, at 2 (arguing that “criminalization and cages” have become “catchall solutions to social problems”).

²² See generally *Introduction*, 132 HARV. L. REV. 1568 (2019) (describing the increasing attention to abolitionist approaches).

²³ But see *supra* note 17.

heroes, defendants are villains, and prison is the proper tool for dealing with Bad Actors.²⁴

In this Article, I challenge that narrative. By de-exceptionalizing wage theft, I examine the limitations of the case for criminalization. Further, I take specific aim at the role of incarceration in redressing economic injustices, suggesting that the wage theft context reflects the worst tendencies of a reflexive turn to prisons as a response to social problems. Even if criminal sanctions were appropriate, why is incarceration the right response? Despite the insistence from proponents of wage theft criminalization that they share the political commitments of activists and academics working to reform or dismantle the criminal system, their arguments and policy preferences reveal a deep and troubling acceptance of the logic of mass incarceration.

This Article is a piece of a larger project of tracing and critiquing the role of the Left and self-described progressives in constructing and maintaining the carceral state.²⁵ To that end, my goal here is to examine the ways in which arguments grounded in egalitarian and redistributive politics ultimately come to support and legitimate deeply inegalitarian institutions. Just because the politics of wage theft might (at least at first blush) look different from the politics of other areas of criminal law does not mean that the lessons learned from decades of tough-on-crime politics should be forgotten. While I am sympathetic to the concerns and commitments of those calling for criminal enforcement of wage theft, I worry that the criminal turn in this context is — at its core — indistinguishable from the criminal turn elsewhere. Or, put simply, my aim in this Article is to contribute to a small but growing literature that argues that the road to mass incarceration is paved at least in part with good intentions.²⁶ Reversing course and dialing back the massive

²⁴ See generally *infra* Part II.

²⁵ See generally Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173 (2016) [hereinafter *Guns and Drugs*] (critiquing left support of carceral solutions to the problem of gun violence); Benjamin Levin, *Imagining the Progressive Prosecutor*, MINN. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542792 [<https://perma.cc/F529-UNH7>] [hereinafter *Imagining the Progressive Prosecutor*]; Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491 (2019) [hereinafter *Mens Rea Reform*] (critiquing progressive reliance on criminal law to deal with politically unpopular defendants); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) [hereinafter *Consensus Myth*] (examining the limits of purportedly transformative criminal justice critiques and reforms).

²⁶ See, e.g., FORMAN, *supra* note 20 (examining the role of left-leaning Black activists in supporting tough-on-crime politics); AYA GRUBER, *THE FEMINIST WAR ON CRIME* (2020) (tracing feminist support for carceral policies); JUSTIN MARCEAU, *BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT* (2019) (describing the carceral turn in animal

apparatus of the carceral state will require checking the punitive impulse and turning a critical eye to situations where progressive politics embrace regressive ends.

In examining the punitive politics of wage theft, my argument unfolds in four Parts. Part I offers a genealogy of “wage theft” as both a rhetorical device and a legal concept. How has wage theft morphed from an evocative turn of phrase deployed by activists into a set of distinct laws and policies? Critically, how has concern about specific employment practices yielded a clarion call for prosecution and incarceration? Next, Part II situates discussions of wage theft within a broader literature on the purposes of punishment and the potential benefits of criminalization. In doing so, I particularly focus on the place of incarceration — are calls for wage theft criminalization explicitly and exclusively calls for incarcerating bosses who violate the law? If so, what is the proffered justification for incarceration, rather than some other form of punishment?

Part III shifts from traditional theories of punishment to a discussion of criminalization’s distributive consequences. I see the case for criminalization as grounded in the language of distributive justice, so here I undertake a distributional analysis of the criminal turn. Specifically, I frame pro-criminalization arguments in opposition to the growing literature and activist discourse on decarceration and abolition, examining why criminalization of wage theft is and might be particularly problematic. Finally, Part IV steps back to consider the implications of the push for criminal enforcement of wage theft. Looking more broadly to other left or progressive criminalization efforts, I argue that this case stands as troubling proof of a continued affinity for criminal law among those otherwise critical of the criminal system. In this respect, I identify wage theft criminalization as emblematic of an impulse I describe as “carceral progressivism.” I contend that advocates on the left have embraced criminalization not only because of pragmatic considerations, but also because of a belief in the legitimacy of criminal enforcement as the apotheosis of the regulatory state.

rights); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014) (outlining the role of liberals in advancing pro-prosecutorial and punitive policies during the twentieth century); JUDAH SCHEPT, *PROGRESSIVE PUNISHMENT: JOB LOSS, JAIL GROWTH, AND THE NEOLIBERAL LOGIC OF CARCERAL EXPANSION* (2015) (examining the fraught relationship between progressives and jail reform); Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. (forthcoming 2021) [hereinafter *Police Prosecutions*] (examining support from the left for prosecuting police).

I. A GENEALOGY OF “WAGE THEFT”

“Wage theft is not a term without controversy.”²⁷ Despite the increasingly ubiquitous use of the phrase, it is generally poorly defined (to the extent it is defined at all). And despite its growing place in the literature, in activist discourse, and in policy circles, “wage theft” as a phrase was unknown until quite recently. Or, perhaps more accurately, the idea that bosses were harming workers and depriving them of wages was hardly unheard of — this observation lies at the heart of modern labor and employment law. (And the notion that the wealthy effectively steal from the poor and working class has long been a staple of radical left discourse.)²⁸ Rather — and I think importantly — that idea was not described as wage theft or treated as theft until very recently. Yet, the categorization of “wage theft” has gone largely unexamined, and the notion that there is a class of conduct that constitutes “wage theft” is frequently treated as a foregone conclusion. This Part provides a brief account of the rise of wage theft, tracking its somewhat-amorphous definition and its relationship to specific legal claims or policy proposals.

Dating back to the nineteenth century, radical leftists had argued that wage labor and the distributions of property constituted theft, or something like it. Writing in 1840, French anarchist Pierre-Joseph Proudhon famously argued that “property is theft!”²⁹ Similarly, Marx traced the definition of “theft” to a particular view of private property that protected the interests of capital and land owners over those of labor and peasants.³⁰ In this account,

the law itself becomes . . . the instrument of the theft of the people’s land The parliamentary form of the robbery is that of Acts for enclosures of Commons, in other words, decrees by

²⁷ Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759, 765 n.18 (2019).

²⁸ See PETER LINEBAUGH, STOP, THIEF!: THE COMMONS, ENCLOSURES, AND RESISTANCE 1-10 (2014); Peter Linebaugh, *Karl Marx, the Theft of Wood, and Working Class Composition*, in CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY 76, 76 (David F. Greenberg ed., 1981); Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law’s Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 789 (2005) (describing “criminal law’s continued commitment to protecting private property and other key institutions of market exchange from violence, theft, and other kinds of disorder”).

²⁹ PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? 13 (Donald R. Kelley & Bonnie G. Smith eds. & trans., Cambridge Univ. Press 1994) (1840).

³⁰ See KARL MARX, *Debates on the Law of Thefts of Wood*, reprinted in 1 KARL MARX & FREDERICK ENGELS, COLLECTED WORKS 224, 232-33 (Jack Cohen et al. eds., 1975).

which the landlords grant themselves the people's land as private property, decrees of expropriation of the people.³¹

While radical and Marxist criminologists applying this frame certainly identified crimes of capital or the capitalist class, they tended to do so in sweeping terms, rejecting the definitions of and approaches to crime recognized by the state.³² Their claim was broader than a critique of a specific set of employer practices; rather, the argument turned on a claim that capitalism and distributions of property rights were fundamentally unjust and designed to entrench distributional inequality.³³ The narrower concept of "wage theft" as a specific practice or set of practices has been a much more recent development.

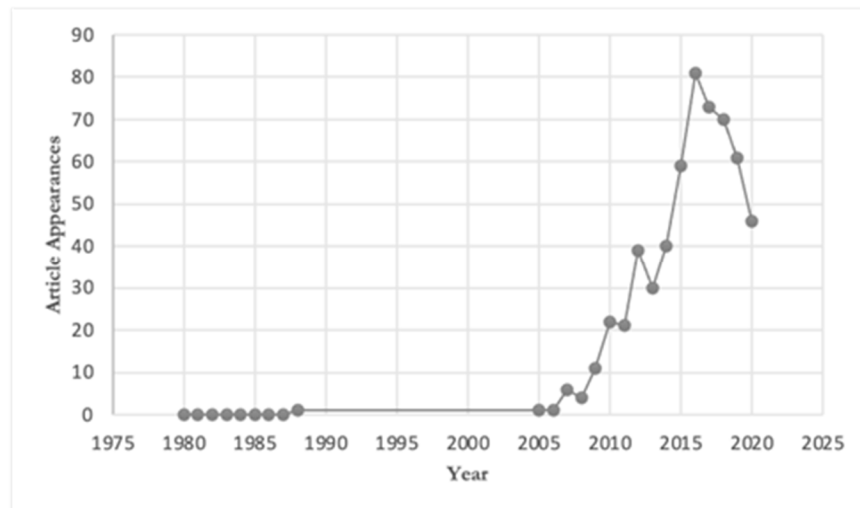
The first use of "wage theft" in academic literature came in 1988, when legal historian Michael Belknap defined the phenomenon as a process by which "employers wrongfully [withheld] the pay of their employees. Because of the structure of the courts and the cost of hiring a lawyer, workers found that as a practical matter there was generally no judicial redress for this form of stealing."³⁴ It was another seventeen years before "wage theft" reappeared in the academic lexicon as means of describing this phenomenon or set of practices.

³¹ Karl Marx, *Crime and Primitive Accumulation*, in CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY, *supra* note 28, at 45, 47.

³² See David F. Greenberg, *Introduction* to CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY, *supra* note 28, at 1, 4-8.

³³ Cf. STUART HALL, *Racism and Reaction*, in SELECTED POLITICAL WRITINGS: THE GREAT MOVING RIGHT SHOW AND OTHER ESSAYS 142, 151 (Sally Davis et al. eds., 2017) ("On the industrial front, it is indeed the law which is recruited directly into confrontation with the working class."); E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 265-66 (1975) (making a similar argument regarding game laws).

³⁴ Michal R. Belknap, *From Pound to Harley: The Founding of AJS*, 72 JUDICATURE 78, 82 (1988).

Figure One. Number of Academic Journal Appearances³⁵

The only other scholarly uses of wage theft prior to its emergence (or reemergence) in the mid-2000s reflect an entirely different meaning: workers stealing from bosses.³⁶ This theft might take one of two forms — the theft of goods by workers as a means of supplementing their wages, or the falsification of time records to claim that a worker was entitled to more wages that she actually had earned.³⁷ Such a conception is consistent with classed framings of theft and property crimes as the have-nots stealing from the haves.³⁸

Judicial opinions reflect a similar pattern, with some lag behind the academic literature. The first reference to wage theft in a published opinion — in the District of Colorado in 2005 — clearly connotes

³⁵ These data are drawn from a cross-comparison of searches on Westlaw, JSTOR, and Hein last conducted on January 1, 2020. The y-axis represents the number of academic articles that include the phrase “wage theft.”

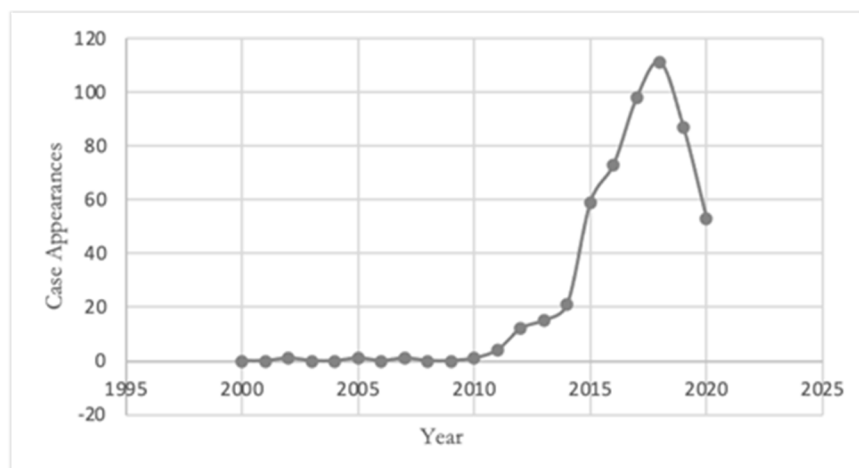
³⁶ See Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 28-29 (1988); Jason Ditton, *Perks, Pilferage, and the Fiddle: The Historical Structure of Invisible Wages*, 4 THEORY & SOC’Y 39, 45 (1977); Edward W. Sieh, *Garment Workers: Perceptions of Inequity and Employee Theft*, 27 BRIT. J. CRIMINOLOGY 174, 175-76 (1987).

³⁷ See generally *supra* note 36.

³⁸ See Marx, *supra* note 30; cf. DARIO MELOSSI & MASSIMO PAVARINI, *THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM* 72 (1981) (noting that “any theft presupposes property rights”).

employees stealing from employers.³⁹ That is, “wage theft” describes an employee’s fraudulent claim that she was working at times in which she was not.⁴⁰ It wasn’t until 2007 that a judicial opinion used “wage theft” to describe an employer’s conduct.⁴¹ Even in that opinion, *Kreisler v. Latino Union, Inc.*, the court’s description of wage theft stemmed not from the nature of the legal claim,⁴² but from a description of the defendant — an organization that operated a legal clinic dedicated to “recouping stolen wages from unscrupulous employers” on behalf of Latinx workers who had “been denied pay for their work.”⁴³

Figure Two. Number of Judicial Opinion Appearances⁴⁴



While some cases use wage theft as a means of describing employment abuses,⁴⁵ most use the phrase only in referring to specific

³⁹ See *Rudd v. Burlington Coat Factory Warehouse of Colo., Inc.*, 388 F. Supp. 2d 1201, 1203 (D. Colo. 2005).

⁴⁰ See *id.* (describing the purpose for an employer’s time-keeping rule as “preventing wage theft”). The syllabus of one earlier unpublished case contains a reference to employees committing wage theft in this way (i.e., an employee stealing from an employer). See *Kurincic v. Stein, Inc.*, 30 F. App’x 420, 423 (6th Cir. 2002). But the opinion itself doesn’t describe the conduct in question as “wage theft.” See generally *id.*

⁴¹ See *Kreisler v. Latino Union, Inc.*, No. 06-CV-3968, 2007 WL 1118408, at *1-2 (N.D. Ill. Apr. 12, 2007).

⁴² That is, the case itself didn’t involve a claim of wage theft.

⁴³ *Kreisler*, 2007 WL 1118408, at *1.

⁴⁴ These data are drawn from a cross-comparison of searches on Westlaw and Lexis last conducted on January 1, 2020. The y-axis tracks the number of judicial opinions that use the phrase “wage theft.”

⁴⁵ See *Ruqiang Yu v. Holder*, 693 F.3d 294, 299 (2d Cir. 2012); *Rasmy v. Marriott Int’l, Inc.*, 343 F. Supp. 3d 354, 367 (S.D.N.Y. 2018), *vacated*, 952 F.3d 379 (2d Cir.

state statutes that define “wage theft” as a particular class of conduct or basis for a particular cause of action.⁴⁶ Indeed, the rise in the occurrence in judicial opinions appears to reflect the rise (and rise in application) of state statutes that explicitly define some class of employer conduct as “wage theft.”⁴⁷

As of 2019, ten states and the federal government statutorily describe unlawful employer conduct as “wage theft.”⁴⁸ That’s not to say that other states do not forbid the same conduct or impose similar burdens on employers;⁴⁹ it’s that these states do not statutorily define violations as “wage theft.” Under the statutory definitions, wage theft

includes not only the outright failure to compensate an employee, but also the various ways in which employers may fail to properly compensate employees, including, for example, the failure to: (1) pay the minimum wage or the agreed-upon wage; (2) pay time and a half for overtime hours; (3) pay at all or for all of the hours worked; (4) pay tips earned; (5) make up the difference between the tipped minimum wage and the

2020); *Kelley v. Hein*, No. 1:17-CV-06636, 2018 WL 4205413, at *4 (N.D. Ill. Sept. 4, 2018); *Vercos v. Bd. of Cty. Comm’rs for Cty. of El Paso*, 259 F. Supp. 3d 1169, 1177 (D. Colo. 2017); *Pyara v. Sysco Corp.*, No. 2:15-cv-01208, 2016 WL 3916339, at *6 (E.D. Cal. July 20, 2016); *Picu v. Bot*, No. C14-0330, 2016 WL 2997168, at *2 (W.D. Wash. May 24, 2016), *amended by* 2016 WL 7732967 (W.D. Wash. May 26, 2016); *Villa Lyan, Inc. v. Perez*, 159 So. 3d 940, 941 (Fla. Dist. Ct. App. 2015); *City of Colleyville v. Newman*, No. 02-15-00017-CV, 2016 WL 1314470, at *1 (Tex. App. Mar. 31, 2016).

⁴⁶ See *Hardgers-Powell v. Angels in Your Home LLC*, 330 F.R.D. 89, 102 n.5 (W.D.N.Y. 2019); *Johnson v. Winco Foods, LLC*, No. ED CV 17-2288, 2018 WL 6017012, at *19 (C.D. Cal. Apr. 2, 2018); *Crowe v. Harvey Klinger, Inc.*, 277 F. Supp. 3d 182, 189 (D. Mass. 2017); *Eren v. Gullough LLC*, No. 15-CV-4083, 2017 WL 9482104, at *1 (E.D.N.Y. May 10, 2017); *Strobos v. RxBio, Inc.*, 251 F. Supp. 3d 221, 237 (D.D.C. 2017) (describing the Wage Theft Prevention Amendment Act of 2014); *Bonilla v. Power Design Inc*, 201 F. Supp. 3d 60, 64 (D.D.C. 2016); *Copper v. Cavalry Staffing, LLC*, 132 F. Supp. 3d 460, 466 (E.D.N.Y. 2015) (“In 2010, the New York State Legislature passed the Wage Theft Prevention Act . . . in an effort to expand the rights of employees to seek civil and criminal avenues of remedy against their employers who fail to comply with the labor law.” (internal quotation marks omitted)); *Inclan v. New York Hosp. Grp., Inc.*, 95 F. Supp. 3d 490, 494 (S.D.N.Y. 2015) (describing claims under the New York Wage Theft Prevention Act).

⁴⁷ See generally sources cited *supra* note 46 (discussing specific examples of state statutes defining “wage theft” and creating causes of action).

⁴⁸ The states are California, Colorado, Florida, Illinois, Maryland, Massachusetts, New Hampshire, New York, Tennessee, and Wisconsin.

⁴⁹ Indeed, in their comprehensive study of wage theft regulation, Jennifer Lee and Annie Smith found that between January 1, 2005 and December 31, 2017, twenty-four states and fifty-seven localities passed a total of 141 laws designed to address misconduct generally identified as wage theft. See Lee & Smith, *supra* note 27, at 772-73.

standard minimum wage when tips do not make up the gap between them. Wage theft also includes the failure to properly pay workers based upon misclassifying them either as exempt from wage and hour laws or as independent contractors.⁵⁰

Of course, judicial opinions and statutory text tell only a part of the story. The story of wage theft is a story of advocates and activists seeking to address a problem and attract public attention.⁵¹ Looking at advocacy materials reveals a similar pattern of “wage theft” discourse gaining ground in the late 2000s and early 2010s. In 2009, the U.S. Government Accountability Office published a major report identifying systemic violations of wage-and-hour laws as “wage theft.”⁵² By 2010, the National Employment Law Project (“NELP”), one of the nation’s leading workers’ rights organizations, had adopted the language of “wage theft” to describe employer misconduct.⁵³

Wage theft needn’t be criminal, and civil penalties often are associated with employers’ failure to pay workers.⁵⁴ In its published reports and activism, NELP has often focused on the need to repay workers, ensure that whistleblowers were protected, and deter employers⁵⁵ — goals that do not necessarily implicate criminal law. But criminal law has frequently been a part of the discussion regarding wage theft and has

⁵⁰ Llezlie L. Green, *Wage Theft in Lawless Courts*, 107 CALIF. L. REV. 1303, 1308 (2019) (citations omitted).

⁵¹ See BOBO, *supra* note 10; Lee & Smith, *supra* note 27, at 765-75.

⁵² U.S. GOV’T ACCOUNTABILITY OFFICE, HIGHLIGHTS OF GAO-09-458T, DEPARTMENT OF LABOR: WAGE AND HOUR DIVISION’S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT (2009), <https://www.gao.gov/highlights/d09458thigh.pdf> [<https://perma.cc/PZ8Q-RAQT>].

⁵³ See ANNETTE BERNHARDT, DIANA POLSON & JAMES DEFILIPPIS, WORKING WITHOUT LAWS: A SURVEY OF EMPLOYMENT AND LABOR VIOLATIONS IN NEW YORK CITY 6 (Jan. 28, 2010), <https://www.nelp.org/publication/working-without-laws-a-survey-of-employment-and-labor-law-violations-in-new-york-city/> [<https://perma.cc/TA32-S75S>].

⁵⁴ See CAL. LAB. CODE § 98 (2016); 820 ILL. COMP. STAT. ANN. § 115/14 (2014); MD. CODE ANN., LAB. & EMPL. § 3-507.2 (2018).

