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Wage Recovery Funds

Elizabeth Ford*

Wage theft is rampant in the United States. It occurs so frequently because employers have much more power than workers. Worse, our main tool for preventing and remedying wage theft—charging government agencies with enforcing the law—has largely failed to mitigate this power differential. Enforcement agencies, overburdened by the magnitude of the wage theft crisis, often settle cases for nothing more than wages owed. The agency, acting as broker for the payment of the wages owed, voluntarily foregoes both interest and statutory penalties.

This is a bad deal for workers, but not just because they do not get the benefit of the interest or penalties. Instead of making workers who have experienced wage theft whole, the enforcement agencies systematically broker no-interest loans from low-wage workers to their employers. The system, as it functions now, essentially transfers wealth from low wage workers to their employers. This is not the result of malicious intent: when forced to choose between recovering wages-only or waiting another six months for a still-uncertain recovery, workers themselves will choose the former.

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This Article proposes an elegant solution that will shift this paradigm: Wage Recovery Funds (WRFs). A WRF is a pool of funds housed at a government agency or community organization. Employees who are victims of wage theft could approach the WRF; if the WRF accepts the case, it would make the worker whole upfront—before the employer has paid—and then take assignment of the worker’s claim. The WRF would then pursue wages, interest, and penalties through administrative enforcement proceedings. Money recovered from employers would then be returned to the fund to support the next case. Beyond aggregating interest and penalties for support of future workers, a Wage Recovery Fund would change the risk paradigm, placing the risk of delayed recovery on an entity that can more easily afford it, and eliminating the workers’ immediate need for lost wages as a source of employer leverage in settlement.

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INTRODUCTION

Wage violations affecting low-wage workers are rampant in the United States. According to the National Employment Law Project, as many as 25 percent of workers in low-wage jobs are paid less than minimum wage.¹ According to the Economic Policy Institute, if low-wage workers were paid in compliance with minimum wage laws, 160,000 families would be lifted out of poverty.²

Many scholars have considered how to tackle this crisis. In her seminal article *The New Labor Law*, Kate Andrias urged the use of employment law to shift workplace power, writing, “[u]nder the emerging model, employment law is no longer just a collection of individual rights to be bestowed by the state. Instead, it is a collective project to be jointly determined and enforced by workers, in conjunction with employers and the public.”³ To this end, some scholars have advocated for a co-enforcement process, combining the unique capabilities of government and community organizations to reach the most vulnerable workers.⁴ David Weil has urged a strategic approach to wage theft

1. Annette Bernhardt, Ruth Milkman, Nik Theodore, Douglas Heckathorn, Mirabai Auer, James DeFilippis, Ana Luz González, Victor Narro, Jason Perelshteyn, Diana Polson & Michael Spiller, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NAT'L EMP. L. PROJECT 4 (2009), <https://s27147.pcdn.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf> [<https://perma.cc/Q2FN-NMKG>] [hereinafter 2009 NELP].

2. See David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. 14 (May 10, 2017), <https://www.epi.org/files/pdf/125116.pdf> [<https://perma.cc/4V24-8WKA>] [hereinafter 2017 EPI].

3. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 68 (2016).

4. See Janice Fine, *New Approaches to Enforcing Labor Standards: How Co-Enforcement Partnerships Between Government and Civil Society Are Showing the Way Forward*, 2017 U. CHI. LEGAL F. 143, 145 (2017); Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759, 814 (2019); Andrew Elmore, *Collaborative Enforcement*, 10 NE. U. L. REV. 72, 80 (2018); Seema

enforcement that involves auditing particularly problematic industries or conducting companywide or even sectoral investigations.⁵ Still others have argued for limiting the use of criminal remedies,⁶ enhancing small claims court procedural protections in wage theft cases⁷, increasing the use of injunctive remedies available under the Fair Labor Standards Act (FLSA),⁸ and pre-paying wage claims.⁹ There is, however, a missing piece to these conversations, a way that enforcement systems are backfiring.

The administrative enforcement process is so overwhelmed that to recover unpaid wages more quickly for more workers, enforcement agencies settle for recouping wages only, leaving interest unpaid. The enforcement mechanisms, therefore, broker no-interest loans from employees to their employers. In this way, the system transfers wealth from the victims of wage theft—disproportionately low-wage workers, women, and people of color—to the perpetrators. This is not the result of malicious intent. It is a practical solution to a real problem: how can an understaffed and underfunded agency get workers their wages quickly enough that the money may still make a difference in their lives? The consistent and institutionalized answer has been to resolve the enforcement action in exchange for the payment of wages only.

This Article proposes to shift this paradigm by proposing a self-funded, upfront payment mechanism. This paper suggests the creation of a Wage Recovery Fund (WRF) whose purpose is to (1) provide workers with meritorious claims immediate, complete relief while they wait for their claims to be adjudicated; (2) reduce employers' ability to demand interest-free loans in exchange for early payment; and (3) be self-funding to more fully support agencies' enforcement efforts.

This Article will explore the mechanics of creating such a fund and propose two structural options to achieve its goals. First, this Article will describe the realities of administrative wage theft enforcement and reasons for wages-only recovery. It will then survey state methods to demonstrate that this approach is avoidable. Next, this Article will present the possibility of creating a WRF using mechanisms that already exist in many state enforcement agencies. Finally, the

N. Patel & Catherine L. Fisk, *California Co-Enforcement Initiatives That Facilitate Worker Organizing*, 12 HARV. L. & POL'Y REV. ONLINE 1 (2017).

5. DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 74 (2010) (David Weil is the current nominee to head the Department of Labor's Wage and Hour Division.) [hereinafter WEIL, STRATEGIC ENFORCEMENT].

6. Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429, 1437 (2021); Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 658 (2014).

7. Llezlie L. Green, *Wage Theft in Lawless Courts*, 107 CALIF. L. REV. 1303, 1304 (2019).

8. Jordan Laris Cohen, *Democratizing the FLSA Injunction: Toward A Systemic Remedy for Wage Theft*, 127 YALE L.J. 706, 714 (2018).

9. Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL'Y REV. 93, 136 (2018) (describing systemic problems with wage theft enforcement and offering several proposals including pre-payment).

Article will explore the option of creating a Wage Recovery Fund controlled by a community-based organization. Placing this growing fund in community hands will enhance collective action and help ensure that the fund is responsive to the community of low-wage workers.

I.

THE COST OF WAGE THEFT ENFORCEMENT

A. *Wage Theft is a Profound Problem in the United States*

Wage theft occurs when an employer violates wage and hour laws and thereby benefits from unpaid or underpaid labor.¹⁰ “[I]n essence, [wage theft] involves employers taking money that belongs to their employees and keeping it for themselves.”¹¹ A groundbreaking 2009 National Employment Law Project study found that 26 percent of low-wage workers were paid less than the required minimum wage in the previous workweek alone and more than 75 percent experienced some form of wage theft during their work life.¹² In 2017, the Economic Policy Institute (EPI) estimated that “the total wages stolen from workers due to minimum wage violations exceeds \$15 billion each year.”¹³ EPI also concluded “workers suffering minimum wage violations are more than three times as likely to be in poverty as someone chosen at random in the eligible workforce.”¹⁴

Wage theft disproportionately harms Black and immigrant workers. The rate of minimum wage violations for Black workers is three times higher than that of White workers.¹⁵ In addition, nativity and citizenship play a major role in vulnerability to wage theft. The wage theft rate among non-citizens is almost twice that of U.S.-born citizens.¹⁶ In addition to the immediate effects it has on communities of color, wage theft magnifies the wealth gap between White

10. See 2017 EPI, *supra* note 2, at 1.

11. Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL’Y INST. ISSUE BRIEF, no. 385, 2014, at 1, <https://www.epi.org/files/2014/wage-theft.pdf> [<https://perma.cc/36GN-XEQY>].

12. 2009 NELP, *supra* note 1, at 2–3.

13. 2017 EPI, *supra* note 2, at 2.

14. *Id.* at 13–14. If workers had been paid at the correct rate, the poverty rate among workers experiencing wage theft would decrease from 21.4 percent to 14.8 percent. *Id.* at 14.

15. 2009 NELP, *supra* note 1, at 48.

16. 2017 EPI, *supra* note 2, at 20 (“Whereas the overall wage theft rate is 3.8% for native born citizens and 4.1% for naturalized citizens, among noncitizens 6.5% percent report being paid below the minimum wage.”); 2009 NELP, *supra* note 1, at 43. (“Wage theft rate for low wage Latina workers was 40%, while the minimum wage violation rate for male Latino counterparts was 24%.”).

workers and Latinx and Black workers¹⁷ and makes it harder for communities to act collectively to press for change.¹⁸

While it is easy to assume that employers engage in wage theft simply out of greed or the failure to see employees as human beings, the reasons are more complex.¹⁹ One explanation is that “an employer’s decision to pay less than the minimum wage involves a cost-benefit analysis that takes into account the probability of detection [and] the expected penalties that would occur.”²⁰ As Professor Nicole Hallett suggested, “employers stand to gain more from violating the law the greater the difference between the market wage and the minimum wage.”²¹ Where employees have the greatest gap in leverage, wage theft will be most prominent. Thus, employers, particularly those who employ low-wage, immigrant, or other vulnerable workers, will fail to comply with the law if they can expect to face small penalties or escape detection altogether.²²

In general, the private rights of action available under most wage theft statutes and ordinances do not reach vulnerable workers. An individual worker with a wage claim will be unable to afford a lawyer on an hourly fee basis and is unlikely to find a private lawyer willing to take that case on a contingency.²³ Private lawyers often will only accept high damages and class action cases.²⁴ Workers can theoretically represent themselves in small claims court, but the practical reality is that workers are not able to do this because of the complexity and inaccessibility of the judicial system and the lack of support.²⁵ Finally, there

17. See Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FED. RSRV. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finance-20200928.htm> [https://perma.cc/6MZD-UE9F] (showing median net worth of “White, Black, Hispanic, and other or multiple race families”).

18. Benjamin I. Sachs, *Law, Organizing and Status Quo Vulnerability*, 96 TEX. L. REV. 351, 358 (2017) (“If individuals believe that the current regime is invincible, that there is no prospect for change, then they are unlikely to participate in a collective effort to make such change, assuming that participation will entail costs – as it always will.”).

19. Hallett, *supra* note 9, at 103.

20. *Id.* at 103 (citing Orley Ashenfelter & Robert Smith, *Compliance with the Minimum Wage Law*, 87 J. POL. ECON. 333, 336 (1979)). See also Yang-Ming Chang & Isaac Ehrlich, *On the Economics of Compliance with the Minimum Wage Law*, 94 J. POL. ECON. 83, 85 (1985) (applying an economic model to explain employers’ decisions on whether to comply with wage laws); Gideon Yaniv, *Minimum Wage Noncompliance and the Employment Decision*, 19 J. LAB. ECON. 596, 597 (2001) (same).

21. Hallett, *supra* note 9, at 104.

22. *Id.* at 103.

23. See SHANNON GLEESON, *PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES* 56–59 (2016) (cataloging worker experiences with wage enforcement agencies); Hallett, *supra* note 9, at 105; Lee, *supra* note 6, at 662.

24. Hallett, *supra* note 9, at 105. If a worker finds themselves in a situation where their claim is one of many in the workplace, they have a far better shot at finding a lawyer. However, the prevalence of mandatory arbitration agreements with class action waivers makes this less likely.

25. See Green, *supra* note 7, at 1304 (identifying the failures of small claims courts and arguing for enhanced procedural protections for low wage workers).

is a small, but growing, cadre of legal services programs focused on recovering wages for low-wage workers, but it is nowhere sufficient to meet the demand.²⁶

This leaves low-wage and vulnerable workers with one enforcement option: administrative agencies. The next Section will describe the challenges faced by those agencies using a case example extrapolated from the clients we see at the Seattle University Workers' Rights Clinic.

B. Administrative Wage Theft Enforcement Allows Employers to Take No-Interest Loans from their Employees

Ironically, the very magnitude of the wage theft epidemic has spawned the system of resolving wages claims without interest or penalties. This Section begins with an example describing the practical reality of the agency enforcement process, the costs that workers incur when they are not paid wages, and the pressure for workers to accept an early resolution that does not include interest. Next, this Section will outline the administrative structures that allow agencies to function as brokers for no-interest loans to employers. Finally, this Section will look at the state enforcement agencies' approach, arguing that while no state has resolved this problem, state approaches offer a framework for resolution.

