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An Advocate's Toolkit: Using Criminal "Theft of Service" Laws to Enforce Workers' Right to be Paid

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AN ADVOCATE'S TOOLKIT: USING CRIMINAL "THEFT OF SERVICE" LAWS TO ENFORCE WORKERS' RIGHT TO BE PAID

*Rita J. Verga**

OVERVIEW

This toolkit is intended to be an accessible guide[1] *for non-lawyer advocates assisting day laborers and other contingent workers to recover unpaid wages. It details a new tactic which uses criminal "theft of service" laws to hold employers accountable for failing to pay wages. This tactic will be most feasible for community groups that have an established relationship with law enforcement officials, and for those that can mount a campaign to pressure law enforcement officials to implement the approach.*

The toolkit introduces "theft of service" laws, sets forth reasons why new wage enforcement tactics are needed, discusses issues that will arise if advocates attempt to use "theft of service" laws, describes legislative efforts to have "theft of service" laws passed at the local level, and proposes a way to improve wage theft laws. It also includes four Appendices with a detailed breakdown of applicable laws, and sample forms and letters which I hope will serve as helpful guides and provide necessary information.

As a final note, I hope that criminal prosecution of the egregious employer practice of stealing workers' wages will help to end the general acceptance of robbing low-wage workers.

I. INTRODUCTION TO "THEFT OF SERVICE" LAWS

Although numerous legal tools exist to enforce workers' right to be paid, studies and anecdotal evidence demonstrate that non-payment of wages[2] is a major and continuing problem for day laborers.[3] This paper aims to describe a promising new tactic which

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1 This guide is formatted to suit the law review style and layout.

2 As used in this guide, "non-payment of wages" includes complete non-payment of wages for work performed, as well as partial payment of wages where the amount paid is less than the amount that was promised. The term "wage theft" is also used to refer to non-payment of wages. As it is generally used, "wage theft" encompasses a wider range of practices than non-payment of wages, including failure to pay overtime.

3 *See* ABEL VALENZUELA JR. & EDWIN MELÉNDEZ, NEW SCHOOL UNIV. & UCLA, DAY

uses existing criminal "theft of service" laws against employers who fail to pay wages. Thirty-three states' criminal codes include a "theft of service" provision[4] which could be used to prosecute employers for wage theft.[5] Though it is unclear what particular con-

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LABOR IN NEW YORK: FINDINGS FROM THE NYDL SURVEY 1, 10 (2003) (indicating that 50 percent of the New York City sample experienced complete non-payment of wages, and that 56 percent were paid less than was agreed); Abel Valenzuela Jr., *Day Laborers in Southern California: Preliminary Findings from the Day Labor Survey* vi, 4, 14 (1999) (indicating that about 50 percent of the Los Angeles and Orange County area sample experienced complete non-payment of wages, and finding that non-payment and pay less than agreed were the most common work-place abuses experienced by day laborers); U.S. GEN. ACCOUNTING OFFICE, LABOR'S EFFORTS TO ENFORCE PROTECTIONS FOR DAY LABORERS COULD BENEFIT FROM BETTER DATA AND GUIDANCE, Pub. No. 02-925, at 14, 15 n.26 (2002), *available at* http://www.gao.gov/new.items/d02925.pdf (indicating that the majority of interviewed nonprofit and government agencies reported that day laborers complained weekly about non-payment of wages, and that researchers reported that over 50 percent of day laborers are not paid the wages that they are owed) (citing DAN KERR & CHRIS DOLE, CHALLENGING EXPLOITATION AND ABUSE: A STUDY OF THE DAY LABOR INDUSTRY IN CLEVELAND (2001)); NATIONAL DAY LABOR ORGANIZING NETWORK, ET AL., COMMON GROUND 5-6 *at* http://www.ndlon.org/research.htm/commongroundreport-Eng.doc (indicating that one of the most pervasive complaints among the survey sample was employers' failure to pay workers the promised wages) (last visited Dec. 21, 2004).

[4] Most "theft of service" provisions are codified independently from conventional "theft" (of property) laws. *See* ALA. CODE § 13A-8-10 (1974); ALASKA STAT. § 11.46.200 (Michie 2002); ARIZ. REV. STAT. ANN. § 13-1802(A)(6) (West 2000); ARK. CODE ANN. § 5-36-104(a)(1) (Michie 1997); CONN. GEN. STAT. ANN. § 53a-119(7) (West Supp. 2004); DEL. CODE ANN. tit. 11, § 845 (2001); GA. CODE ANN. § 16-8-5 (2003); 720 ILL. COMP. STAT. 5/16-3(a) (1993); KAN. STAT. ANN. § 21-3704(a) (1995); KY. REV. STAT. ANN. § 514.060(1) (Michie 1999); ME. REV. STAT. ANN. tit. 17-A, § 357(1) (West 1964 & Supp. 2003); MINN. STAT. ANN. § 609.52(2)(13) (West 2003); MONT. CODE ANN. § 45-6-305 (2003); NEB. REV. STAT. § 28-515 (1995); NEV. REV. STAT. 205.0832(1)(f) (2003); N.H. REV. STAT. ANN. § 637:8 (1996); N.J. STAT. ANN. § 2C:20-8 (West 1995 & Supp. 2004); N.D. CENT. CODE § 12.1-23-03 (1997); OR. REV. STAT. § 164.125 (2003); 18 PA. CONS. STAT. ANN. § 3926 (West 2004); S.D. CODIFIED LAWS § 22-30A-8 (Michie 1998); TENN. CODE ANN. § 39-14-104 (2003 & Supp. 2004); TEX. PENAL CODE ANN. § 31.04 (Vernon 2003 & Supp. 2004-2005); UTAH CODE ANN. § 76-6-409 (2003); VT. STAT. ANN. tit. 13, § 2582 (1974); WASH. REV. CODE ANN. § 9A.56.020 (West 2000); W. VA. CODE ANN. § 61-3-24 (Michie 2000); WYO. STAT. ANN. § 6-3-408(a) (Michie 2003). However, some "theft of service" provisions are incorporated within conventional "theft" laws. *See* CAL. PENAL CODE § 484 (West 2000) (defines the crime of "theft" to include "knowingly and designedly, by any false or fraudulent representation or pretense, defraud[ing] any other person of money, labor or real or personal property . . ."); D.C. CODE ANN. § 22-3211(c) (2001) (defines the crime of "theft" to include theft of property in the form of services); HAW. REV. STAT. § 708-830(4) (Supp. 2003) (defines the crime of "theft" to include obtaining services by deception); IOWA CODE ANN. § 714.1(3) (West 2003) (defines the crime of "theft" to include "obtain[ing] the labor or services of another . . . by deception . . ."); IDAHO CODE § 18-2403 (Michie Supp. 2003) (defines the crime of "theft" to include the theft of property or services); OHIO REV. CODE ANN. § 2913.02 (Anderson 2004) (same).

[5] It is possible to use "theft of service" laws to prosecute employers because almost all such laws explicitly define "service" to include "labor." *See, e.g.*, ALA. CODE § 13A-8-10(b) (1994); ARIZ. REV. STAT. § 13-1801 (West 2005); CONN. GEN. STAT. § 53a-118

duct "theft of service" statutes were originally enacted to deter,[6] they were probably intended to fill the gap created by conventional "theft" and "larceny" laws, which require that defendants have stolen "property."[7] What is clear is that "theft of service" laws have been liberally amended and used to address a number of disparate problems, from evading bus fare to leaving a hotel without paying.[8] This history of flexible adaptation creates potential for the interpretation of "theft of service" laws to adjust to the wage theft issues posed by the day labor work arrangement.