⁵⁵ See, e.g., NAT’L EMP’T LAW PROJECT, WINNING WAGE JUSTICE: CHOOSING THE POLICY OPTIONS RIGHT FOR YOUR COMMUNITY (2012), <https://s27147.pcdn.co/wp-content/uploads/2015/03/WinningWageJusticePolicyOptions.pdf> [<https://perma.cc/TR34-UGCU>] (addressing how to create an effective wage theft campaign); NAT’L EMP’T LAW PROJECT, WINNING WAGE JUSTICE: TALKING POINTS ON THE NEED FOR STRONGER ANTI-WAGE THEFT LAWS, NELP (2012), <https://s27147.pcdn.co/wp-content/uploads/2015/03/WinningWageJusticeTalkingPoints.pdf> [<https://perma.cc/2NAW-BESK>] (discussing the widespread problem of wage theft and the ineffectiveness of current wage theft laws); NAT’L EMP’T LAW PROJECT, WORKERS’ WAGE AND HOUR RIGHTS: DON’T BE A VICTIM OF WAGE THEFT (2010), <https://s27147.pcdn.co/wp-content/uploads/2015/03/WageAndHourRights2010.pdf> [<https://perma.cc/3CXG-5VBX>] (referencing how employers take advantage of employees by non-payment of wages).

frequently been treated as a criminal violation.⁵⁶ By 2011, for example, NELP had begun hailing state efforts to amp up criminal enforcement as victories in the fight against wage theft.⁵⁷ And, by 2013, they were tracking and publicizing individual criminal prosecutions.⁵⁸ Further, of the 141 state and local regulations passed between 2005 and 2018 that were designed to address wage theft, ten percent allowed for the imposition of criminal penalties.⁵⁹ And in 2014, when then-California Labor Commissioner Julie Su sought to promote awareness about the problem of wage theft, the campaign she designed had a simple slogan: “wage theft is a crime.”⁶⁰

Of course, some concept of criminalizing breach of contract, or using criminal law to enforce the employment relationship is hardly unheard of; its history, though, is an ugly one. In the Jim-Crow-era U.S. South, “debt peonage” laws were common.⁶¹ Under these laws, a worker who promised to provide labor but then failed to could be prosecuted, effectively criminalizing the inability to satisfy the terms of an employment contract.⁶² These laws are generally associated with the

⁵⁶ See, e.g., 820 ILL. COMP. STAT. ANN. § 105/11 (2019) (stating that employees that do not receive proper wages have a right to civil action); MASS. GEN. LAWS ANN. ch. 149, § 148 (2009) (punishing wage theft with civil citation); MINN. STAT. ANN. § 609.52 (2020); N.Y. LAB. LAW § 2 (2020) (allowing for civil action arising from wage theft).

⁵⁷ See NAT’L EMP’T LAW PROJECT, WINNING WAGE JUSTICE: ROUND-UP OF RECENT STATE AND LOCAL ACTIVITY TO COMBAT WAGE THEFT (2011), <https://s27147.pcdn.co/wp-content/uploads/2015/03/WinningWageJusticeStateandLocalLegislativeRoundUp.pdf> [<https://perma.cc/4PA2-KSSM>].

⁵⁸ See NAT’L EMP’T LAW PROJECT, WINNING WAGE JUSTICE: A SUMMARY OF CRIMINAL PROSECUTIONS OF WAGE THEFT IN THE UNITED STATES (2013), <https://s27147.pcdn.co/wp-content/uploads/2015/03/Crim-Prosecutions-WWJ.pdf> [<https://perma.cc/84RN-C7NQ>].

⁵⁹ See Lee & Smith, *supra* note 27, at 772, 780.

⁶⁰ See Stephenie Overman, *Waging War on Wage Theft*, SALON (Mar. 30, 2019, 6:00 PM), https://www.salon.com/2019/03/30/waging-war-on-wage-theft_partner/ [<https://perma.cc/Z9WM-3TYF>].

⁶¹ See generally Tamar R. Birkhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1677 (2015) (drawing the parallel between peonage in the late nineteenth century and the new form that has developed today); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era* (pt. 2), 82 COLUM. L. REV. 646, 650 (1982) (describing the continuation of peonage into the twentieth century).

⁶² See, e.g., Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1175 n.134 (2006) (describing the Supreme Court’s choice to strike down laws that effectively maintained peonage); Schmidt, *supra* note 61, at 650 (describing how Black workers who quit jobs for which they had contracted could be arrested); cf. ALEX GOUREVITCH, *FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY* 30 (Cambridge Univ. Press 2015) (tracing this practice to Roman times).

Black Codes and other assaults on free Black labor in the years following the Civil War.⁶³

Yet, the activist and academic embrace of the language of wage theft over the last decade and a half sounds in a very different discourse — the breachers are the bosses, and the punishment isn't intended to bind already marginalized workers; rather, it is to ensure that bosses aren't able to profit unjustly from un- (or under-) compensated laborers.⁶⁴

II. A THEORY OF WAGE THEFT CRIMINALIZATION

As the previous Part showed, defining wage theft as a criminal offense is a move that has gained ground over time. While some concern about bosses stealing from workers has a long lineage, it is not clear that such a critical understanding of employment and wage labor necessitated a turn to state violence of a literal redefinition of theft. Yet, over time, “wage theft is a crime” and “wage theft is theft” have become frequent rallying cries.⁶⁵ This Part asks why exactly advocates, academics, and politicians have adopted this posture. Wage theft may run rampant, be morally objectionable, harm workers, and help entrench economic inequality, but does that mean it should be criminalized? Or, to the extent the conduct already falls under existing criminal statutes, are

⁶³ See, e.g., DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II*, at 7-8 (2008) (describing the role of debt peonage in preserving the subordination of Black people); PETE DANIEL, *THE SHADOW OF SLAVERY: DEBT PEONAGE IN THE SOUTH 1901-1969*, at 19-20 (Univ. Ill. Press 1972) (same); CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 164 (Univ. N.C. Press 2005) (describing various methods through which racial oppression continued post-emancipation); David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 *LAW & SOC'Y REV.* 793, 811 (2005) (listing instruments of terror and segregation, including debt peonage, used in the South after 1890); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 *VAND. L. REV.* 881, 921-27 (1998) (describing coerced Black labor in the South); Dorothy E. Roberts, *Torture and the Biopolitics of Race*, 62 *U. MIAMI L. REV.* 229, 246 (2008) (tracing the transition from public racial violence to a new system of disenfranchisement, debt peonage, and segregation).

⁶⁴ See *infra* Part II.A.

⁶⁵ See, e.g., Andy Reid, *Palm Beach County Scraps Wage-Theft Law*, *Sun Sentinel* (Dec. 4, 2012), <https://www.sun-sentinel.com/news/fl-xpm-2012-12-04-fl-wage-theft-showdown-palm-20121204-story.html> [<https://perma.cc/YFE5-XRM3>] (“Workers deserve to get paid [their] wages Wage theft is theft. The county needs to call it that.”); Robert Rodriguez, *Thousands in Wages Owed by this Popular Clovis Restaurant, Workers Say*, *FRESNO BEE* (Oct. 2, 2018, 12:53 PM), <https://www.fresnobee.com/news/business/article219336660.html> [<https://perma.cc/6LSQ-LRP7>] (“If they are reducing paychecks that is against the law and if they are taking tips that is also against the law Wage theft is a crime.”).

prosecution and carceral sentences a fitting or desirable response to the problem?

Workers should be paid for their labor. And bosses should not violate employment regulations in ways that harm their workers. In short, wage theft is wrong. These strike me as relatively uncontroversial statements.⁶⁶ To the extent that criminalization proponents are making those claims, I agree. But that agreement does not get us very far either as a theoretical or practical matter. “Wrong” and “criminal” needn’t be synonymous. Decades of fiercely punitive politics and ballooning criminal codes show us how dangerous it is to elide those two concepts.⁶⁷ Further, recognizing that labor markets are a site of tremendous injustice does not necessarily require a turn to criminal law and carceral punishment.⁶⁸

In the next two Parts, I will address what I take to be a worrisome tendency to reflexively equate “wrong” or “socially undesirable” with “criminal.” First, in this Part, I will frame the argument in terms of

⁶⁶ If they are controversial, any such disagreement raises enormous questions about the nature of wage labor, the state, regulation, and markets.

⁶⁷ The insight that “[t]he criminal law cannot encompass all behavior that the average citizen may regard as immoral or deviate,” MODEL PENAL CODE § 213.2 cmt. at 370 (AM. LAW INST. 1980), lies at the heart of decades of literature on overcriminalization. See, e.g., DOUGLAS N. HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (Oxford Univ. Press 2008); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748-49 (2005) (“[T]he term overcriminalization is broad enough to cover laws imposing penal sanctions on conduct that should be solely a matter of morality . . . [and] relatively trivial conduct.”); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012) (discussing the rise of laws criminalizing immigration and immigrants); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1961) (describing ballooning criminal codes).

⁶⁸ I emphasize “carceral punishment” here (i.e., a jail or prison sentence) because advocates for greater criminalization and criminal enforcement of wage theft tend to emphasize the importance of these types of punishment. See, e.g., Rob Borkowski, *RIAG: Cleaning Company Owner Faces Wage Theft Charges*, WARWICK POST (July 9, 2020), <https://warwickpost.com/riag-cleaning-company-owner-faces-wage-theft-charges/> [<https://perma.cc/4YYH-9N24>] (“Attorney General Peter F. Neronha’s office has charged a Massachusetts cleaning service owner with wage theft”); James Thurber, Letter to the Editor, *Santa Clara County, DA Should Jail Wage Thieves*, MERCURY NEWS (Dec. 29, 2019, 5:10 AM), <https://www.mercurynews.com/2019/12/29/letter-santa-clara-county-and-the-da-should-jail-wage-thieves/> [<https://perma.cc/9E85-JWYR>] (“[H]ere’s hoping that the County of Santa Clara and the District Attorney’s office will get the courage to start tossing these thieves in jail.”); Amy Traub, *Wage Theft vs. Shoplifting: Guess Who Goes to Jail?*, DEMOS (June 13, 2017), <https://www.demos.org/blog/wage-theft-vs-shoplifting-guess-who-goes-jail> [<https://perma.cc/D6XE-E5GZ>] (advocating for criminal penalties for wage theft).

“traditional” theories of punishment. For a range of reasons, I am hesitant to ascribe too much weight to these theories, which, while generally accepted, sound in a discourse of formalism and rationality that appears foreign to the actual implementation of criminal law.⁶⁹ Nevertheless, they stand as a common language among criminal scholars and practitioners, so I think it is important to consider how this argument for criminalization maps onto other conventional approaches to punishment theory. In Part III, I will analyze the criminalization arguments using a distributive or distributional frame, focusing on how the turn to prosecutions might be justified by a set of structural concerns about distributions of power and resources in society.

A. Retributivism

From a retributive standpoint, the case for criminalization might rest either on the harm done to workers or the moral wrongfulness of the theft.⁷⁰ To the harm-based retributivist, punishment is justified based on the harm done and should be scaled accordingly.⁷¹ To the fault-based retributivist, punishment is based not on harm but on the moral culpability or wrongfulness of a person’s actions.⁷²

⁶⁹ See, e.g., Michael T. Cahill, Response, *Criminal Law’s “Mediating Rules”: Balancing, Harmonization, or Accident?*, 93 VA. L. REV. 199, 199 (2007) (critiquing the “tendency of theoretical work in criminal law . . . to focus on . . . questions about the proper justification, scope, and amount of punishment in the abstract, while giving significantly less consideration to the various institutional and procedural aspects of any concrete system of imposing such punishment”); White, *supra* note 28, at 786 (“Conventional accounts of the criminal justice system tend to obscure its social control agenda behind the idea that its origins and functions lie with the prevention and punishment of crime or even the humanitarian reform of offenders.”).

⁷⁰ Cf. R.A. Duff, *Punishment, Communication, and Community* 19-27 (Oxford Univ. Press 2001) (discussing different approaches to retributivism).

⁷¹ Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 698 (1994); Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 301 (2012); see, e.g., Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 566-67 (1993) (describing “harm-based retributivism”).

⁷² See generally Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1759 n.63 (2012) (describing the role of culpability for “fault-based” retributivists); Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 16 (2010) [hereinafter *A Distributive Theory*] (describing “fault-based” retributivism); Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237 (1994) (“Retributivists . . . care about proportioning punishment to an offender’s deserts.”); Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1076 (1997) (defining culpability-based retributivism).

The harm-based rationale appears relatively straightforward: employers have harmed workers by stealing wages and, therefore, must be punished accordingly.⁷³ The harm done in these cases is, definitionally financial in nature.⁷⁴ Wage theft is property crime.⁷⁵ And the property taken is the money a worker is owed (or her uncompensated labor, which would net out to the same thing).⁷⁶ If property crime is justified generally — i.e., if the unauthorized taking of property is recognized as a harm requiring criminal punishment — then wage theft is justified under the same rationale. Indeed, wage theft may operate as property crime on a grand scale: according to one estimate, minimum wage violations in the United States account for over \$15 billion in losses annually, an amount greater than all other property crime combined.⁷⁷

⁷³ See, e.g., Terri Gerstein, *Stealing from Workers Is a Crime. Why Don't More Prosecutors See It That Way?*, NATION (May 24, 2018), <https://www.thenation.com/article/stealing-from-workers-is-a-crime-why-dont-prosecutors-see-it-that-way/> [https://perma.cc/32FW-Q8TG] [hereinafter *Stealing from Workers Is a Crime*] (“[T]he harm to the victims of wage theft is real and substantial: People are unable to feed their children, pay the rent, buy clothes.”); Hilda L. Solis, *Wage Theft Harms All of Us*, HUFFPOST (July 19, 2016, 9:31 PM), https://www.huffpost.com/entry/wage-theft-harms-all-of-u_b_7829514 [https://perma.cc/46QE-TDXG] (“This harms all of us. It obviously harms the workers . . .”).

⁷⁴ See Llezie Green Coleman, *Disrupting the Discrimination Narrative: An Argument for Wage and Hour Laws' Inclusion in Antisubordination Advocacy*, 14 STAN. J. C.R. & C.L. 49, 66 (2018) (describing wage theft as an “economic harm” done to workers); Melinda Katz, Opinion, *Making the Queens District Attorney a Partner in Justice for Workers*, GOTHAM GAZETTE (Feb. 7, 2019), <http://www.gothamgazette.com/opinion/8259-making-the-queens-district-attorney-a-partner-in-justice-for-workers> [https://perma.cc/J8KU-GALQ] (“New York’s workers lose over a billion dollars a year due to wage theft, as their hard-earned dollars are illegally stolen and put into the pockets of employers . . .”). That said, some accounts of wage-theft stress that the harm is broader and dignitary in nature. See César F. Rosado Marzán, *Dignity Takings and Wage Theft*, 92 CHI.-KENT L. REV. 1203, 1211 (2018) [hereinafter *Dignity Takings*] (“Wage theft may thus lead to a dignity taking if employers confiscate workers’ property, such as wages, and infantilize or dehumanize them in the process.”).

⁷⁵ See Gerstein, *Stealing from Workers Is a Crime*, *supra* note 73 (analogizing wage theft to other forms of property crime).

⁷⁶ See generally Elizabeth J. Kennedy, *Wage Theft as Public Larceny*, 81 BROOK. L. REV. 517, 529 (2016) (describing the lost wages of workers); Rita J. Verga, *An Advocate's Toolkit: Using Criminal “Theft of Service” Laws to Enforce Workers' Right to Be Paid*, 8 N.Y.C. L. REV. 283, 285 (2005) (providing background on “theft” laws that require stolen “property”).

⁷⁷ See DAVID COOPER & TERESA KROEGER, ECON. POL'Y INST., EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 288 (2017), <https://files.epi.org/pdf/125116.pdf> [https://perma.cc/KN47-2748].

From a fault-based retributive standpoint, the claim would be that taking property (or labor) is morally wrong.⁷⁸ Again, the extent of this argument's strength rests on a broader vision of how society should conceive of property (and labor) rights.

Notably, while much scholarship and activism regarding wage theft focuses on the worker as victim, some commentators also stress the state or society as victims.⁷⁹ Bobo argues that employers who commit wage theft — particularly those who commit payroll fraud — have stolen “from the public coffers.”⁸⁰ This theft is not simply an affront to the workers in question, but also to “other businesses and citizens” who as a result must “pay more than their fair share.”⁸¹ Interestingly, this argument sounds in a much-older discourse of “crimes against the public,” a common justification for conspiracy prosecutions, ostensibly victimless crimes, and the criminalization of “vice” crimes.⁸²

Even assuming one accepts some vision of retributivism as a justification for punishment, it is not at all clear to me that retributivism requires (or justifies) any sort of carceral punishment for wage theft.⁸³ The harm done is tangible and seems as though it could be remedied

⁷⁸ Cf. BOBO, *supra* note 10, at 56 (“[The employer] stole wages. He stole workers’ health. He stole people’s dignity.”).

⁷⁹ See, e.g., Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL’Y REV. 93, 101 (2018) (“[W]age theft has second order effects such as increased spending on social programs, like food stamps, and possible adverse public health outcomes.” (footnote omitted)); Kennedy, *supra* note 76, at 522 (“[U]nchallenged wage theft siphons off an even greater amount of taxpayer dollars and public trust.”); Todd A. Palo, *Minimum Wage, Justifiably Unenforced?*, 35 SETON HALL LEGIS. J. 36, 50-51 (2010) (“[W]age theft steals from the public coffers and can affect the national economy.”); Jordan Laris Cohen, Note, *Democratizing the FLSA Injunction: Toward a Systemic Remedy for Wage Theft*, 127 YALE L.J. 706, 712 (2018) [hereinafter *Democratizing the FLSA Injunction*] (“Moreover, wage theft harms society at large by increasing workers’ dependency on public assistance programs, in effect subsidizing employers who violate the law; reducing payroll and tax revenues; decreasing workers’ spending power; and exerting downward pressure on wages.” (footnotes omitted)).

⁸⁰ BOBO, *supra* note 10, at 42-47.

⁸¹ *Id.* at 42.

⁸² See, e.g., Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 23 (2002) (describing the development of crimes against the public welfare); Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 760, 766 (2007) (providing background on public order and vice crimes); Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1479 (2009) (same).

⁸³ Cf. DUFF, *supra* note 70, at 146-52 (tracking the different justifications offered for carceral and financial penalties).

with a tangible penalty.⁸⁴ That is, the actual wage theft cases sound an awful lot like tort and breach-of-contract cases, where we already have a robust language and legal framework for assigning damages as a way of making victims whole.⁸⁵ Criminal law is not the sole vehicle for addressing immoral or harmful conduct.⁸⁶ And non-criminal institutions, more so than criminal ones, foreground the victim and her compensation.⁸⁷

To the extent that tort or administrative frameworks are inadequate,⁸⁸ restorative justice speaks the language of harm and victims' interests.⁸⁹ From institutions rooted in Indigenous approaches to wrongdoing and reparations,⁹⁰ or the radical visions advanced by INCITE!, Survived and

⁸⁴ See Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers*, 20 EMP. RTS. & EMP. POL'Y J. 71, 119 (2016) ("I personally dislike how criminalizing wage theft frames the problem. Ideally, the primary focus of any solution will be on ensuring that workers are made whole for their losses. Treating wage theft criminally . . . is likely to emphasize the criminological goals of punishment and retribution, rather than compensation for victims.").

⁸⁵ This vision of tort law sounds in the discourse on corrective justice, or perhaps civil-recourse theory. From such a perspective, torts are wrongs, and tort damages are a means of addressing those wrongs and compensating plaintiffs for the harm they have suffered. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1661-62 (1992) (describing a harm-focused, corrective-justice-grounded theory of tort law); Benjamin C. Zipursky & John C.P. Goldberg, *Torts as Wrongs*, 88 TEX. L. REV. 917, 946 (2010) ("Tort law provides victims with an avenue of civil recourse against those who have committed relational and injurious wrongs against them.").

⁸⁶ Indeed, according to some tort theorists, tort, rather than criminal law is the set of rules truly committed to addressing harms because "[c]riminal law sometimes prohibits and punishes genuinely inchoate wrongs — uncompleted wrongful acts. Tort law does not." Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1636 (2002).

⁸⁷ See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1644 (2019) [hereinafter *Envisioning Abolition Democracy*] ("An adjunct or alternative to criminal punishment, then, is to pursue justice through a civil lawsuit where the person wronged seeks to be made whole, taking something from the wrongdoer to remove his or her unjust gain and transferring that sum to the victim or survivor of the harm.").

⁸⁸ See *id.* at 1644-46 (describing shortcomings of a "fault-based approach to civil justice" as a replacement for criminal law).

⁸⁹ On the complicated use and misuse of "victims" to describe actors in the criminal system, see generally Anna Roberts, *Victims, Right?*, CARDOZO L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3569623 [<https://perma.cc/9WBR-58AN>] [hereinafter *Victims, Right?*].

⁹⁰ See, e.g., John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1728 (1999) ("We might do better to follow the lead of many Native American peoples who believe in putting the problem rather than the person at the center of this deliberation."); Leena Kurki, *Restorative and Community*

Punished, Critical Resistance, and other abolitionist groups, the move away from carceral victims' rights is gaining ground.⁹¹ Instead, activists have stressed the need for a transformative model rooted in the logic and language of reparations.⁹² If that restorative, transformative, or non-carceral approach could be used to deal with intimate partner violence and police violence, then why couldn't it be used to deal with economic harms? Or, perhaps more importantly, to flip the construction: if — as wage theft criminalization proponents suggest — non-carceral responses are insufficient to address the harm done by wage theft, then how is there any hope that we as a society can move away from carceral responses to violent crime? I do not mean to understate the harms done by wage theft or the suffering of workers deprived of much needed income. Nevertheless, it is important to recognize that there might be much easier non-criminal solutions to the problem than to violent crime and sexual violence, where political support for harsh, carceral punishments remains almost insurmountable. (And where devising attractive and practicable non-carceral solutions remains a challenge.)

One certainly might believe that incarceration is the only acceptable means of advancing victims' interests or responding to harm. But, to be clear, that belief is fundamentally at odds with any sort of decarceral or anti-carceral project. Over half of the currently caged population is

Justice in the United States, 27 CRIME & JUST. 235, 281-82 (2000) (explaining "sentencing circles" and their use in the United States); Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 377 (2005) (describing jurisdictions' experimentation with healing circles); Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126 (1995) (describing the holistic philosophy of an Indigenous justice system); Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564 (2016) (describing tribal courts as potential sites of experimentation and places of departure from the U.S. model of criminal adjudication and punishment).

⁹¹ See LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 5 (Univ. Cal. Press 2018); Gruber, *supra* note 26, at 15-18; Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1421-24 (2012); Andrea James, *Ending the Incarceration of Women and Girls*, 128 YALE L.J.F. 772, 787 (2019); Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not 'Transformative Justice.' Here's Why.*, APPEAL (Feb. 5, 2018), <https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645/> [<https://perma.cc/D8P2-3Y2N>].

