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# **New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships between Government and Civil Society Are Showing the Way Forward**

*Janice Fine*<sup>†</sup>

## INTRODUCTION: ENFORCEMENT IN CRISIS

For many low-wage workers, non-compliance with basic labor standards and health and safety laws by businesses of all sizes has become the new normal. In 2013, an average of eighty-eight workers died on the job every single week—more than twelve workers a day.<sup>1</sup> Foreign-born Latinos were especially vulnerable, averaging fifteen deaths a week. Many workplace injuries are preventable: in 2014, there were more than 6000 OSHA citations issued for businesses lacking fall protection for their workers, over 5000 for not communicating dangerous workplace hazards, 4000 for not having proper scaffolding, and over 3000 for not providing adequate respiratory protection.

In addition to workplace hazards, wage theft is rife in low-wage sectors. A 2009 study in the nation's three largest cities—New York, Chicago, and Los Angeles—found that 26% of workers<sup>2</sup> suffered minimum wage violations in the week prior to being surveyed, and that over 76% of those who had labored more than forty hours in the prior week had not been paid according to overtime laws.<sup>3</sup> In some regions, the US Department of Labor (DOL) itself recorded Fair Labor Standards Act (FLSA) compliance levels below 50% in industries such as nursing

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<sup>1</sup> Rebecca Thiess, *The Future of Work: Trends and Challenges for Low-Wage Workers*, ECON. POL'Y INST. (April 27, 2012), <http://www.epi.org/publication/bp341-future-of-work/> [https://perma.cc/TN4T-PNC9].

<sup>2</sup> Steven Greenhouse, *Low-Wage Workers Are Often Cheated, Study Says*, N.Y. TIMES (Sept. 1, 2009), <http://www.nytimes.com/2009/09/02/us/02wage.html> [https://perma.cc/VV7Q-R6YA].

<sup>3</sup> NAT'L EMPLOYMENT LAW PROJECT, LOCAL LIVING WAGE LAWS AND COVERAGE (July 2011), <http://www.nelp.org/content/uploads/2015/03/LocalLWLawsCoverageFINAL.pdf?nocdn=1> [https://perma.cc/TM9T-9BFF].

homes, poultry processing, daycare, and restaurants.<sup>4</sup> In 2013, the Southern Poverty Law Center found that 41% of Latino immigrants working in the agriculture, construction, hospitality, and poultry processing industries in Nashville, Charlotte, New Orleans, rural southern Georgia and several towns and cities in northern Alabama had also experienced wage theft. In New Orleans, a staggering 80% of workers surveyed reported having experienced wage theft.<sup>5</sup> Most recently, in a study conducted on behalf of the DOL, the Eastern Research Group found that in 2014 between 3.5 and 6.5% of all wage and salary workers in California and New York were paid less than the minimum wage and estimated that more than 300,000 workers in every state suffered minimum-wage violations each month.<sup>6</sup> Why is non-compliance in certain sectors so high?

Firms comply with health and safety and minimum wage laws for one of three reasons: 1) economic—it costs them less to comply than to risk fines and penalties; 2) social—they don't want to be unfavorably compared to others in their industry; and 3) normative—they believe it is the right thing to do.<sup>7</sup> Unfortunately, for too many employers of low-wage workers, economic motives overwhelm the social and normative. The desire to cut costs and limit liability has contributed to the “fissuring” of the employment relationship<sup>8</sup> in which companies have shifted direct employment of workers to other business entities through heightened subcontracting, increased use of fixed-term contracts, temporary staffing agencies and independent contracting arrangements. In reaction to tight competition and thinner profit margins, subcontractors are strongly incentivized to cut costs wherever they can and low-road practices have become normalized across many labor markets. Those firms that want to maintain higher standards are placed at an enormous disadvantage. A systemic transformation is needed.

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<sup>4</sup> *What's the Minimum Wage in your State?*, RAISE THE MINIMUM WAGE, <http://raisetheminimumwage.com/minimum-wage-state/> [<https://perma.cc/TE2L-6LG8>].

<sup>5</sup> S. POVERTY LAW CTR., *UNDER SIEGE: LIFE FOR LOW-INCOME LATINOS IN THE SOUTH* (Mar. 31, 2009), <https://www.splcenter.org/20090401/under-siege-life-low-income-latinos-south> [<https://perma.cc/MF8D-BVG4>].

<sup>6</sup> E. RESEARCH GROUP, INC., *THE SOCIAL AND ECONOMIC EFFECTS OF WAGE VIOLATIONS: ESTIMATES FOR CALIFORNIA AND NEW YORK* (Dec. 2014), <https://www.dol.gov/asp/evaluation/completed-studies/WageViolationsReportDecember2014.pdf> [<https://perma.cc/JD2H-KV5H>].

<sup>7</sup> Robert A. Kagan et al., *Fear, Duty and Regulatory Compliance: Lessons from Three Research Projects*, in *EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION*, 37–58 (Christine Parker and Vibeke Lehmann eds., 2011).

<sup>8</sup> DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

To increase compliance, Wage and Hour Division (WHD) has been targeting specific high-risk industries in which there is a lot of subcontracting, independent contracting and reliance on temporary workers for intensive inspection. WHD's strategic enforcement strategy entails focusing at the top of industry structures, targeting entire business entities rather than individual workplaces, holding joint employers liable for violations and expanding the use of the "hot goods" provision of FLSA.<sup>9</sup> This strategy targets highly non-compliant industries and takes advantage of industry-specific dynamics and structures to impact networks of interconnected employers. In strategic enforcement, the agency also analyzes the regulatory regimes under which specific industries operate and retrofits the enforcement approach to utilize the specific pressure points created by these laws and regulations.

Complaint-based enforcement had been the dominant approach taken by the federal government for many years, but by FY 2012, directed investigations based on strategic enforcement accounted for over 40% of the total and by FY 2015, it had climbed to a remarkable 46%. These numbers are unprecedented in the history of the WHD and the ascendance of strategic enforcement into a co-equal position with complaint-based enforcement is a major step forward. However, this paper argues that for strategic enforcement to fulfill its promise, there must be a means for workers, worker organizations, and high road firms to take part.

Government does not, and likely will not ever, have enough investigators to monitor US establishments.<sup>10</sup> But, it is also true that government is very unlikely to have as much information about conditions on the ground as workers in the workplace do, or have the relationships with vulnerable workers that strong organizations have. Nevertheless, most proposals to improve labor standards enforcement in recent years focus attention away from the latent resources in society that are essential for responding to the crisis of enforcement, often relegating workers to passive victims and worker organizations to providing arms-length political support for enforcement and little else.

Effective deterrence in low wage sectors necessitates *co-enforcement: worker, worker organization, and high road firm* participation in enforcement, and *greater transparency* between government, workers and worker organizations. Without the tacit knowledge that workers

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<sup>9</sup> US DEPT OF LABOR, WAGE & HOUR DIV., FY 2012 CONGRESSIONAL BUDGET JUSTIFICATION (2011), <https://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V2-03.pdf> [<https://perma.cc/FX2T-LFQG>].

<sup>10</sup> ANNETTE BERNHARDT & SIOBHÁN MCGRATH, TRENDS IN WAGE AND HOUR ENFORCEMENT BY THE US DEPT. OF LABOR, 1975-2004 (Sept. 2005), [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_35553.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_35553.pdf) [<https://perma.cc/66FX-9GK7>].

have about workplace practices and problems and the relationships they have with worker organizations, government will never have the trust required for vulnerable workers to come forward, nor the information they can provide as a result.

A broad attack on the problem of noncompliance in low-wage work requires serious reconsideration of a formal role for workers and workers' organizations in government enforcement efforts. Routine, institutionalized collaborations between these organizations and federal, state and local Departments of Labor has the potential to address many of the gaps identified in government efforts to enforce labor standards in the low-wage context. Previous research by Fine and Gordon (2010) and Fine (2013), profiled several contemporary examples of tripartism at the local, state and federal levels. Support from the LIFT Fund in 2014 made the exploration of additional cases—now viewed through the lens of a conceptual framework of co-enforcement—possible.<sup>11</sup>

The paper proceeds as follows: Part I provides a brief literature review that situates our proposal in the scholarly literature, Part II is an elaboration of the key design principles, Part III provides two contemporary case studies at the federal, state, and local levels, and Part IV provides a cross-case analysis and conclusions.

## I. CO-ENFORCEMENT IN CONTEXT<sup>12</sup>

Co-enforcement is when unions, worker centers and other community-based non-profit organizations and high-road firms, in relationship with government inspectors, help educate workers on their rights and patrol their labor markets to identify businesses engaged in unethical and illegal practices.<sup>13</sup> In contrast to government contracting with a

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<sup>11</sup> See generally Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?*, 45 POL. & SOC'Y 359 (2017).

<sup>12</sup> See generally JANICE FINE, CO-PRODUCTION: BRINGING TOGETHER THE UNIQUE CAPABILITIES OF GOVERNMENT AND SOCIETY FOR STRONGER LABOR STANDARDS AND ENFORCEMENT (2013), [http://theliftfund.org/wp-content/uploads/2015/09/LIFTReportCoproductionOct\\_ExecSumm-rf\\_4.pdf](http://theliftfund.org/wp-content/uploads/2015/09/LIFTReportCoproductionOct_ExecSumm-rf_4.pdf) [<https://perma.cc/VFQ6-CS3T>]; Fine, *supra* note 11.