1. The Case of An Yu²⁷

a. Background

Sassy Hair Salon in Bellevue, Washington, hired An Yu as a "Stylist Assistant" at the rate of \$250 per week.²⁸ Ms. Yu, who was new to the United States and did not speak English well, worked Tuesday through Sunday from the

26. See Legal Aid Society of New York, *Employment Law Unit*, <https://legalaidnyc.org/programs-projects-units/employment-law-unit/> [<https://perma.cc/Y68W-BRT8>] (last visited Aug. 6, 2022), Greater Boston Legal Services, *Employment Program*, <https://www.gbls.org/what-we-do/employment> [<https://perma.cc/TV82-K9FT>] (last visited Aug. 6, 2022), Northwest Justice Project, *Priorities* <https://nwjustice.org/priorities> [<https://perma.cc/UWT3-N6PY>] (identifying as a priority "employment issues related to lost wages.") (last visited Aug. 6, 2022).

27. This case is a composite of several situations that we saw in the brief advice clinic operated by the Workers' Rights Clinic at Seattle University School of Law.

28. While Sassy Hair Salon was a stable business, it is important to note that in many communities the businesses that employ the most vulnerable workers have equally vulnerable business owners. These businesses can play an especially critical role in immigrant communities, providing a place for newcomers to access to work and a chance to begin to build stability and community. While it is beyond the scope of this Article, as we create a more secure web of minimum standard enforcement, it will be important to build an enforcement system that accounts for the cultural importance of these businesses while not allowing their employees to be exploited. This will be particularly important in the face of the increased workplace fissuring. Workplace fissuring—the outsourcing of an employer's "non-core" functions—foists the burden of compliance on those least able to manage it and places the employees, at the very end of the chain of subcontractors, in a far more vulnerable position than they would otherwise be. Future scholarship from this author will seek to expand on this problem and offer avenues for consideration.

store's opening at nine o'clock in the morning to its close at seven o'clock in the evening. During the time she worked for Sassy, Ms. Yu struggled to meet her basic expenses. She had a credit card that she used when her cash ran out. Once she maxed out her credit card, she turned to payday lenders. Though she took out small loans at an interest rate similar to her credit card and planned to pay them back on her payday, she soon found that this was not possible. Thus, she had to roll those loans over, incurring fees and a much higher rate of interest. She fell behind on her rent, ultimately being evicted from her apartment and moving in with her sister. The landlord hired a collection company to recover the back rent, and that company sued Ms. Yu for the past rent plus interest.

After six months Ms. Yu was able to quit Sassy and find another job, but Sassy failed to pay Ms. Yu for her last two weeks of work. Ms. Yu came into our clinic wanting to know if she could recover that last paycheck. We advised her that, in addition to the two weeks' pay, Sassy owed her minimum wage for the six months that she worked there. With our help, Ms. Yu filed a wage complaint with the state administrative agency, the Washington Department of Labor and Industries.

b. Ms. Yu's administrative wage complaint

The Department of Labor and Industries (L&I or the Department) investigator gathered records and determined that Ms. Yu was owed back wages. Several months later, that investigator sent a letter to the employer, copied to Ms. Yu, concluding that Sassy owed Ms. Yu back wages and instructing Sassy to "write a check made payable to An Yu for the amount shown above, less applicable taxes. . . . Send the check and earnings statement to L&I at the address above. L&I will mail you a signed release of complaint from the employee."²⁹ The total amount included neither interest nor penalties.³⁰ Sassy agreed to pay. The Department's investigator informed Ms. Yu of the "good news."

Ms. Yu, facing a lawsuit by her former landlord, mounting debt to her payday lender, and a credit card balance growing every month, was anxious to accept the money. We advised Ms. Yu of the missing interest and let her know that it would likely take another six months for the agency to issue a citation, even if we could convince the agency to do so in the face of Sassy's offer.³¹ Ms. Yu concluded that she could not wait, and we were hard-pressed to advise her that she should.

29. This language is taken directly from the Department of Labor and Industries' "Final Demand Letter" template obtained through a public disclosure request and on file with the author. *See also* DEP'T LAB. & INDUS., EMPLOYMENT STANDARDS OPERATIONS MANUAL § 4.08.04A (2020) [hereinafter DLI OPERATIONS MANUAL].

30. L&I's template letter contains no language about missing interest or penalties.

31. The Operations Manual allows an agent to close a complaint once the agent receives the employer's payment. DLI OPERATIONS MANUAL, *supra* note 29, § 4.04.10B ("Once it is confirmed that the payment was received the agent should complete the notes . . . and then close the complaint as 'Otherwise Resolved: Paid.'").

In the end, Ms. Yu gave Sassy Hair Salon an interest-free loan even while she was paying interest on loans she was forced to take because of Sassy's failure to pay minimum wage.

Washington's Department of Labor and Industries, like most enforcement agencies, is empowered to collect back wages, along with pre-judgment interest.³² The Department also has the authority to impose fines ranging from \$1,000 to \$20,000 per violation.³³ With this powerful statutory authority, how could An Yu, with an undisputable claim, end up paying interest on her debts without recovering interest from her employer?

c. The rationale for Washington's approach

Like many states, Washington's wage collection statute requires the Department to issue a citation in every case where a wage violation is found, with one exception: where the matter is "otherwise resolved."³⁴ The Department uses this provision to broker resolutions short of citation in most of its cases.³⁵ As inducement to the employer, the investigator offers to forego interest and waive available penalties if the employer pays immediately. In most cases the worker, believing she has recovered the maximum available and unable to wait any longer, accepts the settlement.³⁶ The amount Washington workers lose—and employers gain—through this "settlement" process is substantial. In 2017, approximately 70 percent of claims where the Department found wages owed were resolved this way.³⁷

This practice is not unique to Washington.³⁸ It is a practical solution to a seemingly insoluble problem: the worker needs their money now, and so the

32. WASH. REV. CODE § 49.48.083(2) (2020).

33. WASH. REV. CODE § 49.48.083(3)(a), (e) (2020) (allowing for penalties and requiring those penalties to be deposited in the supplemental pension fund created by WASH. REV. CODE § 51.44.033 (2020)). The wage theft penalties deposited in that fund are directed to be used to fund loans authorized by WASH. REV. CODE § 49.86.190 (2011), which is the former family medical leave statute. Interestingly, that statute has been repealed to make way for the recently enacted Paid Family and Medical Leave Program, so there is some question as to where those funds will be deposited now. The moment is ripe for legislative action creating a different mechanism.

34. WASH. REV. CODE § 49.48.083(1) (2020). *See generally* DLI OPERATIONS MANUAL, *supra* note 29, § 4.08.04A.

35. *See* DLI OPERATIONS MANUAL, *supra* note 29, § 4.08 (requiring the "final demand letter" in every case).

36. *Id.* § 4.04.12 (instructing the investigator to notify the employee of the payment and verify the employee's address). Once the employee agrees to accept payment, the investigator then presents them with a settlement agreement to sign, including a release of claims. If the employee fails to sign the release, the Department retains the employer's payment—ultimately sending it to the State Treasury where it is treated as unclaimed funds—and administratively closes the investigation.

37. Gathered from a Public Records Request to the Washington Department of Labor and Industries and on file with the author. Of the 2,485 cases in which an L&I Investigator found that wages were owed to an employee, 1,784 were settled via this process.

38. New Mexico is the most dramatic example. There, a group of employees sued the Department of Workforce Solutions (DWS) alleging that the agency engaged in a systematic practice of resolving wage theft complaints in exchange for partial payments. Specifically, the plaintiffs alleged

agency trades *full* recovery for *fast* recovery. The systematic failure to collect interest and penalties has become the crutch to prop up an overwhelmed enforcement system throughout the country. Even the U.S. Department of Labor's Wage and Hour Division has largely not collected penalties and has waffled between efforts to collect and decisions to forego interest. This demonstrates the difficulty, even for a large, experienced agency, to recover for employees with little of their own leverage to contribute to the process.

2. *The U.S. Department of Labor's Approach.*

The Department of Labor (DOL) has been perhaps the most dramatic example of the institutional difficulty of collecting interest and penalties. The Wage and Hour Division (WHD) of the DOL is charged with the responsibility to investigate and enforce violations of the Fair Labor Standards Act. After reviewing a worker's complaint, if WHD concludes that there is sufficient evidence of a violation, it conducts a conference with the employer, explaining its findings and making arrangements for payment and future compliance.³⁹ If the employer elects to comply, the WHD will supervise the payment of the amount owed.⁴⁰ If the employer does not elect to comply, the DOL Solicitor General may sue the employer, but there is no requirement that they do so.⁴¹

that the DWS failed to hold "employers liable for any statutory damages at the administrative enforcement phase of a case." Settlement Agreement at 1–2, *Olivas v. Bussey*, No. D-101-CV-2017-00139 (2017). The case settled before the merits were adjudicated, but the DWS agreed to adjust its policies and begin collecting damages permitted by statute. *Id.* at 3. In many other states, the agency requires the employee to make a demand of payment of wages only directly to their employer, and if the employer pays the wages, the agency does not investigate. *See, e.g.*, COLO. DEP'T LAB. & EMP., <https://cdle.colorado.gov> [<https://perma.cc/9UUH-ZM3D>]; *Wage Claim Form*, MD. DEP'T LAB., <https://www.dlir.state.md.us/forms/essclaimform.pdf> [<https://perma.cc/BM2G-QTF6>] ("Before filing your wage claim with ESS, you must first have asked the employer for your wages and been denied."); *Claim For Wages*, KAN. DEP'T LAB., <https://www.dol.ks.gov/documents/20121/56722/Wage+Claim.pdf/27606782-9efd-7bf2-7c9f-94c325c32e4f?t=1619709003954> [<https://perma.cc/BT8H-654G>] (providing claimants with a "claim form" asking the employer for wages only). Other state agencies require the employee to calculate wages owed, without providing any indication that interest or penalties should be included. *See, e.g.*, *Employment Wage Complaint Form*, MICH. DEP'T LAB. & ECON. OPPORTUNITY, https://www.michigan.gov/documents/WH43_Employment_Wage_Complaint_Form_R6_29_05_141360_7.pdf [<https://perma.cc/FAS4-5SVG>]; *Wage Claim Form*, MONT. DEP'T LAB. & INDUS., https://erd.dli.mt.gov/_docs/labor-standards/Wage-claim.pdf [<https://perma.cc/D99C-YSBV>]. Many other agencies use a "demand letter" process similar to Washington's. *See, e.g.*, *Making a Demand For Final Wages*, MINN. DEP'T LAB. & INDUS., <https://www.dli.mn.gov/business/employment-practices/making-demand-final-wages> [<https://perma.cc/6MQJ-2FZK>]; *Wage Claims Process FAQ*, ILL. DEP'T LAB., <https://www2.illinois.gov/idol/FAQs/Pages/Wage-Claims-Process-FAQ.aspx> [<https://perma.cc/F3C8-3SDT>].

39. *See* 29 U.S.C. §§ 211, 216(c). If the employer does not agree to comply, then the matter may be referred to the Office of the Solicitor to initiate litigation. *See Wirtz v. Atl. States Const. Co.*, 357 F.2d 442, 444 (5th Cir. 1966). Far more commonly, the employee is informed of the finding and of their right to sue privately. Where the DOL elects to sue, the employee is thereafter foreclosed from bringing an action raising the same claims. 29 U.S.C. § 216(b).

40. 29 U.S.C. § 216(c).

