

Wage Theft in Lawless Courts

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Low-wage workers experience wage theft—that is, employers’ failure to pay earned wages—at alarmingly high rates. Indeed, the number of wage and hour cases filed in federal and state courts and administrative agencies steadily increases every year. While much of the scholarly assessment of wage and hour litigation focuses on large collective and class actions involving hundreds or thousands of workers and millions of dollars in lost wages, the experiences of individual workers with small claims have received little attention. Furthermore, scholarly consideration of the justice gap in lower courts, more generally, has often focused on debt collection cases in which the individual denied justice is the defendant, not the plaintiff.

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This article fills a significant gap in the literature by considering the experiences of individual low-wage workers who pursue their claims in the lower courts. In doing so, it identifies the difference between the law as written and the law as experienced by low-wage workers seeking to vindicate their substantive legal rights. After considering the challenges to adjudicating wage and hour cases in small claims courts, it argues that procedural informality and frequent absence of critical inquiry into the substantive legal issues create significant hurdles to low-wage workers' ability to prevail on their claims. Indeed, despite the various protections provided by both federal and state wage and hour laws, courts adjudicating these claims often apply a breach of contract analysis that disadvantages vulnerable workers. This return to what I term a pre-New Deal, Lochnerian approach to wage and hour disputes runs afoul of Congress and state governments' efforts to regulate the workplace and, particularly, to protect vulnerable low-wage workers.

This article argues that the challenge of injecting legal standards into small claims court requires the creative use of narrative and case theory to prevail in wage and hour claims. It also considers potential procedural changes, such as the introduction of specific pleadings and forms for wage and hour claims and state court judge trainings that would better enable pro se parties to assert their federal and state substantive wage and hour rights in small claims courts.

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INTRODUCTION

Sonia Morales¹ worked cleaning houses for Marvelous Maids Cleaning Service (“MMC”) for nearly six months. Each weekday she left her house at 6:40 a.m., driving a van provided by MMC, and picked up a group of coworkers by 7:00 a.m. so they could arrive at MMC by 7:30 a.m. For the next half hour, Ms. Garza, MMC’s owner, gave the women instructions regarding which homes they would clean, while also reminding them how lucky they were to have these jobs due to their immigration status and inability to speak English. At 8:00 a.m., Sonia and her coworkers departed MMC to begin their long day cleaning five homes. Breaks were a luxury in which they rarely engaged, as they would further delay their arrival back home to their families. After cleaning the fifth house, Sonia dropped her coworkers off at a train station and drove home, typically arriving after 7:00 p.m. Sonia received \$65 dollars per day for this work, regardless of the number of hours worked, and with no consideration of overtime pay for hours worked beyond forty in a week. She left MMC frustrated with her underpayment and inability to find consistent childcare given her frequent late arrivals home in the evenings.

1. This narrative draws from an American University Washington College of Law Civil Advocacy Clinic client’s case. While the details reported here are part of the public record, I have nevertheless changed the client’s name, her employer’s name, and any other identifying information. The case documents are on file with the author and available upon request.

She sought assistance at a local worker center that ultimately referred her to a law school clinic for representation. Sonia and her attorneys calculated that MMC owed her approximately \$2,500 in unpaid wages. They therefore brought a claim in small claims court against MMC and Ms. Garza for lost wages in violation of the federal and state wage and hour statutes. The trial included opening statements; witness testimony by Sonia, Ms. Garza, and an MMC employee who never worked with Sonia; cross-examination of the witnesses; and closing statements. At the conclusion of the two-hour trial, the small claims court judge ruled that Sonia had not met her burden of proving that she had worked the number of hours she claimed, and found in favor of the defendant.

The appeal of Sonia's claim—a *de novo* trial before the Circuit Court—yielded a different result. After hearing the evidence, the judge retreated to chambers to consider the case. When he emerged, he engaged in a lengthy conversation with Sonia's counsel about the specific statutory violations alleged and the evidence they believed supported their allegations. Indeed, the judge stated, "Counsel, I consider myself a fairly intelligent person, and I really try to understand what people present to me. But, I'm having difficulty understanding the claims in this case. I'm looking at the law that you cited me and I really need to be educated here." Following a series of questions and answers between the judge and counsel, the judge entered judgment for Sonia, awarding her the wages she sought.

The testimony provided in the small claims court and circuit court was substantially similar. But the willingness of the court to engage in an analysis of the particular statutory violations alleged was drastically different and ultimately yielded different results.

Wage and hour statutes provide protections for workers, but courts often fail to enforce them properly. Individual wage theft claims may involve relatively small amounts of lost wages. Workers must typically file their claims in small claims courts, which use relaxed procedural rules to accommodate the large numbers of *pro se* parties.² A simplified procedural process, however, often yields a simplified application of legal concepts. Federal and state wage and hour laws include many specific protections for workers. Judicial interpretations of those statutes frequently further extend those protections to increase a plaintiff's chance of prevailing in litigation and securing significant remedies that disincentivize wage theft. The statutes advance the public policy goals of enforcing wage and hour statutes and deterring wage theft by providing for liquidated and treble damages plus attorneys' fees and costs. Where workers are

2. These small value claims, often termed "negative value claims," may, in fact, be so small that attorneys reliant on attorneys' fees generated from successful cases may refuse to take them because the cost of litigation and collection exceed the potential recovery of back-pay and any damages. *See, e.g.,* Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 762 (2007). Indeed, scholars often point to the ability to group together negative value claims that plaintiffs would not otherwise pursue as the purpose of class and collective adjudication. *See id.*

successful in their claims, lower courts often fail to award more than the base wages sought. Indeed, liquidated damages, treble damages, and attorneys' fees and costs awards are critically important. If the only penalty for failing to pay a worker is a court eventually ordering the employer to pay the wages due, then employers often consider wage theft a risk worth taking. Moreover, in the absence of careful consideration of these statutory protections, workers may face significant hurdles in proving their claims. The invisibility of the statutory protections in lower courts risks a return to a *Lochner* era³ breach of contract analysis that Congress and many state legislatures have explicitly rejected through the creation of statutory protections.

This dynamic creates additional hurdles to successfully pursuing wage and hour claims. The implications for pro se parties with limited, if any, knowledge of the applicable laws are significant and create challenges to prevailing in wage and hour claims brought in small claims court. Where employees retain attorneys, counsel must determine how to insert the various statutory protections into the simplified process. As such, they construct a narrative of the wage theft that both explicitly and implicitly captures the compelling story as well as the law. In the clinical teaching context, the pedagogical challenges inherent in these processes are complex, as student attorneys grapple with developing these critical lawyering skills.

In this article, I explore the challenges of enforcing wage and hour statutes in small claims courts, where courts often fail to consider the specific statutory protections afforded by the statutes and revert to simplified breach of contract analyses that ultimately disfavor workers. In Part I, I provide a background on wage theft and the protections federal and state statutes provide. In particular, I consider the purposeful distinctions created by statutes to remove wage and hour claims from a breach of contract framework. In Part II, I explore *Lochner v. New York* and the Supreme Court's early rejection of state statutes that attempted to regulate employment relationships. I also discuss the inherent challenges in a contractual analysis of wage and hour violations and contend that absent the proper enforcement of statutory protections, *Lochner's* lasting analytical grip will undermine worker protections. In Part III, I consider the procedural mechanisms in lower courts. While simplified procedures are typically framed as creating docket efficiency and increasing pro se parties' ability to navigate the legal process, I argue that simplification of the law thwarts the critically important intentions of wage and hour laws. In Part IV, I address the need to employ narrative and case theory strategically in wage and hour cases in small claims court. I also consider the potential existence of racialized stock stories

3. *Lochner v. New York*, 198 U.S. 45 (1905). The "*Lochner* era" refers to the years between the Supreme Court's 1905 decision and Congress's passage of the New Deal in 1938 when the Supreme Court regularly invalidated states' efforts to enact wage and hour protections for vulnerable workers. See, e.g., G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 433, 447 (1993) (characterizing the *Lochner* era as 1870 to 1937 followed by the New Deal era).

that may help or hamper this process. Finally, in Part V, I propose potential changes to the structure of small claims court and the process for filing wage and hour claims to ameliorate the challenges identified herein.

I.

WAGE THEFT AND ITS REGULATION: BEYOND THE CONTRACTUAL RELATIONSHIP

A. *Wage Theft Defined*

Wage theft, or the failure to pay employees the statutorily required or agreed-upon wages for hours worked, is a violation of the Fair Labor Standards Act (FLSA) as well as various state wage and hour statutes, many of which expand the protections provided under the FLSA.⁴ It includes not only the outright failure to compensate an employee, but also the various ways in which employers may fail to properly compensate employees, including, for example, the failure to: (1) pay the minimum wage⁵ or the agreed-upon wage; (2) pay time and a half for overtime hours;⁶ (3) pay at all or for all of the hours worked; (4) pay tips earned; (5) make up the difference between the tipped minimum wage and the standard minimum wage when tips do not make up the gap between them.⁷ Wage theft also includes the failure to properly pay workers based upon misclassifying them either as exempt from wage and hour laws or as independent contractors.⁸

4. See 29 U.S.C. §§ 206–07 (2012); see also, e.g., D.C. CODE ANN. §§ 32-1001–15 (West, 2018).

5. The federal minimum wage is \$7.25 an hour. See 29 U.S.C. § 206(a)(1).

6. See *id.* § 7(a).

7. The federal tipped minimum wage is \$2.13 an hour. *Id.* § 208(m)(11); 29 C.F.R. § 531.59(a) (2011). The FLSA permits employers to take a “tip credit” in service industries where workers receive tips from customers. 29 U.S.C. § 203(m). Employers may then directly pay their employees the \$2.13 per hour and make up the difference between \$2.13 per hour rate and the \$7.25 per hour rate with those tips, so the employee ultimately receives at least \$7.25 per hour. If the tips are not sufficient to make up the gap, the employer must still make certain the employee ultimately receives the standard minimum wage. According to various studies and reports, violations of this provision of the FLSA are widespread. As a result, many service industries employees receive far below the federal minimum wage. See, e.g., SARU JAYARAMAN, FORKED 7–11 (2016).

8. See, e.g., Nantiya Ruan, *Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and its Impact on Low-Wage Workers*, 30 HOFSTRA LAB. & EMP. L.J. 351, 361–62 (2013) (discussing the contours of misclassification cases) [hereinafter Ruan, *Same Law, Different Day*].

Wage theft is rampant in the low-wage workforce.⁹ Scholars and advocates have identified, analyzed, and discussed its prevalence.¹⁰ For example, a 2009 report based upon the survey of 4,387 workers in three major US cities found that one quarter of the workers did not receive the minimum wage, with 60 percent underpaid by more than one dollar per hour.¹¹ Furthermore, 76 percent of the workers who reported working more than forty hours the previous week failed to receive legally required overtime compensation.¹²

While immigrant low-wage workers, including undocumented workers, experience particularly high incidents of wage theft,¹³ the phenomenon is generally widespread.¹⁴ The substantial increase in federal wage and hour

9. See, e.g., KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT (2009); Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1, 8–9 (2013) [hereinafter Coleman, *Procedural Hurdles and Thwarted Efficiency*]; Matthew W. Finkin, *From Weight Checking to Wage Checking: Arming Workers to Combat Wage Theft*, 90 IND. L. J. 851, 853–54 (2015); Matthew Fritz-Mauer, *Lofly Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers*, 20 EMPLOYEE RTS. & EMP. POL'Y J. 71, 95 (2016); Ruth Milkman et al., *Wage and Hour Violations in Urban Labour Markets: A Comparison of Los Angeles, New York and Chicago*, 43 INDUS. REL. J. 378, 379 (2012) (discussing a study that found pervasive wage theft in the nation's three largest urban labor markets); Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727–28 (2010) (“If the rising numbers of lawsuits against major corporate employers is any indication, the United States is suffering a crisis of wage theft against its workers.”); Ross Eisenbrey, *Wage Theft is a Bigger Problem Than Other Theft—But Not Enough is Done to Protect Workers*, ECON. POL'Y INST. (Apr. 2, 2014), <http://www.epi.org/publication/wage-theft-bigger-problem-theft-protect> [<https://perma.cc/K44T-MB86>] (“Survey research shows that well over two-thirds of low-wage workers have been the victims of wage theft, but the governmental resources to help them recover their lost wages are scant and largely ineffective.”).

10. See, e.g., BOBO, *supra* note 9; NAT'L EMP'T LAW PROJECT, WINNING WAGE JUSTICE: A SUMMARY OF RESEARCH ON WAGE AND HOUR VIOLATIONS IN THE UNITED STATES (2013), <http://www.nelp.org/content/uploads/2015/03/WinningWageJusticeSummaryofResearchonWageTheft.pdf> [<https://perma.cc/8HSF-AHGT>]; Llezlie Green Coleman, *Exploited at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. SOC. POL'Y & L. 397, 402–05 (2015) [hereinafter Coleman, *Exploited at the Intersection*]; Llezlie Green Coleman, *Rendered Invisible: African American Low-Wage Workers and the Workplace Exploitation Paradigm*, 60 HOW. L. J. 61, 100–02 (2016) [hereinafter Coleman, *Rendered Invisible*]; Omer Kimhi, *Getting More Than Justice on Paper: Bankruptcy Priorities and the Crisis of Unpaid Wages*, 44 HOFSTRA L. REV. 107, 113 (2015) (describing wage theft as an epidemic); Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 668 (2014); Ruan, *Same Law, Different Day*, *supra* note 8.

11. ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 2 (2009) <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf> [<https://perma.cc/296H-CYF8>].

12. *Id.*; see also Andrew Friedman & Deborah Axt, *In Defense of Dignity*, 45 HARV. C.R.-C.L. L. REV. 577, 577–78 (2010) (noting that seventy-six percent of low-wage workers who work more than forty hours per week do not receive the legally mandated time-and-a-half overtime rate).

13. See Coleman, *Exploited at the Intersection*, *supra* note 10, at 402–03; Coleman, *Procedural Hurdles and Thwarted Efficiency*, *supra* note 9, at 6–7. Workers' rights advocate Kim Bobo explains that the lack of a rational immigration policy in concert with economic desperation and fear of deportation make undocumented workers particularly vulnerable to employers withholding their wages. See BOBO, *supra* note 9, at 59–60.

14. See Coleman, *Rendered Invisible*, *supra* note 10.

claims—including collective and class actions often involving hundreds or thousands of workers¹⁵—in addition to various worker advocates’ reports and scholarly articles describing the phenomenon,¹⁶ demonstrate the magnitude of the problem. While cases involving large employers like Wal-Mart or Tyson’s Foods¹⁷ may receive attention in the media and are more likely to be subject to scholarly inquiry, wage theft experienced by individual workers in comparatively small amounts by small employers seems hidden from sight. Employers with twenty or fewer employees, however, are more likely than their larger counterparts to violate the wage and hour laws.¹⁸

Even a seemingly small amount of wage theft has a significant impact on low-wage or minimum wage workers. As the Economic Policy Institute explained:

When a worker earns only a minimum wage (\$290 for a 40-hour week), shaving a mere half hour a day from the paycheck means a loss of more than \$1,400 a year, including overtime premiums. That could be . . . the difference between paying the rent and utilities or risking eviction and the loss of gas, water, or electric service.¹⁹

Where the state minimum wage is significantly higher than the federal minimum wage,²⁰ the losses are even more substantial.

15. See, e.g., Lydia DePillis, *Why Wage and Hour Litigation is Skyrocketing*, WASH. POST, (Nov. 25, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/11/25/people-are-suing-more-than-ever-over-wages-and-hours/?utm_term=.5e265ad2930c [<https://perma.cc/YF7K-SU29>].

16. See, e.g., BERNHARDT, *supra* note 11, at 2 (discussing the National Employment Law Program’s study finding low-wage workers experienced frequent minimum wage and overtime compensation violations); Friedman & Axt, *supra* note 12, at 577–78 (finding that over a quarter of low-wage workers are paid less than minimum wage and that 76 percent of low-wage workers eligible for statutorily-required overtime compensation based on the number of hours they worked each week fail to actually receive it).

17. See, e.g., *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016) (summarized in Kevin McGown, *Justices Uphold Class Action in Tyson Workers’ Wage Case*, BLOOMBERG LAW (Mar. 23, 2016), <https://www.bna.com/justices-uphold-class-n57982068892> [<https://perma.cc/C2PW-CQNT>]); *Braun v. Wal-Mart Stores, Inc.*, 106 A.3d 656 (Pa. 2014) (summarized in *Wal-Mart Must Pay \$188 Million in Workers’ Class Action*, REUTERS BUS. NEWS (Dec. 16, 2014), <https://www.reuters.com/article/us-walmart-lawsuit/wal-mart-must-pay-188-million-in-workers-class-action-idUSKBN0JU1XJ20141216> [<https://perma.cc/Y6NQ-EGGW>]).

18. See Finkin, *supra* note 910, at 852 (“Smaller employers, those with twenty or fewer employees, were more likely to violate the law . . .”).

19. Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL’Y INST. (Sept. 11, 2014), <http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/> [<https://perma.cc/V5PM-UBYA>].

20. In the District of Columbia, for example, the minimum wage is currently \$14.00 per hour and is set to rise 70 cents per year until it reaches \$15 per hour in 2020. See Aaron C. Davis, *D.C. Gives Final Approval to \$15 Minimum Wage*, WASH. POST (June 21, 2016), https://www.washingtonpost.com/local/dc-politics/dc-gives-final-approval-to-15-minimum-wage/2016/06/21/920ae156-372f-11e6-8f7c-d4c723a2becb_story.html?utm_term=.28e4f7768aa5 [<https://perma.cc/RD7B-V7CL>].

Some scholars have argued that the overall financial impact of wage theft is greater than criminal theft.²¹ Indeed, Elizabeth Kennedy characterized wage theft as public larceny and argued for the imposition of creative penalties to deter the practice more effectively.²² Others have advocated for the creation of criminal penalties for wage theft in response to the depth and breadth of the problem.²³

Accordingly, employers' failure to properly compensate employees in violation of federal and state wage and hour laws has become axiomatic in the work experiences of low-wage workers. The enforcement of these statutes, including the awarding of back pay, compensatory damages, and attorneys' fees, is critical to deterring wage theft.

Weak enforcement of the wage and hour provisions make non-compliance attractive to employers. If the only penalty for the violation requires the employer to pay what it would have otherwise paid, "there is no reason why the employer would not cheat: the consequence of being caught, economically speaking, would render the employer no worse off than having complied to begin with."²⁴ As a result, federal and state wage and hour statutes, and the jurisprudence interpreting them, create not only substantive and procedural protections, but also additional damages beyond merely the unpaid wages.

B. Worker Protections: Statutory and Jurisprudential

Congress enacted the FLSA in 1938 as part of the New Deal legislation that extended federal regulation to workers.²⁵ Despite the Roosevelt Administration's full backing of the bill introducing the FLSA,²⁶ it generated vigorous debate.²⁷

21. For example, Ross Eisenbrey compared the value of wages improperly withheld from workers in 2012 (\$280 million) with the money lost through robberies that year (\$139 million) to reach the conclusion that wage theft "is a far bigger problem than bank robberies, convenience store robberies, street and highway robberies, and gas station robberies combined." Eisenbrey, *supra* note 9.

22. See Elizabeth J. Kennedy, *Wage Theft as Public Larceny*, 81 BROOK. L. REV. 517, 540 (2016).

23. See, e.g., Lee, *supra* note 10, at 663–64.

24. Finkin, *supra* note 9, at 855.

25. See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 104 (2011). Under the New Deal, Congress enacted various social safety net programs, including the National Industrial Recovery Act, Social Security Act, Agricultural Adjustment Act, Social Security Act, and Fair Labor Standards Act. See *id.*

26. See Bill Quigley, *Primer on Minimum-Wage and Overtime Issues Under the Fair Labor Standards Act for Low-Wage Workers and Their Advocates*, 29 CLEARINGHOUSE REV. 925 (1996).

27. This debate included active consideration of the Southern Democrats' opposition to extending the same workplace rights to black and white workers. This debate resulted in the exclusion from the statute of occupations with high percentages of black workers, such as agricultural workers and domestic workers. See, e.g., Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 1038–47 (2002); Llezlie Green Coleman, *Disrupting the Discrimination Narrative: An Argument for Wage and Hour Laws' Inclusion in Antisubordination Advocacy*, 14 STAN. J. C.R. & C.L. 49, 79 (2018) [hereinafter Coleman, *Disrupting*

Among other things, the Act created a federal minimum wage of twenty-five cents per hour for workers engaged in interstate commerce²⁸ and instituted the forty-hour workweek and the right to overtime compensation (1.5 times the hourly rate) for hours worked beyond forty in a workweek.²⁹

Since its enactment, various amendments to the statute, as well as jurisprudential interpretation of the statute, have further strengthened worker protections. The following section walks through many of the protections that enhance and support workers' ability to enforce their substantive wage and hour rights.

1. *Liquidated Damages*

Employers that violate the FLSA are not only liable for the wages owed, but also liquidated damages equal to the amount of wages lost.³⁰ Furthermore, these damages are not discretionary; rather, the statute provides that employers who fail to pay minimum wage and overtime “shall be liable to the employee . . . in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages . . .”³¹ These damages are not punitive; rather, they are compensatory.³² Congress intended them to compensate workers for the financial losses that attach to wage theft—such as lost housing and late fees for late debt and housing payments—without requiring that the worker attempt to calculate the financial impact of the wage theft with specificity.³³ While liquidated damages for FLSA violations are presumptive,³⁴ an employer may avoid the payment by demonstrating that it acted with “good faith and . . . had reasonable grounds” in failing to comply with the FLSA.³⁵ This burden, however, is difficult to meet and “double damages are the norm, single damages the exception . . .”³⁶

the Discrimination Narrative]; Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1371–80 (1987); Perea, *supra* note 25, at 114.

28. See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2012); Quigley, *supra* note 26, at 927.

29. See GEORGE E. PAULSEN, *A LIVING WAGE FOR THE FORGOTTEN MAN: THE QUEST FOR FAIR LABOR STANDARDS*, 1933–41 (1996).

30. See 29 U.S.C. § 211. Maryland and Washington, D.C. likewise provide for additional damages above the lost wages for violations of their wage and hour statutes. See MD. CODE. ANN., LAB. & EMPL. § 3-507.2 (West 2010); D.C. CODE ANN. § 32-1331.09(a)(1) (West 2013).

31. 29 U.S.C. § 216(b).

32. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945). The Court explained these damages constitute “compensation for the retention of a workman’s pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.” *Id.*; see also *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 907 (3d Cir. 1991).

33. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583 (1942) (finding the FLSA provides “compensation, not a penalty or punishment, by the Government”).

34. See *Reich v. Southern New Eng. Telecomms. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997).

35. 29 U.S.C. § 260.

36. *Kinney v. D.C.*, 994 F.2d 6, 12 (D.C. Cir. 1993) (citing *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986)).

2. Attorneys' Fees and Costs

The FLSA and many of its state law equivalents defy the American rule that parties bear their own costs of litigation,³⁷ and instead provide that the prevailing party in litigation may collect reasonable attorneys' fees and costs.³⁸ These fees are an integral part of the statute and necessary for its consistent private enforcement.³⁹

Some small claims courts, however, limit the amount of attorneys' fees recoverable in cases before their courts. The District of Columbia, for example, limits the recovery of attorneys' fees to 15 percent of the plaintiff's recovery.⁴⁰ Given the \$10,000 jurisdictional limit on claims, the maximum award contemplated by the court is \$1,500. This restriction creates a substantial deterrent to private attorney representation of workers in that court, given the number of hours necessary to adequately represent a worker in wage and hour litigation.⁴¹ Such a requirement also creates a perverse incentive for an attorney to put minimal effort into a case (that is, \$1,500 of effort) because she will be unable to collect her entire fee. The implications for attorneys' duty of zealous

37. See Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1093 (2007) (discussing the history of trial courts waiving the American Rule, the Supreme Court's rejection of this practice, and Congress' creation of the statutory right to attorneys' fee-shifting clauses).

38. 29 U.S.C. § 216(b) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.").

39. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) ("If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees . . ."); see, e.g., *Fegley v. Higgins*, 19 F.3d 1126, 1134 (6th Cir. 1994) (noting the "purpose of the FLSA attorney fees provision is 'to insure [sic] effective access to the judicial process by providing attorney fees for prevailing plaintiffs with wage and hour grievances'"). Some courts recognize that the amount of attorneys' fees collected in a case may far exceed the amount of the worker's unpaid wages. See *Howe v. Hoffman-Curtis Partners Ltd.* 215 Fed. App'x. 341, 342 (5th Cir. 2007) ("Given the nature of claims under the FLSA, it is not uncommon that attorney fee requests can exceed the amount of judgment in the case by many multiples.").

40. D.C. SUPER. CT. R. PROC. SMALL CLS. & CONCILIATION BRANCH R. 19 ("Except for exceptional circumstances made known to the judge in open court, attorney's fees in this Branch may not be allowed in an amount exceeding 15 percent of the plaintiff's recovery"). Furthermore, the rules plainly fail to contemplate the provision of attorneys' fees in cases alleging violations of fee-shifting statutes, like the FLSA and its state counterparts. Rule 19 does not allow attorneys' fees unless the attorney certifies "that the fee claimed is payable only and entirely to him, and that he has no agreement with the plaintiff and will make none whereby any part for such attorney's fees will be payable to anyone other than such attorney." *Id.* The fee-shifting statutes, however, contemplate that the fee is awardable to the party (who then typically pays the attorney). D.C. CODE ANN. § 32-1308 (West 2017) (providing attorneys' fees and costs shall be awarded to the prevailing parties in cases alleging violations of the Minimum Wage Act, the Sick and Safe Leave Act, or the Living Wage Act).

