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## Bottom-Up Workplace Law Enforcement

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# Bottom-Up Workplace Law Enforcement: An Empirical Analysis

CHARLOTTE S. ALEXANDER\* & ARTHI PRASAD\*\*

*This Article presents an original analysis of newly available data from a landmark survey of 4387 low-wage, front-line workers in the three largest U.S. cities. We analyze data on worker claims, retaliation, and legal knowledge to investigate what we call “bottom-up” workplace law enforcement, or the reliance of many labor and employment statutes on workers themselves to enforce their rights. We conclude that bottom-up workplace law enforcement may fail to protect the workers who are most vulnerable to workplace rights violations, as they often lack the legal knowledge and incentives to complain that are prerequisites for enforcement activity.*

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## INTRODUCTION

Workplace rights in the United States are generally enforced from the bottom up. With few exceptions, labor and employment laws contain private rights of action that enable workers themselves to bring lawsuits when their rights are violated.<sup>1</sup> These private lawsuits vastly outnumber government enforcement actions against law-breaking employers.<sup>2</sup> Even what seems to be top-down government enforcement is often bottom-up enforcement in disguise, as government agencies depend in large part on worker complaints to direct their enforcement activity.<sup>3</sup>

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1. The Occupational Safety and Health Act and, in large part, the National Labor Relations Act are significant exceptions, as workers themselves may not sue to enforce statutory health and safety protections or prohibitions on unfair labor practices. Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 731–32 (2003) (discussing the lack of a private right of action under the OSHA and NLRA).

2. Between fiscal years 1997 and 2012, for example, the number of cases filed by private plaintiffs in federal court to enforce civil rights employment laws was forty-eight times the number of cases filed by the U.S. Equal Employment Opportunity Commission (EEOC). *Compare EEOC Litigation Statistics, FY 1997 through FY 2012*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (listing 5705 EEOC enforcement suits filed in the federal district courts in fiscal years 1997 through 2012), with Supplements Table C-2A: Cases Commenced by Nature of Suit, *Judicial Business Archive*, U.S. COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness/archive.aspx> (listing annual reports identifying 274,422 “Civil Rights Employment” and “ADA—Employment” cases filed by private plaintiffs in federal district court in fiscal years 1997 through 2012). Likewise, between fiscal years 2000 and 2011, private plaintiffs filed thirty-eight times more Federal Fair Labor Standards Act cases than did the U.S. Department of Labor. Author-compiled data, Public Access to Court Electronic Records (PACER) (finding 1382 cases with the FLSA Nature of Suit code filed in federal court by the U.S. Secretary of Labor versus 52,865 cases filed by private plaintiffs) (on file with authors).

3. For example, almost all lawsuits brought by the EEOC, which enforces federal antidiscrimination statutes, begin as worker-filed charges. Though the EEOC may affirmatively initiate an investigation using a mechanism known as a commissioner charge, this charge is rarely used, with only twelve charges filed in fiscal year 2012. *Performance and Accountability Report: FY2012*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, [http://www.eeoc.gov/eeoc/plan/2012par\\_performance.cfm](http://www.eeoc.gov/eeoc/plan/2012par_performance.cfm) (“[I]n FY 2012, 12 new Commissioner charges were filed.”). The U.S. Department of Labor may also initiate its own affirmative “directed investigations,” but those are vastly outnumbered by complaint-driven investigations. DAVID WEIL, *IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT* 8 (2010), available at <http://www.dol.gov/whd/resources>

Workplace law enforcement therefore depends significantly on worker “voice,” with workers themselves identifying violations of their rights and making claims to enforce them.<sup>4</sup>

In theory, a bottom-up system should produce an accessible, responsive, and efficient workplace law enforcement regime. The parties with the most information about violations and the greatest incentive to correct them—the workers—drive the enforcement process.<sup>5</sup> Workers need not wait on cumbersome, budget-strapped, or politically hamstrung government agencies, but can take enforcement duties into their own hands.<sup>6</sup> And when government agencies do act, the bottom-up system should allow them to allocate resources efficiently: the “market” in complaints should signal to agencies which employers are bad actors in need of reform.<sup>7</sup>

However elegantly designed, there is good reason to believe that the system fails in practice, and that it fails particularly badly in the case of workers who are most vulnerable to workplace rights violations.<sup>8</sup> These workers include women, those

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/strategicEnforcement.pdf (reporting that over 75% of U.S. Department of Labor Wage and Hour Division investigations in 2008 arose from worker complaints, as opposed to agency-initiated complaints in accordance with the Department’s strategic enforcement priorities); Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers’ Organizations*, 38 POL. & SOC’Y 552, 556 (2010) (“The [U.S. Department of Labor] is thus expending most of its resources on inspectors responding to complaints filed by individual workers, without an underlying justification that this approach is likely to be effective in detecting violators.”).

4. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30 (1970) (defining a worker’s choices when faced with a problem within her organization as exit, voice, and loyalty: “Voice is here defined as any attempt at all to change, rather than to escape from, an objectionable state of affairs . . . .”); see also *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied.”). *But see* HIRSCHMAN, *supra* at 21–25 (discussing the option to “exit,” or take one’s labor or business elsewhere); *id.* at 76–105 (discussing a “theory of loyalty”).

5. See Gideon Yaniv, *Complaining About Noncompliance with the Minimum Wage Law*, 14 INT’L REV. L. & ECON. 351, 351–52 (1994) (“Being the direct (and sole) victims of noncompliance, underpaid workers are naturally perceived as the faithful guardians of the minimum wage law.”).

6. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 376–77 (2005) (“Private lawsuits can potentially help to fill the enforcement gap left by the undercommitment of public resources; indeed, they can sometimes supply a big gun where public enforcement has none to wield.”).

7. 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. 59, 70 (2005) (“Ideally, regulators would like to assume two things: (1) that the workers who are complaining are voicing legitimate grievances and representing them accurately (in other words, that employees working under lawful conditions are *not* complaining); and (2) that workers who are experiencing violations will complain.” (emphasis in original)).

8. See, e.g., *id.* at 73 (finding “only modest overlap between [worker] complaints and [employer] compliance” with the Fair Labor Standards and Occupational Safety and Health Acts).

with less education, nonunionized workers, and undocumented workers, all of whom hold relatively disempowered positions both in the workplace and in society as a whole.<sup>9</sup> The system fails these workers because it is built on two foundational, misplaced assumptions: (1) that workers have the substantive and procedural legal knowledge to identify violations of their rights and access the proper enforcement procedures, and (2) that workers have sufficient incentives to file suit or make agency complaints.<sup>10</sup> Using a rich source of newly available survey data, this Article demonstrates that for many low-wage, front-line workers—those who earn below the median wage for the city where they live and hold nonmanagerial, nonsupervisory, or nontechnical jobs—neither assumption applies.

This Article analyzes data that were originally collected as part of the 2008 Unregulated Work Survey, a landmark study of 4387 low-wage, front-line workers in the three largest U.S. cities (New York, Chicago, and Los Angeles).<sup>11</sup> These data are valuable, as they include “hidden” groups such as undocumented people or day laborers who are often excluded from research due to their marginalized social, political, and economic statuses. The data are also important because they enable empirical analyses of the determinants of claiming behavior and the transformation of problems into legal claims, subjects of much study within the sociolegal, economic, and political science literatures.<sup>12</sup> Finally, analyses such as these are important as a policy matter. As Steven Willborn puts it, as “policymakers sort through the many choices available when they are deciding how to enforce a labor statute,” they should be guided by both theory and data on the flaws and benefits of our current system of workplace law enforcement.<sup>13</sup>

Our analysis reveals gaps in workers’ legal knowledge and powerful incentives to stay silent in the face of workplace problems. First, the data show that more than three-quarters of surveyed workers did not know where to file a government complaint about a problem on the job, and almost 60% of these workers misunderstood their minimum wage and overtime rights.<sup>14</sup> The data also suggest that female and undocumented workers had less accurate procedural legal knowledge than their male and documented counterparts.<sup>15</sup> Legal knowledge

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9. See generally *infra* Part III (reporting results pertaining to women, nonunionized, less educated, and undocumented workers).

10. Steven Willborn describes workers’ lack of legal knowledge and lack of incentives slightly differently, as problems with detection and discovery of labor regulation violations and problems with prosecution. Steven L. Willborn, *Labor Enforcement Theory: The Case of Public vs. Private Enforcement*, in *REGULATING DECENT WORK* (Colin Fenwick & John Howe eds., forthcoming) (manuscript at 3).

11. See *infra* Part II.

12. See *infra* Part I.

13. Willborn, *supra* note 10, at 1 (“The consequences of [the differences in types of] labor enforcement are under-studied empirically. Labor enforcement theory, if anything, is even less well-studied. This is unfortunate, in part, because only a well-developed theory can help policymakers sort through the many choices available when they are deciding how to enforce a labor statute. Moreover, a well-developed theory is necessary to guide researchers in their efforts to understand both general issues of labor enforcement and particular issues relating to specific legislation.”).

