

## MINIMUM WAGE, JUSTIFIABLY UNENFORCED?

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Due to the current economic downturn, Americans understand that workers are struggling to pay their bills as a result of insufficient wages. It is also widely known that despite increases in corporate profits, large numbers of workers have faced layoffs or struggled with sluggish wage increases.<sup>1</sup> However, amidst these tumultuous financial times, many Americans are surprised to discover that the United States also faces a wage theft crisis.<sup>2</sup> Wage theft occurs when employers steal “money

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<sup>1</sup> STEVEN GREENHOUSE, THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER 4 (2008).

<sup>2</sup> KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID – AND WHAT WE CAN DO ABOUT IT xi (2009).

from workers by cheating them of wages owed.”<sup>3</sup> The Fair Labor Standards Act of 1938 (hereinafter “FLSA”),<sup>4</sup> created the statutory right that all workers should be paid a federally mandated minimum wage for hours worked.<sup>5</sup> Concurrently, the FLSA also created the Department of Labor’s Wage and Hour Division (hereinafter the “Agency”), which is responsible for enforcing the right to a minimum wage.<sup>6</sup> However, inadequate enforcement of the right to minimum wage has allowed wage theft to grow into a “national epidemic.”<sup>7</sup> Thus, critics assert that American labor laws are failing the workers that they were designed to protect because the Agency has not adequately enforced them.<sup>8</sup>

This Article will analyze the Wage and Hour Division’s duty to enforce the right to a federal minimum wage from a moral rights perspective. The Article will demonstrate that some moral theorists divide rights into positive and negative categories which create distinctive correlative duties.<sup>9</sup> This Article will argue that the enactment of the FLSA created a positive right to a federal minimum wage, and subsequently, a moral duty to enforce the right in both the Wage and Hour Division, as well as in society generally. In addition, this Article will examine the duty to enforce the statutory right to a minimum wage through moral theorist Henry Shue’s hierarchical analysis of rights. The Article will demonstrate that Shue does not divide rights into a positive and negative dichotomy, but rather into basic and non-basic categories.<sup>10</sup> The Article will assert that the right to a federal minimum wage is likely a non-basic human right and that by applying Shue’s theory, the Agency’s failed enforcement is defensible because sometimes non-basic rights must be sacrificed to preserve basic rights.

The Article will also analyze the right to a federal minimum wage

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<sup>3</sup> *Id.*

<sup>4</sup> Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201-262 (2010).

<sup>5</sup> 29 U.S.C. § 206(a) (2010).

<sup>6</sup> 29 U.S.C. § 204(a) (2010).

<sup>7</sup> Paul Grondahl, *Help Wanted: Long Hours, No Pay*, TIMES UNION (Albany), Mar. 5, 2009, at A3 (“‘Wage theft is a national epidemic,’ said Kim Bobo, author of a newly published book, ‘Wage Theft in America.’”).

<sup>8</sup> *E.g.*, BOBO, *supra* note 2, at 107-23, 161.

<sup>9</sup> *See, e.g.*, Manuel Velasquez et al., *Rights*, MARKKULA CTR. FOR APPLIED ETHICS SANTA CLARA UNIV., <http://www.scu.edu/ethics/practicing/decision/rights.html> (last visited Oct. 18, 2010).

<sup>10</sup> HENRY SHUE, *BASIC RIGHTS* 19 (1980).

from Stephen Holmes' legal rights perspective.<sup>11</sup> Although Holmes asserts that most legal rights generate an affirmative duty of enforcement upon government,<sup>12</sup> this Article will argue that the costs of rights can limit a government's duty. Thus, the Article's analysis will conclude that the Wage and Hour Division's failure to enforce the right to a minimum wage is justifiable under a legal rights analysis because the Agency is under-resourced.

Part I of this Article will define wage theft and describe in more detail how it occurs. Part I will also explain the widespread influence wage theft has on all types of workers.

Part II will introduce the FLSA and, specifically, the legal right to a federally mandated minimum wage created by the statute. Part II will also introduce the FLSA's establishment of the Wage and Hour Division, which was entrusted with the duty to supervise, enforce, and administer the statutory right.

Part III will analyze the Wage and Hour Division's failure to enforce the statutory right to a minimum wage. First, Part III will assert that the Agency's failure to clearly interpret the FLSA has contributed to its failed enforcement. Second, Part III will assert that the Agency is severely understaffed and under-resourced, which has contributed to its inability to properly enforce the right to a minimum wage. Finally, Part III will argue that the Agency has not consistently administered strict penalties for violations of the FLSA, which has contributed to the proliferation of wage theft.

Part IV will examine the widespread effects wage theft can have not only on individual workers, but also on the national workforce and the nationwide economy.

Part V will introduce the definition of a right from various moral and legal perspectives. First, Part V will describe various moral theorists' definitions of rights and the correlative duties that are created by positive and negative rights distinctions. Second, Part V will outline Henry Shue's hierarchical approach to rights, which divides rights into basic and non-basic categories for the purpose of determining which can be sacrificed. Finally, Part V will describe Stephen Holmes' legal definition of rights and the accompanying affirmative duty of the

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<sup>11</sup> See generally STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999).

<sup>12</sup> *Id.* at 43-44.

government to enforce those rights.

Part VI of the Article will analyze whether the Wage and Hour Division's failure to prevent wage theft is justifiable under both moral and legal perspectives of rights. Part VI will demonstrate that from a positive/negative rights dichotomy, the Agency's failures are justifiable because there is an affirmative moral duty on society to help sustain the general welfare of all workers. Part VI will then examine the Wage and Hour Division's failure to prevent wage theft pursuant to Shue's hierarchical analysis. The Article will assert that Shue would likely consider the right to a minimum wage a non-basic right, and therefore, it can be sacrificed to preserve other basic human rights such as personal security. Finally, Part VI will examine the Agency's duty pursuant to Stephen Holmes' legal rights theory, and will conclude that the cost of rights can justify the government's failure to fulfill its duty to enforce the minimum wage.

Finally, Part VII will conclude by outlining some actions the Wage and Hour Division and society can initiate in order to better fulfill their duty to enforce the right to minimum wage.

### ***1. AN INTRODUCTION TO WAGE THEFT***

Wage theft is an illegal practice that has grown to a crisis level, but amidst the present economic downturn few Americans are aware it exists, let alone are even familiar with what the term means.<sup>13</sup> Kimberly Bobo, the founder of Interfaith Worker Justice and likely the predominant expert on wage theft,<sup>14</sup> defines wage theft as "when an employer violates the law and deprives a worker of legally mandated wages."<sup>15</sup> The national organization Interfaith Worker Justice defines wage theft more specifically as the problem among "[h]undreds of thousands of workers, particularly those in low-wage jobs, [who] suffer the theft of their earned wages by unscrupulous employers."<sup>16</sup> Thus, wage theft can be defined as when an employer deprives an employee of

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<sup>13</sup> BOBO, *supra* note 2, at xi, 41.