41. For example, even at a very low billable rate of \$150 per hour, it is implausible that an attorney could conduct multiple interviews of the client, engage in fact investigation, develop a case theory, draft a complaint, arrange for service, participate in the initial hearing and mediation, prepare for trial (including preparing the client and witnesses for testimony), and try the case for a total of ten billable hours.

advocacy are clear. In addition, this limit in recoverable attorneys' fees is in direct contravention of D.C.'s wage and hour statute that provides that the court *shall* award a prevailing plaintiff attorney fees computed consistent with the matrix approved in *Salazar v. District of Columbia* and "updated to account for the current market hourly rates for attorney's services."⁴²

3. Recordkeeping Requirement

Section 11(c) of the FLSA requires employers make and maintain records of their employees and of their "wages, hours, and other conditions and practices of employment."⁴³ The statute does not require employers to maintain the records in a specific form or format.⁴⁴ However, it identifies a relatively specific list of employee information employers must keep, including the hours worked each day, the total hours worked in a work week, the total daily or weekly straight-time wages, the regularly hourly rate of pay for any workweek in which overtime compensation was due, the total wages paid each pay period, and the date payment was made and the pay period covered by that payment.⁴⁵

No private right of action exists to enforce the statutory recordkeeping requirements.⁴⁶ There are, however, jurisprudentially created litigation penalties for violations. For example, courts have found the failure to keep required records may constitute evidence that the employer's failure to pay the minimum wage or overtime compensation was willful.⁴⁷

42. 123 F. Supp. 2d 8 (D.D.C. 2000); D.C. Wage Theft Prevention Act, D.C. Act § 20-426 (2014) (codified as D.C. Law § 20-157 (2015)).

43. 29 U.S.C. § 211(c) (2012); *see also* 29 C.F.R. § 516.1 (2018).

44. *Brock v. Wilamowsky*, 833 F.2d 11, 19 (1987) (quoting *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986)).

45. 29 C.F.R. § 516.2. The FLSA requires that employers maintain additional records for specific types of employees, such as tipped workers, domestic service employees, and industrial homeworkers. *Id.* § 516.28(a); *id.* § 552.110(a); *id.* § 516.31(b)(2). For example, employers of tipped employees must also maintain records with: a notation on the pay records that identifies employees whose wages include tips, weekly or monthly amounts of tips the employee reports or receives, the amount by which tips have increased the employees pay, the hours worked each workday in which the employee did not work in an occupation that receives tips and the employer's total payment for those hours, and the same for each workday the employee worked in an occupation that receives tips. *Id.* § 516.28(a).

46. *See Castillo v. Givens*, 704 F.2d 181, 198 n.41 (5th Cir. 1983) ("Although FLSA requires all agricultural employees to maintain payroll records showing the hours worked . . . it contains no private enforcement mechanism if the employer fails to maintain such records.") *cert. denied*, 464 U.S. 850 (1983); *East v. Bullock's, Inc.*, 34 F. Supp. 2d 1176, 1183 (D. Ariz. 1998) ("[G]iven the existence of other private rights of action under FLSA, it appears that Congress did not intend to provide a private right to enforce § 215(a)(5)."); *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1471 (C.D. Cal. 1996) ("Neither the FLSA nor the regulations implementing it expressly create a private right of action to enforce § 215(a)(5) or regulations promulgated by the Secretary of Labor."); *O'Quinn v. Chambers County*, 636 F. Supp. 1388, 1392 (S.D. Tex. 1986) ("Private causes of action under the FLSA are established in §216 which does not provide a cause of action for violation of § 211.").

47. *See Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 844 (6th Cir. 2002) (finding it would have been proper for the court to instruct the jury that it could consider the failure to maintain records when determining whether the failure to pay overtime was willful); *Jacobsen v. Stop & Shop*

4. Notice Posting

The FLSA requires employers to post various notices in the workplace that alert workers to their statutory wage and hour rights.⁴⁸ Some courts have found that employers' failure to post the required notices may toll the two-year statute of limitations period.⁴⁹ This tolling period may be particularly important where, for example, a worker has difficulty obtaining counsel or taking the time away from work to engage in the steep learning curve necessary for successful pro se representation.

5. Burden-Shifting in the Absence of Documents

In *Anderson Mt. Clemens Pottery*, the Supreme Court created critically important litigation protections for workers whose employers fail to maintain records. First, the Court opined that where an employer fails to maintain records, the plaintiff need only demonstrate by "just and reasonable inference" that she was an employee, she worked the hours, and the employer failed to pay her.⁵⁰ The "just and reasonable inference" standard is reasonably easy to meet through client testimony⁵¹ and plainly more lenient than the "more likely than not" standard used in many small claims court cases.⁵² Once the employee makes that showing, the burden then shifts to the employer to rebut the inference.⁵³ The D.C. Circuit has described this rebuttal standard as requiring the employer to "pinpoint evidence of the precise amount of work performed or to negative the reasonableness of the inferences to be drawn from the [employee's] evidence,"⁵⁴ and described this burden as "significant."⁵⁵

Supermarket Co., 2003 WL 21136308, at *3 (S.D.N.Y. May 15, 2003) ("[F]ailure to keep the records required by the Department of Labor regulations for non-exempt employees . . . may permit a finding of willfulness.").

48. 29 C.F.R. § 516.4.

49. See, e.g., *Cortez v. Medina's Landscaping Inc.*, 2002 WL 31175471, at *6 (N.D. Ill., Sept. 30, 2002) (holding that an employer's failure to post the FLSA Notice tolls the statute of limitations period until the worker acquires "general awareness" of her rights under the FLSA). But see *Viciedo v. New Horizons Computer Learning Ctr. of Columbus, Ltd.*, 246 F. Supp. 2d 886, 904 (S.D. Ohio 2003) ("[E]mployer's failure to post [an FLSA] notice . . . does not necessarily toll the statute of limitations.").

50. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

51. See, e.g., *supra* Introduction (discussion of small claims court judge's ruling in the *Sonia Morales*).

52. See, e.g., *Dole v. Tony & Susan Alamo Found.*, 915 F.2d 349, 351 (8th Cir. 1990) (finding employee's credible testimony alone was sufficient to meet the just and reasonable inference standard); *Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986). But see, *Rosales v. Lore*, 149 F. App'x 245–46 (5th Cir. 2005) (holding that the employee failed to establish hours worked by a just and reasonable inference where his claims that he worked 12-hour days strained credibility).

53. *Anderson*, 328 U.S. at 687–88.

54. *Dove v. Coupe*, 759 F.2d 167, 174–75 (D.C. Cir. 1985).

55. *Blake v. CMB Const.*, 1993 WL 840278, at *5 (D.N.H. Mar. 30, 1993) ("The burden placed upon the employer is a significant one[.]").

Furthermore, the Court specifically contemplated that a worker may not have documentary evidence, and that the resulting damages awarded may be inexact.⁵⁶ Indeed, the Court explained:

The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11(c) of the Act. . . . Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case, “it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.”⁵⁷

The Supreme Court has thus made clear that an employer should not benefit from a failure to maintain records and that such a practice places the employee at a significant disadvantage in litigation. A small claims court that is accustomed to applying the “more likely than not” burden of proof to a plaintiff’s claim and typically requires a higher level of specificity in determining damages would be much more likely to deny relief to worker under those higher standards, than the standard articulated by the Supreme Court.⁵⁸

6. *Individual Liability for Directors and Supervisors*

Individual corporate officers may also face liability for FLSA violations.⁵⁹ FLSA broadly defines an employee as “any individual employed by an employer,” and employer as “includ[ing] any person acting directly or indirectly in the interest of an employer in relation to an employee”⁶⁰ Courts have consistently determined that corporate individuals who meet one of the following criteria are employers subject to statutory liability: “(1) operational control, (2) substantial role in setting personnel policies and/or control over the employees,

56. *Anderson*, 328 U.S. at 688.

57. *Id.* at 688. *See also*, Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 109–10 (1991) (discussing *Mt. Clemens*’ procedural innovations and noting the record-keeping and burden-shifting process was the only one that survived future congressional action).

58. While the *Mt. Clemens Pottery* decision applies to FLSA claims, many state courts have held that their state wage and hour statutes should be interpreted consistent with the FLSA. *See, e.g.*, *Hernandez v. Stringer*, 210 F. Supp. 3d 54, 59 (D.D.C. 2016); *McFeeley v. Jackson Street Entm’t, LLC*, 47 F. Supp. 3d 260, 267 (D. Md. 2014); *Randolph v. PowerComm Const., Inc.*, 7 F. Supp. 3d 561, 568 (D. Md. 2014); *Thompson v. Linda & A., Inc.*, 779 F. Supp. 2d 139, 146 (D.D.C. 2011).

59. Some state statutes also hold corporate shareholders accountable for unpaid wages. *See, e.g.*, N.Y. Bus. Corp. Law § 630 (2016); Wisc. Stat. § 180.0622 (2016).

60. 29 U.S.C. § 203(d) (2012).

and/or (3) knowing participation in the violation.”⁶¹ As such, workers may seek relief against individual supervisors and corporate officers as joint employers along with the corporate entity.⁶² This ability is often critically important in enforcing judgments in wage theft cases, particularly those against the smaller companies that typify the defendants in small claims court wage theft cases. Corporations may declare bankruptcy, reorganize, or more easily hide their assets than individuals.⁶³ For example, the Ninth Circuit found the corporate defendant’s bankruptcy and resulting stay would not insulate the individual managers from liability under the FLSA.⁶⁴ Furthermore, it is easier for a corporation than for an individual to recover from the impact of a judgment on their credit. A corporate body can dissolve and reemerge with a new corporate identity. As such, federal and some state wage and hour laws contemplate the piercing of the corporate veil to reach the decision-makers and create a greater possibility of actually recovering the unpaid wages.⁶⁵ This individual liability also creates an additional incentive for compliance with the wage and hour laws. Indeed, individual managers and corporate officers may be less inclined to withhold wages where their individual assets are at risk.⁶⁶

7. Independent Contractors

The wage and hour laws apply to “employees” as defined in the statutes.⁶⁷ Employers, however, may improperly characterize workers as “independent

61. See Hina Shah, *Broadening Low-Wage Workers’ Access to Justice: Guaranteeing Unpaid Wages in Targeted Industries*, 28 HOFSTRA LAB. & EMPL. L. J. 9, 30 (2010).

62. Timothy P. Glynn, *Taking Self-Regulation Seriously: High-Ranking Officer Sanctions for Work-Law Violations*, 32 BERKELEY J. EMP. & LAB. L. 279, 324–25 (2011) (The FLSA providing “that officers with supervisory control may be deemed ‘employers’ under the statute and, hence, vicariously liable as if they were the employing enterprise”).

63. Public policy organizations and practitioners report that workers fail to collect a significant percentage of wage theft judgements because the employers disappear, hide assets, or file for bankruptcy. See Kimhi, *supra* note 10, at 108–09. To combat this phenomenon, Kimhi argues for the creation of an insurance-based solution that would require employers to pay into a fund from which employees who prevail in wage theft cases could collect their judgments. See *id.* at 109.

64. *Boucher v. Shaw*, 572 F.3d 1087, 1093 (9th Cir. 2009).

65. See Shah, *supra* note 61, at 22; see also *Avila v. Caring Hearts & Hands Assisted Living & Elder Care, LLC*, No. TDC-15-3943, 2016 WL 4083365, at *3–4 (D. Md. Aug. 1, 2016); Dana M. Muir & Cindy A. Schipani, *The Intersection of State Corporation Law and Employee Compensation Programs: Is It Curtains For Veil Piercing?*, 1996 U. ILL. L. REV. 1059, 1112 (1996).

66. This incentive, however, may be more effective where the employers are “fly-by-night labor contractors and other undercapitalized firms” from whom recovery of a judgment may be difficult. Glynn, *supra* note 62, at 325. It may have less efficacy with solvent employers who may indemnify or insure supervisors against a successful wage theft claim. See *id.*

67. See 29 U.S.C. § 203 (2010) (defining the term employee as “any individual employed by an employer”); see, e.g., D.C. CODE ANN. § 32-1002(1) (West 2018) (defining employees as persons the employer suffered to permit or permitted to work). Other states do not specifically define the term employee. Maryland, for example, does not specifically define the term employee, but applies the economic realities test to determine whether individuals are employees. See MD. CODE ANN., LAB. & EMP. § 3-507 (West 2018).

contractors.”⁶⁸ An independent contractor does not benefit from the legal protections provided by the wage and hour laws.⁶⁹ As a result, employers will misclassify workers as independent contractors, rather than employees, in order to avoid the various statutory responsibilities that attach to the employment relationship.⁷⁰

Indeed, in Sonia Morales’s case discussed in the introduction,⁷¹ the employer testified that she paid Sonia a standard amount per week rather than an hourly rate, that she did not keep track of the number of hours worked each week, and that she ultimately treated Sonia as an independent contractor because Sonia agreed to this arrangement.⁷² In other words, she argued Sonia was an independent contractor because she agreed to this contractual relationship. Workers, however, cannot bargain away or waive their wage and hour rights,⁷³ as doing so destabilizes wage and hour statutes and the important public policy goals tied to their regular enforcement.⁷⁴

Courts typically use the “economic realities test” to determine whether a worker is an employee, and therefore covered by wage and hour laws, or an independent contractor who has entered into a contractual relationship rather than an employment relationship.⁷⁵ The multi-factor economic realities test includes an assessment of: (1) the employer’s level of control over the worker;

68. See, e.g., Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1684 (2016).

69. Worker and unemployment compensation laws, as well as Social Security and disability benefits, exclude independent contractors from coverage. See Elizabeth J. Kennedy, *When the Shop Floor is in the Living Room: Toward a Domestic Employment Relationship Theory*, 67 N.Y.U. ANN. SURV. AM. L. 643, 658–59 (2012); see also Cunningham-Parmeter, *supra* note 68, at 1684.