<sup>13</sup> Co-enforcement as put forward in this paper was developed by Amengual and Fine, draws heavily upon Fine and Gordon, from Josh Cohen and Joel Rogers' proposals about associative democracy as well as tripartism as envisioned by Ayres and Braithwaite. See Ian Ayres & John Braithwaite, *Chapter 3: Tripartism*, in RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); Anuradha Joshi & Mick Moore, *Institutionalized Co-production: Unorthodox Public Service Delivery in Challenging Environments*, 40 J. OF DEV. STUD. 31, 40 (2004); FINE, *supra* note 12; Tony Bovaird, *Beyond Engagement and Participation: User and Community Coproduction of Public Services*, 67 PUB. ADMIN. REV. 846–60 (2007); Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 POL. & SOC'Y 393–472 (1992); Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552–85 (2010); Elinor Ostrom, *Crossing the Great Divide: Co-Enforcement, Synergy and Development*, 24 WORLD DEV. 1073–87 (1996).

third party to take over a service previously delivered by a government agency, co-enforcement is intended to complement rather than replace government enforcement capacity.

With co-enforcement, we shift from conceptualizing state capacity for enforcement as arising primarily from regulators with coercive powers, to conceptualizing state capacity as a process of negotiated interdependence between regulators and societal organizations (Mann 1993, Weiss 1998, Pedriana and Stryker 2004). This idea has been of greatest interest to development scholars who have long puzzled over service delivery under conditions of weak state capacity, but it has not been applied to labor standards enforcement.

Pushing back against theoretically and practically rigid boundaries between state, market, and civil society, Ostrom (1996) defined co-production as “the process through which inputs used to produce a good or service are contributed by individuals who are not ‘in’ the same organization.”<sup>14</sup> Ostrom argues that all public goods and services are not only potentially produced by the regular producer—often government—but also by those who are the consumer of the service—often referred to as the client. The production of a service is frequently difficult to carry out without the active participation of the client.<sup>15</sup> Drawing upon case studies of water, sanitation and education systems in Brazil and Nigeria, Ostrom found that incentivizing citizen participation in the design and maintenance of urban infrastructural development projects made the efforts of public officials more efficacious and contributed to higher levels of welfare. Strikingly, Ostrom found that these co-production projects were most likely to succeed if they were formalized with clear and enforceable contracts.<sup>16</sup>

Building upon Ostrom’s co-production proposals, Joshi and Moore (J&M 2004) argued that privatization and contracting out’s failure to effectively deliver public services indicated a new model could be discerned. This model would have a “preferential shift away from standardized (central) state provision toward recognition of, and sympathy for . . . diversity, experimentation and multi-actor arrangements.”<sup>17</sup> J&M described institutionalized co-production as “the provision of public services (broadly defined to include regulation) through a regular, long-term relationship between state agencies and organized groups of

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<sup>14</sup> Ostrom, *supra* note 13, at 1073.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1082.

<sup>17</sup> Joshi & Moore, *supra* note 13, at 32.

citizens, where both make substantial resource contributions.”<sup>18</sup> In contrast to Ostrom’s requirement of formality, J&M argued that institutionalized co-production could be contractual or non-contractual and informal and that it could be renegotiated almost continuously as long as it was of a long-term nature.<sup>19</sup>

Ostrom, J&M and other scholars mostly studied co-production in the context of public service delivery and advanced it as a strategy in countries where state authority is weak. However, co-production can also be a useful way of thinking about labor standards enforcement, and not only in countries where state authority is weak, but also where it is strong but inspection capacity and trust in government is weak.

In addition to the co-production literature, this proposal builds upon the concept of *republican tripartism* advanced by Ayres and Braithwaite (A&B) and further developed by Fine and Gordon in the labor standards enforcement literature. Seeking to take full advantage of the gains that accrue from repeat encounters and cooperation over time between regulators and firms while avoiding the heightened risk of capture and corruption of the regulator by the firm that close cooperation engenders, A&B advocate for a regulatory process that provides for the full and equal participation of a public interest group (PIG) in enforcement.<sup>20</sup> Like Ostrom, A&B’s PIG plays a formal and ongoing role in enforcement and is granted full access to all information available to the regulator, a seat at the table when the firm and agency are negotiating, and the same standing to sue or prosecute under the regulatory statute as the regulator.<sup>21</sup> The presence of empowered PIGs radically limits the firm’s ability to capture the regulator because it now must capture the PIGs as well as the agency officials.<sup>22</sup> Additionally, PIGs prevent capture and corruption by enforcing a meta-norm of punishing regulators who fail to punish noncompliance.<sup>23</sup> A&B argue that where there is no power base and no information base for the weaker party,

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<sup>18</sup> *Id.* at 40.

<sup>19</sup> *See generally id.*

<sup>20</sup> *See generally* Ayres & Braithwaite, *supra* note 13.

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

<sup>22</sup> Ostrom makes a similar argument:

If the remedy to corruption is seen as the creation of strict bureaucratic structure to separate the servants of the public from the public, it is likely that behind the closed doors of a centralized system corrupt practices can flourish without much fear of exposure. . . . When public officials and the citizens they are supposed to serve work together . . . productivity can be higher and all forms of opportunistic behavior are more likely to be exposed, but never totally eliminated.

Ostrom, *supra* note 13, at 1083.

<sup>23</sup> *See generally* Ayres & Braithwaite, *supra* note 13.

tripartism will not work.<sup>24</sup> To play their role effectively, PIG's must receive public funding.<sup>25</sup>

Finally, these ideas about the critical relational and process dimensions of co-enforcement draw upon some collaborative governance (CG) ideas.<sup>26</sup> More than either co-production or tripartism, CG focuses on the actual processes through which public agencies work with non-state stakeholders to make or implement public policy or manage public programs or assets. CG emphasizes decision-making processes that are formal, consensus-oriented and deliberative. In contradistinction to tripartism, where one PIG is selected to play a role or corporatism and peak bargaining takes place between the state and peak associations of labor and capital,<sup>27</sup> CG includes a broader range of stakeholders who seldom have a representative monopoly over their sectors.<sup>28</sup>

## II. THE FOUR DESIGN PRINCIPLES OF CO-ENFORCEMENT

### A. Principle #1: Recognize and Leverage the Unique, Non-substitutable Capabilities of State and Society

At first glance, studying co-enforcement appears to be an exercise in mapping out ways in which worker organizations and state regulators have an additive effect. Worker organizations might improve enforcement, for example, by providing in kind support to inspectors in the form of transportation. In these circumstances, enforcement itself is not materially changed, just augmented. Such inputs are important, but they are largely "substitutable."<sup>29</sup> When regulators could provide the exact same "inputs" as worker organizations, better strategies or more generous budgets to enforcement agencies could simply substitute for collaboration with worker organizations and increase "outputs." If this were only the case, co-enforcement is helpful, but not necessary. In addition, if this were the case, we could maintain a theory of enforcement that separates the actions of labor inspectors from that of worker organizations without obscuring key elements of the regulatory process.

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

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

<sup>26</sup> See, e.g., Chris Ansell & Alison Gash, *Collaborative Governance in Theory and Practice*, 18 J. PUB. ADMIN. RES. & THEORY 547 (2008).

<sup>27</sup> Philippe C. Schmitter, *Interest Intermediation and Regime Governability in Contemporary Western Europe and North America*, in ORGANIZING INTEREST IN WESTERN EUROPE: PLURALISM, CORPORATISM, AND THE TRANSFORMATION OF POLITICS (Suzanne Berger ed., 1981).

<sup>28</sup> Ansell & Gash, *supra* note 26, at 547.

<sup>29</sup> See generally Ostrom, *supra* note 13.



This research finds that workers, worker organizations, and regulators have capabilities that cannot be perfectly substituted for one another, or could perhaps be partially substitutable at great cost.<sup>30</sup> Additionally as elaborated further below, some of the attributes of state and society are non-substitutable because of trust and power.

One must therefore ask: What capabilities do workers, worker organizations and states possess that the others either do not share or share only partially at great cost? Enforcement begins with workers on the “shop floor”: what they see, hear, and experience firsthand, and most critically, what they are willing to share, are instrumental to the ability of workers’ organizations and the state to identifying non-compliance with labor standards. Workers have unique capabilities to enhance enforcement because they are present at the worksite every day, have tacit knowledge<sup>31</sup> of the work process and firsthand experience with changes in working conditions and employer practices over time. They also are steeped in the culture of the workplace and have relationships with other workers and supervisors. In the absence of “police patrol” enforcement, in which investigators would be regularly walking their workplace beats, if any actor is poised to engage in the “fire alarm” model of enforcement contemplated by the political scientists McCubbins and Schwartz in the context of congressional oversight, it is workers at the workplace.<sup>32</sup>

Certainly, worker knowledge could be at least partially substituted by having a full-time investigator in every workplace at all times, but this is costly and politically unfeasible. Additionally, our conception of worker participation in enforcement is that multiple workers would take part, geometrically increasing the chance that non-compliance would be found out, as opposed to having one investigator with responsibility for monitoring an entire workplace. Worker participation is also important for keeping worker organizational engagement in enforcement dynamic, bottom-up, and accountable. Finally, as Ostrom argues, given the higher cost of labor of public officials in comparison with the opportunity costs of workers spending some of their time engaged in

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<sup>30</sup> There are limits on what states can do on their own. The political scientist Joel Migdal cogently argued, “No matter how vaunted the bureaucracy, police, and military, officers of the state cannot stand on every corner ensuring that each person stop at the red light, drive on the right side of the road, cross at the crosswalk, refrain from stealing and drug dealing, and so on. Modern state leaders could easily find their institutions quickly overwhelmed by the enormity of the task of enforcement, even with vast bureaucracies.” JOEL S. MIGDAL, *STATE IN SOCIETY: STUDYING HOW STATES AND SOCIETIES TRANSFORM AND CONSTITUTE ONE ANOTHER* 252 (2001).

<sup>31</sup> See generally MICHAEL POLANYI, *THE TACIT DIMENSION* (1966).

<sup>32</sup> Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165–79 (1984).

enforcement, the optimal arrangement is to have the enforcement output produced by some combination of inputs from both parties.