(2005); DEL. CODE ANN. tit. 11, § 847 (2005); D.C. CODE ANN. § 22-3201(5) (2004); KY. REV. STAT. ANN. § 514.010 (Michie 1999); MINN. STAT. ANN. § 609.52(1)(9) (West 2003); NEV. REV. STAT. § 205.0829 (1997); TEX. PENAL CODE ANN. § 31.01(6) (Vernon 2004). However, two states do not define "services" at all (ALASKA STAT. § 11.46.990 (Michie 2002); GA. CODE ANN. § 16-8-1 (2003)), and one state does not explicitly include labor within the definition of services (WYO. STAT. ANN. § 6-3-408(d) (Michie 2003) ("'services' includes, but is not limited to, electric, telephone, cable television, gas, water or sewer services")). Thus, in these three states it is unclear whether "theft of service" laws could be used to prosecute employers for unpaid wages. Advocates in these states might consider legislative campaigns to define "services" or to amend the definition of "services" to explicitly include "labor." Interestingly, although New York defines "service" to include labor, N.Y. PENAL LAW § 155.00(8) (McKinney 1998), New York's "theft of service" law is so specifically targeted at theft and attempted theft of certain kinds of services that it could not be used to prosecute wage theft. *See* N.Y. PENAL LAW § 165.15 (McKinney 2004).

6 *But see* Julien Ross, *A Fair Day's Pay: The Problem of Unpaid Workers in Central Texas*, 10 TEX. HISP. J. L. & POL'Y 117, 144 (Fall 2004) ("The concept of theft of service was drafted mainly to protect workers and employers in industries such as restaurant, taxi, or hotel, where services are rendered and compensation is expected upon completion of the services.").

7 *See, e.g.*, TEX. PENAL CODE ANN. § 31.03 (Vernon 2004). Generally, "service" and "labor" are not included in the definition of "property." *See, e.g., id.* § 31.01(5). *See generally* Kimberly J. Winbush, Annotation, *What Is "Property of Another" Within Statute Proscribing Larceny, Theft, or Embezzlement of Property of Another*, 2002 A.L.R. 5th 19, *available at* 2002 WL 31202778 (collecting and analyzing cases in which courts have considered the question of what constitutes "property of another").

8 *See, e.g.*, Tex. House Infrastructure Dev. and Sec. Comm. Rep. on Tex. H.B. 2500, 78th Leg. (May 22, 2003) (Dallas peace officers "conduct fare inspections and issue ['theft of service'] citations to individuals who do not show proof of payment to use bus or rail services"); Tex. Senate Criminal Jurisprudence Comm. Rep. on Tex. S.B. 437, 77th Leg. (May 16, 2001) ("theft of service" law amended to address the problem of hotel guests who pay a deposit for a one-night stay, then extend their stay for additional days and leave without paying for the additional days); H.P. 711, 117th Leg., 1st Reg. Sess. (Me. 1995) ("theft of services" law amended to include theft of cellular telephone services); H.B. 3081, 99th Gen. Assem., 2d Reg. Sess. (Tn. 1995); H.B. 469, 2004 Leg., Reg. Sess. (Ky. 2004) (A current Kentucky bill would amend "theft of services" to include failure to pay for child care.). *See also* Benjamin D. Kern, *Whacking, Joyriding and War-driving: Roaming Use of Wi-Fi and the Law*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 101, 148-51 (2004) (discussing "theft of service" laws' application to using unencrypted Wi-Fi network connections to the Internet without the approval of the network's operator).

II. Why a New Tactic Is Needed: Lack of Enforcement of Federal and State Wage Protection Laws

The use of criminal "theft of service" laws is not meant to be a panacea. Rather it is one of the tools that workers can use to collect unpaid wages. Other tools include the federal Fair Labor Standards Act (FLSA)[9] and state labor code provisions. However, both of these methods have serious drawbacks.[10] Enforcement of the federal FLSA is through one of two paths. The first generally involves an employee making a complaint to the Wage and Hour Division of the United States Department of Labor (DOL).[11] The DOL decides whether to conduct an investigation and makes a determination as to whether an employer has violated the FLSA.[12] If the DOL so determines, it may seek enforcement of the FLSA by filing a civil suit.[13] As commentators and advocates have noted, enforcement by the DOL is hampered by a lack of both resources and political will to investigate low-wage workers' claims.[14] Moreover, when the DOL does bring a claim, the Agency, not the employee, has complete control over the course of the litigation, including the right to make decisions as to whether to settle a claim and for how much. The second method of enforcing the

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9 Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2000).

10 In addition to the problems with enforcement discussed in this Section, many low-wage workers simply are not covered by the FLSA. Most employees of businesses that do not put goods into the stream of interstate commerce and have less than $500,000 in gross revenues a year are exempt from the requirements of the FLSA. 29 U.S.C.A. § 203(s)(1). Nonetheless, it should be noted that undocumented workers are covered by the FLSA and state minimum wage laws. *E.g.*, Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp. 2d 1056, 1058-59 (N.D. Cal. 2002) (concluding that undocumented workers continue to be "employees" covered by the FLSA).

11 Merrick T. Rossein, 1 Emp. L. Deskbook Hum. Resources Prof. § 6:73 (2004); 4 Wage and Hour Law: Compliance and Practice DB19:20. *Cf.* U.S. Gen. Accounting Office, Pub. No. HEHS-95-29, Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops 3 (1994), *available at* http://www.gao.gov/archive/1995/he95029.pdf (finding that in the garment industry the DOL "typically targets workplaces for inspection based on complaints received from workers and other sources").

12 *See* Les A. Schneider & J. Larry Stine, 2 Wage and Hour Law: Compliance and Practice § 19:2 (2004) (summarizing the criteria used by the Wage and Hour Division to select employers for investigation).

13 *E.g.*, Les A. Schneider & J. Larry Stine, 2 Wage and Hour Law: Compliance and Practice § 19:10 (2004) (outlining the Wage and Hour Division's options when it has found violations of the Act, which include taking no action, settling the matter with the employer, notifying the employees of their private right of action, referring the file for litigation, or closing the file after unsuccessful attempts at settlement).

14 *See* Jennifer Gordon, Carnegie Endowment for Int'l Peace, The Campaign for the Unpaid Wages Prohibition Act: Latino Immigrants Change New York Wage Law 3-4 (1999), *available at* http://www.ceip.org/files/PDF/imp_wp4gordon.pdf [hereinafter Gordon, Campaign for Unpaid Wages]; Ross, *supra* note 6, at 156.

FLSA involves employees filing civil suits without the intervention of the DOL.[15] When an employee brings a FLSA claim s/he is responsible for the costs of litigation and potentially liable for attorney fees if s/he is not successful in the lawsuit.[16] Although free legal services organizations handle some wage enforcement cases, budget limitations prohibit them from helping most workers.[17] Furthermore, federally funded Legal Services Corporation (LSC) entities are restricted from representing undocumented workers, who constitute a growing number of low-wage day laborers and contingent workers.[18]

In addition to the federal FLSA, almost every state deals with non-payment of wages in its state labor laws. Like their federal counterparts, the state agencies charged with enforcing labor laws are understaffed, have very limited investigative resources, and generally lack the political will to assist low-wage workers.[19] It should

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15 *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (2000).

16 *See id.*

17 A survey of selected Legal Service Corporation-funded programs in 1993, when LSC funding was substantially higher, disclosed that nearly one-half of all individuals applying for legal services were unable to be helped because of limited program resources. A recent survey indicates that an estimated 80 percent of financially eligible clients are unable to obtain necessary legal assistance. Legal Services Corporation, *Serving the Civil Legal Needs of Low-Income Americans: A Special Report to Congress* 13 (Apr. 30, 2000), *at* http://www.lsc.gov/pressr/EXSUM.pdf. A number of legal needs assessments have been undertaken nationally and in various states. They document the unmet need for legal services of low-income as well as moderate-income individuals. *See, e.g.,* Lonnie Powers, *Legal Needs Studies and Public Funding for Legal Services: One State's Partial Success*, 101 DICK. L. REV. 587, 587-90 (1997). *See also* Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 422 (1995) (describing the dearth of employment-related services at legal services organizations).

