

# LOVE'S LABORS LOST: ACHIEVING THE PROMISE OF CALIFORNIA AGRICULTURE BY CULTIVATING AN IMPROVED RESPONSE TO CALIFORNIA'S THEFT OF LABOR PROBLEM

## I. INTRODUCTION

California is one of the very few states in the nation that subsumes an intangible "labor" into its definition of theft.<sup>1</sup> By amendment in 1927, California Penal Code section 484 combined the crimes of larceny, embezzlement, false pretenses and other kindred offenses into one crime designated as theft.<sup>2</sup> At common law theft had been restricted to just tangible property.<sup>3</sup> Such items as money, real or personal property were historically the proper objects of theft.<sup>4</sup> Without displacing any elements

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<sup>1</sup> Rita J. Verga, *An Advocate's Toolkit: Using Criminal "Theft of Service" Laws to Enforce Workers' Right to Be Paid*, 8 N.Y. CITY L. REV. 283 (2005) at n. 4. A distinction is necessary between those state statutes which provide for "theft of service" independent from conventional "theft" and those which are incorporated and prohibit theft of labor. The author cites only five other jurisdictions in which theft of service provisions are incorporated within theft laws. *Id.*

<sup>2</sup> CAL. BAR ASS'N, CAL. ST. B. J., 115 (1926-27); *cf.*, CAL. PEN. CODE, § 532, providing "Every person who knowingly . . . defrauds any other person of money, labor, or property . . . and thereby fraudulently gets possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained." *Id.* subdivision (a). Prior to the 1905 amendment (Stat. 1905, ch. 533, sec. 3), section 532 did not prohibit theft of "labor," nor specify the stolen property could be either "real or personal."

<sup>3</sup> *People v. Davis*, 561 N.E.2d 165, 168, 1990 Ill. App. LEXIS 1330 (Ill. Ct. App. 1990).

<sup>4</sup> See CAL. PEN. CODE, § 532, Editor's Notes (Deering, LEXIS through 2007). Former law defined grand larceny as "[e]very person who shall feloniously steal, take, and carry, lead, or drive away the personal goods or property of another of the value of fifty dollars. . . shall be deemed guilty of grand larceny . . ." COMPILED LAWS OF CAL. (Garfielde & Snyder 1850—53, 647), SECTION 60.

of the former crimes,<sup>5</sup> the new statute deemed any fraudulent obtaining of the labor or services of another as theft as well.<sup>6</sup>

As such, the legislature quite intentionally appears to have elevated “labor” to the stature of a property, a commodity of substance and value within the context of California’s agriculture-driven economy, worthy of the criminal theft protections afforded by the laws of this state.<sup>7</sup> This intent finds its consonant expression in the ideas of political theorist, John Locke, who asserted:

[E]very Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joynd to it something that is his own, and thereby makes it his *Property*. . . it hath by this *labour* something annexed to it, that excludes the right of other Men. For this *Labour* being the unquestionable *Property* of the *Labourer*, no Man but he can have a right to what that is once joynd to . . . and as good left in common for others.<sup>8</sup>

Similarly, the California Supreme Court has proclaimed:

The crime of theft, of course, is not limited to an unlawful taking of money. Rather, “[e]very person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall . . . knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, *labor*, or real or personal property, . . . obtains credit, or property or obtains the *labor or service of another*, is guilty of theft.”<sup>9</sup> (emphasis added)

Yet, despite the affirmation of California’s high court, there have been very few cases prosecuted in this state. The offices of local district attorneys routinely refer any issue dealing with nonpayment of wages to the Labor Commission for civil action.<sup>10</sup> Law enforcement claims that these

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<sup>5</sup> CAL. PEN. CODE, § 532, Editor’s Notes (Deering, LEXIS through 2007).

<sup>6</sup> STAT. 1927, CH. 619, § 1 (Cal. 1927).

<sup>7</sup> See generally, COMM’N FOR REFORM OF CRIM. PROC., REP. TO LEGIS., APP’X TO J’S OF SEN. AND ASSEMB. 3, 47th ed. (Cal. 1927).

<sup>8</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 328—329 (Peter Laslett, ed., Cambridge Univ. Press 1960) (1703).

<sup>9</sup> People v. Farrell, 28 Cal. 4th 381, 387, 48 P.3d 1155, 121 Cal. Rptr. 2d 603, 2002 Cal. LEXIS 4351 (Cal. 2002) (quoting CAL. PEN. CODE, § 484(a)).

<sup>10</sup> Verga, *supra* note 1, at 292; County of Fresno, District Attorney, available at <http://www.co.fresno.ca.us/2860/dansf/faq.htm> (last visited Sept. 12, 2007).

"crimes" are rarely reported.<sup>11</sup> Only two published cases in California are reported to have prosecuted the offense.<sup>12</sup>

The Ninth Circuit and other federal courts appear reluctant to embrace the idea of an intangible labor as qualifying as theft.<sup>13</sup> Additionally, these authorities note that "the [U.S.] Supreme Court has carefully maintained the distinction between 'property' and other rights when construing criminal statutes."<sup>14</sup> Such a judicial attitude implies a common law-based reluctance to see theft of labor as actual "theft" and may act as a subliminal doctrinal impediment to enforcement of the plain language of California's theft of labor statute.<sup>15</sup>

For those California workers on the lowest end of the economic ladder, wage theft is a continuing fact of life.<sup>16</sup> Studies and anecdotal evidence support that nonpayment of wages is a major problem impacting the everyday existence of many day laborers.<sup>17</sup> By extension, the failure of California's economic system to fulfill its obligation to its workers necessarily impacts social services and other remedial institutions that are funded by our tax dollars. Most importantly, it denies these workers their rightful dignity. With solid American values like hard work and the value of our labor at stake, one might think every force available would be put to the task. Rather, state agencies charged with that responsibility are understaffed and budget limitations prevent free legal service organizations from helping most workers.<sup>18</sup> A lack of political will by state agencies is often cited as a major factor contributing to this failure.<sup>19</sup> With a clear opportunity to punish and deter deliberate nonpayment of wages on the books, the reluctance to prosecute may be understood as stemming from a world view that refuses to acknowledge the true substance of our labor and give it its due recognition under the Penal Code.

This Comment will explore the problem of theft of labor from California's agricultural workers. It will recount the legislative history of Penal

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<sup>11</sup> Interview with Capt. Jeff Hollis, Sheriff's Dep't, Fresno County, in Fresno, Cal. (Oct. 14, 2004).

<sup>12</sup> *Slocomb v. City of L.A.*, 197 Cal. App. 2d 794, 17 Cal. Rptr. 529, 1961 Cal. App. LEXIS 1411 (Cal. Ct. App. 5 1961); *In re Application of Watson*, 106 Cal. App. 644, 289 P. 687, 1930 Cal. App. LEXIS 681 (Cal. Ct. App. 4 1930).

<sup>13</sup> *United States v. Corona-Sanchez*, 291 F. 3d 1201, 1208 (9th Cir. 2002).

<sup>14</sup> *Id.*, quoting *McNally v. United States*, 483 U.S. 350, 356, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987).

<sup>15</sup> See, e.g., Comment, *Theft of Labor and Services*, 12 STAN. L. REV. 663 (1959); *Chappell v. United States*, 270 F.2d 274 (9th Cir. 1959).

<sup>16</sup> Verga, *supra* note 1, at 288, n.3.

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

<sup>18</sup> *Id.* at 286-287.

<sup>19</sup> *Id.* at 287, n.19.

Code section 484, and that of parallel provisions of the early Labor Code, itself comprising the more familiar civil path to the problem of nonpayment of wages, to discern a common legislative intent. This Comment will consider the legislative intent of the statute amid social and legal impediments to the enforcement of criminal prosecutions. It will examine the interrelatedness of other state problems to the failure of our farm labor to achieve the promise of California agriculture. This Comment will discuss the social implications of non-enforcement against the backdrop of the current needs of California's agricultural and laboring classes, supporting enforcement of theft of labor provisions in light of a former legislative rationale of deterrence and sure prosecution still applicable today.

## II. THE PROMISE OF CALIFORNIA AGRICULTURE

That agriculture is important to California and that labor is important to California agriculture is an axiom needing little proof.<sup>20</sup> The state's agricultural sector has been the most important in the United States for fifty years.<sup>21</sup> California is the sixth largest agricultural exporter in the world, comprising thirteen percent of the U. S. total.<sup>22</sup> Food processing itself provides over 190,000 jobs that are dependent upon our harvest.<sup>23</sup> Revenues from agriculture exceed \$25 billion, almost twice as much as Texas, the closest state competitor.<sup>24</sup> Were the \$40 billion revenues of the food processing industry to be counted as generated by agriculture, the approximate \$65 billion dollar total would be second only to the state's computer and electronics sector.<sup>25</sup>

Most of the eighteen Central Valley counties in particular have a high proportion of total employment from farming and agriculture.<sup>26</sup> Seven percent of employment in the state and indeed more than twenty-five

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<sup>20</sup> See generally, CAL. GOVERNOR'S OFF. OF PLAN. AND RES., CAL. RURAL POL'Y TASK FORCE, CALIFORNIA AGRICULTURE: FEEDING THE FUTURE (2003), at [http://www.assembly.ca.gov/ruralcaucus/documents/OPR\\_report.doc](http://www.assembly.ca.gov/ruralcaucus/documents/OPR_report.doc).

<sup>21</sup> *Id.* at 3.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.* at 2. A number of the state's dairy and specialty fruit and vegetable crops are grown nowhere else. *Id.* at 3. A large measure of the success of California farming may be traced to a land and climate that allows production of high-value goods for niche worldwide markets, rather than reliance on less profitable staple crops. *Id.* at 4.

<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.* at 5.

<sup>26</sup> Kenneth W. Umbach, A STATISTICAL TOUR OF CALIFORNIA'S GREAT CENTRAL VALLEY (citing CAL. DEP'T OF FARMS, ECON. RES., County Profiles, Feb. 1997), available at <http://www.library.ca.gov/CRB/97/09/>. (last visited Sept. 14, 2007).

percent in the Central Valley is derived in some way from agriculture.<sup>27</sup> While official figures often undercount our agricultural workers,<sup>28</sup> suggesting as many as 450,000 workers may be employed at peak season,<sup>29</sup> that number may be as high as 800,000.<sup>30</sup> The promise of a vital California agriculture draws workers from afar who, with practical skills and a commitment to the land itself, carry with them a desire to share in that prosperity.