Flowing from what we have stated above, one of the most commonly cited capabilities that worker organizations have is access to vast amounts of information on labor standards that would be difficult for state officials to gather alone.<sup>33</sup> It is often only when the organization has vouched for the agency and worked with workers over time that vulnerable workers have been willing to file complaints with a full description of what has been occurring. Through relationships of trust between workers and organizations, investigators are able to gain access to the knowledge and information workers possess about violations.

Worker organizations can play a critical role in monitoring and enforcement when they are place-based, relational, tutelary, participatory, activist and strategic. By place-based, we mean grounded in specific geographic communities; by relational, we mean they focus on building relationships with and between workers, bringing groups of workers together and building bridges between groups of workers and the larger community;<sup>34</sup> by tutelary, we mean the ability to teach workers about their rights and how to assert them, and to teach investigators about the workforce and the industry; by participatory we mean they have workers actively engaged in the life of the organization; by activist, we mean they have a belief in the need to re-govern the market toward social ends and an orientation toward action; by strategic we mean that they have knowledge of their sectors, laws and regulations, how to work with government, and make the choice to focus some of their resources on enforcement work.

Organizations with these capacities can acquire and pass along to investigators, through workers as well as their own research, specialized knowledge of industry structures and the range of sub-contracting arrangements and employment practices, as well as information on employers who are not complying with wage and hour and occupational safety and health laws. When worker organizations understand how industries function, they are able to trace the root causes of violations, which makes them powerful sources of expertise for inspectors who seldom specialize in a specific sector. This understanding also allows

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<sup>33</sup> See Matthew Amengual, *Pathways to Enforcement: Labor Inspectors Leveraging Linkages with Society in Argentina*, 67 *INDUS. & LAB. REL. REV.* 3 (2014); Fine & Gordon, *supra* note 13; Janice Fine, *Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the US*, 50 *OSGOODE HALL L.J.* 813–44 (2014); Tess Hardy, *Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards*, 22 *ECON. & LAB. REL. REV.* 117 (2011).

<sup>34</sup> MARK R. WARREN, *DRY BONES RATTLING: COMMUNITY BUILDING TO REVITALIZE AMERICAN DEMOCRACY* (Princeton Univ. Press 2001).

worker organizations to anticipate which sectors in the economy are likely to become hotspots.<sup>35</sup> They can help gather information about firm practices, and through their relationships, networks and reputational credibility, encourage workers to file complaints with state and federal agencies.

Worker organizations can also enhance the power of regulators in responding to, and preventing, violations in several ways. Beneath the veneer of neutral application of law, the street-level bureaucrats of regulatory agencies face a wide range of political pressures.<sup>36</sup> While organizational structures, such as civil service protection, can reduce such pressures, they can never be fully eliminated. Worker organizations can play an important role by acting as a countervailing power to employers during enforcement operations. For example, union leaders can push regulators to negotiate terms of compliance that are more favorable to employees. Finally, after the act of enforcement, the power of regulators is dimmed by the low probability of a repeat enforcement action. When labor inspectors move on to other firms or industries, worker organizations can continue to press employers to respect regulations.

To reiterate and build upon our earlier points, as in the case of worker participation, some of the activities of organizations could be substitutable by the state, but only at great cost and likely with inferior results. But it is also clear that some of the attributes of worker organizations are non-substitutable because of trust and power. Organizations have the trust of vulnerable workers that state agencies often lack. Worker organizations that are deeply rooted in their racial and ethnic, linguistic, geographic, sectoral, cultural or political communities are able to gain the trust of marginalized or undocumented workers who are often reticent to complain directly to government.<sup>37</sup> Of course the nature of the collaboration between the organization and the state is of critical importance to retaining workers' trust. The organization must avoid becoming simply an arm of the state; it must preserve its independence and demonstrate its commitment first and foremost to respecting the will of the workers. Once we admit that the enforcement process is always at least somewhat politicized and that there are limits

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<sup>35</sup> For a detailed discussion of the ways in which worker centers and unions can enhance enforcement efforts, see Fine, *supra* note 33.

<sup>36</sup> JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* (1989); MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE* (2d ed. 2010); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989).

<sup>37</sup> See David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 *COMP. LAB. L. & POL'Y J.* 2 (2005).

to the degree that bureaucratic norms can constrain street level bureaucrats from exercising their own discretion, the inclusion of worker organizations can bring in power to support enforcement that cannot be given to the state no matter how many resources are available to it. They also have power to compel changes in firm behavior that the state does not always have or choose to exercise; that is, organizations exercise moral power<sup>38</sup> when they document and publicize egregious examples and patterns of exploitation and abuse, and hold specific employers responsible for them publicly. Fearing such reputational repercussions, some businesses respond to this pressure.

State regulators, of course, also have unique capabilities and independent powers.<sup>39</sup> The power of the state to legally enforce depends upon fundamental attributes as the monopoly holder of coercive powers that can be used to induce compliance that worker organizations lack. The state has the independent power to set standards, to incentivize behavior and to compel firms to undertake improvements. State regulators have the power to demand information, to investigate workplaces through on-site inspections of facilities and payroll records and to punish through the use of fines, suspensions, denial of licenses and closing down firms. Inspectors know the complexities of the laws they are enforcing and the procedures necessary to putting strong cases together. The state has the ability to empower societal groups by delegating to them certain rights and privileges.<sup>40</sup> State regulators also have the capability, both operationally and politically, to enforce regulations where worker organizations are absent or weak. This capability is crucial because there will always be places and industries without strong worker organizations. Finally, by targeting sectors, citing employers, and publicizing their enforcement actions, the state also has the unique power of legitimation<sup>41</sup> of the claims of workers and worker organizations to the broader society.

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<sup>38</sup> JENNIFER JIHYE CHUN, *ORGANIZING AT THE MARGINS: THE SYMBOLIC POLITICS OF LABOR IN SOUTH KOREA AND THE UNITED STATES* (2009); JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (2006); JAMES M. JASPER, *THE ART OF MORAL PROTEST: CULTURE, BIOGRAPHY, AND CREATIVITY IN SOCIAL MOVEMENTS* (1997); GENE SHARP, *GANDHI WIELDS THE WEAPON OF MORAL POWER (THREE CASE STORIES)* (1960).

<sup>39</sup> We agree with the institutional analytical approach that posits an independent role for political institutions and takes into account both the efficacy of institutional design and, as March and Olsen argue: "Bureaucratic agencies, legislative committees, and appellate courts are arenas for contending social forces, but they are also collections of standard operating procedures and structures that define and defend values, norms, interests, identities and beliefs." MARCH & OLSEN, *supra* note 36, at 16–19 (1989); *BRINGING THE STATE BACK IN* (Peter B. Evans et al. eds., 1985).

<sup>40</sup> Ayres & Braithwaite, *supra* note 13; Fine & Gordon *supra* note 13.

<sup>41</sup> JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005).

In sum, this discussion suggests that to identify opportunities for enhancing enforcement it is essential for all parties to recognize that state regulators, workers, and worker organizations have non-substitutable capabilities. When this is the case, the full potential for enforcement cannot be achieved without including workers and worker organizations no matter how many resources are allocated to regulators.

B. Principle #2: Routinize Flows of Information and Resources across the State-Society Divide

What needs to flow across the state-society divide to make enforcement more effective? The analysis above suggests some starting points. To begin, regulators need to have access to information that worker organizations can provide at a granular level. Information-sharing was not emphasized by Ostrom or J&M, but it was of major import for Ayres and Braithwaite and it comes up repeatedly as an issue for organizations in our case studies of co-enforcement in labor standards enforcement. Worker organizations that are actively bringing workers forward need to know not only what the regulatory agency is capable of doing and how it functions (more on this below) but also to be kept abreast of how cases are proceeding. When organizations facilitate complaints, but are not able to get information on how the case is proceeding, their credibility with the workers they have encouraged to step forward is undermined.<sup>42</sup> After this happens repeatedly, organizations can begin to view filing complaints with the state as a last resort.

Resources can also be key to extending the operational capabilities of both states and worker organizations. Worker organizations can provide inspectors with material resources, such as staff who go out to worksites, can interview workers and help them to fill out complaints, and can reconstruct payroll records for use by investigators. These resources can make a tremendous difference for labor inspectorates that have large caseloads and lack sufficient budgets. Most sectors of the low wage economy are not represented by strong unions that can fight for enforcement resources. When resources flow from the state to society, however, regulatory partnerships can be used to strengthen the ability of worker organizations to support enforcement. Reinforcing worker organizations can also occur when the state devolves certain activities to worker organizations by providing the organizations with access that can help them gain and maintain members.

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<sup>42</sup> Interview with Jennifer Rosenbaum, Legal and Policy Director, National Guest Workers Alliance (July 26, 2013).

C. Principle #3: Prioritization of the Relationship, Clear Communication and Decision-Making Processes and Modulation of Demands

Fundamentally, the success of co-enforcement depends upon strong relationships between the state agency and workers, worker organizations and high road firms.<sup>43</sup> Trust, adaptation, accountability and communication are key to these relationships. At the outset, as Ansell and Gash emphasized, it is critical for the parties to recognize the “starting conditions” of the collaboration including power differentials, what incentives to participation exist or do not exist, and whatever has gone before that has either created antagonism or paved the way toward cooperation.<sup>44</sup> In our research, organizational leaders seldom completely shared their true feelings about agency behavior directly with the specific agencies and vice versa. Additionally, they emphasized the necessity of collaboration and sharing as much information as quickly as possible, but did not indicate to the agencies that knowing the status of the case as it progressed was essential to their ability to maintain credibility with workers and continue to expand cases. Government agencies emphasized that organizations need to understand and adapt to the pressures and constraints government must operate within, and have the capacity to add real value to investigations. But these agencies did not always say this directly to the groups. One veteran official emphasized the importance of choosing the right organization. The most effective partnerships were with organizations that, to paraphrase what many agency leaders said enforce in firms even though enforcement will not directly benefit members of the organization, “understood that when you are partnering with government, you have to work within the confines of government, not that government has to work within the broader confines of your organization.”<sup>45</sup>

In their review of the literature, Ansell and Gash find that in rare cases negotiations take place organically without assistance, but that collaborative governance has not been possible in most cases without facilitative leaders on both sides who bring stakeholders together, set and maintain clear ground rules, build trust, facilitate dialogue, explore mutual gains, and work together in a collaborative spirit.<sup>46</sup> Facilitative leaders, who have the skills to promote broad and active participation,

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<sup>43</sup> DARA O’ROURKE, COMMUNITY DRIVEN REGULATION: BALANCING DEVELOPMENT AND THE ENVIRONMENT IN VIETNAM 225 (2004).