⁹² See Mariame Kaba & Andrea J. Ritchie, *We Want More Justice for Breonna Taylor than the System that Killed Her Can Deliver*, ESSENCE (July 16, 2020), <https://www.essence.com/feature/breonna-taylor-justice-abolition/> [<https://perma.cc/8ZP2-E5L9>].

being held for “violent crime.”⁹³ While “violent crime” may be the “third rail” of criminal justice politics,⁹⁴ scholars and reformers increasingly view addressing violence as essential to a truly decarceral reform agenda.⁹⁵ If we dismiss out-of-hand the decarceration of people convicted of crimes of violence or crimes where another person has been harmed, then we necessarily accept a massive carceral population. Embracing carceral solutions to wage theft while asserting a continued support for “criminal justice reform” and opposition to “mass incarceration,” then, entails both a narrow vision of reform and of mass incarceration.⁹⁶

Some workers’ rights advocates and wage-theft criminalization proponents might argue that the injury done to workers is not merely economic in nature. By stealing workers’ labor, bosses inflict a major dignitary harm or in some way violate a worker’s autonomy, freedom, liberty, or sense of self.⁹⁷ The harm of slavery or of indentured servitude certainly transcends what the law and legal scholars usually mean when they speak of “property crime” or “economic damages.” To the extent work and the ability to sell one’s labor are critical components of society, then unfree labor tears at the fabric of individual freedom and social relationships.⁹⁸

⁹³ See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POLY INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/92GS-Q4UH>]. It is worth noting, though, that “violent crime” remains a term of art, and what exactly constitutes “violence” is a question debated by judges, legislators, and academics. See, e.g., *Johnson v. United States*, 576 U.S. 591 (2015) (debating the nature of “violent crime”); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011) (explaining the complexities of “violent crime”).

⁹⁴ JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 185 (2017).

⁹⁵ See, e.g., FORMAN, *supra* note 20, at 229-30; MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 165-69 (Princeton Univ. Press 2014) (critiquing reform efforts focused exclusively on non-violent crime); PFAFF, *supra* note 94, at 23 (“[T]he rhetoric and tactics used to push through reforms for lower-level offenses often explicitly involve imposing even harsher punishments on those convicted of violent crimes.”).

⁹⁶ See generally Levin, *Consensus Myth*, *supra* note 25 (describing and critiquing this narrow conception).

⁹⁷ See generally Marzán, *Dignity Takings*, *supra* note 74 (discussing wage theft’s dignitary harms).

⁹⁸ See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 19 (1999); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CALIF. L. REV. 683, 685, 699 (2004); see also Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in*

I think that argument is fair as far as it goes, but it is effectively unlimited in application. Wage theft is hardly the only area where the surface-level harm belies a range of deeper consequences.⁹⁹ If we look carefully, much conduct often dismissed as “victimless” does, or at least leads to, harm.¹⁰⁰ That expansive conception of harm is frequently offered as a justification for criminalizing a range of drug crimes, pornography-related offenses, and so-called “public order” offenses.¹⁰¹ While these crimes are often critiqued as “victimless” or examples of overcriminalization, an expansive conception of harm might tie each to troubling real-world consequences (drug overdose, gender-based violence, etc.).¹⁰² Further, in recognizing those additional or collateral harms in the wage theft context begs the question of whether we might view all property crime through a similar lens.

A fault-based approach should raise similar concerns for critics of the carceral state. Simply concluding that conduct (here, wage theft) is “bad” or “wrong” needn’t mean concluding that such conduct should be criminalized or should lead to people being held in cages. So, a fault-based argument for caging bosses who steal wages must rest on some view that their conduct is worse than another class of conduct that is morally reprehensible but not bad enough to trigger carceral sanctions.¹⁰³ Again, this analysis raises a question of how deep one’s decarceral commitments are. Arguing that wage thieves must be incarcerated seems to raise problems for those committed to decarceration for violent crime, sex crimes, and other conduct that generally is viewed as extremely bad (or for defendants who are extremely politically unpopular). As I have argued elsewhere,¹⁰⁴ this line of reasoning provides a difficult test for progressives and those on the political left — is their commitment to abolition, decarceration, or

America, 38 HARV. C.R.-C.L. L. REV. 279, 309 (2003); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 447 (1989).

⁹⁹ See, e.g., Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999) (arguing that that even ostensibly victimless crimes can cause harm).

¹⁰⁰ See *id.* at 110-12.

¹⁰¹ See *id.* at 110-13, 153.

¹⁰² See *id.* at 109-15.

¹⁰³ One certainly might believe that all immoral behavior should be criminalized and that all people who behave immorally should be incarcerated. But that would be an extremely radical position to take and would be dramatically at odds with both contemporary scholarly views and the political positions otherwise associated with the left, the center left, and the progressive spaces that wage theft criminalization proponents inhabit.

¹⁰⁴ See generally Levin, *Mens Rea Reform*, *supra* note 25.

sweeping reform; or do they remain committed to incarceration as the tool for addressing conduct they view as bad or socially undesirable? If the former, then the carceral turn here is cause for concern. If the latter, then the carceral state looks like it is here to stay.

B. Deterrence

Many wage theft criminalization proponents frame their arguments in terms of deterrence.¹⁰⁵ Employers have significant financial incentives to cheat and steal from their workers. And, given the relative lack of power exerted by workers (particularly in non-unionized sectors and shops), employers have little to fear from workers by way of reprisal. This dynamic is perhaps most dramatic and disturbing in sectors largely staffed by immigrant labor.¹⁰⁶ Because of the framework

¹⁰⁵ See, e.g., Anna Boiko-Weyrauch, *Wage Theft Rampant in Colorado*, DURANGO HERALD (Jan. 23, 2015, 10:52 AM), <https://durangoherald.com/articles/85275> [<https://perma.cc/4JCS-NV3A>] (quoting an employment law attorney as arguing that “increased criminal enforcement of the wage laws would provide significant deterrent effects”); Gus Bova, ‘Landmark’ Wage Theft Conviction Overturned by Texas Appeals Court, TEX. OBSERVER (Sept. 6, 2018, 6:38 AM), <https://www.texasobserver.org/landmark-wage-theft-conviction-overturned-by-texas-appeals-court/> [<https://perma.cc/FJA7-2XMR>] (“Convicting the worst wage thieves is supposed to act as a deterrent”); Luis Ferré-Sadurní, *New York Officials Battle Wage Theft in Construction Industry*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/nyregion/new-york-construction-wage-theft.html> [<https://perma.cc/CM8Q-B7DS>] (“The \$2.5 million in unpaid wages announced by prosecutors may seem insignificant compared to the estimated \$1 billion in lost wages that affect tens of thousands of workers in New York each year. But officials and worker advocates say the cases may deter employers from conducting such wage violations in the future.”); Melissa Sanchez & Matt Kiefer, *Wage Theft Victims Have Little Chance of Recouping Pay in Illinois*, CHI. REP. (Aug. 9, 2017), <https://www.chicagoreporter.com/wage-theft-victims-have-little-chance-of-recouping-pay-in-illinois/> [<https://perma.cc/CLF9-9VNF>] (“One of the most celebrated aspects of the reforms elevated repeat offenses to felonies, a change that advocates hoped would be a deterrent.”).

¹⁰⁶ See, e.g., Llezlie Green Coleman, *Rendered Invisible: African American Low-Wage Workers and the Workplace Exploitation Paradigm*, 60 HOW. L.J. 61, 63 (2016) (describing “the particular vulnerability of our immigrant population and the resulting high levels of wage theft and other workplace exploitation in the immigrant community”); Lee, *supra* note 13, at 656 (describing the problem of wage-theft in industries with a largely immigrant workforce); Deborah M. Weissman, Jacqueline Hagan, Ricardo Martinez Schuldt & Alyssa Peavey, *The Politics of Immigrant Rights: Between Political Geography and Transnational Interventions*, 2018 MICH. ST. L. REV. 117, 168-69 (discussing the vulnerability of farmworkers); NAT’L EMP’T LAW PROJECT, WORKPLACE VIOLATIONS, IMMIGRATION STATUS, AND GENDER: SUMMARY OF FINDINGS FROM THE 2008 UNREGULATED WORK SURVEY (2011), https://www.nelp.org/wp-content/uploads/2015/03/Fact_Sheet_Workplace_Violations_Immigration_Gender.pdf [<https://perma.cc/HC4F-F7JX>].

of immigration law and its interaction with labor and employment laws, workers have good reason to fear retaliation from employers if they report abuses (and also may have good reason to fear that reporting abuses might expose them to negative immigration consequences at the hands of state actors).¹⁰⁷ Even outside of shops where immigrant workers predominate, the general impotence of legal protections for workers means that there is little formal counterbalance to the financial benefits an employer enjoys by underpaying her workers.¹⁰⁸ Indeed, one scholar has gone so far as to observe that procedural rules that impede class actions effectively “facilitate[] wage theft.”¹⁰⁹ To the extent that a fair and just market economy requires effective counterweights to the profit motive,¹¹⁰ the civil and administrative institutions that provide such a counterweight have failed.

Criminal prosecution, the argument goes, provides that counterbalance.¹¹¹ And not just prosecution. Fines, for many criminalization proponents, do not go far enough to change employers’ cost-benefit analysis.¹¹² Instead, incarceration is necessary to counteract

¹⁰⁷ See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (denying backpay to an undocumented worker who had been laid off for participating in protected labor organizing activity). See generally Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1907-08 (2007) (describing *Hoffman Plastic*’s consequences for “unauthorized workers”); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1564 (2002) [hereinafter *Ossification*] (stating that *Hoffman Plastic* targets the ability to vindicate the rights of a “vulnerable” segment of the labor market); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 348 (2001) (“Recent decisions . . . show[] that labor law’s promise of meaningful protection from exploitation in the workplace remains illusory.”).

¹⁰⁸ See Estlund, *Ossification*, *supra* note 107, at 1564 (lamenting the declining efficacy of labor law in vindicating workers’ rights); Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 463 (2017) (cataloguing procedural hurdles); Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1356 (2015).

¹⁰⁹ Ruan, *supra* note 8, at 728-30.

¹¹⁰ See, e.g., Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 124 (1998) (“[I]f a worker’s choices are constrained because of a boss who exerts oppressive control in order to maximize profits, then the solution may be labor market regulations that require safety precautions, unemployment insurance funded by taxes on employers, or payment of a minimum wage.”).

¹¹¹ See sources cited *supra* note 105.

¹¹² See, e.g., Terri Gerstein, Opinion, *More States Should Follow New Colorado Policy on Wage Theft*, HILL (May 30, 2019, 4:00 PM), <https://thehill.com/opinion/finance/446199-more-states-should-follow-new-colorado-policy-on-wage-theft> [<https://perma.cc/CD3K-NGQS>] [hereinafter *More States Should Follow New Colorado Policy*] (“Our laws too often treat employer crimes with a light touch, levying only minimal penalties

employers' incentives to steal. This argument reflects a common claim advanced by deterrence theorists: if law breaking is common, and the odds of getting caught are quite low, then the punishment must be high enough to scare defendants and keep them from breaking the law.¹¹³ According to commentators, wage theft is rampant and enforcement is shoddy at best.¹¹⁴ So, to the deterrence proponent, the punishment must be very harsh in order for the law to stop greedy employers.

Deterrence theory, though, occupies a peculiar place in the literature on criminal punishment. On the one hand, deterrence is recognized as the primary justification for many criminal laws and much enforcement.¹¹⁵ On the other hand, decades of studies have failed to provide strong empirical support for the deterrent effect of criminalization and incarceration.¹¹⁶ Deterrence arguments tend to display a "characteristic empirical speculativeness."¹¹⁷ Or, as criminal law theorist Alice Ristroph puts it, "[d]eterrence is simply too indeterminate to be of use."¹¹⁸

From a deterrence standpoint, the question remains why criminal law (and, specifically, incarceration) is necessary and why civil penalties are

amounting to little more than a slap on the wrist. The new [criminal] law in Colorado appropriately treats wage theft with the seriousness it deserves."); Amy Traub, *Wage Theft and Shoplifting: Same Cost, Different Deterrents*, AM. PROSPECT (June 23, 2017), <https://prospect.org/article/wage-theft-and-shoplifting-same-cost-different-deterrents> [<https://perma.cc/3GP3-5X4L>] (asserting that "[t]he fines imposed by the federal Fair Labor Standards Act often amount to a slap on the wrist; they're too weak to act as an effective deterrent" and that prosecution is appropriate).

¹¹³ See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 184 (1968) (articulating this theory in the context of criminal law); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 890 (1998) (articulating this theory).

¹¹⁴ See, e.g., Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109, 111 (2013) (describing the "wage theft epidemic"); Cohen, *Democratizing the FLSA Injunction*, *supra* note 79, at 711-12 (stating that "workers lose an estimated \$15 billion annually").

¹¹⁵ See CESARE BECCARIA, *On Crimes and Punishments*, in ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 1, 21 (Richard Bellamy ed., Richard Davies & Virginia Cox trans., Cambridge Univ. Press 1995) (1764).

¹¹⁶ See, e.g., NAT'L RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 4-7 (Alfred Blumstein, Jacqueline Cohen & Daniel Nagin eds., 1978) (describing uncertain results of studies on deterrence); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 416 (1999) ("Deterrence arguments also draw incessant fire from academic theorists. Empirically, deterrence claims are speculative.").

¹¹⁷ Kahan, *supra* note 116, at 430.

¹¹⁸ Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1350 n.227 (2006).

insufficient to address wage theft.¹¹⁹ Criminal law unquestionably imposes substantial social costs.¹²⁰ So, how could we justify adopting such a costly regulatory approach? Scholars tend to offer two justifications. First, financial damages may be difficult to collect — defendants may be judgment-proof, and procedural hurdles might make it extremely time-consuming or costly to enforce a judgment.¹²¹ In the wage-theft context, where many defendants are contractors, smaller construction businesses, or restaurant owners, the specter of a judgment going unpaid looms large.¹²² Second, even assuming that a defendant can and does pay, the civil penalty may not be great enough — it may be viewed as a “cost of doing business,” rather than a message

¹¹⁹ It is worth noting that these regulatory decisions operate against a background set of rules and cultural norms that increasingly have veered away from governmental regulation altogether, instead embracing “self-regulatory” approaches. See, e.g., Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 321 (2005) (“Self-regulation resonates with rather old ideas in workplace governance.”). See generally Timothy P. Glynn, *Taking Self-Regulation Seriously: High-Ranking Officer Sanctions for Work-Law Violations*, 32 BERKELEY J. EMP. & LAB. L. 279, 282 n.5 (2011) (collecting sources).

¹²⁰ I address these costs at length *infra* Part III. See also John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1038-39 (2009); Christopher Buccafusco & Jonathan S. Masur, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law*, 87 S. CAL. L. REV. 275, 284 (2014) (“Incarceration generates very substantial economic costs, costs that are imposed upon the prisoner, his friends and family, and the government that is charged with imprisoning him.”).

¹²¹ See, e.g., Buccafusco & Masur, *supra* note 120, at 284-85 (“[T]he economic justification for criminal law lies with the possibility that defendants will be insolvent or otherwise unable to satisfy a civil judgment.”); Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 950 (2007) (“The problem of monetary victories not translating into cash in hand has occurred in the context of the labor movement, in which judicial findings of violations of workers’ rights have proven inconsequential to the plaintiffs due to companies’ abilities to resist remedial payments.”); cf. Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27, 38-39 (2020) [hereinafter *The Price of Criminal Law Skepticism*] (discussing the interplay of criminal law and insurance markets in ensuring that victims are compensated).

¹²² See Andrew Elmore, *Collaborative Enforcement*, 10 NE. U. L. REV. 72, 75-76 n.4 (2018) (“Employers in small, low-wage workplaces are often judgment proof and more likely to respond to notice of enforcement by closing and reopening under a new name, or by disappearing altogether.”); Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers’ Organizations*, 38 POL. & SOC’Y 552, 555 (2010) (showing that sectors “at greatest risk of FLSA violations are overwhelmingly composed of establishments of fewer than twenty employees”); Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. 1543, 1560 n.93 (2014) (collecting sources).

that the punished conduct is unacceptable.¹²³ That is, in the wage-theft context, an employer might conclude that the chances of evading punishment (or perhaps the financial advantages of paying wages at a later date) outweigh the costs of a potential fine. Particularly if the amount of the fine or judgment is the same as the amount owed, then the employer is no worse off.¹²⁴

A deterrence-based justification for criminalization and carceral punishment rests on two further assumptions: (a) that employers are rational actors, susceptible to social engineering in their decision-making, such that they can be deterred from committing acts of wage theft; and (b) that prison or jail sentences are an effective way to prevent employers from stealing wages. These are *assumptions*, not facts.¹²⁵ And, given the tremendous costs associated with incarceration, we should try to determine whether these assumptions are accurate before accepting that deterrence justifies carceral responses to wage theft.¹²⁶ I do not purport to provide conclusive answers here — these are massive questions that have long troubled criminal law scholarship and policymaking.¹²⁷ But, by highlighting that both claims are contentious

¹²³ See Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* 128 YALE L.J.F. 848, 886 (2019) (“[C]orporations engage in wage theft and view the occasional civil lawsuit forcing compensation for these crimes as a cost of doing business.”); Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 80 (2017) (“To a well-heeled financial institution . . . a civil crackdown is a ‘cost of doing business,’ whereas a criminal crackdown means jail time for employees”); Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF THE LABOR MARKET 31, 43 (Annette Bernhardt et al. eds., 2008) (describing this view as prevalent among employers); Sam Dolnick, *Workers’ Safeguards Strengthened by N.Y. Law*, N.Y. TIMES (Dec. 13, 2010), <http://www.nytimes.com/2010/12/14/nyregion/14wage.html> [<https://perma.cc/6FDP-MUF>] (quoting a New York State Senator as observing that under a previous employment regulation “[t]he fines were so minimal that a lot of these rogue employers saw them as the cost of doing business”).

¹²⁴ Such an analysis of course disregards or discounts other non-monetary costs — e.g., reputational harm, decreasing worker morale, etc.

¹²⁵ Cf. JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983) (arguing that assumptions, masquerading as truths, underlie much legal analysis); Benjamin Levin, Response, *Values and Assumptions in Criminal Adjudication*, 129 HARV. L. REV. F. 379 (2016) (same).

¹²⁶ Cf. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 308 (1998) (“Claims of deterrence are, of course, empirical in nature.”).

¹²⁷ See Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 317 & n.234 (2005) (collecting sources).

at best, I mean to emphasize just how shaky the foundation for a deterrence-based carceral approach to wage theft is.

First, deterrence arguments are at their core rooted in an economic understanding of both crime and human decision-making.¹²⁸ People (according to such an account) know the law, understand law enforcement, and make decisions based on that information. Decades of scholarship, though, reveal that public ignorance of criminal law is quite common.¹²⁹ If criminal law is to have some sort of deterrent effect, potential law-breakers must be aware of the law, and, more importantly here, must be aware of successful enforcement.¹³⁰ Once aware of the law, the likelihood of prosecution, etc., the employer would have to weigh those costs against the benefits of committing wage theft.

I will return to the issue of knowledge/notice in my discussion of expressive theories, but one point about the identity of wage theft defendants merits mention here: much rhetoric surrounding wage theft criminalization speaks of large, powerful bosses. At the same time, though, many of the sectors where wage theft is rampant are dominated by small (often immigrant- and minority-owned) businesses.¹³¹ There might be good reason to think that a large, multi-national corporate entity is capable of and effective at “knowing the law” and then performing a cost-benefit analysis.¹³² But what about individuals, small, closely-held corporations, or businesses run by un-savvy actors? For a deterrence rationale to justify wage theft, we would have to believe that Walmart and the corner deli operate the same way and are similarly situated when it comes to approaching their relationship to workers, law, and law enforcement.¹³³

Second, even if these assumptions about cost-benefit analysis and compliance were correct, are criminal law and carceral penalties effective at deterring undesirable conduct? Much ink has been spilled

¹²⁸ See Gordon Tullock, *Does Punishment Deter Crime?*, 36 PUB. INT. 103, 104-05 (1974).

¹²⁹ See *infra* Part II.E.

¹³⁰ See *infra* Part II.E.

¹³¹ See *infra* Part III.B.1.

¹³² See Levin, *Mens Rea Reform*, *supra* note 25, at 514-15.

¹³³ Cf. *United States v. Park*, 421 U.S. 658, 672 (1975) (“The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.”).

on this question, and the research is inconclusive at best.¹³⁴ Numerous studies across a range of areas have shown the failure of prosecution as a deterrent mechanism.¹³⁵ Or, at the very least, that the marginal deterrent effect frequently is outweighed by countervailing costs.¹³⁶ Indeed, in her sweeping study of corporate crime (generally presumed to be an area where criminal law's deterrent effect might be greater), criminologist Sally Simpson found that the "apparent shift toward criminalization and deterrence" as regulatory strategies "may, in fact, be socially harmful."¹³⁷

Other studies have been more optimistic about the ability of criminal law to do some deterrent work. To the extent those studies find that deterrence "works," the key takeaway is that swiftness and certainty of punishment, rather than severity, are the key ingredients to optimal deterrence via criminal law.¹³⁸ Some of those studies also indicate that

¹³⁴ See Jason Scott Johnston, *Not So Cold an Eye: Richard Posner's Pragmatism*, 44 VAND. L. REV. 741, 756 (1991) (book review) ("The empirical evidence on law's deterrent effect is at best mixed.").

¹³⁵ See, e.g., *Nonimmigrant Visa Issues: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 94, 105-06 (1995) (testimony of Bob L. Vice, President, California Farm Bureau Federation, and John Young) (discussing the failure of prosecution as a deterrent in the context of employment of undocumented workers); Kim Shayo Buchanan, *When Is HIV a Crime? Sexuality, Gender and Consent*, 99 MINN. L. REV. 1231, 1234 (2015) (discussing the failure of prosecution as a deterrent in the context of HIV transmission); Margaret B. Kwoka, *Leaking and Legitimacy*, 48 UC DAVIS L. REV. 1387, 1415 (2015) (discussing the failure of prosecution as a deterrent in the context of government leaking).

¹³⁶ See, e.g., Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 273 (2012) ("[M]anipulating liability and punishment rules within [the criminal] system will work only in . . . atypical cases . . ."); Kwoka, *supra* note 135, at 1418 ("[S]ocial science literature demonstrates that imposing criminal penalties as a method for deterring undesirable behavior is widely regarded as a relatively inefficient and ineffective way to achieve social order."); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 1-37 (1998) ("[I]t is difficult to generalize from the findings of a specific study because knowledge about the factors that affect the efficacy of policy is so limited.").

¹³⁷ SALLY S. SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL 161 (Alfred Blumstein & David Farrington eds., 2002).

¹³⁸ See, e.g., VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 4-5 (2010), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf> [https://perma.cc/QP2B-BHQU] (collecting sources).

white-collar crime might be a better target for deterrence-based approaches than other areas involving less-savvy defendants.¹³⁹

Just as we do not know conclusively whether deterrence works as a general matter, there is not a broad scholarly consensus about whether prosecuting bosses would work to deter wage theft. The little evidence that we do have seems to suggest that criminal (rather than civil) wage theft enforcement actions have not been associated with reduced violation rates.¹⁴⁰ Put simply, even if criminal law works to deter other bad conduct, there is no factual basis to conclude that it actually discourages bosses from violating wage-and-hour laws. There is some empirical support for the claim that large monetary penalties (e.g., treble damages) might deter employers,¹⁴¹ but no evidence about the value of incarceration.

