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The Underprosecution of Labor Trafficking

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THE UNDERPROSECUTION OF LABOR TRAFFICKING

Annie Smith*

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I. INTRODUCTION

For years, human trafficking has garnered substantial attention in the media, in concerned communities, and among lawmakers, yet prosecutions remain relatively sparse. Labor trafficking is particularly underprosecuted. In 2000, Congress enacted laws criminalizing both sex and labor trafficking.¹ Since that time, only a tiny percentage of federal human trafficking prosecutions have involved labor trafficking; the vast majority involve sex trafficking.² Despite its prevalence, only 6.2% of the 145 federal human trafficking prosecutions initiated in 2019 targeted labor trafficking.³

1. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 18 U.S.C. §§ 1589–1592) (describing the purpose of the Act as combating human trafficking); *see* 18 U.S.C. §§ 1581–1588 (criminalizing a number of activities related to the slave trade, including enticing another person into slavery, possessing slaves aboard a vessel, serving voluntarily as a member of the crew on a vessel that is transporting slaves, and transporting slaves away from the United States to another place).

2. ALYSSA CURRIER & KYLEIGH FEEHS, HUM. TRAFFICKING INST., 2018 FEDERAL HUMAN TRAFFICKING REPORT, at i (2019), <https://www.traffickingmatters.com/wpcontent/uploads/2019/04/2018-Federal-Human-Trafficking-Report-Low-Res.pdf> [<https://perma.cc/8VZX-3XRW>].

3. *Id.*

Failure to prosecute labor trafficking fosters an environment where traffickers correctly believe they can act with impunity and where exploited workers suffer outside the protection of the law. It reinforces the myth that all human trafficking is sex trafficking and that worker exploitation is neither a state nor public concern. It also increases the number of those who experience labor trafficking; traffickers are free to victimize unabated and without meaningful consequences.⁴ In the absence of prosecutions, trafficked workers are more likely to face ongoing fear and abuse.⁵ They cannot readily access restitution or the relative peace of mind that can come from knowing their traffickers are being held accountable.⁶

Failure to prosecute also has real consequences for workers vulnerable to abuse. Nearly a decade ago, eighteen Filipino nationals filed a civil lawsuit alleging labor trafficking by their recruiter and labor contractor, Roberto Villanueva, while they were employed at exclusive country clubs in South Florida and New York on temporary work visas.⁷ They alleged Villanueva violated the Trafficking Victims Protection Reauthorization Act (TVPRA)⁸ by, among other things, withholding their immigration documents and threatening arrest, deportation, loss of work, blacklisting, and retaliatory litigation as a means to compel them to work.⁹ The serious harms they alleged included limited access to food; overcrowding; nightmares and difficulty sleeping; and feelings including fear, anxiety, depression, and difficulty concentrating.¹⁰ The court ordered a judgment against Villanueva in the amount of roughly \$13.5 million.¹¹ Despite reports to federal prosecutors, another six years of exploitation passed and numerous additional workers were exploited before Villanueva was finally arrested and charged. In early

4. See Cynthia Shephard Torg, *Human Trafficking Enforcement in the United States*, 14 TUL. J. INT'L & COMPAR. L. 503, 503–04 (2006) (“Prosecution, combined with the imposition of significant penalties, not only provides protection by eliminating the perpetrator’s immediate ability to exploit the victim, but also serves to deter future criminal acts.”).

5. *Cf. id.*

6. *Cf. id.*

7. Complaint at 1–7, *Magnifico v. Villanueva*, 783 F. Supp. 2d 1217 (S.D. Fla. 2011) (No. 9:10-CV-80771); *Magnifico*, 783 F. Supp. 2d at 1221 n.4 (No. 9:10-CV-80771) (revealing that the thirteen original plaintiffs added five more in their second amended complaint).

8. Since 2003, this federal law has provided a private right of action to victims of the human trafficking crimes enumerated in 18 U.S.C. §§ 1589–1591. See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat. 2878. The law was amended in 2008 to extend the private right of action to victims of any Chapter 77 crime. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

9. Plaintiffs’ Second Amended Complaint at 23, *Magnifico*, 783 F. Supp. 2d 1217 (No. 9:10-CV-80771).

10. *Id.* at 33–34, 41.

11. *Magnifico v. Villanueva*, No. 10–CV–80771, 2012 WL 5395026, at *1–2 (S.D. Fla. Nov. 2, 2012).

2020, he pleaded guilty to forced labor and conspiracy to commit forced labor, and he now awaits sentencing.¹²

Advocates, academics, and state actors have identified various possible ways to decrease the incidences of both sex and labor trafficking.¹³ The now-familiar anti-trafficking model, introduced in 1998, is to prosecute, prevent, and protect.¹⁴ Building within and beyond the confines of this three-pronged framework, additional anti-labor trafficking strategies have been developed largely by nongovernmental organizations and survivors;¹⁵ these strategies include education about common human trafficking schemes and workplace rights, reduction of the structural inequities that make some populations more vulnerable to exploitation, and disruption of the financial and other benefits that flow from trafficking.¹⁶ Although these approaches are among the most

12. *United States v. Villanueva*, 17-CR-592 (E.D.N.Y. Feb. 7, 2020) (order of court accepting guilty plea).

13. *E.g.*, ELIZABETH LONG ET AL., RSCH.-TO-POL'Y COLLABORATION, PREVENTING HUMAN TRAFFICKING: USING DATA-DRIVEN, COMMUNITY-BASED STRATEGIES (2018), <https://www.communitypsychology.com/wp-content/uploads/2018/09/Human-Trafficking-Prevention-Brief-FINAL.pdf> [<https://perma.cc/R4ZD-QCZU>]; FREEDOM NETWORK USA, HUMAN TRAFFICKING AND H-2 TEMPORARY WORKERS 4 (2018), <https://freedomnetworkusa.org/app/uploads/2018/05/Temporary-Workers-H2-May2018.pdf> [<https://perma.cc/J33U-8RPQ>]; BRITTANY ANTHONY ET AL., POLARIS, ON-RAMPS, INTERSECTIONS, AND EXIT ROUTES: A ROADMAP FOR SYSTEMS AND INDUSTRIES TO PREVENT AND DISRUPT HUMAN TRAFFICKING 4 (2018), <https://polarisproject.org/wp-content/uploads/2018/08/A-Roadmap-for-Systems-and-Industries-to-Prevent-and-Disrupt-Human-Trafficking.pdf> [<https://perma.cc/Q4PF-RG53>].

14. *See* Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls, 1 PUB. PAPERS 358–60 (Mar. 11, 1998); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 13, 15 (2003), <https://2009-2017.state.gov/documents/organization/21555.pdf> [<https://perma.cc/X9W4-TP3P>]. In 2009, Secretary of State Hillary Rodham Clinton announced an expansion of the model to include a fourth prong: partnership. OFF. TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, THE 3PS: PREVENTION, PROTECTION, PROSECUTION (2011), <https://2009-2017.state.gov/documents/organization/167334.pdf> [<https://perma.cc/6BYN-EZ8C>] (allowing partnership to “serve[] as a pathway to achieve progress on the 3Ps in the effort against modern slavery”).

15. This Article seeks to recognize the humanity, heterogeneity, and resilience of those subjected to human trafficking and uses the terms “victims,” “survivors,” and “trafficked individuals” to identify these individuals. Each term has its own limitations and utility. In general, the term “victim” is used when referring to individuals in relation to the criminal legal process or where the trafficking is ongoing. “Survivor” is used when referring specifically to those who are no longer actively experiencing human trafficking. “Trafficked individual” is used interchangeably with “victim” and “survivor” and encompasses both. When referring to the research of others, the Article generally uses the term employed by the authors.

16. For example, Centro de los Derechos del Migrante (CDM) conducts workshops in Mexico for migrant workers prior to their departures to the United States and provides information about the law and migrant workers' workplace rights. *Worker Education and Leadership Development*, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., <https://cdmigrante.org/worker-education-and-leadership-development/> [<https://perma.cc/F6W>].

promising methods of achieving widespread and lasting change, when pursued with care, prosecution remains another potentially useful—yet famously underutilized—tool in the fight against labor trafficking.¹⁷

This Article identifies possible causes of the ongoing and widespread failure to prosecute labor trafficking, including phenomena this Article refers to as workplace exceptionalism, the labor trafficking eclipse, and maladaptive law enforcement strategies. It then proposes reforms to strategically increase prosecutions. The analysis is informed by insights of scholars across disciplines, anti-trafficking advocates, survivors, law enforcement officers, and federal prosecutors.

This Article proceeds as follows. Part II begins by outlining the federal laws that criminalize labor trafficking and describing these harmful crimes and their consequences. Part III then examines the scarcity of federal labor trafficking prosecutions. Part IV identifies likely barriers to the identification, investigation, and subsequent prosecution of labor trafficking. Part V considers critiques of a carceral approach and argues for thoughtfully and strategically increasing appropriate labor trafficking prosecutions. Finally,

W-EB7D]. CDM also operates *Contratados.org*, a publicly available online review system that allows migrant workers to review their labor contractors and employers. *¿Sobre Quien Quieres Escribir una Reseña? [Who Do You Want to Write a Review About?]*, CONTRATADOS, <https://contratados.org/es/add-review> [https://perma.cc/J3FY-YWDD]. Among other things, online reviews include information about whether workers were threatened; were physically, verbally, or sexually assaulted; had their documents retained; or were kept somewhere against their will. *Id.*

17. Much has been written generally about the impact of criminalizing certain conduct, the usefulness of prosecuting crimes, and the profound harms caused by the criminal justice system. *E.g.*, Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1383–87 (2018). In the context of human trafficking specifically, some have questioned the utility of prosecution as a primary means of addressing trafficking. *E.g.*, Abigail Swenstein & Kate Mogulescu, *Resisting the Carceral: The Need to Align Anti-Trafficking Efforts with Movements for Criminal Justice Reform*, ANTI-TRAFFICKING REV., May 2016, at 118, 118 (“By prioritising prosecution above all else, this approach distances itself from contemporary efforts to build inclusive racial, economic and gender justice movements centered around broader criminal justice reform.”). Swenstein and Mogulescu’s article raises critical points, including that a hyperfocus on prosecution can distract from addressing the significant “systemic failures” survivors regularly experience and for which the state is primarily responsible; does little to ensure the particular prosecutions pursued are sustainable or effective; can conflict with survivors’ own preferences; risks criminalizing those only tangentially related to the trafficking—or who themselves were victimized; and can impede criminal justice reform efforts. *See id.* at 118–122. While written by authors who represent individuals engaged in commercial sex and who have experienced sex trafficking, the critique substantially applies to the context of labor trafficking. *See id.* at 121 (discussing how these issues “serve[] to worsen conditions in certain communities, creating a fertile ground for exploitation and abuse in various labour sectors, including commercial sex”). However, unlike commercial sex, most aspects of other forms of labor are underregulated and lack meaningful state oversight. *See discussion infra* Section IV.A.1. As described in more detail in Section IV.A.1, throughout the United States, workplace protections remain weak and underenforced.

Part VI concludes by identifying efforts already underway and offering additional reforms to increase the number of federal labor trafficking prosecutions.

II. LABOR TRAFFICKING

Labor trafficking is a longstanding global problem, yet the crimes associated with it and their many consequences are still not widely understood. This Part outlines the legal framework that criminalizes labor trafficking in the United States, illustrates the many forms it can take, considers the scant data regarding its pervasiveness, and explores its profound and lasting consequences.

A. *The Prohibition on Labor Trafficking*

Although slavery and involuntary servitude were largely prohibited by the Thirteenth Amendment, prohibitions on other forms of extreme labor exploitation, including peonage and human trafficking, came later.¹⁸ Among other things, the Trafficking Victims Protection Act of 2000 (TVPA) expanded the existing handful of federal crimes that addressed such conduct to include forced labor (18 U.S.C. § 1589) and trafficking with respect to peonage, slavery, involuntary servitude, or forced labor (18 U.S.C. § 1590).¹⁹ The federal crime of sex trafficking was created as part of this same sweeping legislation.²⁰ While the particular conduct underlying sex and labor

18. U.S. CONST. amend XIII, § 1. See Janie Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609, 609–12 (2014), for a thorough analysis of the historical and legal distinctions between, and subsequent merging of, slavery, involuntary servitude, and human trafficking.

19. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 18 U.S.C. §§ 1589–1592). Significantly, the law firmly established that psychological coercion is equal to physical violence and restraint as a means of controlling victims. The crimes that predated the TVPA were 18 U.S.C. § 1581 (addressing peonage and obstructing enforcement); 18 U.S.C. § 1582 (addressing vessels for slave trade); 18 U.S.C. § 1583 (addressing enticement into slavery); 18 U.S.C. § 1584 (addressing sale into involuntary servitude); 18 U.S.C. § 1585 (addressing seizure, detention, transportation, or sale of slaves); 18 U.S.C. § 1586 (addressing service on vessels in slave trade); 18 U.S.C. § 1587 (addressing possession of slaves aboard vessel); 18 U.S.C. § 1588 (addressing transportation of slaves from United States); and 18 U.S.C. § 2421 (criminalizing knowingly transporting a person with intent that the individual engage in commercial sex or other sexual activity for which a crime could be charged).

20. 18 U.S.C. § 1591 (criminalizing the sex trafficking by force, fraud, or coercion, of children). See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1660–64 (2010), for a history of the development of modern anti-trafficking laws and policies and the interplay between sex and labor trafficking.

trafficking crimes is largely distinct, all of the criminalized conduct clearly falls within the inclusive definition of human trafficking applied in other areas of federal law.²¹

With urging by local advocates and national organizations like Polaris, all states have now also criminalized human trafficking. Though definitions of the crime vary between federal law and state laws, they all generally incorporate both sex and labor trafficking.²²

B. *The Many Forms of Labor Trafficking*

Labor trafficking can take many forms and includes the use of threats and other types of psychological coercion, physical restraint, or physical force to

21. A severe form of trafficking in persons is defined in 22 U.S.C. § 7102(11). This provision incorporates both “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age” and “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.” 22 U.S.C. § 7102(11). This definition is used somewhat synonymously with “human trafficking” and is a basis for seeking immigration relief in the form of a T visa. *But see* Jeremy S. Norwood, *Labor Exploitation of Migrant Farmworkers: Risks for Human Trafficking*, 6 J. HUM. TRAFFICKING 209, 211 (2020) (suggesting the distinction between sex and labor trafficking is a false dichotomy as all commercial sex is a form of labor). Norwood’s article focuses on forms of labor trafficking that do not primarily include sex. *Id.* at 210. Some exploitation includes both sex and labor trafficking including, for example, certain abuses that take place in the illicit massage industry. POLARIS, HUMAN TRAFFICKING IN ILLICIT MESSAGE BUSINESSES 10 (2018), <https://polarisproject.org/wp-content/uploads/2019/09/Human-Trafficking-in-Illicit-Massage-Businesses.pdf> [<https://perma.cc/B5BA-TJAN>].

22. In Arkansas, for example:

[A] person commits the offense of trafficking of persons if he or she knowingly: (1) Recruits, harbors, transports, obtains, entices, solicits, isolates, provides, or maintains a person knowing that the person will be subjected to involuntary servitude; (2) Benefits financially or benefits by receiving anything of value from participation in a venture under subdivision (a)(1) of this section; (3) Subjects a person to involuntary servitude; (4) Recruits, entices, solicits, isolates, harbors, transports, provides, maintains, or obtains a minor for commercial sexual activity; or (5) Sells or offers to sell travel services that he or she knows includes an activity prohibited under subdivisions (a)(1)-(4) of this section.

ARK. CODE ANN. § 5-18-103(a)(1)–(5) (West, Westlaw through 2020 1st Extraordinary Sess. and the 2020 Fiscal Sess. of the 92d Ark. Gen. Assemb.). Involuntary servitude is defined to include both commercial sex and other forms of labor. *Id.* § 5-18-102(5); *see also* POLARIS, A LOOK BACK: BUILDING A HUMAN TRAFFICKING LEGAL FRAMEWORK 4 (2014), <https://polarisproject.org/wp-content/uploads/2019/09/2014-Look-Back.pdf> [<https://perma.cc/E9V-RR4C>] (reviewing Polaris’s ratings of state anti-trafficking laws from 2011 to 2014); *State & Territory Profiles: Efforts to Combat Human Trafficking*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Jan. 10, 2018), <https://www.acf.hhs.gov/otip/resource/profiles> [<https://perma.cc/ULM7-UL3A>] (providing profiles summarizing each state’s legislative and other efforts to address trafficking).

compel work.²³ Consider the following examples. In one instance, a ring of human traffickers recruited at least ten teenagers from Guatemala, promising them educational and employment opportunities.²⁴ The traffickers smuggled the young men into the United States and then forced them to live in dilapidated trailers on a rural Ohio egg farm and to work long hours for virtually no pay.²⁵ The traffickers threatened them with deportation and harm to their families.²⁶

In another instance, a South Carolina restaurant manager compelled a U.S. national with an intellectual disability to work at a restaurant for nearly 100 hours each week for no pay.²⁷ The trafficker used physical and emotional abuse to punish him for making mistakes or working too slowly.²⁸ He beat the employee and, on one occasion, burned his neck with metal tongs.²⁹ The trafficker also yelled at and demeaned him with racial slurs.³⁰ This forced labor continued for nearly five years.³¹

Owners of a Florida labor staffing agency compelled roughly forty Filipino workers lawfully present in the United States on temporary visas to work in country clubs and hotels in Southeast Florida.³² They used false promises to get the workers to incur recruitment-related debts and then compelled them to work using threats of arrest and deportation, knowing the economic and legal harms they would face in the Philippines if they failed to pay those debts.³³

23. *See infra* notes 24–42 and accompanying text.

24. Press Release, U.S. Dep't of Just., Leader of Human Trafficking Organization Sentenced to Over 15 Years for Exploiting Guatemalan Migrants at Ohio Egg Farms (June 27, 2016), <https://www.justice.gov/opa/pr/leader-human-trafficking-organization-sentenced-over-15-years-exploiting-guatemalan-migrants> [<https://perma.cc/68HG-5KPK>].

25. *Id.*

26. *Id.*

27. Press Release, U.S. Dep't of Just., South Carolina Man Sentenced to 10 Years in Prison for Forcing Man with Intellectual Disability to Work at Restaurant (Nov. 6, 2019), <https://www.justice.gov/opa/pr/south-carolina-man-sentenced-10-years-prison-forcing-man-intellectual-disability-work> [<https://perma.cc/7FA3-GXV2>].

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Press Release, U.S. Dep't of Just., Florida Couple Sentenced in Forced Labor Conspiracy to Exploit Filipino Guest Workers (Dec. 10, 2010), <https://www.justice.gov/opa/pr/florida-couple-sentenced-forced-labor-conspiracy-exploit-filipino-guest-workers> [<https://perma.cc/93K7-A5AC>].

33. *Id.*

In a Dallas suburb, a couple arranged for a young child to come from a small, rural village in Guinea to live and work in their home.³⁴ The child—who was undocumented—was physically, verbally, and emotionally abused and compelled to cook, clean, and eventually provide childcare for the couple's children.³⁵ The traffickers called her “idiot,” “worthless,” “dog,” and “slave.” Among other abuses, they pulled her hair and hit, choked, and whipped her.³⁶ The traffickers, who were well-respected community members, never enrolled the child in school and kept her in servitude until neighbors helped her escape after sixteen years.³⁷

At a Nebraska Super 8 Motel, a man was forced to work long hours cleaning and performing other tasks.³⁸ Told by his traffickers that he needed to pay off a debt to them, he was never paid wages despite promises that he would eventually be compensated.³⁹ The man was isolated, and his movements were restricted by the traffickers.⁴⁰ They threatened to find him if he escaped, and they verbally abused and assaulted him.⁴¹ The trafficking lasted for over a year.⁴²

These real-life instances of labor trafficking reveal the many ways in which traffickers seek to compel work using tactics including threats, physical force, and other forms of coercion. The examples also demonstrate the diversity of labor traffickers and trafficked individuals, as well as the varied circumstances in which labor trafficking takes place. While different in some ways, each example illustrates how traffickers exploit existing inequalities and power imbalances to compel work.

34. Press Release, U.S. Dep't of Just., Couple Convicted of Forcing Young, West African Girl to Labor in Their Southlake, Texas, Home for 16 Years (Jan. 11, 2019), <https://www.justice.gov/opa/pr/couple-convicted-forcing-young-west-african-girl-labor-their-southlake-texas-home-16-years> [<https://perma.cc/47MY-BEYG>].

35. *Id.*

36. *Id.*

37. *Id.*

38. Press Release, U.S. Dep't of Just., Indian Nationals Sentenced for Roles in Alien Harboring Scheme Involving Labor Exploitation at Nebraska Motel (Mar. 20, 2018), <https://www.justice.gov/opa/pr/indian-nationals-sentenced-roles-alien-harboring-scheme-involving-labor-exploitation-nebraska> [<https://perma.cc/GM56-Q8UV>].

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

C. *The Pervasiveness of Labor Trafficking*

Human trafficking statistics are notoriously unreliable.⁴³ A recent study found that “[o]nly a fraction of the estimated human trafficking victimization in local communities is captured in either law enforcement [or] service provider data.”⁴⁴ Identifying labor trafficking is particularly challenging.⁴⁵ Historically, labor trafficking has been overshadowed by sex trafficking when it comes to empirical research—just as it has elsewhere.⁴⁶ Nonetheless, some sources can provide insights regarding at least baseline numbers of known or highly likely instances of labor trafficking.⁴⁷

Polaris operates the National Human Trafficking Hotline and releases data regarding the number of probable instances of human trafficking

43. See AMY FARRELL ET AL., NAT’L INST. JUST., CAPTURING HUMAN TRAFFICKING VICTIMIZATION THROUGH CRIME REPORTING 4 (2019) (explaining that estimates commonly rely on non-systematic and incomplete data and have “numerous operational, definitional and methodological limitations”); cf. VALERIE R. ANDERSON ET AL., ESTIMATING THE PREVALENCE OF HUMAN TRAFFICKING IN OHIO: EXECUTIVE SUMMARY REPORT 8–9 (2019) [hereinafter ANDERSON ET AL., EXECUTIVE SUMMARY REPORT] (offering several recommendations for improving prevalence-related research); Valerie R. Anderson et al., *Estimating the Prevalence of Human Trafficking in Ohio, 2014–2016*, 109 AM. J. PUB. HEALTH, 1396, 1396 (2019) [hereinafter Anderson et al., *Human Trafficking in Ohio*].

44. FARRELL ET AL., *supra* note 43, at 2 (noting that law enforcement records captured in the range of 2.5% to 6% of the total estimated trafficked individuals in two of the study sites).

45. *Id.* at 1 (reporting that, in some instances, identification of labor trafficking victims was “non-existent for both law enforcement and service providers”); see DOMINIQUE ROE-SEPOWITZ ET AL., OFF. OF SEX TRAFFICKING INTERVENTION RSCH., ARIZ. STATE UNIV., A FOUR-YEAR ANALYSIS OF LABOR TRAFFICKING CASES IN THE UNITED STATES, at ii (2018), https://socialwork.asu.edu/sites/default/files/stir/v9_national_labor_trafficking_study.pdf [<https://perma.cc/AX88-QJK3>] (“Due to the covert nature of labor trafficking activities, creating reliable statistics on prevalence, frequency, geography, and particulars of labor trafficking have been difficult to develop.”); SHELDON X. ZHANG, CTR. SOC. ADVOC., LOOKING FOR A HIDDEN POPULATION: TRAFFICKING OF MIGRANT LABORERS IN SAN DIEGO COUNTY 4–5 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/240223.pdf> [<https://perma.cc/LXB3-MAGK>] (discussing definitional problems and other challenges of empirical efforts to discern labor trafficking). Furthermore, labor trafficking can occur across all industries, potentially making it harder to police.

46. See *infra* Section IV.A.3 for a discussion of the labor trafficking eclipse phenomenon. See also FARRELL ET AL., *supra* note 43, at 2 (reviewing prior estimates of the incidence of human trafficking in the United States and recommending how to improve measurement of it); *The Prevalence of Labor Trafficking in the United States*, NAT’L INST. JUST. (Feb. 26, 2013), <https://nij.ojp.gov/topics/articles/prevalence-labor-trafficking-united-states> [<https://perma.cc/FD5R-SG7U>] (“In an NIJ-funded bibliography of research literature on human trafficking, researchers found that the majority of articles addressed sex trafficking. Indeed, out of 39 articles, only four dealt with trafficking for labor exploitation or domestic servitude.”).