70. See e.g., Katherine V.W. Stone, *Legal Protectors for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMPL. & LAB. 251, 262 (2006) (explaining how employers sometimes attempt to avoid coverage of various anti-discrimination statutes by classifying their workers as independent contractors); see also *Hunt v. Mo. Dep’t of Corr.*, 297 F.3d 735, 741–42 (8th Cir. 2002) (explaining how courts determine whether a party is an “independent contractor” and an “employee” and holding that plaintiffs were misclassified as “independent contractors”); *Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452, 458 (D. Md. 2000) (describing facts suggesting Perdue’s misclassification of workers as independent contractors rather than employees).

71. See *supra* Introduction.

72. See Transcript on file with author, at 35–40.

73. See *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706–07 (1945).

74. See *id.* at 706.

75. Shirley Lung asserts courts have used different versions of an economic realities test, which she characterizes as based on either control or contract theories of employment. Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 318–19 (2003); see also *Herman v. RSR Security Services Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (discussing the economic realities test); *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998); *Dole v. Snell*, 875 F.2d 802, 804–05 (10th Cir. 1989) (discussing and applying a five-factor economic realities test); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988) (discussing and applying a five-factor economic realities test); *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1534–35 (7th Cir. 1987) (discussing and applying a six-factor economic realities test); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984) (discussing and applying a four-factor “economic reality” test).

(2) the worker's opportunity for profit or loss; (3) the worker's capital investment in the process; (4) the skill necessary to perform the job; (5) whether the job is integral to the business's operation; (6) whether the relationship between the worker and employer is permanent.⁷⁶ No single factor is dispositive and not all the factors need to weigh in favor of the employment relationship in order for the court to find the existence of an employment relationship.⁷⁷ Courts, however, consider "economic dependence" the central focus of the inquiry and use the factors to guide the analysis.⁷⁸

C. Additional Protections Under State Statutes

Many state statutes have expanded the protections provided by the FLSA in an effort to further their wage and hour laws' efficacy. State wage and hour statutes provide worker protections without the need for them to engage in interstate commerce. Moreover, many state wage and hour statutes build upon the FLSA and provide additional penalties for non-compliance. For example, the Maryland wage and hour laws provide for treble, rather than liquidated damages.⁷⁹ The District of Columbia's recent amendment to its wage and hour laws created a right for workers to recover *four* times their owed wages for violations of the Wage Payment and Collection Act.⁸⁰

Recent amendments to the District of Columbia and Maryland's wage and hour laws also created automatic joint and several liability under the statute for contractors and subcontractors where the worker alleges he or she did not receive proper payment for hours worked.⁸¹ A frequent narrative in construction worker

76. Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1526 (2016); Dep't of Labor, Wage & Hour Div., *Fact Sheet No. 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)* (July 2008), <https://www.dol.gov/whd/regs/compliance/whdfs13.htm> [<https://perma.cc/U5BL-YCER>].

77. See, e.g., *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) ("No one of these considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor—economic dependence.").

78. See, e.g., *Scantland v. Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013); *Usery*, 527 F.2d at 1311; see also *Werner v. Bell Family Med. Ctr., Inc.* 529 Fed. App'x 541, 543 (6th Cir. 2013) (noting centrality of economic dependence to the "economic reality" test); *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 305 (4th Cir. 2006) ("No single factor is dispositive . . . The test is designed to capture the economic realities of the relationship between the worker and the putative employer."); *Brock*, 840 F.2d at 1059 (explaining that "[n]o one of these factors is dispositive; rather, the test is based on a totality of the circumstances").

79. See D.C. CODE ANN. § 32-1303(4) (West 2017); *id.* at § 2-220.08 (West 2013); MD. CODE ANN. LAB. & EMP. § 3-507.2 (West 2017).

80. D.C. Wage Theft Prevention Act, D.C. Act § 20-426(i) (2014) (providing an employer that violates the wage and hour statute "shall be liable to the employee in the amount of the unpaid wages, statutory penalties, and additional amount as liquidated damages equal to treble the amount of unpaid wages").

81. See D.C. CODE ANN. § 32-1012(c) ("A subcontractor, including any intermediate subcontractor, and the general contractor shall be jointly and severally liable to the subcontractor's employees for the subcontractor's violations of this chapter."); MD. CODE ANN., LABOR & EMPL. § 3-507.2(c)(2) ("In an action brought under subsection (a) of this section, a general contractor on a project

cases progresses as follows: The workers' claim that they did not receive proper payment for the hours worked on a project that involves both contractors and subcontractors. The subcontractor, who likely hired the workers, but may share supervision of the workers' daily duties with the contractor, claims that they have not been able to pay the worker because the contractor has not paid them. The contractor claims to have made all of the required payments to the subcontractor for the work and that, regardless, the contractor did not actually employ the workers. In this way, both the contractor and subcontractor play a game of "not me," disclaiming liability and pointing at one another.⁸² While workers' lawyers have long made claims of joint and several liability between the contractor and subcontractor, the need to prove the various elements of such a claim⁸³ takes time and resources, and is not always successful.⁸⁴ Perhaps recognizing this reality, the District of Columbia has removed this legal hurdle from the workers' pursuit of wage theft claims in construction and shifted the burden to the companies.

II.

BREACH OF CONTRACT AND LOCHNER'S HISTORICAL HOLD ON WORKPLACE REGULATION

A. *Lochner v. New York*

Prior to the enactment of the FLSA, and the other New Deal statutes, workplace disputes resided solely in the realm of contract law. In the seminal case, *Lochner v. New York*, the Court found unconstitutional a New York labor law that regulated the number of hours bakers could work and held that the statute unnecessarily and unreasonably interfered with the individual right to contract.⁸⁵ The FLSA and the other New Deal statutes, which imposed significant responsibilities and boundaries on the employment relationship, were

for construction services is jointly and severally liable for a violation of this subtitle that is committed by a subcontractor, regardless of whether the subcontractor is in a direct contractual relationship with the general contractor.").

82. The statute also provides that the contractor or subcontractor may seek indemnification from the other party for payments made to the worker. D.C. CODE ANN. § 32-1012(c) ("Except as otherwise provided in a contract between the subcontractor and the general contractor, the subcontractor shall indemnify the general contractor for any wages, damages, interest, penalties, or attorneys' fees owed as a result of the subcontractor's violations of this chapter, unless the violations were due to the lack of prompt payment in accordance with the terms of the contract between the general contractor and the subcontractor.").

83. Courts typically apply one of two versions of multi-factor "economic realities" tests to determine whether joint employment under the FLSA exists. *See Lung, supra* note 75, at 317 ("Two competing versions of the economic realities test emerge from contemporary FLSA cases, mirroring the tensions in early Anglo-American tort law for distinguishing between employees and independent contractors."). In 2017, however, the Fourth Circuit adopted yet another version of the test. *See Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017) (establishing a six-factor test for joint employment).

84. *See, e.g., Orozco v. Plackis*, 757 F.3d 445 (5th Cir. 2014); *Gilbreath v. Cutter Biological*, 931 F.2d 1320, 1324-27, 1330 (9th Cir. 1991).

85. *Lochner v. New York*, 198 U.S. 45, 65 (1905).

a congressional rejection of the laissez-faire approach to contracting supported by *Lochner v. New York*.⁸⁶ After *Lochner*, the Court consistently struck down states' minimum wage statutes.⁸⁷ Scholars suggest, however, that the economic destabilization of the Great Depression and subsequent changes to the composition of the Court opened the door for Court approval of the FLSA and its state law equivalents.⁸⁸

Subsequent court cases creating the joint employer doctrine of wage and hour law further “extricated an analysis of the rights of workers and duties of employers from the strictures of contract law.”⁸⁹ As a result, employers cannot simply contract away their duties to workers by using subcontractors; rather, the courts have developed tests based upon the “economic realities” of the relationship between the worker and the company in question.⁹⁰

Risa Goluboff explains that civil rights lawyers at the time understood the New Deal legislation and the Supreme Court's sanction of government's right to protect and provide for the citizenry as a shift in the legal preeminence of contract rights.⁹¹ Furthermore, on the passing of the New Deal legislation, a Republican Party member commented: “We cannot go back to a past which countenanced a widely-exploited labor, a greatly depressed agriculture, an irresponsible Wall Street; to a past which knew no old-age pensions, no unemployment insurance, no maximum hours and minimum wages.”⁹² Nevertheless, Goluboff contends, “the precise ways in which the doctrinal terrain had shifted, and the consequences of the shift, lacked the kind of clarity with which we might endow them today.”⁹³ This shift had both doctrinal significance and normative

86. See Risa Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1614 (2001) (“The demise of the *Lochner* era with the judicial validation of the New Deal had created space for novel interpretation of individual rights and new doctrines addressing the role of government in protecting those rights.”); see also *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) (“[L]iberty does not withdraw from legislative supervision . . . activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.”).

87. See e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 609 (1936) (holding a New York minimum wage law unconstitutional); *Adkins v. Children's Hosp.*, 261 U.S. 525, 558 (1923) (finding unconstitutional the District of Columbia's minimum wage); see also William P. Quigley, “*A Fair Day's Pay for a Fair Day's Work*”: Time to Raise and Index the Minimum Wage, 27 ST. MARY'S L.J. 513, 516–22 (1996) (discussing the rise of state and federal minimum-wage legislation and litigation).

88. See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007) [hereinafter GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS*].

89. *Lung*, *supra* note 75, at 337. *Lung* traces the development of the joint employer doctrine and the control theory economic realities tests. *Id.* at 311–35.

90. See *id.* at 337.

91. See GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS*, *supra* note 88.

92. *Id.* at 23 (quoting C. Gordon Post, *Civil Rights and the Role of the Republican Party in the Post-War World*, 2 BILL RTS. REV. 201, 202 (1941)).

93. See GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS*, *supra* note 88, at 23.

implications for the protection of workers' rights beyond the contractual relationship.

Most scholarly analysis of *Lochner* and the New Deal's rejection of its holding considers the decision's significance to constitutional jurisprudence and the balance of powers.⁹⁴ The shift, however, from a contractual understanding of the employment relationship to one grounded in federal and state statutory protections constituted an important change in workers' ability to seek improperly withheld wages. An employment relationship that rests solely in the contractual relationship presumes equal bargaining power between the parties and thus ignores the employer's ability to exert significant influence over the terms of the employment, particularly where the work is low-wage.⁹⁵ Indeed, the Supreme Court's jurisprudence on the FLSA's record-keeping requirement discussed *supra* reflects the Court's understanding that any other interpretation of the statute would create a perverse incentive for employers not to maintain records in order to cripple workers' ability to bring claims.⁹⁶

Indeed, the Supreme Court has explained:

The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.⁹⁷

A court's failure to consider the wage and hour statutes places workers at the mercy of a breach of contract jurisprudence that Congress, many state legislatures, and courts have explicitly rejected.

B. *The Contractual Analysis of Wage Theft*

In the absence of statutorily prescribed rights, therefore, a shift to a *Lochnerian* approach to the employment relationship occurs and contract principles govern the dispute.⁹⁸ A breach of contract approach to employment,

94. See, e.g., *id.* at 22 (“But the end of *Lochner*'s hegemony destabilized established understandings of civil rights and in broad strokes transformed crucial balances of governmental power.”); Azmy, *supra* note 27, at 1039–40.

95. See, e.g., *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945).

96. See *Miller v. Food Concepts, Int'l*, 2017 WL 1163850, at *19 (S.D. Ohio Mar. 29, 2017) (recognizing employers' perverse “incentive to shirk its recording duties in order to avoid liability”).

97. *Brooklyn Sav. Bank*, 324 U.S. at 706–07.

98. This remains true in states without wage and hour regulations in circumstances in which the FLSA may not apply. Virginia, for example, provides only very limited statutory wage and hour protections. It has a relatively bare minimum wage statute that provides that workers not covered by the FLSA must still receive the federal minimum wage and that courts may penalize employers that violate the statute by imposing fines between \$10 and \$200. See VA. CODE ANN. §§ 40.1-28.8–28.12 (West, 2014). FLSA applies to enterprises with a \$500,000 annual volume of sales or receipts that engaged in interstate commerce. 29 U.S.C. § 203(s)(1)(A)(ii) (2012). Courts have broadly interpreted “engaged in interstate” commerce to include, for example, sending mail across state lines. *Thorne v. All Restoration Services, Inc.*, 448 F.3d 1264, 1266–67 (11th Cir. 2006) (discussing examples of engaging in interstate

particularly as it manifests in small claims courts, is less complex and does not make adjustments for the more vulnerable position of the low-wage worker.⁹⁹ A standard breach of contract analysis considers the existence of a bargain to which the parties have mutually assented and of consideration.¹⁰⁰ A court will then turn to whether either party has substantially breached a material term of the contract.¹⁰¹ In low-wage worker cases where employers paid employees “under the table” in cash or did not maintain the statutorily required records, the only evidence of the hours worked and non-payment may be the worker’s testimony and may therefore turn entirely on her credibility and that of the testifying employer. These circumstances make prevailing on a claim substantially more difficult under a breach of contract analysis than under the federal and state wage and hour laws.

The next section turns to small claims courts’ relaxed procedural rules and considers the implications for workers’ ability to prevail in wage and hour cases, particularly in light of courts’ chronic failure to consider the various protections described above.

III.

SMALL CLAIMS COURTS’ RELAXED PROCEDURE AND APPLICATION OF THE LAW

Procedural informality, particularly when compared to the more structured processes in other state and federal courts, typifies the small claims court experience. Proponents of procedural informality argue traditional litigation structures create insurmountable barriers for the largely pro se litigants in small claims courts.¹⁰² However, the relaxed application of rules and sometimes law in lower courts has yielded mixed results.