While it undoubtedly is significant that we lack an empirical foundation for the claim that prison sentences will prevent wage theft, I do not want to overstate the importance of incarceration's (in)efficacy. Even if new studies showed some deterrent effect, a deterrence argument for wage theft criminalization should trouble anyone concerned about the carceral state. By embracing an argument that caging people is an acceptable approach if it deters bad conduct, workers' rights advocates have accepted and embraced a core component of our harshly punitive system.

If caging a person were justified whenever it deters bad conduct, then we wind up with a deeply carceral approach. Even if incarceration "works" in some narrow sense, does that mean it is good policy? As discussed in the context of retributive justifications, perhaps there is some limiting principle based on what constitutes truly bad conduct.¹⁴² But drawing that line is difficult,¹⁴³ and identifying property crime as an obvious candidate for caging sets a dangerous precedent. It concedes that — in the larger consequentialist analysis — a great deal of suffering and a great deal of state violence are acceptable solutions to social

¹³⁹ Again, I think it's fair to ask whether the "white collar" characterization is helpful as an ordering mechanism and whether wage theft defendants truly are utility-maximizing rational actors. See *infra* Part III.B.

¹⁴⁰ See Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSP. ON POL. 324, 339 (2016); Lee & Smith, *supra* note 27, at 793-94.

¹⁴¹ See Galvin, *supra* note 140, at 339. But see Lee & Smith, *supra* note 27, at 793-94 (expressing skepticism about deterrence resulting from increasing penalties).

¹⁴² See *supra* notes 91-96 and accompanying text.

¹⁴³ Cf. generally Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563 (2018) [hereinafter *Farewell to the Felonry*] (critiquing the naturalization of distinctions between classes of crime).

problems.¹⁴⁴ Or, put differently, to the extent that these justifications rest on a consequentialist analysis, this line of reasoning accepts the benefits uncritically while largely disregarding the costs.

C. Incapacitation

It would not be a stretch to argue that — of the traditional justifications for punishment — incapacitation operates as the driving theory of contemporary carceral policies.¹⁴⁵ Therefore, it is hardly surprising that incapacitation is an easy way to justify any endorsement of incarceration. (Incapacitation is, after all, the defining feature of incarceration.) The wage theft context is no exception. Much of the literature and activism surrounding the crisis of wage theft speaks of bad employers who pose a danger to workers.¹⁴⁶ So, the move to argue for criminalization, prosecution, and incarceration can be understood as a claim that these employers should be “taken out of commission” — that they must be kept out of the market, where their greed and callousness poses a threat to workers and the morality of the marketplace. If we conceive of workers’ rights as a matter of public safety, then an employer who has proven herself willing to prioritize profit over worker safety, compliance with regulations, or fair compensation is a threat to public safety.¹⁴⁷ There may be other ways to shape or influence the employer’s conduct, but — the argument goes —

¹⁴⁴ See *infra* Part III.B.2.

¹⁴⁵ Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 196 (2013); see Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 457-58 (1992).

¹⁴⁶ See, e.g., Rebecca Galemba, Opinion, *Criminalizing Wage Theft Is Only One Step in the Right Direction*, COLO. SUN (Apr. 29, 2019, 4:05 AM), <https://coloradosun.com/2019/04/29/wage-theft-colorado-bill-law/> [https://perma.cc/JUN9-A6A3] (“Employers string workers along who lack the time and resources to spend a day pursuing unpaid wages . . .”); Office of Attorney Gen. Maura Healey, *AG Healey Assesses More than \$2.7 Million in Penalties and Restitution Against Construction Companies in 2018*, MASS.GOV (Feb. 27, 2019), <https://www.mass.gov/news/ag-healey-assesses-more-than-27-million-in-penalties-and-restitution-against-construction> [https://perma.cc/9R7Z-FK6G] (“Workers in the construction industry are particularly vulnerable to wage theft from dishonest contractors who cheat their workers.”); News Release, Cal. Dep’t of Indus. Relations, DIR, Labor Commissioner Launch Online System for Reporting Labor Law Violations (Aug. 31, 2016), <https://web.archive.org/web/20161028151844/https://www.dir.ca.gov/DIRNews/2016/2016-84.pdf> [https://perma.cc/F8AN-CSW3] (“Wage theft and workplace abuse not only hurt workers, they also undermine the safety and stability of communities as they reduce revenues and create an uneven playing field for law-abiding employers.”).

¹⁴⁷ This argument, of course, accepts a specific and narrow understanding of “public safety” — it disregards the safety of incarcerated people.

incarceration provides the surest guarantee that she will not reoffend or continue to harm other workers.¹⁴⁸

If we understand incapacitation as the dominant theory for decades of punitive policies,¹⁴⁹ though, then it is not hard to see why an appeal to incapacitation should be troubling for those concerned about mass incarceration. Whether the rationale is the financial costs of incarceration,¹⁵⁰ the indignities of prison life,¹⁵¹ or the distributive consequences of the carceral turn,¹⁵² more and more commentators appear to be rejecting a reflexive embrace of the incapacitationist logic.¹⁵³ The idea that society's problems can be solved by putting more people in prison is (at least in many circles) falling into disfavor. And a growing body of literature highlights the ways in which "incapacitation" is not merely a theoretical project, or a sterile process of social exclusion. Rather, incapacitation implicates caging, or hyper-surveillance — techniques that do significant physical and psychological harm.¹⁵⁴

¹⁴⁸ This analysis, of course, would differ for corporate defendants. See generally W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905 (2019) (examining the role of incapacitation in addressing corporate misfeasance).

¹⁴⁹ See *supra* note 145 and accompanying text.

¹⁵⁰ See, e.g., Mirko Bagaric, *From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars*, 19 MICH. J. RACE & L. 349 (2014); Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1103 (2013) ("Driven by a number of factors, not the least of which is the enormous human and financial cost of mass incarceration, policy makers are now shrinking prison and jail populations and pursuing cheaper non-brick-and-mortar social control options." (footnotes omitted)).

¹⁵¹ See Levin, *Consensus Myth*, *supra* note 25, at 270-72.

¹⁵² See, e.g., ALEXANDER, *supra* note 20, at 140 ("[J]udges, prosecutors, and defense attorneys may not even be aware of the full range of collateral consequences for a felony conviction."); WESTERN, *supra* note 20, at 35 (tracing the relationship between race, criminalization, and economic inequality); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1274 (2004) ("The first feature of mass incarceration is simply the sheer numbers of African Americans behind bars.").

¹⁵³ See Levin, *Consensus Myth*, *supra* note 25, at 287-88 (describing these competing rationales).

¹⁵⁴ See, e.g., KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT (2016) (discussing how the redefinition of solitary confinement led to normalizing "a practice condemned as torture by international human rights bodies"); JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 4 (2014) ("[T]he conditions existing in U.S. prisons today are fundamentally, irreparably inhumane."); Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 275 (2013) ("[T]he conditions imposed within the prison environment . . . are meant to break those entering the system."); Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48

Assuming that — after decades of mass incarceration — prison no longer receives the benefit of the doubt as the solution to social problems, why should it in the context of wage theft? I don't know. I take most arguments for wage theft criminalization and the incarceration of abusive bosses as having failed to internalize the diverse critiques that have shaped our current moment of carceral skepticism.¹⁵⁵ If incarceration is an evil that should be avoided whenever possible, the question becomes why it shouldn't be avoided here? As noted above, I take wage theft as a prototypical area where non-carceral responses seem like they should be able to do the trick and address the social problem.¹⁵⁶

But, even aside from some appeal to restorative justice, financial penalties, or other alternative sanctions, the question remains why exactly incapacitation is necessary? As noted in the context of the retributive justification, arguing for incapacitation here requires either: (a) acknowledging that many others who are currently incarcerated should stay incarcerated; or (b) arguing that bosses who commit wage theft are actually *more* in need of incapacitation than many other individuals currently behind bars. As in the retributive analysis, I think the former claim is troubling, and the latter claim is both politically and theoretically problematic.

To a growing number of commentators, incapacitation should be the solution of last resort. Radical criminological and abolitionist literature often speaks of “the dangerous few” — even scholars and activists committed to dismantling the carceral state frequently recognize that

AM. CRIM. L. REV. 1 (2011) (discussing how incarcerated people often have to “choose between personal safety and the satisfaction of other basic . . . human needs”); Jeannie Suk, *Redistributing Rape*, 48 AM. CRIM. L. REV. 111, 111 (2011) (“Prison is hell.”).

¹⁵⁵ There are many possible explanations for this failure or, at least, this exceptional treatment that I will address later. But I think it's fair to ask how much we might attribute these pro-carceral arguments to a siloing of legal areas or disciplines, i.e., criminal law is somehow different and distinct from other areas of law, so the concerns and politics that shape the analysis of criminal law might be lacking or viewed as different from the concerns and politics that predominate in discussions of employment law. See Benjamin Levin, *Rethinking the Boundaries of “Criminal Justice,”* 15 OHIO ST. J. CRIM. L. 619, 633 (2018) [hereinafter *Rethinking Boundaries*] (book review); cf. Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 622 (2019) (critiquing the labor/employment law distinction); Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 165 (2007) (critiquing the distinction among labor law, employment law, and employment discrimination as a formalist mischaracterization of “work law”); Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 5 (2011) (critiquing the move to exceptionalize “family law”).

¹⁵⁶ See *supra* Part II.A.

some small portion of the population might continue to pose a danger, such that it is in society's best interest to restrict their liberty in some way.¹⁵⁷ If we were to imagine some dramatic reconfiguration of U.S. political economy (and the political economy of punishment), perhaps some of these bosses might be the "dangerous few." But, such a reconfiguration seems rather far-fetched and also would require a recognition that the harm done by abusive bosses is greater than the harm done by many individuals who commit crimes commonly viewed as more egregious.¹⁵⁸ Further, even imagining such a dramatic reconfiguration or reconceptualization of criminality, would all bosses who commit wage theft constitute the dangerous few?

In a sense, this last question speaks to one of the challenges of the wage-theft discourse: so much conduct is defined as "wage theft."¹⁵⁹ And, as I suggested at the outset of this Article, perhaps so much more could be. Wage theft might encompass: (a) withholding worker's compensation insurance from a paycheck, and not paying that amount to the state; (b) failing to pay time-and-a-half for overtime; (c) failing to pay taxes; (d) paying below the statutorily mandated minimum wage; (e) taking tips; or (f) not paying workers at all.¹⁶⁰ This conduct might all be immoral, it might all be illegal, and it might all help entrench economic inequality, but is it all equally bad? How often would an employer have to steal tips before she was viewed as "the worst of the worst"? To what extent should the employer's own financial or class situation weigh into this analysis? Which is to say, the "dangerous few" might not be so few, or at the very least, if one wished to subscribe to an abolitionist ethic and still support incarceration for wage theft, I think there would need to be a reckoning with and perhaps more careful

¹⁵⁷ See Liat Ben-Moshe, *The Tension Between Abolition and Reform*, in *THE END OF PRISONS: REFLECTIONS FROM THE DECARCERATION MOVEMENT* 83, 90 (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013) (discussing "what to do with those deemed as having the most challenging behaviors"); see, e.g., Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. REV.* 1156, 1171 (2015) ("[T]he question of the dangerous few ought not to eclipse or overwhelm the urgency of a thorough abolitionist analyses . . ."); Jim Thomas & Sharon Boehlefeld, *Rethinking Abolitionism: "What Do We Do With Henry?"*, in *WE WHO WOULD TAKE NO PRISONERS: SELECTIONS FROM THE FIFTH INTERNATIONAL CONFERENCE ON PENAL ABOLITION* (Brian D. MacLean & Harold E. Pepinsky eds., 1993).

¹⁵⁸ See Levin, *Mens Rea Reform*, *supra* note 25, at 556.

¹⁵⁹ See Marzán, *Dignity Takings*, *supra* note 74, at 1204 n.11 ("The worker center where the author performed participatory research . . . had identified at least twenty-two forms of 'wage theft.'").

¹⁶⁰ See Green, *supra* note 50, at 1308-11 (describing conduct that constitutes wage theft).

analysis of what conduct fell into the category where no response short of caging would be acceptable.

D. Rehabilitation

Rehabilitation provides scant support for a move to prosecute or incarcerate bosses for wage theft.¹⁶¹ Criminalization advocates themselves do not ground their arguments in terms of rehabilitation, which should be little surprise given the theory's declining significance and the mismatch between the realities of the carceral system and any objective of personal betterment.¹⁶²

The only remotely credible rehabilitation-based argument strikes me as forcing bosses to confront their workers' humanity. That argument may speak the language of rehabilitation — the goal of punishment is to improve the defendant and make her a better member of the polity. But I am hard-pressed to come up with any reason why putting a person in a cage would help her understand another person's humanity.¹⁶³ There might be arguments as to why prosecution and the trial or sentencing process would accomplish this goal: the employer might be forced to listen to her workers explain just how much they had suffered and illustrate the human costs of the crime. But it is not clear that criminal law or criminal legal institutions are necessary to advance those ends. And why exactly would carceral punishment humanize workers further? I think it would not. At the very least, that strikes me as an empirical argument that requires testing before it could serve as a basis for expanding carceral populations and exposing more individuals to the harsh realities of the punitive system. The argument would have to be one rooted in the boss's suffering as helping her appreciate the worker's suffering. Yet such an argument reveals many of the same defects as the retributive-style analysis: victimized workers might have suffered in many ways, but the prosecution's claim is not that an

¹⁶¹ See generally *infra* Part II.D.

¹⁶² See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 718 (1995) ("Unfortunately, however, rehabilitation is no longer an objective of criminal law in the United States, and prison appears to have an antirehabilitative effect." (footnotes omitted)); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1702 (1992) (noting "the general inappropriateness of imprisonment for rehabilitation").

¹⁶³ To be clear, here and throughout I emphasize the carceral dimensions of criminalization and punishment because criminalization proponents tend to stress those dimensions and highlight carceral sentences as a distinguishing feature from tort or civil regulatory approaches to wage theft.

employer incarcerated her workers.¹⁶⁴ A convicted boss would suffer some harm and dehumanization, yet that harm and dehumanization would be different than the one that the boss inflicted upon her workers.¹⁶⁵

E. Expressivism

I see expressivism as providing one of the strongest justifications for wage theft criminalization, but also one of the most problematic. If criminalization and criminal punishment educate or send a message to the public (a fundamental assumption of expressive theories of punishment),¹⁶⁶ then perhaps criminalizing wage theft makes sense: the decision sends a message that (a) employers exploiting workers is socially unacceptable, and (b) society cares about the marginalized and otherwise-powerless workers who are often victims of wage theft.¹⁶⁷ As

¹⁶⁴ That certainly might happen, but that is a different situation than the one at play in wage-theft fact patterns or described by criminal wage-theft statutes.

¹⁶⁵ Perhaps one way of rationalizing this distinction is via what Aya Gruber describes as a “distributive theory of criminal law”: “that an offender ought to be punished, not because he is culpable or because punishment increases net security, but because punishment appropriately distributes pleasure and pain between the offender and victim.” Gruber, *A Distributive Theory*, *supra* note 72, at 1.

¹⁶⁶ See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000) (“At the most general level, expressive theories tell actors — whether individuals, associations, or the State — to act in ways that express appropriate attitudes toward various substantive values.”); Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965); Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1427 (1986) (“Just as an offender conveys meaning to his victim or to the community through his conduct, that is, through his disrespect for protected interests, so the community — through its agents the sentencing judge and corrections system — responds by conveying meaning through the vehicle of punishment.”).

¹⁶⁷ See, e.g., Charlene Obernauer, *New York Construction Workers Remain at Risk Without Legislative Action*, GOTHAM GAZETTE (Mar. 5, 2019), <https://www.gothamgazette.com/opinion/8320-new-york-construction-workers-remain-at-risk-without-legislative-action> [<https://perma.cc/V42S-G56A>] (“By prosecuting bad actors for wage theft and dangerous labor violations, the DA’s office indicated that contractors are not above the law, especially when they are putting lives at risk.”); Terri Gerstein (@TerryGerstein), TWITTER (Jan. 9, 2019, 8:06 AM), <https://twitter.com/TerriGerstein/status/1083032207961350144> [<https://perma.cc/9RLK-43PK>] (“A man had three different companies work on his home, gave bad checks, then threatened to call immigration when they sought payment; now he’s been arrested. Boulder DA Michael Dougherty is taking action to protect workers.”); David Seligman (@daveyseligman), TWITTER (Jan. 9, 2019, 8:14 AM), <https://twitter.com/daveyseligman/status/1083034292354048001> [<https://perma.cc/3LU7-ZCKE>] (“Thanks

one commentator puts it, laws criminalizing wage theft “should help send a strong message to employers about the importance of following workplace laws. They should also send a strong message to hard working people that work is a thing of value and that intentionally stealing it is theft.”¹⁶⁸

This justification has some intuitive appeal, particularly when we consider wage theft alongside other areas where expressive theories tend to be mobilized.¹⁶⁹ A common feature of the literature on expressive theories of punishment is a focus on victims and societal power dynamics.¹⁷⁰ That is, in much discourse, the victim is framed as somehow weak, powerless, or otherwise marginalized, so prosecution and state violence are necessary to level the playing field.¹⁷¹ The call for criminal punishment often rests on a claim that society has tacitly

to the Boulder DA for watching out for some of the most marginalized members of society [by prosecuting employers].”).

¹⁶⁸ Gerstein, *More States Should Follow New Colorado Policy*, *supra* note 112.

¹⁶⁹ In this section, I frame the discussion of criminal prosecution as signaling social care for a class of victims or their belonging in the community in terms of expressivism or criminal law’s expressive function. That said, Monica Bell’s work on “legal estrangement” might provide a more helpful frame for this analysis. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017) [hereinafter *Police Reform*]. In her discussion of policing, Bell argues for a move away from (or past) legitimacy and instead calls for a focus on estrangement. “From a robust legal estrangement perspective,” Bell argues, “the law’s purpose is the creation and maintenance of social bonds. An emphasis on inclusion implies concerns not only about how individuals perceive the police and the law (and thus whether those individuals cooperate with the state’s demands), but about the signaling function of the police and the law to groups about their place in society.” *Id.* at 2087-88.

¹⁷⁰ See, e.g., Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 860-61 (2014) (discussing this dynamic in the context of hate crimes); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL’Y 13, 34 (2011) (“Like expressive violence itself, criminal punishment is widely understood to ‘send a message’ – the message that women and sexual minorities matter.”); Kahan, *supra* note 116, at 463-64 (describing how punishment for hate crimes can be justified in expressive terms); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 521 (2001) (“[T]he criminal provisions of the Violence Against Women Act might send a message to would-be batterers that our society takes domestic violence very seriously.”).

¹⁷¹ See Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1265 (2000) (“Laws that treat bias-motivated assaults as distinctive harms worthy of federal prohibition accord status and prestige to the groups falling within the law’s ambit. As they enhance the prestige of these protected groups, they also reduce the prestige of others who may no longer define themselves as superior.”).

accepted or tolerated this class of harm or the pain of this class of victims. Such acceptance may doubly harm the victim.¹⁷²

By way of example, take the cases of hate crime legislation and laws addressing intimate-partner violence. In both contexts, there has been a long history of state-sponsored, state-sanctioned, or, at least, state-ignored violence against some marginalized or subordinated group.¹⁷³ The literature on “underenforcement” suggests that the failure to prosecute or severely punish men who beat their wives or partners, lynch mobs, and other socially dominant (or relatively socially dominant) defendants sent a broader message: this behavior was acceptable, and the victims were not full members of the polity deserving of the state’s protections.¹⁷⁴ The victims, in this account, are twice victimized: first by the abuser, and then by the state.¹⁷⁵

Arguments for wage theft criminalization reflect a similar dynamic: workers (particularly low-wage workers, low-wage workers of color, and low-wage immigrant workers) enjoy little social, political, and economic power. They are the precariat, the liminal members of society on whose back the economy functions.¹⁷⁶ Failing to protect them from

¹⁷² See *id.*

¹⁷³ See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 807 (2007) (describing “the ‘norming’ function of criminal law as a basis for reform[s]” aimed at addressing intimate partner violence).

¹⁷⁴ See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW*, at x (1997) (tracing the underenforcement of crimes against Black defendants); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717 (2006) (“Underenforcement can also be a form of deprivation, tracking familiar categories of race, gender, class, and political powerlessness.”); Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1288-89 (2016) (“As is true of underenforcement generally, under-policing tends to result from a devaluing of the harms caused by a specific crime, the harms suffered by members of a certain demographic group, or both.” (footnote omitted)). But see Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1273 (1998) (reviewing Kennedy, *supra*) (critiquing the focus on underenforcement).

¹⁷⁵ See MARK S. UMBREIT, *VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* 196 (1994); see, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2328-29 (1989) (discussing this phenomenon in the context of hate crimes).

¹⁷⁶ See generally GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* 10 (2011) (“[T]he precariat consists of people who lack . . . labour-related security”); V.B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco’s Taxi & Uber Economies*, 38 BERKELEY J. EMP. & LAB. L. 73, 135 (2017) [hereinafter *The Drive to Precarity*] (describing how precarity presents itself in the chauffeur industry); Angela P. Harris, *From Precarity to Positive Freedom: Classcrits at Seven Classcrits VII Symposium Introduction*, 44 SW. L. REV. 621, 630 (2015) (describing the economic and political roots of precarity); Loïc Wacquant, *Marginality*,

predatory bosses or to enforce laws that are meant to value their work and dignity is an affront to their status as members of the polity. It confirms suspicions that politicians and other elite actors value profits and the interests of the wealthy over the interests of workers. Criminal prosecution, the argument goes, represents the embodiment of society's collective morality and the state's moral force.¹⁷⁷ And, a decision to prosecute bosses and criminalize their misconduct reflects a powerful move to right this wrong and to send a message that these workers are valued contributors to the economy and to the community.¹⁷⁸

This vision of expressive punishment stands as an amped up form of general deterrence.¹⁷⁹ It's not just that punishment is designed to shape the conduct and decision-making of rational employers.¹⁸⁰ It's that prosecution sends a message to *everyone* about the value of the victim, the nature of the harm, and the priorities of the state.

Like deterrence arguments, though, expressivist claims rest on a set of empirical assumptions. Specifically, accepting an expressivist justification for criminalization and incarceration appears to require concluding that members of the public: (a) are aware of legislative activity, (b) view the passage of legislation as embodying community

Ethnicity and Penalty in the Neo-Liberal City: An Analytic Cartography, 37 *ETHNIC & RACIAL STUD.* 1687, 1688 (2014) (examining the role of the precariat in urban spaces).