47. See, e.g., ZHANG, *supra* note 45, at 15 (estimating that over 30% of Spanish-speaking migrant workers in San Diego County were victims of labor trafficking).

reported.⁴⁸ Those who suspect or experience human trafficking can make reports or seek assistance via call, text, or online chat to the free and confidential hotline.⁴⁹ The numbers reported by Polaris likely underestimate the total incidence of human trafficking yet remain useful to understanding the scope of the problem.⁵⁰ In 2018, through reports to the hotline, Polaris identified 10,949 potential human trafficking cases, 23,078 potential trafficked individuals, 5,859 potential traffickers, and 1,905 suspicious businesses.⁵¹ Of these, 17% of the potential cases involved suspected labor trafficking—impacting approximately 6,923 potential trafficked individuals (30% of the total reported).⁵² In 2019, the hotline identified an additional 1,236 potential cases involving labor trafficking.⁵³

Although one of the more focused studies on the incidence of labor trafficking is now nearly a decade old and was narrow in scope, it attempts to offer a snapshot of the prevalence of labor trafficking within a specific population.⁵⁴ The 2012 study of undocumented and primarily Mexican national migrant workers in San Diego County found a 30.9% estimated rate of labor trafficking victimization.⁵⁵ Based on his findings, the author projected there were 38,458 victims of labor trafficking in San Diego County and “guesstimate[d]” as many as 2,472,000 victims among undocumented

48. NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org> [<https://perma.cc/HPF9-UTP3>]. The hotline is operated continuously 365 days per year and offers telephonic assistance in roughly 200 languages. *National Hotline Overview*, NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/national-hotline-overview> [<https://perma.cc/HCF6-V23J>]. According to its website, the hotline “provide[s] assistance to victims in crisis through safety planning, emotional support and/or immediate connections to emergency services through our network of trained service provider and law enforcement partners.” *When You Reach Us*, NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/about-us/when-you-reach-us> [<https://perma.cc/EP6W-DAD3>].

49. *National Hotline Overview*, *supra* note 48.

50. The hotline captures information based solely on calls received; it relies on the public, law enforcement, and trafficked individuals to identify trafficking and then actually use the hotline to accurately report it. *Hotline Statistics*, NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/states> [<https://perma.cc/6EFC-L6E> F]. Polaris itself has asserted that labor trafficking is “chronically underreported.” POLARIS, THE TYPOLOGY OF MODERN SLAVERY: DEFINING SEX AND LABOR TRAFFICKING IN THE UNITED STATES 8 (2017), <https://polarisproject.org/wp-content/uploads/2019/09/Polaris-Typology-of-Modern-Slavery-1.pdf> [<https://perma.cc/MQZ4-ZD4E>].

51. POLARIS, 2018 STATISTICS FROM THE NATIONAL HUMAN TRAFFICKING HOTLINE (2019), https://polarisproject.org/wp-content/uploads/2019/09/Polaris_National_Hotline_2018_Statistics_Fact_Sheet.pdf [<https://perma.cc/7XMA-M786>].

52. *See id.*

53. *Hotline Statistics*, *supra* note 50. Note that a single case may include multiple trafficked individuals.

54. ZHANG, *supra* note 45.

55. *Id.* at 17.

Mexican immigrants nationally.⁵⁶ Even if this is a substantial overestimate and only a fraction of such abuses occur, it nonetheless suggests that there are many more instances of labor trafficking than there are prosecutions.

Another and much cruder means to try to understand the prevalence of labor trafficking is to examine the number of federal civil lawsuits filed alleging it. Over a fifteen-year period, 299 lawsuits were filed alleging human trafficking—sometimes on behalf of numerous survivors.⁵⁷ Of those, roughly 91% (274 cases) involved forced labor claims; just 9% (25 cases) included sex trafficking claims.⁵⁸ Only 7% (19 cases) of these forced labor civil lawsuits were involuntarily dismissed or resulted in judgments for defendants.⁵⁹ These numbers almost certainly dramatically underrepresent the amount of labor trafficking that takes place in the United States as civil suits require the trafficked individuals—or someone they were in contact with—to identify the abuses as actionable, access legal counsel with the capacity and willingness to provide assistance, and choose to make the substantial personal investment of bringing a civil suit.⁶⁰ Additionally, some may settle their claims prior to initiating suit, and there is no record of these settlements.

While modest, even federal law enforcement figures reflect the existence of labor trafficking. The Federal Bureau of Investigation (FBI), for example, reported 225 offenses of involuntary servitude in 2017 and another 149 in

56. *Id.*

57. ALEXANDRA F. LEVY, HUM. TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION 6 (Martina E. Vandenberg & Andrew B. Cherry eds., 2018), <https://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf> [<https://perma.cc/EU5K-KZVG>] (reviewing cases filed between October 2003—when the private right of action became available—and October 2018).

58. *Id.* at 13.

59. *Id.* at 15.

60. *See, e.g.*, ANDERSON ET AL., EXECUTIVE SUMMARY REPORT, *supra* note 43, at 1 (noting that many human trafficking victims are not reached by social or legal services). There are a variety of reasons why someone who experienced labor trafficking might elect not to bring a civil suit even if such an option is available, including judgement-proof defendants, the impacts of trauma, and a desire to put the experience behind them. Civil lawsuits can take years to resolve and can require plaintiffs to submit to depositions and testify at trial. *See* Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1678 (2007).

2018.⁶¹ These numbers represent just a small fraction of sex trafficking cases reported by the FBI in those same years.⁶²

A study seeking to document all state and federal arrests for the charge of “labor trafficking” from 2013 to 2016 identified 125 arrests and 120 victims during this four-year period.⁶³ The study almost certainly underreported arrests as it relied on limited search methods to identify them.⁶⁴ Of course, for the many reasons articulated throughout this Article, arrests also do not begin to capture all actual occurrences of labor trafficking.

Available data about immigration applications filed by trafficked foreign nationals provides yet another source of information. From 2008 through 2019, 10,802 foreign nationals submitted T visa applications seeking immigration relief as victims of human trafficking.⁶⁵ By the end of 2019, 6,780 had been granted.⁶⁶ Information about the number of T visa applications based on labor (rather than sex) trafficking is not available.⁶⁷ While the numbers of T visas sought and granted are poor surrogates for concrete data about the actual prevalence of labor trafficking,⁶⁸ they offer another point of

61. See *Human Trafficking, 2018 Crime in the United States*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/additional-data-collections/human-trafficking/table-1.xls> [<https://perma.cc/E2LA-QYRP>]; *Human Trafficking, 2017 Crime in the United States*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2018/additional-data-collections/human-trafficking/table-1.xls> [<https://perma.cc/CG4B-4QWT>].

62. See *supra* note 61 and accompanying text. By contrast, 994 offenses of sex trafficking were reported in 2017 and 1,242 in 2018. See *supra* note 61 and accompanying text.

63. ROE-SEPOWITZ ET AL., *supra* note 45, at ii.

64. *Id.* at 5. The authors acknowledge this limitation:

There are important limitations of this study to consider including that it includes only labor trafficking arrests in the U.S. that were reported online, either through the media or through information releases. Other cases could have been filed against labor traffickers using different crime types (kidnapping, assault, theft, human smuggling) which would not have been detected by this study’s methodology.

Id. at vi.

65. See *Form I-914, Application for T Nonimmigrant Status by Fiscal Year, Quarter, and Case Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t_victim_statistics_fy2020_qtr1.pdf [<https://perma.cc/J5Y5-VWVA>]. T visa eligibility requires, among other things, that a foreign national is or was “a victim of a severe form of human trafficking.” *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status> [<https://perma.cc/VQD8-24AS>].

66. See *Form I-914, Application for T Nonimmigrant Status by Fiscal Year, Quarter, and Case Status*, *supra* note 65.

67. See *id.*

68. Among other limitations, these numbers only capture those foreign national victims who believed they met all eligibility required for the visa and were able to file applications. See *id.* Furthermore, some individuals who experience human trafficking may nonetheless be

data to consider when assessing the sufficiency of federal labor trafficking prosecutions.

D. The Consequences of Labor Trafficking

The harms inflicted by labor trafficking are substantial and can be persistent.⁶⁹ According to the U.S. Department of Health and Human Services, consequences of labor trafficking can include “helplessness, shame and humiliation, shock, denial and disbelief, disorientation and confusion, and anxiety disorders including posttraumatic stress disorder (PTSD), phobias, panic attacks, and depression.”⁷⁰

Survivors of labor trafficking have reported prolonged fear and anxiety,⁷¹ disrupted sleep, nightmares, difficulty developing trust, depression, difficulty concentrating, stress,⁷² isolation,⁷³ humiliation, shame, embarrassment,⁷⁴ trauma, suicidal thoughts,⁷⁵ and emotional distress so profound that it manifested physically and resulted in hospitalization.⁷⁶

Through their examinations of labor trafficking survivors, expert witnesses have identified harms including adjustment disorder with mixed anxiety and depressive moods,⁷⁷ PTSD, major depressive disorder,⁷⁸

ineligible for a T visa if, for example, they are no longer present in the United States as a result of the trafficking. *Victims of Human Trafficking: T Nonimmigrant Status*, *supra* note 65. Victims of human trafficking may also be eligible to apply for U visas in addition to or instead of T visas, and some do. *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status> [<https://perma.cc/8G84-UDB9>]. As trafficking and involuntary servitude are just two of twenty-nine qualifying crimes making victims eligible for a U visa, *id.*, statistics regarding U visas would be unhelpful when estimating the incidence of human trafficking.

69. See COLLEEN OWENS ET AL., URB. INST., UNDERSTANDING THE ORGANIZATION, OPERATION, AND VICTIMIZATION PROCESS OF LABOR TRAFFICKING IN THE UNITED STATES 202 (2014), <https://www.urban.org/research/publication/understanding-organization-operation-and-victimization-process-labor-trafficking-united-states> [<https://perma.cc/5TGZ-7QPL>] (finding that “the mental and physical impact of labor trafficking on survivors was severe”).

70. U.S. DEP’T OF HEALTH & HUM. SERVS., LABOR TRAFFICKING FACT SHEET (2012), https://www.acf.hhs.gov/sites/default/files/orr/fact_sheet_labor_trafficking_english.pdf [<https://perma.cc/UMJ5-39FL>].

71. *Lagasan v. Al-Ghasel*, 92 F. Supp. 3d 445, 458 (E.D. Va. 2015).

72. *Belvis v. Colamussi*, No. CV 16-544, 2018 WL 3151698, at *7 (E.D.N.Y. Feb. 20, 2018).

73. *Alabado v. French Concepts, Inc.*, No. CV 15-2830, 2016 WL 5929247, at *5 (C.D. Cal. May 2, 2016).

74. *Ross v. Jenkins*, 325 F. Supp. 3d 1141, 1174 (D. Kan. 2018).

75. *Carazani v. Zegarra*, 972 F. Supp. 2d 1, 24 (D.D.C. 2013).

76. *Lipenga v. Kambalame*, 219 F. Supp. 3d 517, 531 (D. Md. 2016).

77. *Belvis*, 2018 WL 3151698, at *7.

78. *Rana v. Islam*, 210 F. Supp. 3d 508, 516 (S.D.N.Y. 2016).

hyperfocus on negative events,⁷⁹ anhedonia, insomnia, poor concentration, poor memory, palpitations, chest pain, and headaches⁸⁰ as well as symptoms of dissociation, hyperarousal, mood dysregulation, and changes in neurovegetative indicators.⁸¹

In a case involving domestic servitude over an eighteen-month period, a clinical psychologist's evaluation revealed ongoing suffering nearly two years after the labor trafficking ended.⁸² She noted the trafficked individual was "unequivocally scarred" and had "lost interest in friendships and self-care. [He] lives in an atmosphere of sadness and disappointment, experiences recurrent recollections and terrifying dreams of his abuse, distrusts authority, and suffers from headaches."⁸³ The psychologist anticipated that he likely would experience many of these symptoms for several more years and some for as long as two decades.⁸⁴

The impacts of labor trafficking are not solely psychological. Restricted access to medical care, including dental, by traffickers is common.⁸⁵ In some instances, labor trafficking also includes physical assault, which is sometimes sexual.⁸⁶ Poor housing conditions are also prevalent.⁸⁷ Each of these abuses can result in additional physical and emotional harm. Trafficked individuals may also be subjected to forced criminalization, and they are frequently underpaid, if they are paid at all.⁸⁸

Labor trafficking is most prevalent in industries that are already dangerous, physically demanding, and underregulated. These industries

79. *See id.*

80. *Id.*

81. *Carazani v. Zegarra*, 972 F. Supp. 2d 1, 25 (D.D.C. 2013).

82. *See, e.g., Rana*, 210 F. Supp. 3d at 516.

83. *Id.* (internal quotation marks omitted).

84. *Id.* (explaining that although the harms of labor trafficking demonstrate its seriousness, they should not be interpreted to mean that trafficked individuals are homogenous, weak, or doomed; many survivors have shown resilience, strength, and healing, even when they faced ongoing challenges after the trafficking ended).

85. *See OWENS ET AL.*, *supra* note 69, at 104; *Lagasan v. Al-Ghasel*, 92 F. Supp. 3d 445, 453 (E.D. Va. 2015) (noting that traffickers prohibited the plaintiff from obtaining necessary medical services); *Lipenga v. Kambalame*, 219 F. Supp. 3d 517, 532 (D. Md. 2016) (noting that traffickers refused to let the victim seek appropriate medical treatment and effectively allowed the victim's HIV and tuberculosis to go untreated for the entire duration of employment).

86. *See OWENS ET AL.*, *supra* note 69, at vii; *see, e.g., Rana*, 210 F. Supp. 3d at 516 (noting that the trafficker physically assaulted the victim and knocked the victim unconscious).

87. *See* Cathy Zimmerman & Marc B. Schenker, *Human Trafficking for Forced Labour and Occupational Health*, 71 OCCUPATIONAL & ENV'T MED. 807, 808 (2014).

88. *See* LITTLE HOOVER COMM'N, HUMAN TRAFFICKING: COORDINATING A CALIFORNIA RESPONSE 8 (2020), [https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/250/Report 250.pdf](https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/250/Report%20250.pdf) [<https://perma.cc/45GE-KYYD>].

include agriculture, construction, and domestic work.⁸⁹ In this already risky context, trafficked individuals are particularly likely to labor for long hours, in unsafe conditions, while exhausted, and without proper protective equipment or training.⁹⁰

Labor trafficking has negative impacts beyond the tremendous harms to trafficked individuals.⁹¹ Family members of victims can experience threats, financial consequences, and prolonged separation from their loved ones.⁹² Law abiding employers face unfair competition from traffickers who, as part of their labor exploitation schemes, may also pay unlawfully low wages, fail to pay payroll taxes, and otherwise reduce their business expenses through illegal means.⁹³ The public, too, bears the cost of illegal practices common among labor traffickers, including the failure to pay income taxes or make required unemployment and workers' compensation contributions.⁹⁴ Restrictions on employees' freedom to move between employers may also distort local labor markets.⁹⁵

III. LABOR TRAFFICKING PROSECUTIONS

That labor trafficking is underprosecuted is uncontroversial.⁹⁶ The federal government itself acknowledges the problem in what has become an annual ritual.⁹⁷ The Trafficking in Persons (TIP) Report, issued each year by the U.S.

89. *See id.* at 9; OWENS ET AL., *supra* note 69, at 105 (reporting two of the trafficked individuals interviewed had come into contact with labor inspectors); *see also Number and Rate of Fatal Work Injuries, by Industry Sector*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/charts/census-of-fatal-occupational-injuries/number-and-rate-of-fatal-work-injuries-by-industry.htm> [<https://perma.cc/GDK4-T37G>] (noting the high number of fatal work injuries in construction and manufacturing); U.S. DEP'T OF LAB., 2018 SURVEY OF OCCUPATIONAL INJURIES & ILLNESSES (2019), <https://www.bls.gov/iif/soii-charts-2018.pdf> [<https://perma.cc/7UUG-33PT>] (reporting high numbers of nonfatal work injuries in manufacturing, construction, and agriculture).

90. Zimmerman & Schenker, *supra* note 87, at 807.

91. *See* OWENS ET AL., *supra* note 69, at vii; LITTLE HOOVER COMM'N, *supra* note 88, at 8.

92. OWENS ET AL., *supra* note 69, at 152–54. These harms can also be inflicted on friends of trafficked individuals and others not traditionally recognized as family members. *Cf. id.*

93. *See* LITTLE HOOVER COMM'N, *supra* note 88, at 8.

94. *See id.*

95. Telephone Interview with Emily Tulli, Att'y, Lab. & Immigr. Pol'y Consultant (July 24, 2020).

96. *See* Nirav K. Desai & Sean Tepfer, *Proactive Case Identification Strategies and the Challenges of Initiating Labor Trafficking Cases*, U.S. ATT'YS' BULL., Nov. 2017, at 25, 25 (“The call for increased attention to labor trafficking has come from leadership, legislative bodies, survivors, the victim advocate community, and others for several years.”).

97. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 398 (2014), <https://2009-2017.state.gov/documents/organization/226849.pdf> [<https://perma.cc/3H3Z-4PM>]

State Department, assesses the extent to which each country meets the standards set forth in the TVPA and makes recommendations based on that country's performance.⁹⁸ Since 2014, increasing the number of prosecutions of labor trafficking has been among the top recommendations for the United States.⁹⁹ In 2018, 2019, and 2020, the very first recommendation remained the same: to "increase investigation and prosecution of labor trafficking cases."¹⁰⁰

This Part argues that the United States must prosecute labor trafficking and demonstrates how it continues to fail to do so by examining the disappointingly few federal prosecutions initiated between 2017 and 2019.

A. Responsibility for Investigation and Prosecution

The U.S. government has a unique ability and duty to prosecute labor trafficking.¹⁰¹ The Criminal Section (CS) of the Civil Rights Division (CRT)

8] (recommending the United States "enhance the training of law enforcement and prosecutors to increase focus on labor trafficking; strengthen prevention efforts, including addressing the demand for forced labor and commercial sex"); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 353 (2015), <https://2009-2017.state.gov/documents/organization/243562.pdf> [<https://perma.cc/XKY4-ZC3D>] (recommending the United States "vigorously prosecute labor trafficking"); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 388 (2016), <https://www.state.gov/wp-content/uploads/2019/02/271339.pdf> [<https://perma.cc/V3ZG-CXPV>] (recommending the United States "[i]ncrease prosecution of cases involving nonviolent forms of coercion and labor trafficking cases, including cases in the U.S. insular areas"); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 415 (2017), <https://www.state.gov/wp-content/uploads/2019/02/271339.pdf> [<https://perma.cc/Y3J6-ZS3U>] (recommending the United States "[i]ncrease investigation and prosecution of labor trafficking cases and cases involving nonviolent forms of coercion").

98. See, e.g., U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT, at ii (2018), <https://www.state.gov/wp-content/uploads/2019/01/282798.pdf> [<https://perma.cc/9NMC-7X83>] [hereinafter 2018 REPORT]. The 2019 TIP Report has been criticized by advocacy organizations for its overly positive assessment of the United States. See Terry FitzPatrick, *2019 TIP Report Raises Challenging Questions About Sanctions and Future Rankings*, ALL TO END SLAVERY & TRAFFICKING (June 28, 2019, 3:32 PM), <https://endslaveryandtrafficking.org/2019-tip-report-raises-challenging-questions-about-sanctions-and-future-rankings/> [<https://perma.cc/HRQ3-JM2H>].

99. See *supra* note 97 and accompanying text.

100. 2018 REPORT, *supra* note 98, at 442; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 484 (2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf> [<https://perma.cc/NPV4-HC3E>]; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 515 (2020), <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> [<https://perma.cc/HAS8-2VPT>] [hereinafter 2020 REPORT].

101. Elliott B. Daniels, *Living Outside the Rule of Law: The Data on Department of Justice Human Trafficking Prosecutions and Where We Go from Here*, DEP'T JUST. J. FED. L. & PRAC., Nov. 2019, at 169, 176.

within the Department of Justice (DOJ) is mandated¹⁰² to enforce a variety of civil rights laws, including an array of criminal statutes associated with human trafficking.¹⁰³ The human trafficking-related crimes include forced labor, trafficking with respect to servitude, and other crimes enumerated in Chapter 77 of the U.S. Criminal Code.¹⁰⁴

The FBI conducts most of the CRT's investigations, including human trafficking investigations—particularly when child sex trafficking is involved.¹⁰⁵ The Civil Rights Unit of the FBI is responsible for labor trafficking investigations.¹⁰⁶ Homeland Security Investigations (HSI) of the Department of Homeland Security (DHS) also investigates human trafficking, as do the Diplomatic Security Service (DSS) and a handful of other federal agencies, including the Department of Labor (DOL) Office of Inspector General's Office of Investigation.¹⁰⁷

102. 28 C.F.R. § 0.50(a) (2020) (“The following functions are assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney General, Civil Rights Division: . . . Enforcement of all Federal statutes affecting civil rights . . .”).

103. See U.S. COMM’N ON CIV. RTS., ARE RIGHTS A REALITY?: EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT 70–71 (2019), <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf> [<https://perma.cc/CU8E-A2T4>]; see also 8 U.S.C. § 1324 (prohibiting bringing in and harboring certain aliens); 8 U.S.C. § 1328 (prohibiting the importation of aliens for immoral purposes); 18 U.S.C. § 1351 (prohibiting fraud in foreign labor contracting); 18 U.S.C. § 1546 (prohibiting fraud and misuse of visas, permits, and other documents); 18 U.S.C. § 1581 (prohibiting peonage and obstructing enforcement); 18 U.S.C. § 1584 (prohibiting sale into involuntary servitude); 18 U.S.C. § 1589 (prohibiting forced labor); 18 U.S.C. § 1590 (prohibiting trafficking with respect to peonage, slavery, involuntary servitude, or forced labor); 18 U.S.C. § 1591 (prohibiting sex trafficking of children or by force, fraud, or coercion); 18 U.S.C. § 1592 (prohibiting unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor); 18 U.S.C. § 1593 (providing for mandatory restitution); 18 U.S.C. § 1594 (establishing general provisions, including prohibiting attempt and conspiracy); 18 U.S.C. § 1596 (providing for additional jurisdiction in certain trafficking offenses); 18 U.S.C. § 2421 (prohibiting transportation related to commercial sex or other criminal sexual activity); 18 U.S.C. § 2422 (prohibiting coercion and enticement related to commercial sex or other criminal sexual activity); 18 U.S.C. § 3271 (prohibiting trafficking in persons by persons employed by or accompanying the Federal Government outside the United States).

104. See 18 U.S.C. §§ 1581, 1584, 1589–1590.

105. See U.S. COMM’N ON CIV. RTS., *supra* note 103, at 71–72; KYLEIGH FEEHS & ALYSSA CURRIER, HUM. TRAFFICKING INST., 2019 FEDERAL TRAFFICKING REPORT 37 (2020), https://www.traffickinginstitute.org/wp-content/uploads/2020/05/2019-Federal-Human-Trafficking-Report_Low-Res.pdf [<https://perma.cc/5XJ6-KWS9>].

106. *Department of Justice Components*, U.S. DEP’T OF JUST. (Jan. 6, 2017), <https://www.justice.gov/humantrafficking/departments-justice-components> [<https://perma.cc/L6UK-F3JA>].

107. See FEEHS & CURRIER, *supra* note 105, at 37; *Office of Investigations – Labor Racketeering and Fraud*, OFF. OF INSPECTOR GEN., <https://www.oig.dol.gov/oifraud.htm> [<https://www.oig.dol.gov/oifraud.htm>].