18 The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(18), 110 Stat. 1321, 50 (1996) (codified in various sections of titles 18, 20, 28, and 42 of the United States Code). This Act restricts attorneys receiving Legal Services Corporation funds from serving most undocumented immigrants. Under this law, attorneys receiving federal funds for legal services are required to check the immigration status of potential clients and to deny services to virtually all undocumented immigrants. All federal funds are withdrawn from any attorney who persists in serving undocumented immigrants. Phillip Gallagher, *LSC Restriction Fact Sheet #4: The Restriction Barring Legal Services Corporation-Funded Lawyers from Assisting Aliens*, *at* http://www.brennancenter.org/programs/pov/factsheet_aliens.html (last visited Feb. 3, 2005).

19 *See* GORDON, CAMPAIGN FOR UNPAID WAGES, *supra* note 14, at 4-6 (describing the New York State Department of Labor's systematic under-enforcement of wage and hour violations and unresponsiveness to immigrant workers' complaints). *See also* LIMOR BAR-COHEN & DEANA MILAM CARRILLO, UNIVERSITY OF CALIFORNIA INSTITUTE FOR LABOR AND EMPLOYMENT, LABOR LAW ENFORCEMENT IN CALIFORNIA, 1970-2000, 135 (2002). This 2002 study of the California Division of Labor Standards Enforcement (DLSE), the state agency charged with enforcing California's wage and labor standards, found that its budget and staffing allocations have not kept pace with the

be noted that many of the existing state labor laws dealing with non-payment of wages contain overlapping administrative, civil, and criminal penalty provisions.[20] However, the criminal penalties are rarely imposed.[21] Nonetheless, advocates should be aware that labor laws, criminal laws, and even city ordinances may be used to the advantage of workers.

For all these reasons, enforcement of federal and state wage and hour laws is challenging. Despite the difficulty with enforce-

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growth in the size of the state's workforce, nor with the agency's increased responsibilities. *Id.* The study also found that several key activity measures, such as the number of investigations, citations, and penalties assessed, have failed to increase in proportion to the expansion of funding and staffing that has occurred. *Id.*

[20] State labor laws permit simultaneous or successive civil and criminal enforcement actions against violators. The Double Jeopardy Clause of the Fifth Amendment "protects only against the imposition of multiple *criminal* punishments for the same offense" in successive proceedings. Sec. & Exch. Comm'n v. Palmisano, 135 F.3d 860, 864 (2d Cir. 1998). State labor laws that provide criminal penalties for non-payment of wages include ALASKA STAT. § 23.10.140 (Michie 2002), ARIZ. REV. STAT. ANN. § 23-352 (West 2004), CAL. LAB. CODE § 216(a) (2000), COLO. REV. STAT. § 8-4-114 (2003), CONN. GEN. STAT. ANN. § 31-71g (West 2003), D.C. CODE ANN. § 32-1011 (2001), HAW. REV. STAT. § 388-10(b) (Supp. 2003), 820 ILL. COMP. STAT. 105/11(b) (2004), IND. CODE § 22-2-2-11 (1997), KAN. STAT. ANN. § 44-1210(a) (2000), MD. CODE ANN., LAB. & EMP., § 3-508(c)(1) (1999), MASS. GEN. LAWS ch. 149, § 27C (2004), MICH. COMP. LAWS § 408.484 (2001), MINN. STAT. ANN. § 177.32 (West 1993), MO. ANN. STAT. § 290.525(8) (West 1993), MONT. CODE ANN. § 39-3-206 (2003), NEB. REV. STAT. § 48-1206(2) (1998), NEV. REV. STAT. 608.290(1) (2003), N.H. REV. STAT. ANN. § 275:52 (1999), N.J. STAT. ANN. § 34:11-56a22 (West 1991), N.M. STAT. ANN. § 50-4-10 (Michie 1978 & Supp. 2000), N.Y. LAB. LAW §§ 198-a, 213 (McKinney 2002), N.C. GEN. STAT. § 95-25.21(c) (2003), N.D. CENT. CODE § 34-06-19 (2004), OHIO REV. CODE ANN. § 4113.99 (West 2005), OKLA. STAT. tit. 40, § 165.8 (2004), 43 PA. CONS. STAT. ANN. § 260.11a (West 2004), R.I. GEN. LAWS § 28-14-17 (2003), S.D. CODIFIED LAWS § 60-11-15 (Michie 1993), TENN. CODE ANN. § 50-2-103 (2004), TEX. LAB. CODE ANN. § 61.019 (Vernon 1996 & Supp. 2004-2005), UTAH CODE ANN. § 34-28-12 (2001), VT. STAT. ANN. tit. 21, § 345 (2003), VA. CODE ANN. § 40.1-29(E) (Michie 2002 & Supp. 2004), WASH. REV. CODE ANN. § 49.48.020 (West 2002), W. VA. CODE ANN. § 21-5C-7 (Michie 2002), and WIS. STAT. ANN. § 109.11(3) (West 2002).

[21] For example, The Workplace Project's 1997 "Unpaid Wages Prohibition Act," signed by New York Governor Pataki following lobbying efforts coordinated with the Chinese Staff and Workers' Association and the Latino Workers' Center, makes repeat or willful non-payment or underpayment of wages a criminal felony. 1997 N.Y. Laws 605. Much of the momentum behind the bill came from the Project's analysis of its 900-person database, which documented the Department of Labor's lack of attention to claims brought by low-wage workers. *See* GORDON, CAMPAIGN FOR UNPAID WAGES, *supra* note 14, at 5. The Act, if enforced, would levy extremely tough penalties against employers owing wages. However, to date, no employers have been prosecuted under this law. E-mail from Nadia Marin-Molina, Executive Director, The Workplace Project (Oct. 7, 2004, 16:34:33 EST) (on file with author). In addition, although Colorado's labor law provides criminal penalties, COLO. REV. STAT. § 8-4-114, advocates report that it has never been enforced. Katherine Michienzi, Modern Day Slavery: Unpaid Wages to Immigrant Day Laborers in the U.S. and Colorado 42 (2004) (unpublished M.A. thesis, University of Denver) (on file with author). *But see, e.g., infra* note 59.

ment, attempts to use criminal laws to enforce wage theft claims appear few and far between.[22] Even so, there are several good reasons why criminal laws should be used. The formal use of the "criminal" label and informal societal perceptions about the penal character of particular actions have important consequences for the kind of social stigma associated with behaviors.[23] Criminal charges often have a shaming function and result in negative publicity. Relatedly, local law enforcement's heightened involvement in wage claim cases may deter employers from cheating workers.[24] As former Austin Police Department (APD) Commander Juan Gonzalez has stated, "I think the threat of APD has already made some employers pay up."[25]

In addition to a heightened deterrent effect, another benefit of using criminal theft laws is that government attorneys instead of private attorneys are the "prosecutors." This shifts the costs of enforcement from under-funded federal and state agencies and the working poor to local law enforcement departments. This strategy vests discretion about whether to take legal action in the hands of local police and government prosecutors.[26]

One drawback to using "theft of service" provisions is that workers can recover only wages owed, regardless of whether those wages meet minimum wage or overtime requirements. In other words, even if the wages owed to a worker are below the minimum wage, the worker can only recover the amount that the employer said s/he would pay.[27]

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22 *See, e.g.,* People v. Vanguard Meter Serv. Inc., 611 N.Y.2d 430 (N.Y. Sup. Ct., 1994); Abraham Abramovsky, *Prosecuting Division of Public Labor: Part 2*, NYJL, Jan. 12, 2004, at 3 (col. 1).