<sup>44</sup> Ansell & Gash, *supra* note 26, at 550.

<sup>45</sup> Interview with Anonymous Agency Official.

<sup>46</sup> *Id.* at 554.

productive group dynamics, and the process are especially important when the starting conditions are sub-optimal—such as when the incentives for participation are weak, power and resources are asymmetrically distributed or prior antagonisms between the actors are high. Whereas leaders are often understood as those capable of taking decisive action, Ansell and Gash argue that the leadership focus of the collaborative leader is on promoting, safeguarding and stewarding the process.

#### D. Principle #4: Political Support to Create and Maintain Collaboration

Political support for enforcement agencies is crucial because business interests frequently push back against regulation and attempt to discredit regulators. Unions in the U.S. have long mobilized to defend the programs and budgets of labor standards enforcement agencies. As we elaborate below, coproduced enforcement requires additional support in the US because it is not seen as the norm. Therefore, there must be willingness and capacity among multiple actors to advocate for the partnerships.

Co-enforcement requires ongoing external and internal political support. Partnerships do not form just because they can enhance the abilities of regulators and worker organizations to fulfill their stated goals. Instead, there needs to be a political willingness among multiple actors who advocate for partnerships and for funding of partnerships. Political support is crucial because as regulators and worker organizations collaborate in the process of enforcement, they necessarily cede some control over tasks that are key to their organizations. For instance, the degree to which regulators accept cases from worker organizations may reduce the ability of regulators to select and craft cases in ways that comply with formal organizational objectives, as well as the broader goals of the regulatory agency. Regulators also face the risk of being branded as acting in the interest of worker organizations instead of the public good. In addition, giving worker organizations access to the state can further their own organizational prerogatives, thus strengthening them in the medium to long term. This possibility makes collaborations especially politically sensitive. Similarly, worker organizations need to see it in their own organizational interest to invest time and resources into the enforcement process. Sometimes this means waiting for the slow moving regulatory system. It also may mean taking a step back to allow the regulatory agency to enforce in firms even though enforcement will not directly benefit members of the organization.

To identify ways in which co-enforcement may enhance enforcement, it is necessary to analyze the relationships between state regulators and organizations of civil society. At one end of the spectrum, the relationship can be formalized and worker organizations can be given wide-ranging powers. Tripartism, as envisioned by Ayres and Braithwaite, provides a specific public interest organization with a formal and ongoing role in enforcement and provides access to the same information the regulator sees.<sup>47</sup> Co-enforcement as envisioned by Ostrom, also favors formalization.<sup>48</sup>

At the other end of the spectrum, relationships can be entirely informal. Organizations and government can be in frequent communication, meet together, share information, and strategize without creating a structured agreement. Instrumental to informal partnerships are a shared interest in their value and some common organizational culture regarding collaboration, along with individual relationships between bureaucrats and worker organizations which often involve active boundary-spanning individuals<sup>49</sup> who navigate both worlds of state regulators and worker organizations. These individuals do more than simply communicate and share information between the parties: they process information for both sides, using their discretion to act as gatekeepers and facilitate cooperation.<sup>50</sup>

The combinations of formal and informal attributes of these relationships have implications for the functioning of partnerships. Formal arrangements create clear sets of rules and procedures to govern partnerships. Formal structures can also alleviate concern on the part of state officials that close collaboration with civil society organizations (without official structures) could lead to charges of cronyism or favoritism. And when formal structures guarantee certain status for worker organizations, they can reduce concerns on the part of organizations that their credibility with workers is damaged if they encourage them to come forward but are then kept in the dark as to how their cases are proceeding.<sup>51</sup>

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<sup>47</sup> See generally Ayres & Braithwaite, *supra* note 13.

<sup>48</sup> See generally Ostrom, *supra* note 13.

<sup>49</sup> Boundary spanners are individuals who are able to communicate across organizational boundaries because of their ability to learn local languages, coding schemes and specialized conceptual frameworks and are "attuned to the contextual information on both sides of the boundary . . ." Michael L. Tushman & Thomas J. Scanlan, *Boundary Spanning Individuals: Their Role in Information Transfer and Their Antecedents*, 24 ACAD. MGMT. J. 289, 291-92 (1981).

<sup>50</sup> Howard Aldrich & Diane Herker, *Boundary Spanning Roles and Organization Structure*, 2 ACAD. MGMT. REV. 217 (1977).

<sup>51</sup> Aldrich and Herker also argue that formalization serves a social control function because the programmed nature of the interactions is "partial insurance of boundary spanner consistency with organizational procedures, norms and goals. Members who interact freely with non-member



While politics will always play a role in determining which groups can effectively partner with regulators, formal structures are important for weaker groups in particular.<sup>52</sup> CG scholars argue that if significant power and resource imbalances between shareholders exist such that some are unable to participate in a meaningful way, there must be a commitment to a positive strategy of empowerment and representation of weaker or disadvantaged stakeholders or the project will not succeed.

Formal arrangements are likely to be more robust than those that rely upon relationships between individuals at a specific political moment and thus are always contingent and temporary. Also, certainly in the US, it is less likely that resources will be shared when arrangements are informal. Informal attributes of relationships differ in the types of creation costs. On the one hand, they can fly under the radar of partisan politics and fewer formal rules that can get in the way. This reduces the need to go through formal veto players, such as legislatures. On the other hand, informal relationships require time and investment by individual officials and their societal counterparts to develop collaborative arrangements without the support of official mandates.

### III. CO-ENFORCEMENT CASES

#### A. The National Guestworkers Alliance (NGA) and the OSHA Walk-Around

NGA was founded by the New Orleans Worker Center for Racial Justice (NOWCRJ), an organization of African American and immigrant workers. It began during the post-Katrina clean-up and rebuilding phase during which thousands of immigrant workers were recruited to come to New Orleans to aid in the massive clean-up. At the time, although working conditions were particularly dangerous due to the storm damage, the Occupational Safety and Health Administration (OSHA) was under a federal order to cease all enforcement actions and engage only in “compliance assistance” activities. Workers could not file complaints to have their workplaces investigated and OSHA was barred from issuing complaints or fines against employers. Strikingly, while the DOL was running on a skeletal staff, federal immigration agents were engaging in aggressive enforcement efforts, further discouraging

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groups, particularly homogenous sets, are likely to develop attitudes consistent with those of the non-members, rather than of their focal organization. The existence of standard operating procedures partially protects the organization against attitudes and behaviors that are not consistent with organizational objectives.” Aldrich and Herker, *supra* note 50, at 226.

<sup>52</sup> This form of “stacking the deck” can facilitate co-enforcement and ensure access to the state by particular groups. Jonathan Bendor et al., *Stacking the Deck: Bureaucratic Missions and Policy Design*, 81 AM. POL. SCI. REV. 873 (1987).

workers from reporting unsafe conditions or wage theft.<sup>53</sup> During this period, the center was also contacted by guest workers charged thousands of dollars by recruiters and then subjected to terrible abuse at luxury hotels damaged by the storm. Those who spoke up about the exploitative conditions were routinely threatened with deportation.

In the face of these challenges, the Worker Center and NGA did pioneering work in calling attention to what was happening to the reconstruction workers, providing organizing assistance and expanding the use of labor and immigration laws to support them. As local African American workers and their families were displaced from their homes and locked out of employment, and immigrant workers both documented and undocumented were locked into employment by unscrupulous recruiters and employers, the Worker Center and NGA's signature strategy was to foster relationships, solidarity and common purpose between local workers, undocumented immigrant workers, and guest workers.<sup>54</sup>

In the spring of 2011, 400 students from countries including China, Turkey, Ukraine, Moldova, Mongolia, Romania, Ghana and Thailand were recruited at their universities to participate in the U.S. State Department's J-1 summer cultural exchange visa program.<sup>55</sup> Each of the students paid between \$3000 and \$6000 to CETUSA, a State-department certified recruiter and its international affiliates.<sup>56</sup> Under the J-1 program, work is supposed to be of secondary importance to educational and cultural exchange, but the students got an education of a different sort when they were forced to take up work as exploited, sub-minimum wage factory workers.<sup>57</sup> It was a classic joint employer<sup>58</sup> case: the stu-

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<sup>53</sup> JJ Rosenbaum, Presentation at Rutgers Univ. Sch. of Mgmt. and Labor Rel. (Nov. 10, 2014); Mike Hall, *House Hearing on Katrina Shows Massive Wage Abuse by No-Bid Contractors*, AFL CIO NOWBLOG (June 26, 2007), <http://www.mobilityagenda.org/katrina.pdf> [<https://perma.cc/U6VP-7AEE>].

<sup>54</sup> Interview with Jacob Horwitz, Lead Organizer, NGA (July 23, 2013).