In 2019, the FBI and HSI each served as the primary investigative agency in just under half of labor trafficking prosecutions.¹⁰⁸ DSS was the lead investigative agency for roughly 7% of them.¹⁰⁹ These numbers are fairly consistent with 2018.¹¹⁰ In 2017, by contrast, the FBI was identified as lead investigator in just 36% of the labor trafficking prosecutions, while HSI led 58% and DSS led under 10%.¹¹¹

B. Neglected Crimes

Federal labor trafficking prosecutions are scant.¹¹² In 2016, sex trafficking cases made up 96.3% of all active federal human trafficking prosecutions.¹¹³ The trend continued in 2017. That year, the Human Trafficking Institute (HTI) identified a total of 695 active federal human trafficking prosecutions.¹¹⁴ Of those, merely thirty-four were labor trafficking cases.¹¹⁵ The remaining 95.1% were sex trafficking cases.¹¹⁶ In 2018, HTI's findings were much the same: of 680 active federal human trafficking prosecutions, only thirty-five predominantly involved labor trafficking.¹¹⁷ In

108. *See id.* (noting that the data is limited to the “27 forced labor cases that identified the investigative agency”).

109. *Id.*

110. *See* CURRIER & FEEHS, *supra* note 2, at 13.

111. KYLEIGH E. FEEHS & JOHN COTTON RICHMOND, HUM. TRAFFICKING INST., 2017 FEDERAL TRAFFICKING REPORT 19 (2018), https://www.traffickingmatters.com/wp-content/uploads/2018/05/2017-Federal-Human-Trafficking-Report_hi-res.pdf [<https://perma.cc/A523-HWB2>].

112. *See id.* at 10–11.

113. *Id.* at 11.

114. *Id.* at 10. The report seeks to capture all Chapter 77 offenses. *Id.* at 63 (“18 U.S.C. § 1581 (Peonage); 18 U.S.C. § 1582 (Vessels in the Slave Trade); 18 U.S.C. § 1583 (Enticement into Slavery); 18 U.S.C. § 1584 (Involuntary Servitude); 18 U.S.C. § 1585 (Seizure, Detention of Slaves); 18 U.S.C. § 1586 (Service on Vessels for Slave Trade); 18 U.S.C. § 1587 (Possession of Slaves aboard a Vessel); 18 U.S.C. § 1588 (Transportation of Slaves from the United States); 18 U.S.C. § 1589 (Forced Labor); 18 U.S.C. § 1590 (Trafficking for Peonage, Slavery, Involuntary Servitude, or Forced Labor); 18 U.S.C. § 1591 (Sex Trafficking); 18 U.S.C. § 1592 (Documents); 18 U.S.C. § 1593A (Benefitting Financially); 18 U.S.C. § 1594 (Attempt or Conspiracy to Commit Human Trafficking); and 18 U.S.C. § 1597 (Immigration Documents).”). Additionally, the report seeks to include federal “criminal human trafficking cases where the government charged a defendant under statutes outside of Chapter 77, if there is substantial evidence of compelled or coerced labor, services, or commercial sex.” *Id.* at 62.

115. *Id.* at 10–11. Sometimes, criminal conduct incorporates both sex and labor trafficking. *See id.* at 11 n.2. HTI determined which form of exploitation predominated and counted it toward the total number of sex and labor trafficking charges. *See id.* In 2017, the HTI found eighteen federal prosecutions that included sex and labor trafficking in the indictments. *Id.* Of those, labor trafficking issues predominated in four, and they were counted as such. *Id.*

116. *Id.* at 10.

117. CURRIER & FEEHS, *supra* note 2, at 6–7.

2019, 94.9% of the active cases focused on sex trafficking and approximately 5%—just thirty-one cases—were labor trafficking cases.¹¹⁸

Put into more stark terms, federal prosecutors filed only eleven new labor trafficking criminal cases in 2017 and only nine per year in 2018 and 2019.¹¹⁹ In 2019, prosecutors initiated labor trafficking prosecutions in only eight federal judicial districts.¹²⁰ In the vast majority of U.S. states and territories, not a single federal criminal labor trafficking case was filed.¹²¹

By contrast, there were a total of 69,412 federal criminal cases filed during fiscal year 2019.¹²² Among them, 30,665 were for immigration-related offenses, 13,704 were for drug-related offenses, and 826 were for theft-related offenses.¹²³ While these higher volume cases undoubtedly involve more commonly occurring offenses and require many fewer resources to investigate and prosecute, they are also much less serious by nearly any metric.

Comparing available National Human Trafficking Hotline reports with federal prosecutions offers another disappointing perspective.¹²⁴ It is unlikely that all cases identified by the hotline actually constitute labor trafficking, and

118. FEEHS & CURRIER, *supra* note 105, at 12. Data released by the U.S. government for 2019 in the 2020 TIP Report was largely consistent with the HTI findings; it reported 208 prosecutions involving predominantly sex trafficking and twelve involving predominantly labor. 2020 REPORT, *supra* note 100, at 515. Of the 475 human trafficking convictions secured in 2019, twenty-one involved predominantly labor trafficking. *Id.* at 516. These rates were slight decreases from 2018 (with a sharper decline in the number of sex trafficking convictions). *See id.*

119. FEEHS & CURRIER, *supra* note 105, at 12.

120. *Id.* at 93–95. Federal prosecutors did not bring a single labor trafficking charge in any of the following states or territories during 2019: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wyoming, the District of Columbia, Puerto Rico, Guam, the Northern Mariana Islands, or the Virgin Islands. *Id.* By comparison, that same year, a total of 573 federal criminal cases were filed in the Northern District of Alabama; 659 in the Eastern District of Arkansas; 1,171 in the Eastern District of Missouri; 726 in the Northern District of Ohio; 8,113 in the Southern District of Texas; and 858 in the Southern District of New York—not one of them was for labor trafficking. U.S. ATT'Y'S OFF., U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 2–4 (2019), <https://www.justice.gov/usao/page/file/1285951/download> [<https://perma.cc/PV6M-54L5>].

121. FEEHS & CURRIER, *supra* note 105, at 93–95.

122. U.S. ATT'Y'S OFF., *supra* note 120, at 11–12.

123. *Id.* Less than 0.3% (168 total) were civil rights prosecutions. *Id.* at 11.

124. *See* NAT'L HUM. TRAFFICKING HOTLINE, 2019 DATA REPORT, <https://polarisproject.org/wp-content/uploads/2019/09/Polaris-2019-US-National-Human-Trafficking-Hotline-Data-Report.pdf> [<https://perma.cc/96E9-FC4L>]. However, these numbers demonstrate the gap between the existence of the harmful, illegal conduct and the extent to which it occurs without any legal consequence. *See id.*; U.S. ATT'Y'S OFF., *supra* note 120, at 11–12.

certainly they are not all possible or appropriate to federally prosecute. Nonetheless, the comparison is discouraging. Based on calls received, the hotline reported 127 potential cases of labor trafficking and an additional fifty-eight potential cases involving both sex and labor trafficking in Florida during 2018.¹²⁵ Just one federal labor trafficking prosecution was initiated in Florida that same year.¹²⁶ For Texas, the hotline reported 118 potential cases of labor trafficking and eighty-nine more involving sex and labor trafficking.¹²⁷ Only two federal labor trafficking prosecutions were filed that year in all of Texas.¹²⁸ In Ohio, there were no federal prosecutions of labor trafficking initiated despite sixty-two hotline reports.¹²⁹ Reports to the hotline are likely just the tip of the iceberg in terms of labor trafficking, yet there remains a serious disparity even between the number of credible hotline calls received and federal prosecutions.¹³⁰

The problem of underprosecuting labor trafficking is not restricted to the United States and may be getting worse.¹³¹ Former U.S. Ambassador to Monitor and Combat Trafficking in Persons, Luis C.deBaca, reviewed the 2020 TIP Report with concern and noted, “There were apparently only [twenty-eight] labor cases brought in the *entire* Western Hemisphere, with the

125. NAT’L HUM. TRAFFICKING HOTLINE, FLORIDA SPOTLIGHT, <https://humantraffickinghotline.org/sites/default/files/FL-2018-State-Report.pdf> [<https://perma.cc/XHA5-V6EV>].

126. CURRIER & FEEHS, *supra* note 2, at 87.

127. NAT’L HUM. TRAFFICKING HOTLINE, TEXAS SPOTLIGHT, <https://humantraffickinghotline.org/sites/default/files/TX-2018-State-Report.pdf> [<https://perma.cc/FYK9-SYQT>].

128. CURRIER & FEEHS, *supra* note 2, at 89.

129. *See id.* at 88; NAT’L HUM. TRAFFICKING HOTLINE, OHIO SPOTLIGHT, <https://humantraffickinghotline.org/sites/default/files/OH-2018-State-Report.pdf> [<https://perma.cc/M7FE-ABFT>] (observing thirty-four cases involved labor trafficking and twenty-eight cases involved both sex and labor trafficking).

130. *See* J.C.A. Meshelemiah, *Criminal Provisions for Human Trafficking: Rankings, State Grades, and Challenges*, J. FORENSIC LEGAL & INVESTIGATIVE SCIS., Nov. 26, 2019, at 1, 1, <https://www.heraldopenaccess.us/openaccess/criminal-provisions-for-human-trafficking-rankings-state-grades-and-challenges> [<https://perma.cc/VT2H-RZ84>] (“Due to the clandestine nature of human trafficking, researchers rely on estimates and proxies when determining the prevalence of human trafficking activities in the U.S. as well as around the globe.”).

131. While this Article only examines federal prosecutions, it appears that trends are similar at the state and local levels. *See* Kelly Heinrich & Kavitha Sreeharsha, *The State of State Human-Trafficking Laws*, AM. BAR ASS’N (Jan. 1, 2013), https://www.americanbar.org/groups/judicial/publications/judges_journal/2013/winter/the_state_of_state_humantrafficking_laws/ [<https://perma.cc/D68D-K7H6>]. Some anti-trafficking advocates have observed that this problem tends to be even worse in state courts. *See, e.g.*, AMY FARRELL ET AL., URB. INST., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 193 (2012), <https://www.urban.org/sites/default/files/publication/25526/412593-Identifying-Challenges-to-Improve-the-Investigation-and-Prosecution-of-State-and-Local-Human-Trafficking-Cases.PDF> [<https://perma.cc/CM4P-7V67>] (discussing how most human trafficking cases identified by local law enforcement were prosecuted federally).

U.S. appearing to have brought [twenty-one] of them.”¹³² He pointed out that this was the lowest number of labor trafficking prosecutions identified since the report was first issued nearly two decades ago.¹³³

IV. EXAMINING THE FAILURE TO PROSECUTE

The ongoing failure to adequately prosecute labor trafficking is likely the result of various converging causes. Barriers exist from the early stages of identification and subsequent investigation through the prosecution stage.¹³⁴ Some barriers apply exclusively to labor trafficking while others similarly plague sex trafficking, other crimes, and victimized communities.¹³⁵

This Part examines the barriers most likely to impede the identification and investigation of labor trafficking. It then considers additional barriers that further inhibit the prosecution of labor trafficking.

A. *Barriers to Identification and Investigation*

Law enforcement has struggled to identify labor trafficking and has, in large part, failed to put in place the widespread training and procedures necessary to effectively investigate it.¹³⁶ Prevalent barriers include workplace exceptionalism, pervasive myths, the labor trafficking eclipse, isolation of victims, fear and distrust of law enforcement, ongoing and credible coercion, skepticism of foreign national victims, insufficient training, reactive policing, reliance on traditional policing methods, and agency unit organization.¹³⁷

1. *Workplace Exceptionalism*

Any examination of the failure to adequately prosecute labor trafficking must be grounded in an understanding of the broader norms surrounding the

132. Luis C.deBaca, *Storm Clouds on the Horizon for U.S. Human Trafficking Rankings*, THOMSON REUTERS FOUND., https://news.trust.org/item/20200629130908-h53g1#new_tab [<https://perma.cc/3JJN-YQZL>]. C.deBaca currently serves as the Senior Fellow at Yale University’s Gilder Lehrman Center for the Study of Slavery, Resistance, and Abolition. *Id.*

133. *Id.* While C.deBaca noted that the data relied on in the Report is imperfect, it still serves as a “rough guide.” *Id.*

134. See discussion *infra* Sections IV.A–B.

135. See discussion *infra* Sections IV.A–B.

136. See FARRELL ET AL., *supra* note 43, at 4. As federal prosecution of labor trafficking relies on identification and investigation by all levels of law enforcement, this Section incorporates an analysis of local, state, and federal officers and agencies.

137. See discussion *infra* Sections IV.A.1–10.

policing of employer conduct toward workers.¹³⁸ Workers rarely benefit from the protection of the criminal justice system.¹³⁹ To some, regulating employers and conduct associated with the workplace may seem like a purely civil matter not appropriate for law enforcement intervention.¹⁴⁰ Unlawful employer conduct has also been normalized.¹⁴¹ Additionally, bias makes it less likely that many employers will be viewed as criminals—particularly when they operate in otherwise lawful industries.¹⁴² Yet employers can and do engage in harmful and illegal conduct against workers. Indeed, violations are pervasive.¹⁴³

What this Article refers to as “workplace exceptionalism” is the broad exclusion of employer conduct from meaningful state oversight and the exclusion of all but the most egregious employer conduct from criminal

138. Labor traffickers can be supervisors, recruiters, or others associated with the trafficked individual; they are not always employers. See OWENS ET AL., *supra* note 69, at 35. Nonetheless, workplace exceptionalism impacts the identification, investigation, and prosecution of their crimes as well. Telephone Interview with Stacie Jonas, Lead Att’y, Human Trafficking Project, Tex. Rio Grande Legal Aid (Jan. 10, 2020).

139. See *Few Prosecuted for Illegal Employment of Immigrants*, TRAC IMMIGRATION (May 30, 2019), <https://trac.syr.edu/immigration/reports/559/> [<https://perma.cc/NYN3-ZZCJ>].

140. Telephone Interview with Stacie Jones, *supra* note 138.

141. Compare, for example, the willingness of law enforcement to arrest a homeless shoplifter for stealing a nominal amount of food from a large retailer and law enforcement’s resistance to investigating (let alone prosecuting) an employer who refuses to pay an employee hundreds of dollars for two weeks of work. Advocates coined the term “wage theft” to describe employers’ failure to pay wages owed and to challenge complacency pervasive around wage nonpayment. See, e.g., Daniel A. Schwartz, “Wage Theft”: *The Trendy Phrase That May Not Mean What You Think It Means*, CONN. EMP. L. BLOG (Apr. 23, 2014), <https://www.ctemploymentlawblog.com/2014/04/articles/wage-theft-the-trendy-phrase-that-runs-amok/> [<https://perma.cc/LX2F-G3DF>]. Some lawyers have objected that the term is misleading in those instances where the failure to comply with wage and hour law was not intentional or did not violate a criminal law, but the term is one method to challenge cultural norms that accommodate and overlook violations of workers’ fundamental rights. *Id.*

142. U.S. DEP’T OF JUST., NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING 3 (Jan. 2017), <https://www.justice.gov/humantrafficking/page/file/922791/download> [<https://perma.cc/9QR8-5ZNV>]; Telephone Interview with Stacie Jones, *supra* note 138; Telephone Interview with Patricia Medige, Senior Att’y, Colo. Legal Servs. (Feb. 5, 2020).

143. See, e.g., Press Release, Econ. Pol’y Inst., Employers Are Charged with Violating Federal Law in Four Out of Every 10 Union Elections (Dec. 11, 2019), <https://www.epi.org/press/employers-are-charged-with-violating-federal-law-in-four-out-of-every-10-union-elections/> [<https://perma.cc/XG22-6V3E>] (finding violations of employees’ rights to organize in 41.5% of all union elections); DAVID COOPER & TERESA KROEGER, ECON. POL’Y INST., EMPLOYERS STEAL BILLIONS FROM WORKERS’ PAYCHECKS EACH YEAR 1 (2019), <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/> [<https://perma.cc/5X8J-J5C8>] (estimating workers in the ten most populous states lose \$8 billion each year due to minimum wage violations).

liability.¹⁴⁴ Workplace exceptionalism aggravates existing disparities in bargaining and other forms of power between employers and employees.¹⁴⁵ It also permits workplaces to largely operate outside of law enforcement's reach.¹⁴⁶

Most federal laws governing the workplace, including the Fair Labor Standards Act (FLSA) (child labor, minimum wage and overtime requirements, equal pay), the National Labor Relations Act (the right to organize and union conduct), the Occupational Safety and Health Act (OSHA) (workplace safety), Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act, the Age Discrimination in Employment Act (discrimination), and others are enforced by specialized federal agencies empowered to monitor U.S. workplaces.¹⁴⁷ These agencies are commonly

144. This derives from “agricultural exceptionalism”—a term describing the exclusion of farmworkers from coverage by nearly all federal labor and employment protections. For a discussion of this phenomenon, see Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 489 (1998). See also Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1335–38 (1987) (discussing the origins of agricultural exceptionalism).

145. See JOSH BIVENS & HEIDI SHIERHOLZ, ECON. POL’Y INST., WHAT LABOR MARKET CHANGES HAVE GENERATED INEQUALITY AND WAGE SUPPRESSION? 8–9 (2018), <https://files.epi.org/pdf/148880.pdf> [<https://perma.cc/24Y6-SE6R>].

146. Like agricultural exceptionalism, workplace exceptionalism has its roots partly in slavery and its aftermath. See Jennifer Roback, *Exploitation in the Jim Crow South: The Market or the Law?*, AEI J. ON GOV’T & SOC’Y, Sept./Dec. 1982, at 37, 38, <https://www.cato.org/sites/cato.org/files/serials/files/regulation/1984/12/v8n5-6.pdf> [<https://perma.cc/8LLZ-PBET>] (discussing how the labor laws of the Jim Crow era aided “an otherwise unenforceable labor-market cartel among white employers”). Early southern police operated to ensure enslaved people did not escape or revolt and to ensure they were punished when they did. Chelsea Hansen, *Slave Patrols: An Early Form of American Policing*, NAT’L L. ENF’T MUSEUM: BLOG: ON BEAT (July 10, 2019), <https://lawenforcementmuseum.org/2019/07/10/slave-patrols-an-early-form-of-american-policing/> [<https://perma.cc/38MR-MHPD>]. After the Civil War, southern police sought to continue to control formerly enslaved people who were still performing agricultural work in the South and to enforce the Jim Crow segregation laws. GARY POTTER, E. KY. UNIV., THE HISTORY OF POLICING IN THE UNITED STATES (2013), <https://plsonline.eku.edu/sites/plsonline.eku.edu/files/the-history-of-policing-in-us.pdf> [<https://perma.cc/5CXN-XPNW>].

147. See 29 U.S.C. §§ 201–219 (containing statutes relating to the Fair Labor Standards Act); 29 U.S.C. §§ 151–169 (containing statutes relating to the National Labor Relations Act); 29 U.S.C. §§ 651–678 (containing statutes relating to OSHA); 42 U.S.C. §§ 2000e to 2000e-17 (containing statutes relating to Title VII of the Civil Rights Act of 1964); 29 U.S.C. §§ 621–634 (containing statutes relating to age discrimination). Federal agencies involved in the enforcement of these laws include the Wage and Hour Division of the DOL, 29 U.S.C. § 204; the National Labor Relations Board, 29 U.S.C. § 153; the Occupational Safety and Health Review Commission, 29 U.S.C. § 661; and the Equal Employment Opportunity Commission, 42 U.S.C. § 2000e-4. Not all workplaces are covered by these federal laws—or even any equivalent state law. See, e.g., OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA 3021-06R 2017, WORKER’S RIGHTS 5 (2017), <https://www.osha.gov/Publications/osh3021.pdf> [<https://perma.cc/3ZA8->

underfunded and have insufficient resources to adequately monitor compliance or enforce the law when violations occur.¹⁴⁸

Only a handful of federal labor and employment laws provide for criminal liability,¹⁴⁹ and employers are almost never prosecuted.¹⁵⁰ Under OSHA,¹⁵¹ employers can be criminally prosecuted when an employee dies in the workplace as a result of a willful violation of the Act; such prosecutions are rare.¹⁵² Willful violations of the FLSA's minimum wage and overtime

QHE4] (listing states and territories with OSHA-approved programs). As an example, federal minimum wage and overtime requirements generally apply only to employers and employees who are engaged in interstate commerce or to larger employers who gross over \$500,000 annually. WAGE & HOUR DIV., U.S. DEP'T OF LAB., FACT SHEET #14: COVERAGE UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (July 2009), <https://www.dol.gov/sites/dolgov/files/WH/D/legacy/files/whdfs14.pdf> [<https://perma.cc/9PYK-WLE6>]. Agricultural workers are excluded from the right to overtime altogether—regardless of their employer's size. 29 U.S.C. § 213(b)(12).

148. See KATE HAMAJI ET AL., ECON. POL'Y INST., UNCHECKED CORPORATE POWER: FORCED ARBITRATION, THE ENFORCEMENT CRISIS, AND HOW WORKERS ARE FIGHTING BACK 5–7 (2019), <https://files.epi.org/uploads/Unchecked-Corporate-Power-web.pdf> [<https://perma.cc/Y63T-E84R>]; Daniel Costa, *Immigration Enforcement Is Funded at a Much Higher Rate than Labor Standards Enforcement—and the Gap Is Widening*, ECON. POL'Y INST.: WORKING ECON. BLOG (June 20, 2019, 2:54 PM), <https://www.epi.org/blog/immigration-enforcement-is-funded-at-a-much-higher-rate-than-labor-standards-enforcement-and-the-gap-is-widening/> [<https://perma.cc/B45N-YMV6>]; Marianne Levine, *Behind the Minimum Wage Fight, a Sweeping Failure to Enforce the Law*, POLITICO (Feb. 8, 2018, 6:51 AM), <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644> [<https://perma.cc/X56K-YQVX>].

149. See Blake Weiner et. al., *Employment Law Violations*, 55 AM. CRIM. L. REV. 1049, 1079–93 (2018) (summarizing federal criminal workplace safety and employment statutes, including the Labor Management Relations Act and the Labor-Management Reporting and Disclosure Act).

150. *Few Prosecuted for Illegal Employment of Immigrants*, *supra* note 139. This is true even for violations of federal immigration laws prohibiting employment of foreign nationals who lack work authorization—a stated priority of the Trump Administration. *Id.* Instead of prosecuting employers, it is employees who have been detained, charged, and deported. *Id.* (finding that “since criminal penalties for employers were first enacted by Congress in 1986, few employers have ever been prosecuted under these provisions (8 USC 1324a) [sic]. Prosecutions have rarely climbed above 15 annually and have never exceeded 20 individuals a year except for brief periods during 2005 under President Bush and in the first year of the Obama Administration.”); see also Renae Merle, *As Workplace Raids Multiply, Trump Administration Charges Few Companies*, WASH. POST (Aug. 9, 2019, 5:45 PM), <https://www.washingtonpost.com/business/2019/08/09/workplace-raids-multiply-trump-administration-charges-few-companies/> [<https://perma.cc/2E7H-P526>].

151. 29 U.S.C. § 666(e). Employers can also be criminally prosecuted for willful violations of the Federal Mine Safety and Health Act, 30 U.S.C. § 820(d); the Clean Water Act, 33 U.S.C. § 1319(c)(3); and the Clean Air Act, 42 U.S.C. § 7413(c)(5)(B).

152. See, e.g., Sam Pearson, *Clean Air Case Yields Rare Criminal Convictions in New York*, CTR. PUB. INTEGRITY (May 19, 2014, 12:19 PM), <https://publicintegrity.org/environment/clean-air-case-yields-rare-criminal-convictions-in-new-york/> [<https://perma.cc/US8Y-9QA5>]. State laws may be more stringent. For example, in California, “the California Bureau of

requirements, its prohibition on child labor and retaliation, and some of its other mandates can likewise result in criminal liability for employers but almost never do.¹⁵³ Failure to pay wages has also been criminalized in some state and local jurisdictions.¹⁵⁴ Yet anecdotal evidence suggests these prosecutions remain relatively uncommon as well, despite the widespread prevalence of wage theft.