In response to a national debate on how to improve justice in “poor people’s courts,”¹⁰³ recent scholarship reflects a deepening critique of these courts’

commerce, such as corresponding with and purchasing goods from out-of-state vendors); *Guzman v. Irmadan, Inc.*, 551 F. Supp. 2d 1368, 1371 (S.D. Fla. 2008) (discussing how the Eleventh Circuit has interpreted the FLSA’s requirement for an employee to be “engaged in commerce”). Congress has also extended FLSA coverage to specific groups, such as domestic workers and in-home care providers. Dep’t of Labor, Wage & Hour Div., *Fact Sheet: Proposed Rule Changes Concerning In-Home Care Industry under the Fair Labor Standards Act (FLSA)*, <https://www.dol.gov/whd/flsa/whdfs-NPRM-companionship.htm> [<https://perma.cc/62WU-MYRX>].

99. The court’s reasoning in a Civil Advocacy Client’s *pro se* case for lost wages, discussed in additional detail *infra* pp. 1326-27, provides a clear example of a contractual analysis that did not consider the application of the wage and hour statutes.

100. *Id.*

101. *Id.*

102. See Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 802–03 (2015) [hereinafter Steinberg, *Demand Side Reform in the Poor People’s Court*]; Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC’Y REV. 219, 223–24 (1975).

103. “Poor people’s courts” typically refers to courts overseeing matters seeking smaller amounts of damages and in which the rate of pro se representation is high, such as landlord/tenant court, small

administration of justice, particularly regarding low-income parties. For example, Peter Holland analyzed over 4,000 junk debt collection cases in Maryland and found substantial procedural and substantive justice challenges faced by unrepresented consumers.¹⁰⁴ Likewise, Hannah Lieberman argued that pro se consumers facing debt-collection proceedings in high-volume state court dockets often struggle to navigate a minefield of substantive and procedural law requirements.¹⁰⁵ Jessica Steinberg similarly critiqued the distribution of justice in poor people's courts, critiqued Civil Gideon as the sole solution, and argued for changes to the procedural mechanisms.¹⁰⁶

Elizabeth MacDowell's critique of poor people's courts and their procedural informality is particularly relevant to the issues raised here. In particular, MacDowell challenges what she characterizes as small claims courts' reinforcement of hegemony in ways that further subordinate vulnerable populations.¹⁰⁷ She further critiques the "delegalization" of poor people's courts that she contends may lead to low-income litigants' "loss of rights, limited autonomy and privacy, and deprivation of voice."¹⁰⁸ Her work proposes reforms to legal services based upon a counter-hegemonic approach to accessing justice and relies heavily on analyzing the dynamics in family law courts.¹⁰⁹ However, she recognizes that these same concerns arise in many of the courts frequented by the poor.¹¹⁰

The following section places these critiques in context by assessing the procedural differences between small claims courts in the District of Columbia and Maryland and the state trial courts in those same jurisdictions.

A. Small Claims Courts

Small claims courts in many jurisdictions operate in tandem with courts handling larger claims in state court systems. The significant distinguishing characteristic between small claims cases and other state court cases is the amount in controversy—small claims courts exercise jurisdiction over cases

claims court, and family court. See Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 39 (2010) ("Many reports explore the problems facing those with counsel in 'poor people's courts,' typically handling family, housing, and consumer cases."); Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 *GEO. J. ON POVERTY L. & POL'Y* 473, 475 (2015).

104. Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 *LOY. CONSUMER L. REV.* 179, 233 (2014). "Junk debt" refers to largely defaulted unsecured debt banks purchase for pennies on the dollar and attempt to collect for the full-face value of the debt. *Id.* at 182.

105. Hannah Lieberman, *Uncivil Procedure: How State Court Proceedings Perpetuate Inequality*, 35 *YALE L. & POL'Y REV.* 257, 259–60 (2016).

106. Steinberg, *Demand Side Reform in the Poor People's Court*, *supra* note 102, at 795.

107. MacDowell, *supra* note 103, at 535.

108. *Id.* at 498.

109. *Id.* at 510.

110. *Id.* at 523.

seeking smaller amounts of money in damages.¹¹¹ For example, in the District of Columbia, plaintiffs with claims worth up to \$10,000 must file their cases in the lower court. In Maryland, small claims courts exercise jurisdiction over claims worth less than \$5,000.¹¹² In other words, the only reason one wage and hour complaint is filed in small claims court and another in the state trial court is the amount of wage theft that has occurred. As discussed below, this difference in damages sought may have a profound impact on the worker's practical access to wage and hour law's protections.

A National Center for State Courts' ("NCSC") nationwide study found two thirds of state court cases were contract cases and half those contract cases involved debt collections or landlord-tenant disputes.¹¹³ Moreover, 16 percent of those cases were small claims seeking less than \$12,000.¹¹⁴ The report's characterization of cases provides insight into employment matters, including wage and hour claims, adjudicated in state courts. First, the NSCS describes small claims cases as "lower-value tort or contract disputes in which litigants may represent themselves without a lawyer."¹¹⁵ As such, according to the NCSC, small claims cases typically arise from tort or breach of contract claims. Second, the report includes a chart listing the types of cases handled in the state courts that categorizes employment claims as contract disputes. These descriptions reflect the very phenomena that I have witnessed in my clinic's cases in small claims courts: the courts are inclined to consider wage and hour cases within a breach of contract framework.

B. The Process

The procedural rules governing many small claims courts often differ substantially from those that apply elsewhere. To illustrate, the District of Columbia and Montgomery County, Maryland, small claims courts' procedural processes are instructive. In order to file a claim in small claims court in D.C., a plaintiff must complete and file a statement of claim, verification, and notice, all

111. Small claims courts across the county have varying jurisdictional limits on the amount of damages plaintiff may seek, ranging from \$1,500 in Kentucky to \$25,000 in Tennessee. *See* PAULA HANNAFORD ET AL., *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* 13 (2015) <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [<https://perma.cc/T25R-VG82>]. In December 2016, the District of Columbia increased the jurisdictional amount of the small claims court from \$5,000 to \$10,000. *Court Raises Limit for Cases Filed as Small Claim*, D.C. BAR (Jan. 27, 2017), <https://www.dcbars.org/about-the-bar/news/small-claims-cases.cfm> [<https://perma.cc/EL69-9UL6>]. The increase in the jurisdictional amount to \$10,000 means that an increased number of individual wage theft claims will likely find their way into the lower court. *See id.*

112. MD. CODE ANN., CTS. & JUD. PROC. § 4-405 (2017). Maryland also has an intermediate court between the Small Claims Court and Circuit Court for claims up to \$10,000 that permits limited discovery and other procedural mechanisms, but does not involve the more substantial processes involved in Circuit Court litigation. MD. CODE ANN., REAL PROP. § 3-701 (2018).

113. *See* HANNAFORD, *supra* note 111, at iii.

114. *See id.*

115. *See id.* at 13.

of which appear on a single page form.¹¹⁶ The 8 ½ by 11 inch fillable PDF form contains three lines on which the plaintiff must put a “simple but complete statement” of her claim.¹¹⁷ The initial filing should also include a copy of the “contract, promissory note or other instrument on which the claims is based.”¹¹⁸ The Montgomery County Complaint form likewise provides a very limited space for describing the claim.¹¹⁹ The form also provides a space for the clerk to docket a case as a (1) contract, (2) tort, (3) detinue, or (4) bad faith insurance claim.¹²⁰ Given these limited options, it is perhaps unsurprising that courts would simplify a wage theft claim into a contract claim.

Furthermore, without specific knowledge about the wage and hour laws, pro se plaintiffs might conceptualize their unpaid wages claims as a breach of contract. Indeed, in her book based upon an ethnographic study of cases filed in the poor people’s courts in Boston, Sally Engle Merry observed: “Parties are rarely aware of the particular rules or doctrines which bear on their case but instead have a general sense of fairness which derives from conceptions of property rights, *contractual obligations*, and rights to person security.”¹²¹ Therefore, the language on the complaint form may reinforce a worker’s assumption that her claim is simply about her employer’s failure to pay the agreed upon wages, and not the violation of important statutory rights enacted to protect workers from exploitation.

The case file of a Civil Advocacy Clinic client who originally filed his claim pro se in a Maryland small claims court provides insight into this phenomenon. In the space provided on the complaint form, our client wrote, “I did not get paid no money for my services and loss of earnings at my private work.”¹²² Either he or the clerk checked the “contract” box on the form. As the clinic discovered upon entering the case, his story of lost earnings was complex, and our pursuit involved determining whether he was an employee or an independent contractor, and what hours were compensable. These were important considerations, but the plaintiff lacked knowledge about their relevance to his case, how to plead or describe these issues in the complaint form, and how to provide a compelling narrative at his hearing that included these issues. Thus it was not surprising that he was ultimately unsuccessful when he appeared pro se before the small claims court judge.

116. D.C. SUP. CT. R. PROC. SMALL CL. & CONCILIATION BRANCH R. 2; see Superior Court of the District of Columbia, Statement of Claim Form, <https://www.dccourts.gov/sites/default/files/2018-07/Statement-of-Claim-Form-Rev-June-2018-fillable.pdf> [<https://perma.cc/V2RJ-854G>].

117. *Id.*

118. D.C. SUP. CT. R. PROC. SMALL CLS. & CONCILIATION BRANCH R. 3(a).

119. See District Court of Maryland, Complaint/Application and Affidavit in Support of Judgement Form, <http://www.courts.state.md.us/district/forms/civil/dcev001f.pdf> [<https://perma.cc/K6YR-CYMH>].

120. *Id.*

121. SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN 113 (1990) (emphasis added).

122. Complaint on file with the author.

Once a worker files a case in either Maryland or the District of Columbia small claims court and serves the employer, the cases proceed relatively similarly. The summons contains the initial court date at which all parties are required to appear.¹²³ That initial hearing is typically the first and possibly only opportunity for a worker to persuade the court that her employer failed to pay her wages.

Small claims courts also often lack a formal mechanism for a worker or her counsel to introduce and explain the legal standards to the court. Moreover, some jurisdictions do not even require that the persons deciding small claims court cases have law degrees.¹²⁴ Where the adjudicator may have limited understanding of state, federal, statutory, and common law, it is not surprising that the detailed wage and hour protections described herein receive little consideration in their courts. Although there may be no rule against filing a pre-trial legal memorandum that would allow the plaintiff to surface critical legal issues before the lower courts, their occurrence is infrequent in many jurisdictions. Further, it is unlikely that a small claims court judge would have an opportunity to review such a memorandum before the trial. In contrast, state trial court judges are more likely to review any pre-trial memoranda filed by the parties. Indeed, they may require parties file a pre-trial brief to address legal and factual disputes the court identifies as central to the case.¹²⁵

For example, in a recent wage and hour case my clinic handled in the D.C. Superior Court, the court requested that the parties file pre-trial briefs responding to central questions of law and fact the court had identified in the case. Specifically, the court asked:

- (1) However Defendant or Defendants labeled Plaintiff, whether for the purposes of the wage laws, the court should make an independent determination of whether Plaintiff was an independent contractor or employee. Based on the facts of this case was Plaintiff an independent contractor or employee?
- (2) If Plaintiff was an independent contractor, does Plaintiff have a claim against these Defendants? If so, what is the claim, and under what facts and are these Defendant's [sic] liable?
- (3) If Plaintiff was an employee, under what facts and law are these

123. MD. R. R.C.P. DIST. CT. R. 3-112. In the District of Columbia, this information appears on the Statement of Claim form filed to initiate a case. See SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION SMALL CLAIMS AND CONCILIATION BRANCH INFORMATION HANDBOOK 7 [hereinafter D.C. HANDBOOK].

124. Casey Lesser Mansfield identified courts across the country that do not require the decision-makers to possess law degrees. Cathy Lesser Mansfield, *Disorder in the People's Court: Rethinking the Role of Non-Lawyer Judges in Limited Jurisdiction Court Civil Cases*, 29 N.M. L. REV. 119, app. 3, at 189-97 (1999).

125. Trial court judges in the District of Columbia and Maryland also have access to law clerks to assist them in managing their cases and assessing the legal issues.

Defendants liable for her wages?¹²⁶

The court clearly understood the importance of exploring the legal basis for the relationship between the plaintiff and defendant in an unpaid wages claim. If the plaintiff were an independent contractor, then contract law would apply. On the other hand, if plaintiff were an employee, then D.C.'s wage and hour laws and the FLSA would apply. Furthermore, the third question allowed student attorneys to explain why liability applied to both corporate and individual company officer defendants named in the case.

Another clinic client's recent experience in a Maryland small claims court provides an example of the fundamentally different approach to adjudicating a wage and hour case in small claims court. Mr. Jones filed his complaint form and attached copies of a written agreement and text messages with the defendant.¹²⁷ The court set a hearing because the damages sought required *ex parte* proof. The scheduling order included the following language in the notes section: "unpaid wages, unclear business relationship and unclear what the damages are."¹²⁸

The initial exchange with the small claims court judge proceeded as follows:

The Court: First to of all, who is [the defendant]? Who are they to you?

Mr. Jones: A business

The Court: A business that you want?

Mr. Jones: That I work for.

The Court: All right, so you work for them as an employee?

Mr. Jones: Yes

The Court: Or as an independent contractor? What's the relationship?