23 Some scholars define a crime as "any social harm defined and made punishable by law." JOSHUA DRESSLER, CRIMINAL LAW 3 (2d ed. 1999) (quoting ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 12 (3d ed. 1982)).

24 Deterrence occurs on two levels. First, a recalcitrant employer who has failed to pay workers might be induced to pay based on the threat of criminal sanction. Second, an employer who considers cheating workers might be dissuaded, particularly if a campaign has been widely publicized.

25 Lauri Apple, *The Theft of Wages is Sin: Fighting For Migrant Workers*, AUSTIN CHRON., Dec. 27, 2002, *available at* http://www.austinchronicle.com/issues/dispatch/2002-12-27/pols_feature.html.

26 Reliance on local law enforcement officials may be desirable or a hindrance.

27 Michienzi, *supra* note 21, at 74. This principle is known as restitution. "The restitution principle holds that one who violates a duty or commits some wrong ought to be required to repair any injury she or he has caused." AMY HILSMAN KASTELY ET AL., CONTRACTING LAW 93 (2d ed. 2000). Restitution emphasizes the duty to return or pay for a benefit unjustly retained. *Id.* at 94. Although the remedy of restitution is not explicitly provided for in any "theft of service" statutes, many states have enacted statutes to assist crime victims in the recovery of damages from crimes. *See, e.g.,* TEX.

Another important consideration in deciding whether to use "theft of service" laws arises in states that provide criminal penalties for non-payment of wages within their labor laws. In such states, penalties for "theft of service" in criminal codes may differ significantly from penalties available in labor codes.[28] So, while criminal "theft of service" laws may serve as an alternative basis for prosecuting unpaid wage cases, it is essential to understand the penalties under each available law before deciding which route to follow. Needless to say, it is also necessary to consider the workers' and the advocates' goals in pursuing the case, as well as the likelihood of enforcement.

A final consideration is that defendants are afforded greater protections in a criminal action than in a civil action. For example, in certain criminal actions defendants have a right to appointed counsel,[29] and the right to jury trial.[30] Moreover, criminal prosecutions must be proven *beyond a reasonable doubt*, whereas civil claims must be proven only by a *preponderance of the evidence*.

III. Using "Theft of Service" Laws: Educating and Coordinating With and Among Police and Prosecutors

Those considering filing police reports under a criminal "theft of service" law must coordinate enforcement with and among police and prosecutors. The experience of advocates in Austin, Texas is instructive.

In August 2002, the Austin Police Department (APD) began investigating cases of unpaid wages as criminal "theft of service." Julien Ross, Coordinator of the Equal Justice Center's Central Texas Immigrant Workers' Rights Center (CTIWoRC) or Centro de Apoyo para Trabajadores Inmigrantes, calls the move "unprece-

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Code Crim. Proc. Code Ann. art. 42.037(a) (Vernon 2004) ("In addition to any fine authorized by law, the court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offense."). *See generally* George Blum, Annotation, *Measure and Elements of Restitution to Which Victim is Entitled Under State Criminal Statute*, 15 A.L.R. 5th 391 §§ 3, 45(j) (1993 & Supp. 2004) (collecting "theft of service" cases in which restitution and interest were ordered by judges).

[28] A noteworthy bill was recently introduced in New Jersey. It would have amended the penalty provision of the state's minimum wage labor law, N.J. Stat. Ann. 34:11-56a22 (West 1991), to include the harsher penalties that are already available under the state's criminal "theft of service" provision. 2004 New Jersey Senate Bill No. 584, New Jersey 211th Legislature.

[29] *Cf.* Scott v. Illinois, 440 U.S. 367 (1979) (no constitutional right to appointed counsel in misdemeanor case in which no imprisonment is imposed).

[30] *Cf.* Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) (no constitutional right to jury trial in prosecution for a "petty offense").

dented."[31] He reports that the initiative for using the criminal "theft of service" statute developed out of regular meetings about day labor issues which were attended by workers, City of Austin staff, advocacy organizations, and local police officers. The problem of unpaid wages was frequently discussed at these meetings and Texas's "theft of service" statute was identified as a potential enforcement strategy, with the primary challenge being the ability to prove the employer's "intent not to pay."[32]

Soon after the APD and Travis County Attorney (TCA) agreed to investigate certain cases of unpaid wages under the "theft of service" statute, the CTIWoRC initiated a task force specifically to monitor and flesh out the new policy. The task force participants included workers, and representatives from the CTIWoRC, Catholic Charities, the APD, the TCA, Texas Rural Legal Aid, and the Mexican Consulate. The task force developed evidentiary criteria to establish which circumstances of non-payment would qualify as "intent not to pay," and hence when employers could be arrested for criminal "theft of service." Those criteria are now included in the APD's manual of standard operating procedure (SOP).[33]

The experience of San Francisco's La Raza Centro Legal (La Raza) underscores the importance of coordinating with police and systematizing enforcement. La Raza discussed enforcement of California's "theft of service" law with a local police captain, who verbally agreed to apply the law. However, the captain did not inform the officers under his command of the agreement or formalize any procedures for enforcement in the departmental SOP manual. When La Raza advocates called in reports, police operators told them that unpaid wages are "a civil matter" and their reports were never investigated.[34]

In Austin, the CTIWoRC now serves as a liaison between police, prosecutors, and workers. The affected worker, together with the CTIWoRC, communicates closely with the APD during the in-

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31 Ross, *supra* note 6, at 145.

32 Telephone Interview with Julien Ross, Coordinator, Central Texas Immigrant Workers' Rights Center (Sept. 26, 2004). *See* discussion *infra* Section V. & App. A.

33 Telephone Interview with Julien Ross, Coordinator, CTIWoRC (Sept. 26, 2004). *See infra* App. A. *See generally* Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 14-18 (2003) (discussing the role of departmental standard operating procedure manuals in filling the gap between law and practice, confining officers' discretion, and providing guidance to the front-line workers who make critical decisions in implementing official policy).

34 Telephone Interview with Hillary Ronen, Attorney, La Raza Centro Legal (Sept. 30, 2004).

vestigation of the case and subsequently with the Travis County prosecutor in the event that the employer is arrested. The worker and the CTIWoRC convey to the prosecutor what remedy the worker is seeking - restitution[35] and/or prosecution.[36] The prosecutor then attempts to settle the case with the employer. Julien Ross reports that prosecutors have never settled a case for less than the full amount owed. When cases do settle, the employer makes a check payable to the county, and then the county makes out a check to the worker through the CTIWoRC.[37]

The Austin task force is still working to achieve adequate training of APD detectives and TCA prosecutors who will be working on the "theft of service" cases. According to CTIWoRC advocates, effective handling of wage theft cases requires special training on the nuances of employer-worker relations that may not exist in other types of theft cases. The current strategy is to have each of the nine APD sectors identify one detective who will be assigned to the cases, which will have the special tagged name of "theft of wages." The task force will then hold training sessions with the nine "theft of wages" detectives. The task force hopes to implement the same centralized method to train TCA prosecutors.[38]

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35 *See supra* note 27.