<sup>14</sup> See Grondahl, *supra* note 7; Press Release, Interfaith Worker Justice, S. Labor Comm. to Hold Hearing On Extreme Abuses: Wage Theft Expert Kim Bobo to Deliver Testimony (Mar. 9, 2009), available at [http://www.iwj.org/detail/news.cfm?news\\_id=71&id=80](http://www.iwj.org/detail/news.cfm?news_id=71&id=80).

<sup>15</sup> BOBO, *supra* note 2, at 7.

<sup>16</sup> *Wage Theft - Expanded Definition*, INTERFAITH WORKER JUSTICE, <http://www.iwj.org/template/page.cfm?id=147> (last visited Oct. 18, 2010).

pay which he or she is due as remuneration for work performed.

Wage theft can occur in a variety of ways.<sup>17</sup> Generally, wage theft transpires through intentional conduct by employers.<sup>18</sup> Employers engage in wage theft when they misclassify employees to keep them from receiving overtime pay, issue paychecks that do not reflect the total compensation owed, deny workers their final paychecks after employment has been terminated, or refuse to pay workers the prevailing wage on government contracts.<sup>19</sup> Additionally, wage theft often occurs because employers keep workers' tips,<sup>20</sup> pressure workers to pay to keep their jobs,<sup>21</sup> or pressure employees to work off-the-clock in order to reduce production costs.<sup>22</sup> Many employers also commit wage theft by not paying workers at all, often by giving them paychecks that bounce.<sup>23</sup> Finally, wage theft commonly occurs – and for the purposes of this Article the term will strictly refer to – when employers pay workers below the statutory minimum wage required by the FLSA.<sup>24</sup> Often, employers will illegally bargain with workers to compensate them below the minimum wage or will misclassify workers as independent contractors so that they can avoid paying them in accordance with the FLSA-regulated minimum wage.<sup>25</sup> Subsequently, millions of workers are victims of wage theft because they are paid less than the federal minimum wage each year.<sup>26</sup>

Wage theft happens to all types of workers. It is a widespread and pervasive problem,<sup>27</sup> which in recent years has grown into a “national epidemic.”<sup>28</sup> It occurs “in every income-tax bracket, in every industry, in every state.”<sup>29</sup> Wage theft can and has occurred in all business models.<sup>30</sup>

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<sup>17</sup> BOBO, *supra* note 2, at 23.

<sup>18</sup> *Id.*; see also *Stop Wage Theft: Welcome to the Online Wage Theft Resource Center*, INTERFAITH WORKER JUSTICE, <http://www.wagetheft.org/> (last visited Oct. 18, 2010).

<sup>19</sup> *Wage Theft - Expanded Definition*, *supra* note 16.

<sup>20</sup> BOBO, *supra* note 2, at 32-33.

<sup>21</sup> *Id.* at 29.

<sup>22</sup> *Id.* at 51.

<sup>23</sup> *Id.* at 27, 33-34.

<sup>24</sup> *Id.* at 25.

<sup>25</sup> *Id.* at 35-39.

<sup>26</sup> BOBO, *supra* note 2, at 25.

<sup>27</sup> *Id.* at 7.

<sup>28</sup> Grondahl, *supra* note 7.

<sup>29</sup> *Welcome to the Online Wage Theft Resource Center*, *supra* note 18.

<sup>30</sup> Dan Horn, *Wage-theft Reports On The Rise*, CINCINNATI ENQUIRER, Aug. 29, 2009, at

Several large corporations have settled cases involving allegations of failure to pay minimum wages.<sup>31</sup> However, wage theft is most common among smaller enterprises such as construction and housekeeping companies, restaurants, car washes, and farms.<sup>32</sup> Illegal immigrants and low-wage workers are frequently the victims of wage theft because those workers have fewer resources to contest or recover their wages.<sup>33</sup> Wage theft tends to be more prevalent amongst low-wage and immigrant workers in the Midwestern United States, but occurs quite consistently throughout all regions.<sup>34</sup> Despite prominence in low-wage and illegal immigrant populations, wage theft affects many middle-income, legal citizens as well.<sup>35</sup> Wage theft also affects all workers despite different physical characteristics.<sup>36</sup> “[Y]oung workers, midcareer workers, and older workers” are all victims of wage theft.<sup>37</sup> “[T]he

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<sup>31</sup> See, e.g., Press Release, United Food and Commercial Workers Int’l Union, Gourmet Grocery Workers Fight Back Against Wage Theft (Feb. 26, 2009), *available at* [http://www.ufcw.org/press\\_room/index.cfm?pressReleaseID=421](http://www.ufcw.org/press_room/index.cfm?pressReleaseID=421) (stating that the owners of New York retail gourmet grocery chains Amish Market, Zeytinia, Zeytuna, and other related stores settled with workers for \$1.5 million after the Department of Labor discovered workers were being paid less than the minimum wage and were not receiving overtime wages); Press Release, U.S. Dep’t of Labor, CVS Pharmacy Inc. Agrees To Pay More Than \$226,000 In Penalties and More Than \$38,000 In Back Wages Following Investigation By U.S. Labor Dep’t (Dec. 10, 2007), <http://www.dol.gov/opa/media/press/esa/archive/ESA20071543.htm> (stating that CVS Pharmacy paid over \$38,000 to fifty-one workers in order to settle charges of failure to pay minimum wage and overtime); Press Release, U.S. Dep’t of Labor, Gas Station/Convenience Store Chain Agrees to Pay \$1 Million To Settle U.S. Labor Dep’t Lawsuit (April 2, 2007), *available at* <http://www.dol.gov/opa/media/press/esa/archive/ESA20070426.htm> (stating that employees working at Chestnut Petroleum Dist. Inc., with thirty-seven gas station/convenience store locations throughout New York, New Jersey and Connecticut area, were being paid less than the federal minimum wage).

<sup>32</sup> Horn, *supra* note 30; see also Grondahl, *supra* note 7, at 2.

<sup>33</sup> BOBO, *supra* note 2, at 7, 21, 45-46.

<sup>34</sup> Abel Valenzuela Jr. et al., *On the Corner: Day Labor in the United States*, 14-15 (2006), *available at* [http://www.sscnet.ucla.edu/issr/csup/uploaded\\_files/Natl\\_DayLabor-On\\_the\\_Corner1.pdf](http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf) (presenting a 2004 survey of day laborers over a two month period in the Western, Midwestern, Southwestern, Southern and Eastern regions of the United States that demonstrated that 66% of the workers surveyed were not paid wages at one time or another in the Midwest and 53% were underpaid wages in the Midwest, whereas all other regions found that consistently approximately 49% of the workers surveyed were either underpaid or not paid at all).

<sup>35</sup> BOBO, *supra* note 2, at 7, 21-22.

<sup>36</sup> Cf. *id.* at 7, 45-50.