14. See *infra* Part III.D–E.

15. See *infra* Part III.D–E.

therefore appears to decrease with a worker's relative power and stability, and many workers simply may not have the information necessary to become workplace law enforcers.

Second, even informed workers may lack an incentive to exercise "voice" on the job. The data show that about 43% of workers who had experienced a workplace problem within the twelve months prior to the survey decided not to make a claim.<sup>16</sup> The most common reason for workers' silence was their fear of employer retaliation; the second was their belief that their claim would have no effect.<sup>17</sup> Their fear of retaliation was well founded: about 43% of workers reported experiencing employer retaliation as a result of their most recent claim about a justiciable workplace problem in the twelve months before the survey.<sup>18</sup> Likewise, workers' lack of faith in the efficacy of claiming was borne out by the data, as only about 15% of employers addressed the claim or promised to address it.<sup>19</sup>

Though workplace laws offer a set of protections and inducements to entice workers to become law enforcers—what we call "operational rights"<sup>20</sup>—these incentives are miscalibrated in the case of many low-wage, front-line workers, whose fear of retaliation or doubt in the efficacy of complaining outweigh the benefits that would accrue from workplace law enforcement.<sup>21</sup>

The data suggest, then, that low-wage, front-line workers such as the cashiers, parking lot attendants, and dishwashers captured by the Unregulated Work Survey may be particularly unsuited as bottom-up rights enforcers. At the same time, numerous studies have shown that workplace rights violations are extraordinarily prevalent in the very industries that employ these workers.<sup>22</sup> Thus, the same low-wage, front-line workers who are the most likely to experience workplace rights violations may be the least likely to become rights enforcers. Workers are overdeterred from claiming, and employers may be underdeterred from complying, creating a self-perpetuating enforcement gap in labor and employment law.<sup>23</sup>

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16. *See infra* Part III.A–B.

17. *See infra* Part III.B.

18. *See infra* Part III.C.

19. *See infra* Part III.C.

20. *See infra* Part IV.A; *see also* Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. 353, 386 (2012) (using the term "operational rights" to refer to the set of incentives and protections designed to operationalize or effectuate substantive rights, to entice workers to become bottom-up law enforcers).

21. *See* Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1155 (2010) ("Legislators, as well as adjudicators, must consider tailoring the incentives embedded in the law to the misconduct and the individual that it targets as an enforcer.").

22. *See infra* note 138 and accompanying text.

23. Estlund, *supra* note 6, at 330 ("Traditional enforcement mechanisms have often failed to raise the cost of noncompliance high enough to outweigh the immediate gains from noncompliance. Most enforcement actions secure only the back wages owed to employees (if that); that means opportunistic employers risk very little by underpaying employees and hoping—quite realistically—to avoid enforcement, either by inspection or complaint . . . . Simply ignoring the law is an especially tempting strategy for marginal producers at the

The Article proceeds as follows: Part I reviews previous work in the sociolegal, economic, and political science literatures that provides a theoretical framework for the present analysis. Part II describes the methodology of the 2008 Unregulated Work Survey, the data collected, and our own analysis. Part III reports our findings on the frequency of worker claims, the prevalence of retaliation against workers who did make claims, the level of workers' substantive and procedural legal knowledge, and workers' incentives to engage in enforcement activity. Part IV discusses the implications of a rights enforcement regime that leaves out the most vulnerable workers. Part V concludes by examining possible alternative structures for workplace law enforcement.

### I. THEORETICAL FRAMEWORK

This Article fits into a tradition within the sociolegal, economic, and political science literatures of studying the determinants of claiming behavior and provides an opportunity to expand on existing models. The classic framework for understanding the transformation of problems into legal claims comes from William Felstiner and his coauthors.<sup>24</sup> In this view, problems move through three phases: naming, blaming, and claiming.<sup>25</sup> First, a person must “say[] to [her]self that a particular experience has been injurious.”<sup>26</sup> This is naming. Second, she must “attribute[] [the] injury to the fault of another individual or social entity”—blaming.<sup>27</sup> Third, in the process of claiming, she voices her grievance “to the person or entity believed to be responsible and asks for some remedy.”<sup>28</sup>

Richard Miller, Austin Sarat, and Marc Galanter, among others, propose a more complex dispute generation and resolution pyramid, with additional layers beyond claiming.<sup>29</sup> The pyramid accounts for claims that are disputed by the opposing

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bottom of the production chain, who have little fixed capital or stake in their reputation, who tend to operate under the regulatory radar, and who often rely heavily on undocumented immigrant workers who are too fearful or desperate to complain.” (footnotes omitted); see also David Weil, “Broken Windows,” *Vulnerable Workers, and the Future of Worker Representation*, FORUM, Jan. 2012, at 1, 1 (“In the presence of persistent violations, keeping one’s head down, ‘staying out of other people’s business,’ and turning a blind eye to unfair treatment of others is a survival strategy.”).

24. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 635–36 (1980–81).

25. *Id.*

26. *Id.* at 635.

27. *Id.*

28. *Id.* at 635–36.

29. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 11 (1983); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525, 545 (1980–81); see also Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 681 (“At the base of the dispute pyramid are perceived injurious experiences—the broad mass of injuries that people recognize. Some proportion of these perceived injurious experiences are grievances: injuries that involve a violation of right or entitlement. . . . Only some grievances

party and the resulting suit filing and disposition in court, and the pyramid's shape reflects the fact that many "named" problems—the wide bottom layers—never progress all the way through to litigation at the pyramid's peak.<sup>30</sup>

In a separate strand of economics literature, Albert Hirschman's seminal work examines problems that arise within organizations such as the workplace.<sup>31</sup> Hirschman posits that people have three options in such circumstances: exit, voice, and loyalty.<sup>32</sup> Exit is the option to take one's labor elsewhere; voice is a worker's attempt "to change, rather than to escape from, an objectionable state of affairs"; and loyalty can result in a decision to remain within the organization and silently withstand recognized problems.<sup>33</sup> In many ways, Hirschman's "voice" can be thought of as Felstiner's "claiming."

The present Article takes this prior work as the starting point for investigating the empirics of workplace dispute generation and resolution and for constructing a more complex model that incorporates workers' legal knowledge and incentive structures. Figure 1 illustrates how such a model might look, presenting the panoply of options that workers face when identifying problems on the job and deciding whether and how to address them. The darkened arrows represent a direct path from problem identification to claim resolution using formal legal means such as a lawsuit or government agency complaint. This is the path that our current system of bottom-up workplace law enforcement envisions: workers have the legal knowledge to engage in "naming"; they then "blame" the appropriate party and are incentivized and knowledgeable enough to exercise "voice," to make a "claim" in the form of a lawsuit or agency complaint and pursue it through resolution.

However, as the complexity of the diagram illustrates, there are many alternative paths. And as the diminishing size of each pyramid layer indicates, many problems "escape" along the way. Workers may not have the substantive legal knowledge to recognize justiciable problems (violations of their legal rights at work) as such.<sup>34</sup> Workers who "name" the problems they face may nevertheless choose exit or loyalty over voice, or may not know who to "blame," as a legal matter, for the issues they face. Workers who do make claims may be faced with inaction or

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become claims: when an individual contacts the party allegedly responsible for the grievance. Fewer still are disputes: when the party allegedly responsible for an individual's claim initially denies their responsibility. Some number of disputes results in filings: a formal complaint (in a litigation model, a court filing). The smallest category of all is made up of trials: cases that are adjudicated." (emphases omitted) (footnotes omitted)).

30. Galanter, *supra* note 29, at 11–26 (describing the pyramid).

31. HIRSCHMAN, *supra* note 4.

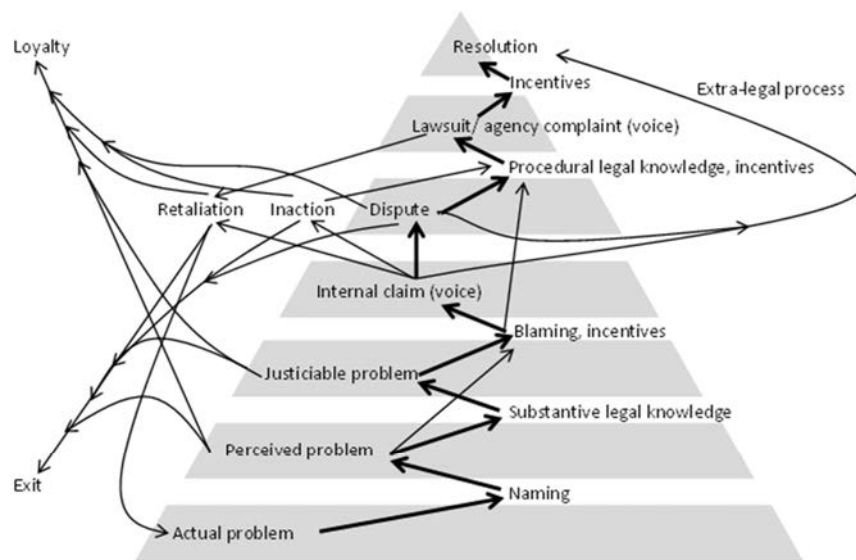
32. *Id.* at 21–35 (discussing exit); *id.* at 30 (discussing voice); *id.* at 76–105 (discussing loyalty).