Historically, migrants from Japan, China, the Philippines, Italy, and Mexico have helped increase the value of California fields to their present level of productivity.<sup>31</sup> Most farm workers today are recent immigrants from Latin America. Seventy-eight percent are of Latino origin and sixty-eight percent are non-citizens.<sup>32</sup> Like their predecessors, these workers tend to be low-income wage earners.<sup>33</sup> A 1990 commission set up by the Immigration Reform and Control Act ended a four-year study that concluded poverty is the chief cause of this flow of displaced people.<sup>34</sup> The average salary in parts of Mexico for working in the greenhouses or out in the field is still ten dollars a day.<sup>35</sup> It is estimated eleven million illegal immigrants reside in this country,<sup>36</sup> with the demand for government services proportional to their poverty.<sup>37</sup>

While the economic promise of California's agriculture has drawn many poor people from their native countries, most are still working for minimum wage or less.<sup>38</sup> Today, thirty-eight percent of farm worker family earnings are below the poverty line.<sup>39</sup> A scant nine dollars was

<sup>27</sup> CAL. GOVERNOR'S OFF. OF PLAN. AND RES., *supra* note 20, at 6, *citing* UNIV. OF CAL. AGRIC. ISSUES CENTER, 2000.

<sup>28</sup> *Id.* at 6.

<sup>29</sup> Jim Steinberg, *Program Extended to Teach Labor Laws to Ag Community*, FRESNO BEE, July 27, 2004, *available at* <http://www.fresnobee.com/local/y-printerfriendly/story/8905896p-9797273c.htm> (last visited Aug. 16, 2004).

<sup>30</sup> CAL. GOVERNOR'S OFF. OF PLAN. AND RES., *supra* note 20, at 6, *citing* CAL. DEP'T OF FOOD AND AGRIC., 2001.

<sup>31</sup> CAL. GOVERNOR'S OFF. OF PLAN. AND RES., *supra* note 20, at 7.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*, *citing* U.S. DOL, 2000.

<sup>34</sup> David Bacon, "Like Outlaws, Like Rustlers, Like Thieves," TRUTHOUT, June 13, 2007, [http://www.truthout.org/docs\\_2006/061307N.shtml](http://www.truthout.org/docs_2006/061307N.shtml).

<sup>35</sup> Nathan Thornburgh, *Inside America's Secret Workforce*, TIME, Feb. 6, 2006, at 41.

<sup>36</sup> *Id.* at 36.

<sup>37</sup> See Ellen Frank, *Dr. Dollar: Poverty*, DOLLARS & SENSE, Jan./Feb. 2006; at <http://www.dollarsandsense.org/archives/2006/0106dollar.html>. (last visited March 29, 2008).

<sup>38</sup> Jennifer T. Manion, *Cultivating Farmworker Injustice: The Resurgences of Sharecropping*, 62 OHIO ST. L.J. 1665 (2001), *citing* Tim Weiner, *In a World at Floodtide, An Effort to Lift the Gate a Bit*, N.Y. TIMES, Sept. 9, 2001, at n. 145.

<sup>39</sup> CAL. GOVERNOR'S OFF. OF PLAN. AND RES., *supra* note 20, at 7.

the median hourly wage of all Mexican-born workers in 2004.<sup>40</sup> A 2000 U.S. Department of Labor survey placed the average hourly wages for crop workers at \$6.18 compared to \$12.78 in the private, non-farming sector.<sup>41</sup>

As a consequence of the federal government's failure of comprehensive immigration reform, state legislatures have considered 1404 immigration measures this year and enacted 170 of them in forty-one separate states.<sup>42</sup> Although overall only 50.2% of the nation's qualified poor received food stamps in 2004,<sup>43</sup> a 2006 *Time* poll found that eighty-three percent of Americans are concerned providing social services for illegal immigrants costs taxpayers too much.<sup>44</sup> Seventy-one percent believe illegal immigrants cause too much crime.<sup>45</sup> Sixty-three percent of the poll's respondents considered illegal immigration an urgent problem.<sup>46</sup>

Present observers have suggested that many citizens and politicians have looked the other way so America might reap the rewards of immigrant labor.<sup>47</sup> Legislators have been said to be slow to close America's porous borders, especially at harvest time, given the need for a permanent supply of cheap labor.<sup>48</sup> If we are to believe prevailing attitudes of

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<sup>40</sup> Thornburgh, *supra* note 35, at 39. (citing Pew Hispanic Center, Nat'l Immig. Law Center, Nat'l Conf. of St. Legislators, & *Instituto Nacional de Estadística, Geografía e Informática*).

<sup>41</sup> CAL. GOVERNOR'S OFF. OF PLAN. AND RES., *supra* note 20, at 7, citing U.S. DOL, 2000.

<sup>42</sup> Julia Preston, *Surge in Immigration Laws Around US*, N.Y. TIMES, Aug. 6, 2007, available at [http://www.truthout.org/issues\\_06/080607LB.shtml](http://www.truthout.org/issues_06/080607LB.shtml) (last visited Aug 7, 2007).

<sup>43</sup> Rob Hotakainen, *Study: Half of Nation's Poor Don't Get Food Stamps*, McCLATCHY NEWSP'S, Aug. 14, 2007.

<sup>44</sup> Thornburgh, *supra* note 35, at 42.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Manion, *supra* note 38, nn.146—150 & nn.153—156 and accompanying texts. When the workers are undocumented, they are likely to be underpaid with no benefits and are unlikely to complain about working conditions. Employers are likely to seek out undocumented workers from particularly vulnerable communities to ensure that their workforce is compliant. Catherine Ruckelhuas and Bruce Goldstein, *From Orchards to the Internet: Confronting Contingent Worker Abuse*, at 3, available at <http://nelp.org/docUploads/pub12%2Epdf> (last visited Dec. 27, 2008). Migrant workers make up 42% of the farm labor force. Workers report "especially low wages and unsafe and unhealthy working conditions, coupled with a difficulty recovering unpaid wages against their employers." *Id.* at 43.

<sup>48</sup> Manion, *supra* note 38, at n.148 and accompanying text. From "1920 to 1930, the farm industrialists were enchanted with the Mexican. The Mexicans were available in large numbers . . . ; they were good workers; unorganized; and, at the end of the season, 'hibernated.' Time and again, in their deliberations, the growers have emphasized the fact that the Mexican, unlike the Filipino, can be deported . . . [They were] easily ex-

most Americans, many immigrants do indeed end up as consumers of social services. A mere recitation of the statistics indicates the problem of social absorption is staggering. Despite their exodus from poverty, most immigrants continue to be bound by low paid jobs such as transient farm labor and exist on the periphery of society. Poverty places its victims firmly on the public dole, impacting education, health, and virtually every government-supplied service. Additionally, poverty is a strong motivator of crime.<sup>49</sup> Although the immigration problem cries for resolution, there are indications political will is lacking due to the influence of important economic interests that rely on unskilled labor.<sup>50</sup> The problems of illegal immigration, poverty, and crime are bound to the history of the state's labor and are deeply rooted in California agriculture.<sup>51</sup>

### III. THEFT OF LABOR, A CURRENCY

The best assessment of a current problem of deliberate nonpayment of wages is revealed by those closest to the issue. Attorney Chris Schneider has been an advocate for the rights of farm workers for many years.<sup>52</sup> As

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exploited not only by the growers, but by the small merchants in the rural towns. 'The Mexican,' writes Ralph H. Taylor, dean of the California farm-capitalist publicists, 'has no political ambitions; he does not aspire to dominate the political affairs of the community in which he lives.' 'The Mexican,' writes A. C. Hardison, a California building-and-loan-company official, 'gives less trouble with collections than the whites.' 'The Mexican laborer,' writes Dr. George Clements of the Los Angeles Chamber of Commerce, 'if he only realized it, has California agriculture and industry in the hollow of his hand. We cannot get along without the Mexican laborer.' In 1927, Simon J. Lubin, in an address in Sacramento, charged . . . that, in certain cases, Mexicans were being guarded in barbed-wire stockades on the ranches." CAREY MCWILLIAMS, *FACTORIES IN THE FIELD: THE STORY OF MIGRATORY FARM LABOR IN CALIFORNIA* (Little, Brown, 1939; Univ. of Cal. Press, 2000), 124—25. See also DON MITCHELL, *LIE OF THE LAND: MIGRANT WORKERS AND THE CALIFORNIA LANDSCAPE* (Univ. of Minn. Press, 1996), 100—01 (citing Dr. Charles L. Bennett, manager of the San Dimas Colony citrus farm in eastern L.A. County, who in the 1920s opined "the recently arrived Mexican peon is in a certain state of savagery or barbarism, and can be treated accordingly," and that amenities should be provided so that "farmers would not miss their chance to develop a near-perfect labor source.") I am indebted to Paul Jackson for his research into the issues and attitudes of these times.

<sup>49</sup> CAL. BUREAU OF LAB. STATISTICS, FIFTEENTH BIENNIAL REP. 52 (1912), 3 APP'X. TO J'S OF S. AND ASSEMB. OF FORTIETH SESS. (1913).

<sup>50</sup> See generally, Verga, *supra* note 1.

<sup>51</sup> See generally, Thornburgh, *supra* note 35.