When violence or overt physical force is present, law enforcement agencies are more likely to view policing the workplace as part of their mandate.¹⁵⁵ However, many labor trafficking cases do not involve physical violence or restraint; instead, traffickers frequently employ more subtle—yet equally criminal—means of coercion and abuse of the legal process.¹⁵⁶ Workplace exceptionalism thus operates as a foundational barrier to the identification, investigation, and prosecution of labor trafficking.¹⁵⁷ The barriers discussed in the sections that follow, including pervasive myths about human trafficking, act as further impediments.¹⁵⁸

2. *Pervasive Myths*

Misunderstandings about human trafficking abound. These widely accepted myths impede the ability of both the public and law enforcement to identify human trafficking.¹⁵⁹ The myths are reinforced by sensationalized

Investigation is required to investigate every workplace fatality, or any incident that seriously injured five or more employees to determine whether to refer the matter for criminal prosecution.” Lisa Nagele-Piazza, *Employers May Face State Criminal Liability for Safety Violations*, SOC’Y HUM. RES. MGMT. (Mar. 16, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/employers-may-face-state-criminal-liability-for-safety-violations.aspx> [<https://perma.cc/ZD7B-U7A3>]. There are also additional state criminal penalties for workplace injuries and deaths. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 25189.5–25189.7 (West, Westlaw through Ch. 31 of 2020 Reg. Sess.).

153. 29 U.S.C. § 216(a).

154. Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759, 772, 780 (finding 10% of the 141 state and local jurisdictions that passed wage theft laws from 2005 through 2018 created criminal penalties).

155. Telephone Interview with Stacie Jonas, *supra* note 138; *see* Amy Farrell et al., *Policing Labor Trafficking in the United States*, 23 TRENDS IN ORGANIZED CRIME 36, 39 (2019) (“Even when confronted with labor trafficking indicators, officers are likely to apply heuristic tools based on an understanding of human trafficking as commercial sexual exploitation or prostitution, areas of policing that are more familiar to officers, and misidentify or fail to recognize labor violations that qualify as a criminal offense.”).

156. Telephone Interview with Stacie Jonas, *supra* note 138.

157. *Id.*

158. *See infra* notes 159–254 and accompanying text.

159. Hilary Axam & Jennifer Toritto Leonardo, *Human Trafficking: The Fundamentals*, U.S. ATT’YS’ BULL., Nov. 2017, at 3, 4; Farrell et al., *supra* note 155, at 39 (“Even when confronted with labor trafficking indicators, officers are likely to apply heuristic tools based on

images, popular media, and well-intentioned but ill-informed community members.¹⁶⁰ They include the beliefs that human trafficking requires movement, that human trafficking is equivalent to smuggling,¹⁶¹ that physical force or restraint is a required element of human trafficking,¹⁶² that victims are largely young and female,¹⁶³ and that sex trafficking is the sole form of human trafficking.¹⁶⁴

These and other misconceptions make it particularly challenging to identify and investigate labor trafficking.¹⁶⁵ For example, trafficked individuals sometimes travel to and from work on their own.¹⁶⁶ Law enforcement officers might incorrectly assume this apparent freedom of movement means that workers are not being victimized. In other instances, workers who complain of unpaid wages or threats from their bosses may be viewed as having “only” a civil employment concern.¹⁶⁷ Finally, trafficked individuals themselves may not be aware that the abuse they are experiencing is human trafficking.¹⁶⁸

an understanding of human trafficking as commercial sexual exploitation or prostitution, areas of policing that are more familiar to officers . . . , and misidentify or fail to recognize labor violations that qualify as a criminal offense.”). See generally Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337 (2007) (discussing the “two primary problems thwarting Congress’ intent to protect victims and prosecute their traffickers”).

160. Farrell et al., *supra* note 155, at 39; Telephone Interview with Stacie Jonas, *supra* note 138.

161. Farrell et al., *supra* note 155, at 38.

162. Florrie Burke, *Innovations in the Fight Against Human Trafficking: Advocates’ Perspectives and Proposals*, 60 N.Y.L. SCH. L. REV. 615, 616–617 (2015–2016).

163. Telephone Interview with Stacie Jonas, *supra* note 138.

164. See Axaam & Leonardo, *supra* note 159, at 5.

165. Farrell et al., *supra* note 155, at 41 (“The labor trafficking tips received from good Samaritans, concerned family members, hotline calls, and the general public were described by police respondents as difficult to pursue because of a limited understanding about what actions/acts constitute labor trafficking both among the general public and among law enforcement officials.”). Prosecutors are also not immune to misunderstandings about labor trafficking. *Id.* at 42. In one instance, a federal prosecutor reported declining to prosecute a case because the victim’s movements were not physically restrained and, thus, the prosecutor did not believe the situation constituted trafficking. *Id.* Confirmation bias may also play a role. Shelley Cavalieri, *The Eyes That Blind Us: The Overlooked Phenomenon of Trafficking into the Agricultural Sector*, 31 N. ILL. U. L. REV. 501, 512 (2011).

166. Norwood, *supra* note 21, at 215.

167. POLARIS PROJECT, HUMAN TRAFFICKING AT HOME: LABOR TRAFFICKING OF DOMESTIC WORKERS 47 (2019), https://polarisproject.org/wp-content/uploads/2019/09/Human_Trafficking_at_Home_Labor_Trafficking_of_Domestic_Workers.pdf [<https://perma.cc/JCV6-M6WB>].

168. LITTLE HOOVER COMM’N, *supra* note 88, at 11.

3. *The Labor Trafficking Eclipse*

One of the most persistent myths about human trafficking is that it consists exclusively of sex trafficking.¹⁶⁹ Many members of the public—and some in law enforcement—do not realize that there are indeed *two* forms of human trafficking: sex and labor.¹⁷⁰ This widespread misconception makes it likely that labor trafficking is underreported to law enforcement. Law enforcement officers may themselves resist investigating workplace related concerns when they fail to recognize those concerns as possible human trafficking.¹⁷¹ Additionally, it may be harder for prosecutors to convince judges, and especially jurors, that labor trafficking is indeed a form a human trafficking. Just as harmful, prosecutors may worry they will face these hurdles at trial and be less likely to undertake labor trafficking cases in the first place.

Even when it is understood that both sex and labor trafficking exist, sex trafficking receives more attention and resources.¹⁷² This “labor trafficking eclipse”—the domination of sex trafficking to the near exclusion of labor trafficking—almost certainly results in fewer cases of labor trafficking being identified, less training and community education focused on labor trafficking, and fewer community-based organizations and efforts working to eradicate labor trafficking and assist trafficked individuals.¹⁷³ The labor trafficking eclipse also likely makes it more politically popular to criminally pursue sex traffickers over labor traffickers. Efforts to address the labor

169. This is not a uniquely American phenomenon. See, e.g., Eleanor Turner-Moss et al., *Labour Exploitation and Health: A Case Series of Men and Women Seeking Post-Trafficking Services*, 16 J. IMMIGRANT & MINORITY HEALTH 473, 473 (2014) (noting that, in the United Kingdom, sex trafficking had been the primary focus of anti-trafficking programs and research on the health consequences of trafficking). For insight into the development of this phenomenon, see Chuang, *supra* note 18, at 613–19; Chuang, *supra* note 20, at 1657.

170. Cf. Chuang, *supra* note 20, at 1657 (categorizing trafficking broadly as either sex-sector trafficking or non-sex-sector trafficking).

171. For a discussion of workplace exceptionalism, see *supra* Section IV.A.1.

172. Farrell et al., *supra* note 155, at 37, 44–45 (“[P]olice efforts have focused more heavily on the identification and investigation of sex trafficking cases as compared to offenses categorized as labor trafficking.”); C.deBaca, *supra* note 132 (“Bringing sex trafficking under the human rights basis of anti-slavery laws and treaties was meant to extend protection to those victims, not to shift enforcement entirely to sexual exploitation.”)

173. See Leila Miller, *Why Labor Trafficking Is So Hard to Track*, FRONTLINE (Apr. 24, 2018), <https://www.pbs.org/wgbh/frontline/article/why-labor-trafficking-is-so-hard-to-track/> [https://perma.cc/L2RK-JSM8] (“Experts and advocates alike describe a self-perpetuating cycle, wherein agencies may not direct resources toward labor trafficking because the issue is rarely the focus of media attention.”).

trafficking eclipse have been made with some limited success, but it nonetheless persists.¹⁷⁴

4. *Isolation of Victims*

Labor trafficking can be a “hidden crime.”¹⁷⁵ Some trafficked individuals are largely hidden from public view and outside of law enforcement’s easy reach—living inside a home or at a remote farmworker labor camp—which can make identification of labor trafficking much more challenging.¹⁷⁶ This problem was likely aggravated by the COVID-19 pandemic and the resulting mandated quarantines, isolation, stay-at-home orders, and temporary closures of healthcare and service provider offices, places of worship, and more.¹⁷⁷ In other instances, though, trafficked individuals come into contact with the public—and even law enforcement—nearly every day.¹⁷⁸ For example, a trafficked woman from Malawi lived in domestic servitude for several years, right next door to the home of a police officer.¹⁷⁹ Victims have experienced labor trafficking while working as servers in country clubs and nurses in nursing homes.¹⁸⁰ They came into daily contact with numerous members of the public.¹⁸¹ Although contact alone does not guarantee better outcomes, it is more challenging to identify labor trafficking among those who are

174. Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3011–12 (2006).

175. PHILIP GNAEDIG ET AL., *COAL. TO ABOLISH SLAVERY & TRAFFICKING, LABOR TRAFFICKING CASES 2008-2018: DATA ANALYSIS REPORT 1* (2019), <https://www.castla.org/wp-content/uploads/2019/11/CAST-NERA-Labor-Trafficking-Cases-Data-Analysis-Nov2019-Report-Final.pdf> [<https://perma.cc/27FN-HZ44>].

176. *See* Desai & Tepfer, *supra* note 96, at 26.

177. *See* Annie Smith, *COVID-19 and Vulnerability to Human Trafficking*, *UARKLAW INSIGHTS* (July 2, 2020), <https://law.uark.edu/insights/insinsig-smith-immigration-20200702.php> [<https://perma.cc/J6KK-654Q>]; LITTLE HOOVER COMM’N, *supra* note 88, at 7. The need to take these important steps to limit the spread of COVID-19 was certainly warranted, but one of the likely unintended consequences was to cause trafficked individuals to become even more isolated.

178. 2018 REPORT, *supra* note 98, at 9.

179. Sarah Frost & Liz Veale, *Speaking Up: One Woman’s Powerful Account of Human Trafficking*, *DIPNOTE: HUM. TRAFFICKING* (June 29, 2018), <https://www.state.gov/speaking-up-one-womans-powerful-account-of-human-trafficking/> [<https://perma.cc/E525-AREX>].

180. Final Default Judgment, *Magnifico v. Villanueva*, No. 10-CV-80771, 2012 WL 5395026, at *1 (S.D. Fla. Nov. 2, 2012) (providing an example of labor trafficking of country club servers); *Paguirigan v. Prompt Nursing Employment Agency LLC*, 17-CV-1302, 2019 WL 4647648, at *18 (E.D.N.Y. Sept. 23, 2019) (providing an example of labor trafficking in nursing homes).

181. *See Magnifico*, 2012 WL 5395026, at *5.

geographically remote, have extremely limited contact with others, or are linguistically isolated due to language differences.¹⁸²

5. *Fear and Distrust of Law Enforcement*

Trafficked individuals and witnesses to labor trafficking may be afraid of law enforcement—and particularly of immigration enforcement.¹⁸³ Traffickers exploit this fear and commonly threaten arrest or deportation.¹⁸⁴ Collaboration between state and local law enforcement agencies and DHS’s Immigration and Customs Enforcement (ICE) only heightens these fears and makes it even less likely trafficked individuals will cooperate with law enforcement officers or seek their assistance.¹⁸⁵ A 2018 study showed they have reason to be concerned; roughly 30% of labor trafficking victims studied were arrested along with their traffickers, mostly in the context of ICE raids.¹⁸⁶ Anti-immigrant rhetoric and the harsh policies of President Trump and his Administration only aggravated the situation and enhanced traffickers’ sense of impunity.¹⁸⁷

182. See Annie Smith, *Imposing Injustice: The Prospect of Mandatory Arbitration for Guestworkers*, 40 N.Y.U. REV. L. & SOC. CHANGE 375, 389–91 (2016) (describing the vulnerability faced by guestworkers living in profound isolation); see also POLARIS, *supra* note 2121, at 17–19 (discussing traffickers’ exploitation of cultural and language differences).

183. Desai & Tepper, *supra* note 96, at 26; LITTLE HOOVER COMM’N, *supra* note 88, at 13; Denise Brennan, *Myths Meet Reality: How We Are Not Fighting Trafficking or Supporting Trafficking Survivors*, 60 N.Y.L. SCH. L. REV. 605, 608 (2015–2016); Farrell et al., *supra* note 155, at 38. Foreign nationals originally from countries with particularly corrupt law enforcement agencies may struggle to trust law enforcement based on their prior experiences as well. See Joyce Koo Dalrymple, *Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act*, 25 B.C. THIRD WORLD L.J. 451, 466 (2005). Furthermore, to the extent that victims have engaged in any criminal conduct, they may be particularly fearful of law enforcement. *Id.*

184. ROE-SEPOWITZ ET AL., *supra* note 45, at 11, 13 (“Thirty-eight (30.4%) labor traffickers threatened to report the victims to the immigration for deportation and 33 (26.4%) withheld victims’ passport/visa. . . . To control and entrap the victim during the recruitment, 30.4% (n = 38) of the labor traffickers threatened to report the victim to the immigration for deportation, and 26.4% (n = 33) of labor traffickers withheld victims’ passports/visas.”).

185. Norma González, *The “Other” Side of Human Trafficking: Effectively Advocating for Labor Trafficking Survivors Under the Trafficking Victims Protection Act*, 14 SEATTLE J. FOR SOC. JUST. 839, 868–69 (2016); REBECCA SMITH ET AL., ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS’ RIGHTS 6 (2009), https://www.jwj.org/wp-content/uploads/2013/12/icedout_report.pdf [<https://perma.cc/3DV3-ZVPL>].

186. ROE-SEPOWITZ ET AL., *supra* note 45, at 19.

187. See Smith, *supra* note 177; see also Jim Daley, *Trump’s Nativist Rhetoric Scares Immigrants Away from Seeking Medical Care*, SCI. AM. (Oct. 30, 2019), <https://www.scientificamerican.com/article/trumps-nativist-rhetoric-scares-immigrants-away-from-seeking-medical-care/> [<https://perma.cc/4KCC-WRQM>] (discussing how President Trump’s rhetoric impacted immigrant access to medical care, as evidenced by a 2018 study that found one-quarter of

For years, advocates and scholars have repeatedly pointed out that the structure of the U.S. guestworker visa program creates inherent vulnerability for workers that can be and is exploited by traffickers and other bad actors.¹⁸⁸ Low-wage guestworkers' lawful presence in the United States arises from their relationships to their employers.¹⁸⁹ Work visas for workers in industries at the highest risk for trafficking are generally not portable; low-wage guestworkers' visas are linked to their particular employer.¹⁹⁰ If their job ends—whether they quit for good reason or are fired for a bad one—these guestworkers lose their immigration status and ability to remain and work in the United States.¹⁹¹ The extreme power difference this creates, coupled with periods of heightened anti-immigrant policies and rhetoric by state actors including the U.S. President, can only enhance guestworkers' fears of arrest and deportation and their distrust of law enforcement.¹⁹²

Importantly, beyond victims and witnesses, there are service providers, lawyers, labor organizers, and others who have direct contact with labor trafficking victims and are themselves extremely reluctant to encourage undocumented victims to report to or collaborate with law enforcement unless

undocumented Latinx patients surveyed were afraid to go to the hospital due to President Trump's statements about immigrants, and half of them delayed medical treatment as a result); Robert M. Rodriguez et al., *Declared Impact of the US President's Statements and Campaign Statements on Latino Populations' Perceptions of Safety and Emergency Care Access*, PLOS ONE (Oct. 30, 2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0222837> [<https://perma.cc/UC2B-SM3U>]; Brennan, *supra* note 183, at 608–09 (arguing that state and local policies that facilitate racial profiling, including 287(g), must be terminated to prevent labor trafficking).

188. *See, e.g.*, Smith, *supra* note 182, at 387–88; INT'L LAB. RECRUITMENT WORKING GRP., *THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR RECRUITMENT ABUSE* 7 (2013), <http://fairlaborrecruitment.files.wordpress.com/2013/01/final-e-version-ilrwg-report.pdf> [<https://perma.cc/XW2W-NJHQ>] [hereinafter AMERICAN DREAM]; MARY BAUER, S. POVERTY L. CTR., *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES* 4–5 (Booth Gunter ed., 2013), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf [<https://perma.cc/78F4-YTT9>]; *Meeting of June 17, 2015 Retaliation in the Workplace: Causes, Remedies, and Strategies for Prevention*, 114th Cong. (2015) (Written Testimony of Daniel Werner, Senior Supervising Att'y, S. Poverty L. Ctr. Before U.S. Equal Emp. Opportunity Comm.), <https://www.eeoc.gov/meetings/meeting-june-17-2015-retaliation-workplace-causes-remedies-and-strategies-prevention/werner> [<https://perma.cc/6XRF-Y7GS>] [hereinafter *Werner*].

189. *Werner, supra* note 188.

190. *See, e.g.*, 8 C.F.R. § 214.2(h)(1)(i) (2020). While it is possible in theory for guestworkers to switch employers in some circumstances, in reality, it is very difficult to do so—particularly for low wage workers. *See id.* § 214.2(h)(2)(i)(D) (2020).

191. *See Werner, supra* note 188.

192. *See* Ashwini Sukthankar, GLOB. WORKERS JUST. ALL., *VISAS, INC.: CORPORATE CONTROL AND POLICY INCOHERENCE IN THE U.S. TEMPORARY FOREIGN LABOR SYSTEM* 47–48 (2012), <https://fairlaborrecruitment.files.wordpress.com/2013/01/visas-inc.pdf> [<https://perma.cc/U9NA-P8GD>]; Merle, *supra* note 150.

they have an existing and trusting relationship with a particular law enforcement officer or agency.¹⁹³ This issue arises primarily in cases involving undocumented individuals, as there are concerns these individuals will be detained and deported rather than treated as victims of a federal crime who are eligible for immigration and other relief.

The murders of George Floyd, Breonna Taylor, and others during the spring and summer of 2020 once again brought into the national spotlight ongoing police violence against Black people, the disproportionate policing of predominantly Black communities, and disparities in the charging and sentencing of Black criminal defendants and other people of color.¹⁹⁴ The racism deeply embedded in our institutions, including in law enforcement, likely makes some labor trafficking victims and witnesses more reluctant to interact with law enforcement in any capacity.¹⁹⁵

Federal laws and law enforcement's own conduct facilitate labor trafficking and create considerable barriers to its prosecution.¹⁹⁶

6. *Ongoing and Credible Coercion*

While a labor trafficking situation is ongoing, trafficked individuals may be afraid to report the abuse due to their traffickers' threats and schemes.

193. See Farrell et al., *supra* note 155, at 54; Telephone Interview with Susan French, Human Trafficking Att'y Consultant & Former DOJ Trafficking in Pers. Prosecutor (Dec. 5, 2019).

194. See PHILLIP ATIBA GOFF ET AL., THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE 15 (2016) https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf [<https://perma.cc/CQ97-XNCY>] (discussing racial disparities in the use of force); see also Ryan D. King & Michael T. Light, *Have Racial and Ethnic Disparities in Sentencing Declined?*, 48 CRIME & JUST. 365, 366 (2019) <https://www.journals.uchicago.edu/doi/pdfplus/10.1086/701505> [<https://perma.cc/HZB3-CQF2>] (discussing racial disparities in sentencing); Cassia Spohn, *Race and Sentencing Disparity*, 4 REFORMING CRIM. JUST. 169, 171 (2017) https://law.asu.edu/sites/default/files/pdf/academy_for_justice/9_Criminal_Justice_Reform_Vol_4_Race-and-Sentencing-Disparity.pdf [<https://perma.cc/T9D6-YWXD>] (discussing racial disparities in sentencing).

195. ANANNYA BHATTACHARJEE, WHOSE SAFETY? WOMEN OF COLOR AND THE VIOLENCE OF LAW ENFORCEMENT 20 (2001), <https://www.afsc.org/sites/default/files/documents/whose%20safety.pdf> [<https://perma.cc/TD2T-QLBU>]; see also Chandra Thomas Whitfield, *It's Complicated: Why Some Black Women Refuse to Call the Police When Their Black Male Partners Threaten Their Lives*, THE GRIO (Apr. 10, 2019), <https://thegrio.com/2019/04/10/why-some-black-women-refuse-to-call-police-black-male-partners/> [<https://perma.cc/8BKQ-JWTJ>] (discussing this issue in the context of domestic violence against Black women); *Black Immigrant Lives Are Under Attack*, THE REFUGEE & IMMIGRANT CTR. FOR EDUC. & LEGAL SERVS., <https://www.raicestexas.org/2020/07/22/black-immigrant-lives-are-under-attack/> [<https://perma.cc/YF2T-Z5VP>] (demonstrating that Black immigrants in the United States are subjected to high rates of family detention, solitary confinement, asylum rejection, and deportation on criminal grounds).

196. See *infra* Section IV.A.5.

Among the federal labor trafficking prosecutions active in 2019, the top forms of coercion and control reportedly used by traffickers were physical isolation, physical abuse, threats of physical abuse, verbal or emotional abuse, and withholding pay.¹⁹⁷ Foreign national victims also commonly had their immigration documents withheld and experienced threats of deportation.¹⁹⁸

Even after a particular trafficking situation ends, in some instances, trafficked individuals nonetheless continue to fear their traffickers and are compelled by traffickers' prior or ongoing threats and other forms of coercion, including threats of retaliation for cooperating with law enforcement.¹⁹⁹ These understandable fears can impact survivors' willingness to participate in a criminal investigation.²⁰⁰

For example, in an instance of debt bondage involving a young farmworker, his labor recruiter took the deed to the farmworker's family land in his country of origin as security for a loan to pay for travel expenses.²⁰¹ The recruiter told the farmworker he had to work for him until the loan was paid off. Failure to comply would result in loss of the family land. With the assistance of a legal services agency, the farmworker fled the labor camp where he had lived under the supervision of the trafficker. He was provided safe housing, free food, and legal and other services. However, a few weeks after fleeing, he contacted and returned to the trafficker because he continued to fear what would happen to his family if he failed to do so.

The power of traffickers' coercion does not necessarily disappear the moment the trafficked individual is no longer under their immediate control.²⁰² This is particularly true when transnational workers are involved and where, for example, traffickers may continue to make threats against family members or communities in the worker's country of origin, including

197. HUM. TRAFFICKING INST., *supra* note 105, at 33. There may have been other forms of coercion that are not included in the materials the HTI reviews for the purposes of its report.

198. *Id.*

199. OWENS ET AL., *supra* note 69, at 127, 209 (explaining that foreign national victims' traffickers can have connections in the country of origin who can continue threaten the victim and their family); see Katie Mettler, *An African Girl Was Forced to Work Like a 'Slave' for 16 Years. Neighbors Helped Her Escape.*, WASH. POST (Apr. 23, 2019, 5:44 PM), <https://www.washingtonpost.com/nation/2019/04/23/texas-couple-who-enslaved-young-girl-sentenced-years-prison-then-deportation/> [<https://perma.cc/R3B9-JM4Z>] ("Forced labor trafficking cases are notoriously difficult to prosecute — in part because victims are often afraid to speak out.").

200. *See infra* Section VI.B.4 (discussing victim preferences regarding whether to participate in a prosecution or whether a prosecution should move forward).

201. This anecdote is based upon the author's work in an unfiled matter. Therefore, neither a case name nor identifying information can be provided.

202. *See, e.g.*, BAUER, *supra* note 188, at 16.

threats of physical harm or blacklisting from future employment.²⁰³ Even if law enforcement officials try, they may struggle to meaningfully intervene and disrupt the coercion. Furthermore, even where traffickers stop actively making threats, survivors may continue to fear prior threats.

While sometimes a barrier, trafficked individuals' fears should not be viewed as the primary reason for the failure to prosecute labor trafficking. There have been multiple instances where individuals who experienced labor trafficking were eager to participate in a prosecution, yet federal prosecutors declined.²⁰⁴ Furthermore, when trafficked individuals are provided the time, services, and security they need, they are much more likely to be willing and able to engage in investigations and subsequent prosecutions.²⁰⁵

7. *Skepticism of Foreign National Victims*

Ironically, immigration remedies intended to make it easier to prosecute labor trafficking cases may have become barriers to it.