36 Telephone Interview with Julien Ross, Coordinator, CTIWoRC (Sept. 26, 2004). Interestingly, the prosecutors in these cases ask the crime "victims" what relief they desire. Note that some states have comprehensive victims' rights laws that allow victims to have input into the prosecution's decision-making process, including consultation with the district attorney in decisions about entering into plea agreements. *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-4419 (West 2004) (allowing victims to confer with the prosecution "about a decision not to proceed with a criminal prosecution, dismissal, plea or sentence negotiations"); COLO. REV. STAT. § 24-4.1-302.5 (2004) (allowing victims to be present at all critical stages of the criminal justice process and "to be heard at any court proceeding that involves a bond reduction or modification, the acceptance of a negotiated plea agreement, or . . . sentencing"); CONN. GEN. STAT. ANN. § 54-91c (West Supp. 2004) (allowing victims "to appear before the court for the purpose of making a statement for the record" in support of or in opposition to any plea agreement); IDAHO CODE § 19-5306 (Michie Supp. 2003) (allowing victims to be "[h]eard, upon request, at all criminal justice proceedings considering a plea of guilty, sentencing, incarceration, placing on probation or release of the defendant"); N.H. REV. STAT. ANN. § 21-M:8-k(II) (2001) (allowing victims to consult with prosecutors regarding plea bargaining and to offer victim impact statements during sentencing proceedings); N.C. GEN. STAT. § 15A-825(9-a) (2003) (requiring that victims receive pretrial notification if the prosecutor plans to offer a plea bargain); S.D. CODIFIED LAWS § 23A-28C-1(5) (Michie 1998 & Supp. 2003) (allowing victims "[t]o offer written input into whether plea bargaining or sentencing bargaining agreements should be entered into").

37 Telephone Interview with Julien Ross, Coordinator, CTIWoRC (Sept. 26, 2004).

38 E-mail from Julien Ross, Coordinator, CTIWoRC (Nov. 15, 2004) (on file with author).

IV. Using "Theft of Service" Laws: Shielding Workers from the Sharing of Immigration Status with Immigration Authorities

Although federal and state laws protect workers from wage theft regardless of their immigration status,[39] workers seeking the assistance of law enforcement rightly fear that such contact could result in the sharing of information related to immigration status with U.S. Immigration and Customs Enforcement (formerly the Immigration and Naturalization Service, or INS).[40] It is critical that advocates ensure that any police department handling wage theft complaints has a formal rule regarding non-enforcement of immigration law before undocumented workers contact law enforcement officials. The absence of such a rule inevitably silences immigrant crime victims and witnesses, and impedes police efforts to win the trust and confidence of the communities they serve.[41] Moreover, "[i]mmigrants will decline to report crimes or suspi-

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39 *See, e.g.,* Wage and Hour Div., U.S. Dep't Of Lab., Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* decision on laws enforced by the Wage and Hour Division (n.d.), *available at* http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm ("The Department's Wage and Hour Division will continue to enforce the FLSA and [Migrant and Seasonal Agricultural Worker Protection Act] without regard to whether an employee is documented or undocumented.").

40 "In June of 2002 Attorney General Ashcroft adopted a new policy that allows state and local police to arrest and detain certain immigrants who are believed to be in violation of non-criminal provisions of the federal immigration laws." Press Release, American Civil Liberties Union, Court Orders Attorney General to Disclose Secret Memo on Local Police Enforcement of Federal Immigration Laws (Sept. 27, 2004), *available at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16566&c=206. On September 24, 2004, a federal judge ordered that the Department of Justice disclose the secret memorandum outlining the new policy. Nat'l Council of La Raza v. Dep't of Justice, 339 F. Supp. 2d 572 (S.D.N.Y. 2004). The DOJ is appealing the decision. *See* Nat'l Council of La Raza v. Dep't of Justice, 345 F. Supp. 2d 412 (S.D.N.Y. 2004). Also see the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2003, H.R. 2671, 108th Cong. (2003), and the Homeland Security Enhancement Act of 2003, S. 1906, 108th Cong. (2003), which, if enacted, would have required police to enforce federal immigration laws.

41 *See, e.g.,* Unconstitutional: The War on Our Civil Liberties (Cinema Libre 2004). Kathy Culliton, Legislative Staff Attorney for the Mexican American Legal Defense and Education Fund, discusses the effects of state and local law enforcement of immigration laws on crime victims and states: "Ashcroft's directive that local police enforce immigration law also means that if an immigrant witnesses a crime they will now be afraid to come forward, fearing that they may be deported or even locked up indefinitely. That leaves criminals to run free on the streets, which is exactly why police departments in Los Angeles and Seattle have policies not to enforce immigration law." *Id. See also* Gail Pendleton & David Neal, ABA Comm'n on Domestic Violence, Local Police Enforcement of Immigration Laws and its Effects of Victims of Domestic Violence, *at* http://www.nationalimmigrationproject.org/GetInvolved/Get%20Involved.htm (last visited Jan. 5, 2005) (discussing the chilling

cious activity, and criminals will see them as easy prey . . . ."[42]

To check whether your state or locality has a formal policy regarding non-enforcement of immigration laws, the National Immigration Law Center (NILC) has compiled an annotated chart of *Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by Local Authorities.*[43] However, because this is a contentious and rapidly developing issue in many communities, advocates should check for the most up-to-date information with their state and local law enforcement officials. If your state or locality does not have such a policy, NILC has also produced *Sample Language for Policies Protecting Residents from Local Enforcement of Federal Immigration Laws.*[44]

V. Using "Theft of Service" Laws: Proving the Elements of Criminal "Theft of Service"

In order to convict an employer of "theft of service" certain elements must be proven *beyond a reasonable doubt.*[45] A review of such laws in all fifty states reveals that some common elements must be proven. Every state's "theft of service" law includes some form of intent requirement.[46] In addition to intent, a number of "theft of service" statutes require that the employer knew that the services were only available for compensation.[47] Still other states

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effect that local police enforcement of immigration matters will have on crime victims).

42 National Immigration Forum, Why *Shouldn't* Local Police Enforce Federal Immigration Laws? (Jan. 28, 2004), *at* http://www.immigrationforum.org/DesktopDefault.aspx?tabid=575.

43 National Immigration Law Center, Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by Local Authorities, Local Law Enforcement Issues (July 2004), *at* http://www.nilc.org/immlawpolicy/LocalLaw/.

44 National Immigration Law Center, Sample Language For Policies Protecting Residents From Local Enforcement Of Federal Immigration Laws (Nov. 2004), *at* http://www.nilc.org/immlawpolicy/LocalLaw/sample%20policy_nov%202004. In addition, possible approaches to solving this problem include "measures protecting confidentiality . . . measures limiting the participation of city workers and police in immigration enforcement and . . . measures opposing federal attempts to require local police to cooperate with immigration law enforcement." Rebecca Smith & Amy Sugimori, National Employment Law Project, Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights ch. 2, 1 (2003), *available at* http://www.nelp.org/publications.cfm?section=\lwp\.

45 The Due Process Clause of the Fourteenth Amendment protects accused persons against conviction except upon proof *beyond a reasonable doubt* of every fact necessary to constitute the crime for which s/he is charged.

46 *See supra* note 4.

47 *See, e.g.,* Ariz. Rev. Stat. Ann. § 13-1802(A)(6) (West 2004); D.C. Code Ann. § 22-3211(c) (2004); Del. Code Ann. tit. 11, § 845 (2004); Ky. Rev. Stat. Ann.

further require that the services were obtained by false representation, threat, deception, fraud, or other means to avoid payment.[48]

Regarding the intent requirement, generally speaking, an act is a crime because the person committing it *intended* to do something that most people would consider wrong. Thus, with very few exceptions, to convict a person of a crime—an offense, a misdemeanor, or a felony—a person must be found to have had the state of mind to commit the crime. This mental state is generally referred to as *mens rea*, Latin for "guilty mind."[49]

When the definition of a crime requires not only doing an act, but doing it with a specific intent or objective, as "theft of service" laws do, the existence of the requisite *mens rea* can be inferred from the surrounding circumstances or circumstantial evidence. In the wage theft context, evidence of an employer's prior offenses, misrepresentations about payment, and intimidating statements or threats are generally admissible to infer intent.[50]

However, some "theft of service" laws create a statutory *presumption of intent* after the happening of some event. For example, Nebraska's law creates a presumption that the service was obtained by deception as to intention to pay "[w]hen compensation for service is ordinarily paid immediately upon the rendering of such service" and a person refuses to pay or absconds without payment or offer to pay.[51] Similarly, North Dakota's law establishes a presumption of intent to deceive where a person absconds without payment or making provision to pay "[w]here compensation for services is ordinarily paid immediately upon their rendition, as in the case of hotels, restaurants, and comparable establishments."[52] Texas's "theft of service" statute creates a presumption of "intent to avoid payment" if the employer fails to pay a laborer within 10 days after

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§ 514.060 (Michie 2004); ME. REV. STAT. ANN. tit. 17-A, § 357 (West 2004); N.J. STAT. ANN. § 2C:20-8 (West 2004).