<sup>37</sup> *Id.* at 7.

largest dollar amounts are stolen from native-born white and black workers,”<sup>38</sup> however, low-wage job categories that are dominated by women and other races tend to incur large wage losses as a result of wage theft as well.<sup>39</sup> Regardless of the widespread occurrence of wage theft, the circumstances under which it occurs are often similar whether conducted by a small landscaping contractor against an immigrant worker or by a large corporate entity like CVS against a middle class citizen employee.<sup>40</sup>

## II. THE STATUTORY RIGHT TO A FEDERAL MINIMUM WAGE

Wage theft is a crime because workers have the legal right to a federally mandated minimum wage rate under the FLSA.<sup>41</sup> Pursuant to the current version of the statute, “[e]very employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce . . . wages . . . not less than” a federally determined wage.<sup>42</sup> This clause is commonly interpreted by the courts to apply equally to both immigrant and citizen workers.<sup>43</sup> At the time of the FLSA’s enactment, the minimum wage was set at twenty-five cents per hour.<sup>44</sup> That figure has risen to \$7.25 per hour.<sup>45</sup> Thus, the

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 47-50 (stating that for many employers, racism and sexism justifies treating some workers as inferior human beings or even disposable commodities).

<sup>40</sup> Compare *U.S. Suit Says Nursery Paid Illegal Wages*, N.Y. TIMES, April 10, 2007, at B4 (stating that certain Pro Tree workers were not being paid a minimum wage), with Press Release, U.S. Dep’t of Labor, CVS Pharmacy Inc., *supra* note 31 (stating that CVS Pharmacy paid over \$38,000 to fifty-one workers in order to settle charges of failure to pay minimum wage and overtime).

<sup>41</sup> 29 U.S.C. § 206(a) (2010).

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., *Gonzalez v. Nicholas Zito Racing Stable, Inc.*, No. 04 CV 22, 2008 U.S. Dist. LEXIS 27598 (E.D.N.Y. Mar. 31, 2008) (permitting undocumented workers to sue as a class for unpaid overtime wages pursuant to the Fair Labor Standards Act); *Serrano v. Underground Util. Corp.*, 970 A.2d 1054 (N.J. Super. Ct. App. Div. 2009) (permitting undocumented workers to recover damages for statutory violations for work already done).

<sup>44</sup> JEROLD WALTMAN, *THE POLITICS OF THE MINIMUM WAGE* 34 (2000) (“The bill finally passed, setting a minimum wage of twenty-five cents per hour, with increases of five cents per year until it reached forty cents.”).

<sup>45</sup> 29 U.S.C. § 206(a)(1)(c) (“Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: except as otherwise provided in this section, not less than 7.25 per hour.”).

FLSA requires that any individual presently employed by an employer should at least receive a minimum wage of \$7.25 per hour for work performed in commerce barring any exceptions.<sup>46</sup>

The enactment of the FLSA also created a correlative duty upon the government to enforce the minimum wage right.<sup>47</sup> The duty of enforcement was created when the FLSA established the Department of Labor's Wage and Hour Division<sup>48</sup>: "There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator [who] shall investigate conditions in the industry . . . and receive such evidence as may be necessary or appropriate . . . to perform its duties and functions under this Act,"<sup>49</sup> including the supervision of unpaid minimum wages.<sup>50</sup> Thus, it can be inferred that the Agency is vested with the administrative and enforcement authority to ensure that the right to a federally mandated minimum wage is protected.<sup>51</sup> The duty of enforcement is further evidenced by Congresswoman Linda Sanchez's interpretation of the FLSA. Sanchez stated in a Congressional hearing, which in part explored the problem of wage theft, that the FLSA did not merely suggest a rate of payment, but it created a right to a minimum wage that the federal government should help enforce.<sup>52</sup> Sanchez also inferred that by creating the Wage and Hour Division, Congress intended not to place the burden of recovering fair wages solely on workers, but on the government as well.<sup>53</sup> Therefore, the FLSA created a duty upon the Department of Labor's Wage and Hour Division to investigate,

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<sup>46</sup> 29 U.S.C. § 206(a).

<sup>47</sup> 29 U.S.C. § 204 (2010); WALTMAN, *supra* note 44 (stating that the Bill provided "for a flat national minimum wage and the vesting of administrative authority in a single [government] agency").

<sup>48</sup> *Id.*

<sup>49</sup> 29 U.S.C. § 204(a).

<sup>50</sup> 29 U.S.C. § 216(c) (2010) ("The Secretary is authorized to supervise the payment of the unpaid minimum wages.").

<sup>51</sup> 29 U.S.C. § 204.

<sup>52</sup> *Is DOL Effectively Enforcing Our Wage and Hour Laws?: Hearing Before the H. Comm. on Educ. and Labor*, 110th Cong. 54 (2008) [hereinafter *DOL Enforcement Hearing*] (statement of Hon. Linda T. Sanchez, Member, H. Comm. on Educ. and Labor), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_house\\_hearings&docid=f:43310.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:43310.pdf).

<sup>53</sup> *Id.* ("The burden of recovering fair wages when they have been denied should not rest entirely on the shoulders of workers. The federal government should vigorously enforce its own laws.").



supervise, and enforce the statutory right to a federal minimum wage.<sup>54</sup>

### ***III. THE WAGE AND HOUR DIVISION'S FAILURE TO FULFILL ITS DUTY***

In part, wage theft occurs because the Wage and Hour Division has failed to fulfill its duty to enforce the right to a minimum wage.<sup>55</sup> Specifically, the Agency has not clearly defined who is a protected employee under the FLSA, which has contributed to the Agency's failure to fulfill its enforcement duty.<sup>56</sup> In addition, the Agency is severely under-resourced and understaffed, which has hindered its investigative and enforcement duties.<sup>57</sup> Finally, the Wage and Hour Division does not administer strict penalties, which has hampered its ability to supervise and enforce the statutory right to a federal minimum wage.<sup>58</sup>

#### ***A. The Agency's Inability to Clearly Interpret the FLSA Has Contributed to Its Failure to Fulfill Its Duty***

The Wage and Hour Division has not clearly interpreted which classifications of workers are protected by the FLSA, and therefore, ambiguities have impeded enforcement as well as fostered wage theft.<sup>59</sup> Pursuant to the FLSA, "any individual employed by an employer" to work is entitled to the federal minimum wage.<sup>60</sup> It would appear that under the FLSA all employees are entitled to the minimum wage.

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<sup>54</sup> 29 U.S.C. § 204 (2010); WALTMAN, *supra* note 44.

<sup>55</sup> Cf. BOBO, *supra* note 2, at 161.

<sup>56</sup> *Id.* at 64, 67.

<sup>57</sup> *Id.* at 52-53, 114-23; Interreligious Working Grp. On Domestic Human Needs, *End Wage Theft: More Funding Needed for the Wage and Hour Division of DOL*, FRIENDS COMM. ON NAT'L LEGISLATION, [http://www.fcni.org/pdfs/budget/wage\\_theft\\_letter.pdf](http://www.fcni.org/pdfs/budget/wage_theft_letter.pdf) (last visited Oct. 19, 2010).

<sup>58</sup> BOBO, *supra* note 2, at 52-53.

<sup>59</sup> *Id.* at 64, 67; see also *Providing Fairness to Workers Who Have Been Misclassified as Independent Contractors: Hearing Before the Subcomm. on Workforce Prots. of the H. Comm. on Educ. and Labor*, 110th Cong. 15 (2007) [hereinafter *Hearing*] (statement of Catherine K. Ruckelshaus, Litigation Director, National Employment Law Project), available at [http://www.frwagegate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_house\\_hearings&docid=f:34139.pdf](http://www.frwagegate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:34139.pdf).