¹⁷⁷ See, e.g., ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 102 (W.D. Halls trans., 2014) (1893); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 138 (Alan Sheridan trans., Vintage Books 2d ed. 1993) (describing the effects of discipline on an individual's sense of self); cf. KENNEDY, *The Stakes of Law*, *supra* note 9, at 107 ("[T]he legal system creates as well as reflects consensus (this is true both of legislation and of adjudication). Its institutional mechanism 'legitimizes,' in the sense of exercising normative force on the citizenry.").

¹⁷⁸ Cf. Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 64 (1984) ("Expressive theory also emphasizes the communal nature of theory and its complex relations with social life. . . . Legal theory can help create communal ties and shared values by freeing us from the sense that current practices and doctrines are natural and necessary and by suggesting new forms of expression to replace outworn ones.").

¹⁷⁹ See Judith Lichtenberg, *Against Life Without Parole*, 11 *WASH. U. JURIS. REV.* 39, 49 n.45 (2019) ("The expressive function is sometimes understood to be a version of retributivism, although one might also view it as a close cousin of general deterrence."); Jake Elijah Struebing, *Federal Criminal Law and International Corruption: An Appraisal of the FIFA Prosecution*, 21 *NEW CRIM. L. REV.* 1, 53 (2018) ("General deterrence is also conceptually intertwined with an expressive account of wrongdoing.").

¹⁸⁰ That is, one might imagine a different version of expressive, or "communicative" punishment by which "the state has an interest in communicating a specific message to someone in particular." Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 *HARV. C.R.-C.L. L. REV.* 407, 429 n.99 (2005).

norms, and (c) wish to conform their behavior to community norms. Second, the expressivist would need to believe that members of the public: (a) are aware of specific prosecutions, (b) view prosecutions and convictions as embodying community norms, and (c) wish to conform their behavior to community norms. Third — to my mind most important — that incarceration is uniquely or dramatically better suited to sending such a message than non-criminal sanctions.¹⁸¹

These assumptions in turn rest on a host of baseline assumptions about the perceived legitimacy of state institutions (the legislature, prosecutors, courts, etc.). Or, put differently, how much are those institutions viewed as capable of expressing or vindicating community norms and values, to the extent that “community norms and values” are even defensible concepts?

In the wage-theft context, victims generally come from communities without significant political clout. Given what we know about the demographics of criminal prosecution, poor people of color (often-identified victims of wage theft) have good reason to believe that police and prosecutors do not represent their best interests.¹⁸² Decades of scholarship and growing activism show that the institutions of the criminal legal system hardly represent the “community values and norms” of heavily policed and prosecuted communities. And, particularly for undocumented workers, it seems peculiar to suggest that the same state actors who aid in enforcing immigration laws also should be viewed as advancing the interests of immigrant communities.¹⁸³

Further, the basic claim of expressivism (not unlike deterrence) rests on some vision of criminal punishment as public, i.e., a set of institutions or practices that the public sees and learns from. Yet, the legal system — comprised of arcane and complex rules — is hardly accessible to the public. And, in a post-trial world, where the vast majority of criminal cases are resolved without a public trial (and where there is reason to be skeptical that the public has any real access to courtrooms),¹⁸⁴ this assumption of public engagement and education seems rather far-fetched.

¹⁸¹ For a related, skeptical take on the arguments and theoretical claims underpinning expressivism, see generally Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145 (2001).

¹⁸² See Bell, *Police Reform*, *supra* note 169, at 2061.

¹⁸³ See Lee, *supra* note 13, at 664-65.

¹⁸⁴ Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 923 (2006) (discussing how plea bargaining occurs in private spaces, not

Even if we accept all of the assumptions that underpin the expressivist's argument, there is a major question lurking: what about enforcement? If caging exploitative bosses is supposed to send a message about the community's respect for the labor of marginalized workers, what if bosses are not actually arrested, prosecuted, convicted, and punished? And, even if they are arrested, prosecuted, convicted, and punished, what if their punishment is viewed as insufficient or merely a "slap on the wrist"?

Criminal law is not self-executing. Its enforcement depends on the discretion of police and prosecutors who effectively determine what the law means.¹⁸⁵ As William Stuntz described the challenge for expressivists: "What, after all, does expressive criminal law express? Is the message the law that the legislature passes? Or is it the sum of the arrest and prosecution decisions of individual police officers and prosecutors?"¹⁸⁶ To the extent the law is the law on the ground, rather than the law on the books,¹⁸⁷ and to the extent that expressive effect requires the law in action,¹⁸⁸ then the relevant inquiry must be how a criminal statute actually is being enforced.

Take the example of intimate partner violence, discussed above, and the federal Violence Against Women Act ("VAWA"):¹⁸⁹

On the one hand, the criminal provisions of [VAWA] might send a message to would-be batterers that our society takes domestic violence very seriously, much more so than it used to. On the other hand, the tiny number of prosecutions under the Act (only a handful per year nationwide) might send precisely the opposite message: that domestic violence is a subject for

open courtrooms); see also William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 562 (2016) (tracing the rise of plea bargaining); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2190 (2014) (explaining how the public is excluded from courtrooms).

¹⁸⁵ See Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 968-69 (2019); Stuntz, *supra* note 170, at 521.

¹⁸⁶ Stuntz, *supra* note 170, at 521.

¹⁸⁷ See Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in *THE NEW CRIMINAL JUSTICE THINKING* 246, 246-47 (Sharon Dolovich & Alexandra Natapoff eds., NYU Press 2017).

¹⁸⁸ See Eisenberg, *supra* note 170, at 918 ("When legislators enact a new law to protect a particular group, that piece of legislation is imbued with expressive force for members of the group and society as a whole. If prosecutors are understood to be sending a different or contrary message through their enforcement decisions, this expressive force is significantly undercut. An exclusive focus on the enactment of such legislation is therefore misguided.").

¹⁸⁹ 34 U.S.C. § 12361(b) (2018).

political posturing, the sort of thing politicians decry but prosecutors do not punish. At the least, the absence of prosecution must indicate that the federal government is not really interested in the subject, which would seem to take away much of the expressive benefit of having the Act in the first place.¹⁹⁰

There might be plenty of other ways to justify VAWA, but the insight here is important: if expressive laws are not enforced (or are not enforced satisfactorily),¹⁹¹ then hasn't the law just reified and entrenched the same inequalities it was intended to address?¹⁹²

Given stated concerns from wage theft criminalization proponents, there is reason to believe that prosecutors and police might not necessarily embrace an aggressive approach to enforcement.¹⁹³ And, even if prosecutors were enthusiastic about taking wage theft cases, why should we believe that low-income people of color and immigrant workers will be comfortable reporting to and cooperating with police?¹⁹⁴ I will take up this question further in the next Part, but it is not unreasonable to conclude that "distrust of the police [among communities often victimized by wage theft] effectively neutralizes the potential of wage theft statutes."¹⁹⁵

¹⁹⁰ Stuntz, *supra* note 170, at 521.

¹⁹¹ The question of what exactly constitutes appropriate or satisfactory punishment is a big one. And, the cultural temptation to treat defendants as having "gotten off" if they receive a relatively short carceral sentence speaks to the challenges of doing criminal law expressively without turning law-and-order politics and fueling the carceral impulse.

¹⁹² See generally Eisenberg, *supra* note 170 (arguing that expressive legislation fails unless accompanied by expressive enforcement).

¹⁹³ See, e.g., Daniel Beekman, *Seattle Takes Aim at Wage Theft; First 3 Years of Law Came Up Empty*, SEATTLE TIMES (Nov. 14, 2014, 10:57 AM), <https://www.seattletimes.com/seattle-news/seattle-takes-aim-at-wage-theft-first-3-years-of-law-came-up-empty/> [<https://perma.cc/C6L6-7GZR>] ("Seattle made wage theft a crime under city law in 2011, vowing to go after employers that intentionally cheat workers out of pay. But more than three years later, the Seattle Police Department and City Attorney's Office have yet to prosecute anyone."); Parisa Dehghani-Tafti, Opinion, *Candidate Essay: Parisa Dehghani-Tafti*, ARLNOW (June 10, 2019, 2:30 PM), <https://www.arlnow.com/2019/06/10/candidate-essay-parisa-dehghani-tafti/> [<https://perma.cc/AZY5-VTQ7>] ("[W]age earners said the [Commonwealth Attorney's] office refuses to prosecute wage theft cases . . .").

¹⁹⁴ See Lee, *supra* note 13, at 664-65 ("While wage theft statutes saddle the police with labor enforcement duties, federal programs have simultaneously piled on a wide range of immigration enforcement responsibilities, exacerbating the rift that has traditionally separated the police and immigrant communities.").

¹⁹⁵ *Id.* at 665.

Further, even assuming that police and prosecutors are on board, what kind of punishment would be sufficient to send the desired message?¹⁹⁶ Calls for wage theft criminalization tend to stress incarceration and treat non-carceral punishment as insufficient. So, how much incarceration is necessary to signal that the state takes wage theft seriously? Given public outcry when defendants receive short carceral sentences — particularly in contexts where the defendants are perceived as relatively powerful¹⁹⁷ — it is hard to imagine what an “acceptable” amount of incarceration would be. Indeed, recent wage theft criminalization efforts often focus on ensuring not only that wage theft is treated as a criminal matter, but that it is a felony, rather than a misdemeanor.

For example, in 2015, when Washington State Attorney General Bob Ferguson chose to bring felony charges against former professional football player Sam Adams, Ferguson stressed that the prosecution “should be a warning to unscrupulous business owners.”¹⁹⁸ Adams and his business partner allegedly failed to pay their health club employees \$7,000.¹⁹⁹ Adams faced up to five years in prison on thirty criminal charges, and prosecutors announced their intention to “seek an exceptionally harsh sentence” to send a message that “[i]f you don’t pay your workers for wages that they have earned, [the Attorney General’s] office will hold you accountable.”²⁰⁰ Despite the bravado and tough-on-crime rhetoric, two years later, Adams agreed to a modified guilty plea, under which the charges were dropped and he paid the \$7,000.²⁰¹

In a moment of reckoning with the punitive excesses of mass incarceration, I think it’s fair to question the propriety of seeking five years’ imprisonment for a \$7,000 loss, of bringing a thirty-count indictment as a means of sending a message, and of using the sort of tough-on-crime language that equates imprisonment and accountability. But, put all that aside for a moment. Even discounting

¹⁹⁶ See *supra* note 191 and accompanying text.

¹⁹⁷ See GRUBER, *supra* note 26, at 5 (discussing this dynamic in the context of prosecutions for sexual violence).

¹⁹⁸ Levi Pulkkinen, AG: *Ex-Seahawk Bilked State, Workers at His Health Clubs*, SEATTLE POST-INTELLIGENCER (Nov. 21, 2017, 9:57 PM), <https://www.seattlepi.com/seattlenews/article/AG-Ex-Seahawk-bilked-state-workers-at-his-6066837.php> [https://perma.cc/2UQU-6EKQ].

¹⁹⁹ *Id.*

²⁰⁰ See *id.*

²⁰¹ See Levi Pulkkinen, *Dismissal: 30 Charges Against Seahawk-Turned-Gym Owner Dropped*, SEATTLE POST-INTELLIGENCER (Nov. 21, 2017, 10:24 PM), <https://www.seattlepi.com/local/crime/article/Seahawks-West-Seattle-Sam-Adams-Dismissal-12376342.php> [https://perma.cc/2XAA-GU5J].

the troublingly punitive politics that the case demonstrates, did it really work? Perhaps the publicity the case attracted actually did send a message, and the selection of a high-profile defendant (who also happens to be Black) helped make wage-theft a recognizable problem. Yet, if the claim is that criminal punishment actually does the important work, the case looks like a resounding failure. Further, we might ask how many resources went into a two-year criminal case and whether those resources might have been used more effectively to reach the same redistributive end.

III. A DISTRIBUTIONAL ANALYSIS OF WAGE THEFT CRIMINALIZATION

The traditional theories of punishment traced above — fixtures formalist treatments of criminal law that have been entrenched in numerous criminal codes²⁰² — provide a limited and at-times deceptive window into the workings of the carceral state.²⁰³ They speak the language of morality, of rational actors, or of impersonal, ostensibly apolitical institutional design. In short, they are a poor fit for structural accounts of criminal law as a political creature, an engine of social control, or a tool of redistribution and oppression.²⁰⁴

While advocates for wage theft criminalization often speak in the register of these traditional theories, and while the theories certainly might be marshalled in support of policy proposals, I see the case for criminalization — and the debate around criminalization — as rooted inherently in a set of distributive and structural questions: How should society deal with rising economic inequality and the limited political power of low-wage workers? Is there a way to harness the resources and moral force of the state without empowering prosecutors, police, and other criminal enforcers? Is it acceptable to treat incarceration and accountability as conceptually interchangeable? Should we be more comfortable with embracing carceral solutions to social problems when a defendant is the more powerful party and a victim is the weaker or more vulnerable party? Do the redistributive purposes of criminalization proposals guarantee that the corner of the criminal system will be immune from the regressive and abusive realities of the

²⁰² See, e.g., 18 U.S.C. § 3553(a) (2018) (stating that judges should consider these purposes of punishment in determining an appropriate sentence).

²⁰³ Cf. Jeffrie G. Murphy, “*In the Penal Colony*” and *Why I Am Now Reluctant to Teach Criminal Law*, 33 CRIM. JUST. ETHICS 72, 76 (2014) (“I have come to think that our body of substantive criminal law influenced by the Model Penal Code is a rather beautiful little boat floating on a sea of excrement, and I am no longer comfortable sailing in that little boat while ignoring the excrement.”).

²⁰⁴ See sources cited *supra* note 69.

carceral state? To what extent should the progressive politics of criminalization proponents and the ostensibly progressive politics of criminal enforcement insulate policy proposals from left critiques? And what are the broader structural costs of accepting or endorsing the prosecutorial move in the context of wage theft?

All of which is to say that wage theft criminalization is justified most forcefully in distributive terms.²⁰⁵ So, the question remains how exactly wage theft prosecutions would *distribute* — who would be prosecuted, and what would be the impact of prosecution? Or, put simply, “who wins and who loses?”²⁰⁶ Such a “distributional analysis” of wage theft criminalization would “involve[] meticulous and deliberate contemplation of the many interests affected by the existing criminal law regime and evidence-informed predictions about how law reform might redistribute harms and benefits, not just imminently but over time.”²⁰⁷ This distributional approach — a staple of critical scholarship²⁰⁸ — “treats law as simply another way of doing politics and cuts through metaphysical, culturalist, economicist, and other mystifications of the law and legal discourse.”²⁰⁹ In the context of criminal law, this approach can — and has — shown the ways that progressive or ostensibly pro-minority criminalization projects can have unintended consequences.²¹⁰

In this Part, I look first at the distributional case for, and then the distributional case against wage theft criminalization.

A. Redistribution via Criminalization

At heart, the case for wage theft criminalization, greater prosecution, and the incarceration of abusive bosses rests on a redistributionist politics. Each of the theoretical justifications traced above ultimately comes down to a story about power, exploitation, and addressing deep structural inequality. What makes wage theft so concerning and what

²⁰⁵ See *supra* Part II.B.

²⁰⁶ Jorge L. Esquirol, *Legal Latin Americanism*, 16 YALE HUM. RTS. & DEV. L.J. 145, 162 (2013).

²⁰⁷ Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3213 (2015) [hereinafter *When Theory Met Practice*].

²⁰⁸ See, e.g., Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir, *Preface to GOVERNANCE FEMINISM: NOTES FROM THE FIELD*, at xvii (2019); Esquirol, *supra* note 206, at 161-62; Gruber, *When Theory Met Practice*, *supra* note 207, at 3213; Levin, *Mens Rea Reform*, *supra* note 25, at 496.

²⁰⁹ Esquirol, *supra* note 206, at 161-62.

²¹⁰ See Gruber, *When Theory Met Practice*, *supra* note 207, at 3213.

has made the phrase itself such a resonant organizing and advocacy tool is the image of the haves stealing from the have-nots. In a system that operates against a background presumption of at-will employment and where background property rules serve to entrench and preserve economic inequality,²¹¹ employers enjoy many structural advantages over workers, particularly low-wage workers. Combine these longstanding dynamics with the rise of mandatory arbitration clauses,²¹² the erosion of unions,²¹³ and the growth of the so-called “gig economy,”²¹⁴ and the U.S. workplace becomes a place of almost unfettered employer power.

This account of power imbalances recurs time and again in calls for expanding criminal solutions. Wage theft represents the quintessential abuse of power, and criminal law and prosecutors become the vehicle for remedying that imbalance, for giving voice to the voiceless and powerless.²¹⁵ Critically, criminalization proponents argue that this

²¹¹ On this vision of background rules as central to legal analysis, see Hale, *supra* note 9, at 472; Karl E. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 767 (1985); K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2459-60 (2018); Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 109 (2012).

²¹² See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 240 (2013) (Kagan, J., dissenting) (noting that arbitration clauses may “chok[e] off a plaintiff’s ability to enforce congressionally created rights”); Lauren B. Edelman, Aaron C. Smyth & Asad Rahim, *Legal Discrimination: Empirical Sociolegal and Critical Race Perspectives on Antidiscrimination Law*, 12 ANN. REV. L. & SOC. SCI. 395, 403 (2016) (describing the role of mandatory arbitration in thwarting employees’ civil rights claims); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1673 (2005) (observing that mandatory arbitration impinges on substantive and procedural rights).

²¹³ See, e.g., JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* 1 (2014) (noting that the unionization rate is at its lowest point since the early twentieth century); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 5 (2016) (“American labor unions have collapsed. While they once bargained for more than a third of American workers, unions now represent only about a tenth of the labor market and even less of the private sector.”).

²¹⁴ E.g., V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 740-41 [hereinafter *Winning the Battle*]; see Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 285 (2018) (“[F]or many U.S. workers and their families, the devolution of stable and decently paid jobs into insecure and undependable contingent work and gigs is a socioeconomic disaster.”).

²¹⁵ See Terri Gerstein & David Seligman, *A Response to “Rethinking Wage Theft Criminalization,”* ONLABOR (Apr. 20, 2018), <https://onlabor.org/a-response-to-rethinking-wage-theft-criminalization/> [<https://perma.cc/4AMR-PZZF>] (“[T]he threat of serious criminal sanction running . . . against the person who’s abused his position of power . . . helps to correct that power imbalance . . .”).

dynamic makes wage theft different from many other areas of criminal law.²¹⁶ Elsewhere (e.g., in the context of drug crime), prosecutors and police are abusive and the criminal system disproportionately harms people of color. Many criminalization proponents are careful to insist that they oppose mass incarceration, that those bad or problematic areas of criminal law are bad or problematic. But prosecuting wage theft represents the *true purpose* of the criminal legal system.

Interestingly, many district attorney candidates running under the mantle of “progressive prosecutors” have stressed that they would make wage theft cases a priority.²¹⁷ Decarceration and declination (i.e., not prosecuting entire classes of crime) elsewhere might be central to the progressive prosecutor’s agenda,²¹⁸ but wage theft represents a different problem: a problem of under-enforcement.²¹⁹ And, where other defendants are deserving of greater humanization, sympathy, or empathy, as prosecutors and reformers seek non- or less-punitive responses, wage theft defendants are in need of the harsh justice that the carceral system offers.

For example, despite his much-publicized decision not to pursue a range of drug- and sex-work-related offenses, reformist Philadelphia District Attorney Larry Krasner created a specific unit designed to prosecute wage theft cases.²²⁰ Similarly, Tiffany Cabán, the public defender and Democratic Socialist who came within a few votes of being elected District Attorney in Queens, promised to set up a wage theft unit because, “by ending prosecution of crimes of poverty and prioritizing

²¹⁶ See Gerstein & Seligman, *supra* note 215 (“[W]e don’t think that bringing the criminal law to bear on predatory employers who take advantage of vulnerable workers exacerbates the injustices of our criminal justice system.”).

²¹⁷ See Levin, *Imagining the Progressive Prosecutor*, *supra* note 25, at 24-25.

²¹⁸ See, e.g., Maria Cramer, *DA Candidate Rachel Rollins Hailed Nationally, But Locally Her Plan Not to Prosecute Petty Crimes Alarms Some*, BOS. GLOBE (Sept. 12, 2018, 9:46 PM), <https://www.bostonglobe.com/metro/2018/09/12/candidate-hailed-nationally-but-locally-her-plan-not-prosecute-petty-crimes-alarms-some/pyQX8MT4iWpyJ8XMi6SsFO/story.html> [https://perma.cc/FEL9-EEEN] (describing one progressive prosecutor’s plan to dismiss certain crimes like trespassing, shoplifting, and drug possession or treat them as civil infractions); Carissa Byrne Hessick & F. Andrew Hessick, *The National Police Association Is Throwing a Fit Over Prosecutorial Discretion*, SLATE (Jan. 4, 2019, 12:55 PM), <https://slate.com/news-and-politics/2019/01/national-police-association-throwing-fit.html> [https://perma.cc/TMC6-KY5V] (discussing prosecutorial declination).

²¹⁹ See Karakatsanis, *supra* note 123, at 886.

²²⁰ See Juliana Feliciano Reyes, *Philly DA’s Office Launches a Unit to Prosecute Employers for Crimes Against Workers*, PHILA. INQUIRER (Oct. 8, 2019), https://www.inquirer.com/news/district-attorney-larry-krasner-employer-crimes-prosecution-wage-theft-20191008.html?__vz=medium%3Dsharebar [https://perma.cc/L3D7-SDQ3].

prosecution of abusive and exploitative landlords and bosses, she sent a simple message: Free the poor and jail the rich.”²²¹

In this telling, the carceral state isn’t rotten to its core;²²² rather, it is an institution (or set of institutions) in need of refocusing. If only legislators would empower prosecutors with new criminal statutes, and if only prosecutors embraced the progressive politics of workers’ rights advocates (the argument goes), then the punitive apparatus could be repurposed to go after the truly deserving defendants.²²³

Central to this argument remains a perception of inequality in enforcement: property crimes are enforced frequently, and are frequently enforced against poor defendants.²²⁴ Why should wealthier defendants be excused when they commit theft?²²⁵ That is, criminalization proponents argue that there is effectively a white-collar theft exception, whereby prosecutors, and presumably police, don’t view what abusive or exploitative bosses do as “theft,” while they continue to pursue charges against poor defendants, particularly poor defendants of color, who commit low-level property crime. The way to address this inequality, according to criminalization proponents is to “level-up” punishment — to treat the richer, more powerful, or more privileged defendant more like the poorer, less powerful, or less privileged defendant.²²⁶ This claim underpins the rhetorical move/organizing strategy to assert that “wage theft is theft.” According to this logic, society has devised a mechanism or set of mechanisms to

²²¹ Oren Schweitzer, *Tiffany Cabán, a Socialist in the District Attorney’s Office*, JACOBIN (June 26, 2019), <https://jacobinmag.com/2019/06/tiffany-caban-socialist-district-attorney-queens-election> [<https://perma.cc/6A2B-UDCQ>].