48 *See, e.g.,* ALASKA STAT. § 11.46.200(a)(1) (Michie 2002) (by deception, force, threat, or other means to avoid payment); CAL. PENAL CODE § 484 (West 2000) (by any false or fraudulent representation or pretense); KAN. STAT. ANN. § 21-3704(a) (1995) ("by deception, threat, coercion, stealth, tampering or use of false token or device"); N.J. STAT. ANN. § 2C:20-8 (West 2004) (by deception, threat, or false statements).

49 In the legal system's eyes, people who intentionally engage in the behavior prohibited by a law have "mens rea;" that is, they are morally blameworthy. For example, a murder law may prohibit "the intentional and unlawful killing of one human being by another human being." Under such a law, one who intentionally and unlawfully kills another person has "mens rea."

50 *See* FED. R. EVID. 403, 404(b).

51 NEB. REV. STAT. § 28-515(1) (1995).

52 N.D. CENT. CODE § 12.1-23-03 (1997).

receiving a notice demanding payment.[53] Unfortunately, an employer's non-response to a demand letter does not create a statutory presumption of intent in states other than Texas. Regardless, once the statutory presumption of intent is triggered, the employer bears the burden of rebutting that presumption.

For workers and advocates, the key to successfully using "theft of service" laws is to identify the elements of "theft of service" in the state or locality, to be familiar with the requisite intent, and to understand the evidentiary burden of proving each element *beyond a reasonable doubt.*

VI. Advocating For "Theft of Service" Ordinances at the Municipal Level

One of the benefits of using "theft of service" provisions is that they already exist in most states. However, in those states that do not have such laws, it may be feasible and desirable to enact ordinances at the municipal level. For example, in early September 2004, advocates in Kansas City, Missouri who were inspired by Equal Justice Center's success in Austin, Texas pushed for and passed Ordinance No. 040964 which expressly provides that "stealing of a person's labor violates this ordinance." The ordinance states that "[a] person commits the ordinance violation of stealing if he appropriates property or services of another with the purpose to deprive him thereof, either without his consent or by means of deceit." Moreover, the law defines services to include "labor for wages."[54]

Lynda Callon, a Community Coordinator for Westside Community Action Network Center, Inc. (Westside CAN), was instrumental in guiding the ordinance through the City's Council. Callon reports that Westside CAN and the police officers with whom the organization works realized that unpaid wages was a growing problem in the neighborhood. Because of this, one officer spoke to a city prosecutor about the problem of unpaid wages. That prosecutor directed the officer to contact the City Attorney, Gaylen Beaufort. The officer eventually convinced Mr. Beaufort that the small claims process was too complex and convoluted for many workers and that workers needed a different legal strategy. Mr. Beaufort then approved a "theft of service" statute proposed by

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[53] Tex. Penal Code Ann. § 31.04(b)(2) (Vernon 2003 & Supp. 2004-2005). *See infra* Apps. A and B.

[54] See App. D for full text of Kansas City ordinance.

Westside CAN.[55]

After the passage of the ordinance, Westside CAN planned to hold a press conference with a city councilman in order to publicize the new ordinance. They also planned to meet with local judges to explain the new law. Westside CAN has forwarded the ordinance to Kansas City Police Department's Patrol Bureau Chief, who has agreed to order training for police officers.[56] Such municipal ordinances are being considered by advocates in other cities as well.[57]

VII. Improving Wage Theft Laws: Strict Liability for Non-payment of Wages

As discussed in Section V., what a defendant *intended* to do often affects whether and how severely s/he will be punished. However this is not always the case. There are some crimes that do not require *mens rea*. These are called strict liability offenses. One way to improve wage theft laws would be by making them "strict liability" crimes. Since the outcome of unpaid wage cases hinges on proving an employer's intent, the difficulty of establishing such cases would be obviated by eliminating intent as an element of the offense.

The significance of a strict liability offense is that certain defenses, such as mistake, are not available.[58] This would be beneficial in wage theft cases because a likely employer defense is mistake. Strict liability for non-payment of wages is not a radical idea. Connecticut currently has a labor law which makes an employer's failure to pay wages a strict liability felony.[59]

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55 Telephone Interview with Lynda Callon, Community Coordinator, Westside CAN Center, Inc. (Sept. 13, 2004).

56 Telephone Interview with Lynda Callon, Community Coordinator, Westside CAN (Oct. 11, 2004).

57 For example, in Denver, Colorado, El Centro Humanitario, a day laborers' center, is developing a proposal for a "theft of service" ordinance. Telephone Interview with Minsun Ji, Executive Director, El Centro Humanitario para Los Trabajadores (Sept. 29, 2004).

58 Dressler, *supra* note 23, at 156. *See also* Charles E. Torcia, 1 Wharton's Criminal Law § 78 (15th ed.).

59 Conn. Gen. Stat. Ann. § 31-71(a) provides:

> Each employer, by himself, his agent or representative, shall pay weekly all moneys due each employee on a regular pay day, designated in advance by the employer, in cash, by negotiable checks or, upon an employee's written request, by credit to such employee's account in any bank which has agreed with the employer to accept such wage deposits.

See State v. Wilson, 848 A.2d 542 (2004) (holding that (1) failure to pay wages was a strict liability crime that did not require proof of criminal negligence, and (2) statute

The justification for a strict liability law is that the social benefits of stringent enforcement outweigh the harm of punishing a person who may be morally innocent.[60] Because the consequences of non-payment of wages are irrefutably and extraordinarily serious—impoverishment, and destruction of community and family—advocates proposing a new law or an amendment to an existing law can and should make a strong argument that such laws hold employers strictly liable for failing to pay workers.

VIII. Checklist of What You Need to Use "Theft of Service" Laws

- A State or Municipal "Theft of Service" Law.
- A Working Relationship with Local Police and Prosecutors.
- An Agreement, Policy or Law that Bans Police from Enforcing Immigration Laws.
- An Explicit and Systematic Procedure for Police and Prosecutors Handling "Theft of Service" Reports.
- An Internal System for Coordinating the Handling of such Cases.

criminalizing failure to pay wages was not rendered unconstitutionally void for vagueness based on failure to contain *mens rea* element). Although generally the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea* (Dressler *supra* note 23, at 161 (citing Staples v. United States, 511 U.S. 600, 616 (1994)), the Connecticut court still held that even a felony may be a strict liability crime. "Neither the United States Supreme Court nor our Supreme Court has held that the magnitude of the penalty determines the constitutionality of strict liability statutes." *Id.* (quoting State v. Nanowski, 56 Conn. App. 649, 656 (2000)).

60 Examples of strict liability laws include "statutory rape" laws which in some states make it illegal to have sexual intercourse with a minor, even if the defendant reasonably believed that the sexual partner was old enough to consent legally to sexual intercourse, and "sale of alcohol to minors" laws that in many states punish store clerks who sell alcohol to minors even if the clerks reasonably believe that the minors are old enough to buy liquor.