<sup>60</sup> 29 U.S.C. §§ 203(e)(1), (2010); see also *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 66 (2d Cir. 2003) ("This definition is necessarily a broad one, in accordance with the remedial purpose of the FLSA.").

However, the statute excludes independent contractors from statutory protection.<sup>61</sup> As a result, independent contractors can legally be paid below federal minimum wage rates.<sup>62</sup> The exclusion of independent contractors from protection creates an enforcement problem because the FLSA does not define the term independent contractor. In fact, according to the United States Government Accountability Office, “no [federal] definitive test exists to distinguish whether a worker is an employee or an independent contractor.”<sup>63</sup> Generally, in determining whether a worker is an employee or independent contractor pursuant to the FLSA, courts apply the “economic reality test.”<sup>64</sup> However, the Wage and Hour Division does not consistently apply the economic reality test, but instead sometimes refers to other federal definitions.<sup>65</sup> Therefore, the Wage and Hour Division often spends unnecessary time determining whether an employee is protected by the statute, rather than fulfilling their duty to enforce the minimum wage right.<sup>66</sup> The inability

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<sup>61</sup> 29 U.S.C. §§ 203(e)(1), (r)(1).

<sup>62</sup> *Hearing*, *supra* note 59.

<sup>63</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 51 (2006), available at <http://www.gao.gov/new.items/d06656.pdf>.

<sup>64</sup> Debra T. Landis, Annotation, *Determination of “independent contractor” and “employee” Status for Purposes of § 3(e)(1) of the Fair Labor Standards Act* (29 U.S.C.A. § 203(e)(1)), 51 A.L.R. FED. 702 (2009). Pursuant to the economic reality test, the following criteria have been mentioned in determining whether an employment relationship existed: (1) the extent to which the services in question are an integral part of the ‘employer’s’ business; (2) the amount of the ‘employee’s’ investment in facilities and equipment; (3) the nature and degree of control retained or exercised by the ‘employer’; (4) the ‘employee’s’ opportunities for profit or loss; (5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and (6) the permanency and duration of the relationship. The courts have indicated that the following factors are not controlling in determining the relationship between the worker and the alleged employer: (1) the intent of the parties and contractual designations. Likewise, in cases involving the FLSA the courts have stated that the following factors, although not controlling, may be considered in determining the existence of an employer-employee relationship: the investment in facilities, whether the worker is really engaging in an independent business as distinguished from performing personal labor, the opportunity for the worker to profit or loss depending on his managerial skill, the permanency of the relationship between the alleged employer and employee and the skill or training required to perform the work . . .

*Id.*

<sup>65</sup> *Cf. BOBO*, *supra* note 2, at 64, 67.

<sup>66</sup> *Id.* at 64.

of the Agency to clearly interpret who is a statutorily covered employee has fostered wage theft, and subsequently impeding the Wage and Hour Division's duty to enforce the FLSA.<sup>67</sup>

*B. Financial Constraints Have Negatively Impacted The Duty Of Enforcement*

The Wage and Hour Division is under-resourced and understaffed, which has contributed to the Agency's failure to fulfill its duty to enforce the minimum wage.<sup>68</sup> The FLSA granted the right to a federal minimum wage and created the Wage and Hour Division to enforce that right; however, the government has not allocated adequate funds to sufficiently support the Agency's task.<sup>69</sup> The Department of Labor's budget for 2008 was \$50.4 billion.<sup>70</sup> The budget of the Employment Standards Division, the division responsible for wage and hour enforcement, was approximately \$3.5 billion in 2008.<sup>71</sup> Only \$187.1 million of that \$3.5 billion budget was allocated to the Wage and Hour Division for staff and enforcement.<sup>72</sup> This equates to approximately one-third of one percent of the entire Department of Labor's budget being spent on wage and hour enforcement.<sup>73</sup> Thus, these budgetary constraints likely caused the Agency's current staffing problems, which have impeded its ability to fulfill its enforcement duty.

Understaffing, perhaps due to the Department of Labor's budgetary constraints, has contributed to the Wage and Hour Division's failure to fulfill its enforcement duty and has helped foster the occurrence of wage theft.<sup>74</sup> The Administrators of the Wage and Hour Division and the Government Accountability Office both implied during a congressional hearing relating to wage theft that because of a lack of resources, the

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<sup>67</sup> *Id.* at 64, 67-68.

<sup>68</sup> *Id.* at 52-53, 114-23; *see also* Interreligious Working Grp. On Domestic Human Needs, *supra* note 57.

<sup>69</sup> *Cf.* BOBO, *supra* note 2, at 52-53, 114-23.

<sup>70</sup> *FY 2008 Budget Overview*, U.S. DEP'T. OF LABOR, [http://www.dol.gov/\\_sec/Budget2008/overview.htm](http://www.dol.gov/_sec/Budget2008/overview.htm) (last visited Oct. 12, 2010).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (\$187.1 million budget of Division of Wage and Hour for 2008 divided by \$50.4 billion budget for the Department of Labor in 2008).

<sup>74</sup> BOBO, *supra* note 2, at 52-53, 114-23; Interreligious Working Grp. On Domestic Human Needs, *supra* note 57.

Agency's ability to enforce labor laws is hindered.<sup>75</sup> During that same hearing, Congressman Phil Hare testified that he does not believe that the Wage and Hour Division has the requisite staff to combat wage theft.<sup>76</sup> The Agency's understaffing problem is further evidenced by the number of its employees as compared to the number of workers in the United States. The number of federal wage and hour investigators has shrunk considerably as compared to one half century ago<sup>77</sup>: "Today, Wage and Hour investigators are responsible for enforcing wage laws covering more than 130 million full- and part-time workers, working in approximately seven million workplaces."<sup>78</sup> Amongst a staff of only 1000 workers in the Federal Department of Labor, there are fewer than 750 federal investigators. Each investigator is responsible for more than 170,000 workers and 9000 workplaces.<sup>79</sup> This is a devastating figure when compared to the 1500 investigators that were assigned to police fifteen million workers in 1941.<sup>80</sup> As a result of understaffing, employees' and workers' rights advocates have found that the Wage and Hour Division "does not consistently work with community partners, refuses to involve workers and advocates in helping gather information for supporting cases, ignores recommendations for targeted investigations, and sometimes won't even return . . . phone calls."<sup>81</sup> Thus, "[t]he overall crisis in terms of investigators means that any vulnerable subset of workers is inadequately protected,"<sup>82</sup> because the Agency is ill-equipped to satisfy its duty of enforcement.

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<sup>75</sup> *DOL Enforcement Hearing*, *supra* note 52, at 13, 47 (statement of Alexander Passantino, Acting Administrator, United States Department of Labor Wage and Hour Division); *Id.* at 28, 30, 39, 43 (statement of Greg Kutz, Managing Director, Government Accountability Office).