Mr. Jones: Well the strange thing is that on the first day in coming in, they were—putting together a contract. And on the contract . . .

The Court: Do you have a copy of the contract?

Mr. Jones: Yes.¹²⁹

The Court then asked Mr. Jones questions regarding the contractual nature of the relationship between himself and his employer.¹³⁰ The Court ultimately determined Mr. Jones failed to establish the existence of an enforceable contract and failed to prove the amount of damages the defendant owed.¹³¹ Thus, ten minutes after Mr. Jones began speaking with the court, he received an order

126. Plaintiff's Memorandum of Law, *Salazar v. B&G Cmty. Serv., Inc.*, No. 2013007652B, 2015 WL 12600919 (D.C. Super. Ct. Sept. 8, 2015).

127. I have altered the client's name and any identifying details to preserve his confidentiality and privacy.

128. Transcript on file with author, at 24.

129. Transcript on file with author, at 3–4.

130. *Id.*

131. *Id.*

finding he had not established his right to payment by the defendant. Mr. Jones appeared to have no knowledge of the wage and hour laws that arguably applied to his employment, and the judge clearly construed his case as a breach of contract, to Mr. Jones's detriment.

C. Mediated Lawlessness

Mediation is typically a very early step in small claims court litigation. In both the District of Columbia and Maryland, the initial hearing date is largely an opportunity for mediation rather than an opportunity for a judge to hear the merits of the case.¹³² While courts cannot typically mandate that parties agree to mediate their claims, they exert significant pressure on parties to at least attempt mediation before proceeding to a trial on the merits of the case.¹³³ Mediation, however, is another space where the law plays little role in the resolution or conciliation of a claim. In every mediation in which my clinic students have participated in D.C. and Maryland small claims courts, the mediators have specifically stated, by way of introduction, that they are not familiar with the law of the case and it is not their job to opine on how a court might decide the case.¹³⁴ In other words, they are typically not concerned with the intricacies of the law; rather, their job is to help the parties reach an agreement to avoid the inherent risks of trial. However, the absence of law has the practical impact of placing the wage and hour cases into a breach of contract framework. The critical questions become: (1) how many hours the worker claims she worked; (2) how much she was owed for that work; (3) how much she was actually paid; (4) how much the employer is willing to pay to make this case go away; and (5) what percentage of the owed wages the worker is willing to receive in order to avoid the uncertainty of trial.¹³⁵ The mediator will likely interpret the absence of a written contract or any formal documentation about the terms of the employment or number of hours worked (e.g., timesheets) as a weakness in the case. The mediator is unlikely to know or understand the employer is statutorily required to maintain records or that the *Mt. Clemens* burden-shifting framework applies in the absence of those records. Indeed, she is unlikely to understand the myriad of protections afforded workers under state and federal wage and hour statutes that facilitate workers' abilities to bring successful claims.

However, the mediation process functions differently outside of the small claims court procedures. For example, at the trial court level in both Maryland

132. D.C. Small Claims Court Rule 12(a) provides the court "shall make an earnest effort to help the parties settle their differences by conciliation." D.C. SUPER. CT. R. PROC. SMALL CLS. & CONCILIATION BRANCH R. 12(a). In practice, this means "[a]ll cases in which both parties are present [at the initial hearing] will go to mediation prior to having a trial on the merits of the case." D.C. HANDBOOK, *supra* note 123, at 15.

133. See D.C. HANDBOOK, *supra* note 123, at 15.

134. In small claims court mediations my clinic has encountered in both D.C. and Maryland, mediators frequently describe their roles in this manner.

135. This line of inquiry typifies my experience in small claims court mediations.

and D.C., mediation occurs months into the litigation, after the completion of discovery and motions practice.¹³⁶ The courts also require that the parties submit pre-mediation statements in which the parties identify the factual and legal bases for their claims.¹³⁷ As a result, workers have an opportunity to develop not only the factual basis for their claims before mediation, but also, perhaps more importantly, to educate the mediator on the relevant legal issues. Indeed, in a recent wage and hour case my clinic students litigated before the D.C. Superior Court, the mediator specifically thanked the student attorneys for their comprehensive mediation statement and indicated he learned a great deal about wage and hour law that he thought would assist him in the mediation.

Thus, mediation in small claims court frequently falls into the legal pitfalls described earlier. The mediator's lack of knowledge about wage and hour laws makes the negotiation seem precariously close to breach of contract—that is, a negotiation about how much money was promised, how much is allegedly owed, and how much the worker is willing to accept in satisfaction of the agreement and to avoid the risks of trial.

D. What and Who is Lost in Informality

The combination of procedural informality and the absence of nuanced legal doctrine in small claims court is not based upon the complexity or importance of the legal matters that appear in that court. Rather, the financial value of the claim determines which legal forum hears the case. Furthermore, despite the fee shifting statutes that permit the prevailing party to collect attorneys' fees from the employer,¹³⁸ workers with small dollar claims are rarely able to secure representation.¹³⁹ Legal aid organizations and law school clinics positioned to take cases without concern for the likelihood they will receive attorneys' fees are the exception to that rule.

Various scholars, including those already discussed here, have questioned whether enough justice occurs in poor people's courts. Wage and hour claims add an additional layer of complexity to this question. As discussed herein, while the basic understanding of wage and hour law may seem simple at first blush, the various protections for workers that have experienced wage theft require that courts go beyond a contractual analysis and consider nuanced and fact-dependent

136. See Superior Court of the District of Columbia, *Mediation and Neutral Case Evaluation Procedures and Confidential Settlement Statement* (2017), <https://www.dccourts.gov/sites/default/files/divisionspdfs/committee%20on%20admissions%20pdf/CSSPackageCivil.pdf> [<https://perma.cc/4X34-AHFT>].

137. See *id.*

138. See, e.g., 29 U.S. Code § 216(b) (2012) (“The court in such action shall, in addition to any judgement awarded to the plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.”).

139. The Civil Advocacy Clinic regularly represent clients with “small-value” claims that legal services organizations are not able to place with private law firms.

issues. The failure to do so puts workers at a significant disadvantage—a disadvantage Congress sought to rectify nearly 80 years ago.

IV.

IMPLICATIONS FOR PRACTICE: NARRATIVE, STOCK STORIES, AND CASE THEORY

The return to a Lochnerian breach of contract analysis in wage and hour cases raises a number of potential challenges for workers seeking their unpaid wages. Given the frequent lack of documentary evidence and the court's resulting reliance on oral testimony, credibility determinations become critically important.¹⁴⁰ A worker often must prove what the court construes as a breach of contract claim based entirely on the worker's oral testimony, likely in the face of contradictory oral testimony from the employer. Thus the court's reliance on witness credibility determinations may make it difficult for the worker to meet the burden of proof in small claims court litigation.

It is also more likely the employer will be able to produce witnesses whose testimony will corroborate the employer's version of the facts. An employer might convince or coerce current employees to testify for them, while workers experience significant difficulty in convincing their co-workers to do the same on their behalf.¹⁴¹ Moreover, even if a worker can find a former employee who would consider testifying against their former employer, the potential witness may be unwilling to take time away from their current jobs and lose pay for those hours to prepare for and testify in court.

In order for workers to increase the likelihood they will prevail in a wage theft claim, they must move past the basic credibility determination as the determining factor in a case. To do so, it is necessary to consider the role of stock stories and the potential for a compelling narrative and case theory.

A. *Stock Stories*

Where all the evidence is testimonial and therefore narrative in nature, there is an increased possibility the court will rely on stock stories and stereotypes to fill in any factual gaps.¹⁴² Those stories will also likely influence the court's assessment of witnesses' credibility.¹⁴³ Stock stories are the familiar stories that dictate the way we view the world and inform categories our minds create to

140. Many workers who experience wage theft received payments in cash, did not fill out time sheets, and have little documentary evidence of their employment experience.

141. For example, in a prior Civil Advocacy Clinic wage and hour case, the defendant put several current employees on the stand as witnesses. The court, however, expressed significant reservation about potential witness bias and therefore discounted their testimony. *Reyes-Diaz v. Marble Movers* (transcript on file with author).

142. See Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984) (explaining how stock stories "help us interpret the everyday world").

143. See, e.g., Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 316 (1996) (discussing the role of stereotypes in credibility determinations).

make sense of what we see and hear.¹⁴⁴ They are the foundation of our understanding of the world and form our assumptions about how it operates.¹⁴⁵ According to Gerald López, however, they also have the potential to “disguise and distort” the truth.¹⁴⁶ They have the power to shape mindset, which is “the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”¹⁴⁷ López explains that problem solving through persuasion requires we “understand and manipulate the stock stories the other person uses in order to tell a plausible and compelling story. . . that moves that person to grant the remedy we want.”¹⁴⁸

Stock stories, particularly racialized stock stories, may create unanticipated hurdles for certain workers to recover their wages without the more nuanced legal protections of the wage and hour laws described above. Some stock stories may actually help workers. For example, the stock story of the exploited immigrant low-wage worker whose employer capitalized on her vulnerable immigration status may help a worker convince a court to believe her wage theft allegations. To illustrate, Leticia Saucedo and Maria Cristina Morales’s work explores the stock stories of Latin workers as enduring difficult workplace conditions in order to provide for their families.¹⁴⁹ In contrast, the stock stories of African American low-wage workers may result in negative racial stereotypes that often characterize the African American poor as uninterested in or unwilling to work.¹⁵⁰

B. Narrative & Case Theory

Scholars and practitioners have long-recognized the role of narrative in litigation, in both written and oral advocacy.¹⁵¹ Lawyers are storytellers, tasked with crafting persuasive narratives and counter-narratives that compel a fact-finder to believe their version of the facts.¹⁵² In addition, Delgado identifies

144. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 47 (2000). Richard Delgado’s work encouraging counter-narratives explores the relationship between the stock story, the counter-narrative, and their power to destroy “the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.” See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989).

145. See Coleman, *Disrupting the Discrimination Narrative*, *supra* note 27, at 57.

146. López, *supra* note 142, at 3.

147. Delgado, *supra* note 144, at 2413.

148. López, *supra* note 142, at 3.

149. Leticia M. Saucedo & Maria Cristina Morales, *Voices Without Law: The Border Crossing Stories and Workplace Attitudes of Immigrants*, 21 CORNELL J. L. & PUB. POL’Y 641, 650–52 (2012).

150. See, e.g., Coleman, *Rendered Invisible*, *supra* note 10.

151. See, e.g., Jeremiah Donovan, *Some Off-the-Cuff Remarks About Lawyers as Storytellers*, 18 VT. L. REV. 751, 762 (1994) (“As lawyers, we are storytellers.”); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 385 (1989) (“Stories and storytellers pervade the legal culture.”).

152. Delgado, *supra* note 144, at 2414.

counter-storytelling as the cure for challenging mindset or stock stories, particularly those that explicitly or implicitly reinforce subordination.¹⁵³

In small claims courts, oral storytelling often provides all or most of the evidence presented in the case.¹⁵⁴ As such, this narrative is typically the worker's only opportunity to prove her case by engaging the stock story—either working with or against it—and tying the narratives to the substantive legal concepts that move the court away from a breach of contract analysis.

This process of connecting narrative—both storytelling and counter-storytelling—to the legal concepts is the work of case theory.¹⁵⁵ Case theory weaves together the factual theory, legal theory, and the remedy sought to “tie[] as much of the evidence as possible into a coherent and credible whole.”¹⁵⁶ While narrative alone may be compelling and even persuasive, it falls short when it fails to intersect with the legal principles that a party wants the court to use in reaching a decision.¹⁵⁷

Binny Miller's work on case theory is instructive. She aptly cautions against a construction of case theory too closely tied to the attorney's understanding of the case and devoid of the client's lived experiences.¹⁵⁸ Miller argues that too often academics' conceptualization of case theory seems distant from the rich details of the client's life that make those theories more compelling.¹⁵⁹ In this way, “lawyers can see case theory as stories that rely on the law.”¹⁶⁰

The case theory should ultimately respond to the question: “What is this case about, counselor?” As such, an opening statement should include a clear articulation of the case theory or theories the party intends to prove. The opening statements in the small claims court and subsequently in the trial court in the Sonia Morales case discussed *supra* provide insight into the importance of

153. Delgado, *supra* note 144, at 2436–37.

154. Small claims courts typically do not include a discovery process. In D.C., for example, the rules do not contemplate the parties engaging in a discovery process, but may, “[f]or good cause shown, and with due regard for the expeditions and informal nature of the proceedings,” authorize a party to pursue discovery. See D.C. SUPER. CT. R. PROC. SMALL CLS. & CONCILIATION BRANCH R. 10.

155. Narrative and case theory are critical element of lawyering taught in law school clinical programs. See, e.g., Margaret Moore Jackson, *Confronting “Unwelcomeness” From the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women*, 14 CARDOZO J.L. & GENDER 61 (2007); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1995) [hereinafter Miller, *Give Them Back Their Lives*]; Binny Miller, *Teaching Case Theory*, 9 CLINICAL L. REV. 293 (2002).

156. Miller, *Give Them Back Their Lives*, *supra* note 155, at 492.

157. Miller, *Give Them Back Their Lives*, *supra* note 155, at 492–93. Miller explains that a case theory contains both a legal theory and a factual theory. The former is “a legal framework developed by a lawyer from interpretation, analysis, and expansion of legal rules and standards,” while the latter is “the party's ‘story’ justifying relief under the legal theory.” *Id.* (citing MARILYN J. BERGER, ET AL., PRETRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY 18–19 (1988)).