<sup>55</sup> Julie Preston, *Foreign Students in Work Visa Program Stage Walkout at Plant*, N.Y. TIMES (Aug. 17, 2011), [http://www.nytimes.com/2011/08/18/us/18immig.html?pagewanted=all&\\_r](http://www.nytimes.com/2011/08/18/us/18immig.html?pagewanted=all&_r) [<https://perma.cc/8FUF-H3JH>].

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> "Joint employer" is when two or more companies share the status of employer of a single worker. The criteria that has been used to determine whether a joint employment situation exists include: whether separate entities share or codetermine matters governing essential terms and conditions of employment or employers meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction. U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #35: JOINT EMPLOYMENT UNDER THE FAIR LABOR STANDARDS ACT (FLSA) AND MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA) (Jan. 2016), <https://www.dol.gov/whd/regs/compliance/whdfs35.pdf> [<https://perma.cc/9Z5B-3HK2>].

dents were brought to work at Eastern Distribution Center III, in Palmyra, Pennsylvania which is owned by the Hershey Co. but operated by Exel North American Logistics, a sizeable contract logistics provider with more than five hundred facilities in the US and Canada, which in turn contracted with SHS Staffing Solutions to bring in the foreign workers. The plant was entirely staffed by these J-1 students who left their countries during college breaks for three-month periods; it ran on a three shift, twenty-four hour a day schedule.<sup>59</sup> The students were put to work packing Reese's peanut butter cups, Kit-Kat bars and Hershey's Kisses for promotional displays under extremely unsafe conditions.<sup>60</sup> Excessive assembly line speeds coupled with low staffing levels resulted in high rates of neck, back and arm injuries from lifting and carrying boxes, according to the OSHA joint employer complaint filed that summer by NGA on behalf of twelve named guest workers and over 400 similarly situated workers.<sup>61</sup>

NGA organizers and lawyers worked with the Department of Labor to share the information they were gathering from the guest workers, developing legal and policy strategies to remedy the situation.<sup>62</sup> NGA organizers went apartment to apartment, talking to students about their living and working conditions, painstakingly constructing a picture of the complex supply chain relationships, documenting the problems students had experienced, teaching them about their labor and employment rights and strategizing with them about how to build the power it would take to win improvements.<sup>63</sup> Together with NGA, students worked collectively to map and document the violations by multi-

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<sup>59</sup> See Preston, *supra* note 55.

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

<sup>61</sup> The complaint charged Exel North American Logistics, Inc., SHS Onsite Solutions and Cultural Exchange Travel, USA (CETUSA) with failing their general duty to furnish their employees "employment and place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees" as required by the Occupational Safety and Health Act, as well as failure to keep records of injuries, as required by law. These details are drawn from the August 17, 2011 OSHA complaint filed by the NGA on behalf of student guestworkers against Exel North American Logistics, Inc., SHS Onsite Solutions and Cultural Exchange Travel, USA (CETUSA). See Jennifer Rosenbaum, *Request for Revocation of Sponsorship of Council for Educational Travel, USA (CETUSA)* (Aug. 17, 2011), <http://www.guestworkeralliance.org/wp-content/uploads/2011/08/WEB.-State-Dept-Complaint-J-1-workers-8.17.2011.pdf> [<https://perma.cc/BA5W-8BN3>]; *US Labor Department's OSHA Cites 2 Companies, Proposes \$288,000 in Fines for Workplace Safety and Health Violations Involving Foreign Students*, OSHA (Feb. 13, 2012), <https://www.dol.gov/opa/media/press/osha/OSHA20120321.htm> [<https://perma.cc/K6PA-8RS8>]; Settlement Agreement, *Solis v. Exel Inc.*, OSHRC (Dec. 31, 2012) (No. 12-0683), <https://www.osha.gov/enforcement/cwsa/exel-inc-12312012> [<https://perma.cc/4DQ7-W6EM>].

<sup>62</sup> See Preston, *supra* note 55.

<sup>63</sup> *Id.*

ple entities under multiple legal regimes, and to build a strategy to expose and change conditions at the plant.<sup>64</sup> The students eventually went on strike to elevate their voice and press their demands for a serious investigation of working conditions at the packing plant.<sup>65</sup>

The Department of Labor responded quickly by activating their Wage and Hour investigators in the region. With the help of the NGA organizers on the ground in Palmyra, who over their time had developed hundreds of contacts and the trust of many of the students, WHD investigators were able to meet and interview students outside the workplace and quickly open an investigation into their claims of mistreatment. “They really took a stance that dignified and empowered the workers,” said Julie Mao, one of the lawyers working in Palmyra<sup>66</sup> Their collaboration with OSHA was a turning point in the campaign and broke important new ground.

Recognizing the importance of employees being informed of government inspections and directly consulted about their experiences of workplace hazards, congressional drafters wrote them into Section 8 of the Occupational Safety and Health (OSH) Act, giving representatives authorized by employees the right to accompany Compliance Safety and Health Officers (CSHO) on inspections.<sup>67</sup> This “walk-around” rule meant that OSHA inspectors, upon entering a facility, routinely asked for the highest-ranking union official at the plant to accompany them. At a time when they represented a third of the US workforce, the rule was largely assumed to apply to labor unions in the plants under inspection,<sup>68</sup> but more recently, the Field Operations Manual was changed to broaden the definition of employee representative. It now says:

an authorized representative of the employee bargaining unit such as a certified or recognized labor organization, an attorney acting for an employee or any other person acting in a bona fide representative capacity including . . . members of the clergy, social workers, spouses and other family members, and government officials or nonprofit groups and organizations acting upon specific complaints and injuries from individuals who are employees.<sup>69</sup>

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

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

<sup>66</sup> Interview with Julie Mao (July 28, 2014).

<sup>67</sup> S. REP. No. 91-1282 (1970).

<sup>68</sup> Interview with Deborah Berkowitz (Mar. 7, 2014).

<sup>69</sup> DAVID MICHAELS, OSHA INSTRUCTION, CPL-02-00-160, FIELD OPERATIONS MANUAL, (Aug.

In practice however, unions and community organizations representing non-union employees had only rarely been granted the right to participate in walk-arounds.

In the complaint filed on behalf of the J-1 students, NGA requested permission for three students and NGA's legal director to participate as the employees' representative in the OSHA walk-around.<sup>70</sup> For the first time, OSHA granted the request.

A narrow interpretation of the type of organization that was entitled to participate on a walk-around was embraced under the Bush administration in a 2003 opinion in response to a query from the Boilermakers Union. At that time, OSHA's interpretation of Section 8 was that a union representative who had filed a complaint on behalf of a worker in a *non-union* facility did *not* have a right to accompany an OSHA CSHO on the inspection walk-around.<sup>71</sup> Nevertheless, the NOWCRJ and NGA had applied several times to be the walk-around rep for workers it was working with. In 2011, in response to a query filed by the Health and Safety specialist at the United Steel Workers of America, OSHA arrived at a different interpretation, one that said that the Act provided that one or more workers *could* in fact "designate a person affiliated with a union or a community organization to act on their behalf as a walk-around representative" and that representative did not have to be a coworker.<sup>72</sup>

Although Hershey opposed it, and Exel Inc. threatened to refuse the inspection, in the end OSHA designated Rosenbaum and three student workers as walk-around representatives. Recounting how they began the inspection that day, Godwin Efobi, a medical student who was one of the walk-around representatives recalled how encouraging the agency investigators were that day, "OSHA told us 'if you know those places where students usually have injuries, we want you to point them out to us. You are protected by us.'" <sup>73</sup> Don't worry if there is anything that is happening that isn't the way it used to be. Just go on the floor

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2, 2016), [https://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-00-160.pdf](https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-160.pdf) [<https://perma.cc/6XHJ-5ERL>].

<sup>70</sup> OSHA, *supra* note 61.

<sup>71</sup> John L. Henshaw, *OSHA Interpretation of 1903.8 Letter to Milan Racic, Health and Safety Specialist of the International Brotherhood of Boilermakers*, OSHA (Mar. 7, 2003), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=24459](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24459) [<https://perma.cc/2YY4-946A>].

<sup>72</sup> Richard E. Fairfax, *OSHA Interpretation Letter Regarding Standards 1903.8, 1903.11, 1952.10 and 1903.20 to Steve Salman, Health and Safety Specialist, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union*, OSHA (Feb. 21, 2013), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=28604](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604) [<https://perma.cc/F6XY-WVTJ>].

<sup>73</sup> Interview with Goodwin Efobi, OSHA Walk-around Rep. (July 28, 2014).

and if you see something different just come to us and point it out.”<sup>74</sup> From Rosenbaum’s perspective, the agency’s findings were more accurate as a result of the students’ participation in the walk-around because OSHA got “real-time” information from the students about priority areas for inspection and what had been changed in the plant prior to the inspection.<sup>75</sup> Efobi recalled that:

the first noticeable thing was the Exel Inc. staff, they were the ones supervising us. They were very courteous, it was like surreal . . . and then more significantly, the pace of the lines was almost like in slow motion or something like that. . . . The pace of work was something people could work at because it was normally so much faster.<sup>76</sup>

As the group walked through the plant they were a visual affirmation that the students’ plight had been noted and that action was being taken; workers were relaxed and smiling, flashing thumbs up signs.

In describing the significance of student participation in the walk-around, Efobi said, “We felt it was a victory. . . . It was satisfying to come in there with the full weight of the law behind us.”<sup>77</sup> From Rosenbaum’s perspective, worker participation in the walk-around is a game-changing intervention because it levels the playing field.<sup>78</sup> Most low wage immigrant workers find themselves at a significant power disadvantage vis-a-vis their employers.

Typically, your employer controls everything about the physical space, being able to bring the government in shows a shift in power that is visible to everyone in the plant. Filing a complaint isn’t visible, OSHA coming in by itself doesn’t change that in a transparent way, but if the worker is walking around with the investigator, giving her side of the story along with the employer, it just feels so fair, because government is in the middle and you both get to tell your side of the story.<sup>79</sup>

Rosenbaum also emphasized that workers often have supply chain information critical to joint employer investigations which the employer may resist providing.<sup>80</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> Interview with JJ Rosenbaum, Nat’l Guest Workers Alliance (July 28–31, 2014).