33. *See id.* at 21–25 (discussing exit), *id.* at 30 (discussing voice); *id.* at 76–105 (discussing loyalty, which, in the alternative, might result in a decision to stay within the organization and exercise voice).

34. Justiciable problems are those that "raise issues in civil law, have civil legal aspects, and have consequences shaped by civil law." Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 968 (2009) (footnote omitted). *See generally* HAZEL GENN WITH SARAH BEINART, STEVEN FINCH, CHRISTOS KOROVESIS & PATTEN SMITH, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* (1999) (setting out theory of justiciable problems, unmet legal needs, and access to justice).



retaliation by their employers, at which point they may choose exit or loyalty, or may start again at the bottom of the pyramid and progress through the steps of “naming,” “blaming,” and choosing whether or not to make a retaliation “claim.” Moreover, if a claim is escalated and becomes a lawsuit or agency complaint, the worker’s incentive structure must push her to pursue the claim to resolution in whatever form it takes (e.g., win or loss at trial, case dismissal, settlement). The costs of formal legal action in time and treasure may build over the duration of the process, and the worker may be retaliated against at any point, which then triggers its own decision tree. Throughout the process, the worker’s incentive structure must continue to encourage pursuit of her claim; for her to persevere through the claim’s resolution, the benefits of claiming must consistently outweigh its costs.



**Figure 1.** Workplace dispute pyramid.

Thus, this more complex workplace dispute generation and resolution pyramid synthesizes Hirschman’s theories with those of Felstiner and his progeny. It also adds to the model the concepts of substantive and procedural legal knowledge and incentives as prerequisites for problem identification, the transformation of problems into claims, and then those claims’ resolution.

The very complexity of the model suggests that the simplistic assumptions behind our bottom-up workplace law enforcement regime (indicated by the darkened arrows in Figure 1) may be misplaced. Workers do not simply progress through a process of naming, blaming, claiming, and claim resolution; they must at every step choose among alternatives and have the legal knowledge and appropriate incentive structure to encourage progression.

The pyramid also raises many empirical questions. Which workers have the substantive legal knowledge to recognize certain workplace problems as justiciable rights violations? Which workers have the procedural legal knowledge required to transform their claims into lawsuits or agency complaints? Which workers choose exit or silent loyalty over voice, at which stage in the process, and why? What forms of extralegal dispute resolution might workers be accessing as alternatives to

court, and how do those mechanisms work? How are workers' incentive structures—their assessments of claiming's costs and benefits—functioning to encourage or discourage claiming? How do those incentives shift and change over the course of the process, and do they work differently for claims of different type and magnitude? Finally, as a policy matter, how do we want these incentive structures to function, and what are the implications for our bottom-up workplace law enforcement regime?

The data presented in this Article provide an opportunity to examine some of these questions, focusing on low-wage, front-line workers as potential workplace rights enforcers. In particular, this Article investigates which of these workers make claims on the job, the prevalence of retaliation against workers who do engage in claiming behavior, the level of workers' substantive and procedural legal knowledge, and workers' incentives to engage in claiming activity. However, these data also leave many questions unanswered, paving the way for additional future research.

## II. METHODOLOGY

### A. 2008 Unregulated Work Survey

The data analyzed in this Article were originally collected as part of the 2008 Unregulated Work Survey, a large-scale study of 4387 low-wage, front-line workers in New York, Chicago, and Los Angeles. With foundation funding, the study was conducted by researchers from the National Employment Law Project, the University of Illinois at Chicago's Center for Urban Economic Development, and the UCLA Institute for Research on Labor and Employment, in partnership with researchers at Cornell University, the City University of New York, Rutgers University, and the UCLA Downtown Labor Center. The survey team originally published some of its findings in a 2009 report, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*,<sup>35</sup> and released its full data set to outside researchers, including the present authors, for the first time in January 2012.

The survey targeted workers in each city who were at least eighteen years old and who worked in industries where the median wage was less than 85% of the city median wage.<sup>36</sup> Workers also had to hold "front-line," or nonmanagerial, nonsupervisory, and nontechnical jobs.<sup>37</sup> Workers surveyed included cooks and dishwashers, car-wash workers, groundskeepers, maids and housekeepers, parking lot attendants, cashiers, cafeteria workers, tellers, garment workers, teacher's assistants, and security guards.<sup>38</sup> Their median hourly wage was \$8.02. Each

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35. ANNETTE BERNHARDT, RUTH MILKMAN, NIK THEODORE, DOUGLAS HECKATHORN, MIRABAI AUER, JAMES DEFILIPPIS, ANA LUZ GONZÁLEZ, VICTOR NARRO, JASON PERELSHTEYN, DIANA POLSON & MICHAEL SPILLER, *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES* (2009), available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>.

36. *Id.* at 56.

37. *Id.*

38. *Id.* at 16.

worker participated in a face-to-face interview in his or her native language, including English, Spanish, Polish, Russian, Chinese, French, Urdu, Hindi, and Korean.<sup>39</sup>

Many of these workers would not be reached via traditional survey methods, as they might not appear on voter registration rolls or other official lists from which survey respondents are typically drawn or, due to their immigration status, might be unwilling to give personal information to a stranger survey-taker. Thus, a typically drawn random sample could exclude or undersample these workers, making it extremely difficult to infer anything about their characteristics or presence in the general population. As a result, the survey team employed a sampling methodology known as respondent-driven sampling (RDS).<sup>40</sup> First pioneered in public health research, RDS uses survey respondents' own social networks to allow researchers to gain access to "hidden" or hard-to-reach groups.<sup>41</sup> RDS methodology solves the problems of lack of access and mistrust by relying on each early respondent to recruit additional later respondents. In an RDS survey, each initial "seed" receives a limited number of coded coupons to distribute to other people in her social

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39. *Id.* at 13–14.

40. For more on RDS methodology, see Douglas D. Heckathorn, *Extensions of Respondent-Driven Sampling: Analyzing Continuous Variables and Controlling for Differential Recruitment*, 37 SOC. METHODOLOGY 151 (2007); Douglas D. Heckathorn, *Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations*, 44 SOC. PROBS. 174 (1997) [hereinafter *New Approach*]; Douglas D. Heckathorn, *Respondent-Driven Sampling II: Deriving Valid Population Estimates from Chain-Referral Samples of Hidden Populations*, 49 SOC. PROBS. 11 (2002) [hereinafter *Chain-Referral*]; Matthew J. Salganik & Douglas D. Heckathorn, *Sampling and Estimation in Hidden Populations Using Respondent-Driven Sampling*, 34 SOC. METHODOLOGY 193 (2004); Matthew J. Salganik, *Variance Estimation, Design Effects, and Sample Size Calculations for Respondent-Driven Sampling*, 83 J. URB. HEALTH 98 (2006); Erik Volz & Douglas D. Heckathorn, *Probability Based Estimation Theory for Respondent Driven Sampling*, 24 J. OFFICIAL STAT. 79 (2008). The above sources were all cited with approval in Michael W. Spiller, Annette Bernhardt, Jason Perelshteyn & Douglas Heckathorn, *Technical Report: Sampling, Fielding, and Estimation in the 2008 Unregulated Work Survey* (Ctr. for the Study of Econ. & Soc'y Working Paper Series, Paper No. 62, 2010), available at [http://www.economyandsociety.org/wp-content/uploads/2013/08/wp62\\_SpillerHeckathornetal\\_Sampling.pdf](http://www.economyandsociety.org/wp-content/uploads/2013/08/wp62_SpillerHeckathornetal_Sampling.pdf).

41. More specifically, some populations may be too socially stigmatized to self-identify as members of the relevant group, some may live in socially insular communities that are not readily accessible to researchers, and some may be members of groups that are simply too small to be captured in a typical randomly drawn sample from the U.S. population as a whole. See, e.g., Douglas D. Heckathorn & Joan Jeffri, *Finding the Beat: Using Respondent-Driven Sampling to Study Jazz Musicians*, 28 POETICS 307, 308 (2001) (defining jazz musicians as a "hidden population" in that "(1) no sampling frame exists, so the size and boundaries of the population are unknown, (2) there are strong privacy concerns, not because of illegal or stigmatized behavior, but because of the tight but informal networks which outsiders find hard to penetrate, and (3) the population constitutes a small proportion of the general population"); Heckathorn, *New Approach*, *supra* note 40, at 174 ("Hidden populations' have two characteristics: first, no sampling frame exists, so the size and boundaries of the population are unknown; and second, there exist strong privacy concerns, because membership involves stigmatized or illegal behavior, leading individuals to refuse to cooperate, or give unreliable answers to protect their privacy.").

network.<sup>42</sup> “Seeds” are compensated for their participation in the survey, as well as for each additional respondent they successfully recruit. They vouch for the integrity of the survey process, solving the trust problem, and they provide researchers with an entrée to hidden communities of respondents, solving the access problem.