41. *Id.*

While the WHD is empowered to collect interest (in the form of liquidated damages)⁴² and penalties, it has mostly failed to do so. Though the data is difficult to come by, David Weil examined WHD’s recovery of liquidated damages between 2003 and 2008 and found that “less than one half of one percent of cases had liquidated damages computed by investigators and that zero cases had liquidated damages assessed.”⁴³ In addition, the Division assessed penalties in only 3 percent of the cases from 1998 to 2008.⁴⁴ In 2013, Weil was appointed to head the WHD and directed investigators to collect liquidated damages in certain cases and encouraged more expansive collection of penalties.⁴⁵

These changes were met with fierce opposition from employers and Congress and were reversed during the Trump administration. On June 24, 2020, Cheryl Stanton, then Administrator of the WHD, issued a Field Assistance Bulletin asserting that “[a]dministrative Fair Labor Standards Act (“FLSA”) investigations involving liquidated damages take 28 percent more time than those involving back wages only.”⁴⁶ And from that evidence, she ordered investigators to cease collecting liquidated damages:

[T]o reduce the time needed to conclude FLSA administrative cases to return back wages to employees more quickly, WHD will no longer pursue pre-litigation liquidated damages as its default policy from employers in addition to any back wages found due in its administratively resolved investigations.⁴⁷

In June 2021, the Biden Administration reversed this policy, instructing investigators to “return to pursuing liquidated damages from employers found due in its pre litigation investigations provided that the Regional Solicitor (“RSOL”) or designee concurs with the liquidated damages request.”⁴⁸ In addition, on June 8, 2021, President Biden nominated Weil to serve another term as Wage and Hour Administrator, signaling a desire to return to more robust enforcement efforts. Weil, however, has faced intense questioning challenging

42. Under the Fair Labor Standards Act (FLSA), liquidated damages are used to substitute for a percentage interest. 29 C.F.R. § 790.22, n.137 (internal quotations and citations omitted) (noting that Section 16b of the FLSA “is not penal in its nature but rather that such damages constitute compensation for the retention of a workman’s pay where the required wages are not paid on time.”).

43. WEIL, STRATEGIC ENFORCEMENT, *supra* note 5, at 13 n.20.

44. *Id.* at 14. Even in cases of repeat offenders, WHD assessed penalties in only 43 percent of the cases, and of those, the penalties were reduced by an average of 61 percent. *Id.*

45. See JESSICA LOOMAN, U.S. DEP’T LAB. WAGE & HOUR DIV., FIELD ASSISTANCE BULLETIN 2021-2: PRACTICE OF SEEKING LIQUIDATED DAMAGES IN SETTLEMENTS IN LIEU OF LITIGATION (Apr. 9, 2021) (reinstating liquidated damages collection policy and noting that neither policy made the collection of liquidated damages automatic—it required the concurrence of the Regional Solicitor).

46. CHERYL M. STANTON, U.S. DEP’T LAB., WAGE & HOUR DIV., FIELD ASSISTANCE BULLETIN 2020-2 PRACTICE OF SEEKING LIQUIDATED DAMAGES IN SETTLEMENTS IN LIEU OF LITIGATION (June 24, 2020).

47. *Id.*

48. *Id.*

his approach during confirmation hearings, and the committee deadlocked on his nomination.⁴⁹

While the WHD has broad reach and therefore represents a promising place to initiate change, the political realities make enforcement innovations unlikely. It may be more fruitful to look to the states for more willingness to create a WRF. Indeed, many states—all over the political spectrum—have been experimenting with ways to recover fully for workers, and the pieces necessary to create a WRF are already there.⁵⁰

II.

WAGE RECOVERY FUND: A BALANCE-RESTORING SOLUTION

This Part will briefly describe the WRF and the statutory ingredients necessary to create it. Then, it will identify those states that already have enacted those ingredients, including those states that have devised systems to segregate the recovery of penalties into designated funds and those that have the authority to take assignment of workers' wage claims. It will identify those few states that have begun to aggregate the total recovery into one place. Finally, it will set out the small number of states that are experimenting with upfront payment of wage theft claims from designated funds.⁵¹

A. *What is a Wage Recovery Fund?*

A WRF makes it possible for enforcement agencies to pay workers their unpaid wages and interest before collecting from the employer. It does this by aggregating the interest and penalties from employers into a fund held by the agency and used to pay upfront workers' meritorious claims of wage theft. Thus, if the employee elects to participate, the employee receives the upfront payment of their wages owed along with interest, and the employee assigns their case to the agency. The agency then initiates an action against the employer to collect the unpaid wages plus interest and penalties. The agency has far more leverage and less economic vulnerability than the individual employee and therefore the capacity to hold out for a resolution that includes these elements. Once the

49. Ben Penn, *Senate Panel Delayed Vote on Weil for DOL Wage Chief*, BLOOMBERG NEWS (July 27, 2021), <https://news.bloomberglaw.com/daily-labor-report/senate-panel-schedules-delayed-vote-on-weil-for-dol-wage-chief> [<https://perma.cc/VFA9-6TXX>].

50. Another reason to begin at the state level is that state administrative enforcement is by far the most common forum for low wage workers to attempt to recover wages. See TERRI GERSTEIN, WORKERS' RIGHTS PROTECTION AND ENFORCEMENT BY STATE ATTORNEYS GENERAL, ECON. POL'Y INST. 3 (2020) ("State labor departments are generally the primary regulator or enforcer [of workplace laws]."); Sharon Block, *State and Local Enforcement: Stepping Up and Filling In on Workers' Rights*, ONLABOR (Oct. 25, 2018), <https://www.onlabor.org/state-and-local-enforcement-stepping-up-and-filling-in-on-workers-rights/> [<https://perma.cc/32FC-DJZH>] ("State and local governments are stepping up, not only to fill in the void left by anemic federal protection of worker rights, but also to advance new strategies for effective and efficient enforcement.").

51. I will use "upfront payment" or "pre-payment" to mean payment to the worker before recovering from the employer.

agency collects a more complete remedy, the payment is deposited back into the WRF. Because the amount collected will include the additional interest accrual as well as penalties, the fund should grow. As such, the WRF will be in a position to fund more employee claims in the future.⁵²

The WRF combines four common wage theft enforcement tools to create this self-sustaining pool of money. The tools are (1) the agency's ability to accept assignment of a worker's claim; (2) the agency's ability to litigate the claim on the employee's behalf; (3) the existence of a dedicated fund; and (4) the ability to pre-pay meritorious claims. As described below, these elements already exist in a variety of states, though no state currently employs all four.

B. The Wage Recovery Fund Ingredients Already Exist in State Law

1. Common State Regulatory Configurations

The first and foundational ingredient to a state-based WRF is that the state has enacted its own minimum wage requirements and created administrative enforcement mechanisms. Happily, most states have minimum wage laws setting the minimum wage higher than the federal standard.⁵³ In these states, there is generally an administrative agency charged with enforcement.⁵⁴ Some state agencies have the authority only to investigate and attempt to extract voluntary compliance from the employer.⁵⁵ Some have the authority to issue citations or other orders requiring payment.⁵⁶ Among the agencies with the authority to require payment, most are able to recover pre-judgment interest,⁵⁷ liquidated

52. Part IV will describe the mechanics of the WRF in more detail.

53. *State Minimum Wages: 2020 Minimum Wage By State*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> [<https://perma.cc/CLJ5-PLGN>].

54. *See, e.g.*, CAL. LAB. CODE § 1193.6 (2021), CONN. GEN. STAT. §§ 31-1 to 31-2 (2020); KAN. STAT. ANN. § 44-322 (2020); N.J. STAT. § 34:1-2 to 34:11-16 (2020); N.D. CENT. CODE § 34-05-01.1 (2020); WASH. REV. CODE ANN. § 49.46.040 (2020).

55. *See, e.g.*, IND. CODE ANN. § 22-1-1-8 (2020); MO. REV. STAT. §§ 286.005, 290.527 (2020); NEB. REV. STAT. ANN. § 48-1206 to 48-1233 (2020).

56. *See, e.g.*, ALASKA STAT. § 23.05.060 to 23.05.180 (2020); ARIZ. REV. STAT. § 23-357 (2020); GA. CODE ANN. § 34-2-6 (2020); IOWA CODE ANN. §§ 91.10, 91A.9 (2020); MD. CODE ANN., LAB. & EMPL. § 3-408 (2020); MINN. STAT. ANN. § 177.27 (2020); MONT. CODE ANN. § 39-3-210 (2020); NEV. REV. STAT. ANN. § 607.210 (2020).

57. *See, e.g.*, CAL. LAB. CODE § 1193.6 (2021) ("wages, compensation, and interest"); HAW. REV. STAT. ANN. § 388-10 (2020) ("interest at a rate of six per cent per year"); 820 ILL. COMP. STAT. ANN.105/12 (2020) ("damages of 5% of the amount of any such underpayments"); ME. REV. STAT. tit. 26, § 626-A (2020) ("a reasonable rate of interest"); MINN. STAT. ANN. § 181.14 (2020) ("interest thereon at the legal rate"); N.M. STAT. ANN. § 50-4-26 (2020) ("unpaid or underpaid minimum wages plus interest"); N.Y. LAB. LAW § 198 (2020) ("the court shall allow such employee to recover . . . prejudgment interest as required under the civil practice law and rules"); N.C. GEN. STAT. § 95-25.22 (2020) ("interest at the legal rate set forth in G.S. 24-1"); VA. CODE ANN. § 40.1-28.12 (2020) ("interest at eight per centum per annum").

damages,⁵⁸ or both.⁵⁹ These amounts are in addition to wages owed and are explicitly intended to compensate employees for “being deprived of the monetary value of [their] loss from the time of the loss to the payment of the judgment.”⁶⁰

In addition, state agencies generally impose civil and administrative penalties for willful violations of minimum wage laws.⁶¹ In some states, the penalties for willful conduct are calculated in multiples of the amounts owed.⁶² In most states, however, penalties are a dollar amount within a statutorily set

58. *See, e.g.*, ALASKA STAT. § 23.10.110 (2020) (“additional equal amount as liquidated damages”); CAL. LAB. CODE § 1194.2 (2020) (“liquidated damages in an amount equal to the wages unlawfully unpaid”); IND. CODE ANN. § 22-2-2-9 (2020) (“equal additional amount as liquidated damages”); KY. REV. STAT. ANN. § 337.385 (2020) (“equal amount as liquidated damages”); MASS. GEN. LAWS ANN. ch. 149, § 150 (2020) (“treble damages, as liquidated damages”); MICH. COMP. LAWS § 408.419 (2020) (“equal additional amount as liquidated damages”); MO. ANN. STAT. § 290.527 (2020) (“twice the unpaid wages as liquidated damages”); N.M. STAT. ANN. § 50-4-26 (2020) (“twice the unpaid or underpaid wages”); OHIO REV. CODE ANN. § 4111.14(J) (2020) (“damages shall be calculated as an additional two times the amount of the back wages”); OKLA. STAT. tit. 40 § 197.9 (2020) (“double the full amount of such wages”).

59. *See, e.g.*, ARIZ. REV. STAT. § 23-360 (2020) (“treble the amount of unpaid wages and which shall be subject to interest at the legal rate”); HAW. REV. STAT. ANN. § 388-10 (2020) (“To the employee, in addition to the wages legally proven to be due, for a sum equal to the amount of unpaid wages and interest at a rate of six per cent per year from the date that the wages were due”); N.Y. LAB. LAW § 198 (2020) (“the court shall allow such employee to recover the full amount of any underpayment . . . prejudgment interest as required under the civil practice law and rules, and . . . an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due”); ME. STAT. tit. 26, § 626-A (2020) (“in addition to the unpaid wages . . . a reasonable rate of interest . . . and an additional amount equal to twice the amount of unpaid wages as liquidated damages”); N.M. STAT. ANN. § 50-4-26 (2020) (“an employer . . . shall be liable to the employees affected in the amount of their unpaid or underpaid minimum wages plus interest, and in an additional amount equal to twice the unpaid or underpaid wages.”); N.D. CENT. CODE ANN. § 34-14-09.1 (2020) (“[The] employee is entitled to recover . . . [i]nterest on the unpaid wages . . . and [liquidated damages].”).

60. *Greene v. Safeway Stores, Inc.*, 210 F.3d 1237, 1247 (10th Cir. 2000) (quoting *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1288 (10th Cir. 1998)). *See also* *Bobich v. Steward*, 843 P.2d 1232, 1236 (Alaska 1992) (“When awarding prejudgment interest, a court does not intend to penalize the losing party, but rather intends to compensate the prevailing party for losing the use of her money between the date she was entitled to it and the date of judgment.”).

61. *See, e.g.*, HAW. REV. STAT. ANN. § 388-10 (2020); 820 ILL. COMP. STAT. Ann. 105/12 (2020); IOWA CODE ANN. § 91A.12 (2020); KAN. STAT. ANN. § 44-1210 (2020); MASS. GEN. LAWS ANN. ch. 149, § 27C (2020); NEV. REV. STAT. ANN. § 608.195 (2020); WYO. STAT. ANN. § 27-1-108 (2020).

62. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-360 (2021) (potential liability of treble the amount of unpaid wages); CAL. LAB. CODE § 206 (2021) (treble damages for failure to pay); 28 R.I. GEN. LAWS ANN. § 28-14-17.1 (2020) (ranging from 15 percent to 50 percent of back wages owed); N.J. STAT. ANN. § 34:11-58 (2020) (“The employer shall also pay the commissioner an administrative fee equal to not less than 10% or more than 25% of any payment made to the commissioner pursuant to this section.”); N.Y. LAB. LAW § 198 (2016) (liquidated damages up to 300 percent of wages due); ME. STAT. tit. 26, § 626-A (2020) (liquidated damages equal to twice the amount of unpaid wages); MD. CODE ANN., LAB. & EMPL. § 3-507 (2021) (award up to three times the wage).

range.⁶³ Generally, the purpose of those penalties is to fund enforcement and deter future unlawful conduct.⁶⁴

2. *Wage Theft Funds*

Some states have created special funds to receive an employer's payment of penalties and direct that revenue toward future enforcement. For example, Colorado's wage enforcement statute authorizes the Director of its Division of Labor to impose penalties on employers who "without good faith legal justification" fail to pay wages.⁶⁵ Those penalties are credited to a wage theft enforcement fund, and the money in that fund is allocated "to the [Division of Labor] for the direct and indirect costs associated with implementing this article."⁶⁶ Illinois, Hawai'i, Kansas, and Washington have created similar funds, with all proceeds to be used for agency enforcement efforts.⁶⁷ However, it is not clear that these funds actually add to the enforcement agency's overall budget allocation. In other words, the revenue from penalties may simply offset the general fund allocation.

Nonetheless, the existence of these funds, and their noncontroversial acceptance in a variety of states, provides the first ingredient necessary to creating a Wage Recovery Fund. The next necessary ingredient is the agency's capacity to accept assignment of a worker's individual claim of wage theft.

3. *Agency Assignment*

Most states have the ability to accept assignment of workers' claims for unpaid wages and litigate on the workers' behalf. For some agencies, taking assignment is discretionary. For example, wage enforcement agencies in Kentucky, Maryland, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, and West Virginia are permitted to accept assignment of an

63. See, e.g., ALASKA STAT. ANN. § 23.05.280 (2020) (up to \$1,000 for each violation); DEL. CODE ANN. tit. 19, § 1112 (2020); IOWA CODE ANN. § 91A.12 (2020); 820 ILL. COMP. STAT. 105/12 (2020); KY. REV. STAT. ANN. § 337.990 (2020); LA. STAT. ANN. § 23:636 (2020); MASS. GEN. LAWS ANN. ch. 149, § 27C (2020); ME. STAT. tit. 26, § 626-A (2020); N.J. STAT. ANN. §34:11-4.10 (2020); NEV. REV. STAT. ANN. § 608.195 (2020); N.M. STAT. ANN. § 50-4-10 (2020); 28 R.I. GEN. LAWS ANN. §28-14-17.1 (2020); VA. CODE ANN. § 40.1-28.11 (2020).

64. See Hallett, *supra* note 9, at 117–21 (discussing increased fines as a method of deterring noncompliance).

65. COLO. REV. STAT. ANN. § 8-4-113 (2020).

66. *Id.*

67. See, e.g., HAW. REV. STAT. ANN. §371-12.5 (2020) (creating the Labor Law Enforcement Special Fund, used to provide for department operating costs); 820 ILL. COMP. STAT. ANN. 115/14 (2020) (creating the Wage Theft Enforcement Fund, used for department operating costs); KAN. STAT. ANN. § 44-324 (2021) (creating the Wage Claims Assignment Fee Fund, expenditures made "in accordance with appropriation acts upon warrants of the director of accounts"); WASH. REV. CODE § 51.44.033 (2020) (showing that the fund was to pay for loans associated with a family leave insurance program that was repealed in 2017).

employees' claims for unpaid wages when the employee requests such an assignment.⁶⁸ New Hampshire's statute is typical of these assignment provisions:

Whenever the commissioner determines that wages have not been paid, and that such unpaid wages constitute an enforceable claim, the commissioner may upon the request of the employee take an assignment in trust for such wages and/or any claim for liquidated damages, without being bound by any of the technical rules respecting the validity of any such assignments and may bring any legal action necessary to collect such claim.⁶⁹

In other states, the agency is required to take assignment of the worker's claim when the worker requests it.⁷⁰ Iowa's statute is typical of this category: "the commissioner shall, with the consent of the complaining employee, take an assignment in trust for the wages and for any claim for liquidated damages without being bound by any of the technical rules respecting the validity of the assignment."⁷¹

The Kansas Secretary of Labor's authority straddles this distinction. There, the secretary must accept assignment, but only of smaller cases where the worker is less likely find private counsel.⁷² Similarly, in Nevada, where "the Labor Commissioner believes that a person who is financially unable to employ counsel has a valid and enforceable claim for wages," the Attorney General is required to prosecute the case.⁷³ The State of Alaska requires all workers to assign their claims to the Alaska Department of Labor and Workforce Development and to relinquish the recovery of any costs or legal fees to the agency, though there is

68. KY. REV. STAT. ANN. § 337.385(4) (2021); MD. CODE ANN., LAB. & EMPL. § 3-507 (2021); N.H. REV. STAT. ANN. § 275:53 (2020); N.J. STAT. ANN. § 34:11-4.9 (2021); N.C. GEN. STAT. § 95-25.22 (2020); OHIO REV. CODE ANN. § 4111.10 (2021); 43 PA. STAT. & CONS. STAT. ANN. § 260.9a (2021); W.VA. CODE ANN. § 21-5-12 (2021).

69. N.H. REV. STAT. ANN. § 275:53 (2020).

70. E.g., S.D. CODIFIED LAWS § 60-11-19 (2021) ("If the Department of Labor and Regulation determines that wages have not been paid, and that the unpaid wages constitute an enforceable claim, the department shall upon the request of the employee take an assignment in trust for the wages or any claim for liquidated damages, without being bound by any of the technical rules respecting the validity of any such assignments and may bring any legal action necessary to collect the claim."); OKLA. STAT. ANN. tit. 40, § 197.10 (2021) ("At the request of any employee who has been found by the Commissioner to have been paid wages less than those to which such employee is entitled, under or by virtue of this act, the Commissioner shall take an assignment of such wage claim in trust for the assigning employee and shall bring legal action necessary to collect such claim."); MONT. CODE ANN. § 39-3-211 (2021) ("Whenever the commissioner of labor determines that one or more employees have claims for unpaid wages, the commissioner of labor shall, upon the written request of the employee, take an assignment of the claim.").

71. IOWA CODE ANN. § 91A.10 (2021).

72. KAN. STAT. ANN. § 44-324 (2021) (where the amount of the wage claim is less than \$10,000, the secretary "shall take an assignment of the claim in trust for such employee," and where the claim exceeds that amount, the secretary *may* accept assignment). Kansas is particularly on point since all proceeds from the assignment—such as attorneys' fees—must be deposited in its "Wage Assignment Fee Fund."

73. NEV. REV. STAT. ANN. § 607.160 (2020).

no guarantee that the agency will litigate those claims.⁷⁴ In nearly every state allowing for assignment, the right to recover interest and attorney's fees is explicitly provided.⁷⁵ In addition, the agency is uniformly permitted to join employee claims together in a single lawsuit.⁷⁶

Thus, the ability to accept assignment is nothing new to wage enforcement agencies. The combination of assignment and a dedicated fund for the penalties and other proceeds gets us one step closer to a self-sustaining WRF. A few states have experimented with this combination.

4. *Wage Theft Funds Combined with Assignment*

Several states combine the ability to take assignment of claims with the creation of a wage theft fund. For example, the Hawai'i Department of Labor and Industrial Relations is permitted to take assignment of employees' claims, and once it litigates those claims, the damages are collected into its Wage Claim Fund. The recovery is held there in trust for the employee, and then disbursed.⁷⁷

74. In Alaska, workers are required to sign the following statement in order to make a wage theft complaint to the Alaska Department of Labor & Workforce Development:

I give the Alaska Department of Labor & Workforce Development the power to settle, without my further approval, my wage claim for less than the full value, including interest and penalties. I agree that once the Department reaches a settlement, I forfeit any other chance to collect on my claim. I further agree that any costs or legal fees that may be collected by the Department of Labor and Workforce Development shall become the property of the State of Alaska.

ALASKA DEP'T LAB. & WORKFORCE DEV., WAGE AND HOUR ADMINISTRATION WAGE CLAIM FILING INSTRUCTIONS AND APPLICATION FORM 5 (2020).

75. *E.g.*, KY. REV. STAT. ANN. § 337.385 (2020) (allowing for attorneys' fees), KY. REV. STAT. ANN. § 337.990 (2020) (allowing for interest recovery); MD. CODE ANN., LAB. & EMPL. § 3-507(b)(1) (2020) (allowing for attorneys' fees and other costs); N.H. REV. STAT. ANN. § 524:1-b (2020) (adding interest to pecuniary damage awards), N.H. REV. STAT. ANN. § 275:53 (2020) (allowing for costs of the action and reasonable attorney's fees); N.J. ADMIN. CODE § 12:55-1.7 (2021) (allowing the Commissioner to award interest with back pay in certain circumstances), N.J. STAT. ANN. § 34:11-4.10 (2020) (allowing for reasonable attorneys' fees); N.C. GEN. STAT. ANN. § 95-25.22 (2020) (allowing for recovery of both interest and attorneys' fees); W.VA. CODE ANN. § 21-5-5d (2020) ("[T]he employee or prospective employee shall recover threefold the damages sustained by him or her, together with reasonable attorneys' fees."), W.VA. CODE ANN. § 21-5-6 (2020) ("judgment [shall include] . . . legal interest thereon"). *But cf.* *Imgarten v. Bellboy*, 383 F. Supp. 2d 825, 838–39 (D. Md. 2005) (where the plaintiff was not entitled to prejudgment interest as a matter of right and the decision whether to award prejudgment interest is typically at the discretion of the factfinder); MD. CODE ANN., LAB. & EMPL. § 3-507.1 (2020) (where the Commissioner may order the payment of interest at five percent annually "if appropriate").

76. *See, e.g.*, KY. REV. STAT. ANN. § 337.385(4) (2020) ("The commissioner in case of suit shall have power to join various claimants against the same employer in one (1) action."); NEV. REV. STAT. ANN. § 607.175 (2021) ("The Labor Commissioner or other designated agent of employees may take assignments of wage or commission claims and bring a single action against any one employer on any number of such assigned claims."); N.H. REV. STAT. ANN. § 275:53 (2020) ("The commissioner shall have power to join various claimants in one preferred claim or lien, and in case of suit to join them in one cause of action."); W.VA. CODE ANN. § 21-5-12(b) (2020) ("The commissioner shall have power to join various claimants in one claim or lien, and in case of suit join them in one cause of action.").

77. HAW. CODE R. § 12-21-9 (2020).

The Illinois Department of Labor (IDOL) has slightly broader authority. It is empowered to take assignment of an employee's wage claim "and may bring any legal action necessary to collect such claim."⁷⁸ Where IDOL brings the claim, the employer may be required to pay "the costs incurred in collecting such claim" and an additional amount up to 20 percent of the value of the claim.⁷⁹ In addition, the employer may be required to pay a penalty of \$1,500.⁸⁰ All of these amounts are deposited into the Illinois Wage Theft Enforcement Fund, which is then used to fund IDOL.⁸¹

In Kansas, the wage theft fund is generated through small dollar claims. The Kansas Secretary of Labor, upon written request by the employee, is required to take assignment of a wage claim under \$10,000 and to litigate the claim on the employee's behalf.⁸² Where the Secretary prevails, "the court shall award . . . the cost of reasonable attorney fees for such action."⁸³ The amounts collected through this process must be deposited into the "wage claims assignment fee fund," 10 percent of which goes to the general fund, while the rest remains with the Secretary.⁸⁴

Thus, there is precedent for combining assignment with a dedicated fund. Now, the question is whether that combination could be used to allow agencies to pay workers' claims before the agency has recovered from the employer. Three states have started to experiment with this, albeit in very limited circumstances, and none is attempting a self-sustaining fund.

