Anti-Trafficking Law as a Means of Holding Employers Accountable

Introduction

Labor and employment lawyers typically discuss their field within a civil regulatory framework: legislatures pass civil codes and administrative bodies execute them.[1] For instance, Congress passed the Fair Labor Standards Act (FLSA) that provides mostly civil remedies for wage and hour violations, and a division of the federal Department of Labor enforces the FLSA.[2]

Criminal justice institutions form a separate enforcement scheme.[3] Sometimes they attack suspect labor arrangements while pursuing non-labor-specific offenses like money laundering or tax evasion.[4] Other times they pursue criminal liability as an alternative means of labor enforcement. For instance, law enforcement has prosecuted employers for homicide where workplace safety violations end in employee death and criminal sanctions under OSHA are

[1] *E.g.*, Mary Beth Hogan & Jyotin Hamid, *Employment Law and Compliance: Overview and Guidance*, ASPATORE 1, 1 (Aug. 2009) (exploring the six general categories of watershed federal employment laws, which are civil laws enforced by administrative bodies).
[2] 29 U.S.C. § 204 (on enforcement of the FLSA by the Wage and Hour Division of the Department of Labor); *see* Justin Bennett, *Employment Law Violations*, 61 AM. CRIM. L. REV. 525, 526 (2024) (explaining that criminal liability is a subset of remedies for violations of the FLSA, which otherwise provides for civil remedies).
[3] Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1796 (1992) (traditionally, the criminal and civil law, each with different purposes and procedural rules, constitute separate paradigms).
[4] REBECCA PFEFFER ET AL., UNDERSTANDING WHAT WORKS IN THE SUCCESSFUL IDENTIFICATION, INVESTIGATION, AND PROSECUTION OF LABOR TRAFFICKING CASES IN THE UNITED STATES 3 17 (Dec. 2023) [hereinafter UNDERSTANDING WHAT WORKS] (money laundering); Kristen Bracy, Bandak Lul & Dominique Roe-Sepowitz, *A Four-year Analysis of Labor Trafficking Cases in the United States: Exploring Characteristics and Labor Trafficking Patterns*, 7 J. HUMAN TRAFFICKING 35, 47 (2021) (tax evasion).

ineffectual.[5] Some states have passed criminal "wage theft" statutes empowering police and prosecutors to penalize the nonpayment of wages.[6]

In 2000, Congress defined and criminalized the acts underlying labor trafficking.[7] This paper explores the potential for anti-labor-trafficking (henceforth "anti-trafficking") efforts to regulate labor activity. Imposing liability in parallel with the civil regulatory scheme, labor trafficking law might hold employers accountable where the traditional regulatory scheme falls short.

Labor trafficking law has the potential to regulate labor exploitation in parallel with civil law because Congress defined labor trafficking broadly. Accordingly, anti-trafficking legislation criminalizes many of the same fact patterns as civil regulatory law finds liable. Part I of this paper discusses this potential for parallel liability.

Yet on the ground, the prosecution of labor trafficking is narrower than the full potential of its legal standard. As discussed in Part II, the broad legal standard allows actors within the criminal justice system to exercise considerable discretion in the actual prosecution of labor trafficking, deciding how to investigate and what to prosecute. These decisions reflect local

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[5] Bennett, *supra* note 2, at 536-37 (the Occupational Safety and Health Administration typically chooses to negotiate settlement agreements that combine monetary penalties with behavioral remedies, with spotty success preventing repeat violations by employers); Joleane Dutzman, *State Criminal Prosecutions: Putting Teeth in the Occupational Safety and Health Act*, 12 GEO. MASON U.L. REV. 737, 755 (1990) (exploring potential for state criminal prosecutions to deter employer misconduct where OSHA has failed).

[6] César F. Rosado Marzán, *Wage Theft As Crime: An Institutional View*, 20 J.L. SOC'Y 300, 300 (2020) (exploring "wage theft" as a crime).

[7] Discussed *infra* Part I. Some scholars believe "labor trafficking" is a contrived problem. *E.g.*, Anette Sikka, *Trafficking in Persons: How America Exploited the Narrative of Exploitation*, 55 TEX. INT'L L.J. 1, 16, 24 (2019) (questioning the Congressional findings that led to the definition of trafficking in the Act). This paper does not opine on whether this is true, nor does it attempt to make a distinction between the legal definition and the "real" phenomenon. Since this paper takes the legal standard as-is and explores liability within those bounds, it tends to use the term "labor trafficking" to refer to the phenomenon as defined at law. Part I sometimes refers to the phenomenon of labor trafficking as distinct from the legal definition as a matter of necessity.

attitudes towards labor arrangements; hence, the regulation of labor trafficking varies from locality to locality.

Ultimately, anti-trafficking law poses an alternative way of holding employers accountable, as discussed in Part III. Anti-trafficking law covers some labor exploitative situations that civil regulatory law cannot reach and offers different and potentially more effective sanctions. However, practitioners must also contend with the wide discretion given to law enforcement who sometimes direct resources toward non-trafficking purposes.

I. The Potential for Parallel Liability

Congress made trafficking a national concern with the Victims of Trafficking and Violence Protection Act of 2000 (henceforth "the Act").[8] It defined two "severe forms of trafficking" in the Act.[9] The first is sex trafficking, which is outside the scope of this paper. The second is labor trafficking.[10]

It also minted new offenses to penalize the range of activities involved in a trafficking scheme.[11] These included an umbrella "Trafficking with respect to peonage, slavery, involuntary

[8] Eun-hye Yoo & Elizabeth Heger Boyle, *National Human Trafficking Initiatives: Dimensions of Policy Diffusion*, 40 LAW & SOC. INQUIRY 631, 634 (2015) (on the origin of labor trafficking as a matter of international law, then adopted as a concern by the United States).
[9] Trafficking Victims Protection Act of 2000 § 103(8), 22 U.S.C. § 7102(11).
[10] Trafficking Victims Protection Act of 2000 § 103(8)(B), 22 U.S.C. § 7102(11)(B). For reference, the definition of labor trafficking follows:

> "(8) SEVERE FORMS OF TRAFFICKING.—The term 'severe forms of trafficking in persons' means— …
> (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."

[11] Trafficking Victims Protection Act of 2000 § 102(b)(14), 22 U.S.C. § 7101 (on the motivations behind adding new offenses to the penal code).

servitude, or forced labor" offense,[12] a "Forced labor" offense penalizing the various coercive "means" of labor trafficking,[13] and a prohibition on withholding immigration documents to further labor trafficking.[14] These were appended in Chapter 77 of Title 18 after § 1584 "Sale into involuntary servitude," a statute created to outlaw the chattel slave trade.[15]

The definition of labor trafficking follows a tripartite structure of "acts," "means," and "purposes" where "recruitment, harboring, transportation, provision or obtaining" are acts, "force, fraud or coercion" are means, and "involuntary servitude, peonage, debt bondage, or slavery" are purposes.[16] This nexus of "acts" accomplished by certain "means" for certain "purposes" distinguishes labor trafficking from mere labor exploitation. Practitioners look for "force, fraud or coercion" (the "means" element) in the labor arrangement, referring to them eponymously as "coercion."[17]

Despite efforts to render criminal labor trafficking conceptually distinct from civil infractions, Congress defined the various elements of the legal standard broadly enough to protect victims in economic distress.[18] The creators of civil regulatory law sought to protect the