Though RDS allows researchers to reach respondents who would likely be missed by traditional survey methods, it creates problems of its own by generating a nonrandom sample of the population. Each respondent’s participation is not determined by chance, but instead by whether she is connected socially to a “seed.” Because randomness is the foundational assumption upon which all of statistical inference is built, RDS must compensate for the nonrandom nature of the samples that its network-recruitment method generates. RDS does so by weighting each response by the size and homophily, or sameness, of that respondent’s social network.<sup>43</sup> (Researchers determine size and homophily by asking a series of carefully designed questions of each respondent.)<sup>44</sup> Weighting produces an estimate of the prevalence of the particular variable of interest in the general population, known as the “population estimate,” within an RDS-specified confidence interval.<sup>45</sup> In other words, it allows the characteristics and experiences of the respondents who were surveyed to be generalized, roughly, to the three cities’ entire population of low-wage, front-line workers—here, approximately 1.64 million total workers.<sup>46</sup>

Though RDS-like “snowball” or chain-referral survey methodologies have existed for years, this weighting procedure represents an innovation, allowing researchers to reliably account for the nonrandomness of respondents’ inclusion in the sample. RDS methods remain an active area of research in statistics and survey design, but the methodology is generally accepted as valid and is in wide use, particularly within the fields of sociology and public health.<sup>47</sup>

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42. Spiller et al., *supra* note 40, at 4 (“Our RDS survey began with an initial set of population members to be surveyed, which we located through our contacts in each city. These ‘seeds’ were then given a fixed number of uniquely numbered dollar-bill sized coupons to pass on to other eligible population members.”).

43. See *Chain-Referral*, *supra* note 40, at 13, 20 (discussing the nonrandom nature of RDS referrals and the resulting introduction of “homophily bias” and overrepresentation of respondents with larger social networks).

44. A list of survey questions regarding respondents’ social networks appears in Appendix A. Researchers also map respondents’ social networks by tracking coupon codes and charting the links between seeds and recruited respondents. Researchers are then able to gauge the level of homophily of each social network along a variety of axes to determine whether, for example, female seeds recruited exclusively female respondents and Latino/a or Hispanic seeds recruited exclusively Latino/a or Hispanic respondents.

45. See *Chain-Referral*, *supra* note 40, at 14 (discussing computation of population estimates and standard errors).

46. BERNHARDT ET AL., *supra* note 35, at 2.

47. See, e.g., Matthew J. Salganik, *Respondent-Driven Sampling in the Real World*, 23 EPIDEMIOLOGY 148 (2012) (discussing widespread use of RDS and ongoing refinements of RDS analytical techniques).

*B. Summary Statistics*

Table 1 reports the number and percentage of survey respondents by a variety of demographic and job characteristic variables. The term “high road,” which appears in Table 1 and throughout this Article, is used by labor economists to designate employers that provide some fringe benefits and pay their employees more than the required minimum:

It is commonly posited that employers face the choice of either competing on the basis of cost or competing on the basis of quality, variety, and service. In popular discussion, the former is referred to as the “low road” and the latter as the “high road,” on the assumption that the latter implies more generous employment conditions (such as wages) and new work systems.<sup>48</sup>

The original survey team designated a “high-road” employer as one that provided two or more of the following: health insurance, paid vacation days, paid sick days, and pay raises to employees. In this data set, the “high-road” designation was not particularly correlated with employer size. Employers with fewer than one hundred employees were roughly as likely as employers with more than one hundred employees to offer “high-road” benefits.

**Table 1.** Characteristics of Survey Respondents

Variable	Frequency (Percent)
City	
Chicago	1097 (26%)
Los Angeles	1772 (42%)
New York	1391 (33%)
Gender	
Female	2250 (53%)
Male	2009 (47%)
Race/Ethnicity	
Latino/a or Hispanic	2506 (59%)
Black or African American	919 (22%)
Asian or other race	614 (14%)
White	214 (5%)
Age	
46+ years	1258 (30%)
36–45 years	1071 (26%)
26–35 years	1036 (25%)
18–25 years	785 (19%)

48. Paul Osterman, *How Common Is Workplace Transformation and Who Adopts It?*, 47 *INDUS. & LAB. REL. REV.* 173, 179 (1994) (citations omitted); see generally ARNE L. KALLEBERG, *GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S* (2013) (describing the rise of precarious labor and the growing gap in job quality between high-wage and low-wage work).

**Table 1** (continued)

Variable	Frequency (Percent)
<b>Education</b>	
Less than high school degree, no GED	1715 (40%)
High school degree or GED	1385 (33%)
Some college or associate's degree	819 (19%)
College or higher degree	326 (8%)
<b>Nativity and immigration status</b>	
U.S.-born citizen	1506 (36%)
Undocumented resident	1445 (34%)
Foreign-born citizen	518 (12%)
Documented resident	757 (18%)
<b>Union membership</b>	
Not a union member	3911 (92%)
Union member	330 (8%)
<b>Occupation during previous workweek<sup>49</sup></b>	
Service occupations	2156 (51%)
Production, transportation, and material	944 (22%)
Sales and office occupations	760 (18%)
Construction, extraction, and maintenance	333 (8%)
Management, professional, and related	66 (2%)
<b>Industry during previous workweek<sup>50</sup></b>	
Arts, entertainment, recreation, accommodations, and food services	833 (20%)
Other services (except public administration)	746 (18%)
Retail trade	662 (16%)
Nondurable goods manufacturing	605 (14%)
Educational, health, and social services	431 (10%)
Professional, scientific, and management	411 (10%)
Construction	267 (6%)
Transportation and warehousing	201 (5%)
Finance, insurance, real estate, and rental and leasing	58 (1%)
Durable goods manufacturing	32 (1%)
Wholesale trade	6 (0%)
Public administration	4 (0%)
Information and communications	3 (0%)

49. Occupation categories are those used by the U.S. Department of Labor's Bureau of Labor Statistics. See BUREAU OF LABOR STATISTICS, DOL, 2010 CENSUS OCCUPATIONAL CLASSIFICATION (2011), available at <http://www.bls.gov/cps/cenocc.pdf>.

50. Industry categories are those used by the U.S. Department of Labor's Bureau of Labor Statistics. See BUREAU OF LABOR STATISTICS, DOL, 2007 CENSUS INDUSTRIAL CLASSIFICATION (2009), available at <http://www.bls.gov/cps/cenind.pdf>.

**Table 1** (continued)

Variable	Frequency (Percent)
Job tenure	
0–5 years	3675 (87%)
6–10 years	372 (9%)
11–15 years	130 (3%)
16–20 years	29 (1%)
Employer size	
Under 100 employees	2371 (62%)
100 employees or more	1484 (38%)
“High-road” employer	
0–1 “high-road” indicators	2967 (69%)
2+ “high-road” indicators	1233 (31%)
(N = 4387)	

### C. Our Analysis

The original survey team’s 2009 *Broken Laws* report focused primarily on unpaid wages and health and safety violations experienced by low-wage, front-line workers.<sup>51</sup> Though the report also presented figures on the prevalence of retaliation and workers who chose not to make claims about workplace problems (variables of interest here), it did so only descriptively, without the regressions included in our analysis that allow study of the characteristics of workers who made different claiming choices.<sup>52</sup> Nor did the report investigate our other variables of interest: the level of workers’ substantive and procedural legal knowledge and the factors associated with workers’ being more or less informed about their rights.

Drawing on the raw survey data, our analysis focuses on five main variables: (1) workplace problems, or the frequency with which workers reported experiencing problems on the job (the “naming” of problems); (2) claims, or the frequency with which workers engaged in claiming behavior after identifying a workplace problem; (3) retaliation, or the prevalence of retaliation against workers who made claims about justiciable problems; (4) substantive legal knowledge, or the extent to which workers knew their minimum wage and overtime rights;<sup>53</sup> and (5) procedural legal knowledge, or the extent to which workers knew how to make a government complaint about a workplace problem.<sup>54</sup>

51. BERNHARDT ET AL., *supra* note 35, at 2 (“This report exposes a world of work in which the core protections that many Americans take for granted—the right to be paid at least the minimum wage, the right to be paid for overtime hours, the right to take meal breaks, access to workers’ compensation when injured, and the right to advocate for better working conditions—are failing significant numbers of workers.”).

52. *Id.* at 24–25.

53. The original survey asked only about workers’ knowledge of minimum wage and overtime law and not about their knowledge of other types of workplace rights. Relevant survey questions are reproduced in Appendix A.