<sup>52</sup> E-mail from Schneider to author (Aug. 15, 2007, 11:11:09 PDT) (on file with San Joaquin C. of Law). Attorney Chris A. Schneider has served as Executive Director of Central California Legal Services since 1993. Prior to that he worked with California Rural Legal Assistance for four years. He worked in various capacities with the United Farm Workers of America, AFL-CIO during 1973—1989. Through his work with these

Executive Director of Central California Legal Services (“CCLS”) and in prior work for the United Farm Workers union, Schneider cites many examples of theft of labor that have come before him<sup>53</sup> in which the same unscrupulous employers steal money from workers year after year.<sup>54</sup> His agency<sup>55</sup> has been an eyewitness to the substantial harm and economic devastation to families that transpires.<sup>56</sup> In one such case occurring in 2003, CCLS assisted approximately twenty-five farm workers in filing unpaid wage claims for over \$10,000 against their former grower-employer.<sup>57</sup> In addition to that amount, a grocer in Kingsburg had already cashed almost \$14,000 worth of the worker’s payroll checks after he was wrongly assured by the employer the checks were good.<sup>58</sup> An examination of the Fresno Superior Court website revealed the employer to have had over \$175,000 in judgments against him.<sup>59</sup> The great bulk of these represented money owed to ex-employees and at least one farm labor contractor who formerly recruited workers for the employer.<sup>60</sup> A few short days after entry of this judgment, according to Schneider, the Bankruptcy Court discharged the debt owed to the contractor.<sup>61</sup> Subsequently, in 2003, additional judgments of \$7,231.20, \$8,130.25, and \$3,304.10, confirming labor commissioner awards, were entered by the court on behalf of three more workers.<sup>62</sup>

Schneider has also pointed out<sup>63</sup> a Delano-area grape grower has recently settled a federal class action suit by paying \$1.7 million dollars for

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organizations he has represented hundreds of farm workers in labor matters. Schneider gained admission to the California State Bar through his participation in law office study permitted under Rules Regulating Admission to Practice Law in California, Rule VII, Section 2(b)(2). *Id.*

<sup>53</sup> Letter from Chris Schneider, Exec. Dir., CCLS, to Elizabeth Egan, Dist. Att’y, Fresno County (Aug. 27, 2003) (on file with San Joaquin C. of Law).

<sup>54</sup> *Id.*

<sup>55</sup> CCLS, available at <http://www.centralcallegal.org> (last visited on Aug. 11, 2007). The offices of Central California Legal Services exist to “advance justice” by providing free legal assistance to low-income people and by empowering them by education and outreach. *Id.*

<sup>56</sup> Letter from Chris Schneider, Exec. Dir., CCLS, to Elizabeth Egan, Dist. Att’y, Fresno County (Aug. 25, 2003) (on file with San Joaquin C. of Law).

<sup>57</sup> Press Release, CCLS, Twenty-five Workers Go to Ex-employer’s Office to Seek Over \$10,000 in Unpaid Wages (Aug. 25, 2003) (on file with San Joaquin C. of Law).

<sup>58</sup> Schneider, *supra*, note 53.

<sup>59</sup> *Id.* at 2.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> E-mail from Chris Schneider, CCLS, to author (Oct. 6, 2005, 08:59:33 PST) (on file with San Joaquin C. of Law).



forcing 500 harvesters to labor off the clock for half an hour each day.<sup>64</sup> Workers were required to show up for work a half hour early to unload wheelbarrows and supplies, placing them in vineyard rows so work could start on schedule.<sup>65</sup> That half hour was considered time for which the harvesters were not compensated.<sup>66</sup> This is, says Schneider, "in my humble opinion, felony theft of labor . . . Multiply the hourly wage by number of workers by number of hours off the clock each day and you have the amount stolen each day."<sup>67</sup> According to the United Farm Workers Union ("UFW") such violations of state and federal wage and hours laws alleged are common in the table grape industry.<sup>68</sup> "There is a lot of working off the clock. Workers are asked to set up at the beginning of the day, then take equipment home, wash it and store it," says UFW President Arturo Rodriguez.<sup>69</sup> Farmworkers "are particularly vulnerable to work rights violations because they are unaware of their protections under law."<sup>70</sup>

In his letter to the Fresno County District Attorney's office ("DA") asking that it consider prosecution of felony theft of labor cases, Schneider stated, "This is an outrage. If a person stood at the edge of a field, and robbed workers of their pay as they left, they would be prosecuted. If someone walked into a store and took \$14,000 out of the safe, they would be prosecuted."<sup>71</sup> Under the plain language of the statute, notes Schneider, such a pattern of behavior qualifies as theft of labor, triggering the criminal provisions of Penal Code 484(a).<sup>72</sup> Schneider's letter concludes: "Clearly, civil remedies have thus far failed [the] employees . . . Employers must know that, if they steal from their workers, they will face criminal prosecution."<sup>73</sup>

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<sup>64</sup> Press Release, United Farm Workers, Grape Workers Win \$1.7 Million Settlement: Take to Help Other Abused Workers (Oct. 4, 2005) (on file with San Joaquin C. of Law).

<sup>65</sup> *Id.*

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

<sup>67</sup> Schneider, *supra* note 63.

<sup>68</sup> United Farm Workers, *supra* note 64.

<sup>69</sup> Juliana Barbassa, *Farmworkers Win \$1.7 Million in Suit Over Unpaid Work*, Associated Press (Oct. 11, 2005).

<sup>70</sup> *Id.*

<sup>71</sup> Schneider, *supra* note 53.

<sup>72</sup> *Id.* quoting CAL. PEN. CODE, SECTION 484(a): "The hiring of any additional employee . . . without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud."

<sup>73</sup> Schneider, *supra* note 53.

Alegria de la Cruz of California Rural Legal Assistance (“CRLA”) would surely agree.<sup>74</sup> Cruz’s office,<sup>75</sup> which focuses almost exclusively on assisting farm workers and the rural poor, conceives of “an impoverished land of shanties, labor camps and human exploitation. . . where the poor see laws meant for their benefit ignored and un-enforced. . . [D]enial of justice can mean the difference between dependency and independence, domination and dignity, and even life and death.”<sup>76</sup> CRLA represented twenty-eight workers who over a period of years worked for a grower pruning and picking grapes.<sup>77</sup> As clients, they had filed multiple wage claims for nonpayment against the grower and had obtained favorable judgments from the Labor Commissioner.<sup>78</sup> When even more clients arrived with wage claims against the same grower, CRLA’s answer was to file for an injunction under Labor Code section 243.<sup>79</sup> Instead of filing more wage claims, CRLA litigated the issue<sup>80</sup> and obtained a default judgment for \$102,000 against the employer. After securing the judgment, however, CRLA was reduced to trying to collect that amount through the debtor’s exam process and other difficult civil collection methods,<sup>81</sup> with no assurance of ultimate success.

CRLA also came to the aid of fifty-two workers who spent twenty-two days picking grapes and tomatoes on farmlands in the Stockton and Tracy areas.<sup>82</sup> These workers were supposed to be paid one dollar per box, but the licensed farm labor contractor on the job claimed some middleman who was supposed to pay the workers never got the money to

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<sup>74</sup> See E-mail from Alegria De La Cruz, CRLA, to author (Nov. 1, 2005, 17:55:56 PST) (on file with San Joaquin C. of Law).

<sup>75</sup> CRLA, at <http://lawyers.justia.com/firm/California-Rural-Legal-Assistance-4048/> (last visited on Dec. 24, 2007). CRLA has maintained offices throughout California since 1965 assisting farmworkers with civil rights, employment law, and healthcare law issues. *Id.*

<sup>76</sup> CRLA, available at [http://www.crla.org/about\\_us.htm](http://www.crla.org/about_us.htm) (last visited Dec. 24, 2007).

<sup>77</sup> E-mail from Alegria De La Cruz to author (Nov. 2, 2005, 10:57:10 PST) (on file with San Joaquin C. of Law).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* CAL. LAB. CODE, § 243 SUBDIVISION (c) provides in part: “[A]n employer shall be deemed to have been convicted . . . if, to secure labor or personal services in connection with his or her business, the employer . . . fails to satisfy a judgment for wages respecting those employees . . . but only if the employer had actual knowledge of the person’s failure to pay wages. In issuing a temporary restraining order pursuant to this section, the court, in determining the amount and term of the bond, shall count the agent’s, contractor’s, or subcontractor’s employees as part of the employer’s total work force . . .”

<sup>80</sup> De La Cruz, *supra* note 77.

<sup>81</sup> *Id.*

<sup>82</sup> De La Cruz, *supra* note 74.

them.<sup>83</sup> The workers were hired by the contractor to pick in fields the contractor had himself leased to harvest and sell the produce using a produce license.<sup>84</sup> The workers were owed \$87,480 in unpaid wages and an additional \$19,000 for alleged rest and mealtime violations.<sup>85</sup> According to De la Cruz, "Fresno County prosecutors claimed to have assessed the case, but did not initiate an investigation."<sup>86</sup> Rather than investigating and charging theft of labor such that the actual thief may have been compelled to pay, damages were paid out by the state's Farmworker Fund.<sup>87</sup>

Of some solace to those calling for more frequent application of criminal sanctions are some recent successful prosecutions for grand theft of labor in the janitorial industry in the Los Angeles area.<sup>88</sup> Acting on complaints from the Maintenance Cooperation Trust Fund ("MCTF") and the Mexican American Legal Defense and Educational Fund concerning janitorial subcontractors, a cooperative task force consisting of law enforcement officials in the city and county of Los Angeles, investigators from DLSE, the U.S. Department of Labor and other agencies<sup>89</sup> found that janitorial maintenance workers at supermarkets, department stores, and manufacturing companies were not receiving minimum wage.<sup>90</sup> The scheme involved the shutting down of one company and reopening it under different names, leaving workers unpaid.<sup>91</sup> Subcontractors working for Encompass Services Corporation were booked on multiple charges, including grand theft of labor, and pled no contest.<sup>92</sup> Workers were owed nearly \$2 million in unpaid wages.<sup>93</sup> MTCF's Executive Director, Ellia Garcia, says, "Irresponsible employers prey on the fact this workforce is vulnerable due to their immigration status, and use this to

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> De La Cruz, *supra*, note 77.

<sup>87</sup> *Id.*

<sup>88</sup> CAL. LAB. COMM'R., 2 LAB. COMM'R BULL., ISSUE 1, at 1. (2003).

<sup>89</sup> *Id.* at 5.

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

<sup>91</sup> CAL. LAB. COMM'R., 2 LAB. COMM'R BULL., ISSUE 2, at 9. (2003)

<sup>92</sup> *Id.*

<sup>93</sup> CAL. LAB. COMM'R. *supra* note 88, at 9. Evidence obtained from these investigations also allowed the L.A. County District Attorneys office to win convictions against two other janitorial contractors. CAL. LAB. COMM'R, *supra* note 88, at 2. The owner of American Unique Services pled guilty to felony theft of labor after he failed to pay four workers \$12,000 to \$15,000 and seven other workers were owed a total of approximately \$31,000. *Id.* at 5. Owners of Cindy's Cleaning Service pled guilty to eight counts of felony theft of labor and received one year in county jail and with three years probation after paying \$10,000 restitution to workers. *Id.* at 11.

intimidate them."<sup>94</sup> That grand theft of labor may successfully be prosecuted in the industrial arena by district attorneys and allied agencies is a hopeful sign of improved attention to a widespread problem of theft of labor in California's agricultural sector.