<sup>76</sup> *Id.* at 38 (statement of Hon. Phil Hare, Member, H. Comm. on Educ. and Labor) ("I don't question the dedication of the employees here. I think a large part of this maybe it is just—would like to know your thought on this—I don't think you have enough people, A, to enforce the laws that we currently have, and I think that is certainly part of the problem.").

<sup>77</sup> GREENHOUSE, *supra* note 1, at 291.

<sup>78</sup> BOBO, *supra* note 2, at 116.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 119.

<sup>81</sup> *DOL Enforcement Hearing*, *supra* note 52, at 17 (statement of Kim Bobo, Executive Director, Interfaith Worker Justice).

<sup>82</sup> BOBO, *supra* note 2, at 117.

*C. Failure to Impose Strict Penalties Has Contributed to the Lack of Enforcement*

Although the FLSA is ambiguous in part, it could restrict or minimize wage theft if the Agency more adequately enforced the statute.<sup>83</sup> In fact, a Government Accounting Office investigation suggests that “the Department of Labor currently has the necessary tools to fight wage theft, [but] suggests that the problem of wage theft is only getting worse because of weaker enforcement.”<sup>84</sup> When investigators do prosecute employers for “stealing wages, many of them are not given consequences that are sufficient for changing behavior.”<sup>85</sup> Pursuant to the FLSA, the Secretary of the Department of Labor (hereinafter “Secretary”) can seek an injunction, which confers upon the District Courts jurisdiction to restrain violations of the FLSA and to enforce judgments for past-due wages.<sup>86</sup> In addition, the Secretary can seek a fine of not more than \$10,000, liquidated damages, or imprisonment for not more than six months for a violation of the FLSA.<sup>87</sup> However, steep fines or imprisonment are rarely issued.<sup>88</sup> In fact, the most common penalty administered “is that the employer will have to pay the wages the employer should have paid in the first place.”<sup>89</sup> Being forced to pay employees the wages that they were originally owed is hardly a penalty, but rather “employers in effect get a no-interest loan from their workers.”<sup>90</sup> Additionally, in many instances employers are able to avoid paying employees their entire past-due wages.<sup>91</sup> Pursuant to the FLSA, if an action is not commenced within two years after the unlawful conduct has occurred, the party will be barred from litigation.<sup>92</sup> Therefore, stolen wages beyond the two year statute of limitations cannot be recovered.

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<sup>83</sup> *Id.* at 52-53.

<sup>84</sup> *DOL Enforcement Hearing*, *supra* note 52, at 2 (statement of Hon. George Miller, Chairman, H. Comm. on Educ. and Labor).

<sup>85</sup> BOBO, *supra* note 2, at 53.

<sup>86</sup> 29 U.S.C. §§ 216, 217 (2010); *see also* Mitchell v. Lublin, 358 U.S. 207 (1959).

<sup>87</sup> 29 U.S.C. § 216 (no one may be imprisoned under the FLSA except for an offense committed after conviction for a prior offense and pursuant to administrative proceedings of the Department of Labor).

<sup>88</sup> Interview with Wilson Sada, Representative, U.S. Dep’t of Labor Wage and Hour Div. (Oct. 20, 2009).

<sup>89</sup> BOBO, *supra* note 2, at 145.

<sup>90</sup> *Id.* at 146.

<sup>91</sup> *Id.*

<sup>92</sup> 29 U.S.C. § 255 (2006).

Thus, employers are not deterred from committing wage theft because of the lack of enforcement.<sup>93</sup> Ultimately, because the Wage and Hour Division fails to consistently enforce strict penalties, wage theft has become a crime without consequences.<sup>94</sup>

#### **IV. EFFECTS OF THE LACK OF ENFORCEMENT**

The effects of wage theft spread beyond the mere individual who has his or her pay stolen.<sup>95</sup> Wage theft “is bad for America. It hurts workers [and their families], it places ethical employers at a competitive disadvantage, [it undermines the Department of Labor,] it robs resources from the public coffers, and it denies communities of the economic stimulus.”<sup>96</sup>

Wage theft harms workers and their families because victims of wage theft still have to pay for food, clothes, and child care.<sup>97</sup> Moreover, victims of wage theft have more difficulty saving for their children’s education, paying for healthcare, and making payments on their homes, and therefore, have to spend additional time away from their families working.<sup>98</sup>

Wage theft also has negative effects on the national labor force. When society permits “employers to steal wages from some workers, it drives down wages and standards for all workers.”<sup>99</sup> When small businesses and corporations engage in wage theft, they are often “more inclined to injure or steal from workers in other ways” as well.<sup>100</sup> When wage theft occurs, workers are also subject to unsafe work environments and various other threats.<sup>101</sup> Moreover, wage theft puts those ethical employers that would usually not consider underpaying

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<sup>93</sup> BOBO, *supra* note 2, at 53, 145-47.

<sup>94</sup> *Id.* at 144.

<sup>95</sup> *See* BOBO, *supra* note 2, at 21-22.

<sup>96</sup> *DOL Enforcement Hearing*, *supra* note 52, at 16 (statement of Kim Bobo, Executive Director, Interfaith Worker Justice).

<sup>97</sup> BOBO, *supra* note 2, at 21-22.

<sup>98</sup> *Id.* at 22.

<sup>99</sup> *Id.* at 22, 50.

<sup>100</sup> Stephen Franklin, *Forgotten Corners of the Economy*, THE AMERICAN PROSPECT, Oct. 21, 2009, at A16.

<sup>101</sup> Janine Zeitlin, *Ignored and Cheated; Farm Workers Earn Nada in America’s Green Bean Capital*, MIAMI NEW TIMES, Mar. 13, 2008, available at <http://www.miaminewtimes.com/2008-03-13/news/ignored-and-cheated/>.

their workers at a competitive disadvantage.<sup>102</sup> The illegal conduct undermines ethical businesses and could drive them to engage in wage theft in order to keep up with competitors in the market.<sup>103</sup>

Continued existence of wage theft can also undermine the Wage and Hour Division. If wage theft is permitted to continue without adequate enforcement of the right to a minimum wage, an already under-resourced Agency could be spread thinner. The Government Accountability Office has already implied that the Agency's morale may be a contributing factor to the lack of wage and hour enforcement,<sup>104</sup> and additional wage theft cases could cause that morale to plummet further. Additionally, the impact of increased wage and hour violations could lead not only to a collapse of the morale of the Agency, but public confidence in the Wage and Hour Division could also erode, further undermining its enforcement capabilities.<sup>105</sup> The number of FLSA private lawsuits has already quadrupled in the last ten years.<sup>106</sup> Kimberly Bobo asserts that one could argue that lawyers are just becoming overzealous.<sup>107</sup> But she believes that it is more likely that there is an "explosion of workers not being paid and filing [private] lawsuits in part because the Wage and Hour Division is not able to handle cases."<sup>108</sup>

Finally, wage theft steals from the public coffers and can affect the

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<sup>102</sup> BOBO, *supra* note 2, at 22, 50.