Continued Presence is a temporary immigration status granted to victims of human trafficking that are designated by law enforcement as potential witnesses in a future prosecution.²⁰⁶ This status permits the individual to remain in the United States, to work, and to receive government benefits and services.²⁰⁷ It is intended to be immediately sought when law enforcement officers determine an individual is a likely victim of human trafficking.²⁰⁸

203. *Werner*, *supra* note 188 (“Migrant workers from politically unstable countries face an additional layer of vulnerability. With political instability, resources supporting a robust civil society decline. Corruption often takes its place and impunity pervades all levels of the justice system. Transnational migrants returning home, or the families of the migrants who remained home, are painfully aware that threats to themselves and their loved ones will go unpunished, and local law enforcement may even be complicit in these threats. Further, networks of contractors will often exercise near total control over the recruitment market across swaths of territory in source countries. This monopoly, coupled with impunity, give contractors disproportionate power over the transnational migrants they recruit.” (footnote omitted)); *see, e.g.*, *BAUER*, *supra* note 188, at 16–17 (noting that representatives for an employer traveled to a remote Guatemalan community to coerce guestworkers into excluding themselves from participation in a class action for unpaid wages by threatening not to renew their visas in future years). In some instances, deeds to the guestworkers’ family homes had been given as collateral. *Id.* at 11.

204. *See, e.g.*, discussion *supra* Part I.

205. *See infra* Section VI.B.4.

206. 28 C.F.R. § 1100.35 (2020). *See generally* U.S. IMMIGR. & CUSTOMS ENF’T, CONTINUED PRESENCE: TEMPORARY IMMIGRATION DESIGNATION FOR VICTIMS OF HUMAN TRAFFICKING, https://www.dhs.gov/sites/default/files/publications/blue-campaign/19_1028_bc-pamphlet-continued-presence.pdf [<https://perma.cc/4NHQ-683L>].

207. 22 U.S.C. § 7105(b)(1)(A); *see* 8 C.F.R. § 214.11(d)(3)(iii) (2020).

208. U.S. IMMIGR. & CUSTOMS ENF’T, *supra* note 206 (“Law enforcement is urged to make an expeditious initial determination of CP eligibility and to complete the application as

Some law enforcement officers are nonetheless reluctant to seek Continued Presence for victims.²⁰⁹ Advocates continue to raise concerns that very few requests for Continued Presence are made and that, when made, they are more likely in cases involving sex trafficking.²¹⁰

Longer-term and more stable immigration relief is also available for foreign national victims of labor trafficking, including T and U visas.²¹¹ Applications for each are strengthened by a law enforcement officer's certification of the applicant as a victim of human trafficking.²¹² Law enforcement agencies are not required to sign these certifications, and some agencies refuse to do so or unnecessarily delay the process.²¹³

Some law enforcement officials have expressed skepticism about the veracity of foreign nationals' reports of trafficking because the officers believe they must be ruses invented to secure immigration relief.²¹⁴ Among other things, this betrays an absence of effective training.

This law enforcement skepticism is yet another impediment to investigating and prosecuting labor trafficking. It means officers are less likely to seriously investigate allegations or to assist in securing either Continued Presence, a T visa, or a U visa. Consequently, skeptical officers fail to facilitate the stability and security that trafficked individuals need to participate in a successful prosecution.

8. *Insufficient Training*

Labor trafficking demands persistent and thoughtful approaches to law enforcement and strategies that differ from more traditional policing

early as practicable upon encountering a victim. A best practice is for law enforcement to bring the paperwork to an interview; if the individual credibly appears to be a victim and law enforcement will take any additional actions, then CP should be requested. . . . Law enforcement should not be selective but should request CP for every identified victim who lacks immigration status and may be a potential witness to be available, if necessary, for the investigation.”).

209. OWENS ET AL., *supra* note 69, at 133–35, 202; *see* González, *supra* note 185, at 849–50.

210. *See* 2018 REPORT, *supra* note 98, at 446.

211. *Id.* at 445–46. Under the Trump Administration, T visas became more difficult to secure. *See, e.g.,* Michael Gordon, *Lured to U.S. at 16, She Sought Visa for Trafficking Victims. Now She May Be Deported*, CHARLOTTE OBSERVER (Sept. 11, 2020, 1:47 PM), <https://www.charlotteobserver.com/news/local/crime/article245622580.html> [<https://perma.cc/QC9X-XNX6>].

212. 8 U.S.C. § 1184(p)(1); § 214.11(d)(3).

213. Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273, 303–06 (2018); Haynes, *supra* note 159, 359–60.

214. *See* Lauren Smiley, *U-Visa: Illegal Immigrants Become Legal Residents via Crime Victimization*, SF WEEKLY (Mar. 16, 2011, 4:00 AM), <https://www.sfweekly.com/news/u-visa-illegal-immigrants-become-legal-residents-via-crime-victimization/> [<https://perma.cc/4WT6-NN3>].

methods.²¹⁵ Specialized training is needed to ensure that law enforcement officers are more effective at identifying labor trafficking and investigating it once it is identified—including engaging with victims appropriately.²¹⁶ Both front-line officers and more experienced officers, such as detectives, need customized labor trafficking training that focuses on their role in identification and investigation, the unique patterns and types of evidence they should gather, and the investigation tools available to them.²¹⁷

State and local police officers are more likely than federal agents to encounter ongoing labor trafficking in the community.²¹⁸ Yet they currently receive insufficient training on labor trafficking—as do federal law enforcement.²¹⁹ For example, a 2020 report by the Little Hoover Commission on coordinating a human trafficking response in California found that officers and public safety dispatchers have access to only minimal training on labor trafficking.²²⁰ To the extent there is human trafficking training at all, it focuses primarily on sex trafficking.²²¹

Hopefully progress has been made in the intervening years, but a comprehensive 2008 study of 3,000 state, county, and local law enforcement agencies found that roughly 75% of those studied perceived human trafficking

215. See *infra* Section IV.A.9.

216. See Farrell et al., *supra* note 155, at 38, 44; Deborah Grubb & Katherine Bennett, *The Readiness of Local Law Enforcement to Engage in US Anti-Trafficking Efforts: An Assessment of Human Trafficking Training and Awareness of Local, County, and State Law Enforcement Agencies in the State of Georgia*, 13 POLICE PRAC. & RSCH. 487, 489 (2012); Claire M. Renzetti et al., *Does Training Make a Difference? An Evaluation of a Specialized Human Trafficking Training Module for Law Enforcement Officers*, 38 J. CRIME & JUST. 334, 336 (2015); Deborah G. Wilson et al., *Trafficking in Human Beings: Training and Services Among US Law Enforcement Agencies*, 7 POLICE PRAC. & RSCH. 149, 158 (2006); U.S. DEP'T OF JUST. ET AL., FEDERAL STRATEGIC ACTION PLAN ON SERVICES FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES 2013–2017 32 (2014) <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/FederalHumanTraffickingStrategicPlan.pdf> [<https://perma.cc/26CJ-6CQN>] (“The ability of law enforcement to effectively identify victims and hold offenders accountable depends on their capacity to connect with and support victims. It is also critically important that they know of services and immigration benefits available for victims of human trafficking.”).

217. Farrell et al., *supra* note 155, at 44.

218. Grubb & Bennett, *supra* note 216, at 489. When trafficked individuals are out of the immediate labor trafficking situation and are receiving services, their attorney or other service provider is more likely to reach out to the FBI or another federal agency rather than state or local law enforcement. See ROE-SEPOWITZ ET AL., *supra* note 45, at 28.

219. See LITTLE HOOVER COMMISSION, *supra* note 88, at 13; AMY FARRELL ET AL., INST. ON RACE & JUST., UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING 112 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/222752.pdf> (finding that, in 2008, “only 18 percent of local, county or state law enforcement agencies nationwide have had some type of human trafficking training”).

220. LITTLE HOOVER COMM'N, *supra* note 88, at 13.

221. Farrell et al., *supra* note 155, at 38.

of any kind to be rare or nonexistent in their jurisdiction.²²² Law enforcement officers are highly unlikely to find labor trafficking if they do not believe it is there in the first place.²²³

Law enforcement officials may also reasonably struggle to understand exactly what conduct criminal labor trafficking statutes cover.²²⁴ In a 2019 study of labor trafficking in four U.S. communities, participating law enforcement officers raised concerns over not receiving sufficient guidance on how to distinguish labor trafficking crimes from civil labor and employment matters.²²⁵

To the extent that labor trafficking investigations involve intricacies related to wages, work visas, and other potentially unfamiliar topics, the prospect of investigating may seem cumbersome, overwhelming, or irrelevant.²²⁶ Additionally, law enforcement officers may not know which agencies might be useful partners, thus making investigations seem even more untenable.²²⁷

9. *Maladaptive Law Enforcement Strategies*

Although existing law enforcement strategies may function effectively for some purposes, they operate as substantial barriers to the identification and investigation of labor trafficking. These maladaptive strategies include reactive policing models, reliance on traditional methods, and agency unit organization.

a. *Reactive Policing*

Law enforcement agencies receive few reports of labor trafficking.²²⁸ Members of the public and victims themselves may not realize that the labor exploitation they are seeing is human trafficking.²²⁹ This is particularly concerning because, until now, federal labor trafficking cases have primarily come to light only after trafficked individuals proactively reported to law enforcement or had a third party, such as an advocate or friend, do so on their

222. FARRELL ET AL., *supra* note 43, at 3. *But see* Farrell et al., *supra* note 155, at 38 (noting a 2019 report asserts law enforcement officers believe labor trafficking occurs in their jurisdictions).

223. FARRELL ET AL., *supra* note 43, at 112.

224. Farrell et al., *supra* note 155, at 42.

225. *Id.*

226. Telephone Interview with Patricia Medige, *supra* note 142.

227. Farrell et al., *supra* note 155, at 39, 46. For example, a state's department of labor that is tasked with enforcing minimum wage and overtime requirements and could be a helpful partner in a labor trafficking investigation.

228. *Id.* at 37.

229. *See supra* Section IV.A.2 (discussing pervasive myths related to labor trafficking).

behalf.²³⁰ If law enforcement waits for compelling reports from victims to percolate up to them, there will likely continue to be very limited numbers of labor trafficking prosecutions.²³¹

b. Reliance on Traditional Policing Methods

Bringing change to policing can be a challenging and slow process.²³² The laws that criminalize labor trafficking are relatively new. In its current form, labor trafficking has been criminalized under federal law for just over twenty years and a crime under state laws for even fewer.²³³

Due to law enforcement's substantial and longstanding experience policing vice and commercial sex, officers are more prepared to identify and investigate the criminal activity and networks commonly associated with sex trafficking.²³⁴ Reliance on traditional policing methods, including undercover and sting operations, will yield few—if any—labor trafficking leads.²³⁵ Other techniques used for sex trafficking investigations, such as online surveillance, also may not readily apply to labor trafficking.²³⁶

Traditionally, identification and investigation of sex trafficking by federal officials has occurred using a task force model and with the participation of law enforcement officials already policing commercial sex.²³⁷ They tend to use law enforcement tools including operations targeted to both sellers and buyers, electronic surveillance, financial investigations, and outreach to those most likely to come in contact with individuals experiencing sex trafficking.²³⁸ As noted above, in comparison, most federal labor trafficking prosecutions are initiated by reports to law enforcement.²³⁹ More proactive, creative, and customized approaches are needed to identify and investigate these crimes.

Furthermore, labor trafficking often occurs in locations and industries that law enforcement does not typically police.²⁴⁰ These include homes of wealthy individuals, country clubs, construction sites, and farm labor camps located

230. Desai & Tepfer, *supra* note 96, at 26.

231. See Farrell et al., *supra* note 155, at 38 (“[L]abor-trafficked persons typically do not present themselves as victims . . .”).

232. See *id.* at 38–39 (detailing challenges to change police department policies).

233. See, e.g., ARK. CODE ANN. § 5-18-101 to 105 (West, Westlaw through 2020 1st Extraordinary Sess. and the 2020 Fiscal Sess. of the 92d Ark. Gen. Assemb.).

234. Telephone Interview with Stacie Jonas, *supra* note 138; Telephone Interview with Susan French, *supra* note 193; Farrell et al., *supra* note 155, at 44.

235. Farrell et al., *supra* note 155, at 39.

236. Desai & Tepfer, *supra* note 96, at 26.

237. *Id.*

238. *Id.*

239. *Id.*

240. Farrell et al., *supra* note 155, at 39, 46.

deep within private property.²⁴¹ Law enforcement's absence makes it more likely that labor trafficking will go undetected.

c. Agency Unit Organization

Many law enforcement agencies—particularly local ones—do not have a suitable or obvious unit that can be responsible for investigating labor trafficking; in the absence of such a home, labor trafficking can fall through the cracks.²⁴² Law enforcement agencies with existing training, a dedicated unit, or established protocols dedicated to human trafficking are two to three times more likely to identify it.²⁴³ Currently, when human trafficking is assigned to a unit, it is likely to be part of a vice unit that tends to focus on sex trafficking.²⁴⁴ This lack of dedicated units is another example of the absence of widespread institutional commitment to addressing labor trafficking.²⁴⁵

10. Additional Barriers

Labor traffickers sometimes hold positions considered to be legitimate—even prestigious—and thus may not be as readily suspected of the serious and degrading crimes they commit.²⁴⁶ A study found that individuals arrested for labor trafficking from 2013 through 2016 (and for whom such information was available) held seemingly legitimate jobs as small business owners, law

241. *See id.* at 46. However, labor trafficking also occurs in spaces like homes of lower-income individuals, hotels, and motels that are more regularly policed for crimes including domestic violence, drug offenses, and commercial sex. *See, e.g.*, FREEDOM NETWORK USA, *supra* note 13.

242. Telephone Interview with Patricia Medige, *supra* note 142; Farrell et al., *supra* note 155, at 44.

243. FARRELL ET AL., *supra* note 43, at 115.

244. *Id.* at 108–109. While not specifically a vice unit, labor trafficking cases are worked under the FBI's Crimes Against Children and Human Trafficking program, and the FBI operates FBI Child Exploitation and Human Trafficking Task Forces in most field offices to collaborate with state and local law enforcement; the names of the program and taskforce themselves suggest the institutional focus may tend towards sexual exploitation. *What We Investigate: Human Trafficking*, FBI, <https://www.fbi.gov/investigate/violent-crime/human-trafficking> [<https://perma.cc/9EDP-U68M>]. Within HSI, there are “dedicated human trafficking investigative groups in the Special Agent in Charge field offices” throughout the United States. *Human Trafficking*, U.S. IMMIGR. & CUSTOMS ENF'T (Feb. 13, 2020), <https://www.ice.gov/features/human-trafficking> [<https://perma.cc/V3W9-D9AR>].

245. Farrell et al., *supra* note 155, at 44–45.

246. *See* Ieke De Vries, *Connected to Crime: An Exploration of the Nesting of Labour Trafficking and Exploitation in Legitimate Markets*, 59 BRIT. J. CRIMINOLOGY 209 (2019) (identifying legitimate industries that are prone to labor trafficking).

enforcement officers, and even—in a small number of instances—public figures.²⁴⁷

Bias against immigrants can also serve as a barrier to identifying, investigating, and ultimately prosecuting labor trafficking cases.²⁴⁸ Related barriers include cultural and language differences between law enforcement officers and trafficked individuals.²⁴⁹

An additional hurdle is that labor trafficking occurs in diverse settings.²⁵⁰ It can be challenging for law enforcement to gain the competence needed to work across so many industries.²⁵¹ Furthermore, the definitions of the labor trafficking crimes themselves may be confusing to officers seeking to enforce them or may raise concerns regarding misinterpretation of the law.²⁵² Local front-line law enforcement officers generally work in shifts and have limited time and resources to conduct their investigations; these limitations are not conducive to investigation of labor trafficking. Finally, other barriers include the impacts of trauma²⁵³ and the fact that trafficked individuals do not necessarily self-identify.²⁵⁴

B. Barriers to Prosecution

Many of the barriers that impede identification and investigation of labor trafficking also influence whether prosecutors move forward with criminal charges.²⁵⁵ Additionally, labor trafficking prosecutions are further limited by case complexity, proof concerns, desire for the “perfect” victim, institutional disincentives, and insufficient resources.

247. ROE-SEPOWITZ ET AL., *supra* note 45, at 7 (“The majority of labor traffickers (n = 61, 78.2%) worked in private or service industries (truck or taxi drivers, repairmen, own or operate restaurants or owners of small businesses). Some labor traffickers (n = 5, 6.4%) owned or worked at construction job, or were public figures (athlete, actor, politician, member of royal family) (n=4, 5.1%). Three (3.8%) labor traffickers held positions of authority, such as law enforcement, firefighter, nurse, etc. Two (2.6%) labor traffickers were military officials, two (2.6%) labor traffickers were students (at a college or university), and one (1.3%) labor trafficker worked at school.”).

248. See González, *supra* note 185, at 852.

249. Desai & Tepfer, *supra* note 96, at 25–26; Farrell et al., *supra* note 155, at 39.

250. LITTLE HOOVER COMM’N, *supra* note 88, at 12.

251. *Id.*

252. Farrell et al., *supra* note 155, at 43.

253. These impacts include traumatic bonding, difficulty with memory, and mental health challenges. See 2018 REPORT, *supra* note 98, at 24. At least to some extent, impacts can be mitigated by access to supportive services and other resources that help to provide long-term stability. González, *supra* note 185, at 861–62.

254. Farrell et al., *supra* note 155, at 37.

255. See *supra* Section IV.A.

1. *Case Complexity*

Human trafficking cases can be challenging to prosecute.²⁵⁶ According to the CRT, “each case requires a dedication of time, resources, and specialized skill in jurisdictions across the country and around the globe.”²⁵⁷ In each of its last three performance reports, the CRT acknowledged the difficulty and demands of investigating and prosecuting human trafficking, which it planned to counter by dedicating “time, resources, and specialized skill in jurisdictions across the country.”²⁵⁸ Prosecutions require substantial time, in part, to ensure victim witnesses are stable and able to testify credibly.²⁵⁹

Labor trafficking cases, in particular, can be demanding.²⁶⁰ In addition to the demands identified throughout this Article, the unlawful conduct often unfolds over a period of months or even years.²⁶¹ There are frequently multiple victims and jurisdictions involved.²⁶² Pursuing prominent or influential members of the business community in labor trafficking cases can also be challenging and politically unpopular.²⁶³ Among other things, defendants with financial assets can more readily mount vigorous legal defenses.

2. *Proof Concerns*

Labor trafficking prosecutions frequently require prosecutors to prove psychological coercion beyond a reasonable doubt.²⁶⁴ Prosecutors in labor trafficking cases must show the use of force, certain forms of fraud, or

256. U.S. DEP’T OF JUST., GENERAL LEGAL ACTIVITIES CIVIL RIGHTS DIVISION (CRT) FY 2019 BUDGET REQUEST AT A GLANCE, <https://www.justice.gov/file/1033091/download> [<https://perma.cc/K9U7-4AMJ>] [hereinafter FY 2019 BUDGET REQUEST]. *But see* Daniels, *supra* note 101, at 176–77 (explaining that the DOJ is particularly well-positioned to prosecute these long-term and complex cases).

257. FY 2019 BUDGET REQUEST, *supra* note 256.

258. *E.g., id.* Among other things, investigations of labor trafficking can require securing a victim statement, corroborating a victim’s immigration and personal history, identifying and interviewing witnesses, and collecting business records that are often protected by non-disclosure orders through a combination of *ex parte* orders, subpoenas, and search warrants. E-mail from Anonymous (Dec. 11, 2020) (on file with author).

259. Susan French & Cindy C. Liou, *The Importance of Strategic, Victim-Centred Human Trafficking Prosecutions*, 6 ANTI-TRAFFICKING REV. 114, 115 (2016).

260. *See* FEEHS & CURRIER, *supra* note 105, at 66–67. In 2019, charges against labor trafficking defendants took an average of one year longer to resolve than those primarily involving sex trafficking. *Id.* at 67. Resolution of labor trafficking charges ranged from fifteen years to just three months with an average of three years and three months. *Id.*

261. *Id.* at 66.

262. *Id.*

263. Telephone Interview with Patricia Medige, *supra* note 142.

264. *See* 22 U.S.C. § 7102(11); FEEHS & RICHMOND, *supra* note 111, at 62.

coercion.²⁶⁵ Specifically, the crime of forced labor requires that the defendant knowingly provided or obtained the labor or services using at least one of the following: (1) “force, threats of force, physical restraint, or threats of physical restraint”; (2) any harm, “whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm”; (3) “abuse or threatened abuse of law or legal process . . . whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action”; or (4) “any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.”²⁶⁶ The crime of “trafficking with respect to peonage, slavery, involuntary servitude, or forced labor” requires a showing of similar types of conduct by defendants.²⁶⁷ The TVPA extends criminal liability to any person who “knowingly recruits, harbors, transports, provides,

265. See 18 U.S.C. §§ 1589–1590.

266. 18 U.S.C. § 1589. Additionally, someone who knowingly benefits from a venture that engaged in this conduct and who knew or was in reckless disregard of the fact that it did so can also be charged under the statute. *Id.* § 1589(b).

267. 18 U.S.C. § 1590; see, e.g., *Adia v. Grandeur Mgmt., Inc.*, 933 F.3d 89, 94 (2d Cir. 2019) (“Adia alleges that when he was working in South Dakota, Younas recruited him to come work for Grandeur by saying that he would sponsor his H-2B transfer application. This allegation is distinct from the forced labor allegations. The defendants recruited Adia by promising to transfer and sponsor his H-2B visa, then forced him to work for less than he was owed by threatening to revoke that sponsorship. Section 1590 employs the disjunctive ‘or’ in delineating the ways in which a defendant can violate the statute. Therefore, if a defendant violates section 1589, he also violates section 1590 if he recruited the person to perform forced labor. As Adia has plausibly alleged claims for forced labor, he has also plausibly alleged a claim for trafficking based on the allegation related to his recruitment.”); *Paguirigan v. Prompt Nursing Emp. Agency LLC*, 286 F. Supp. 3d 430, 439 (E.D.N.Y. 2017) (“Plaintiff alleges that she was recruited by defendants Luyun, Philipson, and Sentosa Agency in the Philippines to work in defendants’ nursing home in New York, that she signed an employment contract—signed by defendant Landa—to that effect, and that she eventually worked for defendant Spring Creek as a nursing manager. In combination with her claims alleging violations of 18 U.S.C. § 1589(a), plaintiff has properly stated a claim under § 1590(a) of the TVPA.” (citations omitted)); *Baxla v. Chaudhri*, 225 F. Supp. 3d 588, 593 (E.D. Va. 2016) (“Plaintiff’s Complaint alleges that Nancy recruited Ms. Baxla by ‘offering to arrange a job in the United States’ for her to perform childcare work. After Ms. Baxla accepted Nancy’s offer, Nancy arranged for Ms. Baxla’s ticket to travel to the United States and travel documents, including a two-year visa. Plaintiff traveled to the United States in 2005, where she met Defendants at the airport. Ms. Baxla had not met or spoken with the Defendants previously. Defendants then transported her from the airport to their home in Virginia, where she lived, other than for two brief periods, from 2005 until 2015. During that time, Ms. Baxla worked for Defendants, providing childcare and housekeeping services, for \$350 per month.” (citations omitted)).

or obtains by any means, any person for labor or services in violation of [Chapter 77 of the U.S. Criminal Code].”²⁶⁸

By comparison, in sex trafficking cases involving minor victims, there is no need to prove force, threats of force, fraud, or coercion of any kind.²⁶⁹ Essentially, so long as the prosecution can show a minor engaged in commercial sex, which in some cases can be proved without victim testimony, it has met the most challenging aspect of its burden of proof.²⁷⁰ This may explain, at least in part, why minor sex trafficking is prosecuted more frequently than either adult sex trafficking or labor trafficking.²⁷¹

The majority of recent human trafficking prosecutions involved exclusively child sex trafficking victims: 65.8% of all federal human trafficking prosecutions in 2017,²⁷² 54.4% in 2018,²⁷³ and 60.1% in 2019.²⁷⁴ Another portion of these prosecutions involved sex trafficking of minors and adults: 15.4% in 2017,²⁷⁵ 17.1% in 2018,²⁷⁶ and 19.6% in 2019.²⁷⁷

Sting operations are another way that prosecutors can mitigate their concerns about proof at trial—at least in sex trafficking prosecutions. Some sex trafficking cases involve sting operations, where a law enforcement

268. 18 U.S.C. § 1590(a).