#### IV. ROOTS OF OUR LABOR LAWS

##### A. *The Progressive Movement*

The legislative history surrounding the creation of our labor laws and institutions illuminates their present application to similar concerns<sup>95</sup> demonstrates a legislative purpose common to Penal Code section 484 to eradicate the many evils that prey on labor.<sup>96</sup> The concept of labor as a valuable commodity needing protection, of the interdependence between other social problems of the state and the problems of labor, first coalesced during the Progressive Era.<sup>97</sup> At the turn of the century, children could be found selling chewing gum, matches, and papers soon after school let out, remaining on the streets until as late as nine o'clock at night.<sup>98</sup> Because of the new Child Labor Law, child workers had been practically eliminated from the factory, workshop and store, and school attendance was swelling as a consequence.<sup>99</sup> Strict enforcement of the eight hour law for women had raised the working women of the state to a better position than working women in other states.<sup>100</sup> The Progressive era in California was characterized by substantial humanitarian, political, environmental, and labor reforms.<sup>101</sup> Important measures passed in 1913

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<sup>94</sup> *Id.* at 2.

<sup>95</sup> Lisa Hampton, LEGISLATIVE RESEARCH INCORPORATED, *Legislative History of California Labor Code § 201*, p. vi, Guiding Comments (on with San Joaquin C. of L).

<sup>96</sup> Legislative Resources Incorporated ("LRI"), *Legislative History of California Labor Code § 201*, Endnotes, citing *People v. White*, "A wide variety of factors may illuminate legislative design, such as context, object in view, evils to be remedied, history of the times, and of legislation upon the same subject, public policy, and contemporaneous construction." (Cal. Sup. Ct. App. Dep't 1978) 77 Cal.App.3d Supp.17). "In the present circumstances both the legislative history of the statute and the wider circumstances of its enactment are legitimate and valuable aids in divining the statutory purpose." *Id.* See Cal. Mfrs Ass'n v. Pub. Util's Comm'n, 24 Cal. 3d 836, 844 (Cal. 1979). I am deeply grateful to Carolina C. Rose, J.D., President of LRI (Sacramento, Cal.) who provided a large part of the research material for this project and without whose gracious and professional help, this article might not have been possible.

<sup>97</sup> See generally FRANKLIN HICHBORN, STORY OF THE SESSION OF THE CALIFORNIA LEGISLATURE OF 1915 (S.F., James H. Barry Co. 1916).

<sup>98</sup> CAL. BUREAU OF LAB. STATISTICS, *supra* note 49, at 13.

<sup>99</sup> *Id.* at 10.

<sup>100</sup> *Id.*

<sup>101</sup> HICHBORN, *supra* note 97, at 14, 196.

included the "Blue Sky Law," "The Conservation Act," and the "Redlight Abatement Act."<sup>102</sup> Progressive reforms included breaking up the Southern Pacific machine's "strangle-hold" on the state in 1910<sup>103</sup> which had served to block social progress. The expanse of Progressive enactments spoke to a new emphasis on social concerns that would elevate protections for the common man at the expense of the larger industrial machine. It was against this moral backdrop that important protections for labor were achieved.

### B. The Bureau

In 1883 the Bureau of Labor Statistics was established as primarily a statistics-gathering body, but by the turn of the century it undertook enforcement of all laws affecting labor.<sup>104</sup> Numerous cases had come to the attention of the Bureau suggesting workers who had been discharged were not paid wages.<sup>105</sup> Early on, the problem of nonpayment of wages seemed disproportionately represented among those laboring classes least able to afford it.<sup>106</sup>

The Bureau's recommendations to the legislature in 1896 acknowledged the "labor laws of the State of California have been few, imperfect, and incomplete; effective in some instances, but not of sufficient scope to meet the requirements and necessities of our laboring classes."<sup>107</sup> It was suggested eighteen proposed laws<sup>108</sup> would remedy and abolish "many of the evils to which labor has been subjected in the past."<sup>109</sup>

<sup>102</sup> *Id.* at 10.

<sup>103</sup> *Id.* at 89.

<sup>104</sup> CAL. BUREAU OF LAB. STATISTICS, *supra*, note 49, at 9.

<sup>105</sup> CAL. BUREAU OF LAB. STATISTICS, FOURTEENTH BIENNIAL REP. 43 (1910), 2 APP'X TO J'S OF SEN. AND ASSEMB. OF THIRTY-NINTH SESS. (1912). Wage claims over the prior two years had totaled more than a thousand, *Id.* with complaints by common laborers comprising the majority. CAL. BUREAU OF LAB. STATISTICS, *supra* note 49, at 34. During 1911—1914, over 7000 complaints were filed against employers for nonpayment of wages and 77 cases were prosecuted. CAL. BUREAU OF LAB. STATISTICS, SIXTEENTH BIENNIAL REP. 11 (1914), 4 APP'X TO J'S OF SEN. AND ASSEMB. OF FORTY-FIRST SESS. (1915).

<sup>106</sup> CAL. BUREAU OF LAB. STATISTICS, EIGHTEENTH BIENNIAL REP. 18 (1918), 5 APP'X TO J'S OF SEN. AND ASSEMB. OF FORTY-THIRD SESS. (1918). Laborers were the largest group among men filing wage claims in 1916—17, representing 22% of the total and 27% in 1917—18. Farm hands and carpenters were the next largest group. *Id.*

<sup>107</sup> CAL. BUREAU OF LAB. STATISTICS, BULL., PROPOSED LAB. LAWS (1896), at 5.

<sup>108</sup> *Id.* at 5-7.

<sup>109</sup> *Id.* at 5. The Labor Commissioner called for, *inter alia*, new laws providing for an eight hour work day, *Id.* for a Time-Check System that would prohibit depriving laborers their pay for unreasonable periods, for a reasonable time for a mid-day meal, the creation

These new protections would “form a nucleus” of “a code of laws” acting to safeguard labor that “might be added to and improved upon from time to time as necessity requires,” to accord labor “full justice at the hands of the people.”<sup>110</sup> To realize that vision, the Bureau declared the absolute need for enforcement so these laws might be more than just “dead letters on our statute books.”<sup>111</sup> From its earliest stages, the Bureau predicted the need for an evolution of the law, a unity of laws built around a core purpose of protecting labor, together operating in a cooperative fashion to eradicate the many evils that prey upon it. According to the Bureau, the problem was “fundamental,” striking “at the very root of our economic, social, and political structure.”<sup>112</sup> The worker who had “honestly toiled” but who could not obtain wages “loses faith in humanity and the efficacy of our laws and our courts” to be “turned out a beggar, vagrant, or criminal,” or seeking “redress by forcible means.”<sup>113</sup>

Admitting that sense of hopelessness, faith in our cherished institutions and continued adherence to them could depend on how they responded to the victims of abuse. Remedial legislation was demanded to avoid a “spirit of unrest and dissatisfaction”<sup>114</sup> from the many “paycheck evils” and “wage evils” then “in vogue.”<sup>115</sup> Such effective legislation would tend to prevent honest men who had been denied their wages from “becoming embittered against society in general, and from being forced, by lack of money, to commit crime.”<sup>116</sup> In keeping with the moral concerns of the time, it was hoped that the new laws would prevent working women from being “wrongly cast out into the community without funds and thereby forced to live a life of shame.”<sup>117</sup> At issue was a foundation of our social values, a belief that honest work could elevate the status of the worker to virtue and raise him from poverty to productive citizenry. At issue was the belief that a moral imperative obligated our social institutions to protect those values.

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of minimum wage that laborers must be paid, and for avoiding delay in the payment of wages when an employee is discharged from service. *Id.* at 7.

<sup>110</sup> CAL. BUREAU OF LAB. STATISTICS, *supra* note 107, at 5.

<sup>111</sup> CAL. BUREAU OF LAB. STATISTICS, *supra* note 49, at 29.

<sup>112</sup> CAL. BUREAU OF LAB. STATISTICS, SIXTEENTH BIENNIAL REP. 15 (1914), 4 APP'X TO J'S OF SEN. AND ASSEMB. OF FORTY-FIRST SESS. (1915).

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

<sup>114</sup> CAL. BUREAU OF LAB. STATISTICS, *supra* note 105, at 43.

<sup>115</sup> CAL. BUREAU OF LAB. STATISTICS, *supra* note 107, at 6.

<sup>116</sup> CAL. BUREAU OF LAB. STATISTICS, *supra* note 49, at 9.

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

*C. Wage and Paycheck Evils*

Illustrative of the many paycheck evils of the period was the problem of the Alaskan salmon canneries.<sup>118</sup> Each year, chiefly foreign men would be hired in March or April to work the salmon canneries on the Alaskan coast to be returned to San Francisco after the season.<sup>119</sup> Chinese contractors would contract with the canneries for \$250 per man per season and then sublet the contract to subcontractors of various nationalities who would then go among their own people and hire them for \$160 to \$180.<sup>120</sup> The contractors gleaned additional profits from the stores and gambling tables they operated and controlled and that furnished the men with all food, wares, and entertainment.<sup>121</sup> Numerous claims of false and exorbitant deductions on wages had come to the attention of the Bureau the prior two seasons.<sup>122</sup> Often, men would arrive back in San Francisco without a cent due them after a season's work, all of it having been charged against them for food or gambling debts.<sup>123</sup> The Bureau noted a process that casts several thousand penniless men adrift in the city adds "a large factor to the criminal element of the community."<sup>124</sup>

Other deceptions included "the luring of foreign workers by compatriot agents to another job with promises of higher pay."<sup>125</sup> In one case, hundreds of Greek men were lured from their work on railroad construction to apply for what they had hoped would be higher paid work.<sup>126</sup> After the disenfranchised workers would pay a broker fee to the agent, they would find out no such work existed.<sup>127</sup> It became the duty of law and government to protect the "helpless classes"<sup>128</sup> against the social forces that would exploit them, the consequence of inaction being too great.

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<sup>118</sup> *Id.* at 51.