5. *Pre-Payment of Wage Claims*

Three states—California, Maine, and Oregon—have combined the ability to take assignment and create a dedicated wage theft fund with the upfront payment of meritorious wage claims. For example, California created the Garment Special Fund,⁸⁵ funded by registration fees paid by garment manufacturers.⁸⁶ This fund pays employees upfront for a "failure to pay wages and benefits by any garment manufacturer, jobber, contractor, or subcontractor."⁸⁷ The Commission can then take assignment of the employee's claim, and the amounts recovered are returned to the fund.⁸⁸

78. 820 ILL. COMP. STAT. 105/12 (2020). *See also* 30 ILL. COMP. STAT. 105/5.766 (2020) (creating the fund).

79. 820 ILL. COMP. STAT. 105/12(b).

80. *Id.*

81. *See id.*

82. KAN. STAT. ANN. § 44-324 (West 2020). The Secretary has discretion to take assignment or decline where the claim exceeds \$10,000. *Id.*

83. KAN. STAT. ANN. § 44-324(c) (2021).

84. KAN. STAT. ANN. § 44-324(d) (2021).

85. CAL. LAB. COMM'R OFF., GARMENT WORKERS: RECOVER YOUR UNPAID WAGES (2020) [<https://perma.cc/WL3N-X4TG>].

86. CAL. LAB. CODE § 2675.5 (2021).

87. *Id.*

88. *Id.*

Maine created a \$200,000 Wage Assurance Fund, which pays workers claims where the wages are otherwise unrecoverable.⁸⁹ The fund can pay a maximum of two weeks of wages directly to workers who have made wage claims, but only where the employer has no assets or has filed for bankruptcy.⁹⁰ The state is then subrogated to any claims against the employer for unpaid wages, but only to the extent of the payment from the fund to the employee.⁹¹ This Assurance Fund does not replenish itself; rather, it is periodically funded by the Legislature.⁹²

The State of Oregon created a Wage Security Fund, which is also used to pay an employee's meritorious claim for wages where the employer has ceased doing business and lacks the assets to pay the wages owed to the employee.⁹³ The agency is authorized to bring an action for the amount of the payment, but in Oregon the agency can recover an additional 25 percent or \$200, whichever is greater.⁹⁴ That amount is returned to the agency and not necessarily to the fund.⁹⁵

Thus, the ingredients are present in states as politically diverse as California, Kansas, and Maine. We already have the well-established and noncontroversial ability to create a dedicated fund for penalties and the ability to accept assignment. And we already have some experimentation with pre-payment of wage claims. The next Part will describe how these elements can be combined to create a self-sustaining Wage Recovery Fund that will permit payment of a worker's meritorious wage claims in advance of the enforcement action necessary to collect from the employer.

III.

WAGE RECOVERY FUNDS: IMAGINED

This Section will first walk through step-by-step how the WRF would be administered by an enforcement agency. Next, the Part will tackle how to fund the WRF by presenting two alternatives. The first funding model, which I will call "Wrongdoer Pays," is perhaps the most obvious: a WRF is funded exclusively through recovery from employer wrongdoers. This has rhetorical appeal in that it imposes the cost of upfront payment squarely on the entity causing the problem. The second model is also administered by the agency but adds a "Social Insurance" funding supplement, taking into account the uncertainty of collection and the additional administrative costs by proposing funding through a combination of recovery from wrongdoers and a small contribution across all employers.

89. ME. STAT. tit. 26, § 632 (2009).

90. *Id.*

91. *Id.*

92. *Id.*

93. OR. REV. STAT. §§ 652.409, 652.414 (2021).

94. OR. REV. STAT. § 652.414 (2021).

95. *Id.*

This Part will conclude by presenting the “Community-Based WRF” model, which proposes expanding existing collaborations between enforcement agencies and community organizations to allow for the WRF to be administered by nonprofit organizations. These options are intended to be a menu and not a hierarchy. Some configurations may be best for some states while others fit better elsewhere.

A. Enforcement Agency-Administered Wage Recovery Funds: Step-by-Step

This Section describes the creation of an administrative Wage Recovery Fund held by the enforcement agency and used to provide early payment to workers with strong wage claims. This Section will proceed step-by-step through the proposed agency process: identifying meritorious claims; taking assignment of those claims in exchange for prepaying wages to the employee; recovering wages, interest, attorney’s fees, and penalties; and using that recovery to replenish and increase the wage recovery fund.

1. Investigation

The first step in this process is for the agency to conduct an investigation to determine whether the case is appropriate for assignment. This model, it should be emphasized, does not assume that the agency will take assignment of every claim. Rather, the agency would take assignment in easy-to-prove cases. Making the distinction between the easy cases and the more difficult ones is not as difficult as it seems. State enforcement agencies routinely distinguish between very strong and not-very-strong wage claims. Indeed, in every state that accepts assignment and litigates on behalf of the employee, the agency first determines if the claim has merit.⁹⁶ Thus, all that the agency is doing here is finding those cases that are the most clearly meritorious.⁹⁷

Doing this is made easier by the fact that wage theft cases are not legally nor factually complex. Most cases look very much like An Yu’s: The employer failed to pay the last paycheck; the employer paid a vulnerable worker less than minimum wage; the employer paid nothing in overtime; the employer paid nothing at all. Certainly, there are some cases that are closer calls, and those

96. See, e.g., MD. CODE ANN., LAB. & EMPL. § 3-408 (2021); *Wage Claim Form*, MD. DEP’T LAB., <https://www.dllr.state.md.us/forms/essclaimform.pdf> [<https://perma.cc/AF9H-J5QU>]; *How to File a Wage Complaint*, N.C. DEP’T LAB., <https://www.labor.nc.gov/workplace-rights/employee-rights-regarding-time-worked-and-wages-earned/how-file-wage-complaint> [<https://perma.cc/4PZ6-YNFL>]; *Wage Claim Process*, N.D. DEP’T LAB. & HUM. RTS., <https://www.nd.gov/labor/wage-claim-process> [<https://perma.cc/H2ZS-4CZK>]; *Claim for Wages*, N.D. DEP’T LAB. & HUM. RTS., <https://www.nd.gov/eforms/Doc/sfn17081.pdf> [<https://perma.cc/7T5C-638A>]; N.M. CODE R. § 11.1.4.100 (2021).

97. As the WRF matures, it will be possible to take on more complex or contested cases.

might not be appropriate for this method of resolution. However, most instances of wage theft are neither complicated, nor near the boundaries of the law.⁹⁸

The challenge here will be identifying those cases in which recovery is likely once liability is established. In many instances, agencies are unable to recover because the employer lacks—or asserts that it lacks—resources to satisfy the obligation. Like plaintiff’s lawyers, the WRF should evaluate the employer’s ability to pay in its assessment. In addition, however, agencies have tools at their disposal that the private bar may not. One of those is the ability to require that the employer provide a bond at the outset of the investigation.⁹⁹ In some jurisdictions, the agencies can also impose liens on personal or real property belonging to the employer.¹⁰⁰ Nonetheless, collection is a real challenge, and while it does not solve this problem, the WRF could serve to create even more pressure among agencies to develop better collection tools.

2. Assignment

Next, the agency will do what many agencies already do: offer to take assignment of the worker’s claim. If the worker agrees, the agency will pay the amount owed to the worker from the WRF, including wages and interest accrued to that point. Then, the agency owns the claim. Any recovery belongs to the agency and the agency bears the risk of failing to recover. The only difference between this proposal and the structure of most existing state law assignments is that the employee gets paid upfront.

There is a legitimate question about whether a portion of employer penalties—as distinct from interest—should be paid to the worker once those fines or penalties have been collected by the agency. It is easy to imagine that once the worker has been fully paid out, the worker could lose interest in the enforcement effort, thus affecting the agency’s ability to fully litigate the case. The possibility of additional recovery once the case is concluded could inspire the worker to continue to expend effort toward a favorable resolution.¹⁰¹ We just do not know how much of an issue this will be since it is the opposite of the problem currently experienced by most workers. Agencies are generally anxious to cut off the investigation if, for example, the worker finds private counsel or

98. See Hallett, *supra* note 9, at 98–99.

99. See OR. REV. STAT. § 652.125 (2021); W. VA. CODE R. § 42-33-6 (2020); WASH. REV. CODE § 49.48.086 (2020); CAL. LAB. CODE § 238 (2016).

100. MD. CODE ANN., LAB. & EMPL. § 3-1109 (2013); WASH. REV. CODE § 49.48.086 (2020); 2021 Wash. Sess. Laws 2 (amending WASH. REV. CODE § 49.48.086, effective Jan. 1, 2022); CAL. LAB. CODE § 238.3 (2016); OR. REV. STAT. § 652.414 (2021) (agency can institute lien against employer for benefit of Wage Security Fund); *but see* N.Y. Senate Bill S2844B (2019) (vetoed by Gov. Andrew Cuomo).

101. This is not unlike a *qui tam* arrangement in that it creates an incentive for the employee to come forward and also encourages the agency to hold out for the collection of penalties. In addition, there are a few states and localities where the administrative agency can collect penalties payable to the employee rather than to the state. In those cases, it is only fair for the agency to provide those penalties to the employee once the employer has paid.

the worker gives any indication that their motivation is flagging. Workers, by contrast, must be persistent and diligent just to make sure their cases don't fall through the cracks.

After taking assignment, making the employee whole for their wages and interest, and designating some of the available penalties to the employee for later payment, the agency sets about recovering the amounts owed. In this step, the incentives are switched: the agency has "skin in the game" and therefore a reason to try to recover more fully. In addition to an internal motivation, the agency has vastly more leverage than the individual employee to insist on a full recovery. Unlike An Yu, the agency has the ability to weather the enforcement period without payment. The agency will not lose its home, go into debt to a payday lender, or need to use a high-interest credit card while waiting for payment. The agency also has far more expertise and skill in wage recovery than the individual worker, whereas only a minority of workers may be able to engage private lawyers.¹⁰² The agency, on the other hand, likely has access to its own firm (generally the state attorney general's office), which should be well-positioned and well-qualified to litigate these cases. Additionally, the state often has tools like bonds and liens, which can help to prevent uncollectable judgments.¹⁰³

Adding to its leverage, the agency can also join claims together. Again, in every state that allows assignment of claims, the agency is permitted to join together claims against the same employer.¹⁰⁴ The same would be true here. For example, if An Yu's coworkers also filed wage claims against Sassy's, the agency could aggregate those claims, thereby increasing their leverage while also extending the reach of the recovery.

This strategy could be particularly useful where the agency engages in proactive and strategic enforcement. In California, for example, the Labor

102. See Deborah L. Rhode, *Access to Justice: A Roadmap For Reform*, 41 *FORDHAM URB. L.J.* 1227, 1228–30 (2014) (discussing a survey that reported that in the United States, "thirty-eight percent of poor individuals and twenty-six percent of middle-income individuals took no action in response a legal problem"); Rebecca L. Sandefur, *What We Know and Need to Know about the Legal Needs of the Public*, 67 *S.C. L. REV.* 443, 447–48 (2016) (stating that only a "minority of the American public's civil justice problems are ever taken to lawyers in the hopes of securing advice or representation"); LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 6 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/EPW6-AD79>] ("86% of the civil legal problems reported by low-income Americans . . . received inadequate or no legal help.").

103. See MASS. GEN. LAWS ch. 149 § 27C(a)(7) (2004); N.H. REV. STAT. ANN. § 275:53 (2020); OR. REV. STAT. § 652.414 (2020); WASH. REV. CODE § 49.48.086 (2021); W.VA. CODE ANN. § 21-5-12 (2021).

104. KY. REV. STAT. ANN. § 337.385(4) (2020) ("The commissioner in case of suit shall have power to join various claimants against the same employer in one (1) action."); NEV. REV. STAT. ANN. § 607.175 (2021) ("The Labor Commissioner or other designated agent of employees may take assignments of wage or commission claims and bring a single action against any one employer on any number of such assigned claims."); N.H. REV. STAT. ANN. § 275:53 (2020) ("The commissioner shall have power to join various claimants in one preferred claim or lien, and in case of suit to join them in one cause of action."); W.VA. CODE ANN. § 21-5-12 (2021) ("The commissioner shall have power to join various claimants in one claim or lien, and in case of suit join them in one cause of action.").