54. The original survey asked only whether workers knew where to file a government complaint and not how to engage in other methods of formal claiming such as contacting an

Using the RDS network-size weighting process, we first generated population point estimates and confidence intervals for the five main variables.<sup>55</sup> This allowed us to calculate the percentage (within a given margin of error) of the three cities' low-wage, front-line workforce that fell into each of the five main variable categories, that is, the approximate percentage of workers who had identified workplace problems, made claims, experienced retaliation, and had accurate substantive and procedural legal knowledge. We also generated RDS estimates for two additional variables: (1) the reasons workers gave for their decisions not to make claims; and (2) for those who did make claims, the method(s) and subject(s) of those claims.<sup>56</sup>

Next, we explored which groups of workers were more or less likely to identify problems, make claims, experience retaliation, and have accurate substantive and procedural legal knowledge. Using logistic regression, we modeled the associations between these dependent variables and a number of independent variables, including worker demographics and job characteristics.<sup>57</sup> Though logistic regression does not allow us to identify causal relationships, it does enable us to identify whether workers with certain characteristics—for example, women or undocumented workers—were more or less likely, holding all else constant, to

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attorney, union representative, or other third party. Relevant survey questions are reproduced in Appendix A.

55. We used the Respondent Driven Sampling Analysis Tool software (RDSAT), available at <http://www.respondentdrivensampling.org>, to produce RDS population point estimates and confidence intervals.

56. We report these results in Part III and Table 7 in Appendix B.

57. We used Stata to run all regressions. We chose to use a logit model because our dependent variables are binary, that is, they have two values (0, 1). To test model fit, we used a nonlinear version of the Hausman test (a combination of the `suest` and `testnl` commands in Stata) to compare the logit and ordinary least squares (OLS) coefficients. The null hypothesis of the test is that the coefficients from both estimators are not significantly different from each other so the OLS estimator is consistent and efficient, versus an alternative hypothesis that the coefficients from both estimators are significantly different from each other so the OLS estimator would be inconsistent. The test results for our regressions led us to reject the null hypothesis, indicating that logit is the better model. In addition, we used probability weights provided by the original survey team in estimating the logistic regression equations to correct for the sample bias introduced by the RDS sampling methodology. These weights also took into account the undersampling of certain races/ethnicities among survey respondents. For a further explanation of the weighting process, see Spiller et al., *supra* note 40, at 13. Finally, following the protocol recommended by the original survey team, we dropped from our analysis all respondents identified as home health workers, due to changing coverage of this occupational category under federal and state wage and hour law. For other uses and explanations of logistic regression methods and interpretation, see James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1694–1713 (1999) (using logistic regression to model the effect of a variety of independent variables on judicial voting in cases involving unions); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 316 (2004) (using logistic regression to investigate the relationship between a judge's ideology and voting patterns).



identify problems, make claims, experience retaliation, or have accurate substantive and procedural legal knowledge.<sup>58</sup>

A preliminary note is warranted on possible limitations of the survey data. First, the survey was not designed primarily to investigate questions of problem identification, claiming behavior, retaliation, and legal knowledge. Though the particular survey questions analyzed in this Article do address those topics, they contain some gaps. For example, the questions concerning workers' substantive legal knowledge asked only about knowledge of minimum wage and overtime rights, and not about other areas of employment and labor law, and the questions concerning procedural legal knowledge inquired only about claims made to a government agency, and not about claims made via litigation. As a result, the conclusions drawn in this Article are necessarily limited.

Second, the data are now relatively old, as they were collected in 2008, five years before the time of this writing. However, 2008 came after the onset of the Great Recession, the effects of which low-wage, front-line workers continue to feel.<sup>59</sup> To the extent that depressed economic conditions have an impact on workers' claiming behavior, conditions are still relatively depressed, and readministering the survey today would likely produce substantially similar results.<sup>60</sup> In fact, some commentators have observed that conditions for low-wage, front-line workers have worsened since 2008, as employers increasingly use temporary, part-time, and other contingent work arrangements, and union density continues to decline.<sup>61</sup>

Third, one could argue that selection effects may be present among the respondents who chose to participate in the survey. Only the more assertive workers would choose to be surveyed, the argument goes, and those more assertive workers might also be more likely to have made claims on the job. However, as noted in Part III, only about 57% of workers made any claim at all in the twelve months before the survey. If this figure represents only assertive, claim-prone workers, then the real incidence of claiming behavior was even lower, further emphasizing the problems with a claims-driven, bottom-up workplace law enforcement regime.

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58. Part III and Tables 8–12 in Appendix C present the results of our logistic regression models.

59. See, e.g., *Long-Term Unemployment: Causes, Consequences, and Solutions: Hearing Before the Joint Econ. Comm.*, 111th Cong. 35, 36 (2010) (statement of Lawrence F. Katz, Professor, Harvard University) (testifying about lingering “labor market distress” well into 2010).

60. See Willborn, *supra* note 10, at 8 (postulating that “[e]conomic downturns may . . . affect discovery of violations through private enforcement”).

61. PAMELA LOPREST & AUSTIN NICHOLS, UNEMPLOYMENT & RECOVERY PROJECT, URBAN INST., LESS-EDUCATED CONTINUE TO LOSE JOBS IN RECOVERY—EVEN IN LOW-WAGE INDUSTRIES (2011), available at [http://www.urban.org/url.cfm?id=412382&RSSFeed=UI\\_PovertyandSafetyNet.xml](http://www.urban.org/url.cfm?id=412382&RSSFeed=UI_PovertyandSafetyNet.xml) (“[S]ince the end of the recession, low-skill workers continue to be the biggest net job losers across industries.”); WEIL, *supra* note 3, at 9–11 (discussing the breakup, or “fissuring,” of the traditional employment relationship, declining unionization rates, and other factors contributing to the degradation of conditions for low-wage, front-line workers).

### III. RESULTS

This Part, along with the tables in Appendices B and C,<sup>62</sup> reports the results of our analysis of the survey data. The subsequent Part discusses possible explanations for our findings and considers the implications for bottom-up workplace law enforcement.

#### A. Workplace Problems

About one-third of low-wage, front-line workers identified a problem on the job in the twelve months before the survey.<sup>63</sup> In Felstiner's terms, these are the workers who perceived, or "named" problems. However, the occurrence of actual workplace problems was probably much higher. The original survey team gathered respondents' raw wage and hour data and determined that 26% of workers had been paid less than the minimum wage during the previous workweek and 76% who had worked more than forty hours had not been paid proper overtime.<sup>64</sup> Thirty percent of tipped workers had not been paid lawfully, and 70% of workers who had worked beyond their scheduled shift were not paid for this extra working time.<sup>65</sup> These calculations focus only on violations of wage and hour laws; occurrences of actual workplace problems may have been higher if other rights violations were also considered.<sup>66</sup>

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62. Table 7 in Appendix B reports the RDS population point estimates and confidence intervals for the five main variables (workplace problems, claims, retaliation, substantive legal knowledge, and procedural legal knowledge), along with the reasons workers gave for their decisions not to make claims, and, for those who did engage in claims making, the method(s) and subject(s) of their claims. Tables 8–12 in Appendix C show the full results of our logistic regression equations for the workplace problems, claims, retaliation, and substantive and procedural legal knowledge variables.

63. The original survey did not ask respondents directly about workplace problem identification. As a result, we calculated the rate of problem identification by adding together the workers who had made a claim about a problem with the workers who had identified a problem but did not make a claim. *See infra* Appendix A (reproducing two separate survey questions).

64. BERNHARDT ET AL., *supra* note 35, at 2–3.

65. *Id.*

66. For example, surveys of almost five hundred low-wage workers in the San Francisco, California, area conducted by sociologist Shannon Gleeson revealed that:

Almost all claimants had had a rest or meal break denied or shortened throughout their working life, and half reported problems with timely payment.

Over a third had been denied time off for illness and half had been become injured or ill because of their job. Verbal abuse or degrading treatment had at some point been present for two-thirds of the sample, and over a quarter of all women reported being sexually harassed at some point.

Shannon Gleeson, *The Limits to Lawyering: Findings from a Survey of Low-Wage Workers in the San Francisco Bay Area*, Remarks at the Labor and Global Solidarity, American Sociological Association Labor & Labor Movements Section Mini-Conference (Aug. 12, 2013) (on file with author).

The difference between the one-third of workers who identified workplace problems and the higher rates of actual problems points to issues with “naming”: workers were not “saying to [themselves] that a particular experience has been injurious.”<sup>67</sup> As explored further below, the discrepancy may also be explained by workers’ lack of substantive legal knowledge, creating an inability to identify justiciable problems and an underreporting of problems at work.<sup>68</sup>

Table 2 lists the characteristics of the workers who were more and less likely to identify workplace problems, all else equal. This and subsequent tables in this Part list only the regression results that are statistically significant and that likely can be explained by an actual association between the independent variables (worker characteristics) and dependent variable (workplace problems) rather than by chance. These results are indicated by asterisks. The table also lists results that are just outside the bounds of significance, but appear to be intuitively correct, indicated by a dagger. Full regression results for workplace problems are reported in Table 8 in Appendix C.<sup>69</sup>

The regression results summarized throughout this Part should be interpreted differently depending on the type of independent variable at issue. For independent variables such as gender that have a discrete set of values (female and male), each value that was included in the regression model is compared to its counterpart that was not in the regression. These comparison values are known as the “base category,” and are listed for each regression in Tables 8–12 in Appendix C. For example, in Table 2, the variable “female” is included in the model, while “male” is in the base category. Table 2 shows that, holding all else constant, women workers were less likely to have identified a workplace problem in the previous year than male workers, the value in the base category. For continuous independent variables such as age, the results reflect the impact on the dependent variable when the value of the independent variable increases by one. Referring again to Table 2, for example, each additional year of age reported made a respondent less likely to identify a workplace problem.