<sup>103</sup> *Id.*

<sup>104</sup> *DOL Enforcement Hearing, supra* note 52, at 39 (statement of Greg Kutz, Managing Director, Government Accountability Office); *Id.* at 43 (statement of Hon. Yvette D. Clarke, Member, H. Comm. on Educ. and Labor) ("If their morale is down, if they are overwhelmed with respect to the number of cases that they have, how does that go to the quality of the work and their pursuit of justice for these workers?").

<sup>105</sup> *Id.* at 30-31 (statement of Hon. Dale E. Kildee, Vice Chairman, H. Comm. on Educ. and Labor)

I think we could say that, generally speaking, when you have no policemen around that maybe crime – other types of crimes – can be committed, and that you have to have – the idea that apprehension and enforcement is going to be there in order to get compliance . . . . I do know that I could play a role in making sure that someone would make a complaint, and they had greater assurance that the employer would be forced to comply with the law, but I don't see that as much now.

*Id.*

<sup>106</sup> *Id.* at 32 (statement of Kim Bobo, Executive Director, Interfaith Worker Justice).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

national economy.<sup>109</sup> In the midst of the current economic crisis, people are finding themselves increasingly out of work. The current economic instability combined with employer corruption has created an atmosphere where threats of job loss are used to maintain wage theft practices, consequently worsening the financial crisis.<sup>110</sup> Wage theft leads to “[b]illions of dollars in wages being illegally stolen from millions of workers each and every year.”<sup>111</sup> This can lead to both employers and employees underpaying taxes and creating unnecessary encumbrances on social services.<sup>112</sup> In addition, with less revenue being circulated, less income is being spent locally and throughout the national economy.<sup>113</sup> This is especially true when wage theft is perpetrated against low- and moderate-income workers and their families: “Economists are clear that the most effective way to facilitate the use and spending of money is to give it to low- and moderate-income families. Few will hoard it away . . . the money is circulated in the communities, which is precisely the kind of economic stimulus the nation needs.”<sup>114</sup> Thus, the effects of wage theft spread well beyond the individual worker, and therefore, the statutory right to a minimum wage must be more vehemently enforced.

#### **V. MORAL AND LEGAL IMPETUS TO ENFORCE A RIGHT**

Stephen Holmes argues that broadly there are two distinct ways to define rights: moral and legal.<sup>115</sup> Holmes states that the moral approach identifies rights with ethical principles; “[i]t identifies rights not by consulting statutes and case law, but by asking what human beings are morally entitled to.”<sup>116</sup> He characterizes moral rights as “aspirations binding on conscience, [which] impose moral duties on all mankind.”<sup>117</sup> Alternatively, Holmes argues that the legal or descriptive approach

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<sup>109</sup> BOBO, *supra* note 2, at 22.

<sup>110</sup> Franklin, *supra* note 100.

<sup>111</sup> BOBO, *supra* note 2, at 6.

<sup>112</sup> Interfaith Worker Justice, More Info About Wage Theft: Wage Theft FAQ, WAGETHEFT (2009), <http://www.wagetheft.org/moreinfo/moreinfo.html>.

<sup>113</sup> *Id.*

<sup>114</sup> Interview by Kari Lydersen with Kim Bobo (Jan. 28, 2009), <http://mhpbooks.com/mobydives/?p=3076>.

<sup>115</sup> HOLMES & SUNSTEIN, *supra* note 11, at 16.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 17.



focuses on how legal systems function rather than their justifications.<sup>118</sup> He asserts that the descriptive approach is less evaluative and “takes no stand on which human interests are, from a philosophical perspective, the most important and worthy.”<sup>119</sup> In addition, Holmes claims that the legal rights approach is a pragmatic “inquiry into the kinds of interests that a particular politically organized society actually protects. Within [the legal] framework, an interest qualifies as a right when an effective legal system treats it as such by using collective resources to defend it.”<sup>120</sup> Holmes asserts that under a legal theory, a right only exists when and if it has budgetary costs, and subsequently, when it is “enforced in functioning and adequately funded courts of law.”<sup>121</sup> Although moral and legal rights are fundamentally different approaches to defining rights, some moral and legal theorists believe that an affirmative duty to act accompanies the definition of a right.<sup>122</sup>

#### *A. Moral Rights Theories*

There are several different moral definitions of a right, but many moral philosophers are divided as to “whether, or to what extent rights and duties are logically correlative.”<sup>123</sup> For example, Thomas Donaldson believes rights “establish minimum levels of morally acceptable behavior.”<sup>124</sup> In an example of his theory, Donaldson states that if an individual has a right to physical security, then another person must refrain from depriving the individual of that security.<sup>125</sup> He argues that it would be nice if the second party also treated the individual with kindness and love, but at a minimum, others in society must respect the rights of individuals.<sup>126</sup> Donaldson also asserts that without a minimal correlative obligation of respect, a right is weakened and could become

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<sup>118</sup> *Id.* at 16.

<sup>119</sup> *Id.* at 16-17.

<sup>120</sup> *Id.* at 17.

<sup>121</sup> HOLMES & SUNSTEIN, *supra* note 11, at 19.

<sup>122</sup> Compare ALAN R. WHITE, RIGHTS 57-58 (1984), with HOLMES & SUNSTEIN, *supra* note 11, at 43-8.

<sup>123</sup> Joel Feinberg, *Duties, Rights, and Claims*, 3 AM. PHIL. Q. 137, 137 (1966); see also WHITE, *supra* note 122, at 55.

<sup>124</sup> THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 66 (1989).

<sup>125</sup> *Id.* at 66.

<sup>126</sup> *Id.*

obsolete.<sup>127</sup> Conversely, moral theorists Alan White and Joel Feinberg make duty a larger part of their definitions of rights. White asserts that many philosophers believe “that one person’s right is correlative with, is the necessary or sufficient ground of, or is the other side of the same coin as, another person’s duty (or obligation).”<sup>128</sup> Similarly, Feinberg defines rights as claims, where an individual has a justified entitlement to something from someone, which reflect the assumption of a duty.<sup>129</sup> Therefore, an ongoing debate exists between moral theorists regarding the extent to which rights and duties are logically correlative.<sup>130</sup>

One result of the debate between rights and duties has been for some moral theorists to draw a distinction between what are termed negative and positive rights. Negative rights impose obligations on others to refrain from interfering with the rights of the holder.<sup>131</sup> Negative rights present a claim by an individual that imposes a negative duty, often the duty of omission or “for each person a zone of non-interference from others.”<sup>132</sup> Examples include the “right to privacy, the right not to be killed, or the right to do what one wants with one’s property, [each] protect[ing] some form of human freedom or liberty.”<sup>133</sup> On the contrary, positive rights require more than mere omission: “positive rights impose on us [all] the duty to help sustain the welfare of those who are in need of help.”<sup>134</sup> Positive rights “are rights that provide something that people need to secure their well being, such as a right to an education, the right to food, the right to medical care, the right to housing, . . . the right to a job,” or, relevant to this Article, the right to a minimum wage.<sup>135</sup> Thus, as theorist Henry Shue states, the distinction between positive and negative rights is “between acting and refraining from acting.”<sup>136</sup> By dividing rights into positive and negative categories, it may not solve the debate as to what extent rights and duties are logically correlative, but it does further demonstrate the notion that

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<sup>127</sup> *Id.*

<sup>128</sup> WHITE, *supra* note 122, at 59-60.