Commissioner's Department of Labor Standards Enforcement engages in both individual claims adjudication and industry-wide enforcement.¹⁰⁵ With the addition of a wage recovery fund, the agency could decide to take assignment of the workers' claims across a target industry. Then, the Commissioner could go after the employer on behalf of the group of workers, recovering wages, interest, attorney's fees, and penalties on a much larger scale. That recovery would go right back into the fund so the fund could support more workers in the future.

B. WRF Agency Funding Models

Now, the \$64 million dollar question: how does the agency afford to pay these claims before collecting from the employer? This Section will describe two funding models. The first model relies solely on recovery from employers found to have engaged in wage theft. The second model incorporates a social insurance supplement that requires contributions from employers across the board.

1. Wrongdoer Pays Model

In this model, the funding for worker payments will not come out of the agency's operating budget. It will come from the WRF, and that fund will be replenished whenever the agency recovers more than it pays out on the claim. Again, this is not new territory. As argued above, every state that allows for assignment of claims is empowered to collect the wages, interest or liquated damages, and penalties, along with attorney's fees and costs. In addition, three states are already prepaying wage theft claims in targeted situations.¹⁰⁶

This proposal takes the next step from these existing prepayment efforts. Here, the WRF is intended to be like the three existing programs in that the fund would be dedicated to the prepayment of wage theft claims.¹⁰⁷ Unlike those funds, the "Wrongdoer Pays" Wage Recovery Fund would not rely on a tax or fee to sustain it. The fund would be replenished and expanded through recovery of interest and some or all available penalties from employers. While the fund would pay out wages and interest up to the point of the assignment, it would collect far more than that. The agency would hold the rights to the entire claim, including the wages and interest, not just to the point of assignment, but up to judgment. Thus, if the agency merely collected all the interest to which the

105. *Labor Commissioner's Office*, CAL. DEP'T INDUS. RELS., <https://www.dir.ca.gov/dlse/dlse.html> [<https://perma.cc/H3EH-VHHP>] (last visited Aug. 5, 2022).

106. CAL. LAB. CODE § 2675.5 (2017) (California's Garment Special Fund is supported by registration fees paid by all garment employers.); ME. STAT. tit. 26, § 632 (2009) (Maine's Wage Assurance Fund is allocated \$200,000 each fiscal year.); OR. REV. STAT. § 652.414 (2020); OR. REV. STAT. § 652.409 (2016) (Oregon's Wage Security Fund is allocated funding).

107. Again, this is familiar territory. Agencies—particularly those working in the employment space—are accustomed to dedicated funds used to make particular payments to workers. Workers Compensation systems are a common example of this kind of dedicated fund. Likewise, while unemployment insurance is federally underwritten, states uniformly use dedicated funds to pay out benefits.

worker is entitled, it would be far ahead of the amount the fund paid out. In short, the WRF relies on funding by bad actors.¹⁰⁸

Shifting the costs associated with enforcement to the wrongdoer is consistent with the aims of the wage and hour law. The FLSA, like its state counterparts, requires the court to award attorney's fees and costs incurred by the plaintiff in bringing an enforcement action.¹⁰⁹ A prevailing defendant, however, is not equally entitled to fees and costs.¹¹⁰ This divergence is designed to enhance the enforcement reach of the statute by allowing plaintiffs to "act as a private attorney[s] general."¹¹¹ Scholars have argued that this one-way fee-shifting provision is designed to recognize that "some civil litigation has value beyond serving the substantive or procedural rights of the litigants. In those areas, Congress has seen fit to authorize the reimbursement of attorneys pursuing the cases so that attorneys will, in fact, pursue them."¹¹² There is nothing particularly radical about a plaintiff's lawyer supporting future cases through the recovery of contingent fees. Indeed, scholars argue persuasively that such fee shifting should be available to support public interest law firms, such as legal services.¹¹³ The idea of using penalties and interest to support the government's enforcement systems is a small logical step.

108. It is important to note that there will be administrative costs associated with the creation and maintenance of the WRF. While this Article suggests that startup costs be accounted for through a one-time legislative appropriation or outside grant sources, this Article does not propose that any increased day-to-day enforcement costs would be covered by the WRF. It is the function of the agency to enforce claims of wage theft, and this proposal neither increases nor decreases the prevalence of those claims. It does create an incentive for the agency to pursue those claims more forcefully, and therefore potentially creates more work for the agency than it is performing now, which means more agency staffing. But the WRF did not create that need; it existed long before this proposal. *See, e.g.,* Zach Schiller & Sarah DeCarlo, *Investigating Wage Theft: A Survey of the States*, POLICY MATTERS OHIO (2010), <http://www.fairwarning.org/wp-content/uploads/2014/04/Link23.pdf> [<https://perma.cc/B2SS-9D4G>] (investigating the level of wage theft enforcement effort by states); *NYS Department of Labor's Widespread Failure to Serve Wage Theft Victims*, NAT'L MOBILIZATION AGAINST SWEATSHOPS (2013), <http://nmass.org/nys-department-of-labors-widespread-failure-to-serve-wage-theft-victims> [<https://perma.cc/9AGC-8JPD>]; *Settlement, Olivas v. Bussey, Cnty. of Santa Fe First Jud. Dist., No. D-101-CV-2017-00139* (2017) (acknowledging a systemic failure to collect unpaid wages and committing to change).

109. 29 U.S.C. § 216(b).

110. *See, e.g.,* *Andrews v. America's Living Ctrs., LLC*, 827 F.3d 306, 312 (4th Cir. 2016) (Because the statute is silent on the award of fees to a prevailing defendant, "an award of attorneys' fees on a statutory basis would be improper.").

111. *Fegley v. Higgins*, 19 F.3d 1126, 1134 (6th Cir. 1994) ("The purpose of the FLSA attorney fees provision is to ensure effective access to the judicial process by providing attorney fees for prevailing plaintiffs with wage and hour grievances.") (internal citations and quotations omitted); *United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, Loc. 307 v. G & M Roofing & Sheet Metal Co.*, 732 F.2d 495, 501–02 (6th Cir. 1984) ("The availability and award of attorney fees under § 216(b) must reflect the obvious congressional intent that the policies enunciated in § 202 be vindicated, at least in part, through private lawsuits charging a violation of the substantive provisions of the wage act.").

112. Kathryn A. Sabbeth, *What's Money Got To Do with It?: Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 467 (2014).

113. *Id.* at 488.

Likewise, the ability to aggregate the liability of bad actors is nothing new to the FLSA. In addition to the Secretary's plenary ability to combine claims against a single employer, the FLSA also authorizes enforcement actions "by any one or more employees for and on behalf of himself or themselves and other employees similarly situated."¹¹⁴ This unique enforcement structure known as "collective action" has existed since the 1935 enactment of the FLSA. Though the Portal-to-Portal amendments in 1946 significantly narrowed the reach of collective action, it is still explicitly intended to allow individual employees to aggregate enforcement resources. As the Supreme Court recognized in *Hoffman-LaRoche v. Sperling*, a "collective action allows . . . the advantage of lower individual costs to vindicate rights by the *pooling of resources*."¹¹⁵ Thus, aggregating enforcement resources among employees is a long-standing part of the wage and hour enforcement system.¹¹⁶

Aggregating penalties to support future enforcement also serves an important deterrence function. The effectiveness of agency penalties as a deterrent, of course, depends on the agency's ability to collect them.¹¹⁷ While states continue to ratchet up penalty rates, those heightened penalties have done little to reduce the prevalence of wage theft because the probability of an employer being required to pay those fines is vanishingly low.¹¹⁸ As Weil pointed out, an administrative enforcement system limited to the collection of individual wages "puts investigators on a hamster wheel: running very fast and working very hard, but not advancing the larger aim of protecting and enhancing the welfare of the Nation's workforce. Traditional enforcement focused on a back wage recovery objective must therefore be challenged."¹¹⁹

A Wrongdoer Pays WRF would make two things more likely, which should increase the collection of penalties. First, it would make it more likely that a worker will bring a claim. One of the main reasons that employees do not come forward to claim stolen wages is the likelihood that they will be fired as a result. The possibility of upfront payment of wages and interest reduces the effectiveness of retaliation as a threat to the employee. The employee would at

114. 29 U.S.C. § 216.

115. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (emphasis added).

116. The idea of aggregating interest and penalties to support an enforcement system has precedent in other areas as well. In the criminal arena, the imposition of the court costs through fines and forfeitures is common. The issues related to the imposition of these fees and fines have arisen as the result of their disproportionate impact on the already poor and powerless. In the case of the WRF, the purpose is exactly the opposite: more consistently imposing these costs on the already-too-powerful in an effort to change the wage theft calculus and shift the leverage. In this way, this fee-shifting is more akin to imposing civil costs on certain state court repeat players (such as institutional debt collectors) to attempt to level the power imbalance between plaintiff and defendant.

117. See Hallett, *supra* note 9, at 106.

118. See Daniel Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSPS. ON POL. 324, 339 (2016).

119. WEIL, STRATEGIC ENFORCEMENT, *supra* note 5, at 13.

least have a reserve of money to draw on if they should lose their job.¹²⁰ Second, because the WRF switches incentives by placing the risk of low recovery on the agency and not the employee, it should be far more likely that the agency will hold out for some penalties in settlement negotiations. And any increase in penalty recovery would be a dramatic change from the current situation.¹²¹

There are some practical risks of this approach. First, it relies on the agency's ability to collect more than it pays out in enough cases so that the fund will grow and not shrink. This depends on the agency's ability and interest in finding "easy" cases. Given the empirical evidence presented in Part II.A, there should be an abundance of "fish in a barrel" cases. Nonetheless, even in those cases, the employer may not be able to pay, and not all agencies have the legal tools, resources, expertise, or institutional desire to engage in effective collection litigation. In jurisdictions where there is access to effective collection tools, such as liens and bond requirements, the agencies would need to use them perhaps to a greater extent than they do now.¹²² In jurisdictions without those tools or where those tools have not been effective, the fund would—at least initially—need to be risk averse and, similar to plaintiff-side firms, constrained in the cases that would take on. To allow the agency to be less risk averse, the next Section lays out the possibility of adding a "Social Insurance Supplement" to the funding model. This does not eliminate the wrongdoing employer as a source of funding, but adds a layer of certainty through employer contribution.

120. See LAURA HUIZAR, NAT'L EMP. L. PROJECT, RETALIATION FUNDS: A NEW TOOL TO TACKLE WAGE THEFT 5 (2021), <https://s27147.pcdn.co/wp-content/uploads/NELP-Policy-Brief-Retaliation-Funds.pdf> [<https://perma.cc/4FSK-WQWD>].

121. It is important to acknowledge that the fund would require seed money to begin its work. Because the payments to workers are paid before the recovery against the employer is made, there would be the need for external funding in the first year. There are a variety of ways to accomplish this. The first, and simplest, is a one-time, small general fund allocation. This mirrors the arrangement in Maine, though it should not need to be recurring. It would be a modest allocation, enough to get the program off the ground and to establish that it works. This seed money could also be generated through outside grant sources. This kind of one-time, foundational support is perfectly suited to philanthropic or other outside funding sources.

122. See, e.g., WASH. REV. CODE § 49.48.060 (2010) ("If upon investigation by the director, after taking assignments of any wage claim under RCW 49.48.040 or after receiving a wage complaint as defined in RCW 49.48.082 . . . the director may require the employer to give a bond in such sum as the director deems reasonable and adequate in the circumstances, with sufficient surety, conditioned that the employer will for a definite future period not exceeding six months conduct his or her business and pay his or her employees in accordance with the laws of the state of Washington."); 2021 Wash. Sess. Laws, Chap. 102 (allowing for liens against real property and for agencies to foreclose on those liens); OR. REV. STAT. § 652.125 (2019) ("If, upon complaint by an employee, and after investigation, it appears to the Commissioner of the Bureau of Labor and Industries that an employer is failing to pay wages within five days of a payday scheduled by the employer, the commissioner may require the employer to give a bond in such amount as the commissioner determines necessary, with sufficient surety, to assure timely payment of wages due employees for such future period as the commissioner considers appropriate."); HAW. REV. STAT. § 388-9 (2008) ("[T]he director may institute proceedings . . . to compel the employer to cease doing any business until the judgment has been satisfied.").