²²² *But see infra* Part III.B.

²²³ *See* Gerstein & Seligman, *supra* note 215 (“While criminal sanction should be invoked carefully and only for very bad actors, the threat of prosecution is an important and effective tool in policing wage theft, which is one of the most prevalent crimes in the market and inflicts serious harm on the most marginalized members of society.”).

²²⁴ *See* Schweitzer, *supra* note 221.

²²⁵ *See* OFFICE OF SENATOR ELIZABETH WARREN, RIGGED JUSTICE: 2016 HOW WEAK ENFORCEMENT LETS CORPORATE OFFENDERS OFF EASY 1 (2016), https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf [<https://perma.cc/6KCY-AHGB>] (“If justice means a prison sentence for a teenager who steals a car, but it means nothing more than a sideways glance at a CEO who quietly engineers the theft of billions of dollars, then the promise of equal justice under the law has turned into a lie.”).

²²⁶ *See generally* Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337 (2018) [hereinafter *Equal Protection*] (describing and critiquing this approach); Levin, *Mens Rea Reform*, *supra* note 25, at 491-92 (describing the tendency of advocates to argue that the “privileged defendant should be treated as poorly as the disadvantaged defendant, rather than using the privileged defendant’s treatment as a model”); Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839 (2019) [hereinafter *Discipline and Policing*] (same).

address theft: prison, the criminal system, and a web of punitive policies. Rather than being exceptionalized, the argument goes, bosses should be treated like the defendants that society already marks as “criminal” and exposed to the same carceral system and set of punitive or prosecutorial institutions.

Some scholars and advocates might embrace that punitive turn wholeheartedly,²²⁷ while others might do so with reservations but some sense of pragmatism.²²⁸ It is unlikely that many DAs will stop prosecuting property crime altogether or that legislators will pass legislation that decriminalizes the poor teenager’s theft of a candy bar from a convenience store; so, why should the wealthier thief get a pass? This more reserved (or carceraly skeptical) criminalization proponent might agree that all property crime should be decriminalized or that carceral politics generally should be dialed back. But until we see a sea change in criminal policy, bosses should not be spared state violence. Or, put differently, wide scale decarceration might be a desirable goal, but wage theft and the abuses of capital are not the right place to start a decarceration project.²²⁹

B. *The Distributive Limits of Criminalization*

As a project rooted in the language of social justice and egalitarian politics, wage theft criminalization should be justified most strongly on distributive terms. And, the previous subpart outlined that distributive account. Yet, the rhetoric and reality of the carceral turn here do not necessarily match. In this subpart, I turn first to the complicated distributive realities of “white-collar crime,” before addressing deeper concerns about the potential legitimating effects of wage theft criminalization.

1. Cultural Narratives, Distributive Justice, and White-Collar Crime

As applied to wage theft criminalization, distributional analysis should help push past the assumptions that appear to motivate many commentators as they decry wage theft as a part of general impunity on

²²⁷ See generally *infra* Part IV.

²²⁸ See generally *infra* Part IV.

²²⁹ This debate plays out in other contexts involving powerful and particularly unsympathetic defendants. See, e.g., Elisabeth Epps, *Amber Guyger Should Not Go to Prison*, APPEAL (Oct. 7, 2019), <https://theappeal.org/amber-guyger-botham-jean/> [<https://perma.cc/X5UR-HY4G>] (same); Levine, *Discipline and Policing*, *supra* note 226 (critiquing punitive approaches to police misconduct).

the part of “white-collar” defendants. One way of understanding the exceptional treatment of wage theft as distinct from many other areas of the criminal system relies on its status as “white-collar crime.”²³⁰ Where the truly offensive parts of the criminal enforcement apparatus involve urban misdemeanor prosecutions and felony prosecutions against marginalized defendants,²³¹ white-collar defendants experience an entirely different “criminal justice system.”²³² The result is a “two-tiered” system, where the problems at the top (e.g., underenforcement, insufficient punishment, and criminal law as failed and toothless regulatory regime) are almost the complete inverse of those at the bottom (e.g., overpolicing, overpunishment, and criminal law as oppressive institution of social control).²³³

Whether this account is generally accurate as a descriptive matter, it is important to recognize the complexity of “white-collar crime” as a descriptive category, a complexity that should bear on our understanding of wage theft criminalization. In common parlance and the cultural imagination, white-collar crime is the province of wealthier, whiter defendants.²³⁴ Discourse surrounding white-collar crime tends

²³⁰ The distinction helps illustrate why it might be a mistake to call the administration of criminal law a “system” at all. See, e.g., LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 461 (1993); Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1528 n.7 (2020); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 421 (2018); Sara Mayeux, *The Idea of “The Criminal Justice System,”* 45 AM. J. CRIM. L. 55, 55 (2018); Levin, *Rethinking Boundaries*, *supra* note 155, at 619 (“[T]he criminal justice ‘system’ is not a system at all . . .”).

²³¹ See generally ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS* POLICING 3 (2018) (“[T]he expression ‘misdemeanorland’ also signifies the widely shared notion that there is something unique about the operations of justice in the subfelony world.”); ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018) (describing the mass processing of marginalized defendants).

²³² See Alexandra Natapoff, *The Penal Pyramid*, in *THE NEW CRIMINAL JUSTICE THINKING* 71, 74 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (characterizing the criminal system as a “pyramid” in which the bottom — misdemeanor cases against indigent defendants — lacks the process associated with the top).

²³³ See *id.* at 89.

²³⁴ Given the ways that framings of “crime,” “criminality,” and “criminals” shape not only public discourse but policy-making, I think it’s worth considering the ways that the “white-collar criminal” or “wage thief” is constructed or imagined. Cf. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 136 (2001) (describing the ways that portrayals of crime and criminality are used to advance broader political agendas); STUART HALL, CHARLES CRITCHER, TONY JEFFERSON, JOHN CLARKE & BRIAN ROBERTS, *POLICING THE CRISIS: MUGGING, THE STATE,*

to focus on corporate actors, executives, and defendants associated with the excesses and exploitative realities of capitalism — defendants who are seen (rightly, I would argue) as having built fortunes on the backs of working peoples' labor. And, in the context of wage theft, advocates frequently identify large employers as some of the greatest perpetrators.²³⁵ Put simply, the language of wage theft criminalization mirrors pro-prosecutorial language throughout the white-collar realm: punishment is necessary to redistribute and to tamp down the forces of inequality.

The reality of white-collar crime and its enforcement is more complicated, and — based on what little anecdotal evidence we have — the reality of wage theft looks to be as well. In a 2000 study,²³⁶ the FBI reported that the mean amount stolen or counterfeited in “white-collar incidents” was \$9,254.75, the median was \$210, and the mode was \$100.²³⁷ Over three times more “economic crimes” were committed at convenience stores (129,749) than at banks (38,364).²³⁸ Granted, the majority of white-collar defendants were white men in their late twenties and early thirties.²³⁹ But the scale of the incidents and what they included (low-level property crimes, check fraud, etc.) fails to jibe

AND LAW AND ORDER 26-27 (1978) (discussing the role of policing in shaping narrative and political/cultural imagination).

²³⁵ See, e.g., PHILIP MATTERA, GOOD JOBS FIRST, GRAND THEFT PAYCHECK: THE LARGE CORPORATIONS SHORTCHANGING THEIR WORKERS' WAGES (2018), https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft_report_revised.pdf [<https://perma.cc/MS5S-K9LZ>] (discussing wage theft by large corporations); AMY TRAUB, THE STEAL: THE URGENT NEED TO COMBAT WAGE THEFT IN RETAIL (2017), <https://www.demos.org/research/steal-urgent-need-combat-wage-theft-retail> [<https://perma.cc/3N6Y-CF44>] (“Nowhere is the contrast between attitudes toward shoplifting and wage theft more apparent than at Walmart. The retail giant is the largest private employer in the United States, and it may well be among the nation’s largest perpetrators of wage theft.”); Sasha Kramer, *For Big Corporations Like Walmart, Wage Theft Penalties Are Just the Price of Doing Business*, IN THESE TIMES (June 8, 2018), <https://inthesetimes.com/article/walmart-corporations-wage-theft-labor-settlements-firms> [<https://perma.cc/2BKV-GWVB>] (discussing wage theft by large corporations); Lauren Weber, *Banks Pay Out Some of the Biggest Settlements in Wage Disputes*, WALL ST. J. (June 5, 2018), <https://www.wsj.com/articles/banks-pay-out-some-of-the-biggest-settlements-in-wage-disputes-1528189200> [<https://perma.cc/3UTN-PVTF>].

²³⁶ While extremely dated, the study remains the most recent comprehensive collection of data compiled by the FBI on this topic.

²³⁷ See CYNTHIA BARNETT, FBI, THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA 4 (2000), http://www.fbi.gov/about-us/cjis/ucr/nibrs/nibrs_wcc.pdf [<https://perma.cc/9NJ4-3CZK>].

²³⁸ See *id.* at 3.

²³⁹ *Id.* at 5.

with the dominant cultural (and legal) imagination of “white-collar crime.”

One response to this observation, of course, might be that the problem is definitional. White-collar crime was initially defined in the 1930s to refer to “high-status persons engaging in occupation-based crimes,”²⁴⁰ but the FBI now defines white collar crime as

synonymous with the full range of frauds committed by business and government professionals. These crimes are characterized by deceit, concealment, or violation of trust and are not dependent on the application or threat of physical force or violence. The motivation behind these crimes is financial — to obtain or avoid losing money, property, or services or to secure a personal or business advantage.²⁴¹

However, “[t]he term ‘white collar crime’ means different things to different disciplines, as well as to different camps within those disciplines.”²⁴² And there is a general lack of clarity as to whether the classification refers primarily to the identity of the defendant or the nature of the conduct. In short, the legal academic literature on “white-collar crime” reflects no consensus as to what makes this class of crimes distinct.

Such a line-drawing or categorization problem is hardly endemic to the realm of white-collar crime.²⁴³ Yet it is important to recognize who draws those lines: ultimately judges, but — in the first instance — law enforcement and prosecutors.²⁴⁴ And it appears that the definition of white-collar crime that is applied by these front-line actors is one that sweeps in many offenses involving small sums of money. The defendant labeled as a “white collar criminal” might just as well be someone who passes a bad check at a convenience store, as Bernie Madoff. Indeed, given the difficulty of obtaining a conviction in a complex financial

²⁴⁰ Miriam H. Baer, *Sorting Out White-Collar Crime*, 97 TEX. L. REV. 225, 227 n.2 (2018).

²⁴¹ *White-Collar Crime*, FBI, <https://www.fbi.gov/investigate/white-collar-crime> (last visited June 20, 2019) [<https://perma.cc/9U98-FG3C>].

²⁴² Gerald Cliff & Christian Desilets, *White Collar Crime: What It Is and Where It's Going*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 481, 482 (2014).

²⁴³ See Hessick, *supra* note 185; Ristroph, *Farewell to the Felonry*, *supra* note 143, at 564-65.

²⁴⁴ See generally Hessick, *supra* note 185 (arguing that prosecutors exercise more discretion and have less oversight than judges); Stuntz, *supra* note 170, at 521 (“Is the message the law that the legislature passes? Or is it the sum of the arrest and prosecution decisions of individual police officers and prosecutors?”).

fraud case involving well-resourced defendants,²⁴⁵ there is good reason to think that the bad check, rather than the massive Ponzi scheme, will be the offense that will lead to a prosecution, a conviction, and a prison sentence. Put simply, the cultural framing of white-collar crime does not appear to match the reality of the law or its enforcement. So, arguing for more white-collar enforcement, without greater specificity,²⁴⁶ need not yield the distributive consequences that proponents envision.²⁴⁷

As one particular corner of white-collar crime, wage theft criminalization should raise similar concerns. The general narratives, rhetoric, and intuitions that appear to guide criminalization proponents speak to a specific intersectional power dynamic: wealthy bosses (often coded as white or large corporate actors) are exploiting poor marginalized workers (often people of color, immigrants, and so on).²⁴⁸ Based on the data that we have, the claim that wage theft particularly harms these particularly vulnerable workers appears to be well-supported.²⁴⁹ Many of the industries identified as hotbeds of wage theft are disproportionately staffed by Black and Latinx workers, and, in several instances, are disproportionately staffed by women.²⁵⁰

²⁴⁵ See generally BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 1 (2014) (“It is hard to think of prosecutors as the little guy in any fight. Yet they may play the role of David when up against the largest and most powerful corporations in the world.”).

²⁴⁶ It’s possible that laws might be drafted to target specific classes of defendants or misfeasance on a particular scale. See OFFICE OF SENATOR ELIZABETH WARREN, *CORPORATE EXECUTIVE ACCOUNTABILITY ACT 2*, <https://www.warren.senate.gov/imo/media/doc/2019.4.2%20Corporate%20Executive%20Accountability%20Act%20Text.pdf> [https://perma.cc/2DU5-JY57] (specifying that prosecution may only involve defendants with a sufficiently significant impact on the market). That said, even such an approach raises a range of concerns. See Carissa Byrne Hessick & Benjamin Levin, *Elizabeth Warren’s Proposal to Imprison More Corporate Executives Is a Bad Idea*, SLATE (Apr. 4, 2019, 1:39 PM), <https://slate.com/news-and-politics/2019/04/elizabeth-warren-corporate-fraud-prison-negligence-mass-incarceration.html> [https://perma.cc/57NA-8U9A].

²⁴⁷ This dynamic is not uncommon in the realm of progressive criminalization projects. See, e.g., Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273, 273-74 (2015) (discussing whether provocation reform would reduce gendered violence); Levin, *Guns and Drugs*, *supra* note 25, at 2173 (describing how gun and drug law reform may not solve social problems).

²⁴⁸ See *supra* Part II.B.

²⁴⁹ See ANNETTE BERNHARDT, RUTH MILKMAN, NIK THEODORE, DOUGLAS HECKATHORN, MIRABAI AUER, JAMES DEFILIPPIS, ANA LUZ GONZÁLEZ, VICTOR NARRO, JASON PERELSHTYEN, DIANA POLSON & MICHAEL SPILLER, *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES* 2, 5 (2009), <https://s27147.pcdn.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf> [https://perma.cc/E743-CA8D] [hereinafter *BROKEN LAWS, UNPROTECTED WORKERS*].

²⁵⁰ See Mattera, *supra* note 235, at 3.

From a distributional standpoint, things get dicier when we look at the defendants (i.e., the bosses). Large corporate employers certainly have been singled out for wage theft enforcement actions.²⁵¹ The five parent companies assessed the largest cumulative penalties are Walmart (over \$1.4 billion), FedEx (over \$500 million), Bank of America (over \$380 million), and the poster-child for corporate misfeasance Wells Fargo (over \$200 million).²⁵² Yet, incarceration is not a part of the conversation in the regulation of these entities. Instead, many of the industries, employers, and workplaces identified in the literature on criminalization look very different. Commentators point to restaurants, construction, home care, nail salons.²⁵³ Exposés of these industries have prompted public outcry and have spurred calls for criminal prosecution — the victims are society’s most marginalized.²⁵⁴ But this narrative generally fails to reckon with the fact that many of these industries “consist[] of small, often immigrant-owned businesses.”²⁵⁵ Indeed, looking at press releases and media coverage resulting from criminal wage theft cases, the defendants often fit this description.²⁵⁶ That is, when district attorneys tout potential carceral sentences and set high bail amounts, they frequently are not dealing with high-ranking executives at multinational corporations; they are punishing middle

²⁵¹ See *id.* at 8-10.

²⁵² *Id.* at 9.

²⁵³ See, e.g., BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS*, *supra* note 249, at 4 (discussing construction and restaurants); MATTERA, *supra* note 235, at 22 (discussing restaurants); Dubal, *Winning the Battle*, *supra* note 214, at 751 (discussing construction, home care, and nail salons); Michele Gilman & Rebecca Green, *The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization*, 42 N.Y.U. REV. L. & SOC. CHANGE 253, 266 (2018) (discussing restaurants, construction, and nail salons).

²⁵⁴ See generally Nicole Taykhman, *Defying Silence: Immigrant Women Workers, Wage Theft, and Anti-Retaliation Policy in the States*, 32 COLUM. J. GENDER & L. 96, 96-100 (2016) (discussing a *New York Times* exposé of wage theft in the nail salon industry).

²⁵⁵ *Id.* at 100.

²⁵⁶ See, e.g., A.G. Underwood Announces Jail Time for Southampton Princess Diner Owner and Recovery Of \$132,000 in Stolen Wages for 23 Restaurant Workers, N.Y. ST. OFF. ATT’Y GEN. (Dec. 7, 2018), <https://ag.ny.gov/press-release/ag-underwood-announces-jail-time-southampton-princess-diner-owner-and-recovery-132000> [<https://perma.cc/LNR8-9T92>]; Contractor Sentenced for Criminal Wage Theft, False Reporting of Workers’ Comp Payments, WASH. ST. OFF. ATT’Y GEN. (July 27, 2018), <https://www.atg.wa.gov/news/news-releases/contractor-sentenced-criminal-wage-theft-false-reporting-workers-comp-payments> [<https://perma.cc/7M2N-556H>].

managers,²⁵⁷ minority business owners of small firms, and minor players in small markets.

This is not to say that the defendants in these cases — Sonny Nicholas the sixty-two-year-old contractor held on ten thousand dollars bail and facing a year in jail for his alleged failure to pay \$2,300;²⁵⁸ Sourin Babayan, the sixty-four-year-old contractor facing over fifty-seven years in prison and held on \$200,000 bail for allegedly stealing wages from workers on a public construction project²⁵⁹ — were blameless or did not harm workers. Rather, it is to stress that these defendants may not look like the corporate monoliths or captains of industry who are often painted as driving the exploitative employment practices that result in worker exploitation.²⁶⁰ Criminalization proponents still might be comfortable embracing carceral solutions if defendants were less affluent, non-white, or less representative of the “too-big-to-jail” set. Yet doing so would reflect a different distributive vision. It would reflect that harm was done along lines of relative, rather than absolute, power differentials and that criminalization proponents were comfortable with criminal solutions that might harm minority defendants or defendants who did not represent the “1%.”²⁶¹ That is, the clear victim-defendant binary that commentators embrace and that frames the parties at opposite ends of a stratified socioeconomic system might not actually

²⁵⁷ Cf. RENA STEINZOR, *WHY NOT JAIL?* 220 (2015) (noting that white-collar prosecutions often fail to bring down the most powerful or culpable actors, instead ensnaring middle managers).

²⁵⁸ Ana Goñi-Lessan, *Harris County Prosecutors Bring First Wage Theft Case over Harvey Paint Job*, HOUS. CHRON. (Sept. 9, 2018, 3:31 PM), <https://www.chron.com/news/houston-texas/houston/article/Harris-County-prosecutors-bring-first-wage-theft-13207906.php> [<https://perma.cc/YX23-FSMZ>].

²⁵⁹ See Beau Nicolette, *Glendale Man Indicted for Defrauding His Employees, Taking Wages*, L.A. TIMES (Oct. 9, 2013, 12:00 AM), <https://www.latimes.com/socal/glendale-news-press/news/tn-gnp-xpm-2013-10-09-tn-gnp-me-glendale-man-indicted-for-defrauding-his-employees-taking-wages-20131009-story.html> [<https://perma.cc/9QYG-P3KQ>].

²⁶⁰ A similar observation (i.e., that enforcement does not match cultural narratives) might be made in other areas where progressive or leftist commentators tend to be enthusiastic about criminal law from a distributive standpoint. See, e.g., GRUBER, *supra* note 26, at 5-6 (arguing that criminalization projects aimed at addressing gender inequality often reproduce other inequalities); Gabriel J. Chin, *The Problematic Prosecution of an Asian American Police Officer: Notes from a Participant in People v. Peter Liang*, 51 GA. L. REV. 1023, 1024 (2017) (highlighting the issues inherent in prosecuting an Asian-American police officer as a means of addressing racial injustice); Levine, *Police Prosecutions*, *supra* note 26 (arguing that prosecutions of police for their violent conduct seem to fall more heavily on officers of color).

²⁶¹ Cf. FORMAN, *supra* note 20, at 12 (examining this dynamic in regards to Black communities).

reflect the dynamic in each case (or, in the cases that prosecutors appear to be bringing).²⁶²

2. Legitimizing Capital and the Carceral State

Relatedly, the turn to criminal law in addressing wage theft risks legitimating the structures and structural flaws of both the criminal system and the contemporary market economy.²⁶³

First, by framing “wage theft” as a specific class of employer conduct that is fundamentally immoral and opposed to workers’ interests, proponents of wage theft criminalization risk legitimating other employer behaviors and structures of economic inequality.²⁶⁴ There are many practices that exacerbate inequality, that harm workers, or that enrich bosses at the expenses of their workers. Many of these practices are not only legal, but widely accepted. It is widely understood that U.S. labor and employment laws are less worker-friendly than they could be and that employers have wide latitude in decisions about hiring, firing, and workplace management.²⁶⁵ So, what does it mean to say that some class of conduct is “wage theft” while other conduct is not?

Indeed, as noted at the outset of this Article, radical left critics have long contended that the very structures of capitalism and wage labor

²⁶² See, e.g., Jody Armour, *N*ggas Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9, 55 (2014) (alteration in title) (“Macro-level perspectives—which an inflamed retributive urge obscures—can help law-abiding Americans see the common humanity in wrongdoers by helping them think beyond the boundaries of good and evil and praise and blame in criminal matters”); Shamir, *supra* note 211, at 135 (“The fixation on sex trafficking, with its supposedly clear-cut victims and villains, the focus on extreme cases, and the disregard for structural labor market inequalities hamper the development of effective anti-trafficking policies.”).

²⁶³ By legitimation, I refer to the Gramscian concept. See, e.g., LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in LENIN AND PHILOSOPHY AND OTHER ESSAYS 127 (Ben Brewster trans., 1971); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 236, 398 (1997); SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2189 (2013); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429-32 (1995).