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[12] Trafficking Victims Protection Act of 2000 § 112(a)(2), 18 U.S.C. § 1590.
[13] Trafficking Victims Protection Act of 2000 § 112(a)(2), 18 U.S.C. § 1589.
[14] Trafficking Victims Protection Act of 2000 § 112(a)(2), 18 U.S.C. § 1592.
[15] Trafficking Victims Protection Act of 2000 § 112(a) (explaining the appendage); *United States v. Kozminski*, 487 U.S. 931, 932 (1988) ("the phrase 'involuntary servitude' was intended 'to cover those forms of compulsory labor akin to African slavery').
[16] U.S. DEP'T OF STATE, 2024 TRAFFICKING IN PERSONS REPORT 26 (Off. to Monitor and Combat Trafficking in Persons, 2024) (referring to the tripartite structure).
[17] POLARIS, THE TYPOLOGY OF MODERN SLAVERY: DEFINING SEX AND LABOR TRAFFICKING IN THE UNITED STATES 8 (Mar. 2017) (did not classify hotline calls as labor trafficking if they did not hear explicit indicators of force, fraud or coercion); Barbara Brown, *Workshop 1C: A Multi-Disciplinary and Data-Driven Approach to Agricultural Labor Trafficking*, THE COTERIE ONLINE (Oct. 16, 2024), https://thecoterieonline.com/national-labor-trafficking-conference (prosecutor explaining that they always train according to force, fraud and coercion); Summer Stephan & Wendy Patrick, *Fighting Modern-Day Slavery Justice in Human Trafficking Cases Requires A Victim-Centered Approach*, 60 JUDGES J. 10, 10 (Spring 2021) (using the shorthand for trafficking which is "exploitation…through force, fraud or coercion, for sex, labor or both").
[18] Discussed *infra* Part I.A.

same victims. For many of the same fact situations that can lead to civil liability, then, labor trafficking law offers parallel criminal liability.[19]

A. The Legal Scheme: Broadening the Concept of "Coercion"

In the Act, Congress called labor trafficking "a modern form of slavery."[20] Seeking a politically viable rhetoric, it tied anti-trafficking efforts to the nation's anti-slavery commitments, reiterating that the United States had "outlawed slavery and involuntary servitude in 1865, recognizing them as evil institutions that must be abolished."[21] This harkening back was purely a matter of rhetoric. As discussed below, Congress intended to remake a legal scheme originally designed to forbid chattel slavery and stretch it over exploitative labor arrangements.

Before 2000, the slavery and involuntary servitude statutes criminalized only servitude brought about through use or threatened use of "physical or legal coercion."[22] This fell in line with what American chattel slavery was: state power and the law were used to deprive Black individuals of bodily liberty— physical and legal coercion, respectively.[23]

The victims Congress envisioned vindicating in the 2000 Act were not chattel slaves, but poverty-stricken, foreign-born women enticed to work for traffickers out of economic desperation.[24] At the hearing organized by the Act's sponsor Representative Christopher Smith,

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[19] Discussed *infra* Part I.B.
[20] Trafficking Victims Protection Act of 2000 § 102(b)(1), 22 U.S.C. § 7101.
[21] Trafficking Victims Protection Act of 2000 § 102(b)(22), 22 U.S.C. § 7101.
[22] Trafficking Victims Protection Act of 2000 § 102(b)(13), 22 U.S.C. § 7101.
[23] Peña Grace Delgado, *The 'Trafficked Narrative': Modern Slavery's Troubling History in the United States and Mexico*, *in* THE PALGRAVE HANDBOOK ON MODERN SLAVERY 137, 139 (Kapardis et al., eds., 2024).
[24] *The Sex Trade: Trafficking of Women and Children in Europe and the United States: Hearing Before the Comm'n on Sec. and Coop. in Eur.*, 106th Cong. 2 (1999) ("Trafficking is induced by poverty,"), 23 ("...trafficking often originates in countries with poverty"), 25 ("...refugee crises are fertile ground for trafficking in women and children… Refugee women and children are often left facing dire levels of poverty"), 47 ("Traffickers also prey on economically desperate women and girls.").

expert Steven R. Galster of the Global Survivor Network stated that after "work[ing] longer hours under bad conditions for little to no-money…[trafficked victims] feel stuck, tired, and afraid to fight [their bondage]."[25] Making no mention of shackles or chains, Galster instead described a psychological imprisonment wrought by financial deprivation.[26]

Thus Congress objected to the narrow historical interpretation of coercion as physical or legal.[27] Seeking to criminalize conduct that had the same purpose and effect,[28] it updated the legal definition of "involuntary servitude" to include servitude induced "by means of…any

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The prototype of the innocent girl co-opted by the conniving trafficker was a hundred years old and first fashioned in anti-prostitution legislation. Delgado, *supra* note 23, at 137, 145 (In the 1910 White-Slave Traffic Act, or Mann Act, legislators envisioned that innocent women and girls en route to respectable city jobs were being abducted by foreign-born men and forced into sex work. Subsequent conventions and resolutions and task forces devoted to fighting what was dubbed "white slavery" kept the issue alive through the 20th century.).

Men could be victims of labor trafficking, too, but the female victim better galvanized the bi-partisan support required to pass the Act, winning over both the religious right and the feminist left. *The Sex Trade: Trafficking of Women and Children in Europe and the United States*, *supra*, 5 ("Men are also trafficked, particularly into forced labor," acknowledged Anita Botti, Deputy Director for International Women's Initiatives, "but we emphasize trafficking in women and children because they are basically the targets of the criminal activity"); Sikka, *supra* note 7, at 12 (with their political popularity waning, radical feminists and the religious right—representing organizations like Planned Parenthood USA and the Heritage Foundation—formed the unlikeliest of alliances and formulated the poster victim).

Accordingly, in the text of the Act itself, every description of the problem of trafficking, every characterization of the victim, and every explanation of who deserves humanitarian relief is haunted by the phrase "especially women and children." *E.g.*, Trafficking Victims Protection Act of 2000 § 102(b)(1), § 7101 ("At least 700,000 persons annually, *primarily women and children,* are trafficked within or across international borders. Approximately 50,000 *women and children* are trafficked into the United States each year" (emphasis added)), § 102(b)(4), § 7101 ("Traffickers *primarily target women and girls,* who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin" (emphasis added)).

[25] *The Sex Trade: Trafficking of Women and Children in Europe and the United States*, *supra* note 24, at 15.

[26] *See id.*

[27] The case law defined "coercion" narrowly. *United States. v. Kozminski*, 487 U.S. 931, 932 (1988) (the court has "never interpreted the guarantee of freedom from involuntary servitude to … prohibit compulsion of labor by other means, such as psychological coercion").