2. *Social Insurance Supplement Model*

The Social Insurance Supplement model is identical to the Wrongdoer Pays model with one exception. It adds another funding source: employer contribution. In this model, the money used for upfront worker payments would still come from the WRF, and the WRF would still be periodically replenished by recovery from wrongdoing employers. However, this model adds small, regular contributions from employers to the funding pot.

It is not uncommon for employers to contribute to state-administered funds supporting basic benefits for workers. The most common are workers' compensation and unemployment insurance.¹²³ More recently, however, this funding model has been used to provide for paid family leave benefits.¹²⁴ In California, employer contributions fund the Garment Special Fund, which is used to pay wage theft claims upfront.¹²⁵ In all three cases, the purpose of employer contribution is to move the risk of loss off the individual employee and spread it across a large group of employers. While this article in no way proposes a “grand bargain” like the one that led to the workers' compensation system, the idea of spreading the responsibility of injury incurred in the “common enterprise” is similar.¹²⁶

A Social Insurance Supplement makes particular sense in the face of workplace fissuring, the practice of large employers subcontracting or otherwise shedding low-wage functions to small, low-margin, often financially shaky organizations. When an employer engages in fissuring, wage theft inevitably grows because the subcontracting organizations either do not have the means or the desire to comply with minimum standards laws.¹²⁷ Because those subcontracting organizations often do not have the resources to remedy their bad behavior, workers are left holding all the risk and experiencing all the damage caused by the failure to pay wages. The marginal business, presumably undercompensated for assuming the noncore functions of the more stable business, are also left managing a level of risk for which they are unprepared. Incorporating an insurance component—an obligation across all employers to

123. Indeed, in the Workers Compensation area, once the agency has paid out benefits, many states allow the agency the option to take assignment of any third party claims the employee may have. The recovery in those actions is then returned to the workers compensation fund. *See, e.g.*, WASH. REV. CODE § 51.24.050 (2020); WYO. STAT. ANN. § 27-14-105 (2009).

124. *See generally* WASH. REV. CODE § 50A.05 et seq. (2022).

125. CAL. LAB. CODE § 2675.5 (2022).

126. *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 203–04 (1917) (“Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise.”).

127. WEIL, *FISSURED WORKPLACE* 8 (2014); Galvin, *supra* note 118, at 325 (“[A]s employment responsibilities have been delegated to lower-level companies operating in more highly competitive labor markets, downward pressure has been placed on wages and labor standards.”).

ensure that the most vulnerable workers are paid the minimums promised them—expands the responsibility for payment across employers and prevents it from falling primarily on those who are unable to pay.

This source of funding would add stability to the fund, building a buffer to account for institutional uncertainties. First, the creation and maintenance of a WRF brings administrative costs with it. In an environment of austerity among public agencies, it is easy to imagine an agency trading off some of its current priorities in order to administer this fund. This additional buffer could allow the agency to view the fund as purely additive—one more tool in the agency’s toolbox. Second, this financial buffer could allow the fund to take on more cases of a broader variety. For example, while the “bread and butter” for the fund could be the easy, quickly resolved cases, additional resources could allow the fund to take on bigger litigation. This litigation is more costly to prosecute but has the potential to produce larger recoveries and bring more public attention.¹²⁸ Finally, and most importantly, the added financial buffer could act as a hedge against uncollectable judgments, making the fund less vulnerable to the reality that some employers are either unable to or would sooner go out of business than pay in accordance with minimum standards law.

The institutional confidence created by this additional funding would likely enhance deterrence as well. As described above, the deterrence effect depends in large part on the agency’s ability to recover exemplary damages and penalties. Like the workers themselves, the more financially stable the fund is, the more it is able to resist resolutions that do not include penalties. While we do not yet know the deterrence effect of consistently recovering penalties, it is easy to imagine that it will be dramatic.

This is not to say that the social insurance component is without downsides. The most obvious problem is political. It will be difficult to amass the political will to enact an across-the-board employer contribution where large employers, such as Amazon, are asked to pay for the misdeeds of smaller employers. If Seattle’s experience with its employer “head tax” is any indication, passing any employer tax, even in the bluest of blue cities, will be a challenge.¹²⁹ In some jurisdictions, it will simply be a nonstarter. Another potential downside relates to incentives. The WRF serves to give agencies the incentive to expend extra effort recovering more fully from employers. There is a risk that the existence of a financial buffer in the fund could diminish that incentive.

128. Terri Gerstein, *State and Local Workers’ Rights Innovations: New Players, New Laws, New Methods of Enforcement*, 65 ST. LOUIS U. L.J. 45, 86 (2020) (“This use of publicity is a critical but sometimes underused tool in promoting labor law compliance. A recently published study showed a significant deterrent impact resulting from OSHA’s policy under the Obama administration of routinely issuing press releases for violations with penalties above a certain threshold.”).

129. See David Streitfeld & Claire Ballentine, *Seattle Officials Repeal Tax That Upset Amazon*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/technology/seattle-tax-amazon.html> [<https://perma.cc/J2R8-RXX6>].

This Section was intended to make clear how to slot together existing state regulations to allow state agencies to stop brokering no-interest loans from low-wage workers. While this would be a dramatic improvement to the status quo, placing the WRF in a government agency does not directly build worker or community power. The next Section of this Article proposes the alternative of placing the Wage Recovery Fund in the community, which would help to build community resources and organizing capacity.

C. *Community-Based Wage Recovery Funds*

The Wage Recovery Fund could also be placed in and administered by a community organization. This Section will describe the reasons to consider placing the WRF in community, rather than agency, control. It will set out some of the mechanics for placing the fund in community. Then, it will acknowledge several challenges embedded in this approach.

1. *Community-Based WRFs as Co-Enforcement Partnerships*

The abundant scholarship on community-based wage theft enforcement argues that partnerships between local enforcement agencies and community-based organizations improves agency enforcement and thereby strengthens minimum employment standards.¹³⁰ Primarily based on the study of worker centers, the contention is that government enforcement of wage theft claims does not, by itself, reach the most vulnerable and therefore the most important victims

130. See, e.g., Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-Enforcement Succeed Where the State Alone Has Failed?*, 45 POL. & SOC'Y 359, 359 (2017) (“[C]o-enforcement, in which government partners with organizations that have industry expertise and relationships with vulnerable workers, has the potential to manage the shifting and decentralized structures of twenty-first-century production, which were explicitly designed to evade twentieth-century laws and enforcement capabilities.”); Matthew Amengual & Janice Fine, *Co-Enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States*, 11 REGUL. & GOVERNANCE 129, 129 (2017) (“Co-enforcement – ongoing, coordinated efforts of state regulators and worker organizations to jointly produce labor standards enforcement – is an important, yet overlooked, mode of labor standards enforcement.”); TIA KOONSE, MIRANDA DIETZ & ANNETTE BERNHARDT, UCLA CTR. FOR LAB. RSCH. & EDUC., UC BERKELEY CTR FOR LAB. RSCH. & EDUC., *ENFORCING CITY MINIMUM WAGE LAWS: BEST PRACTICES AND CITY AND STATE PARTNERSHIPS* 13 (2015) (“Enforcement agencies can leverage the complementary strengths of community-based organizations (CBOs) and legal services providers in order to increase effectiveness and reach. The linguistic, cultural, and industry knowledge within CBOs make them valuable partners in educating workers about their rights, building trust between workers and investigators, and providing knowledge of the particular industry dynamics at play.”); NAT’L EMP. L. PROJECT, *WINNING WAGE JUSTICE: AN ADVOCATE’S GUIDE FOR STATE AND CITY POLICIES TO FIGHT WAGE THEFT* 39 (2011) (“Workers’ advocates and stakeholders including worker centers, labor unions, employment lawyers and high-road employers have substantial expertise about violations in our nation’s workplaces. State agencies should build and strengthen relationships with these constituents to ensure enforcement resources are being used strategically and efficiently, and to have a directed impact on the communities and employers that most need attention.”).

of wage theft.¹³¹ Additionally, partnerships between government and communities, sometimes called “co-enforcement,” provide a more lasting mechanism to address wage theft by funding and legitimizing community organizations. This, in turn, facilitates worker organizing and creates more effective countervailing power in the workplace.¹³²

This theory has been put into action in a variety of jurisdictions.¹³³ In San Francisco, for example, the city’s Office of Labor Standards Enforcement (OLSE) partners with a coalition of organizations, led by the Chinese Progressive Association (CPA), to enforce San Francisco’s suite of minimum standards ordinances.¹³⁴ OLSE provides funding to CPA through its granting process. CPA then brings together a coalition of trusted community organizations to provide outreach and enforcement directly to their communities.¹³⁵ These organizations provide safe and culturally appropriate support to workers challenging wage theft. They also respond to workers’ desire to organize to secure ongoing, meaningful changes in their workplaces.

CPA’s advocacy in the Yank Sing case demonstrates how organizing and enforcement combine to improve conditions for vulnerable workers. In 2014, a group of workers at Yank Sing, a Michelin-rated dim sum restaurant in San Francisco, sought the CPA for help. Yank Sing workers were not receiving minimum wages, overtime pay, or rest breaks. CPA engaged its coalition partner, Asian Americans Advancing Justice - Asian Law Caucus (ALC) to bring the legal claim.¹³⁶ While ALC represented the individual workers who came forward, CPA organized nearly 100 more Yank Sing employees into the fight, thereby increasing public pressure on the restaurant.¹³⁷ ALC then filed charges with the State Labor Commissioner’s Office.

Yank Sing then offered to sit down and negotiate. In addition to resolving the legal claims, the group was able to secure a 5 percent wage increase, paid

131. Fine, *supra* note 130, at 360 (“[V]ulnerable workers in low-wage sectors are not filing complaints anywhere near proportionate to their actual experiences of wage theft.”).

132. See Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 552 (2021) (“[M]ass-membership organizations enable pooling of politically relevant resources, including money, among individuals with few such resources; they provide information to decisionmakers about ordinary citizens’ views; they navigate opaque and fragmented government structures, thereby enabling citizens to monitor government behavior; and they allow citizens to hold decisionmakers accountable.”).

133. Fine, *supra* note 130, at 372–77 (describing the Carwashero campaign in Los Angeles, the Dick Lee Pastry campaign in San Francisco, and the Yank Sing campaign in San Francisco).

134. S.F., CAL., CODE § 12R.25 (2020). See also SEATTLE, WASH., CODE § 3.15.009 (2020).

135. Those community organizations include Asian Americans Advancing Justice, Delores Street Community Services, Filipino Community Center, La Raza Centro Legal, South of Market Community Action Network, and Trabajadores Unidos/Workers United.

136. ALC is a non-profit law office that, among other areas, represents workers in claims of wage theft. See *What We Do*, ASIAN AMS. ADVANCING JUST. — ASIAN L. CAUCUS, <https://www.advancingjustice-alc.org/what-we-do/> [https://perma.cc/642X-M79X] (last visited Aug 5, 2022).

137. See Fine, *supra* note 130, at 377–78.

sick leave, and vacation time, which had never before been available to Yank Sing employees. In addition, Yank Sing agreed to acknowledge the violations, make a public apology, and commit to compliance with the law going forward.¹³⁸

This kind of success demonstrates the power of placing enforcement tools within the grasp of expert community organizations. A community-based WRF could be an important addition to this agency-community partnership and “enable pooling of politically relevant resources, including money, among individuals with few such resources.”¹³⁹ The next Section will describe how this could work.

2. *Community-Based WRF Mechanics*

Creating a community-based wage enforcement fund is a natural next step in community-based enforcement. Using the CPA coalition as a hypothetical illuminates how this would work. First, like the Yank Sing case, a worker or group of workers would contact CPA with an allegation of wage theft. CPA would conduct an initial assessment to determine if the case had legal merit. The same criteria that the enforcement agency used would be appropriate, though CPA would have the additional ability to consider how a given claim fits into the community’s priorities. If the claim appeared to have merit, then CPA would pay the worker upfront the amount their employer owed, including interest accrued. In exchange, the worker would assign their claim to CPA.

Then, the CPA would turn to its law firm partners, like ALC, to take on the litigation. The firm, rather than representing the individual worker, would now represent the CPA. Together, they would be an abusive employer’s worst nightmare: an organization with every incentive to hold out for an outcome that both compensates employees fully for past harm and provides commitments for the future.