269. Telephone Interview with Stacie Jonas, *supra* note 138; *see also* 18 U.S.C. § 1591 (providing that individuals may be charged with sex trafficking minors without proving “force, threats of force, fraud, [or] coercion”).

270. 18 U.S.C. § 1591(a) (“Whoever *knowingly*—(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, *recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).*” (emphasis added)). The knowledge requirement is reduced when minors are involved. 18 U.S.C. § 1591(c) (“In a prosecution under subsection (a)(1) in which the *defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.*” (emphasis added)).

271. Telephone Interview with Stacie Jonas, *supra* note 138; *see* FEEHS & CURRIER, *supra* note 105, at 20; Farrell et al., *supra* note 155, at 43.

272. FEEHS & RICHMOND, *supra* note 111, at 14. In some instances, the age of the victim is not publicly available information. *Id.*

273. CURRIER & FEEHS, *supra* note 2, at 7.

274. FEEHS & CURRIER, *supra* note 105, at 20.

275. FEEHS & RICHMOND, *supra* note 111, at 14.

276. CURRIER & FEEHS, *supra* note 2, at 8.

277. FEEHS & CURRIER, *supra* note 105, at 20.

officer poses as a would-be victim.²⁷⁸ In those cases, the need for a testifying victim is obviated altogether. In 2019, eighteen sex trafficking cases were filed based solely on sting operations (12.4% of all human trafficking prosecutions initiated in 2019).²⁷⁹ By contrast, a total of nine labor trafficking cases were filed that same year.²⁸⁰

Prosecutors themselves may be skeptical about whether the psychological coercion involved in an exploitative situation was sufficient to constitute a labor trafficking crime.²⁸¹ Even in instances when prosecutors believe labor trafficking indisputably occurred, if there is no clear evidence of physical force, they may be reluctant to move forward with charges.²⁸² They may be concerned about whether they can successfully meet the high burden of proof and convince jurors that verbal threats or psychological coercion took place or that the coercion was sufficient to constitute labor trafficking.²⁸³ This is particularly true in cases where there is limited or no corroboration of the coercion, including cases with just one victim.²⁸⁴ In the absence of other evidence, prosecutors may be leery of time-consuming and complex cases that rest, in large part, on victim testimony.²⁸⁵ The government must consider—as with some sexual violence cases, for example—whether it can carry its high burden without corroboration of victim reports.²⁸⁶

278. Telephone Interview with Stacie Jonas, *supra* note 138; CURRIER & FEEHS, *supra* note 2, at 8.

279. FEEHS & CURRIER, *supra* note 105, at 38.

280. *Id.*

281. *See* Farrell et al., *supra* note 155, at 42–43.

282. *See id.* at 43.

283. Telephone Interview with Patricia Medige, *supra* note 142; Luke Barr, *Prosecuting Human Traffickers Poses Significant Challenges, Top Prosecutor Says*, ABC 7 NEWS (Aug. 12, 2019), <https://abc7news.com/prosecuting-human-traffickers-poses-significant-challenges-top-prosecutor-says/5460249/> [<https://perma.cc/29G4-W3ZJ>] (“Hilary Axam, a top prosecutor with the Human Trafficking Unit at the Department of Justice, said that it is hard to prove that the victim was indeed being trafficked against the victim’s will, because it requires getting into the victim’s mind. ‘You have to prove the victim’s state of mind,’ Axam said at a Police Executive Research Forum conference in Washington this week. ‘It’s a heavy burden of proof.’”).

284. Desai & Tepfer, *supra* note 96, at 25; Farrell et al., *supra* note 155, at 47.

285. *See* Telephone Interview with Susan French, *supra* note 193. Outcomes of federal prosecutions for sex trafficking of minors tend to be more successful. *See, e.g.*, FEEHS & RICHMOND, *supra* note 111, at 27–28. For example, in 2017, all defendants charged with sex trafficking exclusively involving minors received higher conviction rates than those charged with other forms of human trafficking. *Id.*

286. E-mail from Anonymous, *supra* note 258.

3. *Desire for the “Perfect” Victim*

Prosecutors, particularly inexperienced ones, may be concerned about inconsistencies in victim statements or the fact that a victim participated in illegal conduct—for example, entering the United States without authorization or using a false social security number.²⁸⁷ Anecdotally, it is not uncommon for victims to provide inconsistent statements because they either fail to disclose information, disclose progressively over a period of time, or offer statements to protect themselves or their traffickers.²⁸⁸ Of course, many of these challenges are expected and reasonable given the complexities of labor trafficking. Further, trauma caused by labor trafficking can impact memory, including victims’ ability to recount their experiences in a linear manner, as well as their trust in others and thus their ability and willingness to share complete and consistent reports of their victimization.²⁸⁹ Preoccupation with identifying the “perfect” victim improperly discourages prosecutors from bringing labor trafficking cases.²⁹⁰

4. *Institutional Disincentives*

When labor trafficking is not prioritized by the DOJ or by the U.S. attorneys leading each district, it is far less likely to receive necessary resources or attention.²⁹¹ Furthermore, to the extent labor trafficking cases are viewed as challenging or risky, overreliance within the DOJ on successful case outcomes as a primary performance measure for attorneys, districts, or divisions may discourage prosecutors from bringing these cases at all.²⁹²

The DOJ’s most recent strategic plan included no meaningful mention of human trafficking at all.²⁹³ Nothing in the plan, its attendant strategies, or its performance indicators directly relate to labor trafficking.²⁹⁴

287. Telephone Interview with Susan French, *supra* note 193.

288. E-mail from Anonymous, *supra* note 258.

289. See González, *supra* note 185, at 861.

290. E-mail from Susan French, Human Trafficking Att’y Consultant, Former DOJ Trafficking in Pers. Prosecutor (Dec. 23, 2020) (on file with author).

291. *Cf.* Daniels, *supra* note 101, at 186 (arguing that the “government has the ability to drive up federal human trafficking prosecutions when the investment is made”).

292. See Farrell et al., *supra* note 155, at 47.

293. See OFF. OF THE ATT’Y GEN., U.S. DEP’T OF JUST., FY 2018–2022 STRATEGIC PLAN 1 (2018), <https://www.justice.gov/jmd/page/file/1071066/download> [<https://perma.cc/GDZ3-8DR2>] (describing DOJ’s strategic goals to: (1) enhance national security and counter the threat of terrorism; (2) secure the borders and enhance immigration enforcement and adjudication; (3) reduce violent crime and promote public safety; and (4) promote rule of law, integrity, and good government).

294. *But see id.* at 16 (listing human trafficking within one of DOJ’s broader strategic goals of reducing violent crime).

Within the CRT, human trafficking has actually been identified as a priority.²⁹⁵ For fiscal years 2016 through 2019, the CRT selected human trafficking as one of a handful of its key enforcement areas.²⁹⁶ In 2019, the CRT reported it would “continue its highly successful human trafficking program.”²⁹⁷ The CRT did not specify a particular focus on labor, however, and a reference to sexual assault in its discussion of human trafficking suggests its focus may primarily be on sex trafficking.²⁹⁸ If the CRT’s leadership is focused on sex trafficking, prosecutors may not as readily invest the time and resources necessary to pursue labor trafficking.²⁹⁹

295. See FY 2019 BUDGET REQUEST, *supra* note 256.

296. *Id.*; U.S. DEP’T OF JUST., GENERAL LEGAL ACTIVITIES CIVIL RIGHTS DIVISION (CRT) FY 2018 BUDGET REQUEST AT A GLANCE, <https://www.justice.gov/jmd/page/file/968381/download> [<https://perma.cc/P4J5-739H>] [hereinafter FY 2018 BUDGET REQUEST]; U.S. DEP’T OF JUST., GENERAL LEGAL ACTIVITIES CIVIL RIGHTS DIVISION (CRT) FY 2017 BUDGET REQUEST AT A GLANCE, <https://www.justice.gov/jmd/file/822036/download> [<https://perma.cc/3CTK-KSNH>] [hereinafter FY 2017 BUDGET REQUEST] (“The Division aims to protect victims of human trafficking and to prosecute traffickers. It will continue to expand its already successful human trafficking program by coordinating the launch of Phase II of the Anti-Trafficking Coordination Team (ACTeam) Initiative.”); U.S. DEP’T OF JUST., GENERAL LEGAL ACTIVITIES CIVIL RIGHTS DIVISION (CRT) FY 2016 BUDGET REQUEST AT A GLANCE, https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/16_bs_section_ii_chapter_-_crt.pdf [<https://perma.cc/3XJ9-C3GS>] [hereinafter FY 2016 BUDGET REQUEST] (“Combating human trafficking is among the highest priorities for the Justice Department. The Division and U.S. Attorneys’ Offices brought 236 human trafficking cases from FY 2011 – FY 2014, compared to 169 in the previous four-year period, a 40% increase.”).

297. FY 2019 BUDGET REQUEST, *supra* note 256.

298. See *id.* Sexual assault can occur in labor trafficking, but this is more likely a reference to sex trafficking. The CRT releases its own annual performance budget that includes a list of areas for strategic focus. See *id.* The CRT’s FY 2019 Budget and Performance Congressional Justification generally referred to human trafficking as one of its seven key enforcement areas. *Id.*; FY 2018 BUDGET REQUEST, *supra* note 296; FY 2017 BUDGET REQUEST, *supra* note 296 (“The Division aims to protect victims of human trafficking and to prosecute traffickers. It will continue to expand its already successful human trafficking program by coordinating the launch of Phase II of the Anti-Trafficking Coordination Team (ACTeam) Initiative.”); FY 2016 BUDGET REQUEST, *supra* note 296 (“Combating human trafficking is among the highest priorities for the Justice Department. The Division and U.S. Attorneys’ Offices brought 236 human trafficking cases from FY 2011 – FY 2014, compared to 169 in the previous four-year period, a 40% increase.”).

299. But see U.S. DEP’T OF JUST., GENERAL LEGAL ACTIVITIES CIVIL RIGHTS DIVISION (CRT) FY 2015 BUDGET REQUEST AT A GLANCE, <https://www.justice.gov/sites/default/files/jmd/legacy/2013/12/17/crt.pdf> [<https://perma.cc/6KXS-LR5Z>] [hereinafter FY 2015 BUDGET REPORT] (acknowledging labor trafficking through an effort to “combat human trafficking through a comprehensive enforcement approach focused on all forms of involuntary servitude . . .”). The priorities of leadership in the district where an Assistant U.S. Attorney (AUSA) practices also heavily influence prosecutors’ exercise of discretion.

The DOJ seems to rely on case outcome as the primary metric by which to evaluate success.³⁰⁰ It produces a joint performance report and plan annually.³⁰¹ In 2018, the sole civil rights performance measure listed was to “favorably resolve” 85% of all civil rights cases.³⁰² In the 2019 report and plan, the DOJ ceased employing even that baseline measure for civil rights matters, including for human trafficking cases.³⁰³

While it is a worthwhile objective and certainly a critical goal of undertaking prosecutions, overreliance on the favorable resolution of cases as a performance metric may make prosecutors more reluctant to bring them.³⁰⁴ This is particularly concerning because recent labor trafficking cases have had lower conviction rates than sex trafficking cases.³⁰⁵

5. *Insufficient Resources*

A review by the U.S. Commission on Civil Rights raised concerns about the budget challenges faced by the CRT in recent years, as well as the impact those challenges may have on its ability to bring cases and establish good precedent.³⁰⁶ The CRT’s staffing has declined annually since 2016, and it was subject to a department-wide hiring freeze from early 2017 through early 2019.³⁰⁷ Funding and staffing pressures may inhibit the ability and willingness to bring labor trafficking cases—even after effective trainings or other efforts have been made to increase the number of such cases.³⁰⁸

300. *See, e.g.*, U.S. DEP’T OF JUST., *Budget and Performance*, <https://www.justice.gov/doj/budget-and-performance> [<https://perma.cc/6N73-NS9P>] (providing an example of online annual reports and plans).

301. *Id.*; *see also* U.S. COMM’N ON CIVIL RIGHTS, *supra* note 103, at 81.

302. U.S. DEP’T OF JUST. OFF. OF THE ATT’Y GEN., FY 2017 ANNUAL PERFORMANCE REPORT AND FY 2019 ANNUAL PERFORMANCE PLAN 27–28 (2018).

303. *See* U.S. DEP’T OF JUST., FY 2018 ANNUAL PERFORMANCE REPORT / FY 2020 ANNUAL PERFORMANCE PLAN 33–35, 51 (2019). Instead, it added specific objectives and measures regarding “ensuring . . . the integrity of our immigration system,” and the First Amendment and religious liberty, among others. *See id.*

304. These incentive structures can also impact law enforcement officers’ conduct. *See* Farrell et al., *supra* note 155, at 47. Furthermore, when prosecutors decline to proceed with investigated cases, it may discourage them from pursuing labor trafficking in the future. *See, e.g., id.*

305. The conviction rate for labor trafficking defendants was 83.3% (fifteen) in 2019. FEEHS & CURRIER, *supra* note 105, at 55. Of labor trafficking prosecutions resolved by trial, 80% (eight) of defendants were convicted in 2016, 69.6% (sixteen) in 2017, and 100% (nineteen) in 2018. *Id.* By comparison, in 2019, sex trafficking defendant prosecution rates ranged between 93.7% (163) and 96.2% (126), depending on the age of the victims. *Id.*

306. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 103, at 80.

307. *Id.* at 78.

308. Law enforcement agencies can also struggle with insufficient resources. *See, e.g.,* Farrell et al., *supra* note 155, at 45.

Taken together, case complexity, proof concerns, the desire for a “perfect” victim, institutional disincentives, and insufficient resources hamper prosecutors’ efforts to bring federal labor trafficking cases.

V. THE CASE FOR INCREASED PROSECUTION

Prosecution is not appropriate in every instance. Involvement of the criminal justice system is certainly not always desirable or helpful.³⁰⁹ This Part considers arguments against pursuing increased labor trafficking prosecutions and proposes a nuanced and strategic approach to holding more labor traffickers and those who knowingly benefit from labor trafficking criminally liable.³¹⁰

Prosecution by no means guarantees—or facilitates—healing for survivors.³¹¹ A study by the Urban Institute considered whether criminal prosecution best meets human trafficking survivors’ needs or achieves the justice they seek.³¹² Surveyed survivors expressed skepticism over whether the criminal justice system could actually achieve justice, including whether it could prevent future trafficking.³¹³ They identified alternative forms of justice worthy of pursuit, including moving on from trafficking, gaining autonomy, and achieving their personal goals.³¹⁴

309. For example, in some cases, victims do not want to participate in a criminal prosecution but would have to do so for their trafficker to be convicted. Kate D’Adamo, *Prioritising Prosecutions is the Wrong Approach*, ANTI-TRAFFICKING REV., May 2016, at 111, 112.

310. Aspects of this topic were the subject of a debate on the utility of prosecution published by the Anti-Trafficking Review. See generally Anne T Gallagher, *Editorial: The Problems and Prospects of Trafficking Prosecutions: Ending Impunity and Securing Justice*, ANTI-TRAFFICKING REV., May 2016, at 1, 9–10.

311. D’Adamo, *supra* note 309, at 111–13.

312. EVELYN MCCOY ET AL., URB. INST., *DELIVERING JUSTICE FOR HUMAN TRAFFICKING SURVIVORS: IMPLICATIONS FOR PRACTICE* 3, 6 (2018). The authors of this study noted that its results were limited because data was collected only in metropolitan areas from survivors who accessed services and remained in touch with providers. *Id.* at 19. Further, the results were skewed toward victims of labor trafficking over victims of sex trafficking. *Id.*

313. *Id.* at 6.

314. *Id.* A potentially complementary model, the Survivor-Led Justice Inquiry Tool, created by attorney and consultant Lisa Palumbo, is designed to assist advocates to develop plans based on survivors’ justice goals. *Id.* at 17–18. The advocate first advises the survivor about the possible types of justice that may be available (e.g., reuniting with family, being paid unpaid wages, reporting to law enforcement, or getting passport returned) and then, the survivor selects their particular goals and designates their order or priority. *Id.* at 18. Palumbo recommends the tool be revisited periodically to assess progress and address evolving priorities. *Id.*

Some victims are unable or unwilling to participate in prosecutions.³¹⁵ Despite this, prosecutors sometimes use federal material witness warrants to compel victims to participate. A study of the use of these warrants in human trafficking prosecutions found at least forty-nine instances of victims being detained.³¹⁶ Trafficked individuals should not be arrested, detained, or compelled to testify when they cannot or do not want to participate as witnesses.³¹⁷ Instead, they should be offered the support and specialized services they need and deserve.³¹⁸

Prosecution of labor trafficking cannot replace or distract from other efforts to address the underlying state-created dynamics that allow labor trafficking to thrive.³¹⁹ For example, as discussed in Section IV.A.5, the lack of portability of low-wage guestworker visas—a federally created policy—makes temporary foreign workers lawfully working in the United States incredibly vulnerable to exploitation; threats of termination and deportation by employers frequently form the basis for coercion in labor trafficking schemes.³²⁰ This federally-manufactured vulnerability can and should be

315. See HENRY WU & ALEXANDRA YELDERMAN, HUM. TRAFFICKING LEGAL CTR., PROSECUTION AT ANY COST?: THE IMPACT OF MATERIAL WITNESS WARRANTS IN FEDERAL HUMAN TRAFFICKING CASES 8–16 (2020) (discussing addiction, homelessness, distrust of law enforcement, trauma, intimidation and witness tampering, and victim bonding to the trafficker as reasons victims may be unable or unwilling to testify).

316. *Id.* at 4. The vast majority of the cases identified over approximately eleven years involved sex trafficking, *see id.*, but the same principles and concerns apply to labor trafficking.

317. *See id.* at 25–26. (detailing the many reasons why it is inappropriate to arrest and detain trafficking victims in this context).

318. *Episode 54: At What Cost to Victims Should Traffickers Be Brought to Justice and Are For-Profit Prisons Engaged in Labor Trafficking?*, CELIA, at 8:36 (July 21, 2020) (telephone Interview by Celia Williamson with Sarah Bessell, Deputy Director, Human Trafficking Legal Center on Emancipation Nation), <https://celiawilliamson.com/episodes/episode-54-atwhat-cost-to-victims-should-traffickers-be-brought-to-justice-and-are-for-profit-prisons-engaged-in-labor-trafficking-?rq=sarah%20bessell> [<https://perma.cc/24YN-FCX7>].

319. Lyndsey P. Beutin, *Criminalising Traffickers Is an Alibi for State-Produced Vulnerability*, OPEN DEMOCRACY (Nov. 19, 2015), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/criminalising-traffickers-is-alibi-for-state-produced-vulnerability/> [<https://perma.cc/99TX-7QXW>] (“Turning structural violence and exclusion into the sadistic tendencies of a villain becomes the state’s ultimate alibi. Even though the state creates the conditions necessary for precarious and exploitable migrant labour, the discourse of enslavement allows the state to present its carceral solutions—putting ‘bad’ people in prison—as ‘abolition.’”); *see also* Inga Thiemann, *Villains and Victims, but No Workers: Why a Prosecution-Focused Approach to Human Trafficking Fails Trafficked Persons*, ANTI-TRAFFICKING REV., May 2016, at 126, 126–129; Swenstein & Mogulescu, *supra* note 17, at 120

320. S. POVERTY L. CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 14 (2013) (“The most fundamental problem with guestworker programs, both historically and currently, is that the employer—not the worker—decides whether a worker can come to the United States and whether he can stay. Because of this arrangement, the balance of

resolved by congressional action.³²¹ Other state conduct also facilitates labor trafficking and should be halted, including collaboration between state and local law enforcement agencies and ICE.³²² This conduct makes undocumented individuals less likely to come forward to seek assistance when their rights are violated and creates prime conditions for coercion.³²³ Grave, well-publicized mistreatment of asylum-seekers and others at the hands of government officials also only emboldens would-be traffickers and makes migrants more vulnerable.³²⁴ Furthermore, financial insecurity, lack of employment opportunities, and institutionalized bias against certain populations, including LGBTQ youth and undocumented individuals, put individuals at greater risk of exploitation.³²⁵ Prosecution alone cannot address these issues and should not detract from efforts that do.³²⁶

It is difficult to fathom arguing for increased prosecution of any crime when the U.S. criminal justice system is so deeply afflicted with serious and systemic problems.³²⁷ There is vast scholarship clearly documenting the limitations and harms of the criminal justice system.³²⁸ Nonetheless, there are good reasons to strategically pursue the increased prosecution of labor

power between employer and worker is skewed so disproportionately in favor of the employer that, for all practical purposes, the worker's rights are nullified. At any moment, the employer can fire the worker, call the government and declare the worker to be 'illegal.'"); *see also* Smith, *supra* note 182, at 380 (discussing the increased vulnerability of guestworkers due to the growing use and enforcement of arbitration clauses).

321. Smith, *supra* note 182, at 380.

322. *See* SMITH ET AL., *supra* note 185, at 11.

323. *See id.* at 6, 28.

324. *See, e.g.*, OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-20-38, CAPPING REPORT: CBP STRUGGLED TO PROVIDE ADEQUATE DETENTION CONDITIONS DURING 2019 MIGRANT SURGE 2 (2020); *UN Rights Chief 'Appalled' by US Border Detention Conditions, Says Holding Migrant Children May Violate International Law*, UN NEWS (July 8, 2019), <https://news.un.org/en/story/2019/07/1041991> [<https://perma.cc/3EKW-UDYR>]; Ilana Panich-Linsman, *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html> [<https://perma.cc/GTB9-WXWT>].

325. *E.g.*, D'Adamo, *supra* note 309, at 112 (citing "poverty, housing and food instability, lack of education, labour exploitation, discrimination[,] and/or domestic violence" as risks of exploitation); *see* Swenstein & Mogulescu, *supra* note 17, at 121 (arguing that trafficking is a more complex situation that is, in part, tied to the prevalence of poverty and other societal ills); Jordan Blair Woods, *Unaccompanied Youth and Private-Public Order Failures*, 103 IOWA L. REV. 1639, 1652-56 (2018).

326. D'Adamo, *supra* note 309, at 111-13.

327. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (describing, discussing, explaining, and showing empirically the disproportionate and unjustified abuses of Black people in the criminal justice system).

328. *See, e.g.*, Swenstein & Mogulescu, *supra* note 17, at 122.

trafficking, particularly prosecution of those who knowingly benefit from it.³²⁹

Prosecuting labor trafficking is an appropriate role for federal prosecutors.³³⁰ It helps develop precedent and uncover useful information about how and how often labor trafficking occurs, which in turn equips law enforcement to identify, investigate, and dismantle additional instances of trafficking.³³¹ Further, prosecutions that result in the payment of court-ordered restitution can support victims' goals and long-term stability by providing them with financial resources.³³² Victims may want their traffickers to be prosecuted for a variety of reasons, including to prevent future abuse of others.³³³ In some instances and with proper care and support, victims' participation in the prosecution of their traffickers can be a restorative and empowering process.³³⁴

Failure to prosecute erodes the rule of law—trafficked individuals may feel that they cannot be protected or that their experiences do not matter,³³⁵ they and the public may lose further faith in the criminal justice system, and those seeking to exploit others can do so without concern for criminal consequences.³³⁶ Minimizing the risk of engaging in a high-reward criminal enterprise increases the likelihood that labor trafficking will thrive.³³⁷

329. French & Liou, *supra* note 259, at 115 (recommending that prosecutors direct limited resources for human trafficking prosecutions to cases that are likely to impact a large number of former, current, and future victims or that will extend the reach of the law); Marika McAdam, *Not All Prosecutions Are Created Equal: Less Counting Prosecutions, More Making Prosecutions Count*, ANTI-TRAFFICKING REV., May 2016, at 123, 124 (arguing that the goals of prevention and protection can be achieved, at least in part, through selective prosecution—for example, by targeting human trafficking operations through prosecution for whatever crimes will most effectively disrupt the trafficking).