[28] Trafficking Victims Protection Act of 2000 § 102(b)(13), 22 U.S.C. § 7101.

scheme, plan or pattern" that could "cause someone to believe…[she] would suffer serious harm."[29] A finding of coercion rested not on the category of the trafficker's act but on a reasonable victim's perception of whether she would suffer "serious harm."[30] This generalized standard could sweep in the kind of conduct that Galster had described, and more. The tendency of this standard to metastasize can be seen in the 2008 Congressional update to the "serious harm" standard.[31] In the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Congress clarified that "serious harm" covers "physical or nonphysical, including psychological, financial, or reputational harm," rattling off a non-exhaustive list of what could qualify the trafficker's act as coercive.[32]

In addition, Congress added debt bondage as a "purpose" element to labor trafficking.[33] It did so to capture the kind of coercion that worked on economically desperate victims.[34] Debt bondage is defined as failing to pay the reasonable value of a worker's labor towards satisfying

[29] Trafficking Victims Protection Act of 2000 § 103(5), 22 U.S.C. § 7102(8).
[30] This "reasonable victim" standard was clarified later in the update to § 1589 "Forced Labor" in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 222(b)(3), 18 U.S.C. § 1589.
[31] 18 U.S.C. § 1589 (current law keeps this clarification).
[32] *Id.*
[33] Trafficking Victims Protection Act of 2000 § 103(8)(B), 22 U.S.C. § 7102(11)(B) (definition of labor trafficking, *supra* note 10 for text).
[34] *The Sex Trade: Trafficking of Women and Children in Europe and the United States*, *supra* note 24, at 15 ("Since most of the women and girls do not have the kind of money demanded of them, they're given the opportunity to work off their debt.").

their debt. [35] The drafters intended debt bondage to capture traffickers' use of oppressive recruitment fees; traffickers perpetuated the debt as leverage over trafficked victims.[36]

By including victims driven by economic desperation, the drafters of anti-trafficking law decided to criminalize even those labor arrangements to which victims consented. Some women, as Galster described it, were "adequately informed, knowingly coerced," though not "excited" when they chose to involve themselves in the trafficking situation.[37] The drafters still labeled them trafficked.[38] This is still the contemporary wisdom: the Department of State 2024 Trafficking in Persons Report states that "the trafficker's exploitative scheme," and "not a victim's prior consent or ability to meaningfully consent thereafter," "is what matters."[39] Volition is not supposed to prevent liability.[40]

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[35] Trafficking Victims Protection Act of 2000 § 103(4), 22 U.S.C. § 7102(7). The complete definition of "debt bondage" follows:

> "...the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined."

[36] *The Sex Trade: Trafficking of Women and Children in Europe and the United States*, *supra* note 24, at 15 ("...Recruitment fees are always demanded [by traffickers]...This is the first and biggest problem [victims] fall into.").

[37] *The Sex Trade: Trafficking of Women and Children in Europe and the United States*, *supra* note 24, at 14.

[38] *Id*.

[39] U.S. DEP'T OF STATE, *supra* note 16, at 27.

[40] But it still does when the participants in the labor arrangement have a say in the prosecution of the case. Discussed *infra* Part II.

From a theoretical perspective, the irrelevance of the victim's volition aligns with the paradigm of criminal law: the state takes prerogative to penalize wrongs that violate the collective interest. Criminal law does not require an individual to recognize her own interest as infringed on, unlike in the civil paradigm where a legal case must be initiated by a private party. Mann, *supra* note 3, at 1806.

Civil regulatory law aligns closer with criminal law than with traditional civil law because the regulator takes prerogative regardless of what parties have agreed to. Private consent never legitimizes an infringing labor arrangement. *See Lochner v. New York*, 198 U.S. 45 (1905)

The motivations behind labor trafficking legislation thus resembled those behind civil regulatory law. Legislators of civil labor and employment laws spoke of workers being subject to "economic duress" as they accepted crushing employment terms due to a lack of bargaining power.[41] Labor and employment laws counterbalanced this dynamic by mandating better employment terms.[42] Thus, volition is not supposed to prevent liability in the civil context, either.[43]

B. Covering the Same Fact Patterns as Civil Regulatory Law

With Congress defining the "coercive" element of labor trafficking so broadly, anti-trafficking law had the potential to impose liability for as broad a set of fact patterns as civil regulatory law did. The fact patterns covered by anti-trafficking law and civil regulatory law overlap substantially, albeit not perfectly.

The "coercive" element of labor trafficking follows three conceptually distinct lines: "force" refers to physical coercion, "fraud" to the use of misinformation, and "coercion" to the

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(writing that laws like the one in controversy limiting the number of hours bakers could work "are mere meddlesome interferences with the rights of the individual," because they "limit[…] the hours in which grown and intelligent men may labor to earn their living."). During the New Deal Era, in a reversal of jurisprudence, the SCOTUS decided that a legislature could override individual agreements that infringed on certain minimum standards. *E.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1936) (writing that a minimum wage law prevented "exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage.").

[41] Samuel Bagenstos, *Lochner Lives On*, ECONOMIC POLICY INSTITUTE (Oct. 7, 2020), https://www.epi.org/unequalpower/publications/lochner-undermines-constitution-law-workplace-protections/#_ref17 (Senator Robert Wagner, principal sponsor of the National Labor Relations Act, had stated: "The law has long refused to recognize contracts secured through physical compulsion or duress. The actualities of present-day life impel us to recognize economic duress as well.").

[42] *E.g.*, Hogan & Hamid, *supra* note 1, at 3 (explaining that employers and workers cannot privately contract below the federally mandated minimum wage under the FLSA).

[43] *Id.*

use of psychological manipulation via threats.[44] The first two overlap with civil regulatory law, as discussed below.[45]

i. "Force" and Workplace Health and Safety Violations

The "force" standard is met when an employer uses physical overpowering, harm or restraint to compel an individual to comply with demands.[46] Therefore, the standard covers situations in which an employer physically endangers the worker.[47] One example is the withholding of medical treatment, widely recognized to be a coercive tactic in labor trafficking.[48]

Fact patterns where an employer acts in ways that physically endanger the worker also violate workplace health and safety law. Under OSHA, the federal workplace health and safety regime, the Secretary of Labor has promulgated rules governing everything from emergency exit routes to the use of personal protective equipment.[49] One need not look for a specific rule to find liability: the Act also incorporates a general "catch all" provision requiring an employer to keep the workplace free of recognized hazards that are causing or likely to cause death or serious physical harm to its employees.[50] To revisit the previous example, OSHA also finds liability where medical treatment has not been made available: the employer must contact medical

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[44] This is a shorthand used by practitioners. Charlee Borg, *Labor Trafficking Basics (Pre-Conference Training)*, THE COTERIE ONLINE (Oct. 16, 2024), https://thecoterieonline.com/national-labor-trafficking-conference.

[45] "Coercion," defined as the use of direct or implied threats to encourage a person to act or perform a certain way, might be the most expansive of the three kinds, incorporating many factual situations. However, it is so conceptually different from civil regulatory law that comparing "coercion" to civil regulatory laws may be like comparing apples to oranges, so it is not discussed here.

[46] Borg, *supra* note 44.

[47] *Id.*

[48] POLARIS, LABOR TRAFFICKING ON SPECIFIC TEMPORARY WORK VISAS 17 (2022), https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf (listing methods of coercion).

[49] 29 C.F.R. § 1910.33 (emergency exits); 29 C.F.R. § 1910.132 (PPE).

[50] 29 U.S.C. § 654(a)(1).

personnel for advice and consultation and retain someone onsite who is trained in first aid if the workplace is not near an infirmary, clinic, or hospital.[51]

Still, civil workplace safety law and "force" in labor trafficking differ in their requirements for the employer's state of mind. Labor trafficking law requires that "force" be used for a particular purpose, namely, subjection to involuntary servitude, peonage, debt bondage, or slavery.[52] The OSHA standards do not require a showing of intent: an unintentional failure to act will incur liability.[53] In requiring less by way of the employer's state of mind, OSHA may cover some fact situations that the "force" standard does not.