<sup>129</sup> Feinberg, *supra* note 123, at 137, 142-44.

<sup>130</sup> DONALDSON, *supra* note 124, at 66.

<sup>131</sup> Velasquez, *supra* note 9.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> SHUE, *supra* note 10, at 37.

where a right does create a duty, “[o]ften [the] duties fall upon more than one class of moral agent.”<sup>137</sup>

However, not all moral theorists believe that rights and duties should be broken into positive and negative categories.<sup>138</sup> Henry Shue argues against the negative and positive distinction because some rights do not “fit neatly into their assigned sides of the simplistic positive/negative dichotomy.”<sup>139</sup> In addition, Shue asserts that by dividing rights into positive and negative categories, there is the tendency to guarantee negative rights first.<sup>140</sup> Shue claims that because positive rights “are positive and require other people to do more than negative rights require – perhaps more than people can actually do – negative rights” are essentially easier to guarantee first.<sup>141</sup> Thus, society will only allocate the remaining resources to guaranteeing positive rights.<sup>142</sup>

Alternatively, Shue argues that the distinction should be based on a hierarchy between basic and non-basic rights.<sup>143</sup> He asserts that basic rights are defined as “everyone’s minimum reasonable demands upon the rest of humanity”; they are the rights that are “essential to the enjoyment of all other rights.”<sup>144</sup> Contrarily, Shue asserts that non-basic rights are defined as “intrinsically valuable rights.”<sup>145</sup> Shue argues that “[i]n practice . . . basic rights need to be established securely before other rights can be secured” and enjoyed.<sup>146</sup> For example, he stresses that guaranteeing basic rights, such as the right to personal security and subsistence, “ought to supersede the provision” of a non-basic right like education.<sup>147</sup> Thus, Shue asserts, “if a right is basic, other, non-basic rights may be sacrificed, if necessary, in order to secure the basic right.”<sup>148</sup> However, “the protection of a basic right may not be sacrificed

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<sup>137</sup> DONALDSON, *supra* note 124, at 66.

<sup>138</sup> *See, e.g.*, SHUE, *supra* note 10, at 37.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 19.

<sup>144</sup> SHUE, *supra* note 10, at 19.

<sup>145</sup> *Id.* at 20.

<sup>146</sup> *Id.* at 19-20.

<sup>147</sup> *Id.* at 20.

<sup>148</sup> *Id.* at 19.

in order to secure the enjoyment of a non-basic right” because essentially the sacrifice would be self-defeating.<sup>149</sup> Shue argues that if a choice needs to be made, enforcing and administering a basic right ought to supersede the enforcement of a non-basic right.<sup>150</sup>

### *B. Legal Rights Theories*

There are variations of legal rights theories, but Stephen Holmes’ definition of rights does not agree with dividing rights into a simplified and orderly scheme of negative and positive rights either.<sup>151</sup> Holmes admits that simplification can be useful, but he questions “whether the relevant simplification [actually] helps illuminate reality.”<sup>152</sup> Holmes contrarily asserts that all legal rights are positive rights.<sup>153</sup> His notion develops from the classic legal maxim that “where there is a right, there is a remedy.”<sup>154</sup> Holmes believes that “[i]ndividuals enjoy rights, in a legal as opposed to a moral sense, only if the wrongs they suffer are fairly and predictably redressed by their government.”<sup>155</sup> In fact, he asserts that “[n]o right is simply a right to be left alone by public officials . . . . All rights . . . amount to entitlements defined and safeguarded by law [and] if rights were merely immunities from public interference, the highest virtue of government . . . would be paralysis or disability.”<sup>156</sup> Thus, Holmes argues almost every legal right implies a correlative positive duty of enforcement.<sup>157</sup> However, he does note that rights in American society have both social and budgetary costs, and protection of rights can be limited by the availability of resources.<sup>158</sup>

## **VI. IS THE WAGE AND HOUR DIVISION’S FAILURE OF DUTY JUSTIFIABLE?**

Whether analyzed from a positive/negative rights dichotomy,

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<sup>149</sup> *Id.*

<sup>150</sup> SHUE, *supra* note 10, at 20.

<sup>151</sup> HOLMES & SUNSTEIN, *supra* note 11, at 37-39.

<sup>152</sup> *Id.* at 39.

<sup>153</sup> *Id.* at 43.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 44.

<sup>157</sup> HOLMES & SUNSTEIN, *supra* note 11, at 43-44.

<sup>158</sup> *Id.* at 21-23.

Henry Shue's hierarchical perspective, or Stephen Holmes' legal rights theory, the Wage and Hour Division's failure to fulfill its duty to prevent wage theft can be defended and even justified. Pursuant to a positive/negative dichotomy, the right to a federal minimum wage creates not only a statutory duty of enforcement on the Wage and Hour Division, but also an affirmative moral duty on all of society to help sustain the welfare of those who are in need of help. Therefore, the existence of wage theft is a result of not only the Agency's failure to fulfill its statutory duty, but also society's failure to perform its moral duty. Under Shue's hierarchical analysis, the Agency's failure is defensible because the right to a minimum wage is a non-basic right, and the Wage and Hour Division is allocating resources to sustain other basic human rights such as personal security. Finally, under Holmes' legal rights theory, the Agency's failures are arguably justifiable because it is not equipped with sufficient resources to adequately enforce the right.

When analyzed pursuant to a positive/negative theory of rights, the FLSA created a positive right to a federal minimum wage. However, the statute not only imposed a statutory duty upon the Wage and Hour Division to investigate, supervise, and enforce the right to a minimum wage,<sup>159</sup> but also a moral duty on all Americans to help improve the general well-being of workers. This is evidenced in the stated purpose of the FLSA, which is to prevent "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers [that would] interfere with the orderly and fair marketing of goods in commerce."<sup>160</sup> Society's moral duty is further supported by applying Immanuel Kant's moral theory, which is "often used to justify positive" rights, and states that "each of us has a worth or a dignity that must be respected."<sup>161</sup> Kant maintained that "humanity must always be treated as an end, not merely as a means. To treat a person as a mere means is to use a person to advance one's own interest. But to treat a person as an end is to respect that person's dignity."<sup>162</sup> Therefore, the Wage and Hour Division's failure to prevent wage theft is defensible under a positive rights

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<sup>159</sup> 29 U.S.C. § 204(d) (2010).

<sup>160</sup> 29 U.S.C. § 202(a) (2006).

<sup>161</sup> Velasquez, *supra* note 11.

<sup>162</sup> *Id.*

analysis because employers are failing to abide by the FLSA and are abusing the dignities of individuals. Although the Wage and Hour Division has an affirmative statutory duty to enforce the minimum wage, society also has a duty to treat workers as an end, not merely a means to an end. Therefore, the Agency's failure to fulfill its duty is defensible, and even justifiable, because society has also failed to fulfill its correlative moral duty to help enforce the right to a minimum wage.