<sup>76</sup> Efobi, *supra* note 73.

<sup>77</sup> *Id.*

<sup>78</sup> Rosenbaum, *supra* note 75.

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

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

Despite her enthusiasm for expanded use of the new walk-around policy, Rosenbaum made it clear that it was important that workers' centers adopt a flexible approach to how to work with OSHA in investigations. "The critical point is that the investigative procedure makes sure OSHA is getting the information it needs from workers and employers in an uncoerced way."<sup>81</sup> Top officials at OSHA who were interviewed for this study concurred, saying that from their perspective, the walk-around is not always the most critical component of an investigation for organizations to be involved in. From their perspective, workers do not always feel comfortable speaking their mind to investigators during walk-arounds, so having worker centers participate in getting worker interviews offsite is often of greater value.<sup>82</sup>

After a six-month investigation that culminated with the walk-around, Exel was cited for nine violations, including six *willful* workplace safety and health violations at the Eastern Distribution Center III, with proposed penalties totaling \$283,000.<sup>83</sup> Exel was cited for failing to record injuries and illnesses as required by law including forty-two serious injuries that had occurred over the past four years at the plant. OSHA also cited SHS Staffing Solutions for one serious violation:<sup>84</sup> failing to provide training to employees on the lockout/tagout of energy sources, with a proposed penalty of \$5000. CETUSA's designation as a J-1 visa program sponsor was also terminated. In addition, the WHD found violations of the minimum wage and overtime provisions of FLSA due to excessive housing cost deductions and imposed additional civil monetary penalties for repeat violations. As part of a joint settlement on the wage and hour violations with Exel, SHS, and CETUSA, Exel had to agree to implement a voluntary corporate-wide compliance program to review each of its facilities for FLSA and OSHA compliance, to provide training for managers and supervisors regarding FLSA and OSHA requirements, to establish a hearing conservation program, eliminate incentive programs based on the number of reports of work-related injuries or illnesses, to hire a qualified safety consultant and to create a permanent position within the company with authority for overseeing this work.

In making the judgment to include NGA and the students in the walk-around in Palmyra, OSHA recognized the unique role each was

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

<sup>82</sup> Interview with Deborah Berkowitz (Aug. 14, 2014).

<sup>83</sup> Willful violations are those committed with intentional knowledge or voluntary disregard for the law's requirements, or with plain indifference to worker safety and health.

<sup>84</sup> A serious violation occurs when there is substantial probability that death or serious physical harm could result from a hazard about which the employer knew or should know.

playing in identifying safety problems and bolstering the hundreds of student guest workers to come forward with the facts of the case, despite their fear of being blacklisted and deported. OSHA valued the relationship and in the face of strong organizing by NGA, the agency took the political risk to include the organization and the students in the walk-around. NGA prioritized partnering with government on enforcement. OSHA is in the process of drafting changes to its Field Operations Manual that should include the new walk-around interpretation and administrative language that encourages more widespread inclusion of worker organizations in investigations. In November of 2014, NGA's Legal Director was appointed as a labor representative to the Whistleblower Advisory Committee—a recognition of the expertise residing in worker centers in developing effective whistleblower and anti-retaliation policies within OSHA.<sup>85</sup>

Worker and worker center participation in the walk-around must be understood as one tactic in a larger strategy of engagement with health and safety issues that can empower workers to organize and improve conditions at the enterprise-wide level and to drive change throughout their supply chains. In fact, walk-around rights for workers, unions and worker centers in non-union settings are part of a larger set of strategies pioneered by Eric Frumin, Health and Safety Director for Change to Win, the late Tony Mazzochi of the Oil Chemical and Atomic Workers Union, Peg Seminario, the AFL-CIO Health and Safety Director and other individuals and unions within the labor movement who have long utilized health and safety as an organizing tool in non-union workplaces. For example, it was during the campaign to organize J.P. Stevens in 1979, that the Amalgamated Clothing and Textile Workers Union (ACTWU) first established the right of non-union workers to choose unions to represent them under OSHA. ACTWU, the Steelworkers, the United Farm Workers, UNITE HERE, SEIU, the Teamsters and most recently, UFCW in its Our Walmart campaign, have all engaged in organizing campaigns in which health and safety issues figured prominently as a tool to build worker power and call the public's attention to unsafe working conditions. In all of these cases unions represented non-union workers, despite not being the bargaining agent, in filing complaints and getting citations.<sup>86</sup> The other advantage to OSHA as an organizing tool is that workers who go on strike to protest workplace hazards are protected for work refusals and for concerted activity.

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<sup>85</sup> *Secretary of Labor Announces New Members of the Whistleblower Protection Advisory Committee*, OSHA (Oct. 20, 2014), <https://www.osha.gov/news/newsreleases/trade/10202014> [<https://perma.cc/67Z3-FE42>].

<sup>86</sup> Interviews with Eric Frumin (Apr. 3, 16, 2014 & June 4, 5, 16, 2014).



Given the increase in worker centers engaging in health and safety work and being supported through the Susan Harwood program at OSHA, there is a ripe opportunity for deeper collaboration between worker centers and unions on the linkages between enforcement and organizing in health and safety. It is essential that there be mutual learning and sharing of innovative practices developed by unions over many years in health and safety organizing with worker centers and other “alt-labor” groups. Through the AFL-CIO, Change to Win, COSH and other networks, Seminario, Frumin and others have been sharing this history and knowledge with the worker center movement but there is a need to develop deeper, more deliberate opportunities for reaching and training new generations of health and safety researchers and organizers.<sup>87</sup>

#### B. The Los Angeles Black Worker Center Community Compliance and Monitoring Project

The L.A. Black Worker Center (LABWC) was founded in 2010 to build organized power and grassroots leadership among Black workers and the extended community to reverse disproportionate levels of unemployment and underemployment which stand at a staggering 50% in the Los Angeles Black community.<sup>88</sup> The organization’s goals are to increase access to quality careers, address employment discrimination and improve conditions in industries that employ Black workers in L.A. LABWC has targeted the construction sector because it provides access to real careers and cannot be outsourced, but has had a history of excluding Blacks.<sup>89</sup> In the early 1990’s, Waldinger and Bailey found that reliance by the construction unions, and the industry as a whole, on informal social networks for both recruitment and training have made it difficult for African American workers to break into construction.<sup>90</sup> In Los Angeles, only 4.9% of construction workers are Black, despite comprising 9% of the population. As Will Scott, Joint Apprenticeship Coordinator of Sheetmetal Workers Local 105 put it “In my career which

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<sup>87</sup> Eric Frumin, et al., Health and Safety Tools in Organizing Campaigns, Presentation at the National Council for Occupational Safety and Health Training (Dec. 6–7, 2012).

<sup>88</sup> For the groundbreaking study that catalyzed the founding of the LA Black Worker Center, see Steven C. Pitts, *Job Quality and Black Workers: An Examination of the San Francisco Bay Area, Los Angeles, Chicago and New York*, UC Berkeley Center for Labor Res. and Educ. (2d ed.2007), [http://laborcenter.berkeley.edu/pdf/2007/blackworkers\\_07.pdf](http://laborcenter.berkeley.edu/pdf/2007/blackworkers_07.pdf) [<https://perma.cc/CD43-TV43>].

<sup>89</sup> Thomas J. Sugrue, *Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945-1969*, 91 J. AM. HIST. 143–73 (2004); Roger Waldinger & Thomas Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction*, 19 POL. & SOC’Y 291–323 (1991).

<sup>90</sup> Waldinger & Bailey, *supra* note 89, at 293.

spans now twenty-four years, it was very unlikely to find other black workers on these construction sites.” Scott also described the effects of the racially exclusive culture:

There were very few and if you did see other black workers you were almost cautious not to draw yourself to them . . . There was fear of . . . your reputation. You didn’t want to be seen as gathering or slacking by being sociable on the jobsite with other blacks . . .<sup>91</sup>

LABWC’s beginning strategy for opening up construction has been to focus on diversifying the enormous public sector projects that are underway in the City and County.

The organization has its roots in the groundbreaking work of the UC Berkeley and Los Angeles Labor Centers as well as the Los Angeles Alliance for a New Economy (LAANE). In 2012 it was a leading participant in a labor/community coalition that won the first metropolitan transit authority Project Labor Agreement (PLA) with national targeted hiring goals for federally-funded, Federal Transit Administration approved projects in the nation. It is mammoth—covering \$70 billion worth of projects and projected to create more than 270,000 jobs. Financing comes partially through Measure R, the half-cent sales tax that was approved by LA County voters in 2008 and partially through federal funding from the Federal Transit Administration, which requires national targeted hiring goals.<sup>92</sup> In addition to federal affirmative action requirements, the LA County Metropolitan Transit Authority also adopted a Construction Careers Policy intended to encourage construction and employment and training opportunities “in ways calculated to mitigate the harms caused by geographically concentrated poverty, unemployment and underemployment . . . .”<sup>93</sup>

As the debate on the PLA unfolded, the LABWC focused on “creating a climate for this issue of black workers to be prioritized,” said Lola Smallwood Cuevas, Executive Director of the LABWC. “We mobilized out-of-work black construction workers to come out and testify about why they needed to be a part of it and how the Metro board could help make a change,” she continued. As a result of their work, including the establishment of a Black Labor Construction Council made up of Black

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<sup>91</sup> Interview with Will Scott (Dec. 4, 2014).

<sup>92</sup> Executive Order 11246 requires affirmative action hiring for minorities and women on all federally funded projects. Exec. Order No. 11,264, 30 Fed. Reg. 12,319, 12,935 (Sept. 24, 1965).