Like an enforcement agency, CPA could aggregate claims and bring them together as a class action. Like the agency, CPA would be entitled to the full range of remedies and thus would be entitled to recover wages owed. However, they would also be entitled to interest on wages from the point at which the wages should have been paid to the worker. In addition, they would be entitled to exemplary damages—which under San Francisco’s ordinance is “an additional sum as penalties in the amount of \$50 to each Employee or person whose rights under this Chapter were violated for each day that the violation

138. See *id.*; Vinnee Tong, *How A Group of Dim Sum Makers Won \$4 Million in Back Pay*, KQED (July 23, 2015), <https://www.kqed.org/news/10559232/how-a-group-of-dim-sum-makers-won-4-million-in-back-pay> [<https://perma.cc/QYK3-7JLQ>]; Marlize von Romburgh, *Dim Sum Palace Yank Sing to Pay \$4 Million Settlement for Allegedly Abusing Workers*, S.F. BUS. TIMES (Nov. 19, 2014), <https://www.bizjournals.com/sanfrancisco/blog/2014/11/yank-sing-dim-sum-san-francisco-settlement-labor.html> [<https://perma.cc/96FL-42BU>].

139. Andrias & Sachs, *supra* note 130, at 552.

occurred or continued.”¹⁴⁰ In addition, the CPA would be entitled to recover attorney’s fees and any costs.¹⁴¹ Once the claim is resolved, either by judgement or settlement, the amounts recovered would be returned to the wage theft fund. In most cases, the amount recovered would substantially exceed the amount paid to the worker, and thus the fund would grow.

This description is intended to give an overview of how the process might work in a nonprofit setting. But, more than the government-administered WRF, a privately administered WRF brings challenges with it. The next Section lays out some of these challenges and offers thoughts on their mitigation.

3. *Challenges of a Community-Based WRF*

a. *Champerty*

A community-based WRF would likely encounter state courts’ discomfort with anything resembling champerty.¹⁴² Champerty is an “agreement between a stranger to a lawsuit and a litigant by which the stranger pursues the litigant’s claim as consideration for receiving part of any judgment proceeds.”¹⁴³ Champerty was disfavored in English common law, but rules against champerty and prohibitions of assignment are—at least nominally—no longer a part of U.S. law.¹⁴⁴

The Supreme Court affirmed as much in *Sprint Communications Co. v. APCC Services, Inc.*¹⁴⁵ That case arose from the now-anachronistic use of a 1-800 number issued by a carrier to complete a long-distance telephone call from a payphone.¹⁴⁶ Where a carrier’s customer used the 1-800 number, the carrier was required by regulation to compensate the payphone operator for each call.¹⁴⁷ Because the operators were relatively small, as were the claims against the carriers, APCC Services acted as an aggregator of the payphone operators’ claims, taking assignment of the claims and recovering on behalf of the operators.¹⁴⁸ Sprint challenged the aggregator’s standing, echoing the common law concerns with champerty, but the Court disagreed:

140. S.F., CAL., CODE § 12R.7(d) (2020). *See also* CAL. LAB. CODE § 1194.2 (2020) (double damages).

141. S.F., CAL., CODE § 12R.7(d) (2020).

142. Anthony Sebok, *Going Bare in the Law of Assignments: When Is an Assignment Champertous?*, 14 FIU L. REV. 85, 88 (2020) [hereinafter Sebok, *Going Bare*]; Paul Bond, *Making Champerty Work: An Invitation To State Action*, 150 U. PA. L. REV. 1297, 1300 (2002) (noting that champerty is banned in most states). *See, e.g.*, Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453 (2011) (comparing champerty to gambling and insurance and concluding that it is neither).

143. Sebok, *Going Bare*, *supra* note 142, at 86.

144. *Id.* While it is technically distinct from assignment of claims, the concepts are frequently conflated by courts.

145. *Sprint Commc’ns Co. v. APCC Services, Inc.*, 554 U.S. 269, 271 (2008).

146. *Id.*

147. *Id.*

148. *See id.* at 271–72.

[C]ourts have long found ways to allow assignees to bring suit; that where assignment is at issue, courts—both before and after the founding—have always permitted the party with legal title alone to bring suit; and that there is a strong tradition specifically of suits by assignees for collection.¹⁴⁹

Still, state courts have had a hard time letting go of their reluctance to allow private assignments of claim. Most state courts will not allow using assignment for the purpose of “litigious strife” or “stirring up quarrels.”¹⁵⁰ However, in a dramatic example, New York law prohibits any assignment of claims “with the intent and for the purpose of bringing an action or proceeding thereon.”¹⁵¹ Other states, while not issuing outright prohibitions, have indicated willingness to void such agreements on policy grounds.¹⁵² Still other states’ decisions are inconsistent¹⁵³ or express confusion over their treatment of the law in this area.¹⁵⁴ Given this state-to-state uncertainty and the potential benefit of the use of assignment to benefit a less powerful plaintiff, Professor Paul Bond has argued for a more uniform public system of champerty in which assignments would be permitted but administered by the judiciary.¹⁵⁵

However, there are mechanisms that could lessen the uncertainty for community-based WRFs. First, in a version of Professor Bond’s public champerty proposal, the enabling legislation for the partnership between state or local enforcement agencies and community-based nonprofits could be expanded to include an explicit grant of assignment authority to the nonprofit, just as almost every state grants assignment authority to the agency. In addition to guarding against the misuse of that authority through speculation or malicious litigation, the legislative authority could reserve to the agency the ability to approve or reject any individual assignment.

Second, while the worker will have been paid at the outset the wages and interest owed to them, the worker should still retain an interest in the penalties or exemplary damages available despite the assignment. In other words, the safest course is to have all of those penalties presumptively payable to the

149. *Id.* at 285. *But see id.* at 306 (Roberts, J. dissenting) (calling the historical evidence “equivocal”).

150. *See* Markarian v. Bartis, 199 A. 573, 577 (N.H. 1938); Boettcher v. Criscione, 299 P.2d 806, 811 (Kan. 1956).

151. N.Y. JUD. LAW § 489 (2020).

152. Sebok, *Going Bare*, *supra* note 142, at 91 (cataloging the variety of state approaches); Bond, *supra* note 142, at 1333.

153. *Compare* Roberts v. Holland & Hart, 857 P.2d 492, 495–96 (Colo. Ct. App. 1993) (finding that the assignment of legal malpractice claims was prohibited, in part because such assignment would “promote champerty”) *with* Casserleigh v. Wood, 59 P. 1024, 1026–27 (Colo. Ct. App. 1900) (holding that champerty *per se* is not prohibited under state law).

154. Giambattista v. Nat’l Bank of Com. of Seattle, 586 P.2d 1180, 1186 (Wash. Ct. App. 1978) (“It is questionable whether many remnants of these doctrines [champerty and maintenance] remain in this state.”).

155. Bond, *supra* note 142, at 1316.

worker.¹⁵⁶ This is even more important than in government-administered WRF's because the penalties and exemplary damages available in private litigation tend to be payable to the plaintiff and higher than the penalties that an agency is authorized to collect. This guards against a recovery to the fund that far exceeds the earlier payment to the individual. While there is no reason that a large recovery to the fund should invalidate the assignment, such damage awards create the perception of unfairness and the temptation to engage in "officious litigation."

Whether or not there would be viable state-based challenges to the assignment arrangement within the WRF, these additional protections may be advisable to head off the kinds of policy concerns that arise with private actors taking assignments. Community organizations are certainly not immune to the temptation to misuse the additional leverage that could come with aggregating damages in wage cases.

b. Rules of Professional Conduct

The next challenge in creating a community-based WRF involves legal ethics. If the fund were created as a part of organizations that provide legal services, a transaction in which the organization purchases and then litigates the employee's claim would violate the Model Code of Professional Responsibility.¹⁵⁷ The solution here is straightforward. The organization that holds the WRF should be an organization distinct from the organization that provides representation. In addition to resolving the ethical issue, it is also an eminently practical choice—the holder of the WRF would have the ability to engage one or more firms depending on the firm's particular capacity or qualifications.

This raises the interesting question of the relationship between the WRF and the law firm. One could also imagine a version of a contingent fee arrangement where the firm recovers its fees or a percentage of the overall recovery. Once the WRF is sufficiently well-funded, one could imagine that it would engage one or more firms, pay each firm on an hourly basis, and then recover fees as part of the settlement or judgment. Finally, a nonprofit law firm like ALC, funded through grants and donations, may well be able to forego its

156. It is possible to imagine this as a presumption of the worker holding the right to penalties, and that presumption could be overcome by the worker affirmatively agreeing to split those penalties. This raises further complexity in determining exactly how explicit that affirmative agreement should be. An easier route might be to offer the worker the opportunity to make a donation to the organization once the settlement is reached.

157. MODEL CODE OF PRO. COND. r. 1.8(i) (AM. BAR ASS'N 1983) ("A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case.").

fees until the judgement or settlement is reached. If the fund does not prevail, one can imagine the non-profit law firm waiving its fees altogether.¹⁵⁸

c. Relationship with the Agency and Public Disclosure

Enforcement agencies, like those in San Francisco and Seattle, have well-developed partnerships with community-based organizations. These relationships generally take the form of contracts providing funding in exchange for certain deliverables, such as outreach events or worker intakes. It would be easy to imagine a one-time grant included in this funding model to launch a wage recovery fund. Once the partnership is expanded to include a WRF, the relationship with the agency likely brings with it an obligation of transparency and even implicates mandatory public disclosure laws. The organization holding the WRF, as described above, would not be a law firm, and so its communication would not generally be shielded from public disclosure. So, the organization would want to be careful to segregate communication regarding potential or actual WRF cases so that it would be covered by the work-product doctrine.

Identifying these challenges is not intended to state a preference for the agency-based over the community-based fund. There is much to commend in both approaches, and they are not mutually exclusive. Shifting power—in the form of money—from employers directly to community organizations will likely generate significant opposition. Identifying these challenges is an effort to be forearmed. Nonetheless, the WRF's potential to build organizational capacity among communities and to shift leverage in the workplace is significant.

d. Capacity Building, Leverage Shifting, and Potential for Community-Based Wage Theft Enforcement

As the above Section demonstrates, creating a community-based WRF will be a complex undertaking and could bring some risk to the organization, but for the right organization, this structure also brings significant benefits.

First, it creates a real and tangible means of aggregating the value of uncollected interest and penalties to support community and worker advocacy. This will not be easy or quick, and it will require time and organizational stability to get the WRF off the ground. But, it could allow a community organization to limit its dependence on government or philanthropic funding, allowing the organization to take the strategic lead from the community rather than the funders.

Second, it could allow community organizations to create new tables for workplace negotiation, thereby shifting workplace leverage from employers toward employees. In the communities we serve at the Seattle University Clinic, the distribution of leverage between employer and employees is so imbalanced

158. While it is beyond the scope of this Article, there is a question as to whether any of these arrangements would affect the law firm's non-profit status.

that it is hard to see that a negotiation is taking place at all. No employer expects that it needs to negotiate with—or even talk to—its low-wage workers. Those who do engage with their employees do so most commonly out of legal necessity, i.e., when we sue them. We have been able to leverage the legal action into a broader negotiation and more enduring workplace improvements. The aggregation of interest and penalties could allow for a more sustained and strategic approach to community-based legal intervention. Forthcoming work from this author will create a roadmap for building power through community-based wage theft enforcement by connecting the theories of leverage with the strategies available to community-based legal advocacy organizations.

CONCLUSION

Wage theft continues to be an intractable problem in the United States. At this point, a major facet of this problem is the sheer number of wage theft cases to be resolved. There are so many cases of wage theft that agencies and community organizations are quickly overwhelmed by the need for effective representation. The good news is that these cases are not legally or factually complex; employers, possessing so much more power than their workers, are for the most part simply not paying them. The other piece of good news is that the minimum wage statutes generally provide for the recovery of interest and penalties. This article attempts to aggregate those elements of damage to fund a more effective approach to enforcement that shifts the risk of delay from employees to the organizations that can more easily absorb them: government enforcement agencies and community-based organizations.

It is unacceptable for organizations dedicated to enforcing workers' legal rights to serve as brokers for no-interest loans from employees to their employers. Enforcement agencies should be able to get workers their money in a timely way without forcing them to give their employer a no-interest loan. This article proposes one way to do this: pay workers upfront from a dedicated WRF. If the many studies documenting the extent of wage theft in the United States are correct, there are more than enough meritorious claims to justify this risk.