The Wage and Hour Division's failure to prevent wage theft can be justified under Henry Shue's hierarchical perspective of moral rights as well. Shue argues that the guarantees of intrinsically valuable rights can be sacrificed to preserve basic rights, which are the "minimal reasonable demands upon the rest of humanity."<sup>163</sup> Shue does not argue that basic rights are uniformly more important than non-basic rights, but rather asserts that they are given priority when a choice must be made between defending a basic right against a non-basic right.<sup>164</sup> In the case of the right to a minimum wage, Shue would likely argue that it is a non-basic right and that the duty of enforcement can be superseded in order to sustain other basic rights. Shue would likely assert – as he did while examining the non-basic right to public education – that the enjoyment of the right to a minimum wage is much "greater and richer – more distinctively human, perhaps – than merely going through life without ever being assaulted."<sup>165</sup> However, he would likely argue, based on his position on public education, that guaranteeing the right to personal security takes priority.<sup>166</sup> Shue would likely defend his position by citing some of the recent goals of the Department of Labor, which have been to ensure worker safety and create jobs.<sup>167</sup> In addition, Shue would probably cite that a majority of the 2008 Department of Labor budget is directed toward programs ensuring worker safety and promoting job

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<sup>163</sup> SHUE, *supra* note 10, at 19.

<sup>164</sup> *Id.* at 19-20.

<sup>165</sup> *Id.* at 20.

<sup>166</sup> *Cf. id.*

<sup>167</sup> *FY 2008 Budget Overview*, *supra* note 70:

In FY 2008, the Department will spend \$803.8 million to make American workers safer and healthier. The Budget builds on the MINER Act of 2006 and includes an increase of \$16.6 million to retain the 170 coal mine safety and health enforcement personnel that were added in FY 2006 and 2007.

*Id.* The budget also proposes approximately \$4 billion for training and employment grant programs to train more workers while reducing overhead and administrative complexity. *Id.*

creation.<sup>168</sup> Therefore, Shue would almost certainly argue that the intrinsic, non-basic right to a minimum wage is properly being sacrificed to preserve basic rights such as the right to personal security, the right to work, and the right to subsistence. Shue would assert that enjoyment of the right to personal security at work and the right to work are essential to enjoying the right to a minimum wage. Moreover, he would likely argue that if more resources were allocated away from guaranteeing basic rights and instead toward minimum wage enforcement, it would be self-defeating because a worker would be unable to enjoy a minimum wage if they could not safely work at all.<sup>169</sup> Thus, by applying Shue's theory of hierarchical rights, the Agency's deficiencies in wage theft enforcement are justifiable because the overarching Department of Labor is directing its efforts and resources towards preserving basic rights.

By applying Stephen Holmes' legal rights theory, one can also argue that the Wage and Hour Division's failure to adequately enforce the federal minimum wage is defensible. Holmes asserts that "[a]ll rights are claims to an affirmative governmental response."<sup>170</sup> Holmes also believes that rights are costly, and society must make financial sacrifices in order to acquire or secure them.<sup>171</sup> Therefore, Holmes would likely find that the Agency's failure to fulfill its duty of enforcement is justifiable because it is understaffed and under-resourced. Holmes would support his conclusion by citing statements made by the Administrator of the Department of Labor and the Government Accountability Office, which indicate that the Wage and Hour Division is struggling to enforce the minimum wage because they are under-resourced.<sup>172</sup> In addition, Holmes would likely reference that despite the recent proliferation of wage theft, there have only been marginal increases in the Wage and Hour Division's enforcement budget in recent years.<sup>173</sup> Therefore, because Holmes believes that "the quality and

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<sup>168</sup> *Id.*

<sup>169</sup> *Cf. SHUE, supra* note 10, at 19.

<sup>170</sup> HOLMES & SUNSTEIN, *supra* note 11, at 44.

<sup>171</sup> *Id.* at 21-24.

<sup>172</sup> *DOL Enforcement Hearing, supra* note 52, at 22 (statement of Alexander Passantino, Acting Adm'r, U.S. Dep't of Labor Wage and Hour Div.); *Id.* at 30, 39, 43 (statement of Greg Kutz, Managing Dir., Gov't Accountability Office).

<sup>173</sup> *FY 2008 Budget Overview, supra* note 70 (stating that the Wage and Hour Division enforcement budget increased by only \$16.7 million dollars from 2007 to 2008.).

extent of rights protection depends on private expenditures, as well as on public outlays,”<sup>174</sup> it is likely that he would conclude that the failures of the Wage and Hour Division to enforce minimum wage violations are a product of being financially ill-equipped.

### **VII. GOING FORWARD; ACTION TO BE TAKEN**

Despite the fact that the Agency’s failure to prevent wage theft can be defended and even justified, wage theft remains a national epidemic<sup>175</sup> and action should be taken to improve minimum wage enforcement. First, the Wage and Hour Division should publicly identify perpetrators of wage theft and the widespread effects of such illegal conduct.<sup>176</sup> Not only will publicly identifying criminals serve as a deterrent,<sup>177</sup> but society may be more inclined to fulfill its moral duty to help improve the general well-being of workers. Second, the Wage and Hour Division must clearly define which employees are protected by the minimum wage laws.<sup>178</sup> By clarifying and strengthening the definition of a statutorily-protected employee, the Wage and Hour Division will spend less time categorizing whether a worker has a valid claim and more time fulfilling their duty to investigate and enforce wage theft violations.<sup>179</sup> In addition, “[i]t would also level the playing field for law-abiding employers who do right by their workers.”<sup>180</sup> Third, the Agency must enforce stricter penalties against those convicted of wage theft, especially repeat offenders.<sup>181</sup> Stricter penalties would include uniformly imposing liquidated damages, interest on the wages owed, civil penalties, and automatic debarment from government contracts for all first time offenders. Finally, the government must infuse the Wage and Hour Division with more funding so that they can hire more investigators and pursue more claims.<sup>182</sup> The funding should not detract from agencies enforcing other basic rights. However, more funding generally should allow the Agency to better fulfill its statutory

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<sup>174</sup> HOLMES & SUNSTEIN, *supra* note 11, at 21.

<sup>175</sup> Grondahl, *supra* note 7.

<sup>176</sup> BOBO, *supra* note 2, at 151, 154, 171-72.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 177-78.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 178.

<sup>181</sup> *Id.* at 147-55.

<sup>182</sup> BOBO, *supra* note 2, at 122-23, 170-71.



duty to enforce the non-basic right to a minimum wage.<sup>183</sup>

If the aforementioned actions are taken, then both society and the Wage and Hour Division can better fulfill their duty to enforce the minimum wage and reaffirm the idea that “[w]age and workplace standards aren’t the dream . . . [t]hey are the bottom-line minimum below which no workplace should fall.”<sup>184</sup> However, if action is not taken, then the already widespread crisis of wage theft could render the statutory right to a minimum wage obsolete. For rights have “little value if those who ostensibly possess [them] lack the resources to make their rights effective.”<sup>185</sup>

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 68.

<sup>185</sup> HOLMES & SUNSTEIN, *supra* note 11, at 20.