<sup>93</sup> L.A. CTY. METRO. TRANSP. ADMIN., PROJECT LABOR AGREEMENT, [http://media.metro.net/about\\_us/pla/images/Project\\_Labor\\_Agreement.pdf](http://media.metro.net/about_us/pla/images/Project_Labor_Agreement.pdf) [<https://perma.cc/7L84-WY9H>].

construction workers, and the alliances they forged with elected officials, and the local Sheet Metal, IBEW and Painters unions, the resulting PLA included a 10% “disadvantaged worker” component.<sup>94</sup> Adopted unanimously, LABWC believed that the organization needed to set its sights on robust implementation. “We did not call it a victory when we were able to see this adopted,” said Smallwood Cuevas, “because we felt enforcement was the key.”

The LABWC’s goal is to double the representation of Black construction workers on transit projects, particularly those that align with predominantly Black neighborhoods. Since construction commenced on the \$2.058 billion Crenshaw/LAX Transportation Project in early 2014, LABWC has been developing strategies strengthening the pipeline of Black workers into construction, providing ongoing support to ensure success and monitoring the numbers of workers hired and employed on the jobsite and their experiences on the job. “We expect these worksites to look like the census tracts they are working in. We started with the Crenshaw line, because if we can’t do it in Crenshaw, where can we do it?” said Smallwood Cuevas. The organization’s benchmark for success on the Crenshaw project is 25% Black, 5% female and 20% apprentice participation. It has been extremely focused on how to monitor and enforce the terms of the PLA.

The LABWC created the Community Compliance and Monitoring Program to ensure that Metro, the contractor (Walsh-Shea), any sub-contractors, and the unions comply with the spirit of the PLA, which is intended to tackle the barriers that have kept Blacks and women out of the trades. “We are doing grassroots monitoring and enforcement of the agreement because a lot of enforcement has been dismantled,” said Smallwood Cuevas. “Unions have so many things they are ensuring—workers in the right classifications and trust funds being paid into. Who will prioritize exclusion? Diversity often comes down low on the list of things that folks are actually monitoring and enforcing and tracking,” she observed. “We want to understand what are those policies that help us ramp up enforcement. What are the tools that help us combat the notion that we don’t have the political will to enforce civil rights laws in the U.S?” In the first phase of the project, the organization developed a

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<sup>94</sup> Prevented by the passage of Proposition 209 from setting explicit racial targets, the disadvantaged worker language is defined to mean someone who resides in an economically disadvantaged or extremely economically disadvantaged area and faces at least two of the following barriers to employment: 1) homelessness; 2) being a custodial single parent; 3) receiving public assistance; 4) lacking a GED or high school diploma; 5) having a criminal record or other involvement with the criminal justice system; 6) suffering from chronic unemployment; 7) emancipated from the foster care system; 8) being a veteran of the Iraq/Afghanistan war or 9) being an apprentice with less than 15% of the hours required to graduate to journey level Los Angeles Metropolitan Transit Authority and Los Angeles. *Id.*

report card tool for researching, evaluating and grading contractors bidding on the Crenshaw work based on previous adherence to equity, transparency and accountability and then moved on to the hiring process and outcomes.

The PLA requires the contractor to hire a Jobs Coordinator whose job is to facilitate implementation of the Targeted Hiring Requirements.<sup>95</sup> Metro releases a monthly Targeted Worker Report, but it is based on self-report data from contractors. Working with researchers from the University of Southern California, the organization developed a Community Compliance Monitoring Toolkit that laid out a methodology for carrying out their own oversight, generating their own numbers and then comparing it to the Metro Targeted Worker Reports.<sup>96</sup> Additionally, given the length and depth of the problem of Black employment in the trades, the organization pushed for the establishment of an oversight table that is regularly bringing Metro, contractors, elected officials, EEOC representatives and City agencies together to review the recruitment and retention numbers, consider strategies for raising them, and probe the issues that affect Black workers on the worksite, in real time.<sup>97</sup> “Through conversations with our members we have been identifying what is needed . . . from day one the subcontractors need to know the policy and we need to be in the pre-jobs meetings, showing them how discrimination happens,” said Smallwood Cuevas. “If workers have to solicit their work, they can contact the primary or the subcontractor, but we need to know whether their information is being taken or whether they are being turned away . . . or why people are being jumped on the hiring list . . .” she said. The Black Labor Construction Council gives them a unique capacity to flag these issues. From Metro’s perspective, LABWC brings unique capacities to the monitoring and enforcement process. “They are right in the middle of the Crenshaw

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<sup>95</sup> The Jobs Coordinator always works for the contractor, not for Metro. On the Crenshaw/LAX project, that position is held by PV Jobs which is responsible for: generating and maintaining specific programs targeting residents for construction opportunities at the project, attending jobs fairs and/or community meetings to outreach to the community regarding opportunities available for the union, provide assistance to clients for entry into the unions, generate and maintain program specific documentation for the project’s request for skilled workers and for reporting and tracking purposes, provide referrals that meet the geographic project requirements for low income, and specific skill set requirements, coordinate and collect monthly reports indicating conformance of each hiring requirement, and assume full administrative responsibilities for program implementation of hire and apprentice requirements. *Project Labor Agreement and Construction Careers Policy*, METRO, <https://www.metro.net/about/pla/> [<https://perma.cc/D88P-YFWW>] (last visited Sept. 25, 2017).

<sup>96</sup> WEI WANG, ET AL., GUIDELINES ON COMMUNITY COMPLIANCE MONITORING TOOLKIT: A COLLABORATIVE RESEARCH PROJECT BY THE LOS ANGELES BLACK WORKER CENTER AND UNIVERSITY OF SOUTHERN CALIFORNIA (May 15, 2014).

<sup>97</sup> L.A. BLACK WORKER CTR., INCREASING LABOR STANDARDS AND DIVERSITY IN LOS ANGELES THROUGH CO-ENFORCEMENT (2015).

corridor and can advocate for the goals of the PLA and refer workers to the jobs coordinators. They are great partners and are providing things to make our PLA successful,” said Miguel Cabral, Head of Strategic Business, PLA and Construction Careers.

Due to the peculiar nature of construction, which happens in stages, it is particularly important to review numbers frequently and over the entire life of the project. Workers are often hired and employed to do specific jobs for limited periods of time. Close monitoring and data analysis meant that the organization was able to note patterns over time, finding that representation of Black workers had fluctuated dramatically on the project: from a high of 78% in November of 2013 down to 12% by May of 2014. LABWC was able to raise concerns that Black workers were being employed largely in the early stages but when site prepping was finished and prime contractor hours were introduced, the percentage of Black workers dropped off precipitously, suggesting that they were not being hired for the long-term work.<sup>98</sup>

Although very important, from the organization’s perspective, numbers reveal only part of the story. It wanted to have a finer-grained view in order to understand the reasons behind the fluctuations. Through the oversight table, the parties can delve more deeply into workers experiences. They can make sure that workers don’t get passed over for employment when they walk up to the jobsite, or are bullied or pushed out once they are there or quit out of frustration from lack of information, training or discriminatory treatment on the job.

When we can sit together with the key players, we can figure out things like: why were three workers fired last week . . . and identify problems that can arise like “I am trying to figure out what I am supposed to do but the instructions are unclear to me” or we find out that the safety meetings were conducted only in Spanish . . . .

said Smallwood Cuevas.

Beyond the oversight table itself, LABWC has won access to all of the pre-jobs meetings conducted by Metro with contractors, and is working on getting clear signage that provides information about who is in charge on the jobsite, and gaining access to workers on the jobsite. They believe that building community and peer mentoring is instrumental to workers staying on the job. While protocol requires LABWC members

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<sup>98</sup> L.A. BLACK WORKER CTR., COMMUNITY COMPLIANCE AND MONITORING REPORT 3 (Apr. 2014).

to undergo safety training and sign in and out with the primary contractor, Metro is very supportive of the organization being able to go on job sites. “We have been facilitating this process for the BWC because we want to create a culture of transparency here. We want to put the most accurate numbers out there that we can, and BWC is doing that . . .” said Cabral.

From what I have seen them do already in terms of marketing, referral, in terms of going on site and doing validation, and providing supportive services to clients who have been placed on the job, publishing a quarterly report on Metro’s PLA summarizing where we are on each project, they have done a lot. I see them as a partner on our PLA . . . holding us accountable and making sure that we are monitoring and enforcing.

LABWC has also been working on setting up a complaint system. It has received training from the EEOC as well as the DOL on what kind of information is most useful for bringing cases against contractors that violate labor standards.

In addition to the work it is doing on the public transit PLA, LABWC is working with a coalition of organizations to pass a wage theft law that would create an OLSE-like entity in Los Angeles, would include equal employment opportunity enforcement and have a strong co-enforcement component.

#### IV. ANALYSIS AND CONCLUSION

This paper has argued that the crisis of compliance in low wage industries will not be solved through enforcement initiatives undertaken by the state alone. Re-embedding norms of compliance will require creative collaboration between government, workers, civil society organizations and high road firms. Development of effective enforcement models has become increasingly urgent as more labor mandates are being passed at the local and state levels. Cities are considering expanding the enforcement role of existing agencies, the establishment of new institutions, and formal contracts with worker organizations and legal non-profits to assist in enforcement activities. In regions and sectors where public agencies have historically been weak, innovative place-based and sector-specific private monitoring regimes linked to strong market consequences have emerged. Organizations are finding new pathways to worker power through representation in private inspection regimes, settlement agreements, direct action, worker-to-worker education and public policy. Deep collaboration and trust have been instrumental to the success of co-enforcement efforts, and ongoing

public relationships between worker organizations and government bodies are at the center of each of the two cases. Agency leaders and investigators find that access to workers and their willingness to come forward greatly increased when they were in relationship with organizations the workers trusted. Likewise, when they felt they could trust organizations, government officials articulated strong advantages to working closely with them.