158. *Id.* at 526–27.

159. *Id.* at 554–55.

160. *Id.* at 555.

narrative and case theory in effectively framing a case for the judge.¹⁶¹ This includes communicating not just the compelling narrative but also the relationship between that narrative and the wage and hour laws.

C. Comparing Case Theories

The opening statements presented in Sonia Morales's small claims court and circuit court trials provide useful examples of what may be lost when counsel do not adequately connect the factual theory, legal theory, and remedy to create compelling and persuasive case theories. In Sonia Morales's small claims court trial, the student attorney's opening statement proceeded as follows:

Sonia Morales was hired and employed by Marvelous Maids Service to work as a driver and a housecleaner. The evidence will show that she worked long days and was paid between \$65.00 to \$67.50 per day, often amounting to less than the federal minimum wage. Ms. Morales will testify that she was not paid for all the hours that she worked, nor was she paid for the hours that she worked beyond a 40-hour workweek, as required by state and federal law. Ms. Morales will also testify that she was not required to fill out timesheets, was sometimes paid in cash, and other times paid by company check, but not payroll checks, and that the defendant willfully violated Maryland wage and hour laws, Maryland labor and employment laws, Maryland wage and payment collection laws, and the Fair Labor Standards Act. Accordingly, we respectfully request that this court grant Ms. Morales back pay wages and overtime, penalties, liquidated damages, and trouble damages, pursuant to Maryland Labor and Employment, Section 3507, B1, the Fair Labor Standards Act, Section 216B, and the Maryland Wage and Payment, Section 305-7-B1. Thank you.¹⁶²

The case theory presented in this statement falls short and ultimately proved fatal to the plaintiff's claim in the small claims court. First, the narrative, while succinct, does not weave together the factual theories sufficient to create a compelling story of the plaintiff's workplace exploitation. Second, it mentions the statutes violated and the remedies sought, but does little to engage the various legal standards discussed *supra* that would bolster the plaintiff's claim. Thus, while the court may have heard the references to statutes, since the narrative elements of the case theory focused so heavily on facts that mirrored a more straight-forward breach of contract claim, the court applied a watered-down analysis that referenced wage and hour laws, but did not actually engage those laws.

Moreover, the court did not consider whether the client was an employee, as the student attorneys argued, or an independent contractor, as the defendant argued. The judge's assessment of the burden of proof in the case clearly did not

161. See *supra* Introduction.

162. Transcript on file with author, at 2-3.

include the *Mt. Clemens* burden-shifting analysis. Instead, the court retreated to a determination of whether the client could prove through her testimony that her factual theory of the number of hours she worked and the pay she received was more likely true than not, when faced with counter-testimony from the defendant.¹⁶³

In the Circuit Court de novo appeal, the student attorney's opening statement proceeded as follows:

We are here today because the defendant engaged in the business of exploitation. Today, the evidence will prove three key points that will demonstrate that the defendant engaged in illegal employment practices to the detriment of Ms. Morales during her employment at Marvelous Maids Services. First, the evidence will show that that MMS employed Ms. Morales as an hourly employee, not a contracted employee. Further, the evidence will show that Ms. Morales worked an average of fifty to sixty hours per week, and was underpaid and never paid overtime Under the Maryland Wage and Hour law, employers are required to pay the minimum wage of \$7.25 per hour. Further, hourly employees are entitled to one and half times the hourly rate for every hour worked over forty hours in a single work week, for a total of \$10.87 per hour in overtime pay. Evidence will demonstrate that Ms. Morales was in fact an hourly worker, underpaid, and never paid overtime compensation. Though employees have the initial burden of proving they worked a certain number of hours, their testimony of their recollection of the amount of hours worked is sufficient, and the Supreme Court has held that the burden then shifts to the employer to come forward with evidence of the number of hours worked, or the evidence that negates the reasonableness of the inference drawn from the employee's evidence.¹⁶⁴

Here, the case theory articulated through the opening statement does substantially more work to situate Sonia's experiences within the exploited worker narrative, while also bringing explicit wage and hour law, both statutory and judicially-created, into the courtroom. As an initial matter, this case theory incorporates several legal issues, including the independent contractor or employee question, the minimum wage and overtime standards, and the *Mt. Clemens* burden-shifting framework.

This case theory fails, however, to position Sonia's story within the legal framework.¹⁶⁵ The narrative and the law seem disjointed, rather than

163. *Id.* at 48–49.

164. *Id.* at 6–7. At this point, the judge interrupted the student attorney with questions about the application of the Supreme Court's reasoning in *Mt. Clemens Pottery* to the alleged violations of state wage and hour claims before the court. *Id.*

165. One of the challenges of clinical pedagogy is working with students to produce their best work, without taking over ownership. While I worked with both sets of students in these cases to develop strong case theories and opening statements, I did not write them for the student attorneys and instead

interconnected. Instead of bogging down the end of the narrative with a complicated explanation of the law, the case theory might have proceeded as follows:

We are here today because the defendant engaged in the business of exploitation. Today, the evidence will demonstrate the defendant engaged in employment practices that violated multiple sections of the federal and state wage and hour statutes. First, the evidence will show that that MMS employed Ms. Morales as an hourly domestic employee, not an independent contractor, and she is therefore subject to the protections of the Fair Labor Standards Act, the Maryland Wage Payment and Collection Act and the Maryland Minimum Wage Act. Further, the evidence will show that Ms. Morales worked an average of fifty to sixty hours per week, received only \$6.50 to \$6.75 per hour—below the minimum wage of \$7.50 per hour—and never received time and a half as overtime compensation in violation of Maryland’s statutes. Ms. Morales’s testimony of the number of hours she worked and the amount she was paid will meet her burden to demonstrate her claims by a “just and reasonable inference”—the standard articulated by the Supreme Court. The defendant will then shoulder the burden of providing evidence to negate the reasonableness of this inference. The evidence will ultimately show that both the corporate defendant, MMS, and the individual defendant, Mrs. Brown, are liable for their failure to pay Ms. Morales her hard-earned wages.

This case theory weaves significant legal standards into a comprehensive narrative. By relying heavily on facts as applied to specific legal standards, it centers the law in the narrative to deter the fact-finder from applying a breach of contract analysis.

A comparison of the three case theories above sheds light on the difficulty of weaving various legal elements into the narrative to create a compelling argument before the court. This exercise, however, is particularly important in small claims courts where the intricacies of wage and hour law may go overlooked in an effort to provide simple and efficient resolution of the claims.

VI.

NORMATIVE RESPONSES FOR PRO SE PARTIES

As discussed in detail above, crafting a compelling narrative and case theory is a layered and complex process, particularly where the litigant must use a narrative process to educate the judge about various statutory legal protections. It is unreasonable to expect a pro se party to engage successfully in this process, assuming she is even aware of its necessity. Thus, a response requires the

guided them to develop case theories they considered to be persuasive, client-centered, and emotionally compelling. Imperfection is a typical and expected result of this pedagogy.

identification of procedural reforms that would better position pro se workers who pursue their unpaid wages in small claims court.

A. An Argument for Procedural Changes

Why should courts consider specific procedural changes for wage and hour cases? One might simply argue that any procedural changes that increase courts' ability to provide justice to the parties are advisable. Of course, the hallmarks of small claims courts are judicial efficiency and economies of scale that acknowledge the system's imperfections.¹⁶⁶ However, unlike other types of cases that small claims courts typically adjudicate,¹⁶⁷ wage and hour cases engage in the important work of vindicating statutes whose enforcement is critical to workplace regulation.¹⁶⁸ State and federal governments engage in wage and hour enforcement,¹⁶⁹ but the statutes' efficacy depends upon private enforcement through private attorneys general.¹⁷⁰

One way to avoid needing to seek small amounts for each plaintiff in small claims courts is to use collective and class actions.¹⁷¹ While these procedural mechanisms may permit large numbers of plaintiffs to pursue their claims jointly in state or federal court, the pursuit of justice cannot require the availability of class and collective adjudication. Indeed, not every workplace employs enough workers for class or collective actions,¹⁷² and not every employment lawyer has the resources to handle complex cases.¹⁷³ Even where there are enough workers to pursue a collective or class action and lawyers available to represent them, the

166. See Susan E. Raitt, et al., *The Use of Mediation in Small Claims Courts*, 9 OHIO ST. J. ON DISP. RES. 55, 62–63 (1993) (“Small claims court procedures are less expensive, faster, and less formal than the regular civil litigation process.”) (quoting JOHN A. GOERDT, STATE JUSTICE INSTITUTE, SMALL CLAIMS AND TRAFFIC COURTS: CASE MANAGEMENT PROCEDURES, CASE CHARACTERISTICS, AND OUTCOMES IN 12 URBAN JURISDICTIONS 22–23 (1992)); Yngvesson & Hennessey, *supra* note 102, at 262 (noting that “rapid and inexpensive processing of small claims” was an early goal of small claims court).

167. Small claims courts typically handle cases involving: “1) breach of contract/breach of warranty, 2) negligence, 3) defective products, 4) intentional misconduct, and 5) violations of statutes designed to protect consumers.” Raitt, et al., *supra* note 166, at 57.

168. See Coleman, *Exploited at the Intersection*, *supra* note 10 at 216 (discussing Congress’s adoption of fee-shifting statutes for the FLSA and other “cases involving the vindicating of important public policy goals”).

169. See *id.* at 22–23.

170. See *id.* at 19–25.

171. 29 U.S.C. § 216(b) (2012).

172. Collective actions serve a limited purpose where only a small number of workers join a case. Indeed, courts have decertified wage and hour collective actions where only a few workers joined the litigation. See, e.g., *Holaway v. Stratasys, Inc.*, 2013 WL 5787476, at *3 (D. Minn. Oct. 28, 2013) (decertifying a case involving only three workers).

173. Prior to joining the law school faculty, I practiced wage and hour law and litigated wage and hour collective action cases. Those cases require a significant expenditure of resources by plaintiffs’ counsel to, for example: (1) keep track of what may be hundreds or thousands of opt-in plaintiffs; (2) distribute notice of the case to all of the potential workers providing them an opportunity to “opt-in” or join the case; (3) litigate issues around the language included in the notice; and (4) respond to discovery issued to the named plaintiffs and often a sub-set of the opt-ins.

judiciary's increasing hostility to class actions may create procedural barriers to enforcement.¹⁷⁴

Courts' explicit discouragement of confidential settlements in wage and hour cases provides additional evidence of the important public policy goals met through such cases. Class and collective action wage and hour cases require court approval of any settlements reached by the parties.¹⁷⁵ Many courts also discourage confidential settlements of individual cases.¹⁷⁶

B. *Turner v. Rogers: A Framework for Procedural Justice*

Critiques of procedural informality raise questions about the quality of justice administered in high-volume state courts like small claims courts.¹⁷⁷ What does procedural justice require in poor people's courts? Is it simply providing an opportunity to be heard, or is something more required? An analysis of these inquiries is beyond the scope of this article, yet they provide a compelling frame through which to consider potential remedies to procedural challenges discussed above.

The Supreme Court's reasoning in *Turner v. Rogers* provides an important backdrop to a consideration of procedural due process in the lower courts.¹⁷⁸ In 2011, the Court considered whether a family court provided sufficient process to a father responding to a complaint of civil contempt for non-payment of child support.¹⁷⁹ The South Carolina Family Court threatened incarceration for civil contempt of family court orders where the party was able to comply and failed to do so.¹⁸⁰ The father in *Turner* was subject to an order to pay \$51.73 per week in child support.¹⁸¹ After a number of years marked by periods of irregular payments, non-payment, and periods of imprisonment ranging from a few days

174. See generally Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523 (2012) (discussing courts' increasing imposition of procedural barriers to Rule 23 class actions and the misapplication of those rules to wage and hour collective actions). Large employers may also require workers to sign arbitration agreements that prohibit them from adjudicating their claims in court or as a class. See, e.g., *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (upholding enforceability of employment arbitration agreements); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (finding the Federal Arbitration Act preempts California's rule on contract unconscionability).

175. See, e.g., Lonny Hoffman & Christian J. Ward, *The Limits of Comprehensive Peace: The Example of the FLSA*, 38 BERKELEY J. EMP. & LAB. L. 265, 279 (2017) ("Rule 23 (and its state law equivalents) already requires the court to sign off on the settlement as fair, reasonable, and adequate.").

176. See, e.g., *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015) (affirming district court's refusal to approve a private settlement agreement); *Steele v. Staffmark Investments, LLC*, 172 F. Supp. 3d 1024, 1030–31 (W.D. Tenn. 2016) (rejecting the inclusion of a confidentiality agreement in the settlement of a case alleging FLSA violations).

177. See, e.g., Lieberman, *supra* note 105, at 258 ("Without significant reform, too many of the generally low-income defendants in these high-volume dockets suffer wholesale denials of justice, further exacerbating economic inequalities.").

178. *Turner v. Rogers*, 564 U.S. 431 (2011).

179. *Id.*

180. *Id.* at 435.