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

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

<sup>121</sup> *Id.* at 52.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* The Bureau also noted, "They are a helpless class and the prey of every type of human shark . . ." CAL. BUREAU OF LAB. STATISTICS, *supra* note 112, at 17. "As most of these men are ignorant, they pay the attachments and costs in order to get whatever money remains of their wages. They are unable to hire attorneys to fight their cases, and are usually in such absolute need that they are willing to make any sort of a sacrifice . . ." *Id.* at 18. "In years gone by these men were cast adrift in the city after their return from Alaska, practically penniless." *Id.* at 17.

<sup>124</sup> *Id.* at 31.

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

<sup>126</sup> *Id.* at 31.

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

<sup>128</sup> *See supra*, note 123.

Acting as a mirror to present day abuses,<sup>129</sup> the examples of past evils preying upon labor are familiar.

#### D. The Wage Law and Paycheck Law

The first legislative session to give the needs of Labor worthwhile consideration was convened immediately following the Southern Pacific machine's "overthrow."<sup>130</sup> Accordingly, the legislature of 1911 enacted two laws that stood out as milestones to improve the conditions of labor, the wages law and the paycheck law.<sup>131</sup> The wage law eliminated a common self-serving practice in which employers paid wages in "time checks," payable in one, two, or sometimes as long as six months.<sup>132</sup> In many instances employees were required to travel long distances to collect their wages only to find that when they arrived, at the option of the employer, their claim would not be honored for another thirty to ninety days.<sup>133</sup> Collection agencies that had formerly charged fifty percent plus costs for collecting wages due were practically driven out of business.<sup>134</sup> The latter paycheck law provided for the payment of wages in cash or negotiable paper that would be payable without discount.<sup>135</sup> Due to the paycheck law, employers could no longer compel workers to cash checks at a saloon owned by the employer where they would be automatically discounted.<sup>136</sup> Following enactment of its legislative proposals, the Bu-

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<sup>129</sup> See *infra* Section III., THEFT OF LABOR, A CURRENCY.

<sup>130</sup> HICHBORN, *supra* note 97, at 191.

<sup>131</sup> CAL. BUREAU OF LAB. STATISTICS, *supra* note 49, at 29. Acting to counter the "multitude of . . . abuses," (CAL. BUREAU OF LAB. STATISTICS, *supra* note 49, at 9) and "Schemes to Defraud Labor" by which "unscrupulous employers and dishonest schemers" would attempt to defraud the "working men and women of this state. . ." *Id.* at 9. The wage law, our present day Labor Code section 201, provided for payment of wages immediately upon discharge or within five days if the employee quit or resigned. *Id.* at 29. It called for a monthly pay day and prohibited the withholding of wages for more than 15 days. *Id.* at 31.

<sup>132</sup> CAL. BUREAU OF LAB. STATISTICS, *supra* note 49, at 9. The Wage Law of 1911 was declared unconstitutional in 1914, making amendment necessary (See CAL. BUREAU OF LAB. STATISTICS, *supra* note 106, at 17.) because it lacked the requisite constitutional element of fraud needed for imprisonment. (Citing *In re Crane*, 26 Cal. App. 22, 25 (Cal. Ct. App. 1 1914); see Pomeroy, C.P., Reporter, *Reports of Cases in the District Courts of Appeal of the State of California* (Bancroft-Whitney 1915). The amendment corrected the constitutional imperfection by adding the intent element to the statute. (See Stats. 1915, ch. 143, § 3); Section 15 of Article I provided. "No person shall be imprisoned for debt in any civil action . . . unless in cases of fraud . . ." *Id.*

<sup>133</sup> CAL. BUREAU OF LAB. STATISTICS, *supra* note 105, at 10.

<sup>134</sup> CAL. BUREAU OF LAB. STATISTICS, *supra* note 49, at 10.

<sup>135</sup> *Id.* at 29.

<sup>136</sup> *Id.* at 10.



reau seemed self-satisfied it had collected in about two-thirds of non-payment of wages cases notwithstanding that "in only four instances" was any "provision made for [the law's] enforcement."<sup>137</sup>

Although California's Labor Code comprises a parallel, largely civil, statutory scheme for the problem of nonpayment of wages,<sup>138</sup> the trend moved towards increasing criminal sanctions. Amid an awareness of the multitude of abuses and interrelated social ills acting to undermine a work ethic essential to the social fabric, the legislature intended an evolving law, adaptable to the breadth of abuse. The subsequent enactment of Senate Bill 408 in 1927 affording criminal protections to labor must be seen as one more addition to this "code of laws" standing to accord labor "full justice at the hands of the people." Where prior laws had been "few, imperfect, and incomplete; effective in some instances, but not of sufficient scope to meet the requirements and necessities of our laboring classes," the later enactment of criminal theft provisions suggests a parity of application of the Labor and Penal Codes. Declaring in 1911 "the absolute need for enforcement," the legislative history of the period supports active enforcement of coming theft of labor provisions.

## V. THE LEGISLATIVE HISTORY OF SENATE BILL 408, STATUTES OF 1927

### A. *The Commission for Reform of Criminal Procedure*

At the urging of the California Bar,<sup>139</sup> to counter the continuing specter of social inequity and crime, the legislature of 1925<sup>140</sup> created the Commission on Reform of Criminal Procedure.<sup>141</sup> For criminal laws to be effective, it was said, "they must be so efficiently enforced as to be not only a punishment, but a deterrent of crime."<sup>142</sup> The framers opined

<sup>137</sup> *Id.* at 11.

<sup>138</sup> CAL. LAB. COMM'R., *supra* note 88, at 7.

<sup>139</sup> CAL. BAR ASS'N, *supra* note 2, at 114.

<sup>140</sup> COMM'N FOR REFORM OF CRIM. PROC., *supra* note 7. The legislature directed the Commission, "To make a study of the methods of criminal procedure and recommend to the legislature of the State of California, which will convene in the year 1927, such new system of criminal procedure or such amendments to the present system as will in its opinion tend to provide for this state the most efficient system for the swift and certain administration of criminal justice." *Id.* at 1.

<sup>141</sup> CAL. BAR ASS'N, *supra* note 2, at 103. The belief was the state of American criminal procedure frequently afforded delays that made it possible "for the criminal to very frequently defeat the ends of justice." *Id.* at 31.

<sup>142</sup> CAL. BAR ASS'N, *supra* note 2, at 31. Foundational to that request was an idea that "We have inherited a criminal procedure which was developed in past centuries to meet conditions entirely different from those prevailing today." *Id.* at 103. "Crime has become an organized business in this country. Either society must control organized crime, or

that in other countries where crime is promptly prosecuted, there is much less crime.<sup>143</sup> The proposed changes would "parallel changes in criminal procedure advocated by the National Crime Commission" and commissions in other states considering the subject.<sup>144</sup> The new package of forty-three laws which included Senate Bill 408 recommended by the Commission comprised sweeping amendments to the Penal Code.<sup>145</sup> They were to apply to all classes of offenders and operate with the same efficacy and swiftness in all cases.<sup>146</sup> An unequal, delayed enforcement of the provisions would undermine any deterrent value.<sup>147</sup>

Senator Baker's Senate Bill 408, in composite, was described as "An act to amend sections 484 [through] 490 of the Penal Code and to add a new section to the Penal Code to be numbered 490a, defining the crime of theft and prescribing punishment therefor."<sup>148</sup> As chairman of the Revision of Criminal Law and Procedure Committee,<sup>149</sup> Baker's initial bill

organized crime will control society. . . it is believed that the criminal law should be framed to give all the people the fullest possible degree of protection and safety . . . Experience teaches that the criminal law which is most effective is the one which operates with the greatest swiftness and certainty." *Id.*

<sup>143</sup> CAL. BAR ASS'N, *supra* note 2, at 31.

<sup>144</sup> *Id.* It is noteworthy that precisely at this time commissions across the United States were working to formulate new criminal procedures, the Journal documents the contemporaneous formation of the American Law Institute ("ALI") under Elish Root, Dean of the American Bar. Responding to the "outcry from judges and lawyers against the ever-increasing flood of laws, opinions, and reports . . . and the general disorganization for the common law as applied in the United States," the ALI has "undertaken the almost Herculean task of restatement and classification of the common law . . ." This "tremendous task," it was said, called for "the very best talent and ability available." These "greatest American experts" at the onset composing the first ALI were "Prof. Samuel Williston, of Harvard University, author of a monumental work on 'Contracts'; Joseph H. Beale, also of Harvard, is the reporter for 'Conflict of Laws'; of the law of 'Agency,' Floyd Mechum, of the University of Chicago, is the reporter; Mr. Boland . . . for 'Torts,' while for 'Corporations,' the director, Dr. William Draper Lewis, is reporter." *Id.* at 92.

<sup>145</sup> See SUMM. OF ACTIONS AND FINAL STATUS OF S.B.'S, CONST'L AMENDM'S, CON. AND J. RESOL'S, 1925, at 298-299, available at <http://192.234.213.35/clerkarchive/>. Included were measures affecting the time for hearing appeals, the certainty of judicial proceedings and punishment, pleadings, trials, bail, and swiftness of punishment. COMM'N FOR REFORM OF CRIM. PROC., *supra* note 6, at 7-10.

<sup>146</sup> CAL. BAR ASS'N, *supra* note 2, at 93.

<sup>147</sup> COMM'N FOR REFORM OF CRIM. PROC., *supra* note 7, at 5. Noting the welfare of the entire public is involved to a far greater degree in criminal matters than in civil matters, the Commission's report reasoned "Punishment administered promptly . . . tends to strongly deter the commission of other crimes. When punishment does not follow promptly after the crime, a very large percentage of the deterrent effect is lost." *Id.* at 8.

<sup>148</sup> STATE OF CAL., SEN. J. (1927) 664.