²⁶⁴ Cf. generally Jamelia Morgan, *Rethinking Disorderly Conduct*, CALIF. L. REV. (forthcoming) (arguing that “disorderly conduct” laws construct the boundaries of what it means for conduct to be orderly and acceptable).

²⁶⁵ See JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994*, at 1 (1995); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 59-63 (2005); Klare, *Judicial Deradicalization of the Wagner Act*, *supra* note 3, at 265-70.

constitute theft. The Industrial Workers of the World, for example were famous for beginning public speeches with the cry of “Stop thief! I’ve been robbed. I’ve been robbed by the capitalist system.”²⁶⁶ This was not a legalistic claim about individual employers — rather it was a structural claim about the nature of wage labor.

I do not mean to suggest that there are not meaningful gradations on the spectrum of employer/employee relations. Rather, I mean to suggest that by cordoning off one class of conduct as criminal and deserving of moral opprobrium, criminalization proponents are sending a signal that the other conduct, the other rules, and the other structures of the market are *not* objectionable, immoral, or deserving of societal condemnation.²⁶⁷ That might be perfectly acceptable when it comes to many aspects of employment. And that would be a reasonable course of action if these commentators viewed it as morally acceptable for enormously profitable fast food companies to pay minimum wage or for employers to take full advantage of the at-will doctrine to fire vulnerable or precarious workers. But workers’ rights advocates routinely frame minimum or living wage campaigns in moral terms — it is immoral to pay a worker less than a living wage.²⁶⁸ If such lawful (and non-criminal) conduct is also objectionable, then I think there is harm done by drawing the line and identifying some set of conduct as criminal and as uniquely objectionable. If criminalization proponents are arguing that bosses should be caged because their conduct is immoral, then they

²⁶⁶ Linebaugh, *supra* note 28, at 1.

²⁶⁷ See Kahan, *supra* note 116, at 420 (“Economic competition may impoverish a merchant every bit as much as theft. The reason that theft but not competition is viewed as wrongful, on this account, is that against the background of social norms theft expresses disrespect for the injured party’s moral worth whereas competition (at least ordinarily) does not.” (footnote omitted)); cf. Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions and Procedural Protections*, 76 ALA. L. REV. 1777, 1777 (2013) (critiquing naturalized distinctions between criminal and non-criminal conduct); Ristorph, *Farewell to the Felony*, *supra* note 143, at 564-65 (same).

²⁶⁸ See, e.g., Michele Estrin Gilman, *Poverty and Communitarianism: Toward a Community-Based Welfare System*, 66 U. PITT. L. REV. 721, 814 (2005) (“Given the virtual stalemate in the economic arguments surrounding living wage statutes, the balance is tipped by the moral and symbolic value of these statutes as an expression of community norms, along with the personal dignity they afford to workers.”); Roger C. Hartley, *Preemption’s Market Participant Immunity — A Constitutional Interpretation: Implications for Living Wage and Labor Peace Policies*, 5 U. PA. J. LAB. & EMP. L. 229, 243 (2003) (“The case for living wage ordinances . . . revolves primarily around moral claims”); Paul Krugman, *Living Wage: What It Is and Why We Need It*, WASH. MONTHLY (Sept. 1, 1998), <https://www.thefreelibrary.com/Living+Wage:+What+It+Is+and+Why+We+Need+It.-a021103427> [<https://perma.cc/L45E-GWL3>] (“And yet there is a problem with markets: They are absolutely and relentlessly amoral. Labor, in a market system, is just another commodity”).

are implicitly sending a message that other employers' conduct is not immoral, or, at least that it is different in kind.²⁶⁹ (Or, if they truly are embracing a carceral worldview, then why shouldn't *all* employer misconduct be criminalized?) Contrary to advocates' contentions, the turn to criminal law entrenches a narrative where the real problem is a few bad apples or bad actors, rather than a deeper set of structural problems.²⁷⁰ Using criminal law to address

the social question in a strong form would contradict the fundamental logic of both the criminal system and the penal system as presently constituted. In keeping with the basic ideologies of individualism, these institutions were structured around 'the individual,' making it impossible . . . to put society in the dock.²⁷¹

Indeed, the legitimating effect is exacerbated by the capacious understanding of who is a victim of wage theft. Instead of confining victimization to workers, many criminalization proponents (and many commentators on wage theft, generally) take a broader view. Former Secretary of Labor Hilda Solis, for example, has argued that wage theft "harms the business owners who do play by the rules" because they face unfair competition from bosses who underpay,²⁷² while Bobo and others argue that the state is a victim because it is deprived of tax revenue.²⁷³ As a descriptive matter, that may be true — indeed, this sweeping understanding of victimhood echoes the sweeping understanding of

²⁶⁹ Cf. JACQUES DERRIDA, *OF GRAMMATOLOGY* 141-64 (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1976) (describing the theory of supplementary relationships).

²⁷⁰ Cf. Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 79 n.285 (2004) ("[P]eople blame disposition for the bad conduct, partly (we suspect) in order to minimize the problem and isolate its cause — like looking for bad apples and ignoring the barrel or the tree. Doing so helps to maintain the legitimacy of the system.").

²⁷¹ DAVID GARLAND, *PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES* 175 (2018) [hereinafter *PUNISHMENT AND WELFARE*] (internal quotation marks omitted).

²⁷² Solis, *supra* note 73.

²⁷³ See, e.g., BOBO, *supra* note 10, at 42-47; CTR. FOR POPULAR DEMOCRACY, *A PRACTICAL GUIDE TO COMBATTING WAGE THEFT: LESSONS FROM THE FIELD* 27 (2017), https://populardemocracy.org/sites/default/files/WTHandbook-web_output%20%281%29.pdf [<https://perma.cc/79L6-NUQT>] ("It is also strategic to emphasize that law-abiding businesses have nothing to fear, as cracking down on wage theft only impacts the bad actors that hurt all of us."); Gerstein, *Stealing from Workers Is a Crime*, *supra* note 73 ("They also harm law-abiding businesses, who struggle to compete with bottom feeders.").

harm discussed earlier.²⁷⁴ And, of course, this logic echoes general “race-to-the bottom” arguments in favor of regulation.²⁷⁵ Yet, this broad frame suggests that labor markets and labor market regulation otherwise are both moral and acceptable. This conception of victimhood also evokes the idea of a “crime against the market,” a longstanding trope of prosecutions aimed at labor unions and left radicalism dating back at least to the nineteenth century.²⁷⁶ Rather than workers or even consumers as victims, the market as victim implies a troubling naturalization of market ordering.²⁷⁷ That is, the market generally is framed as just and good; the deviant behavior of bad bosses threatens to upset that balance.²⁷⁸

Second, by turning to criminal law and defending its controversial practices (prosecutorial discretion, lengthy sentences, hefty cash bail, etc.), criminalization proponents further prop up the much-maligned institutions of the carceral state.²⁷⁹ The story of criminal law and its enforcement over the last half century is a story of ballooning prison populations, unconstrained prosecutorial power, and the mass surveillance and incarceration of marginalized populations. To most

²⁷⁴ See *supra* Part II.A.

²⁷⁵ See, e.g., *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 557-67 (1933) (Brandeis, J., dissenting) (“The race was one not of diligence but of laxity.”); RAPHAEL KAPLINSKY, *GLOBALIZATION, POVERTY, AND INEQUALITY: BETWEEN A ROCK AND A HARD PLACE* 163-232 (2005); ROBERTO MANGABEIRA UNGER, *FREE TRADE REIMAGINED: THE WORLD DIVISION OF LABOR AND THE METHOD OF ECONOMICS* 193-98 (2007); Dubal, *The Drive to Precarity*, *supra* note 176, at 91 (“Savvy to the fact that a ‘race to the bottom’ on rates was not good for taxi workers who would only see their salaries lowered and the income from their commissions decrease, the Chauffeur’s Union pushed . . . to establish a ‘minimum rate’ . . .”).

²⁷⁶ See generally CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 149 (1993); Benjamin Levin, *American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law as Market Control*, 48 HARV. C.R.-C.L. L. REV. 105, 145-50 (2013).

²⁷⁷ This concept of a natural or naturalized market has long been a target of left legal scholarship. See, e.g., Christine Desan, *The Market as a Matter of Money: Denaturalizing Economic Currency in American Constitutional History*, 30 LAW & SOC. INQUIRY 1, 5 (2005) (discussing characterizations of the market as “natural”); Hale, *supra* note 9, at 474-75.

²⁷⁸ Cf. Douglas Hay, *Property, Authority and the Criminal Law*, in *ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* 17, 19 (1975) (“Forgers, for example, were almost invariably hanged, and gentlemen knew why: ‘Forgery is a stab to commerce, and only to be tolerated in a commercial nation when the foul crime of murder is pardoned.’”).

²⁷⁹ For similar accounts in other areas of criminal law, see, for example, Gruber, *supra* note 26, at 6 (critiquing the turn to criminal law to address gender subordination); Levin, *Mens Rea Reform*, *supra* note 25, at 528-540 (critiquing the turn to criminal law as the means of regulating industry).

scholars of criminal law, the core institutions have experienced (and are experiencing) a major crisis of legitimacy.²⁸⁰ To radical and abolitionist critics, the system is rotten to its core — mass incarceration and the carceral state are inherently linked to a history of structural racism, social control, and oppressive hierarchy.²⁸¹ To other critics, the system is very much in need of reform and right-sizing to dial back dramatic racial disparities and refocus recourses and incentives.²⁸² Either way, the growing scholarly consensus on the criminal system is that it is hardly a paragon of good governance and that turning to criminal law should raise a lot of red flags.²⁸³

The rhetoric and policy proposals of wage theft criminalization proponents appear entirely divorced from this discourse and appear to have done little to internalize those critiques. In these accounts, there might be some bad or objectionable areas of criminal law enforcement (e.g., drug crime) that are defined by racially discriminatory policing, abusive prosecutions, and unnecessary incarceration. But, to these commentators, wage theft is different. Here, prosecutors are trustworthy, defendants are deserving of punishment, and the full force of state violence cannot come swiftly enough.²⁸⁴

This desire to exceptionalize one area of criminal law is hardly exceptional to wage theft. But turning to criminal law here risks legitimating all of the other problematic institutions and dynamics that define other corners of the criminal system. If prisons are inhumane and degrading to conceptions of dignity, why not when the defendant has committed wage theft? If plea bargaining effectively robs a defendant of her constitutional rights and coerces her into waiving a fair trial, then why should plea bargaining in wage theft cases be okay? And, if the

²⁸⁰ See generally Levin, *Consensus Myth*, *supra* note 25 (questioning the consensus on the core issues of criminal policy).

²⁸¹ See, e.g., SPADE, *supra* note 20, at 19 (discussing prison abolition); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1419 (2016) (arguing that the criminal system is designed to do harm); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1684 (2019) (using an “abolitionist framework”); McLeod, *Envisioning Abolition Democracy*, *supra* note 87 (critiquing the U.S. criminal system as fundamentally irredeemable); Roberts, *Abolition Constitutionalism*, *supra* note 20 (framing constitutional litigation against the backdrop of a long history of racism and colonialism); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2019) (using an abolitionist framework).

²⁸² See Levin, *Consensus Myth*, *supra* note 25, at 270 (describing this view).

²⁸³ See *id.* at 259.

²⁸⁴ See, e.g., Gerstein & Seligman, *supra* note 215 (“[P]rosecutors . . . are not likely to impose criminal sanctions on a whim . . .”).

legislative and judicial failure to rein in prosecutors is a problem elsewhere, why not here?

By embracing uncritically the institutions of criminal law, proponents of wage theft criminalization send a dangerous message: those practices really are not so bad *as long as the defendant is deserving*.²⁸⁵ Further, they send a message to politicians and prosecutors that the way to appease progressives and to address inequality is to continue to “govern through crime.”²⁸⁶ This pattern creates bad incentives and stands to reward actors who are otherwise criticized for being outwardly hostile to egalitarian and redistributive projects.

To a hammer, the saying goes, everything is a nail. And, to a prosecutor, everything is a crime. Or, more accurately, the way to address each problem should come via criminal law and prosecution. Take the example of former Attorney General Jeffrey Sessions and his treatment of transgender rights. Upon taking office, Sessions quickly took steps to roll back protections for transgender individuals in schools and workplaces.²⁸⁷ At the same time, though, Sessions devoted substantial resources to prosecuting federal hate crimes against transgender victims, in one case sending a senior trial attorney to Iowa to take the lead on the murder case of transgender high schooler Kedarie Johnson.²⁸⁸

Regardless of one’s views on the merits of the Johnson case, it is important to recognize the narrow vision of civil rights and egalitarian politics that Sessions embodied. In this vision, the identity of the victim needn’t be important, and neither does the broader expressivist message that might be sent about holding transphobic people accountable.

²⁸⁵ *But cf.* THOMPSON, *supra* note 33, at 266 (“It is true that in history the law can be seen to mediate and to legitimize existing class relations. Its forms and procedures may crystalize those relations and mask ulterior injustice. But this mediation, through the forms of law, is something quite distinct from the exercise of unmediated force. The forms and rhetoric of law acquire a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless.”).

²⁸⁶ See generally SIMON, *GOVERNING THROUGH CRIME*, *supra* note 21 (arguing that criminal law has become the dominant governance paradigm in the United States).

²⁸⁷ See, e.g., Jeremy W. Peters, Jo Becker & Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html?module=inline> [https://perma.cc/8XKZ-F5R3]; Charlie Savage, *In Shift, Justice Dept. Says Law Doesn’t Bar Transgender Discrimination*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/politics/transgender-civil-rights-act-justice-department-sessions.html?module=inline> [https://perma.cc/ZQ2L-8UX8].

²⁸⁸ See Matt Apuzzo, *Aiding Transgender Case, Sessions Defies His Image on Civil Rights*, N.Y. TIMES (Oct. 15, 2017), <https://www.nytimes.com/2017/10/15/us/politics/jeff-sessions-transgender.html> [https://perma.cc/D5KE-XW37].

Instead, the motivation for state action might be nothing more than the need to identify bad actors and punish them harshly for their bad conduct. Law breakers are law breakers. And law breakers deserve punishment. By clamoring for prosecutions, and hailing the harsh, punitive approach, commentators, activists, and scholars risk rewarding and reinforcing that vision.

Further, despite claims about empowering workers that tend to underpin wage theft activism,²⁸⁹ this embrace of criminal law does not redistribute power or resources from bosses to workers; it distributes more power to the institutions of the carceral state. Jocelyn Simonson has argued that radical critics of the criminal system should view proposed reforms through a “power lens” and ask how power would be distributed: would marginalized communities and the relatively powerless or disempowered benefit, or would the reform strengthen the criminal apparatus?²⁹⁰ As discussed above, there certainly might be ways to address wage theft in a way that prioritized paying workers, restoring their dignity, or empowering them in the labor market.²⁹¹ Instead, the turn to criminal law is shifting more power not just to the state, but to its punitive arm (an arm that, all else aside, is ill equipped to redistribute on these terms).²⁹² As Monica Bell has argued, for scholars concerned about marginalized communities, “increasing the power of the state bears at most a spurious relationship to the outcome of concern, which is social inclusion across groups.”²⁹³ And despite appeals to social inclusion for harmed workers made by criminalization advocates, it is not clear that criminal enforcement would or could advance those ends. Indeed, one major concern in using criminal law to address wage theft is that workers (particularly undocumented workers who face deportation) might actually suffer as a result of law enforcement intervention in their workplaces.²⁹⁴ That is, the outsider and marginal

²⁸⁹ See *supra* Parts II.A, II.E; see also Marzán, *Wage Theft as Crime*, *supra* note 17, at 301 (arguing that criminalization and prosecution are justified because they are supported by workers and movement actors).

²⁹⁰ See generally Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. (forthcoming 2021).

²⁹¹ See *supra* Part III.A.

²⁹² See Kate Levine & Benjamin Levin, *Redistributing Justice* (unpublished manuscript) (on file with author); cf. Gruber, *A Distributive Theory*, *supra* note 72, at 16 (arguing that criminal law does distributive work, but in terms of distributing pain and, perhaps, pleasure, not power or resources).

²⁹³ Bell, *Police Reform*, *supra* note 169, at 2087.

²⁹⁴ Cf. Chris Bragg, *Amid Wage Fight with Guilderland Restaurant, Cook Is Seized by ICE Agents*, TIMES UNION (Aug. 22, 2019), <https://www.timesunion.com/news/article/In-fight-with-Albany-restaurant-cook-is-seized-14371045.php> [<https://perma.cc/8557->

status of the workers might remain, even if their status as “crime victims” were solidified.²⁹⁵

Intentionally or not, proponents of wage theft criminalization are providing positive reinforcement for a punitive, prosecutorial impulse that strengthens the institutions of the carceral state. At the same time that activists, academics, and politicians across the political spectrum are fighting to rein in the punitive drive that defined decades of carceral policies and politics, the arguments by criminalization proponents reflect a troubling retrenchment. Rather than thinking outside of the box or the rubric of “governing through crime,”²⁹⁶ advocates for workers’ rights have doubled down on the politics of the carceral state. Former New York State labor enforcement attorney Terri Gerstein, for example, argues that increasing wage theft prosecutions should be a priority of progressive voters:

There are scores of district-attorney seats in play in November, as well as over 30 state-attorney general elections. Criminal-justice advocates have rightly set their sights on these races, hoping to unseat some of the district attorneys whose “tough on crime” policies tend to be limited to offenses like drug violations or traffic infractions. Yet these contests also present an opportunity to elect leaders who understand the importance of judiciously using criminal law to address serious employer abuses, like wage theft, sexual assault, and utterly avoidable workplace injuries and fatalities.²⁹⁷

The message is not that “progressive prosecutors” should be engaged in a project of decarceration and dialing back the apparatus and institutions of criminal enforcement. Instead, it is that being a progressive prosecutor means prosecuting more aggressively some class of crimes that progressives care more about. The question remains, of course, “*care more about than what?*”

This position reflects a troublingly narrow view of just what’s wrong with the U.S. criminal legal system. Criticizing mass incarceration has

AC39] (describing the case of an undocumented Chinese immigrant who was seized by ICE after testifying against his employer in a civil wage-theft suit). *See generally* Lee, *supra* note 13 (discussing the various hardships undocumented workers face when employers steal their wages).

²⁹⁵ Cf. Roberts, *Victims, Right?*, *supra* note 89 (manuscript at 5) (arguing for an abolitionist conception of victimhood that focuses on harm, rather than lawbreaking).

²⁹⁶ *See generally* SIMON, *GOVERNING THROUGH CRIME*, *supra* note 21 (discussing the use of criminal law as a response to social problems).

²⁹⁷ Gerstein, *Stealing from Workers Is a Crime*, *supra* note 73.

become a staple of academic, political, and popular discourse. And, particularly among progressives and those on the left, signaling disgust with the contemporary state of the criminal system has become a means of shoring up political *bona fides*. Indeed, with the popularity of Michelle Alexander's *The New Jim Crow* and Ava DuVernay's *13th*,²⁹⁸ not to mention the consciousness-raising of the Movement for Black Lives, "structural racism" has entered the vernacular and being anti-mass incarceration has become a practical requirement of being an early-twenty-first-century progressive.²⁹⁹

But what exactly does it mean to be against mass incarceration if one is quick to turn to criminal law solutions? The next Part takes up that question.

IV. CARCERAL PROGRESSIVISM

In this final Part, I step back to ask how we can or should reconcile the drive for wage theft criminalization with the stated left/egalitarian/redistributive politics of proponents. Over the past few decades, legal scholars have focused more and more attention on the political economy of criminal law. Frequently, those treatments emphasize the relationship between mass incarceration and the forces of neoliberalism.³⁰⁰ "Liberal market economies," Darryl Brown contends, "not only favor weaker social safety nets and less regulated markets, they also tend to rely more on imprisonment as an instrument of social order."³⁰¹ In these accounts, criminal law or "neoliberal penalty" actually coincides with deregulatory policies. That is, advocates of deregulation come to endorse criminal punishment as the

²⁹⁸ 13TH (Kandoo Films 2016).

²⁹⁹ Popular press outlets increasingly use the phrase, accompanied by broader critiques of the criminal system as perpetuating white supremacy. See, e.g., Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power — and Learns the Limits — of His Office*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [https://perma.cc/R7BY-F659]; Leah Sakala & Nicole D. Porter, Opinion, *Criminal Justice Reform Doesn't End System's Racial Bias*, USA TODAY (Dec. 12, 2018, 7:55 PM), <https://www.usatoday.com/story/opinion/policing/politics-policing/2018/12/12/racial-injustice-criminal-justice-reform-racism-prison/2094674002/> [https://perma.cc/GNX4-9XRA]; Serena Sonoma, *Study Shows Police Shootings Are Hurting Black People's Mental Health*, TEEN VOGUE (July 11, 2018), <https://www.teenvogue.com/story/study-shows-police-shootings-are-hurting-black-peoples-mental-health> [https://perma.cc/FE5E-4LHC].

³⁰⁰ See sources cited *supra* note 18.

³⁰¹ BROWN, *supra* note 18, at 207.

sole acceptable province of the state and of state regulatory force.³⁰² A turn towards harsher and more intrusive criminal law complements, rather than contradicts, a deregulatory turn in the civil or administrative realms.³⁰³ I find that account compelling, but it has little to say about pro-regulatory forces. It explains how the advocates of deregulation on the right and in the neoliberal recesses of the center-left have come to embrace criminal law. Yet, how can or should we understand the role of the left (broadly conceived) in the rise of the carceral state?³⁰⁴ Or, put differently, what is the relationship between *pro-regulatory* policy positions and attitudes toward mass incarceration?³⁰⁵

That relationship is one I have explored in past work,³⁰⁶ and one which I plan to explore at much greater length in future work. Here, though, I simply wish to note briefly the ways in which Progressivism (in the capital “P” sense) and a punitive impulse have much in common. Contemporary left-liberalism/progressivism tends to embrace decarceral language and critiques of the criminal system.³⁰⁷ Yet, time and again, progressive commentators endorse carceral ends as a means of addressing inequality and social problems about which they care.³⁰⁸ As Aya Gruber explains this dynamic:

On the one hand, critical race and feminist scholars are by and large vocal critics of the American penal state. The critique primarily comes in the form of observations about the authoritarian criminal justice apparatus’s punitive, masculinist nature and disproportionate effects on minority men. On the other hand, much of left-leaning criminal law scholarship involves identifying various crimes against minorities and women (domestic violence, rape, hate crimes, etc.), exposing

³⁰² See, e.g., Harcourt, *supra* note 9, at 40-44 (“Neoliberal penalty facilitates passing new criminal statutes and wielding the penal sanction more liberally because that is where government is necessary, that is where the state can legitimately act, that is the proper and competent sphere of politics.”).