However, prosecutors can allege "force" where no OSHA standard yet exists and where the "catch-all" provision is not met.[54] Further, the "catch-all" provision uses a "death or serious physical harm" standard to assess whether a workplace condition is hazardous, whereas the "force" standard more loosely entails any means of physical restraint or harm, and the "purpose" toward which such force is directed is merely "serious harm."[55] As discussed in Part I, "serious harm" can be financial, psychological, or reputational.[56] For instance, locking a worker outside

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[51] 29 C.F.R. § 1910.151.
[52] Trafficking Victims Protection Act of 2000 § 103(8)(B), 22 U.S.C. § 7102(11)(B) (definition of labor trafficking, *supra* note 10 for text).
[53] *Compare* 29 U.S.C. § 666(c) (imposing a potential civil penalty for violation of a standard, sans any mental state requirement) *with* 29 U.S.C. § 666(e) (imposing criminal liability for willfulness in violating a standard).
[54] In finding "force" where no OSHA standard yet exists, law enforcement circumvents the time-consuming rule-making process. *See* STEVEN L. WILLBORN, STEWART J. SCHWAB, & GILLIAN L. L. LESTER, EMPLOYMENT LAW: CASES AND MATERIALS 957 (7th ed. 2022) (the development of permanent standards has taken between 52 and 138 months).
[55] *Compare* 29 U.S.C. § 654(a)(1) ("each employer…shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees"), *with* Borg, *supra* note 44 (force is defined as the use of physical overpowering, harm or restraint to compel an individual to comply with demands) *and* 18 U.S.C. § 1589 ("Forced Labor" provision requires that the employer intend "serious harm").
[56] Discussed *supra* note 30-32.

employer-provided housing may not rise to the level of "serious physical harm" under OSHA, but it can meet the legal standard for "force" unto "serious harm" for labor trafficking.[57] In other words, anti-trafficking law covers fact patterns that are not liable under OSHA.

ii. "Fraud" and Wage and Hour Violations

"Fraud" is another means of coercion in labor trafficking. The "fraud" standard entails the distortion of information through lies, omittance or misrepresentation.[58] Resting on a finding that the worker has agreed to one set of terms but the employer has acted otherwise, the standard flexes for a wide range of possible fact patterns.[59] Fraudulent acts commonplace in labor trafficking include imposing excessive working hours, withholding earnings, misrepresenting the job, and debt bondage.[60] Debt bondage thus elides the "means" and "purpose" elements: in addition to being a "purpose" for which coercion is used,[61] it is a "means" of coercion by fraud because it requires deceptively withholding earnings that the parties initially agreed would satisfy debt.[62]

Since acts of "fraud" often entail the withholding of earnings, they may also incur liability under civil wage and hour laws. Under the FLSA, the federal wage and hour law, employers must stay above a floor in the wage rate paid to workers, the so-called "minimum

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[57] PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 7 (recounting a real labor trafficking case where a domestic worker was locked outside the house).
[58] Borg, *supra* note 44.
[59] POLARIS, LABOR TRAFFICKING ON SPECIFIC TEMPORARY WORK VISAS, *supra* note 48, at 17 (listing examples of fraudulent coercive tactics); Bracy et al., *supra* note 4, at 46 (listing examples of fraudulent coercive tactics).
[60] POLARIS, LABOR TRAFFICKING ON SPECIFIC TEMPORARY WORK VISAS, *supra* note 48, at 17; Bracy et al., *supra* note 4, at 46.
[61] Recall the definition of labor trafficking lists debt bondage as one of the four purposes for which the coercive tactics are used, discussed *supra* Part I.A. Trafficking Victims Protection Act of 2000 § 103(8)(B), 22 U.S.C. § 7102(11)(B) (definition of labor trafficking, *supra* note 10 for text).
[62] Trafficking Victims Protection Act of 2000 § 103(4), 22 U.S.C. § 7102(7) (definition of debt bondage; *supra* note 35 for text).

wage" provision.[63] Employers must pay at least one-and-a-half times the minimum wage for hours worked above a certain threshold, the so-called "overtime" provision.[64] Both overtime or minimum wage violations may occur in tandem with the fraudulent act of debt bondage. In debt bondage where the "length and nature of [a worker's] services are not respectively limited and defined," the worker's compensation likely drops below the minimum floor set by wage and hour laws.[65]

The two legal schemes differ in that "fraud" may operate in a labor arrangement permitted by wage and hour laws, where the worker is paid at least minimum wage and for overtime but still less than what he had agreed to.[66] In fact, the "fraud" standard may include all fact patterns infringing on wage and hour laws, since any wage and hour violation necessarily entails an employer reneging on an unspoken agreement that the worker will be paid at least the mandated minimum.

With the "means" element of labor trafficking rendered so expansively, do other parts of the legal standard narrow liability? The "purpose" element appears to impose a heightened requirement on the employer's state of mind, limiting liability to situations where the employer coercively disempowers the worker *with the intention of* obtaining the worker's labor on its coercive terms.[67] Hence when the employer unintentionally disempowers the worker, he has not trafficked the worker.[68] As previously discussed, some workplace safety violations may not rise

[63] Hogan & Hamid, *supra* note 1, at 3 (describing FLSA).
[64] *Id.*
[65] Trafficking Victims Protection Act of 2000 § 103(4), 22 U.S.C. § 7102(7) (definition of debt bondage; *supra* note 35 for text).
[66] PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 1 (Dec. 2023) (even highly skilled workers like computer engineers and lawyers can be victims of labor trafficking).
[67] Discussed *supra* Part I.A., the definition of labor trafficking includes the "purpose" element.
[68] In any criminal prosecution, the *mens rea* requirement must be met. Mann, *supra* note 3, at 1805.

to the level required by "force" in labor trafficking law because the employer did not intend the suspect act.[69]

However, the "purpose" requirement only weakly circumscribes liability. One need only ask the question in the negative: when would an employer lack the intention of preserving the worker's labor on the employer's terms? One would imagine almost never. Indeed, in contemporary practice, the state need only prove that the trafficker undertook the coercive act for the "purpose" of "obtaining labor."[70] Given that most employers are in the business of "obtaining labor," the standard is impossible not to meet.[71]

In practice, law enforcement officials across the board note the substantial overlap between labor trafficking law and civil regulatory law. Some find it to be a boon, intentionally partnering with civil regulatory officials to detect labor trafficking leads,[72] cross-train for domain

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[69] *Supra* Part I.B.i.

[70] The Act focused on fleshing out the concept of coercive "means" and glossed over the "purpose" element. For instance, the definition of "involuntary servitude" focuses on what "means" induced the "condition of servitude" but declines to define "servitude," the purpose toward which those means are directed. Trafficking Victims Protection Act of 2000 § 103(5), 22 U.S.C. § 7102(8).

The Department of State Trafficking in Persons report refers to purpose with the phrase: "to exploit the labor or services of another person." U.S. DEP'T OF STATE, *supra* note 16, at 26 ("Forced Labor, sometimes also referred to as labor trafficking, encompasses the range of activities involved when a person uses force, fraud, or coercion to exploit the labor or services of another person.").

In Oklahoma, the pattern jury instructions refer to the purpose element as "for the purpose of engaging that/those person(s) in labor." HUMAN TRAFFICKING FOR LABOR—ELEMENTS (Vernon ed., Apr. 2020), Westlaw VRN-OKFORM OUJI-CR 4-113A.

[71] This is likely why practitioners agree that the coercive "means" element is the one that indicates labor trafficking. *Supra* notes 16-17.