#### Formalization of Co-enforcement

Organizations playing a formal role have enabled more effective monitoring and enforcement of labor and employment laws in low-wage sectors. Government officials are largely positive about what organizations are bringing to the table. Concern on an agency's part that close collaboration with civil society organizations could lead to charges of favoritism or breaches of confidentiality reinforces the importance of formalization of the relationship with a clear set of rules and procedures. However, while formalization may be necessary, it is not sufficient when the commitment to the collaboration on either side is weak.

In interviews, most worker center and labor leaders expressed a strong preference for formalization over informal agreements. They felt that lacking formal agreements, agencies would be less likely to routinely involve the organizations and would proceed instead on an ad-hoc, case-by-case manner. They were also concerned that if agencies were not officially committed to providing groups with information, resources, a seat at the table and an ongoing role in monitoring and enforcement, they would fall back on entrenched practices. Additionally, they worried that without written policies, organizations would be serving at the pleasure of individuals; cooperation could be discontinued at any time and relationships would not be institutionalized for the longer run. Informal cooperation, they also felt, made it less likely that their organizations could alter the relations of power in their sectors and begin to create a culture of compliance among employers.

Government agencies, for the most part, were more dubious about formal agreements. Generally speaking, they worried that formalizing a relationship with a worker organization in particular would jeopardize perceptions of them as neutral parties. There is no doubt that government agencies in the US tend to be uncomfortable with explicit partnerships and formal arrangements with worker organizations. Generally speaking, they worry that formalizing a relationship with a worker organization would jeopardize the perception of them as neutral parties. While beyond the scope of this paper, this "administrative" or "bureaucratic neutrality" mindset with its deep-seated notions about

the proper role of state agencies in the US can be traced back to at least three sources: court-centric ideas of the rule of law as a source of legitimacy were baked into the early administrative state, a strict separation of politics and administration dating back to Woodrow Wilson, and scientific management principles imported into government administration during the Progressive Era.<sup>99</sup>

### Resourcing Organizations

In the two profiled cases, organizations were paying for their enforcement activities out of existing budgets comprised largely of funding from foundations. Other case studies profile examples of government funding playing a key role in a worker organization's co-enforcement activities.<sup>100</sup> Like formalization, government providing financial support to organizations in order to engage in education and enforcement activities has been controversial in some quarters. But there is no particular reason that government funding in this area should be any more controversial than other programs that fund civil society organizations to operate programs that assist government in achieving its goals. These grant programs are governed by formal rules—organizations must apply, they must meet specific selection criteria and are required to submit regular progress reports. As a practical matter, funding is necessary because low wage worker organizations are modestly funded, enforcement-related work is very time-consuming and competes for resources with other critical activities like organizing and service provision.

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<sup>99</sup> The common law court was enshrined as the ideal against which administrative agencies were to be judged. The courts' influence "reached deep into the thought processes of administrators and taught them to justify their actions in a peculiarly legalistic way." This mental model combined with Wilsonian notions of a science of administration and Taylorist tenets of scientific management to become central tropes of the administrative state that emerged in the United States between 1900-1940. Taylor's "Principles of Scientific Management" helped to create and sustain the idea of a dichotomy between politics and administration. They formed the basis of the recommendations of President Taft's 1912 commission on efficiency and economy which sought to implement the principles of scientific management in government in order to improve its performance. The first two textbooks on public administration presented the field based on scientific grounds of governance and asserted the importance of scientific principles to public administration. See Wasim Al-Habil, *The Development of the Concept of the 'One Best Method' in Public Administration*, 2 J. PUB. ADMIN. & POL'Y RES. 96-102 (2010); DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 (2014); Woodrow Wilson, *The Study of Administration*, 56 POL. SCI. Q. 197-222 (1887).

<sup>100</sup> For additional case studies, see Matthew Amengual & Janice Fine, *Co-enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States*, 11 REG. & GOVERNANCE 129 (2017); Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?*, 45 POL. & SOC'Y 359 (2017); Janice Fine & Gregory Lyon, *Segmentation and the Role of Labor Standards Enforcement in Immigration Reform*, 5 J. ON MIGRATION & HUM. SECURITY 431 (2017).



### New State Actors

In LA, working with LABWC, the Metropolitan Transit Authority became the first metropolitan transit authority in the nation to sign a Project Labor Agreement with affirmative action hiring goals, a construction careers policy and a disadvantaged worker component. In San Francisco, an entirely new institution has been created that has a broad mandate and significant powers including the ability to involve other city agencies in enforcing labor laws. OLSE has substantial investigative capacity and also provides funding for community organizations to engage in co-enforcement of enforcement. Building a local institution and involving organizations on the ground in labor standards enforcement is strongly supported by Luce's research, which documents much higher levels of compliance with the living wage in cities in which there was a local government entity involved in enforcement and community organizations involved in implementation.<sup>101</sup>

### Absence of High Road Employers in Low-Wage Sectors

Strong, collaborative relationships between worker organizations and businesses have only just begun to emerge. Strikingly, some of these are with firms that were once highly opposed to the involvement of workers' organizations in their sectors, others are with firms at the top of supply chains that have agreed to require their contractors and suppliers to comply and cease doing business with them if they do not. Unfortunately, high road firms joining with civil society and government in strengthening enforcement are rare in sectors that have adopted low wages, part-time work and just in time scheduling as core components of their business models. However, business participation is not always present. These cases—NGA and the warehousing companies in Pennsylvania, and the LABWC, Metro and Walsh-Shea (the general contractor on the Crenshaw Line)—involved worker organizations going to the top of network supply chains and engaging firms in some form of co-enforcement, albeit mostly after significant pressure was brought to bear upon them. In LABWC and Pennsylvania, elected officials or government agencies played a major role in compelling firms to participate. These developments hold out the promise that the experience of co-enforcement itself might be transformative in terms of how companies see themselves and wish to be seen by others.

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<sup>101</sup> See generally STEPHANIE LUCE, *FIGHTING FOR A LIVING WAGE* (2004).

### Scant Role for Workers in Enforcement

Of those cases that were based upon formal agreements, only one included an official role for workers at the worksite. OSHA provides individual workers the right to ask for their employer's health and safety records and the walk-around rule allows workers to choose their own representatives. As discussed above, with a presence on every worksite and experiential knowledge of work processes and employer practices, workers have unique capabilities to bring to enforcement. They are particularly important to represent in co-enforcement schemes and provide whistleblower protections to, because many of the most vulnerable workers are at worksites that are not in relationship with any sort of worker or community organization. It is critical for local, state and federal labor standards policies and programs to establish new models for worker voice at the workplace level, as another means for workers to be empowered to come together collectively to monitor and enforce labor standards.<sup>102</sup>

### The Connection between Enforcement and Raising Standards

These cases shed light on the relationship between enforcement and organizing and between defending minimum standards and raising them. The two organizations profiled here, like the bulk of worker centers across the country, become involved in enforcement of wage and hour and health and safety laws because so many of the people they work with have been exploited, and because taking on these cases is a concrete way to build relationships with workers and gain their trust. Many times, what begins as a wage claim evolves into a direct-action campaign on an employer or group of employers, or public policy campaigns at the state and local levels. Wage claims and wage theft campaigns on individual employers are part of a cycle, as organizations evolve from taking all comers, to requiring workers to participate in the organization, to treating cases differently depending upon their strategic significance, to ultimately spending the most time on those cases that will best support a broader campaign to raise standards by spotlighting current conditions.

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<sup>102</sup> There have been debates within the U.S. labor movement about whether the establishment of alternative institutions for employee voice at the worksite level will undermine union prospects. There have also been major legal debates about whether works councils, in particular, would violate the 8a2 prohibition in the National Labor Relations Act against company unions. In the context of Volkswagen's recent overtures, Harvard law professor Benjamin Sachs has argued that there are legal strategies for doing so. Benjamin Sachs, *Minority Unionism (sort of) Comes to VW Chattanooga*, ON LAB.: WORKERS, UNIONS, & POL. (Nov. 12, 2014), <https://onlabor.org/2014/11/12/minority-unionism-sort-of-comes-to-vw-chattanooga/> [<https://perma.cc/863K-BL69>].

Organizations know that for many workers, just ensuring they actually receive the minimum wage is an improvement, and the necessary first step to raising the floor. They also know they cannot win improvements in a sector unless there is an actual floor to begin with. In the building trades, garment and janitorial sectors, union organizing campaigns often began the same way—with efforts to rid the labor market of “bottom-feeders” who engaged in unfair competition through business models that flouted wage and hour and health and safety laws. Today, low wage worker organizations trace a similar trajectory that begins with reestablishing a floor. They do this through workers learning their rights under the law and asserting them individually and collectively, gaining the confidence that comes with the state moving into the labor market in a more aggressive way and validating their claims of mistreatment. As this work evolves, organizations ratchet up demands on employers beyond statutory minimums. Sometimes it is through direct action on employers, lawsuits and settlement agreements; sometimes it is through public policy campaigns that enshrine new rights and wage standards; sometimes it is through unionization efforts; and often times, it is through combinations of all of them. As discussed above, regulatory unionism—an approach that combines the setting of a wage and collective bargaining rights and incentives—encapsulates this approach. This kind of approach is reflected in the Fast Food Forward and Fight for Fifteen campaigns, which put forward demands for \$15 an hour in the fast food and homecare sectors and demand the right to a union for workers in such sectors.

The crisis of compliance in low wage industries will not be solved through enforcement initiatives undertaken by the state alone. Re-embedding a norm of compliance will require creative collaboration between government, workers, civil society organizations and high road firms. This study provides concrete evidence for the promise of collaboration between the state and civil society.