<sup>149</sup> CAL. LEGIS., SEN. FINAL HISTORY: SYNOPSIS OF S.B.'S, CONST'L AMENDM'S, CON. AND J. RESOL'S, 17 (1927).

carried the commodity of "labor" to the synthesis of the historical property theft provisions.<sup>150</sup> Representing the fertile Salinas valley<sup>151</sup> and sitting on the Agriculture Committee, amid the general dearth of historical information for this period,<sup>152</sup> Baker's agricultural focus and object of protection may be presumed. Upon the third reading, he instructed Senator McKinley "as a Special Committee of One" to amend the bill to include a standard for meeting a *prima facie* case and a methodology for valuing the labor stolen.<sup>153</sup> The historical record reveals, therefore, that "labor" was added to our criminal theft provisions with the full intent of the legislature theft of labor be prosecuted with the same vigor expected for all its revisionist enactments.<sup>154</sup> Noting the welfare of the entire public is involved to a far greater degree in criminal matters than in civil matters,<sup>155</sup> the Commission's report reasoned "Punishment administered promptly . . . tends to strongly deter the commission of other crimes. When punishment does not follow promptly after the crime, a very large percentage of the deterrent effect is lost."<sup>156</sup> Historically, this legislative directive has been largely ignored in favor of the Labor Code. In the

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<sup>150</sup> S.B. 408, 47TH LEGIS., (Cal. 1927). On January 19, 1927, the bill, as introduced by Baker, in relevant part, read, "Every person . . . who shall knowingly . . . defraud any other person of money, labor, or real or personal property . . . is guilty of theft." *Id.*

<sup>151</sup> CAL. LEGIS., *supra* note 149, at 18.

<sup>152</sup> E-mail from Ruth Borger, Senior Librarian, U.S. Attorney's Office, Sacramento, to Lloyd Carter (Sept. 20, 2004, 11:30:54 PST); E-mail from Genevieve Troka, Cal. State Archives, to author (Sept. 20, 2004, 13:18:48 PST); E-mail from Kerry Prindiville, librarian, Fresno County law library, to author (Sept. 19, 2004, 13:38:37 PST) (all on file with San Joaquin C. of Law).

<sup>153</sup> CAL. LEGIS., SEN. J., 769 (Mar. 16, 1927). "AMENDMENT NUMBER ONE. [¶] On page 1, line 13, of the printed bill, add the following: 'In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received, the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing so as to cover any money, property, or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the period in question. The hiring of additional employees without advising each of them of every outstanding labor claim and every judgment that the employer has been unable to meet shall be *prima facie* evidence of intent to defraud.'" *Id.*

<sup>154</sup> COMM'N FOR REFORM OF CRIM. PROC., *supra* note 7, at 7. CAL. PEN. CODE, SECTION 681(a) urges, "The welfare of the people of the State of California requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial officers and of all district attorneys to expedite the hearing and determination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice." *Id.*

<sup>155</sup> *Id.* at 8.

<sup>156</sup> *Id.* at 5.

absence of effective prosecution, various other means were developed to counter the abuse.

## VI. RECENT ATTEMPTS AT THE PROBLEM

### A. *The Licensing Approach*

Licensing and verification requirements were passed in 2002 creating an affirmative obligation for growers to inspect contractor licenses before entering into a contract to do business with them.<sup>157</sup> These set up a farm labor contractor verification unit that certifies the status of a license.<sup>158</sup> The intent of licensing is to compel employers to pay wages properly.<sup>159</sup> The Division of Labor Standards is very aware of the problem of nonpayment of wages to farm workers.<sup>160</sup> Yet, the vast workload is spread among a mere five staff members who are able to devote only one day a week to verification requests.<sup>161</sup> Recently, as suggested above,<sup>162</sup> allied labor agencies have joined forces to obtain some significant “theft of labor” criminal prosecutions under Penal Code section 484(a), but legislative sources suggest that the magnitude of the task at hand is leaving even heightened efforts inadequate.<sup>163</sup> A 2002 study of the Division of Labor Standards and Enforcement confirms that budget and staffing allocations have not kept pace with the enforcement requirements of the state’s growing workforce, the number of investigations, citations, and penalties have fallen proportionately.<sup>164</sup> Agricultural inspections have risen only slightly from 647 in 1993 to 855 in 2003.<sup>165</sup>

In an effort to secure contracts through low bids, says Information Officer Susan Gard of the Division of Industrial Relations, farm labor contractors often operate on the margins of profitability and that can trans-

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<sup>157</sup> E-mail from Susan Gard, Info. Officer, Dep’t Indus. Rel, to author (Oct. 12, 2004, 11:15:19 PST) (on file with San Joaquin C. of Law).

<sup>158</sup> E-mail from Susan Gard, Info. Officer, Dep’t Indus. Rel, to author (Oct. 8, 2004, 15:15:55 PST) (on file with San Joaquin C. of Law).

<sup>159</sup> Gard, *supra* note 157.

<sup>160</sup> E-mail from Dean Fryer, Dep’t Indus. Rel, to author (Oct. 7, 2004, 17:20:33 PST) (on file with San Joaquin C. of Law).

<sup>161</sup> Gard, *supra* note 157.

<sup>162</sup> See discussion *infra*, SECTION III, THEFT OF LABOR. A CURRENCY.

<sup>163</sup> Ben Nicholson, Recent Statute, *Businesses Beware: Chapter 906 Deputizes 17 Million Private Attorneys General to Enforce the Labor Code*, 35 MCGEORGE L. REV. 581, 582. (2004).

<sup>164</sup> Verga, *supra* note 1, at n.19.

<sup>165</sup> Fryer, *supra* note 160, at DIV. LAB. STANDARDS ENFORCMENT, ENFORCEMENT ACTIVITY IN AGRICULTURE (Calendar Years 1993 Through 2003).

late so that workers may not get paid.<sup>166</sup> U.C. Berkley Agriculture Labor Management Specialist Howard Rosenberg confirms, “[m]ore than a few contractors have expressed frustration about the difficulty of meeting obligations to employees and government when they don’t get paid on time or at all for contracted work.”<sup>167</sup> Obviously, while licensing may act to encourage labor contractors to pay workers, they must be paid by the growers for workers to receive the benefit. Assessing the problem in scope, licensing must be seen as an incomplete solution.

### B. *The Private Attorneys General Approach*

Aware that the growth of California businesses had far outstripped the state’s capacity to enforce its Labor Code, the legislature enacted the Private Attorneys General Act<sup>168</sup> (“the Act”) in 2003.<sup>169</sup> To that end, the Act “effectively deputizes more than 17 million workers to enforce the Labor Code themselves.”<sup>170</sup> In the wake of statistics showing inadequate inspections and citations statewide due to inadequate funding, the legislature found “staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future.”<sup>171</sup> Financing and resources were the nub of the issue.<sup>172</sup> Where prior to enactment misdemeanor violations were largely neglected by prosecutors who had the sole jurisdiction to enforce the Code, the Act now authorizes any ag-

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<sup>166</sup> Gard, *supra* note 157. Additionally, it has been said “many migrant farmworkers who are hired through labor intermediaries experience poorer wages and working conditions and less job security than those who are hired directly by the farm operator.” Catherine Ruckelshaus and Bruce Goldstein, *From Orchards to the Internet: Confronting Worker Abuse* 16, at <http://nelp.org/docUploads/pub12%2Epdf>. Only half of all seasonal farmhands in California now work directly for growers, down from 80-90% thirty years ago. *Id.* at 43.

<sup>167</sup> E-mail from Howard Rosenberg, Agric. Lab. Mgmt. Spec., Univ. of Cal., Berkeley, to author (Sept. 9, 2004, 11:32:48 PST) (on file with San Joaquin C. of Law); *See also* Manion, *supra*, note 38, at n. 92, (stating the structure of the employment relationship creates additional difficulties when farm workers attempt to get wages they are owed from undercapitalized crew leaders who are hard to find).

<sup>168</sup> Nicholson, *supra* note 163, at 580 (citing CA. LAB. CODE § 2698, 2699).

<sup>169</sup> Nicholson, *supra* note 163, at 584.

<sup>170</sup> *Id.* at 585.

<sup>171</sup> *Id.* at 583, 587, n. 10 (citing ASSEMB. COMM. ON LAB. AND EMP., COMM. ANALYSIS OF S.B. 796, at 3 (July 9, 2003) originating from a U.S. DEP’T OF LAB. study of the L.A. garment industry). Enforcement activity dwindled from 282 total agricultural civil citations of all types issued in 1993 to only 112 issued in 2003. Fryer, *supra* note 160, at Div. LAB. STANDARDS ENFORCMENT, ENFORCEMENT ACTIVITY IN AGRICULTURE (Calendar Years 1993 Through 2003).

<sup>172</sup> Nicholson, *supra* note 163, at 582.

grieved employees acting as private attorneys general to file actions to recover civil penalties.<sup>173</sup> Whether the Act's provision for reasonable compensation of attorney's fees and costs<sup>174</sup> will encourage that kind of response is questionable.

Benjamin Ebbink, Consultant to the Assembly Labor & Employment Committee,<sup>175</sup> assures us "there has been a lot of debate over the past few years about the lack of enforcement in general. The lack of criminal prosecutions was one of the issues discussed in the legislative history of SB 796 . . . that there were many section[s] of the Labor Code that had criminal . . . penalties . . . and that the criminal penalties were rarely enforced."<sup>176</sup> Ebbink notes "such violations are rarely prosecuted. I think much of the state's enforcement focus on wage claims tends to concentrate primarily on getting the proper wages for the worker."<sup>177</sup> Civil action is slow and cumbersome.<sup>178</sup> The pursuit of civil remedies under the Labor Code may take years and may easily be nullified by bankruptcy or other measures. The fact that the Act was necessary at all underscores the limited efficacy of the state's enforcement efforts to date and supports the need for implementation of our criminal theft of labor statute. Says Ebbink, "Many criminal provisions are intended as a deterrent . . . one could argue that it's not much of a deterrent if nobody is ever prosecuted."<sup>179</sup>

### C. *An Impression of Disparate Enforcement*

Contributing to an overall impression of disparate enforcement, farm theft prosecutions under the Central Valley Rural Crime Prevention ("CVRP") grant are limited exclusively to property crimes against a farmer, rancher, or agriculture-related business that impacts business production or economic livelihood.<sup>180</sup> "Clearly, the crime of stealing

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<sup>173</sup> *Id.* at 583.

<sup>174</sup> CAL. LAB. CODE, § 2699(g)(1) (West Supp. 2007).

<sup>175</sup> E-mail from Benjamin Ebbink, Consultant, Assemb. Lab. & Emp. Comm., to author (Oct. 1, 2004, 3:01:31 PST) (on file with San Joaquin C. of Law).

<sup>176</sup> *Id.*

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

<sup>178</sup> Interview by Chris Schneider and Stephen Malm with Captain Jeff Hollis, Fresno Police Dep't. (Oct. 14, 2004).