Appendix A: Texas "Theft of Service" Statute and Intent Criteria

After one and a half years of discussion, an Austin task force which included day laborers came up with the idea of using Texas's criminal "theft of service" law to enforce day laborers' claims for unpaid wages.[61]

Texas's statute declares the following:

> A person commits theft of service if, with *intent to avoid payment* for service that he knows is provided only for compensation:
>
> (1) he intentionally or knowingly secures performance of the service by deception, threat, or false token;
>
> . . .
>
> (4) he intentionally or knowingly secures the performance of the service by agreeing to provide compensation and, after the service is rendered, fails to make payment after receiving notice demanding payment.[62]

Although "intent to avoid payment" must ultimately be proved, the law provides two factual scenarios after which it will be presumed:

> (1) the actor absconded without paying for the service or expressly refused to pay for the service in circumstances where payment is ordinarily made immediately upon rendering of the service, as in hotels, campgrounds, recreational vehicle parks, restaurants, and comparable establishments;
>
> (2) the actor failed to make payment under a service agreement within 10 days after receiving notice demanding payment.[63]

The task force discussed common non-payment scenarios and developed additional criteria which would satisfy the "intent not to pay" requirement. The criteria are now included in the standard operating procedure (SOP) for the Austin Police Department (APD). The SOP is the operations manual used by the entire police department. It serves as a guide for the police in determining whether to arrest, and makes the police more consistent and less likely to arrest someone who could not be convicted.

The SOP currently provides that any of the following circum-

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61 Telephone Interview with Julien Ross, Coordinator, CTIWoRC (Sept. 26, 2004).

62 Tex. Penal Code Ann. § 31.04(a) (Vernon 2003 & Supp. 2004-2005) (emphasis added).

63 Tex. Penal Code Ann. § 31.04(b) (Vernon 2003 & Supp. 2004-2005).

stances can be considered as a showing of "intent not to pay" when receiving a complaint regarding non-payment of day labor services:

> (1) The business/individual has had 2 or more incidences[64] of failing to pay for services rendered (with the same or different people); or
>
> (2) The work agreement[65] specifies that payment be made immediately upon services rendered, and the business/individual fails to tender payment to worker at that time; or
>
> (3) The business/individual schedules a "pay day," agreeing to meet worker on a particular day, and fails to show up; or
>
> (4) The business/individual indicates to a third party his/her intent not to pay; or
>
> (5) Payment is rendered with a check and that business/individual fails to make payment via one of the following scenarios:
>
> (a) *knowingly* issues that check on a closed or nonexistent account,
>
> (b) stops payment on the check,
>
> (c) after receiving notification of insufficient funds on the check rendered, fails to tender payment within a reasonable time period.[66]

In Austin, the procedure for enforcing "theft of service" claims is as follows. If one of the "intent not to pay" criteria is satisfied, an advocate from CTIWoRC calls the employer to attempt to negotiate by phone. If negotiations are unsuccessful, an advocate then sends a certified demand letter with return receipt notifying the employer that wages are owed.[67] Enclosed with the demand letter is a memorandum from the Austin Police Department explaining the "theft of service" law and the Department's policy of enforcing it. The enclosure of the APD letter is designed to show employers that the police are serious about enforcing the law. The employer then has ten days to pay the wages or an arrest warrant is filed with the Austin Police Department.

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64 This section is purposely vague in order to include both complaints and convictions. Workers' previous complaints to CTIWoRC or the Mexican Consulate, even those that did not result in any formal legal action, count as an incident.

65 The agreement may be oral or written.

66 E-mail from Julien Ross, Coordinator, CTIWoRC (Sept. 14, 2004) (on file with author).

67 Note that the Texas statute specifically provides that intent is presumed when the employer fails to make payment after receiving notice demanding payment. It should be noted that in drafting a demand letter it is an ethical violation for an attorney to use the criminal process to improve his client's position in a civil matter. Accordingly, such a letter must be carefully drafted. *See infra* note 69.

If the employer does not pay or contact the CTIWoRC, then the worker (with the guidance of CTIWoRC) calls 311 to file a "theft of service" police report. The individual filing the report must provide (1) the first and last name, telephone number, and physical address of the employer, and (2) the physical Austin address where the work was performed or where the worker was contracted.

The Austin Police Department SOP also sets out the following additional criteria that "should be met" when investigating and eventually filing charges for Theft of Service/Wage Claims:

> (1) Some aspect of the offense occurred within the city limits of Austin which include one of the following scenarios:
>
> (a) the business is located in Austin,
>
> (b) the work was performed in Austin,
>
> (c) the worker was picked up/contracted in Austin and work completed outside the city;
>
> (2) An agreement for work was reached either orally or in writing and payment was not rendered for the services contracted for by that agreement;
>
> (3) Attempts were made by the victim/representing organization/detective to resolve the situation by contacting the business or individual employer;
>
> (4) A demand letter has been mailed by certified mail requesting payment for services rendered with return receipt requested;
>
> (5) Intent to avoid payment is presumed if the business or individual employer fails to make payment under a service agreement within 10 days after receiving notice demanding return;
>
> (6) It is presumed that written notice was received not later than 5 days after demand letter was sent;
>
> (7) If the certified letter is returned unopened to the sender, the letter will serve as evidence of attempt to request payment, so long as it was sent to the last known address of the business or individual employer;
>
> (8) A sworn statement is obtained from the victim, or a sworn statement is obtained from the victim and presented by an individual acting as the liaison;
>
> (9) The victim correctly identifies the employer from a photograph-based lineup.[68]

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[68] E-mail from Julien Ross, Coordinator, CTIWoRC (Sept. 14, 2004) (on file with author).

APPENDIX B:
TEXAS DEMAND LETTER[69]

Re: Demand for unpaid wages/theft of service.
Sent by certified mail

Dear *Mr./Ms. Employer*:

The Central Texas Immigrant Worker Rights Center is a non-profit law office that assists low-income workers. We are writing you on behalf of *Mr./Ms. Worker*, who worked for you between *months of year*. *Mr./Ms. Worker* claims that *he/she* is owed $ *amount* in unpaid wages for *type of work* performed for you. *Mr./Ms. Worker* has presented to us a detailed calculation of the dates and hours worked, the salary promised, and the amount of outstanding wages owed.

This letter is a demand for payment of the $ *amount* in unpaid wages. **Failure to pay the $ *amount* within ten days of receiving this letter creates a presumption of committing an offense, and this matter will be referred to the Austin Police Department.** The Austin Police Department is investigating such cases under criminal Theft of Service charges, pursuant to Chapter 31.04 of the Texas Penal Code (see attached Police memo).

It is always our policy to attempt to settle this type of dispute through negotiation. We attempted to resolve this with you by telephone and were unsuccessful. Please contact us immediately if you wish to settle this matter or if you have any questions: Tel: 512-474-0007, ext. 102; Fax: 512-474-0008. To resolve this matter immediately, send payment of $ *amount* made out to "Equal Justice Center Trust Account" within 10 days of receiving this letter to: Equal Justice Center; 510 S. Congress Ave.; Suite 206; Austin, TX 78704. We will not distribute the funds to *Mr./Ms. Worker* until they have signed a release form.

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[69] This is letter included with the permission of Julien Ross, Coordinator, CTIWoRC. Please note that Texas is the only state in which a non-response to a demand letter creates a presumption of "intent to avoid payment." See *supra* Section V. State rules of professional conduct, which govern the conduct of lawyers, generally prohibit lawyers from presenting and threatening presentation of criminal charges when the purpose is to affect the resolution of a civil dispute. Gregory G. Sarno, Annotation, *Initiating, or Threatening to Initiate, Criminal Prosecution as Grounds for Disciplining Counsel*, 42 ALR 4th 1000, 1017 (1985). Thus, if a lawyer were to send a letter to an employer expressing a conditional intent to file a criminal complaint, or even if a lawyer were to send a letter arguing that an employer's conduct violated a criminal law and asking for an explanation or justification of the conduct, the lawyer would have to be very careful to word the letter so that s/he does not violate the disciplinary rules of the particular state.

Please be advised that it is illegal to retaliate or take any adverse action with respect to *Mr./Ms. Worker*.

Thank you for your attention to this matter and I hope to hear from you soon.