330. Daniels, *supra* note 101, at 176–77 (listing DOJ infrastructure, global law enforcement networks, access to subject matter expertise, and jurisdictional reach as reasons why the DOJ has a special obligation to investigate and prosecute human trafficking cases). While prosecutors have wide discretion, it is a constitutional mandate to faithfully execute laws passed by Congress, including the TVPRA. *See* U.S. CONST. art. II, § 3.

331. LITTLE HOOVER COMM'N, *supra* note 88, at 13; U.S. COMM'N ON C.R., *supra* note 103, at 80.

332. Restitution is mandatory. 18 U.S.C. § 1593(a). However, it is not always sought or awarded. *See* LEVY, *supra* note 57, at 15.

333. Telephone Interview with Gonzalo Martinez de Vedia, Program Manager, Buffett-McCain Inst. Initiative to Combat Mod. Slavery (Feb. 18, 2020); Daniels, *supra* note 101, at 183.

334. Martina E. Vandenberg, *Palermo's Promise: Victims' Rights and Human Trafficking*, ANTI-TRAFFICKING REV., May 2016, at 138, 139–40.

335. French & Liou, *supra* note 259, at 114.

336. *See* Daniels, *supra* note 101, at 184.

337. *See id.* Victor Boutros & John Cotton Richmond, *Investments in Human Trafficking Prosecutions Are Indispensable*, ANTI-TRAFFICKING REV., May 2016, at 107, 108. Furthermore,

When labor trafficking is not prosecuted, this further normalizes workplace exploitation. It also reinforces the harmful myth that all human trafficking is sex trafficking. More consistent prosecution of these cases is one way to begin to chip away at workplace exceptionalism and the labor trafficking eclipse, while publicly demonstrating that labor trafficking occurs, that it matters, and that those who criminally exploit workers can and will be held accountable.³³⁸

Redirecting existing criminal justice resources to labor trafficking is a worthwhile endeavor.³³⁹ Such a shift could help transfer law enforcement efforts away from policing that disproportionately targets low-income communities and communities of color—including aggressive enforcement of minor crimes associated with violating immigration laws, using drugs, or engaging in commercial sex work—and instead place attention on the serious and exploitative crimes associated with labor trafficking.³⁴⁰

VI. STRATEGIES FOR REFORM

Although the underprosecution of labor trafficking can seem endemic to the DOJ and law enforcement agencies, reform is possible.³⁴¹ Section VI.A reviews federal agencies' recent attempts to address the failure to prosecute labor trafficking and recommends evaluation of their impact, while Section VI.B proposes additional reforms. Ideally, these reforms would not only result in more frequent prosecution of labor traffickers but would also decrease prosecution of certain other crimes, facilitate development of law enforcement

the threat of being caught and punished can deter crime in some instances. NAT'L INST. OF JUST., U.S. DEP'T OF JUST., NCJ 247350, FIVE THINGS ABOUT DETERRENCE 2 (2016). Of course, prosecutions are not without risk; if well-publicized labor trafficking prosecutions are brought and yet fail, this also risks empowering would-be traffickers.

338. Those who criminally exploit workers include employers as well as those who work on their behalf, such as labor recruiters, staffing agencies, crew leaders, and others.

339. This Article does not argue for the transfer of resources from the investigation and prosecution of sex trafficking to labor trafficking. Instead, it recommends that resources be rededicated from policing less serious crimes.

340. There are already efforts to support shifting and decriminalizing some of this conduct, including the use of drug and mental health courts. *See, e.g., Mental Health Among Drug Court Participants in Drug Treatment*, PRACTICAL RECOVERY, <https://www.practicalrecovery.com/mental-health-among-drug-court-participants-in-drug-treatment/> [<https://perma.cc/35TK-H36A>]; LILJA GONG, PUB. RTS. PROJECT, GROWING AN EQUITABLE ENFORCEMENT PRACTICE: A GUIDE FOR LOCAL PROSECUTORS TO FIGHT CORPORATE ABUSE 6 (2019), <https://drive.google.com/file/d/14g1Xv7DoBCKSIsqFcxwAy1c8pHJVyCxl/view> [<https://perma.cc/V5TA-ZPJJ>]. While a change in focus would not resolve concerns about policing, it would, at a bare minimum, reduce the number of those targeted.

341. There are certainly federal law enforcement officers and DOJ attorneys committed to combating labor trafficking; some are cited in this Article, and their experiences and insights provide the basis for a number of the recommended reforms discussed in Section VI.B.

frameworks to address employment-based crimes, and perhaps modestly improve law enforcement interactions with crime victims.

A. Existing Efforts

Federal efforts have been made to increase the prosecution of labor trafficking and human trafficking more generally.³⁴² Since 2007, a unit within the CRT called the Human Trafficking Prosecution Unit (HTPU) has focused on the prosecution of human trafficking.³⁴³ Prosecutors from within the HTPU serve as subject-matter experts, working with Assistant U.S. Attorneys (AUSAs) in federal districts across the country to assist them with investigating and prosecuting human trafficking cases, interpreting and applying the statutes, ensuring victim access to necessary resources, coordinating between districts, and otherwise building capacity.³⁴⁴

Beginning in 2011, the Anti-Trafficking Coordination Team (ACTeam) Initiative sought to improve inter-agency coordination regarding human trafficking.³⁴⁵ As a collaboration between the Departments of Justice, Homeland Security, and Labor, the effort “focuses on investigating and prosecuting forced labor, international sex trafficking, and sex trafficking of adults by force, fraud, or coercion[.]”³⁴⁶

In 2015, as part of its “Blue Campaign” to raise awareness of human trafficking, DHS released a series of labor trafficking videos.³⁴⁷ It has also produced and distributed materials for law enforcement and the public on

342. Some states are also making efforts to better address labor trafficking. *See, e.g.*, Jake Thomas, *New Task Force Examines Overlooked Issue of Labor Trafficking in Oregon*, SALEM REP. (Jan. 10, 2020), <https://www.salemreporter.com/posts/1718/new-task-force-looks-into-underlooked-issue-of-labor-trafficking-in-oregon> [<https://perma.cc/9VQJ-QPE7>].

343. U.S. DEP’T OF JUST., NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING 6 (2017), <https://www.justice.gov/humantrafficking/page/file/922791/download> [<https://perma.cc/69GT-2C6W>].

344. *Human Trafficking Prosecution Unit*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu> [<https://perma.cc/C5Y5-XWZA>]; *Department of Justice Components*, U.S. DEP’T OF JUST., <https://www.justice.gov/humantrafficking/department-justice-components> [<https://perma.cc/3BQT-JXH9>] [hereinafter *Justice Components*]. AUSAs are required to provide written notice to the CRT when they begin investigating human trafficking crimes and before indictment. U.S. DEP’T OF JUST., JUSTICE MANUAL §§ 8–3.120, 3.140, <https://www.justice.gov/jm/jm-8-2000-enforcement-civil-rights-civil-statutes> [<https://perma.cc/RM8H-PKNP>] (setting out “Enforcement of Civil Rights Criminal Statutes”).

345. U.S. DEP’T OF JUST., ANTI-TRAFFICKING COORDINATION TEAM (ACTEAM) INITIATIVE FACT SHEET 1 (2015).

346. *Id.*

347. Blue Campaign, *Labor Trafficking Awareness Videos*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/blue-campaign/videos/labor-trafficking> [<https://perma.cc/7SQJ-M3VS>].

topics relevant to labor trafficking, including how to identify human trafficking,³⁴⁸ how to use a victim-centered approach,³⁴⁹ and how to provide immigration relief for victims.³⁵⁰

In 2017, the FBI created the Labor Trafficking Initiative, which was specifically intended to increase identification of labor trafficking.³⁵¹ The initiative sought to identify geographic regions within which vulnerable individuals might be located; to educate state and local regulators, inspectors, and law enforcement agencies in those areas about how to recognize possible instances of labor trafficking; and to distribute outreach materials.³⁵² That same year, Wage and Hour Division investigators within the DOL received training on human trafficking awareness.³⁵³ In 2020, the DOL solicited public guidance on how to better address labor trafficking through a national online dialogue process.³⁵⁴

The DOJ's National Institute of Justice (NIJ) has funded research to increase understanding of labor trafficking and how to address it.³⁵⁵ Studies funded by the NIJ include *Labor Trafficking in North Carolina: A Statewide Survey Using Multistage Sampling*;³⁵⁶ *Understanding the Organization*,

348. BLUE CAMPAIGN, WHAT CAN YOU DO?: IDENTIFYING VICTIMS AND REPORTING SUSPECTED CASES OF HUMAN TRAFFICKING, <https://www.dhs.gov/sites/default/files/publications/blue-campaign/materials/pamphlet-victim-id-law-responders-healthcare/bc-pamphlet-victim-id-law-english.pdf> [<https://perma.cc/7V69-TBDM>].

349. Blue Campaign, *A Victim-Centered Approach*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/blue-campaign/victim-centered-approach> [<https://perma.cc/ZD6U-NQU2>].

350. Blue Campaign, *Immigration Assistance for Non-U.S. Citizen Victims*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/blue-campaign/immigration-assistance> [<https://perma.cc/W3F2-74VN>].

351. Mollie Halpern & Ryan Blay, *FBI, This Week: FBI Launches New Labor Trafficking Initiative*, FBI (Feb. 3, 2017), <https://www.fbi.gov/audio-repository/ftw-podcast-labor-trafficking-020317.mp3/view> [<https://perma.cc/VN6V-C4QJ>].

352. *Id.*; PRESIDENT'S INTERAGENCY TASK FORCE, REPORT ON U.S. GOVERNMENTS EFFORTS TO COMBAT TRAFFICKING IN PERSONS 26 (2017), https://www.state.gov/wp-content/uploads/2018/12/report_usg_tip_efforts.pdf [<https://perma.cc/45PY-YPCL>].

353. 2018 REPORT, *supra* note 98, at 444.

354. U.S. Department of Labor's Efforts to End Labor Trafficking National Online Dialogue, IDEASCALE, <https://endtrafficking.ideascale.com> [<https://perma.cc/LGB7-BT3L>]. Participants had the opportunity to respond to a series of questions about how the DOL and other agencies' efforts might be improved to better address labor trafficking and to vote on proposals submitted by stakeholders, including the New Orleans Workers' Center for Racial Justice; the University of Maryland Support, Advocacy, Freedom, and Empowerment (SAFE) Center for Human Trafficking Survivors; Centro de Los Derechos del Migrante; and others. *Id.* The recommendations were then intended to be reviewed by the relevant agencies within the DOL. *Id.*

355. *Justice Components*, *supra* note 344.

356. SHELDON ZHANG ET AL., LABOR TRAFFICKING IN NORTH CAROLINA: A STATEWIDE SURVEY USING MULTISTAGE SAMPLING (2018), <https://www.ncjrs.gov/pdffiles1/nij/grants/252>

Operation, and Victimization of Labor Trafficking in the United States;³⁵⁷ *Looking for a Hidden Population: Trafficking of Migrant Laborers in San Diego County*;³⁵⁸ and others. In 2020, the NIJ solicited research aimed at better “understand[ing], prevent[ing], and respond[ing] to trafficking in persons in the United States.”³⁵⁹ Labor trafficking was one of the four priority areas identified.³⁶⁰

The DOJ’s Bureau of Justice Assistance has offered trainings on labor trafficking for law enforcement and prosecutors, including a multiday workshop in early 2020 on how to identify, investigate, and prosecute labor trafficking using a trauma-centered approach.³⁶¹ The DOJ has also conducted public outreach to help better identify labor trafficking cases.³⁶²

The DOJ’s Office for Victims of Crimes (OVC) provides funding and technical assistance.³⁶³ It has produced and made available webinars on topics including “Labor Trafficking: Improving Victim Identification”;³⁶⁴ “Continuum of Labor Exploitation: Wage Theft, Fraud in Foreign Labor Contracting and Human Trafficking”;³⁶⁵ and “Labor Trafficking—Research to

521.pdf [https://perma.cc/BZ8V-UZ65]; *Detailed Information for Award 2013-IJ-CX-0047*, NAT’L INST. OF JUST., https://external.ojp.usdoj.gov/selector/awardDetail?awardNumber=2013-IJ-CX-0047&fiscalYear=2013&applicationNumber=2013-91795-CAIJ&programOffice=NIJ&po=NIJ [https://perma.cc/W9PM-7QPZ].

357. OWENS ET AL., *supra* note 69.

358. ZHANG, *supra* note 45.

359. U.S. DEP’T OF JUST., NIJ-2020-17324, RESEARCH AND EVALUATION ON TRAFFICKING IN PERSONS, FISCAL YEAR 2020, at 5 (2020), https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/NIJ-2020-17324.pdf [https://perma.cc/BLF4-8ZV7].

360. *Id.*

361. *Effective Strategies to Investigate & Prosecute Labor Trafficking in the U.S.*, INT’L ASS’N OF CHIEFS OF POLICE, https://www.myiacp.org/event-information?id=a01110000065e6QAB [https://perma.cc/KA9Y-BFST]. The training was offered in collaboration with the International Association of Chiefs of Police and AEQUITAS. *Id.*

362. Desai & Tepfer, *supra* note 96, at 29 (recommending augmentation of existing outreach efforts to communities, including tribal, refugee, LGBTQ, and other communities).

363. *Human Trafficking*, OFF. FOR VICTIMS OF CRIME TRAINING & TECH. ASSISTANCE CTR., https://www.ovcttac.gov/views/HowWeCanHelp/dspHumanTrafficking.cfm [https://perma.cc/Q6L3-9L9L].

364. *Labor Trafficking: Improving Victim Identification*, OFF. FOR VICTIMS OF CRIME TRAINING & TECH. ASSISTANCE CTR. (Nov. 14, 2017), https://www.ovcttac.gov/ovcttac_assets/eblast/November%20HT%20Joint%20Webinar_508c_12.7.17_KH.pdf [https://perma.cc/6KQV-HA8N].

365. *Continuum of Labor Exploitation: Wage Theft, Fraud in Foreign Labor Contracting and Human Trafficking*, OFF. FOR VICTIMS OF CRIME TRAINING & TECH. ASSISTANCE CTR. (Apr. 21, 2016), https://www.ovcttac.gov/downloads/Trafficking/files/AprilOVCTAWebinar_508c_042816_DM.pdf [https://perma.cc/V3C6-8UJ6].

Practice.”³⁶⁶ OVC’s “Faces of Human Trafficking” series, which targets the public, law enforcement, and prosecutors, includes an introductory video on labor trafficking.³⁶⁷ OVC also provides funding to organizations that identify and serve victims and human trafficking task forces.³⁶⁸

It will likely take time to see whether agencies’ most recent efforts positively impact the incidence of identification, investigation, and prosecution of labor trafficking. The effectiveness of each of these programs should be evaluated and either modified or abandoned based on the findings.

B. Recommended Reforms

Underprosecution of labor trafficking remains a persistent challenge, but additional steps can be taken to address it. These include reallocating resources and shifting incentives; training law enforcement and prosecutors, adapting law enforcement strategies by conducting regional assessments, engaging in strategic partnerships, proactively analyzing data, and applying survivors’ and advocates’ insights; improving victim experiences; and utilizing civil litigation as a source of intelligence and complementary enforcement mechanism.

1. Reallocate Resources and Shift Incentives

More resources should be committed to labor trafficking on a sustained basis, including resources for dedicated prosecutors³⁶⁹ and law enforcement

366. *Labor Trafficking—Research to Practice*, OFF. FOR VICTIMS OF CRIME TRAINING & TECH. ASSISTANCE CTR. (Nov. 19, 2015), https://www.ovcttac.gov/downloads/Trafficking/files/LaborTraffickingPPT_508c_112015_CN.pdf [<https://perma.cc/3ZNM-ES2L>].

367. *Faces of Human Trafficking Video 3: An Introduction to Labor Trafficking*, OFF. FOR VICTIMS OF CRIME (Dec. 1, 2015), <https://ovc.ojp.gov/media/video/3581> [<https://perma.cc/F4EP-VEP7>].

368. *Human Trafficking: Grants & Funding*, OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/program/human-trafficking/grants-funding> [<https://perma.cc/Y2YE-Z58T>]. Some of the most recent grants were specifically focused on labor trafficking, including one to Metropolitan Family Services in Illinois to “develop innovative solutions to address barriers to identifying and assisting labor trafficking victims.” *Matrix of OVC/BJA-Funded Human Trafficking Services Grantees and Task Forces*, OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/matrix-ovcbja-funded-human-trafficking-services-grantees-and-task-forces> [<https://perma.cc/5R46-J67E>].

369. In Texas, funding from the Buffett-McCain Institute Initiative to Combat Modern Slavery supported creation of a Human Trafficking Unit in Hidalgo County in 2019. *DA Focuses on Human Trafficking in Agriculture*, VALLEY BUS. REP., <https://valleybusinessreport.com/industry/agriculture/da-focuses-on-human-trafficking-in-agriculture/> [<https://perma.cc/S2DN-2R8H>]. The unit focuses primarily on labor trafficking in agriculture and includes a Labor Trafficking Specialty Prosecutor, a Labor Trafficking Specialty Investigator, and a Human Trafficking Taskforce Coordinator. *Id.*

units or officers, for widespread and effective training programs, and for any other costs of implementing the recommendations set forth below.³⁷⁰ To the extent possible, resources should be strategically diverted from other law enforcement priorities to fund these reforms.³⁷¹

Labor trafficking prosecutions may increase if the DOJ and CRT tether their success to bringing them.³⁷² U.S. Attorneys also have the authority to set priorities for their districts, and they, too, should prioritize labor trafficking. Setting goals and performance measures associated with labor trafficking cases should incentivize bringing such cases and should not focus solely on case outcomes or even the raw number of cases filed.³⁷³ Alternative metrics could include a variety of measures such as the amount of restitution awarded per victim, for example.³⁷⁴ Law enforcement agencies should take a similar approach and incentivize identification and investigation of labor trafficking.

2. *Expand and Enhance Training*

Additional efforts should be made to train law enforcement officers who may come into contact with labor trafficking, including those who participate in community outreach.³⁷⁵ While training has been made available in the past, more innovative approaches and widespread participation is needed.³⁷⁶

370. See *supra* Section V for a discussion of how to reallocate law enforcement and prosecution resources.

371. E.g., NAT'L IMMIGR. JUST. CTR., *A LEGACY OF INJUSTICE: THE U.S. CRIMINALIZATION OF MIGRATION 3* (2020), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-07/NIJC-Legacy-of-Injustice-report_2020-07-22_FINAL.pdf [<https://perma.cc/ZMN6-R2KT>] (discussing defunding the prosecution of migration-related criminal charges).

372. Telephone Interview with Susan French, *supra* note 193.

373. See McAdam, *supra* note 329, at 123–24.

374. See Vandenberg *supra* note 334, at 138.

375. Desai & Tepfer, *supra* note 96, at 29 (recommending training “those investigating or prosecuting gangs, organized crime, drug trafficking, healthcare fraud, environmental crimes, Indian country cases, and national security and financial crimes . . . Law Enforcement Coordinating Committee Chiefs (LECCs), Community Outreach Specialists, Victim-Witness Coordinators, etc.”).

376. For example, as an attorney, human trafficking consultant, and former fellow for the DOJ’s Office for Victims of Crime, Erin Albright advocates for a new model to address labor trafficking and offers training to law enforcement agencies and others in how to apply her “New Framework.” *A New Framework: Re-imagining Labor Trafficking Responses*, NEW FRAMEWORKS, <https://newframeworks.org/labor-trafficking> [<https://perma.cc/2DJF-KQ6D>] (the framework includes four steps: (1) narrow down the universe using data and research; (2) understand conditions and context of industry; (3) new, strategic, and nontraditional partnerships; and (4) understand coercion).

Future efforts should include broad training of state and local law enforcement officers to understand what labor trafficking entails;³⁷⁷ how to tailor investigative strategies to the particular challenges of labor trafficking; and, where appropriate, how to make referrals to and collaborate with federal law enforcement.³⁷⁸ Depending on the audience, training should address common myths, the various forms that coercion can take and how to intervene in it, how to distinguish trafficking from other forms of labor exploitation, how to engage with community partners, what kind of evidence should be gathered to support appropriate restitution awards, the importance of helping victims seek stability, and the critical role of immigration relief in that process for foreign nationals.³⁷⁹ The training scenarios used should be consistent with what officers are most likely to actually encounter.³⁸⁰ Among other things, officers must know how to use skilled and unbiased interpreters, how to work across cultural differences, and how to interview and engage with survivors of trauma.³⁸¹ They must also understand the importance of Continued Presence and other forms of immigration relief to foreign national victims and their role in securing this relief.

Efforts are being made to develop innovative law enforcement training tools.³⁸² In collaboration with Boston University, the Massachusetts Attorney General's Office rolled out a new web-based application designed to help local law enforcement identify labor trafficking.³⁸³ Recognize & Evaluate Signs to Uncover Labor Trafficking (RESULT) is intended to be an accessible tool that provides simple background information regarding labor trafficking indicators, includes examples of those indicators, and then offers simple

377. In particular, law enforcement should understand the role of psychological coercion and how traffickers use fear of law enforcement and deportation to control their victims. Owens et al., *supra* note 69, at 89, 209.

378. *See id.* at 205; FARRELL ET AL., *supra* note 43, at 115.

379. *See, e.g.,* Farrell et al., *supra* note 155, at 50–51 (describing victim-centered approaches to investigation); 2020 REPORT, *supra* note 100, at 516–18; FARRELL ET AL., *supra* note 43, at 115; Telephone Interview with Susan French, *supra* note 193; E-mail from Anonymous, *supra* note 258.

380. FARRELL ET AL., *supra* note 43, at 115.

381. A failure to understand trauma may result in an officer not believing victims because there are inconsistencies in their statements. *See id.* at 218. A lack of knowledge about appropriate use of interpreters, for example, may mean that the officer permits an individual who is connected to the labor trafficking to serve as an interpreter and either intimidate the victim or purposefully misinterpret information provided. *See, e.g.,* Farrell et al., *supra* note 155, at 50–51 (describing victim-centered approaches to investigation).

382. *See* Julie Dahlstrom, *Labor Trafficking Is a Crime You Probably Don't Notice*, WBUR (Oct. 29, 2019), <https://www.wbur.org/cognoscenti/2019/10/29/massachusetts-human-labor-trafficking-julie-dahlstrom> [<https://perma.cc/9ELD-VKHR>].

383. *Id.*

questions to ask regarding each indicator.³⁸⁴ RESULT also gives law enforcement officers tips to prepare them to engage with trafficked individuals, including very brief primers on how to build trust, understand the impact of immigration status, engage in safety planning, use a qualified interpreter, make appropriate referrals, and learn about trauma.³⁸⁵ If this tool proves successful, federal agencies might replicate it to assist law enforcement officers in identifying labor trafficking under the TVPRA and effectively engaging with suspected victims both to minimize retraumatization and other harms and also to increase the likelihood that they will voluntarily participate in a subsequent investigation and prosecution.³⁸⁶

The International Association of Chiefs of Police produced a series of training videos on investigating child sex trafficking; the videos provide common minor sex trafficking scenarios and model how to best investigate in each instance.³⁸⁷ A similar video series on how to identify labor trafficking would be an excellent addition to existing training materials and could model what law enforcement officers on the ground should actually do when confronted with it. The videos could be produced in ten- to fifteen-minute segments that are conducive for showing officers during roll call.³⁸⁸

Beyond identifying suspected cases of labor trafficking, law enforcement officials must also understand how to effectively investigate and work up a case.³⁸⁹ In Colorado, officials and advocates have discussed providing advanced trainings to law enforcement officers that go beyond basic awareness and address topics such as investigation of suspected labor

384. The tool is available online. *Recognize and Evaluate Signs to Uncover Labor Trafficking*, RESULT, <http://www.traffickingresult.com> [<https://perma.cc/62WG-5HE3>]. The assessment provides questions that relate to Massachusetts's Crime of Trafficking in Persons for Forced Services. *Massachusetts Law*, RESULT, <http://www.traffickingresult.com/statute> [<https://perma.cc/J258-6NG7>]. Labor trafficking indicators to be examined are serious harm, physical restraint, abuse of the law, identity documents, extortion, and financial harm. *Id.*

385. *Prepare*, RESULT, <http://www.traffickingresult.com/prepare> [<https://perma.cc/AU4S-2FZW>].