³⁰³ See, e.g., BROWN, *supra* note 18, at 185 (“In contrast to a general skepticism of government power, that popular endorsement reflects a strong, basic *trust* in the state’s criminal justice administration, and especially in its strong version of executive enforcement discretion.”).

³⁰⁴ See sources cited *supra* note 26.

³⁰⁵ Cf. Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 LAW & PHIL. 437, 445 (2004) [hereinafter *Guns and Drugs: Case Studies*] (noting potential tensions).

³⁰⁶ See sources cited *supra* note 25.

³⁰⁷ See *supra* Part III.B.

³⁰⁸ See Gruber, *When Theory Met Practice*, *supra* note 207; Levin, *Mens Rea Reform*, *supra* note 25, at 529.

the lackluster police and prosecutorial responses to such crimes, and calling for reforms targeted toward increasing arrests, prosecutions, convictions, and sentence severity. Thus, left-leaning legal scholars are in the contradictory position of regarding the U.S. criminal system as cruel, sexist, racist, and unfair, but investing more power in that very system in the hope of reducing crime against minorities.³⁰⁹

So, what should we make of this contradiction, this punitive preference framed in critical terms?

This carceral turn might be, and has been, explained in terms of interest convergence (i.e., criminal law might not have been the first choice, but it reflected a compromise with other powerful actors) and in terms of carve-outs (i.e., there is a core decarceral commitment, but for some reason an exception should be or has been made in this area). These explanations for progressive support for punitive policies are appealing and help explain various political and academic moves over the years.³¹⁰ Perhaps they might even explain the carceral turn among workers' rights proponents.

First, take interest convergence: as Derrick Bell famously argued, structural racism and inequality generally prevented the powerless and the marginalized from winning formal legal victories; but, when the interests of the powerless converged with those of more powerful actors, formal legal and political victories could be won.³¹¹ Importantly, though, Bell and generations of critical scholars have shown that these apparent legal victories for minorities often go a long way towards advancing the interests of the powerful.³¹² As in the example involving

³⁰⁹ Gruber, *When Theory Met Practice*, *supra* note 207 (footnotes omitted).

³¹⁰ Indeed, as noted above, I have endorsed both explanations elsewhere. See Levin, *Guns and Drugs*, *supra* note 25, at 2215-16; Levin, *Mens Rea Reform*, *supra* note 25, at 529-30.

³¹¹ See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 165-78 (Oxford Univ. Press 2004).

³¹² See, e.g., Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003) (stating that meaningful relief only came once those in power decided that ending discrimination furthered more important policies); Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 916 (2008) (discussing how accommodations for disabled people also provides a benefit to non-disabled people); Gruber, *Equal Protection*, *supra* note 226, at 1365-66 ("A poignant example is domestic violence reform, where feminists' interest in fair treatment of female victims converged with prosecutors' interest in punishing batterers, resulting in punitive policies that actually devalued and materially harmed women. Lawmakers' and other state actors' receptivity to disparity claims vary by their interests, and the criminal arena is one in which punitive interests are ascendant."); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1764 (2003) (reviewing

Attorney General Sessions and transgender rights,³¹³ perhaps this is a place where interests converge between a powerful group (i.e., advocates of law and order) and a less powerful group (i.e., advocates for low-wage workers). Political gridlock and polarization might make other regulatory approaches impracticable, but the power of the prosecution lobby makes criminalization an ever-attractive option. Or, it is not that criminal law is the desired solution to a social problem; it is that political realities make criminal law the only meaningful option.³¹⁴

Second, the carve-out or exceptionalization thesis suggests that reform advocates may still adopt “tough-on-crime” views when confronted with specific areas of criminal law that they view as “different.”³¹⁵ This pattern often plays out in areas where there is perceived to be a history of underenforcement or where the victim is viewed as particularly vulnerable, and the defendant particularly powerful or unsympathetic.³¹⁶ Elsewhere, I have described this

FRANCISCO VALDES, JEROME MCCRISTAL CULP & ANGELA P. HARRIS, *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (Temple University Press 2002)) (discussing interest convergence in the employment context); Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980) (explaining *Brown* in terms of interest convergence).

³¹³ See *supra* notes 287–88 and accompanying text.

³¹⁴ See, e.g., FORMAN, *supra* note 20, at 12-13; Elizabeth Hinton, Julilly Kohler-Hausmann & Vesla M. Weaver, Opinion, *Did Blacks Really Endorse the 1994 Crime Bill?*, N.Y. TIMES (Apr. 13, 2016), <https://www.nytimes.com/2016/04/13/opinion/did-blacks-really-endorse-the-1994-crime-bill.html> [<https://perma.cc/YJ8F-RQFA>] (“Policy makers pointed to black support for greater punishment and surveillance, without recognizing accompanying demands to redirect power and economic resources to low-income minority communities.”).

³¹⁵ See Husak, *The Price of Criminal Law Skepticism*, *supra* note 121, at 51-52 (“Even those members of the public who tend to agree that the criminal justice system punishes too many persons with too much severity can be heard to complain when leniency is afforded to certain kinds of offenders. . . . Among liberals, justice is said to be denied when police are not punished for using excessive force against unarmed minorities, when prosecutors are reluctant to indict white collar criminals, or when sexual offenders escape their just deserts.”).

³¹⁶ See, e.g., Ely Aharonson, “Pro-Minority” Criminalization and the Transformation of Visions of Citizenship in Contemporary Liberal Democracies: A Critique, 13 NEW CRIM. L. REV. 286, 287 (2010) (discussing how social movements have resorted to criminalization campaigns to advance social equality); Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 202 (2020) (defining progressive punitivism as “a logic that wields the classic weapons of punitive law — shaming, stigmatization, harsh punishment, and denial of rehabilitation — in the service of promoting social equality”); Stuntz, *supra* note 170, at 507 (“[C]riminal law’s breadth is old news. It has long been a source of academic complaint; indeed, it has long been the starting point for virtually all the

phenomenon as “carceral exceptionalism” because it appears to reflect an understandably human, but also troubling impulse to suggest that one’s particular problem or area of concern merits a solution that is uncalled-for in other areas.³¹⁷ In the context of wage theft, think of the ways in which criminalization proponents have stressed the power dynamic between workers and bosses, the relative social standing of the defendants, and the harm done to victims as ways of explaining why wage theft is different from other areas of criminal law.³¹⁸

Interest convergence and carceral exceptionalism are helpful explanatory frames that shed light on the move to push for criminalization of wage theft. Nevertheless, I think they miss another important possibility: that progressive proponents of criminalization truly are enthusiastic. That is, criminalization might not be a last-ditch compromise, a cynical calculation, or a solution arrived at after grappling with the broader flaws of mass incarceration. Instead, perhaps criminalization — for some progressive activists, advocates, and scholars — stands as the apotheosis of what they believe the state should do.³¹⁹ Rather than a least-worst regulatory solution, criminalization is the right way to address deeply immoral employer conduct. Indeed, in numerous calls for prosecution, commentators observe that regulatory agencies *have* investigated and punished employers, but that the punishment strikes them (the commentators) as insufficient to deter future theft.³²⁰

scholarship in this field, which (with the important exception of sexual assault) consistently argues that existing criminal liability rules are too broad and ought to be narrowed.”).

³¹⁷ See Levin, *Mens Rea Reform*, *supra* note 25, at 548-49. In other work, Aya Gruber and I describe this same phenomenon as reflecting a willingness to create “carve outs.” See Aya Gruber & Benjamin Levin, *Abolitionisms* (Sept. 27, 2019) (unpublished manuscript) (on file with author); see also Aya Gruber, *#MeToo and Mass Incarceration*, 17 OHIO ST. J. CRIM. L. 275, 279 (2020) (“How come gender crime gets a carve-out from or even veto over criminal justice reform?”).

³¹⁸ See *supra* Part II.B.

³¹⁹ Cf. HAY, *supra* note 278, at 62 (“The sanction of the state is force . . .”).

³²⁰ See, e.g., Luke Darby, *Is Your Employer Stealing from You?*, GQ (Nov. 8, 2019), <https://www.gq.com/story/wage-theft> [<https://perma.cc/4KTZ-FSRM>] (arguing that jail time is necessary to deter wage theft); Reyes, *supra* note 220 (“The new unit represents another avenue for recourse for workers in Philadelphia, one that carries more serious penalties than those that can be levied by the city’s Office of Labor, which can fine employers who break city laws by stealing wages or not providing mandated paid sick leave. (The Office of Labor can also revoke business licenses but has never done so, opting for a less aggressive course of action.) Fines, however, do not always deter bad employers, said Chris Woods, executive vice president of health-care union District 1199C, who advocated for the unit’s creation.”).

The possibility of progressive enthusiasm finds purchase in scholarship on white-collar crime that stresses the particular appeals of punishment to U.S. voters. James Whitman, for example, has argued that the U.S. appetite for white-collar punishment differs from many European approaches and can be traced to a particular brand of populism.³²¹ Similarly, Miriam Baer has described the ways that punishment holds both psychological and rhetorical advantages over non-criminal regulatory approaches to corporate misfeasance.³²² Put simply, it is much easier to understand that a wealthy actor has broken the law and will lose her liberty, than it is to appreciate the intricacies of the Sarbanes-Oxley Act or the terms of a U.S. Securities and Exchange Commission settlement agreement.

The distinction between pragmatic necessity and ideological commitment may well be a significant one.³²³ If the problem were simply one of mobilization, organizing, or garnering sufficient votes, then the solution might sound in political adjustments. Such adjustments are, of course, easier said than done. But they suggest that there is a *real* agreed upon goal, and that goal is not punitive or carceral in nature. Criminal law is a result of “pathological politics,” which, if fixed, might give way to a more effective welfare state and more effective non-criminal regulatory solutions.³²⁴ Advocates have turned to criminal law simply because of an otherwise limited menu of options.³²⁵ Reading the rhetoric of wage theft criminalization proponents (and, many other progressive commenters addressing progressive criminalization projects), though, it is difficult to conclude that incarceration is not the real end goal.³²⁶

³²¹ JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 7-10, 47, 80-82 (2003).

³²² See Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 581 (2012) [hereinafter *Choosing Punishment*].

³²³ Of course, the distinction often might not be so clear, and there might be good reason to think that a punitive impulse coexists with a pragmatic preference.

³²⁴ See Stuntz, *supra* note 170, at 521 (describing criminal law’s pathological politics).

³²⁵ See generally LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME & DEMOCRATIC POLITICS* (Oxford Univ. Press 2016) (arguing that voters’ preference for criminal law often results from a limited set of non-criminal choices).

³²⁶ Perhaps this characterization isn’t fair: maybe the rhetoric I identify is simply the product of political necessity and an attempt to frame arguments in a way that will be as emotionally resonant as possible. One doesn’t make a bounded call to action in this age of social media. Perhaps, but the claim that proponents don’t really mean what they say shouldn’t do much work for two reasons. First, if that’s the case, the legitimization concerns outlined above should be a major problem — arguing for incarceration when you don’t really mean it sends a bad message and reinforces our cultural belief that

Much criminal law scholarship operates from a starting assumption that criminal law should be a tool of last resort and that the turn to governance through crime reflects a major social failing. Meanwhile, scholars of white-collar and regulatory crime have bemoaned the socio-political forces that have led to criminal law, rather than civil or regulatory measures becoming the dominant paradigm for addressing misfeasance by market actors.³²⁷ The arguments described in Parts II and III, though, reflect a very different world view — a view that criminal law is the right (and perhaps natural) vehicle for addressing bad conduct or social problems.³²⁸

My claim here is that a strong strand of Progressive thought and political action views criminal law as an appropriate *and desirable* way of regulating. To a certain extent, this is an historical and theoretical argument that requires much more space than this Part and this Article afford. Yet, from the Temperance Movement, to the rise of federal criminal law during the Roosevelt administration, to the movements to address race- and gender-based violence, a substantial strand in Progressive thought treats criminal law as the gold standard in the regulator project — the ultimate signal of the state's moral force, and

accountability and incarceration are synonymous. But, second, I think that hiding behind pragmatism undersells the sort of righteous indignation motivating the calls to criminalize wage theft. Substantial political capital is being spent on encouraging prosecutions and amping up statutory penalties. That is political capital that could be spent elsewhere on other projects designed to address economic inequality. Cf. Gruber, *When Theory Met Practice*, *supra* note 207 (“Liberal faith in the criminal apparatus as a solution to the problems of racial and gender subordination may serve to legitimize our status quo criminal system, strengthen the discourse of individualism that prevents greater institutional change, and distribute scholarly capital away from emphasizing the structural nature of racial and gender oppression.”); Dean Spade, *Their Laws Will Never Make Us Safer*, in *AGAINST EQUALITY: PRISONS WILL NOT PROTECT YOU* 4-9 (Ryan Conrad ed., 2012). And, as I argue more generally in this Part, I think such an appeal to pragmatism fails to take criminalization proponents at their word and to recognize the strong ideological and moral claim that underpins their prosecutorial impulse.

³²⁷ See, e.g., Baer, *Choosing Punishment*, *supra* note 322 (discussing societal preference for criminal punishment over civil regulation); Darryl K. Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL'Y 657 (2011) (arguing that criminal law has wrongly been used for regulatory tasks that should be governed by civil law mechanisms); John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 198 (1991) (describing trends that have led to the expansion of criminal law).

³²⁸ See SAMUEL W. BUELL, *CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE* 231-32 (2016) (suggesting that skepticism about criminalizing financial misconduct is not “widely shared” outside of conservative, business friendly spaces).

the ultimate signal that the morality of the state maps onto a broader reformist (or P/progressive) vision of society.

Framed in this way, the liberal-progressive flirtation with anti-carceral politics, then, might be more an anomaly or historical contingency than a defining political feature. The association of some broadly conceived left with an anti-prosecutorial or pro-defendant ethos might have more to do with the practical realities of “criminal justice” in the United States than with any fundamental skepticism about prosecution or punitivism. That is, the administration of criminal law may have been problematic as a manifestation of deep racism and classism (see, for example, the Warren Court’s targeting of notoriously racist state criminal enforcement).³²⁹ But, incarceration and criminal prosecution were hardly antithetical to the P/progressive project. In fact, prosecution might have been essential to advancing a certain vision of progressive governance.

My suggestion is that we might (and perhaps should) understand a significant strand of historical Progressivism as — first and foremost — defined by its statism. Society is beset by many problems, and the state should be there to fix them. If that is a fair statement of purpose, then it should cause little surprise that progressive criminalization proponents do not see the internal flaws of the carceral state and its prosecutorial apparatus as deal breakers; instead, they call for the institutions’ improvement, for better technocratic approaches, or better democratic inputs.

Perhaps this entire discussion might highlight the ways in which much writing and thinking about criminal law reflects an uncritical acceptance of the criminalization/regulation distinction. To libertarian critics, criminal law might be particularly objectionable precisely because it is viewed as the most obtrusive form of regulation or state

³²⁹ See, e.g., Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 93 (2000) (“[I]t is erroneous to conceive of these landmark criminal procedure cases as instances of judicial protection of minority rights from majoritarian oppression. Rather, they better exemplify the paradigm of judicial imposition of a national consensus on resistant state outliers (with the qualification that even the southern states generally accepted these norms in the abstract).”); Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1916 (2006) (“Indeed, the wholesale criminal procedure revolution wrought by the Warren Court in the 1960s was in large part an attempt to bring outliers — again, mostly southern states — up to a national standard of due process in criminal cases.”). But see Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 929 (2014) (critiquing the scholarly focus on “outliers”).

intervention.³³⁰ Yet, many commentators on the left (broadly conceived) tend to treat non-criminal regulation as a social good, while expressing skepticism about the criminal system. But, to channel the insights of the legal realists (if not Hayek), the state is always waiting to enforce non-criminal regulations. And that means the police powers and the prospect of state violence are inextricable from any regulatory project.³³¹ Or, put differently, “[t]he police power should be appreciated in its comprehensiveness as a mode of governance, rather than a particular variety of governmental regulation.”³³²

To be clear, I do not purport to argue that Progressivism is or has been the dominant ethos or driving ideology of the carceral state’s rise.³³³ Mass incarceration has grown as the result of competing and at-times complementary social, political, and economic forces.³³⁴ Rather, I simply mean to suggest that we might identify a strand running through decades of progressive policies as reflecting a view that the nation needs the progressive prosecutor (or, perhaps more accurately, the prosecutorial progressive) to bring the forces of inequity and injustice to heel.

For example, in her aptly titled call for corporate criminal accountability, *Why Not Jail?*, law professor and founder of the Center for Progressive Reform, Rena Steinzor, argues that prosecutors err when they fail to exercise their full punitive power.³³⁵ Steinzor contends that they are properly viewed as “police ensuring consequences for the past,” rather than “policymakers” who should decline prosecutions.³³⁶ Where

³³⁰ Cf. Husak, *Guns and Drugs: Case Studies*, *supra* note 305, at 445 n.28 (suggesting that libertarians “have the virtue of consistency” on some questions of criminalization).

³³¹ Cf. generally MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005) (discussing the origins of the police power).

³³² *Id.* at 213; see also Mariana Valverde, *Police, Sovereignty, and Law: Foucaultian Reflections*, in *POLICE AND THE LIBERAL STATE* 15, 25 (Markus D. Dubber & Mariana Valverde eds., 2008) (“That the differentiated risks posed by capitalist labor, urban space, transportation, moral and social threats, and later, sites and substances identified as dangerous to public health were the main sites giving rise to police innovations and regulations is well known.”).

³³³ But see generally Murakawa, *supra* note 26 (arguing that liberal law-and-order campaigns helped to build the carceral state).

³³⁴ See, e.g., FORMAN, *supra* note 20, at 229 (arguing that “a series of small decisions, made over time, by a disparate group of actors” caused mass incarceration); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006) (describing the various factors that lead to political elites creating the carceral state).

³³⁵ See STEINZOR, *supra* note 257, at 275.

³³⁶ *Id.*

half a century of criminal law scholarship reflects a fear that criminal law has metastasized and prosecutors have found ways to prosecute almost anyone for anything, Steinzor decries “[t]he legal profession’s disinterest in pushing the criminal law’s application out to the frontier of [large scale corporate in misfeasance in mining and other dangerous activities]” as “discredit[ing] a fundamentally cautious and tradition-bound profession that seems chronically unable to think outside the box.”³³⁷ Instead of advancing theories of expansive criminal liability (which they should do), in this account, “law professors . . . debat[e] at tedious length whether such prosecutions are a good idea.”³³⁸

Steinzor, like many wage theft criminalization proponents decries the racial and socioeconomic inequities of the U.S. criminal system.³³⁹ Yet those are not problems that cut to the quick of the prosecutorial project or in any way delegitimize the carceral turn. As in Gerstein’s call for progressive prosecutors to prioritize wage theft, the common critiques of mass incarceration do not dampen the progressive faith that prosecutors remain suited to serve as the voice of the public, that criminal court rooms are truly sites of justice, or that prisons are acceptable vehicles for humane punishment.³⁴⁰ Demands for greater corporate accountability are framed in terms of “haul[ing] out [executives] in handcuffs.”³⁴¹ And prosecutors who fail to bring charges or obtain carceral sentences are decried as members of the “chickenshit club.”³⁴²

In these accounts, there is little space devoted to collateral consequences, to the realities of prison, or to what punishment will actually look like. There is little talk of who *else* stands to gain in expanding and further legitimating criminal law’s reach — the police, the prison administrators, the bondsmen, et al. — and others who will lose. Put simply, the carceral progressive project takes at face value the

³³⁷ *Id.* at 228.

³³⁸ *Id.*

³³⁹ See *id.* at 7-8; cf. GARLAND, PUNISHMENT AND WELFARE, *supra* note 271, at 175 (“Despite the radical positions that each of these [commentators] stakes out, reminding the reader of the social causes of crime and the need for reform, these social elements later disappear in the actual arguments and policy recommendations that follow.”).

³⁴⁰ See *supra* note 297 and accompanying text.

³⁴¹ Elizabeth Warren, Opinion, *Corporate Executives Must Face Jail Time for Overseeing Massive Scams*, WASH. POST (Apr. 2, 2019, 5:01 PM), https://www.washingtonpost.com/opinions/elizabeth-warren-its-time-to-scare-corporate-america-straight/2019/04/02/ca464ab0-5559-11e9-8ef3-fbd41a2ce4d5_story.html?https://perma.cc/5836-BJPV.

³⁴² See JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (Simon & Schuster ed. 2017).

claims of institutional legitimacy. (Or, perhaps phrased differently, the threat to the criminal system's legitimacy comes from a failure to prosecute sufficiently and effectively, not from the overuse of the prosecutorial or carceral toolkit.) This is law-and-order politics. It's just a preference for a different set of laws, accompanied by a different vision of order.

CONCLUSION

We live in a society where economic inequality is endemic and where structures of governance often serve to exacerbate, rather than address that inequality. Wage theft stands as one of many practices that serve to hurt workers and enrich bosses. But, the preference for criminal law as a means of advancing equality and protecting the marginalized in the context of wage theft should be as concerning as the criminal turn elsewhere.

The turn to criminal law as a means of curbing capitalism's abuses should help us appreciate critical fault lines on the Left. For proponents of abolition or widescale decarceration, the criminal turn here should represent a misguided reliance on law-and-order politics and faith in criminal legal institutions. For many progressives, though, the criminal turn represents a much-needed signal that the state can and should take seriously its job of redistribution and protecting the marginalized. And, for many relatively powerless victims of wage theft, turning to the prosecutorial apparatus might provide some specter of accountability for abusive bosses.

Ultimately, I argue that the criminal turn here represents a troubling manifestation of "carceral progressivism" — an affinity for criminal law as a means of achieving regulatory and redistributive ends. Progressive proponents of wage theft criminalization may decry mass incarceration, but as I have argued, their punitive project reinforces and legitimates the inequities of the carceral state. Critics and skeptics of the carceral state should be careful of adopting this punitive approach simply because the politics of wage theft appear different, other regulatory approaches have failed, or the moral wrong appears clear. In doing so, they understate the ways in which our contemporary criminal system rests on a belief that prosecutors vindicate the interests of the vulnerable and that accountability and incarceration are synonymous. Challenging those beliefs is a central component of any true project of decarceration. But challenging those beliefs may also run headlong into a Progressive vision of the state as social savior.