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67. Felstiner et al., *supra* note 24, at 635.

68. The discrepancy might also be explained by respondents’ reluctance to identify workplace problems to survey takers, out of a fear that their complaints might somehow reach their employers’ ears.

69. Throughout this Part, we have chosen only to examine the sign, or direction, of the association between independent and dependent variables, rather than the relative strength of that association. Though additional work could be done (using odds ratios or marginal effects) to rank the relative impact of each independent variable on the dependent variables, because many of our results lack statistical significance, we have chosen to restrict our analysis to an examination of only the sign or direction of the coefficient and not its relative magnitude.

**Table 2.** Workplace Problems

Less likely to identify workplace problem	More likely to identify workplace problem
<ul style="list-style-type: none"> <li>• Female**</li> <li>• Age***</li> <li>• Not a union member<sup>†</sup></li> <li>• Job tenure of fewer than 12 months*</li> <li>• Employer has fewer than 100 employees**</li> </ul>	<ul style="list-style-type: none"> <li>• Education***</li> <li>• Does not know where to file government complaint (procedural legal knowledge)**</li> <li>• Employer is not “high road”***</li> </ul>
(N = 3620)	

\*\*\*p ≤ 0.01; \*\*p ≤ 0.05; \*p ≤ 0.10; <sup>†</sup>p ≤ 0.15

As Table 2 shows, women, nonunion members, workers who had job tenure of less than one year, and workers at employers with fewer than 100 employees were all less likely than their counterparts in the base category to have identified a problem at work in the previous twelve months. In addition, for every year of age a respondent reported, she was less likely to have identified a workplace problem.

The results with respect to gender, union membership, and increasing age appear generally to follow from theory. Women, nonunion members, and older workers, who tend to hold less powerful positions in the workplace and society as a whole, may be less accustomed to taking the relatively transgressive step of “naming” workplace problems, to “saying to [themselves] that a particular experience has been injurious.”<sup>70</sup> These groups of workers may also have less legal knowledge than other worker groups to enable them to identify problems at work. For example, Table 5, *infra*, reports that each increasing year of a respondent’s age was associated with a lower chance that a worker knew her minimum wage and overtime rights. In addition, labor unions may serve an educational or consciousness-raising function, enabling their members to engage in more “naming” of workplace problems than their nonunion counterparts.<sup>71</sup> Social science research has also shown that women in particular may be reluctant to “name” workplace problems as such, “to perceive themselves as targets of discrimination [including sexual harassment], notwithstanding evidence” that these workplace problems have occurred.<sup>72</sup> Researchers posit that this may be a self-esteem preservation strategy: if women workers’ failings are the result of personal deficiencies, rather than their gender, their self-esteem may suffer in the “performance domain,” but may be intact with respect to their standing in society as a whole.<sup>73</sup> Such a dynamic may be at play in the results reported in Table 2, where women workers were less likely than men to “name” workplace problems.

70. Felstiner et al., *supra* note 24, at 635.

71. The results reported in Table 5, *infra*, complicate this narrative somewhat.

72. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 26 (2005) (collecting social science research).

73. *Id.* at 26–27.

With respect to job tenure, this result may merely be a consequence of exposure: workers who had been employed for less than a full year may have had fewer opportunities to experience, and to identify, a problem on the job during that year. Alternatively, workers with shorter job tenures may have had less experience in the workplace generally and be less aware of and able to identify workplace problems when they occurred.

Finally, the positive association between a lower likelihood of naming workplace problems and a worker's employment at a relatively small employer (fewer than 100 employees) could be interpreted in multiple ways. On the one hand, there may be fewer workplace problems to identify in the first place at smaller employers, because those workforces may be closer-knit and better at avoiding workplace conflict than larger ones.<sup>74</sup> On the other hand, the rate of underlying workplace problems may be the same at smaller and larger employers, but workers at smaller employers may be less likely to identify those problems because of a greater sense of loyalty generated by small workplace size, or because smaller "mom and pop" employers may tend to hire workers who are a priori less educated and assertive than workers employed at larger, more sophisticated operations.<sup>75</sup>

Table 2 also shows that every year of education reported by a worker made it more likely that she had identified a workplace problem in the previous twelve months. Workers who did not know where to file a government complaint and those employed by "low-road" employers were also more likely to have identified problems on the job. The education result makes sense: as education levels increase, one would expect workers to be aware of their legal rights and norms of fair treatment on the job, and to "name" violations of those rights and norms as they occur. The result with respect to workers employed by low-road employers is also intuitive: employers that do not provide health insurance, paid sick and vacation leave, and pay raises may generate more dissatisfaction in the workplace, and their workers may be more likely to identify workplace problems.

The result with respect to lack of procedural legal knowledge is harder to explain, as one might expect that workers who did not know where to file a government complaint would be less likely to have identified a workplace problem

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74. See, e.g., Harry Matlay, *Employee Relations in Small Firms: A Micro-Business Perspective*, 21 EMP. REL. 285, 292 (1999) (describing the results of a study of approximately 6000 small businesses in the United Kingdom; finding that "[t]he deliberate informality inherent in the majority of [small business] owner/managers' styles seems to have facilitated a personal approach that, in most cases, resulted in amicable solutions to complex and occasionally acrimonious work-related situations").

75. See, e.g., Marilyn Carroll, Mick Marchington, Jill Earnshaw & Stephen Taylor, *Recruitment in Small Firms: Processes, Methods and Problems*, 21 EMP. REL. 236, 238 (1999) (describing results of a study of forty small firms in the United Kingdom; reporting complaints from small firms about "the quality of labour available, including a lack of basic literacy skills, particularly among young people"); George Saridakis, Rebeca Muñoz Torres & Stewart Johnstone., *Do Human Resource Practices Enhance Organizational Commitment in SMEs with Low Employee Satisfaction?*, 24 BRIT. J. MGMT. 445, 452 (2013) (finding in analysis of nationwide survey of British firms that "employees in small organizations are more committed [to their organizations] than their counterparts in large firms").

in the previous twelve months. However, this result may in fact signal the importance of a worker's having both substantive and procedural legal knowledge in order to progress up the dispute identification and resolution pyramid. Without knowledge of her substantive legal rights in the workplace, procedural legal knowledge alone—knowing where or how to file a workplace complaint with the government—may not help a worker take the initial step of “saying to [herself] that a particular experience has been injurious.”<sup>76</sup>

### B. Claims

Of the workers who had identified a workplace problem within the year prior to the survey, about 57% decided to make a claim of some type.<sup>77</sup> Almost all of these workers (96%) chose to make a claim to their employer, while very few complained directly to a government agency or to an intermediary such as an attorney or union representative. Sixty-five percent of workers' claims were about justiciable workplace problems, that is, violations of workers' legal rights around pay, discrimination, harassment, abuse, or occupational safety. The remaining claims were nonjusticiable, centering on quality of worklife (e.g. commute time, workload, and work schedule) and benefits. Of all workers who had identified a workplace problem, then, approximately 37% made a claim about a justiciable problem, 20% made a nonjusticiable claim, and 43% made no claim at all.

Of the 43% of workers who decided not to make a claim about an identified workplace problem, the top two reasons workers gave for their decision were a fear of being fired and a belief that the claim would make no difference.<sup>78</sup> The next two reasons (apart from “other”) were also retaliation related: the worker's fear of having her wages or hours cut and the worker's knowledge of retaliation against others for claiming behavior. The next reason points to a lack of procedural legal knowledge: uncertainty as to how to make a claim.

Table 3 lists the worker characteristics that were associated with a greater or lesser likelihood of claims making.<sup>79</sup>

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76. Felstiner et al., *supra* note 24, at 635.

77. Appendix A reproduces the relevant survey questions. Here, workers were asked, “During the last 12 months, did you make a complaint, either by yourself or with co-workers, about your working conditions, by going to your employer, supervisor or going to a government agency?”

78. Workers were asked, “During the past 12 months, were there times when you DID NOT complain, even though you had a problem at your job with dangerous working conditions, discrimination, not being paid the minimum wage or not being paid overtime?” and “What stopped you from complaining?” The menu of choices is listed in Appendix A.