386. The majority of states also have laws proscribing labor trafficking. UNIF. PREVENTION OF AND REMEDIES FOR HUM. TRAFFICKING § 4 cmt. (UNIF. L. COMM'N 2013); see also Marley S. Weiss, *Human Trafficking and Forced Labor: A Primer*, 31 A.B.A. J. LAB. & EMP. L. 1, 41 (2015).

387. *Toolkit: Child Sex Trafficking: A Training Series for Frontline Officers*, INT'L ASS'N OF CHIEFS OF POLICE (Jan. 1, 2015), <https://www.theiacp.org/resources/document/toolkit-child-sex-trafficking-a-training-series-for-frontline-officers> [<https://perma.cc/SEG5-6Q8K>]. The videos demonstrate how minor sex trafficking might present in school, hotel, traffic stop, and hospital settings.

388. *The Crime of Human Trafficking: Roll-Call Training Video*, INT'L ASS'N OF CHIEFS OF POLICE (Sept. 16, 2015), <https://www.theiacp.org/resources/video/the-crime-of-human-trafficking-roll-call-training-video> [<https://perma.cc/8PZJ-4XZN>] (providing a training video on recognizing human trafficking in general).

389. Telephone Interview with Patricia Medige, *supra* note 142.

trafficking.³⁹⁰ Training on how to conduct regional assessments, engage in strategic partnerships, proactively analyze data, and use other advanced techniques should be provided.³⁹¹ Technical assistance should be available to advise law enforcement officers on how to handle a potential case once identified.³⁹²

Prosecutors should receive ongoing training associated with labor trafficking crimes as well as more advanced training on topics including the forms of immigration relief available to victims and strategies to address commonly anticipated hurdles, such as proof concerns regarding coercion and possible inconsistencies in victim statements.

Additionally, better educating the public could increase community identification of labor trafficking and encourage reallocation of law enforcement resources.³⁹³ Political pressure is particularly meaningful on a local level and could result in more focused attention on policing labor trafficking.³⁹⁴ When members of the public understand labor trafficking and its impacts, they can better identify these crimes, apply pressure to local officials to prosecute them, and serve as more knowledgeable jurors during their adjudication.³⁹⁵

3. *Adapt Law Enforcement Strategies*

Strategies are available to law enforcement agencies to increase their capacity to identify and investigate labor trafficking. These constructive adaptations include conducting regional assessments, engaging in strategic partnerships, proactively analyzing data, and applying survivors' and advocates' insights. To be successful, each strategy relies on dedicating units or teams to labor trafficking within prosecutors' offices or law enforcement agencies.³⁹⁶

390. *Id.*

391. See discussion *infra* Section VI.B.3–5. Training materials on these strategies are already available to law enforcement. See, e.g., *Developing Your Labor Trafficking Threat Assessment*, JUST. CLEARING HOUSE (Mar. 12, 2018), <https://justiceclearinghouse.com/resource/developing-your-labor-trafficking-threat-assessment/> [<https://perma.cc/AEW3-EDXP>].

392. Telephone Interview with Patricia Medige, *supra* note 142.

393. OWENS ET AL., *supra* note 69, at 209–10.

394. Farrell et al., *supra* note 155, at 39.

395. *Id.* at 54.

396. Telephone Interview with Gonzalo Martinez de Vedia, *supra* note 333. A better fit than vice might be officers skilled in addressing economic crimes. Telephone Interview with Patricia Medige, *supra* note 142.

a. Conduct Regional Assessments

Law enforcement, perhaps using the task force model, should begin by assessing the populations, places, and industries in their region most likely to be connected to labor trafficking.³⁹⁷ Longtime federal prosecutors Nirav Desai and Sean Tepfer proposed a series of questions to home in on potential labor trafficking:

What industries in our area of responsibility or district have the most labor-intensive, unsafe, and unstable jobs? Which locations have a history of labor, immigration, or safety violations? What are the most insular, isolated, impoverished, and transient local communities in our area, and are they generally associated with certain types of work or locations? Are groups of vulnerable individuals concentrated in specific jobs, industries, or work sites?³⁹⁸

Law enforcement can also target “hot spot” job sites where known labor or other violations have occurred.³⁹⁹

Among populations with heightened vulnerability are undocumented individuals, workers present in the United States on temporary work visas,⁴⁰⁰ domestic workers employed by foreign government officials and diplomats, unhoused individuals, and workers living with disabilities.⁴⁰¹ Understanding which populations are most vulnerable to labor trafficking is essential.⁴⁰²

b. Engage in Strategic Partnerships

To uncover information responsive to the questions Desai and Tepfer posed and to identify possible instances of labor trafficking, law enforcement should engage in partnerships with other federal agencies,⁴⁰³ with state and

397. Desai & Tepfer, *supra* note 96, at 26. As part of a pilot effort to decrease labor trafficking in Texas, the Buffett-McCain Institute Initiative to Combat Modern Slavery is conducting mapping using wage and hour compliance data, H-2A job orders, and other information. Telephone Interview with Gonzalo Martinez de Vedia, *supra* note 333.

398. Desai & Tepfer, *supra* note 96, at 26.

399. *Id.*

400. Smith, *supra* note 182, at 385–92 (describing the profound vulnerability of low-wage guestworkers).

401. Desai & Tepfer, *supra* note 96, at 28–29.

402. *Id.* at 28.

403. *Id.* at 26–27 (recommending partnerships with the DOL’s Office of the Inspector General, Wage and Hour Division, and OSHA; the U.S. State Department’s Diplomatic Security Service and U.S. Citizenship and Immigration Services; the U.S. Department of Agriculture’s Office of Inspector General; and the EEOC).

local agencies,⁴⁰⁴ and with advocacy groups and other organizations that work on the ground and are most likely to encounter trafficked individuals and those at greatest risk of experiencing labor trafficking.⁴⁰⁵ These groups might include both formal and informal workers' and immigrants' rights organizations along with other advocacy organizations, lawyers, and direct service providers.⁴⁰⁶ Partnerships present the opportunity to train those most likely to come into contact with labor trafficking on how to provide appropriate services for trafficked individuals; such training may even yield referrals to law enforcement.⁴⁰⁷ Partners, including housing or labor inspectors and migrant health services staff members, are also likely have more access to isolated workers than law enforcement does.⁴⁰⁸ Where possible, providing appropriate case updates to referring individuals may increase the likelihood of future referrals.⁴⁰⁹

c. Proactively Analyze Data

In addition to conducting regional assessments and engaging in strategic partnerships, Desai and Tepfer recommended analyzing existing data to conduct labor trafficking "threat assessments."⁴¹⁰ Sources already available to federal law enforcement include information regarding visas issued; investigations into visa abuses; investigations of health and safety, wage, discrimination, and other violations; court records from private actions against employers and labor contractors; licensing information; and financial records

404. *Id.* at 27 (recommending communication with and training of the many state and local agencies that regulate and enter workplaces, including labor regulators, fire marshals, health or code inspectors, first responders, emergency healthcare providers, and those that investigate fraud and theft related to public benefits).

405. *Id.* at 26–27; Farrell et al., *supra* note 155, at 53–54; Telephone Interview with Susan French, *supra* note 193 (explaining the critical role of having established relationships with community organizations on the ground and in different labor sectors); Telephone Interview with Stacie Jonas, *supra* note 138. *But see* Farrell et al., *supra* note 155, at 47 (noting that agencies are not all equipped or willing to partner with law enforcement); GONG, *supra* note 340, at 6, 22 (discussing reasons for prosecutors to partner with community-based organizations).

406. Desai & Tepfer, *supra* note 96, at 27; *see also* Farrell et al., *supra* note 155, at 53.

407. Farrell et al., *supra* note 155, at 53. For partnerships to be effective, efforts must be made to maintain continuity; this can be difficult when there is turnover in personnel. Telephone Interview with Susan French, *supra* note 193.

408. *See* Desai & Tepfer, *supra* note 96, at 27.

409. *Id.* at 30.

410. *Id.* The Buffett-McCain Institute Initiative to Combat Modern Slavery has experimented with a data driven approach. It analyzed publicly available data to identify high-risk zones for Texas farmworkers. LITTLE HOOVER COMM'N, *supra* note 88, at 14.

and reports.⁴¹¹ Law enforcement agencies can also consult data about past prosecutions and the characteristics of the victims and traffickers involved.⁴¹² Officers already skilled at conducting intelligence into organized crime, drug trafficking, and national security should be trained to assist with these efforts.⁴¹³ The use of data and analysis, along with regional assessment and strategic outreach, can be used as a starting place for proactive investigations into labor trafficking.⁴¹⁴

d. Apply Survivors' and Advocates' Insights

Law enforcement officers and prosecutors should incorporate the insights of labor trafficking survivors and anti-trafficking advocates. In addition to direct communications with survivors and advocates, officers and prosecutors can use resources produced by organizations like the Coalition to Abolish Slavery and Trafficking (CAST), Polaris, the Urban Institute,⁴¹⁵ and the Human Trafficking Legal Center⁴¹⁶ to better identify, investigate, and respond to labor trafficking. Nearly all of these organizations work directly with survivors and have collected, analyzed, and published useful data.

Los Angeles-based CAST analyzed a decade of data about labor trafficking experienced by approximately 550 of its clients to identify “actionable patterns” that might prove useful to identification and prevention efforts.⁴¹⁷ Among its many findings were that clients experienced labor trafficking primarily in domestic work, hotels and hospitality, and

411. Desai & Tepfer, *supra* note 96, at 27; LITTLE HOOVER COMM’N, *supra* note 88, at 13–14.

412. FARRELL ET AL., *supra* note 43, at 115.

413. *See id.*

414. The need for proactive investigations is underscored by the findings of a 2018 study of labor trafficking arrests between 2013 and 2016. ROE-SEPOWITZ ET AL., *supra* note 45, at 19 (“Most often, police identified a trafficking situation reactively, when they arrested a trafficker as a result of an investigation for other activity (n=46, 36.8%), police found the victim in an immigration (ICE) sting/sweep (n = 31, 24.8%), and the victim contacted the police to turn their trafficker in (n = 16, 12.8%). Other times, police received an anonymous call (n = 12, 9.6%), did a sting (n = 6, 4.8%), police found a suspected ad online (n = 3, 2.4%), a person in a position of authority to the victim contacted the police (n = 2, 1.6%), or someone else called the police about the situation (n = 2, 1.6%).”).

415. OWENS ET AL., *supra* note 69, at vii (analyzing the experiences of survivors based on “122 closed labor trafficking victim service records from service providers in four US cities” as well as interviews with survivors, advocates, service providers, and law enforcement personnel).

416. *See, e.g.*, ALEXANDRA LEVY, HUM. TRAFFICKING LEGAL CTR., FACT SHEET: HUMAN TRAFFICKING & FORCED LABOR IN FOR-PROFIT DETENTION FACILITIES 3 (2018), <https://www.htlegalcenter.org/wp-content/uploads/Human-Trafficking-Forced-Labor-in-For-Pr ofit-Detention-Facilities.pdf> [<https://perma.cc/CL72-JD2X>] (examining federal civil lawsuits alleging labor trafficking in facilities that are part of the U.S. penal system).

417. GNAEDIG ET AL., *supra* note 175, at 3, 19.

agriculture.⁴¹⁸ CAST clients were most commonly recruited into labor trafficking by employment agencies, friends or acquaintances, partners or family members, business owners, smugglers, and heads of households.⁴¹⁹ Meaningful patterns emerged from their clients' experiences, including that those working in hospitality were largely recruited from the Philippines via employment agencies, entered the United States on temporary work visas, and were trafficked by owners or managers of hotels or related businesses.⁴²⁰ In contrast, clients who worked as domestic workers were from a wide variety of countries; were recruited by known individuals, largely family or friends; and were trafficked by members of the household where they worked.⁴²¹ By listening to the experiences and insights of survivors, law enforcement can use the patterns identified to proactively investigate labor trafficking.⁴²²

Polaris produced a typology of human trafficking based on its analysis of approximately 32,000 cases reported to the National Human Trafficking Hotline over nearly a decade.⁴²³ For the twenty-five types of human trafficking identified,⁴²⁴ Polaris's report offers the business model, trafficker and victim profiles, recruitment strategies, and methods of control most likely to be associated with each type.⁴²⁵ This industry-specific information can help law enforcement craft strategies targeting specific types of labor trafficking.⁴²⁶

4. *Improve Victim Experiences*

Trafficked individuals are more likely to participate in investigations when they have positive experiences with law enforcement.⁴²⁷ One study found that law enforcement methods for building trust include providing a consistent point of contact; listening to the survivor's story; being honest, fair, and transparent; and relating to the survivor.⁴²⁸ Relatability might involve

418. *Id.* at 8.

419. *Id.* at 10.

420. *Id.* at 18.

421. *Id.* at 19.

422. *Id.*

423. POLARIS, THE TYPOLOGY OF MODERN SLAVERY: DEFINING SEX AND LABOR TRAFFICKING IN THE UNITED STATES 5 (2017), <https://polarisproject.org/wp-content/uploads/2019/09/Polaris-Typology-of-Modern-Slavery-1.pdf> [<https://perma.cc/Z2ZG-XT8B>]. This report includes cases reported via text to its BeFree "textline." *Id.*

424. *Id.* at 3, 8.

425. *See id.* at 6.

426. *Id.*

427. *See* MCCOY ET AL., *supra* note 312, at 6.

428. While these recommendations were primarily from sex trafficking survivors, it is likely they would also apply to many of those who have experienced labor trafficking. *Id.* at 6–7.

wearing civilian clothing or taking into account the survivor's gender, ethnicity, and race when selecting an officer to interact with them.⁴²⁹ Other strategies to build trust include using the survivor's preferred terminology, focusing on their needs and helping them meet those needs,⁴³⁰ assuring them they will not be criminalized or deported as a result of the trafficking, and offering them options and decision-making power.⁴³¹ Among other things, survivors who participated in a survey recommended using a compassionate, trauma-informed approach; focusing on them as individuals instead of on the crimes; providing interpreters; speaking in softer and friendlier tones; and having an advocate or caseworker present during each interaction with law enforcement.⁴³²

All actors in the criminal justice system should use a victim-centered and trauma-informed approach when engaging with victims.⁴³³ To pursue justice of any kind, it is critical that victims' needs are met.⁴³⁴ When victims have stability, including stable housing, income, and immigration status, it enhances their ability to serve as witnesses in the prosecution of their traffickers.⁴³⁵

Continued Presence should be more consistently and readily available to labor trafficking victims.⁴³⁶ Training may help achieve this goal. Additionally, expanding the range of those who have authority to seek Continued Presence to include federal victim assistance specialists may prove useful.⁴³⁷ Federal agencies should also create incentives or develop policies that encourage or even mandate federal, state, and local law enforcement officers to pursue Continued Presence when appropriate and to promptly certify victims of severe forms of trafficking in persons in support of their T visa applications.

When law enforcement and prosecutors improve victim experiences, it will not only help the victim and prosecution but will also facilitate the development of more trusting relationships with service providers, advocates,

429. *Id.* at 6.

430. *Id.* at 8.

431. *Id.* at 8, 13.

432. *Id.* at 12–13.

433. *E.g.*, González, *supra* note 185, at 860–62.

434. *See* Farrell et al., *supra* note 155, at 49. The Human Trafficking Legal Center recommends appointing an attorney to serve as victim-witness counsel in human trafficking cases as another way to ensure victims' needs are addressed during prosecution. WU & YELDERMAN, *supra* note 315, at 6.

435. *See* González, *supra* note 185, at 857–58, 867–68.

436. Telephone Interview with Susan French, *supra* note 193. DHS issued Continued Presence to a total of only 125 human trafficking victims in 2019. 2020 REPORT, *supra* note 100, at 518.

437. *See* 2020 REPORT, *supra* note 100, at 518.

and organizations on the ground.⁴³⁸ Those relationships, in turn, are likely to result in more referrals of labor trafficking cases.⁴³⁹

5. Utilize Civil Litigation

Civil litigation can be used as a source of intelligence and as a complementary enforcement mechanism. Law enforcement agencies and prosecutors can systematically monitor federal and state civil lawsuits that allege labor trafficking in order to identify traffickers for investigation.⁴⁴⁰

Federal agencies that lack the authority to criminally enforce labor trafficking crimes can still pursue traffickers and help eradicate “de facto safe harbor[s.]”⁴⁴¹ In addition to cases brought by labor trafficking survivors, the U.S. Equal Employment Opportunity Commission (EEOC) has experimented with bringing suits against traffickers using the anti-discrimination laws that it has the authority to enforce.⁴⁴²

The EEOC, sometimes in collaboration with private counsel, has successfully brought suit in at least three labor trafficking cases.⁴⁴³ These cases, brought on behalf of 132 survivors, resulted in judgments totaling roughly \$250 million as well as a \$1 million settlement and a consent decree that required a defendant to provide future work, housing, college tuition, and sponsorships to support the survivors’ continued work in the United States.⁴⁴⁴

While civil litigation does not replace the need for criminal prosecutions, it can serve as a means to, at least partially, financially compensate survivors; to seek to hold perpetrators accountable; to bring to light occurrences of labor trafficking; to offer a venue for trafficked individuals to share experiences;

438. See U.S. IMMIGR. & CUSTOMS ENF’T, *supra* note 244.

439. Telephone Interview with Susan French, *supra* note 193.

440. Civil lawsuits under the TVPRA can be stayed pending a criminal prosecution. 18 U.S.C. § 1595(b)(1).

441. P. David Lopez & Stephanie Goulston-Madison, *Employment Discrimination Law: A Model for Enforcing the Civil Rights of Trafficking Victims*, in HUMAN TRAFFICKING RECONSIDERED: RETHINKING THE PROBLEM, ENVISIONING NEW SOLUTIONS 69, 77 (Kimberly Kay Hoang & Rhacel Salazar Parreñas eds., 2014).

442. *EEOC Combats Human Labor Trafficking*, U.S. EQUAL OPPORTUNITY EMP. COMM’N, <https://www.eeoc.gov/eeoc-combats-human-labor-trafficking> [<https://perma.cc/XN9L-CZFS>].

443. E.g., *EEOC Opens “New Frontier” in War Against Human Labor Trafficking*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (2014), <https://www.eeoc.gov/laws/guidance/eeoc-opens-new-frontier-war-against-human-labor-trafficking#:~:text=EEOC%20Opens%20“New> [<https://perma.cc/LDP2-EXYY>].

444. Lopez & Goulston-Madison, *supra* note 441, at 74–76 (discussing *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247 (N.D. Okla. 2006); *EEOC v. Trans Bay Steel*, No. 06-CV-07766, 2006 WL 4545990, at *1 (C.D. Cal. Dec. 7, 2006); and *EEOC v. Hill Country Farms, Inc.*, 899 F. Supp. 2d 827 (S.D. Iowa 2012)).

and perhaps to deter at least some future instances of labor trafficking.⁴⁴⁵ The lower burden of proof in civil cases—a preponderance of the evidence rather than beyond a reasonable doubt—makes it easier to bring and prevail in a civil suit.⁴⁴⁶ It may also be a preferable option for some victims, including those who do not want to engage with law enforcement or those who want more control over the legal process.⁴⁴⁷

6. *Additional Reforms*

Beyond the recommendations discussed, there are additional strategies that should be evaluated as possible means to address the underprosecution of labor trafficking. These include amending and simplifying the federal labor trafficking crimes, expanding the capacity and authority of labor agencies, educating the public, and encouraging state and local prosecutions.

Simplifying the language of labor trafficking crimes may be helpful. For example, the language of one of the core labor trafficking crimes (18 U.S.C. § 1590) is unnecessarily confusing. It fails to provide law enforcement with clear guidance about what specific conduct is unlawful, and it requires a thorough understanding of Chapter 77 of the U.S. Criminal Code. Clarifying what conduct is prohibited would make it much easier for law enforcement—and jurors—to understand and apply the law.

Expanding the authority and capacity of labor enforcement agencies to investigate labor trafficking could also prove useful.⁴⁴⁸ Although agencies that enforce labor and employment laws lack sufficient resources to carry out their existing enforcement obligations, they already have experience engaging with workers, have more ready access to workplaces, and have an understanding of workplace dynamics and investigations superior to that of traditional law enforcement agencies.⁴⁴⁹ Providing these agencies with additional resources and the authority to investigate labor trafficking could assist in identifying more instances of labor trafficking and have the secondary benefit of increasing oversight of employer compliance more generally.

445. See Jennifer J. Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Empowerment*, 46 LOY. L.A. L. REV. 31, 50–56 (2012).

446. Lopez & Goulston-Madison, *supra* note 441, at 69.

447. Telephone Interview with Stacie Jonas, *supra* note 138.

448. There has already been some modest experimentation with this approach. In 2016, an agreement between the DOL and DOJ allowed the DOL's Office of Inspector General to investigate labor trafficking related to programs that the agency administers. 2018 REPORT, *supra* note, 98 at 444.

449. See Desai & Tepfer, *supra* note 96, at 25–26.

Federal prosecutors cannot realistically be expected to prosecute all instances of labor trafficking.⁴⁵⁰ Each state has now passed human trafficking legislation.⁴⁵¹ In some cases, state statutes improve on the federal labor trafficking crimes and may make prosecution easier.⁴⁵² Some states are already periodically prosecuting labor trafficking.⁴⁵³ Encouraging others to do so—provided they can do it well—may also prove fruitful.⁴⁵⁴

Finally, much is lost when experienced law enforcement officers and prosecutors leave their positions after gaining valuable training and experience, developing relevant skills, and building trusted relationships in the community. Attention should be paid to retention of such actors so that agencies are better equipped to address labor trafficking.⁴⁵⁵

VII. CONCLUSION

Labor trafficking is prosecuted only rarely and far less frequently than it occurs. The most likely causes of this failure to prosecute arise from policies and practices of law enforcement agencies and the DOJ, widespread misunderstandings about human trafficking, the underlying dynamics of labor trafficking, and workplace exceptionalism.

The incidence of labor trafficking and the need for its prosecution at all would be dramatically reduced by systemic change that fundamentally alters the vulnerability of populations to exploitation and eradicates the extreme power imbalances between workers and those who employ them. While such

450. AMY FARRELL ET AL., URB. INST., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 2 (2012), <https://www.urban.org/sites/default/files/publication/25526/412593-Identifying-Challenges-to-Improve-the-Investigation-and-Prosecution-of-State-and-Local-Human-Trafficking-Cases.PDF> [<https://perma.cc/7V2V-J6T9>].

451. *Id.* at 4.

452. *See id.* at 234–35.

453. *See id.* at 4.

454. For example, as of June 2020, the prosecutor's Labor Trafficking Unit in Alameda County, California, was handling nineteen cases and had successfully resolved another thirteen. LITTLE HOOVER COMM'N, *supra* note 88, at 17. Other states are not as active but do periodically prosecute labor trafficking. *E.g.*, Gregory Yee, *Majority of South Carolina Human Trafficking Cases Involved Victims Under 18 Years Old, Report Shows*, POST AND COURIER (Jan. 6, 2017), https://www.postandcourier.com/news/majority-of-south-carolina-human-trafficking-cases-involved-victims-under-18-years-old-report-shows/article_a890a97a-d387-11e6-845a-9b18c909cbd1.html [<https://perma.cc/GH5E-WGDN>]. A criminal case involving rape and labor trafficking of a restaurant employee by the restaurant's owner is underway in Arkansas. Order of Continuance & Tolling of Speedy Trial, *State v. Chen*, No. 16JCR-18-168 (Cir. Ct. Craighead Cnty., Ark., 2020). In Minnesota, a construction contractor was charged and pleaded guilty to labor trafficking in 2019. Riham Feshir, *Hennepin County's First Labor-Trafficking Case Ends in Guilty Plea*, MPR NEWS (Nov. 19, 2019), <https://www.mprnews.org/story/2019/11/18/contractor-ricardo-batres-pleads-guilty-in-rare-labor-trafficking-case> [<https://perma.cc/JZV9-C9FN>].

455. Telephone Interview with Stacie Jonas, *supra* note 138.

sweeping long-term change is pursued, the concrete reforms discussed in this Article can and should be evaluated and implemented to more effectively identify, investigate, and prosecute labor trafficking.