181. *Id.* at 436.

to six months, he appeared pro se before the court in response to a motion for contempt based on a \$5,728.76 arrearage in payments.¹⁸² In a five-minute proceeding in which the court only asked him if there was “anything you want to say,” the court found the father in willful contempt of the child support order and sentenced him to 12 months’ imprisonment.¹⁸³ The family court made no express findings regarding his ability to pay the arrearage, and the father did not volunteer any specific information on that issue.¹⁸⁴ While the Court found the Due Process Clause does not require the provision of counsel at a civil contempt proceeding, it reasoned that due process considerations called for procedural safeguards for unrepresented parties in such cases.¹⁸⁵ Specifically, the Court found the family court must provide:

- (1) notice to the defendant that his “ability to pay” is a critical issue in the contempt proceeding;
- (2) the use of a form (or the equivalent) to elicit relevant financial information;
- (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by his responses on the form); and
- (4) an express finding by the court that the defendant has the ability to pay.¹⁸⁶

The Court was careful in *Turner* to narrow the requirement of these procedural safeguards to circumstances involving unrepresented parties and the potential deprivation of liberty.¹⁸⁷ Nevertheless, as Jessica Steinberg has aptly argued, they may provide a starting place for determining the types of procedural safeguards that would better enable parties to experience procedural justice in other civil contexts.¹⁸⁸ Moreover, while courts often carve out certain procedural protections for cases involving a deprivation of liberty, they do not necessarily afford those same protections to cases in which a potential deprivation of liberty does not arise.

Many of the procedural safeguards contemplated in *Turner* would also better position workers to pursue their substantive wage and hour rights through

182. *Id.*

183. *Id.* at 437; see also Judith Resnick, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 160 (2011) (noting the trial judge “spent less than five minutes, made no findings on the record, . . . and sent Turner to jail for twelve months”).

184. *Turner*, 564 U.S. at 437.

185. *Id.* at 448.

186. *Id.* at 447–48.

187. See Steinberg, *supra* note 102, at 794 (“*Turner* offers important constitutional support for procedural and judicial reform, but its reforms are limited and its holding applies only to civil contempt cases.”).

188. See *id.* at 789. Steinberg utilizes *Turner v. Rogers* as a launching pad for recommended procedural, evidentiary, and judicial reforms in poor people’s courts. She argues that strategies for court reform that attempt to increase access to justice through the provision of counsel—either through unbundled legal services or the adoption of “civil Gideon”—are insufficient and produce anemic results. *Id.* She further contends that the systematic adoption of demand-side reforms would more adequately address the justice gap in the lower courts. *Id.*

litigation. Their adaptation to the wage and hour context would create mechanisms that incorporate the various legal protections discussed herein.

1. *Notice of Basic Wage Rights*

When a plaintiff prepares to file a claim in small claims court, the Court should provide her basic information on her rights under the state wage and hour laws. This basic information would include the minimum wage and the right to time and a half for hours worked over forty in a week. In addition, she should receive an explanation of the difference between an employee and an independent contractor, and the potential for burden-shifting where the employer fails to maintain proper employment records. In jurisdictions that have explicitly adopted the FLSA's extension of liability to directors and supervisors, workers should also learn about their ability to pursue their claims against both individuals and companies. This information would better position the pro se party to navigate the complicated legal terrain necessary to prevail on wage and hour claims.

A second option for providing workers information about their wage and hour rights could involve the creation of employee rights resource centers to give free legal information to workers and employers. It might also provide referral information to legal services organizations that provide workers' rights trainings programs that educate workers about their wage and hour rights. In the growing absence of unionized workplaces,¹⁸⁹ worker centers have become critical spaces for empowering workers through education and advocacy.¹⁹⁰ Relying solely on these centers, however, may exclude certain low-wage workers, given that most worker centers serve largely immigrant populations.¹⁹¹

2. *Specific Pleading Forms and Automatic Discovery*

Pro se plaintiffs alleging wage theft would benefit from specific pleading forms that allow them to check boxes as well as provide a narrative explaining

189. See Coleman, *Rendered Invisible*, *supra* note 10, at 88 (discussing increasing reduction in unionized workplaces); see also REBECCA THIESS, ECON. POLICY INS. BRIEFING PAPER, THE FUTURE OF WORK: TRENDS AND CHALLENGES FOR LOW-WAGE WORKERS 13 (Apr. 27, 2012), <http://www.epi.org/files/2012/bp341-future-of-work.pdf> [<https://perma.cc/H3UB-7HV2>] (“Union coverage has fallen dramatically over the last 30 years, with the share of unionized wage and salary workers dropping 0.4 percent per year from 1979–2010.”); Shannon Gleeson, *From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers*, 43 LAW & SOC’Y REV. 669, 690 (2009) (“[O]verall unionization has been steadily declining in the United States”); Janice Fine, *Worker Centers: Entering a New Stage of Growth and Development*, NEW LAB. F. (Oct. 2011), <https://newlaborforum.cuny.edu/2011/10/12/working-centers-entering-a-new-stage-of-growth-and-development> [<https://perma.cc/M7T2-ZAUH>] (discussing declining union density).

190. See Coleman, *Rendered Invisible*, *supra* note 10, at 88–89 (discussing the increasing importance of worker centers in protecting workers’ rights).

191. See *id.*, at 88–92 (discussing the increased importance of worker centers in educating workers about their wage and hour rights and the resulting troubling absence of black workers from those spaces).

their claims. The pleading could provide plaintiffs an opportunity to identify whether their claims involve, for example: (1) minimum wage violations; (2) non-payment of wages; (3) overtime pay violations; (4) failure to pay tips properly; and (5) independent contractor violations. The form could also provide a space in which the worker could check a box indicating whether the employer posted the statutorily-required notices regarding wage and hour rights in the workplace.

This form would serve multiple important functions that would greatly improve workers' ability to bring successful wage and hour claims in small claims courts. First, it would allow the court to see, from the onset of the case, the various issues the plaintiff intends to raise. Many small claims court judges relax the adversarial mechanisms in their courts and actively engage with unrepresented parties.¹⁹² Rather than relying entirely on the narrative provided by the parties, they often ask questions, either to clarify an issue, or to elicit information about a legal element of the claim that may be unknown to the pro se party. A wage claim form would alert the judge which areas of the wage and hour laws are relevant to the worker's claim and would therefore position the judge to inquire further, if necessary. The form might also alert the worker to the types of information—and, therefore, evidence—that would be relevant to her claim for lost wages. As a result, she might take the time to gather additional evidence that would support her claim—evidence she may not have realized would be relevant before she filed the complaint.

In addition, in those small claims courts that do not typically permit discovery, the courts should provide for automatic discovery in wage and hour claims.¹⁹³ Specifically, they should require both parties to provide all documents concerning the employment relationship alleged in the complaint. This process would allow the worker to ascertain whether the employer has retained the statutorily required documents. If the employer fails to produce documents, then the court would apply the *Mt. Clemens* burden-shifting framework to the case.¹⁹⁴

192. See Jessica Steinberg, *Adversary Breakdown and Judicial Role Confusion in Small Court Case Civil Justice*, 2016 B.Y.U. L. REV. 899, 938 (2016) [hereinafter Steinberg, *Adversary Breakdown*].

193. For example, the D.C. Small Claims Court currently only permits discovery by application of a party and for good cause shown. See D.C. SUPER. CT. R. PROC. SMALL CLS. & CONCILIATION BRANCH 10 (“For good cause shown, and with due regard for the expeditious and informal nature of the proceedings, the Court may authorize a party to proceed with discovery . . .”). The court rules, however, contemplate the possibility that the court could initiate discovery “if the interest of justice appears to require it.” See *id.* at 10(b) (“If any claim of any party is unliquidated, or if the interest of justice appears to require it, the Court shall, in the course of the pretrial inquired provided for in Small Claims Rule 12(a), elicit from the parties or their attorneys a statement as to the necessity for discovery proceedings in order to accomplish just and expedition determination of the cause. Upon good cause appearing, he shall order or authorize such proceedings pursuant to Superior Court Rules of Civil Procedure 26–37 as the interests of justice seem to require, and shall continue the cause for such period of time as may seem reasonably necessary.”).

194. See *supra* at 1315-16.

3. *Opportunity to Provide Specific Information at the Hearing*

Court should provide wage and hour claimants the opportunity to provide specific information regarding their claims at their hearings. For example, they should have an opportunity to discuss the terms of their employment in order to demonstrate they were employees and not independent contractors. They should have the opportunity to provide evidence that they meet the “economic realities test” by demonstrating (1) the ways in which the employer controlled them; (2) their lack of opportunities to make a profit or a loss from the work; (3) the absence of their capital investment into the work; (4) the level of skill necessary to perform the jobs; (5) that the jobs they completed were integral to the business’s operations; and (6) the permanence of their relationships with the employer.¹⁹⁵ Given that these factors are not necessarily relevant to whether an employee worked a certain number of hours and whether she received full compensation for those hours, a court that is not sensitive to the plaintiff’s need to establish an employment relationship, rather than a contractual relationship, would not necessarily allow the plaintiff time to present the necessary evidence.

4. *Express Findings by the Court*

Courts should also make certain express findings in wage and hour cases. First, courts should explicitly find whether the worker is an employee or an independent contractor, and provide an explanation for that determination. Second, the court should determine whether the defendant failed to maintain the required records such that the *Mt. Clemens* burden-shifting framework applies to the case. These two basic findings would significantly impact workers’ ability to demonstrate violations of the wage and hour statutes.

5. *Collection*

Workers often experience significant difficulty in collecting judgments from employers, particularly smaller employers whose assets may be more difficult to locate. Wages, however, may be recoverable with the institution of certain processes that make critical information available to plaintiffs in wage and hour cases. Specifically, courts should require that employers provide certain financial information to plaintiffs, such as the identification of bank accounts and a list of real property assets, as part of the mandatory discovery discussed above. While court rules often permit parties to seek these documents through post-judgment discovery or submitting to oral examination,¹⁹⁶ defendants evading payment may fail to respond to discovery requests at that juncture.

In an effort to aid judgment collection efforts, the District of Columbia has enacted a rule requiring judges to order the defendant to appear in court to testify about his financial status and ability to pay the motion. Rule 18 provides:

195. Means & Seiner, *supra* note 76, at 1526.

196. See, e.g., MD. R. R.C.P. DIST. CT. R. 3-633.

In all cases where the judgment is founded in whole or in part on a claim for wages or personal services, the judge shall, upon written or oral motion of the party obtaining judgment, order the appearance of the party against whom such judgment has been entered, but not more often than once each 4 weeks, for oral examination under oath as to his financial status and his ability to pay such judgment, and the judge shall make supplementary orders as may seem just and proper to effectuate the payment of the judgment upon reasonable terms, provided, that the term “personal services” does not apply to a litigant whose claim is based upon professional services.¹⁹⁷

C. Judicial Trainings

All states require newly-elected or appointed judges to participate in some form of orientation.¹⁹⁸ More than half of states also require judges to take continuing education courses that may last from a few days to three weeks.¹⁹⁹ While much of the available training seems to focus on more general procedural and ethical issues,²⁰⁰ judicial training on wage and hour laws would position small claims judges to properly assess the various legal issues discussed above. Where pro se parties²⁰¹ experience difficulty in telling their stories with sufficient detail to address the multiple intersecting legal issues relevant to wage and hour claims, the court’s ability to identify those issues and elicit testimony or evidence on them would better position workers to prevail on their claims.²⁰²

CONCLUSION

The FLSA and its state law counterparts create significant protections for workers that explicitly remove wage and hour disputes from the realm of contract law. These protections, however, are only as strong as their application in court. Small claims courts, by design, involve simplified procedures to efficiently process large numbers of cases, many with pro se parties, that rarely delve into

197. D.C. SUPER. CT. R. PROC. SMALL CLS. & CONCILIATION BRANCH R. 18.

198. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, JUDGES AND HEARING OFFICERS (April 13, 2018), <https://www.bls.gov/ooh/legal/judges-and-hearing-officers.htm#tab-4> [<https://perma.cc/M9RP-PDHL>].

199. *Id.*

200. For example, the judicial training courses listed on the National Judicial College website are largely procedural, and the few that address substantive law do not include wage and hour law. *See* Courses, NAT’L JUD. C. (2019) www.judges.org/2018/courses [<https://perma.cc/3TKQ-2U55>].

201. Indeed, such trainings would also aid represented parties by creating an atmosphere in which the judge expects counsel to discuss legal issues relevant to the proper adjudication of wage and hour cases.

202. Hannah Lieberman has advocated for judicial training and rules that would “permit litigants to offer narrative testimony and encourage questions from the judge to elicit information that is germane to claims and defenses.” *See* Lieberman, *supra* note 105, at 270. Jessica Steinberg has likewise argued that judges in lower courts should abandon the passive arbiter approach and instead engage in more active judging in order to permit pro se parties to properly pursue their substantive legal rights. *See* Steinberg, *Adversary Breakdown*, *supra* note 192.

the nuances of the law. In wage theft cases, however, these nuances are paramount for protecting exploited workers. The efficiencies of the court may therefore create substantial roadblocks for plaintiffs. This reality of how the law actually functions in courts has significant implications for the strategies employed by lawyers in these cases. The development of a succinct and persuasive case theory that not only presents a compelling narrative, but also ties the narrative to the statutory legal elements, is critically important in wage theft cases pursued in small claims courts. Furthermore, given the number of pro se parties in poor people's courts, courts should consider procedural changes they can implement to protect the substantive wage and hour rights workers pursue in their courts. The adaptation of mechanisms identified in *Turner v. Rogers* would permit pro se plaintiffs to better benefit from the wage and hour laws' protections.