[72] Amy Farrell et al., *Policing labor trafficking in the United States*, 23 TRENDS ORGANIZED CRIME 36, 46 (2020) (finds that local regulators and labor inspectors are better positioned to identify labor trafficking crimes and recommends developing protocols for such partners to report suspected labor trafficking); REBECCA PFEFFER ET AL., UNDERSTANDING WHAT WORKS IN THE IDENTIFICATION, INVESTIGATION AND PROSECUTION OF LABOR TRAFFICKING CASES IN THE UNITED STATES: IMPROVING COLLABORATION BETWEEN LAW ENFORCEMENT AGENCIES AND DEPARTMENTS OF LABOR KEY FINDINGS AND RECOMMENDATIONS 1, 4 (Mar. 2024) [hereinafter IMPROVING COLLABORATION] (When DOLs investigate workplace abuses, they can refer cases

knowledge,[73] receive assistance calculating restitution,[74] and seek civil remedies when they are unable to prove a labor trafficking charge.[75] Others are troubled by the expansion of criminal liability into "gray areas,"[76] designating labor-oriented cases as outside their purview on the assumption that civil bodies will pick up the labor code violations, even where there were indicators of trafficking.[77]

II. Public as Regulator

With justice in criminal law imposed by sovereign rather than private parties, institutional actors acting on behalf of the state wield hefty powers.[78] The police exercise powers of search and interrogation, and prosecutors initiate legal action that may result in imprisonment.[79]

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that have elements of labor trafficking or other criminal violations, which may not be immediately obvious, to local law enforcement. This partnership could be especially effective where DOLs had unique access to worksite locations otherwise unobservable to law enforcement.).

[73] PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 11 (commenting on how regulatory agencies know how to conduct financial investigations, understand the labor markets, and govern the matrix of regulations that characterize different industries.).

[74] PFEFFER ET AL., IMPROVING COLLABORATION, *supra* note 72, at 5 (With limited understanding of written and verbal employment agreements, industry-specific wage differentiators, overtime rules, and exemptions, criminal justice personnel felt out of their depth calculating restitution. Some practitioners in the labor trafficking space thus regularly relied on their local departments of labor to help with calculations.)

[75] Farrell et al., *Policing labor trafficking in the United States*, *supra* note 72, at 50; PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 17.

[76] Farrell et al., *Policing labor trafficking in the United States*, *supra* note 72, at 43 (a federal law enforcement officer uses the term "grey area" to describe cases that are not "sweatshop" cases with "people held against their will").

[77] Farrell et al., *Policing labor trafficking in the United States*, *supra* note 72, at 43 ("other agencies like Department of Labor would probably investigate" explained a federal law enforcement officer).

[78] Mann, *supra* note 3, at 1810-11.

[79] *Id.*

Such power must be directed.[80] In anti-trafficking efforts where a broad sweep of activity might incur criminal liability, the local community prioritizes resources. The local community maintains its own norms and sensibilities as to which labor arrangements are permissible and which ought to be criminalized. Those norms and sensibilities constrain the work of institutional actors as victims and jurors bring them into the judicial process and sway the likelihood of a successful prosecution. Institutional actors like prosecutors also adopt public norms themselves, tailoring their activities according to what they believe is a permissible labor arrangement.

Thus, the legal standard may deem a plethora of situations suspect, but criminal liability befalls only those labor arrangements condemned by the public. In this way, the public rather than a legal standard "regulates" labor activity.

A. The Public Intervenes: Victims and Jurors

The public intervenes in law enforcement activities at key junctures to determine whether criminal liability will stick. Victims cooperate as witnesses throughout the lifecycle of a case, and jurors find facts at trial.

Police discover trafficking primarily via victim self-reporting.[81] Police otherwise detect labor trafficking reactively, encountering it in the course of investigating other crimes.[82] For instance, officers responding to crimes like drug sales, shoplifting and fraud may encounter forced criminality, a subset of labor trafficking.[83] Given that police often detect labor trafficking reactively, victims must themselves classify their employment situations as labor trafficking and

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[80] Farrell et al., *Policing labor trafficking in the United States*, *supra* note 72, at 37 (using "institutional readiness" to describe law enforcement having to operationalize their powers of search and interrogation); *see* Marzán, *supra* note 6, at 308 (prosecutors have scarce resources and will not impose penal sanctions for minor or technical violations).
[81] Stephan & Patrick, *supra* note 17, at 12.
[82] Bracy et al., *supra* note 4, at 46.
[83] PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 4 2.

come forward.[84] They, however, chronically underreport their victimization.[85] Some victims underreport because they prefer that their labor arrangements persist.[86] Thus volition poses an obstacle to criminal liability even though the legal standard demands that it should not.[87]

Prosecutors also depend on victim cooperation. To prove the presence of coercion and meet the evidentiary burden, a prosecutor may need to put his victim on the witness stand.[88] This becomes imperative if the trafficker used psychological coercion. Since psychological violence does not leave physical traces the way physical or sexual violence can, the victim's testimony becomes the only way to make a showing.[89] According to this logic, most trafficking cases require victim testimony. In a nationwide study of cases between 2013-2016, traffickers used psychological violence in 97.6% of the cases. [90] They used physical violence in only 25.6% of cases, and sexual violence in 20% of cases.[91] If the victim is unwilling to take the stand, the

[84] Stephan & Patrick, *supra* note 17, at 12 (explaining the importance of victim cooperation).
[85] POLARIS, THE TYPOLOGY OF MODERN SLAVERY, *supra* note 17 at 8 ("...labor trafficking cases in the U.S. are chronically underreported [via the Polaris hotline, used by victims and victim service providers] due to a lack of awareness about the issue and a lack of recognition of the significant vulnerability of workers in many U.S. labor sectors.").
[86] PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 11 (victims fear that trafficking investigations might disrupt the little money they are able to regularly provide for their families).
[87] Discussed *supra* Part I.A.
[88] *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (finding the prosecution must prove every essential element of the offense beyond a reasonable doubt to a rational trier of fact, or a conviction will not result).
[89] PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 14 ("Primary evidence in labor trafficking cases is often victim testimony"); *see, e.g.*, Kate Alexander, *Workshop 2C: Federal Labor Trafficking Criminal Case Study: Familial Labor Trafficking and Unaccompanied Minors*, THE COTERIE ONLINE (Oct. 16, 2024), https://thecoterieonline.com/national-labor-trafficking-conference (explaining that in the trafficking case *United States v. Francisco-Juan*, a minor girl arrived at the hospital in the middle of a miscarriage and presented signs of domestic abuse; nurses immediately measured and took pictures of her bruises which were taken into evidence).
[90] Bracy et al., *supra* note 4, at 43.
[91] *Id.*

prosecutor lacks a case. The victim's own sensibilities as to whether his situation should be criminalized affect whether a prosecutor can meet his evidentiary burden.[92]

When a case proceeds to trial, the jury, constituted by members of the public, makes the factual determinations that decide a case. Jurors hold preconceived notions of what constitutes a trafficking situation, leading them to adjudge a case in ways that deviate from the legal standard.[93] For instance, they see chattel slavery as the archetype of modern trafficking.[94] In a 2012 case, the jury found that 300 defrauded and unpaid Filipino teachers were not labor trafficked because they were not working as "virtual slave[s]" of their employers in "cotton fields."[95] However, the situation met the legal standard for labor trafficking.[96] Since most jurors have held jobs, jurors find more in common with labor trafficking victims than with victims of other crimes; some have been known to abbreviate the labor trafficking situation as "nothing more than a relatable bad work experience."[97] Other jurors ignore the presence of coercion when victims show willingness to enter into or stay in labor arrangements, even though the Act prevents the victim's agency from negating the trafficker's coercive act.[98]