APPENDIX C:
SAMPLE "THEFT OF SERVICE" INTAKE FORM/AFFIDAVIT[70]

CiTiWoRC
Centro de Apoyo para Trabajadores Inmigrantes
510 S. Congress Ave, Suite 206; Austin, TX 78704 * Teléfono: (512) 474-0007, ext 102 * Fax: (512)474-0008

Recuperación de Salario Atrasado/*Wage Claim Form*

Case Contact Person: _____
Date Received: _____
Date Closed: _____

1. INFORMACIÓN DEL TRABAJADOR/A Case #_____

Nombre/*Name* _____

Lugar de nacimiento/*Place of Birth* _____

Fecha de nacimiento/*D.O.B.* _____

Número de Teléfono Local/*Local Telephone Number* _____

Dirección Local/*Local Address* _____
Código/ *Zip Code* _____

Número de Teléfono Permanente/*Permanent Telephone* _____

Dirección Permanente/*Permanent Address* _____

Contacto en caso de Emergencia/*Emergency Contact* _____

¿Que idioma(s) habla Usted?/ *What Language(s) do you Speak?* ___

_____

2. INFORMACIÓN DEL EMPLEADOR (Patrón)

Nombre del Patrón ó Supervisor/*Employer's or Supervisor's name* ___

_____

Nombre de la compañia/*Company name* _____

Dirección/*Address* _____

Código Postal/*Zip Code* _____

Teléfono (s)/ *Telephone Number (s)* _____

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70 This form is included with the permission of Julien Ross, Coordinator, CTIWoRC. *See also* NATIONAL EMPLOYMENT LAW PROJECT, PROTECTING YOUR RIGHT TO BE PAID (Jan. 2002), *available at* http://www.nelp.org/docUploads/pub107%2Epdf. This New York fact sheet for workers shares record-keeping strategies for successful enforcement of unpaid wage claims. *Id.*

Número de placas y descripción del vehículo/*License Plate & Vehicle Description* ———————————————

Descripción del Trabajo/*Work Description* ———————————————

Lugar donde se realizó el trabajo/*Address Where Work was Performed* ———————————————

Qué idioma habla su patrón?/*What Language Does your Employer Speak?* ———————————————

Otra compania contrató a su patrón? Quien?/*Who Contracted your Employer?* ———————————————

Fechas Trabajadas	Salario Prometido	Horas ó Días Trabajadas	Salario Recibido	Salario Debido
Dates Worked	*Salary Promised*	*Total Hours/Days Worked*	*Salary Received*	*Amount Owed*

*¿El acuerdo ó contrato con su patrón fué verbal ó escrito? *(Verbal or written agreement/contract?*) ———————————————

*¿Dónde/Cómo conoció al empleador? *(Where/How did you meet the employer?)* ———————————————

**¿El patrón le dió alguna razón para no pagarle? Qué razón?*

(Did employer give you a reason not to pay? If so, what?) ———————————————

**¿Supervisó ó empleó a otros trabajadores? (Did client supervise/hire other workers?)*

Sí ———— No ————

*¿Si respondó "Si", quién le pagó a los trabajadores? (*If so, who paid the workers?)* ———————————————

*¿Ha tratado de negociar con el patrón? ¿Cuántas veces? ¿Qué ha dicho?

(Have you tried negotiating? How many times? What did the employer say?) ———————————————

**¿Conoce a otros trabajadores del mismo patrón a quienes no se les ha pagado? Nombres/teléfonos? (Other victims of the same employer? Names/ telephones?)* ———————————————

*¿Su patró le ha amenazado ó tratado con agressión? ¿En qué forma?

(*Has the employer threatened you or acted with aggression? How?)* ——

*¿Cómo supo del Centro de Apoyo? *(How did you find out about us?)* ——

Yo, ——————————, doy fé que esta información es cierta. *(I affirm that this information is correct.)*

Firma del trabajador(a)/*Signature* Fecha/ *Date*

Resumen del Caso (Case Summary)

Nombre del Trabajador(a) _____

Nombre del Patrón(a) _____

ESCRIBA ABAJO UNA BREVE DESCRIPCIÓN DE LO QUE PASÓ EN EL CASO. (*Write below a brief description of what happened in your case).*

_____

_____

_____

_____

_____

_____

_____

_____

_____

Yo, _____ doy fé que esta información es cierta.

Firma del trabajador _____ Fecha _____

Cálculo de días trabajados y salarios no pagados

Nombre del Trabajador(a) _____

Nombre del Patrón(a) _____

Fechas trabajadas	Hora de entrada	Hora de comida	Hora de salida	Total Horas Trabajadas	Salario prometido (lo que deberian haber pagado)	Salario pagado y la fecha	Salario total que se le debe.

Yo, _____ doy fé que esta información es cierta.

Firma del trabajador _____ Fecha _____

Appendix D:
Kansas City Wage Theft Ordinance

Ordinance No. 040964

Amending Chapter 50, Code of Ordinances, by repealing Section 50-106, Stealing, and enacting in lieu thereof one new section of like number and subject.

WHEREAS, currently Section 50-106, Stealing, Code of Ordinances, does not expressly provide that the stealing of a person's labor violates this ordinance; and

WHEREAS, the stealing of a person's labor by means of deceit is a growing problem in parts of the City; NOW, THEREFORE,

BE IT ORDAINED BY THE COUNCIL OF KANSAS CITY:

Section 1. That Chapter 50, Code of Ordinances of the City of Kansas City, Missouri, is hereby amended by repealing Section 50-106, Stealing, and enacting in lieu thereof a new section of like number and subject, to read as follows:

Sec. 50-106. Stealing.

(a) Definitions. The following words, terms and phrases, when used in this section, shall have the meanings ascribed to them in this subsection, except where the context clearly indicates a different meaning:

(1) Appropriate means to take, obtain, use, transfer, conceal or retain possession of.

(2) Credit device means a writing, number or other device purporting to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer.

(3) Deceit means purposely making a representation which is false and which the actor does not believe to be true and upon which the victim relies, as to a matter of fact, law, value, intention or other state of mind. The term "deceit" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. Deception as to the actor's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise.

(4) Deprive means to:

a. Withhold property from the owner permanently;

b. Restore property only upon payment of reward or other compensation;

c. Use or dispose of property in a manner that makes recovery of the property by the owner unlikely; or

d. Refuse or fail to pay for labor for wages or services provided by an individual natural person pursuant to an agreement.

(5) Of another. Property or services is that "of another" if any natural person, corporation, partnership, association, governmental subdivision or instrumentality, other than the actor, has a possessory or proprietary interest therein, except that property shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security arrangement.

(6) Property means anything or value, whether real or personal, tangible or intangible, in possession or in action, and shall include but not be limited to the evidence of a debt actually executed but not delivered or issued as a valid instrument.

(7) Receiving means acquiring possession, control or title or lending on the security of the property.

(8) Services includes labor for wages, transportation, telephone, electricity, gas, water or other public service, accommodation in hotels, restaurants or elsewhere, admission to exhibitions and use of vehicles.

(9) Writing includes printing, any other method of recording information, money, coins, negotiable instruments, tokens, stamps, seals, credit cards, badges, trademarks and any other symbols of value, right, privilege or identification.

(b) A person commits the ordinance violation of stealing if he appropriates property or services of another with the purpose to deprive him thereof, either without his consent or by means of deceit.

(c) Evidence of the following is admissible in any criminal prosecution under this section on the issue of the requisite knowledge of belief of the alleged stealer:

(1) That he failed or refused to pay for property or services of a hotel, restaurant, inn or boardinghouse.

(2) That he left the hotel, restaurant, inn or boardinghouse with the intent not to pay for property or services.

(3) That he surreptitiously removed or attempted to remove his baggage from a hotel, inn or boardinghouse.