79. Full regression results for the claims model are reported in Table 9 in Appendix C.

**Table 3.** Claims

Less likely to make claim	More likely to make claim
<ul style="list-style-type: none"> <li>• Does not know minimum wage and overtime rights (substantive legal knowledge)*</li> <li>• Does not know where to file a government complaint (procedural legal knowledge)**</li> <li>• Employer is not “high road”*</li> <li>• Not a union member<sup>†</sup></li> <li>• Age<sup>†</sup></li> <li>• Job tenure of fewer than 12 months***</li> <li>• Asian or other race<sup>†</sup></li> </ul>	<ul style="list-style-type: none"> <li>• No results</li> </ul>
(N = 1422)	

\*\*\*p ≤ 0.01; \*\*p ≤ 0.05; \*p ≤ 0.10; †p ≤ 0.15

The regression results summarized in Table 3 suggest that workers without substantive and procedural legal knowledge, as well as workers who were not union members or who worked for a low-road employer, were less likely to make claims about a workplace problem than their counterparts in the base category. In addition, for each additional year of age reported by a worker, the likelihood that she had made a claim in the twelve months before the survey decreased. Finally, workers who had been employed for fewer than twelve months were less likely to have made a claim during that time, as were workers who identified as “Asian or other race.”<sup>80</sup>

These results are, on the whole, as one might expect: less powerful and economically stable workers appear less likely to engage in claiming behavior than their more powerful and stable coworkers. For example, claims may be riskier for older than younger workers, because if an older worker is fired in retaliation, finding a replacement job may be relatively more difficult.<sup>81</sup> Likewise, nonunion members might be expected to make claims less frequently than their unionized counterparts, as they have less support and fewer channels through which to air their grievances.

In addition, workers who were employed by low-road employers were less likely to make claims than their counterparts in the base category. At first glance,

80. “Other races” include any worker who did *not* identify as “White,” “Black or African American,” or “Latino/a or Hispanic.”

81. *See, e.g.,* Sewin Chan & Ann Huff Stevens, *Job Loss and Employment Patterns of Older Workers*, 19 J. LAB. ECON. 484, 485 (2001) (finding that employment rates of workers aged 50 and older “are substantially below the employment rates of comparably aged nondisplaced workers” and that “a job loss at age 50 or above has substantial and long-lasting employment effects”). Older workers may also have more dependents to support than younger workers, increasing the harm caused by a retaliatory job loss and making those workers more reluctant to risk retaliation by making claims.

this result may seem counterintuitive: workers at low-road companies would presumably have more to complain about than their counterparts who receive benefits and pay raises. However, low-road employers may hire a less empowered workforce to begin with, or might send signals, either explicitly or implicitly by providing substandard wages and working conditions, that worker claims would be futile.

It is also unsurprising that workers who did not know their substantive legal rights or how to make a government complaint were less likely to make claims than workers who did have this knowledge. This result squares with the self-reported reasons, discussed above, that workers gave for choosing not to make claims after identifying workplace problems: a top explanation given was that workers did not know how to make a claim.

Workers who had held their job for fewer than twelve months were also less likely to have made a claim about a workplace problem during that time. This may simply reflect the opportunity (or lack thereof) to experience a problem: the longer a worker remains on the job, the more potential exposure she has to workplace problems and the more chances she has to make claims. In addition, the more experience a worker accrues at a job, the more valued she may feel at the company and the more secure she may feel in engaging in claiming behavior.

Finally, it is difficult to explain why workers who identified as “Asian or other race” were less likely to make claims than other workers who identified as “White,” “Black or African American,” or “Latino/a or Hispanic.” As Tables 5 and 6 show, workers who identified as “Asian or other race” were less likely than members of other racial and ethnic groups to have accurate substantive and procedural legal knowledge. This lack of legal knowledge—itsself an interesting result—probably contributed to these workers’ lower likelihood of engaging in claiming behavior.

### C. Retaliation

Of the workers who had made claims about justiciable problems in the twelve months before the survey, about 43% experienced some form of employer reprisal in response to their most recent complaint.<sup>82</sup> Of these reprisals, roughly 35% constituted unlawful retaliation in violation of labor and employment laws, including termination or suspension, calls to the police or immigration, decreases in hours, and abuse and harassment.<sup>83</sup> The remaining reprisals were acts such as threats that likely did not rise to the level of an “adverse employment action,” a requirement for retaliation to be unlawful,<sup>84</sup> but nevertheless likely had a silencing effect on workers.

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82. Workers were asked, “Did your employer or supervisor know you made this complaint?” and “Did your employer or supervisor do any of the following as a direct result of this complaint?” The menu of choices is listed in Appendix A.

83. To identify unlawful retaliation, the original survey team analyzed respondents’ descriptions of the reprisals they experienced and counted only those acts that would be actionable under the relevant labor and employment laws. Spiller et al., *supra* note 40, at 25–26 (describing criteria used).

84. Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535 (2001) (discussing adverse employment action requirement for FLSA).



Apart from those workers who experienced some form of retaliation, approximately 15% of workers reported that their employers addressed or promised to address the workers' claims. The remaining workers' employers took no action, ignored the workers' claims, or engaged in some other response.

Thus, in sum, of all workers who had made claims about justiciable workplace problems, about 15% experienced unlawful retaliation, 28% experienced some other form of reprisal, another 15% had their claims addressed or promised to be addressed, and 42% were met with employer inaction or some other response.

Table 4 lists the variables that were associated with higher and lower risks of employer retaliation of all types, not just reprisals that would constitute violations of the law. Full regression results on retaliation are reported in Table 10 in Appendix C.

**Table 4.** Retaliation

Less likely to experience retaliation	More likely to experience retaliation
<ul style="list-style-type: none"> <li>Made claim alone*</li> </ul>	<ul style="list-style-type: none"> <li>No results</li> </ul>

(N = 560)

\*\*\*p ≤ 0.01; \*\*p ≤ 0.05; \*p ≤ 0.10; †p ≤ 0.15

As Table 4 shows, we achieved only one statistically significant result with respect to retaliation. We suspect that a smaller number of observations (560 as opposed to between 1422 and 3620 for the other dependent variables) may be driving this outcome. It also may be explained by the very nature of retaliation. Individual-level worker characteristics such as gender and race/ethnicity may not be associated strongly with the experience of reprisals because an employer's retaliatory threats or acts may be directed toward the workforce generally, as opposed to singling out a particular worker or workers.<sup>85</sup> For example, an employer may gather the entire low-wage, front-line workforce and threaten them about the negative consequences of claiming behavior.<sup>86</sup> Such threats may have a silencing effect across the workforce, without regard to individual worker characteristics, and may therefore not register in the regression analyses performed in this Part.

Turning to the one result in Table 4, workers who made claims alone were less likely to experience retaliation of any type than those who complained in a group. This may seem counterintuitive, as individual claimants would appear to be weaker and more vulnerable to being "picked off" by employer retaliation. However, employers may perceive claims brought by groups of workers as more threatening than those brought by individuals, and therefore be more likely to engage in reprisals against group rather than individual claimants.

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retaliation cases); Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623 (2003) (same for Title VII).

85. Thanks to Pauline Kim for this insight.

86. See, e.g., *infra* Part V.A (recounting a circumstance in which an entire workforce was likely silenced by an employer's threats).

#### *D. Substantive Legal Knowledge*

Approximately 41% of workers had accurate substantive legal knowledge in the area of wage and hour law, meaning that 59% misunderstood their minimum wage and overtime rights.<sup>87</sup> With respect to the minimum wage, workers were asked to name the current applicable minimum wage in their city, and the original survey team checked the responses for accuracy based on the federal, state, and local laws in place at the time. Workers over- and underestimated the required minimum wage in about equal numbers: 25% gave a number below the required minimum, while 21% gave a number above.

Table 5 lists the variables that were associated with a greater or lesser likelihood of a worker's knowing her minimum wage and overtime rights. Full substantive legal knowledge regression results are reported in Table 11 in Appendix C.

**Table 5.** Substantive Legal Knowledge

Less likely to know minimum wage and overtime rights	More likely to know minimum wage and overtime rights
<ul style="list-style-type: none"> <li>• Employer has fewer than 100 employees***</li> <li>• Age***</li> <li>• Black or African American***</li> <li>• White***</li> <li>• Asian or other race<sup>†</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Not a union member*</li> <li>• No legal immigration status<sup>†</sup></li> </ul>
(N = 3620)	

\*\*\*p ≤ 0.01; \*\*p ≤ 0.05; \*p ≤ 0.10; <sup>†</sup>p ≤ 0.15

Here, workers who worked for relatively small employers (those with 100 or fewer employees) were less likely than employees of larger companies to know their minimum wage and overtime rights. As workers reported higher ages, the likelihood that they had accurate substantive legal knowledge also fell. In addition, workers who identified as “Black or African American,” “White,” or “Asian or other race” were less likely to know their minimum wage and overtime rights than those who identified as Latino/a or Hispanic. On the other hand, workers who were not union members and who had no legal immigration status (i.e. were undocumented workers) were more likely to report accurate knowledge of their wage and hour rights.

The result with respect to employer size is relatively intuitive: smaller companies that lack human resources departments or formal employee screening

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87. Workers were asked, “As far as you know, what is the current minimum wage in [CITY]?” and “As far as you know, do employers have to pay workers more than their usual wage when they work more than 40 hours in a week?” See *infra* Appendix A.

procedures may hire a less sophisticated workforce with lower levels of legal knowledge. Alternatively, smaller companies may do a worse job than larger companies of educating their employees about workplace laws through training and compliance programs.<sup>88</sup>

With respect to age, older workers may be at a disadvantage in knowing their minimum wage rights because the minimum wage changes over time. For example, the oldest respondent was eighty-one years old at the time of the survey. Since his or her eighteenth birthday in 1945, federal minimum wage laws have changed twenty-six times, California's state minimum wage law has changed at least eleven times, Illinois' at least fourteen times, and New York's at least sixteen times.<sup>89</sup> A worker may learn the minimum wage when she enters the workforce and may update that knowledge periodically, but may not always have accurate, current minimum wage information for her locality.