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[92] *See supra* note 87.
[93] Stephan & Patrick, *supra* note 17, at 14 ("jurors might hold preconceived notions about trafficking victims and trafficking activity that might compromise their ability to judge the case fairly and impartially").
[94] Delgado, *supra* note 23, at 208 ("You have to get over the perception from jurors that human trafficking is slavery with an iron ball attached to their leg, and they're wearing rags and sleeping in a shipping container .... It's hard. And the facts that fit that circumstance don't come along all the time.").
[95] Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609, 635 (2014) (quoting the defense counsel and arguing that the jury rejected the trafficking claim because the defense counsel characterized trafficking as chattel slavery).
[96] *Id.*
[97] PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 18.
[98] *Id.* ("grand juries often look at someone seemingly traveling of their own volition and fail to understand how they are being trafficked"). A victim's willingness to stay in the arrangement does not negate the trafficker's liability, discussed *supra* Part I.A.

Judges are supposed to delimit jurors' extralegal beliefs by providing clear jury instructions. However, they often fail to define terms of art.[99] In one case, the trial court declined to define "force" and simply recited the black-letter law from the penal code.[100] Instead of conforming the juror's judgment to a precise legal standard, the instructions left room for the jury to exercise discretion based on extralegal beliefs as to what constituted "force."[101] Where judges leave room for extralegal beliefs, juries fall back on preconceived notions of what merits a conviction.[102]

B. Institutional Actors Respond: Prosecutors and Police

As victims and jurors influence the outcomes of cases, prosecutors and police reorient their activities, pursuing those cases that will succeed.

Juries and victims constrain the prosecutorial effort because prosecutors pick which cases to bring based on legal sufficiency.[103] Legal sufficiency refers to whether the facts of a case will make for a successful conviction based on available charges.[104] A study showed that experienced

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[99] *See* MONIQUE C.M. LEAHY, LITIGATION OF CRIMINAL PROSECUTIONS FOR HUMAN TRAFFICKING, 165 Am. Jur. Trials 313, § 42, Westlaw (database updated Nov. 2024) (listing cases where the trial judge gave instructions failing to define terms of art in the trafficking charge).

[100] *Lindsey v. State*, 176 A.3d 741, 758 (2018) (The judge's instruction: "The defendant is charged with the offense of human trafficking by force, fraud, or coercion. In order to convict the defendant, the State must prove that the defendant did knowingly take or detain [S.S.] with the intent to use force, threat, or coercion to compel [her] to perform a sexual act, sexual contact, or vaginal intercourse." Defendant had asked for the following definition of force: "Force is the knowing taking or detention of another with the intent to use force, threat and coercion to compel the other to perform a sexual act, sexual contact, or vaginal intercourse." However, the judge declined the request.).

[101] *See id.*

[102] Because of this problem, practitioners have advocated for specialty courtrooms with specialty judges trained in trafficking issues. Stephan & Patrick, *supra* note 17, at 12.

[103] AMERICAN PROSECUTORS RESEARCH INSTITUTE, HOW MANY CASES SHOULD A PROSECUTOR HANDLE? RESULTS OF THE NATIONAL WORKLOAD ASSESSMENT PROJECT 6, 8 (2002); *see, e.g.*, Michelle Leigh Brown, *Scapegoats*, 22 SEATTLE J. FOR SOC. JUST. 337, 358–60 (2024) (on sexual assault cases not being pursued because conviction rates are so low).

[104] AMERICAN PROSECUTORS RESEARCH INSTITUTE, *supra* note 103, at 8.

prosecutors spent 35 percent more time screening cases than their less experienced colleagues and less time preparing cases and bringing cases to disposition.[105] When jurors and victims inhibit the prosecution of certain labor trafficking cases, prosecutors learn to not advance cases with those facts.

The prosecutor's and jury's actions then guide police activity. Police have a "downstream orientation" where they prioritize investigating crimes with more clear and established roads to prosecution.[106] They classify a case as unfounded if decision makers at subsequent stages do not carry a case forward, such as if the prosecutor will not prosecute or a jury will not convict.[107] One law enforcement official described being disincentivized from investigating labor trafficking because in his past experience he had collected "a bunch of [evidence]" that still did not "rise to the level for a prosecutor."[108] When these cases go uninvestigated, police never perform upstream activities necessary to sustain a charge, like collecting evidence. In turn, these cases continue to go under-prosecuted.[109]

C. Institutional Actors Act: Prosecutors

Institutional actors themselves also act according to their personal sensibilities as to what should be criminalized. Prosecutors exercise considerable discretion in deciding what crimes to prosecute and with what charges, circumventing the jury trial and the need for victim-witnesses with the practice of plea bargaining.[110] In labor trafficking cases, pleas are ubiquitous: in the

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[105] AMERICAN PROSECUTORS RESEARCH INSTITUTE, *supra* note 103, at 6.
[106] M. L. Brown, *supra* note 103, at 359.
[107] *Id.*
[108] PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 14.
[109] Because they lack legal sufficiency, *supra* notes 103-105.
[110] Gregory M. Gilchrist, *Regulation by Prosecutor*, 56 AM. CRIM. L. REV. 315, 315 (2019) ("A distinctive and underappreciated aspect of prosecutorial authority lies in the ability to impose plea terms…"); AMERICAN PROSECUTORS RESEARCH INSTITUTE, *supra* note 103, at 5 (pleas are pursued unless there is community pressure to pursue prosecution in full).

aforementioned national study collating labor trafficking cases between 2013 to 2016, defendants in 59.3% of the cases pled guilty and 37.3% pled no contest.[111] Only 3.4% pled not guilty and proceeded to trial.[112] This means that 96.6% of cases resolved on plea bargains.[113]

Exercising such unbridled power, prosecutors focus their efforts according to personally held sensibilities. When choosing what charges to impose, prosecutors have in mind what level punishment they believe perpetrators deserve: in one federal labor trafficking case, the lead prosecutor explained that her team charged the traffickers with kidnapping— which entailed a longer minimum sentence of 20 years— because she thought the defendants' abuse of the three female victims was "especially egregious."[114] She voiced satisfaction that the judge decided on a life sentence for one of the defendants.[115] For another sentenced to six years, she commented it was "not as much as we would have hoped but a pretty good sentence."[116] Another prosecutor explained that she felt compelled to pursue a labor trafficking charge despite being urged to charge the more familiar offense of alien harboring because she was disturbed by the facts of the case, showing her supervisor "photos of the man who got hit with a fire extinguisher…saying, 'that's why'" she felt compelled to pursue a labor trafficking charge.[117] Rather than a legal standard, prosecutors' personal intuitions determine what behaviors should be criminalized.

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[111] Bracy et al., *supra* note 4, at 38.
[112] Bracy et al., *supra* note 4, at 47.
[113] In comparison, a recent statistic suggested that 95% of all criminal cases in the United States result in plea bargains. Mark R. Fondacaro, *Social Ecology, Preventive Intervention, and the Administrative Transformation of the Criminal Legal System*, 40 GA. ST. U.L. REV. 277, 305 n.161 (2024).
[114] Alexander, *supra* note 89.
[115] *Id.*
[116] *Id.*
[117] PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 18.