<sup>179</sup> Ebbink, *supra* note 175.

<sup>180</sup> E-mail from Stephanie Savrnoch, Dep. Dist. At'y, Fresno County, to author (Sept. 15, 2004, 15:50:47 PST) (on file with San Joaquin C. of Law.). The Central Valley Rural Crime Prevention Grant prosecutes "[a]ny property crime against a farmer, rancher, agricultural-related business or other designated industry which takes place in the unincorporated rural areas of the state, and impacts the victim's commercial production, distribu-

labor from the farm worker does not fit into this description,” states Stephanie Savrnock, a Fresno County Deputy DA for the Rural Crimes Unit.<sup>181</sup> Savrnock did recall a couple occasions where labor contractors or other employees of the farmer stole the checks that were to go to the workers.<sup>182</sup> In those cases *it was the farmer who was the victim* so her office was able to prosecute.<sup>183</sup> Similarly, the pilot Rural Crime Prevention and Model Prosecution Program that went into effect in Tulare County in 1996<sup>184</sup> was geared almost exclusively toward preventing property theft from ranches and farms.<sup>185</sup> The measure was described as acting to deter “agricultural crime,” but the focus of the task force the grant created was solely on crimes interfering with farm and ranch productivity.<sup>186</sup> Such a one-sided interpretation of “agricultural crime” may indicate a lack of general awareness or disfavor of “theft of labor” problems that also inhibit the marketplace. A 2004 search of Kern County DA databases revealed no “labor theft” cases whatsoever.<sup>187</sup> Likely, for our farm-laboring classes, there is the appearance of an inequity which further fuels a belief the law will not protect their rights.

## VII. IMPEDIMENTS TO PROSECUTION

### A. *Social and Institutional*

Sources close to the District Attorney’s office state the reasons for not prosecuting wage theft may go to the nature of the process itself. The inordinately heavy caseload carried by most district attorneys demands the prioritization of which crimes they will actually prosecute.<sup>188</sup> This

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tion, or economic livelihood derived from agricultural products, livestock, petroleum, chemicals, farm implements, and equipment.” *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

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

<sup>184</sup> See generally Kerri M. Couillard, Comment, *California’s War on Agricultural Crimes*, 8 S.J. AGRIC. L. REV. 119 (1998).

<sup>185</sup> *Id.* at 138, n. 9. (citing CAL. PEN. CODE, § 14170 (rural crime demonstration program)).

<sup>186</sup> Couillard, *supra* note 184.

<sup>187</sup> E-mail from Mike Yraceburn, Supervisor, White Collar Crimes Unit, DA, Kern County, to author (Sept. 16, 2004, 02:41:29 PM) (on file with San Joaquin C. of Law).

<sup>188</sup> E-mail from Phil Cronin, to author (Aug. 16, 2004, 9:54:04 PST) (on file with San Joaquin C. of Law). Phil Cronin graduated Hastings College of Law in 1973. He served as a Deputy District Attorney, Deputy Attorney General, and U.S. Attorney for criminal prosecutions and appeals. From 1985 to 1992, he was a senior litigator with the Bakersfield firm of Young, Woodridge, Pauldon, Self, Farr, and Griffen. Mr. Cronin was Fresno County Counsel from 1992 until his retirement in 2004. Professor Cronin now

use of that discretion is based upon his perception of what is best for the common good and there is very little control exercised over it by the courts.<sup>189</sup> A district attorney may exercise his discretion by choosing to prosecute major property or crimes against the person.<sup>190</sup> Supervising Deputy DA Michael Yraceburn points out theft of labor is a crime requiring proof of the specific intent to deprive the victim of the value of that labor.<sup>191</sup> Of necessity, every element of the crime must be proven beyond a reasonable doubt.<sup>192</sup> To approach the requisite *mens rea*, prima facie evidence of intent to defraud would be “[t]he hiring of any additional employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet.”<sup>193</sup> While Yraceburn admits his office has never considered this as evidence because “we have never had a case,”<sup>194</sup> this nexus issue may be seen to limit prosecutorial ability to address the problem.<sup>195</sup> Accordingly, amid impediments of proof, where there is an administrative agency set up to handle problems of nonpayment of wages and wage theft, there may be very little incentive for the DA to devote scarce resources to issues with little or no public support or constituency.<sup>196</sup>

In addition to the limitations imposed by the CVRP mandate, DA Savrnock acknowledges wage theft is underreported, likely due to the fact that many farm workers are undocumented and fearful of being deported.<sup>197</sup> The lack of understanding of how the criminal justice system works and the language barrier is also a problem.<sup>198</sup> Further, the workers themselves are migratory and, by the time cases come up for hearings,

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teaches Jurisprudence as well as Criminal Law and Procedure at San Joaquin College of Law. See <http://www.sjcl.edu/LawProgram/Faculty/AdjunctFaculty/tabid/71/Default.aspx>.

<sup>189</sup> Cronin, *supra* note 188.

<sup>190</sup> *Id.*

<sup>191</sup> Yraceburn, *supra* note 187. Yraceburn graduated from Pepperdine Law School in 1985, passed the bar in December of that year, and has been a Deputy District Attorney for Kern County ever since. Yraceburn’s specialty is investigation and prosecution of financial crimes and financial aspects of criminal activity. He has taught courses to peace officers and prosecutors throughout California related to that specialty and has acted as a consultant to both the California Department of Justice and the U.S. Department of Justice. *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> CAL. PEN. CODE, § 484 (a) (WEST’S ANN. CUM. POCKET PART 2004).

<sup>194</sup> E-mail from Mike Yraceburn, Supervisor, White Collar Crimes Unit, DA, Kern County, to author (Sept. 21, 2004, 09:51:40 PM) (on file with San Joaquin C. of Law).

<sup>195</sup> Yraceburn, *supra* note 187.

<sup>196</sup> Cronin, *supra* note 188.

<sup>197</sup> Savrnock, *supra* note 180.

<sup>198</sup> *Id.*



there is no ability to call them to court.<sup>199</sup> These obstacles may serve to dissuade prosecution. Law enforcement itself may see the case as a contract dispute and more appropriately handled in civil court<sup>200</sup> and never refer it for prosecution. The length of time it takes to achieve any relief from the crime may well contribute to a sense of futility and hopelessness in the pursuit.

Other barriers exist even when there may be a desire to prosecute. The wide shadow of the Labor Code has caused theft of labor to be understood as simply a civil matter best handled by the Labor Commissioner rather than by prosecution.<sup>201</sup> Former trial attorney, now mediator, Doug Noll assures us, "This makes some sense politically because the district attorney would rather prosecute real 'bad' guys instead of cheats."<sup>202</sup> Sadly, says Noll, "[t]his socio-economic group is simply not powerful enough to warrant protection for this type of crime," resulting in the "continued oppression of farm workers, who do not have a political voice."<sup>203</sup> It may well be those few growers who willfully deny workers their rightful pay wield local influence making them unlikely candidates for prosecution.

### *B. Subliminal Impediments to Enforcement*

A federal view reinforcing theft of labor is not really theft at all may compound the problem of enforcement, acting as a subliminal impediment to prosecution, in that it allows those charged with that task to ignore the plain language of the statute. In seeking a core, generic concept of theft, the federal courts seem firmly allied in favor of its common law definition.<sup>204</sup> In *Corona-Sanchez*, the Ninth Circuit examined this question as it sought to determine whether a prior petty theft conviction qualified as an aggravated felony for federal sentencing purposes.<sup>205</sup> The court reasoned it must necessarily infer Congress intended to define that

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> E-mail from Douglas Noll, Esq., to author (Sept. 17, 2004, 9:18:39 PST) (on file with San Joaquin C. of Law). Noll was a trial attorney and principle shareholder in the law firm of Lang, Richert & Patch for twenty-two years where he specialized in complex civil litigation. He graduated from Dartmouth College with distinction in 1973 and was law clerk from 1977 to 1978 to the Honorable George A. Hopper of the Fifth District Court of Appeal. Professor Noll now is Chairman of the Board at San Joaquin College of Law where he teaches Peacemaking. He has published two books and numerous articles. See <http://www.sjcl.edu/LawProgram/Faculty/AdjunctFaculty/tabid/71/Default.aspx>.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *United States v. Corona-Sanchez*, 291 F. 3d 1201, 1205 (9th Cir. 2002).

<sup>205</sup> *Id.* at 1203.

term according to its accumulated settled meaning under the common law.<sup>206</sup> At common law, larceny had been confined to a “trespassory taking,” or one in which the thief “took and carried away” personal property with the intent to deprive the owner of it.<sup>207</sup> Noting the desirability of a national, uniform definition of theft, the Ninth Circuit adopted the generic definition,<sup>208</sup> already in use by the Seventh and Tenth Circuits.<sup>209</sup> The court stated, “[t]he language of the California theft statute is unique among the states . . . § 484(a) is broader than the generically defined offense. . . Not only is the theft of labor not a part of the [generic] definition, but it generally has not been included within the scope of ordinary theft statutes *because one’s labor is not one’s ‘property’* . . . the contrary is true; if labor were property, there would be no need for separate provisions criminalizing the theft of labor or services.<sup>210</sup>

That the federal courts have steadfastly refused to recognize a *proprietary* interest in labor, its *property*, belonging to the owner, has been challenged as early as 1960 in a Stanford Law Review article.<sup>211</sup> In *Chappel*, an Air Force master sergeant was convicted of violating the general theft provision of the federal Criminal Code by causing a subordinate under his control to paint apartments owned by defendant.<sup>212</sup> On appeal to the Ninth Circuit, the court held services are not a proper subject of theft under the statute and reversed with directions to dismiss.<sup>213</sup> Following an exhaustive examination of early common law decisions, the author concluded the court erred because it failed to consider whether any of the elements of former consolidated crimes of larceny or embezzlement

<sup>206</sup> *Id.* at 1204.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 1205 (citing *Hernandez-Mancilla v. INS*, 246 F.3d 1002, 1009 (7th Cir. 2001): “. . . a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent”). *Id.*

<sup>209</sup> *United States v. Corona-Sanchez*, 291 F. 3d 1201, 1205 (9th Cir. 2002).

<sup>210</sup> *Id.* at 1207-1208. Similarly, the Ninth Circuit concluded “grand theft under § 487(c) of the California Penal Code does not facially qualify as an aggravated felony under SECTION 1101(a)(43)(G) under the categorical approach” by reason that section 487(c) proscribes theft conduct outside the generic definition of theft offense. *Martinez-Perez v. Ashcroft*, 393 F.3d 1018, 1024 (9th Cir. Ct. App. 2004). Although *Corona-Sanchez* declined to find an aggravated felony where a state statute criminalizes behavior outside the generic definition of theft, other courts have sustained aggravation when conviction documents show theft of a tangible, personal property. See *Fonua v. Gonzales*, No. 05-74327, 2007 WL 1374770, at \*10.

<sup>211</sup> *Theft of Labor and Services*, *supra* note 15, at 663.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

might reasonably include diversion of services.<sup>214</sup> Indeed, the United States Supreme Court had indicated in the *Morrisette* decision that intangibles may be a proper subject for criminal conversion.<sup>215</sup> As such:

The commonly stated rule is that larceny and embezzlement involve only tangible personalty. But closer analysis reveals that the traditional rule is inaccurate. Because larceny, the only form of theft recognized at common law, involved a violation of possession, the subject was usually tangible. It seems clear, however, that the offense consisted of interference with the victim's interest in the thing taken, not the taking of certain things.<sup>216</sup> (emphasis added)

What is certain is a federal interpretation of "theft" restricting it to tangibles must serve to undermine any wider application. That labor and other intangibles do not meet the generic federal definition must serve to erode confidence in California's theft of labor statute. Accepting the many institutional, cultural, and systemic obstacles to prosecution, where labor is seen as an improper subject of criminal theft provisions, the easy way out may be seen to refer all such cases to the Labor Commission.

#### VIII. THE NATURE OF PROPERTY

At common law, accepted wisdom viewed only tangible personal property as the proper subject of larceny.<sup>217</sup> Upon closer inspection, however, the nature of property proves to be far more expansive, quite often embracing many intangible components.<sup>218</sup> A property right may be held in contract or a proprietary right, whether tangible or intangible, in a chose in action.<sup>219</sup> Trademarks, copyrights, and intellectual property of pecuniary value are property rights entitled to protection as such.<sup>220</sup>

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<sup>214</sup> *Id.* at 664. The author cites numerous examples in which intangibles may be the subject of theft, such as choses in action and even ideas. *Id.*

<sup>215</sup> *Id.* at 667.

<sup>216</sup> *Id.* at 664.

<sup>217</sup> *People v. Davis*, 561 N.E.2d 165, 168, 1990 Ill. App. LEXIS 1330, 1141 (Ill. Ct. App. 1990), citing *People v. Zakarian*, 460 N.E.2d 422, 425 (Ill. Ct. App. 1984). Written documents such as deeds and contracts and things growing on, affixed to, or found on land partaking of the nature of realty, electrical energy and water power were not considered property for the purposes of larceny. Moreover, it has been stated that only property which is detectable or measurable by the senses or mechanical means or property which can be moved can be the subject of theft. *Id.*

<sup>218</sup> See generally, *Theft of Labor and Services*, *supra* note 15, at 664.

<sup>219</sup> *Bensinger v. Davidson*, 147 F. Supp. 240, 246 (Dist. Ct. S.D. Cal. 1956) (stating a conditional sales contract involving real estate is property itself and "a well known animal in the legal menagerie of the state").

<sup>220</sup> *Warner Bros. Pictures v. Columbia Broadcasting Sys.*, 102 F.Supp. 141, 147, 92 U.S.P.Q. 54 (D.C. Cal. 1951) "Any civil right not unlawful in itself nor against public policy, that has acquired a pecuniary value, becomes a property right that is entitled to

Correspondingly, in a Probate setting, a “property” may signify any valuable right or interest protected by law.<sup>221</sup> Similarly, California’s Civil Code recounts that things subject to ownership in which a property may exist include all obligations such as “labor or skill . . . the good will of a business, trade marks and signs, and of rights created or granted by statute.”<sup>222</sup> As such, the proprietary value of labor appears firmly rooted in California’s legal tradition. The circuit court in 1880 considered the importance of labor as it responded to a challenge to Article XIX of the California Constitution which prohibited corporations from employing persons of Chinese or Mongolian descent.<sup>223</sup> In analyzing the practical effect of denying this group the right to work, the court stated, “No. . . civilized society . . . would exclude the right to labor for a living. *It is as inviolable as the right of property, for property is the offspring of labor.* (emphasis added.) It is as sacred as the right to life, for life is taken if the means whereby we live be taken . . . .”<sup>224</sup> That a proprietary interest in one’s labor should equate with all the enforcement protections afforded property under the law would seem in order.

## IX. CONCLUSION

California’s prosperity may be traced to the richness of its land and people. As the state’s agricultural workers pursue that promise and contribute to the state’s prosperity, we must bear in mind the state owes them a debt to enforce the protections of its laws equally, without reservation. Economic justice requires no less.<sup>225</sup> Although real social and systemic impediments to the prosecution of wage theft exist, such as the need to prove intent, in keeping with the legislative rationale of deterrence, it is notable no statement of intent is necessary to *charge the of-*

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protection as such,” *citing* Fisher v. Starr, 231 N.Y. 414, 420, 132 N.E. 133, 137, 19 A.L.R. 937 (1921) *Id.*

<sup>221</sup> Fields v. Michael, 91 Cal. App. 2d, 443, 449, 205 P.2d 402 (Cal. Ct. App. 2 1949).

<sup>222</sup> CAL. CIV. CODE, SECTION 655 (West 2007).

<sup>223</sup> In re Tiburcio Parrot, 1 F. 481, 6 Sawy, 349, 1880 U.S. Appeals LEXIS 2027 (Cir. Ct. Dist. Cal. 1880).

<sup>224</sup> *Id.*

<sup>225</sup> Wiley, H. W., *The Dignity of Chemistry*, 53 SCIENTIFIC AMERICAN SUPP. 21846 (1902). The anthem of forward thinking of the age might best be summed up: “Every honest effort to earn a living and a competency is worthy of equal praise, and therefore in dignity of effort there is no rank. The workman in the woods, the farmer in the fields, the artisan in the atelier and the mechanic in the mill have an equal claim to the dignity of labor with the preacher, the lawyer, and the professor. There is no form of labor which is beneath the dignity of man. Instead of being a curse, labor is the greatest blessing which Providence, fate or evolution has conferred on humanity.” *Id.*

*fense*.<sup>226</sup> The prompt payment of wages due an employee is a fundamental public policy of this state.<sup>227</sup> Prompt payment of wages serves society's interest by promoting a more stable job market and the legislature's decisions to criminalize violations demonstrates this policy involves a broad public interest, not merely the interest of the employee.<sup>228</sup> Quite clearly, "It shall be the duty of . . . all district attorneys to expedite the hearing and determination of all such cases . . . to the greatest degree consistent with the ends of justice."<sup>229</sup>

Where modern remedies such as licensing<sup>230</sup> and the Private Attorneys General Act<sup>231</sup> have met only partial success at stemming the tide of continuing wage theft for the state's agricultural workers,<sup>232</sup> the legislature intended labor receive "full justice at the hands of the people."<sup>233</sup> The delays inherent in other remedies might allow "the criminal to defeat the ends of justice,"<sup>234</sup> in that "punishment administered promptly . . . tends to strongly deter the commission of other crimes."<sup>235</sup> The framers opined "[e]xperience teaches that the criminal law is most effective . . . which operates with the greatest swiftness and certainty."<sup>236</sup> Accordingly, "[w]hen punishment does not follow promptly after the crime, a very large percentage of the deterrent effect is lost."<sup>237</sup>

Most labor law violators would agree with Los Angeles District Attorney Barry Gale that the threat of jail time is a greater deterrent than the risk of civil penalties. Gale led the task force of state, local, and federal agencies to halt widespread labor law abuses in the janitorial industry through criminal prosecution.<sup>238</sup> "No one wants to bring a toothbrush and go to jail," says Gale. "Companies are aware that when it gets criminal, it gets nasty. They've faced civil fines – they're used to that on a day to day basis. When they find out it's criminal, it's a real shock . . . It wakes them up."<sup>239</sup>

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<sup>226</sup> See CAL. PEN. CODE § 952.

<sup>227</sup> See, e.g., *Gould v. Md. Sound Indus., Inc.*, 31 Cal. App. 4th 1137, 37 Cal. Rptr. 2d 718 (Cal. Ct. App. 2 1995).

<sup>228</sup> *Id.*

<sup>229</sup> See note 154, (citing CAL. PEN. CODE, SECTION 681a).

<sup>230</sup> See *infra*, SECTION VI. A., *The Licensing Approach*.

<sup>231</sup> See *infra* SECTION VI. B., *The Private Attorneys General Approach*.

<sup>232</sup> See *supra* note 14 and note 179.

<sup>233</sup> See *infra* SECTION IV. B., *The Bureau*.

<sup>234</sup> See note 159.

<sup>235</sup> See note 165.

<sup>236</sup> See note 160.

<sup>237</sup> *Id.*

<sup>238</sup> CAL. LAB. COMM'R, *supra* note 88, at 5.

<sup>239</sup> *Id.*

By adding an intangible labor to California's Penal Code, the legislature quite literally recognized the substance of California's "labor," and raised it to the stature of a property. The principle that labor arises in "every man" as a "*Property* in his own *Person*" to which "no Body has any Right to but himself" and is "the unquestionable *Property* of the *Labourer*,"<sup>240</sup> resounds within the legislative history of Senate Bill 408. The legislative history of the period suggests California Labor laws had been "imperfect, and incomplete; effective in some instances, but not of sufficient scope to meet the requirements of our laboring classes."<sup>241</sup> In combating the "many evils to which labor had been subjected to in the past," it was necessary to improve upon these "from time to time as necessity requires."<sup>242</sup> The theft of labor provisions of California Penal Code section 484 are additions to that "nucleus" or "code of laws" acting to safeguard labor. Criminal sanctions are part and parcel to the larger legislative intent and "necessity requires" enforcement that these laws might be more than mere "dead letters on our statute books."<sup>243</sup> As such, that intent demands full application of the Penal Code to the problem of wage theft.

STEPHEN D. MALM

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<sup>240</sup> See *supra* John Locke, p. 1.

<sup>241</sup> See *infra* SECTION IV. B., *The Bureau*.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*