D. Liability Varies Locally

The presence of a federal law appears to cloak the criminalization of labor trafficking with uniformity. But law enforcement does not respond uniformly to the scheme.[118] With law enforcement traditionally undertaken at the local level and the legal standard broad enough to afford discretion to institutional actors, what is criminalized as labor trafficking varies locally.[119]

The tendency for some members of the public to hew to the notion of trafficking as chattel slavery has already been noted.[120] They do not hold modern, volitional labor arrangements liable. For instance, some communities know that migrant agricultural workers labor in suspect conditions.[121] However, local communities that depend on these labor arrangements fail to view the relationship as problematic. As one victim services provider observed: "We'll see attitudes often that are like, 'Well, earning five dollars an hour, that's obviously below our minimum wage, but that's more money than they could earn in Mexico. So they're fine."[122] Here, though the withholding of wages was a coercive act meeting the legal

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[118] PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 14 (trafficking is seen as a federal issue); Farrell et al., *Policing labor trafficking in the United States*, *supra* note 72, at 39 (Discrepancies between federal and local-level agendas have been confirmed in other domains federal agencies have embraced as their responsibility, like cybercrime.).

[119] FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 2 (2012) ("Local and state governments have traditionally been responsible for crime control in the U.S.."); Renee M. Knudsen, *From Second Class to Certified Class: Using Class-Action Lawsuits to Combat Human Trafficking*, 28 REGENT U.L. REV. 137, 145 (2016) (explaining that local police know their own communities and are best positioned to monitor and apprehend crime); Stephan & Patrick, *supra* note 17, at 15 ("The 2018 U.S. Department of State Trafficking in Persons Report recognizes that local communities are most affected by human trafficking and also provide the first line of defense.").

[120] Discussed *supra* note 94-95 (jurors fail to convict when victims are not working in cotton fields or tied up with chains).

[121] CARLY FOX ET AL., MILKED: IMMIGRANT DAIRY FARMWORKERS IN NEW YORK STATE 32 (2017) (labor abuses and indicators of trafficking have been catalogued on many New York farms).

[122] PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 12.

standard, the local community dismissed the need for liability.[123] Victims themselves may be reluctant to identify their experience as trafficking.[124] Migrant workers and employers alike may prefer that their longstanding relationships not be criminalized.[125] The permissibility of such labor arrangements is thus locally ensconced.

Yet such attitudes are not universal. As a counterpoint to the example above, in 2022 the program director of the Human Exploitation and Trafficking (HEAT) Unit within the Georgia Bureau of Investigation sought a $4.9 million grant to go after labor trafficking in agriculture.[126] Faced with a plethora of industries in which labor trafficking was present, she focused law enforcement resources toward agriculture because Georgia ranked third in the country for H-2A visas issued.[127] As part of its strategy, the HEAT Unit gathered data on H-2A employers in the state.[128] It then trained law enforcement in counties with H-2A employers to detect trafficking.[129] Far from condoning labor trafficking in the agricultural context, the prosecutors that led the

[123] *Id.* (discussing the kinds of public perceptions that hinder anti-labor-trafficking efforts).
[124] PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 11 (victims fear that trafficking investigations might disrupt the little money they are able to regularly provide for their families).
[125] *See, e.g.*, Rebecca Redelmeier, *New York dairy farms prepare for increased immigration enforcement*, WSKG (Feb. 10, 2025), https://www.wskg.org/regional-news/2025-02-10/new-york-dairy-farms-prepare-for-increased-immigration-enforcement (capturing local sentiments about federally imposed immigration enforcement, finding that employers and workers alike depend on their labor arrangements: "In New York, many farms have long standing connections with villages in Guatemala and southern Mexico, and rely on workers who have been going back and forth for decades").
[126] B. Brown, *supra* note 17 (explaining the history of Georgia HEAT Unit's anti-labor trafficking campaign and the outcome of their three year efforts).
[127] *Id.* (noting that "measuring the prevalence of labor trafficking in Georgia is particularly difficult, given the *sheer number and diversity of* occupational sectors involved (emphasis added)" and explaining why they chose to focus on agriculture).
[128] *Id.* (explaining that the HEAT Unit collected data on seasonal changes in the H-2A program and trained law enforcement on what the H-2A program was).
[129] *Id*. (once the HEAT Unit analyzed its data to determine which businesses and locations were likely to be involved in labor trafficking, they then collaborated with local law enforcement to schedule training in the targeted areas).

HEAT Unit targeted this context.[130] Juxtaposed with the prior example, this example demonstrates that localities differ in how they choose to criminalize labor trafficking.

III. Holding Employers Accountable

Labor trafficking law offers a powerful alternative to civil regulatory law because it imposes liability where civil regulatory law cannot and provides for different sanctions, filling out the toolkit for combatting labor exploitation. However, practitioners must contend with the wide discretion the broad legal standard allots the public to direct law enforcement resources as they will. Because this discretion may allow police power to be used for purposes other than anti-trafficking proper, a broad construction may be ill-advised as a matter of policy.

A. Anti-Trafficking as an Alternative Instrumentality

As discussed above, labor trafficking law can impose liability where civil regulatory law does not.[131] For instance, "force" in labor trafficking can be found when employers violate workplace safety laws, but it can also be found when employer behavior has not risen to the level of a workplace safety violation.[132] In particular, law enforcement can enforce labor agreements where employers have explicitly agreed to do more than the bare minimum, like pay more than

[130] Targeting H-2A employers was a strategic move. The H-2A program is a hotbed for labor trafficking because of the prevalence of recruitment fees (charged by middlemen contractors who make the overseas connection), the fact that employers must provide housing (giving them opportunity to exercise force) and the fact that immigration status is tied to a single employer (allowing employers to threaten immigration status as a coercive tactic). *See* POLARIS, LABOR TRAFFICKING ON SPECIFIC TEMPORARY WORK VISAS, *supra* note 48, at 17.
[131] Discussed *supra* Part I.B.
[132] Discussed *supra* Part I.B.i.

the minimum wage.[133] This is especially powerful in industries where the reasonable value of services is typically more than the minimum wage, like in higher-skilled occupations.[134]

Thus, law enforcement can impose punishment befitting the circumstances of the labor arrangement. A finding of "debt bondage," for instance, rests on the employer's failure to apply the reasonable value of the worker's services toward liquidation of his debt.[135] Where the value of the worker's services exceeds minimum wage, restitution under anti-trafficking law will be more substantial than under civil regulatory law where the remedy is to restore wages to the mandated minimum.[136] One law enforcement official testified that when he threatened labor trafficking charges against an employer, the employer "paid [the workers] all more than…we [would have] paid them the fair labor standards with overtime and the whole thing."[137]

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[133] Once the employer has explicitly agreed to terms, then its failure to act accordingly constitutes "fraud" in labor trafficking, where "fraud" is the distortion of information through lies, omittance or misrepresentation. Borg, *supra* note 44.

[134] PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 1 (finding that even high skilled workers like computer engineers and lawyers can be victims of labor trafficking). *See* CYNTHIA ESTLUND, AUTOMATION ANXIETY: WHY AND HOW TO SAVE WORK (2021), for a description of the phenomenon of "fissuring" where employers contract out their labor needs in order to avoid being held to labor standards. "Fissuring" precedes automation, so it is especially rife in knowledge work like software engineering. H-1B software engineers, employed by labor contractors and fielded out to U.S. companies, make a fraction of what U.S. workers make. They cannot be vindicated by civil regulatory laws because they are paid higher than the minimum wage. Labor trafficking law has the potential to fill this gap where substandard wages indicate the presence of coercive tactics like employers not following through on promised work conditions or wages.

[135] Trafficking Victims Protection Act of 2000 § 103(4), 22 U.S.C. § 7102(7) (definition of debt bondage; *supra* note 35 for text).

[136] Discussed *supra* Part I.A and I.B, the civil regulatory laws set a floor for permissible labor arrangements. The exception is punitive damages, where the adjudicator may impose greater damages than what would bring the employer into bare minimum compliance. Mann. *supra* note 3, at 1814, argues that civil punitive damages subvert the neat line we've drawn between criminal and civil law and actually shade into the criminal paradigm.

[137] Farrell et al., *Policing labor trafficking in the United States*, *supra* note 72, at 49.

Criminal law sanctions are more severe than civil law sanctions because they include imprisonment.[138] Because of this, they may more effectively deter employer misbehavior. Practitioners have noted that employers snap into compliance at mere allusions to criminal liability.[139] One law enforcement officer recounted: "...my email was like, 'Hey, we got this [trafficking] complaint and I'm trying to decide if we need to open a full investigation. Are you planning on paying them or not? We just need to know what your response is' because most people see that, and most people...it's like, 'No, we're going to pay them' kind of thing."[140] Mere allusions to criminal liability have a normative effect.[141]

B. Drawbacks to the Broad Purview of Anti-Trafficking Law

Because anti-trafficking law criminalizes a broad range of behavior, the local community trains law enforcement resources on what it finds to be morally reprehensible.[142] Practitioners pursuing labor trafficking charges must therefore contend with local norms and sensibilities.

Some scholars insist that the legislature should determine what activities are criminalized.[143] They decry that anti-trafficking law is so broad that it delegates criminalization to members of the public.[144] Others might applaud the fact that law enforcement and members of the public have broad powers of discretion. From a practical perspective, a broad construction of

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[138] Mann, *supra* note 3, at 1813.
[139] *See* PFEFFER ET AL., UNDERSTANDING WHAT WORKS, *supra* note 4, at 3 19.
[140] *Id*.
[141] This effect operates in other areas where crimes impose parallel liability on labor exploitative arrangements, like wage theft. Marzán, *supra* note 6, at 307 (discussing, in the context of wage theft, how the "threat of jail quickly changes behavior").
[142] Discussed *supra* Part II.
[143] *See, e.g.*, *United States v. Kozminski*, 487 U.S. 931, 932 (1988) (arguing that "involuntary servitude" could not be interpreted to criminalize a broad range of day-to-day activity and thereby delegate to prosecutors and juries an inherently legislative task).
[144] *Id.*

anti-trafficking law prevents legislatures and law-making bodies like administrative agencies from throttling labor enforcement.[145]

On the other hand, the flexibility of the legal standard exposes police power to being leveraged for ulterior purposes. In "migration control states," lawmakers introduce anti-trafficking initiatives for the purpose of restricting immigration.[146] The perception of a criminal threat greenlights the use of police power to target and remove noncitizens; police power reserved for criminal justice is thus purloined for immigration purposes.[147] This is problematic because police power in criminal justice systems is only permitted in light of equally weighty procedural safeguards and the Constitutional rights found in the 4th, 5th and 6th Amendments.[148] No such safeguards exist in the immigration context.[149] Anti-trafficking laws not only serve to galvanize police power for immigration purposes, they also conceal sub-federal immigration regulation that might otherwise violate the doctrine of federal preemption.[150] Because of

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[145] *Supra* note 54 (noting that OSHA takes ponderously long to make standards). From a separation of powers perspective, administrative agencies are considered part of the Executive and are not legislatures proper, but scholars acknowledge that administrative agencies make law and debate whether it is appropriate. *See, e.g.*, PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL (2014) (arguing that such lawmaking power consolidates in the Executive powers that the Constitution allocates to the Legislative branch); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (arguing that lawmaking by administrative agencies is palatable so long as there is a "separation of functions").

[146] Jennifer M. Chacón, *Human Trafficking, Immigration Regulation, and Subfederal Criminalization*, 20 NEW CRIM. L. REV. 96, 109 (2017) (When Arizona passed its trafficking law in 2005, one of the Senators quoted in the press release explained that "by sending this bill to the Governor, we have taken a big step toward providing important tools to attack the exploitation of migrant workers *and reduce illegal immigration* (emphasis added).")

[147] *See id*.

[148] Mann, *supra* note 3, at 1811 (suspicion as to the state's potential to overreach and abuse its power has led to the incorporation of procedural doctrines to protect the citizen).

[149] Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L.J. 2105 (1997) (for an in-depth discussion of how noncitizens' rights are limited).

[150] Chacón, *supra* note 146, at 106-07. Federal preemption reserves the regulation of immigration issues exclusively to the federal government. State laws regulating immigration will likely be struck down even where they complement federal law. *See, e.g.*, *Arizona v. United States*, 567

outcomes like these, one may conclude that the broad construction of anti-trafficking law is ill-advised as a matter of policy.

Conclusion

In 2000, Congress broadened the meaning of "coercion," the element that distinguishes labor trafficking from other forms of labor exploitation. It sought to vindicate victims driven into labor arrangements by economic desperation, the same class of workers contemplated by drafters of the watershed federal statutes that form our civil regulatory laws. Thus, anti-trafficking law ran alongside civil regulatory laws as an alternate form of regulation.

In its breadth, anti-trafficking law gives discretion to decision makers intervening at key junctures in the law enforcement and prosecutorial process. Members of the public imbued these activities with their own notions of what labor arrangements are permissible. Such notions vary from locality to locality, so the regulatory effect of anti-trafficking efforts vary locally as well.

Anti-trafficking law offers an alternative regulatory instrumentality in its weighty and more flexible sanctions, but practitioners who want to leverage this instrumentality must recognize that local sensibilities constrain liability. Some believe that the wide discretion afforded by the legal standard indicates that anti-trafficking law is poorly crafted; because of such discretion, members of the public misappropriate anti-trafficking resources for other purposes. Anti-trafficking law as it is currently constructed has labor regulatory potential, but such potential comes with strings attached.

U.S. 387 (2012) (striking down a state law imposing a misdemeanor charge on noncitizens for seeking or engaging in unauthorized work because Congress had legislated sanctions for employers only in the Immigration Reform and Control Act of 1986).

Imposing liability, whether civil or criminal, is still a limited solution to labor exploitation. Working within the perpetrator-victim paradigm limits the remedies available.[151] To solve a labor trafficking crime, the state ends the infringing labor arrangement, often by incarcerating the employer.[152] Some scholars have argued that this lets the state off the hook from more drastic economic redistribution programs that would equalize access to wealth and prevent trafficking victims from being lured into trafficking situations in the first place, measures like restructuring capital ownership structures, remaking inheritance laws or providing more generous immigration pathways.[153] One thing is certain: imaginative solutions like these will continue to preoccupy labor and employment scholars for time to come.

[151] Sikka, *supra* note 7, at 45 (discussing this carceral turn, the focus on criminalization).
[152] Marzán, *supra* note 6, at 306 (noting that imposing criminal liability necessarily entails this result)
[153] Sikka, *supra* note 7, at 40.