Turning to the race and ethnicity results, it is unclear why members of certain races or ethnicities would be less likely to have substantive legal knowledge than members of other races. Here, "Latino/a or Hispanic" is the variable in the base category; workers who identified as every other race/ethnicity were less likely than Latino/a or Hispanic workers to know their minimum wage and overtime rights. This may be because Latino/a or Hispanic workers are generally overrepresented in the type of low-wage, front-line jobs targeted by this survey.<sup>90</sup> Latino/a workers may therefore have stronger networks on the job than other workers and be more likely to educate one another about their wage and hour rights. Precisely because of that overrepresentation, these workers may also be the recipients of targeted know-your-rights campaigns and outreach efforts by advocacy groups, designed to inform Latino/a workers of their substantive legal rights.<sup>91</sup>

Finally, the two variables associated with a greater likelihood of a worker's knowing her substantive minimum wage and overtime rights, "not a union member" and "no legal immigration status," appear initially to be counterintuitive. However, it may be that workers who are union members tend to earn relatively

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88. For example, research conducted in the United Kingdom has shown that employer size was correlated with legal knowledge: smaller firms were "less likely to be knowledgeable about employment rights." ROBERT BLACKBURN & MARK HART, SMALL FIRMS' AWARENESS AND KNOWLEDGE OF INDIVIDUAL EMPLOYMENT RIGHTS (Small Business Research Centre, Kingston Univ., Employment Relations Research Series No. 14) 70-71 (2002).

89. See Wage & Hour Div., *Changes in Basic Minimum Wages in Non-Farm Employment Under State Law: Selected Years 1968 to 2013*, U.S. DEP'T OF LAB. (Apr. 2013), <http://www.dol.gov/whd/state/stateMinWageHis.htm#.UNHUt3ek04U>; Wage & Hour Div., *History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938-2009*, U.S. DEP'T OF LAB., [http://www.dol.gov/whd/minwage/chart.htm#.UM\\_ECqDyXRQ](http://www.dol.gov/whd/minwage/chart.htm#.UM_ECqDyXRQ).

90. See, e.g., Janelle Jones & John Schmitt, *Low-Wage Latino Workers*, CENTER FOR ECON. POL'Y & RES. (Apr. 4, 2012, 11:15 AM), <http://www.cepr.net/index.php/blogs/cepr-blog/low-wage-latino-workers> (concluding that, given their overall presence in the population, "Latinos are indeed over-represented among low-wage workers," defined as those who earn \$10 per hour or less).

91. For example, the U.S. Department of Labor's Wage and Hour Division runs a campaign that specifically targets undocumented workers with wage and hour claims. Wage & Hour Div., *We Can Help*, U.S. DEP'T OF LAB., <http://www.dol.gov/wecanhelp/>.

high wages under their particular collective bargaining agreements and are therefore less informed about universally applicable minimum wage requirements under the law.<sup>92</sup> In addition, undocumented workers, who, like Latino/a and Hispanic workers, hold a disproportionate number of low-wage, front-line jobs,<sup>93</sup> may be the recipients of the same sort of targeted “know-your-rights” outreach efforts by advocacy groups discussed above. Undocumented workers may also be less complacent about knowing the law than their documented counterparts, as the law shapes their existence to a great extent, with the risk of arrest, detention, and deportation looming large in their working lives.<sup>94</sup>

#### *E. Procedural Legal Knowledge*

Approximately 23% of workers had accurate procedural legal knowledge; a corresponding 77% did not know where to file a workplace complaint with the government. Interestingly, even those workers who knew how to make a government complaint were unlikely to act on that knowledge, as 96% of workers who did make a claim on the job made it directly to their employers, rather than to a government agency or other third party. Moreover, the 23% result may actually be inflated, as a worker’s knowledge of government complaint procedures was self-reported, with no way for researchers to test the accuracy of workers’ responses.<sup>95</sup>

Table 6 lists the variables that were associated with higher and lower likelihoods of a worker’s knowing where to file a government complaint.<sup>96</sup>

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92. Lawrence Mishel, *Unions, Inequality, and Faltering Middle-Class Wages*, 342 ECON. POL’Y INST. ISSUE BRIEFS 1 (2012) (reporting that workers covered by a union contract earn 13.6% higher wages than those without a union contract).

93. RANDY CAPPS, MICHAEL FIX, JEFFREY S. PASSEL, JASON OST & DAN PEREZ-LOPEZ, URBAN INST., BRIEF NO. 4, A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 1 (2003) (finding that “[i]mmigrants compose an increasingly large share of the U.S. labor force and a growing share of low-wage workers” and “[t]wo of every five low-wage immigrant workers are undocumented”).

94. Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 563 (2010) (contending that, “like the holistic experiences of race, class, and gender,” “undocumented status is similarly a master status that is constructed by the law and that in turn shapes an individual’s relationship to the law” (emphasis omitted) (citations omitted)).

95. Workers were asked, “Do you know where to file a complaint with the government if you are having a problem with an employer?” See *infra* Appendix A.

96. Full procedural legal knowledge regression results are reported in Table 12 in Appendix C.

**Table 6.** Procedural Legal Knowledge

Less likely to know where to file government complaint	More likely to know where to file government complaint
<ul style="list-style-type: none"> <li>• Female***</li> <li>• No legal immigration status***</li> <li>• Employer is not “high road”***</li> <li>• Asian or other race**</li> </ul>	<ul style="list-style-type: none"> <li>• Age***</li> <li>• Education**</li> <li>• Black or African American**</li> </ul>

(N = 3606)

\*\*\*p ≤ 0.01; \*\*p ≤ 0.05; \*p ≤ 0.10; †p ≤ 0.15

As Table 6 shows, women, workers without legal immigration status, workers employed by low-road employers, and those who identified as “Asian or other race” were all less likely than those in the base category to know where to file a workplace complaint with a government agency. On the other hand, increasing age, education, and identification as “Black or African American” were associated with a greater likelihood of a worker’s having accurate procedural legal knowledge.

These results generally follow from theory. Low-wage, front-line women, who have lower social standing than their male counterparts, may have had less exposure than men to information about government complaint procedures. And undocumented workers, despite having relatively greater substantive legal knowledge, might not know how to make a government complaint because of an overarching view that government contact of any sort would risk detection and deportation.<sup>97</sup>

The result regarding low-road employers is also consistent with intuition: low-road employers may be less likely to educate their workers about government complaint procedures, or may hire workers who are a priori less knowledgeable about their procedural legal rights. In addition, workers who identified as “Asian or other race” were less likely to have procedural legal knowledge. As with the results in Tables 3 and 5, some cultural norm against claiming may be in effect, resulting in workers who identify as “Asian or other race” being less likely to have legal knowledge or engage in claiming behavior.

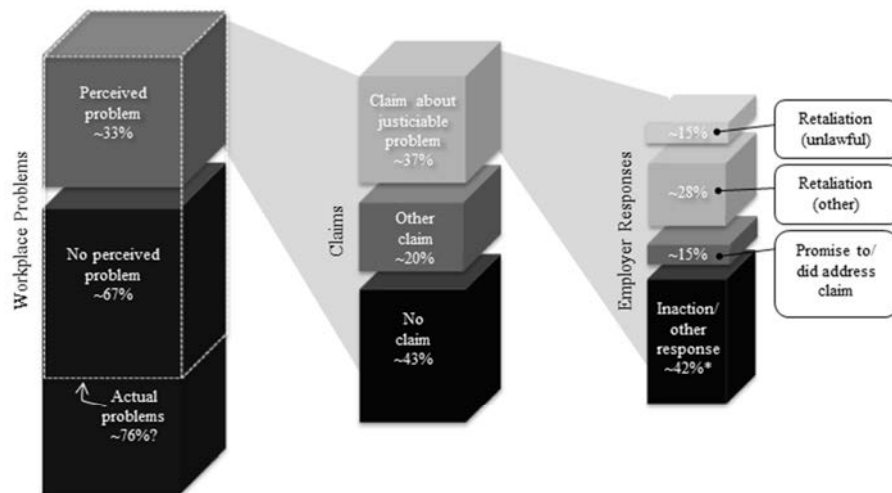
On the flip side, age, education, and identification as “Black or African American” were positively associated with accurate procedural legal knowledge. With respect to age, unlike the substantive wage and hour laws, channels for government complaint tend not to change over time. One would therefore expect procedural legal knowledge to increase as workers grow older and have more exposure to workplace problems and channels for complaint. In addition, workers with higher levels of education overall may know more about how to lodge a government complaint than those with fewer years of schooling. Finally, workers’

97. See, e.g., Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1101–03 (2011) (discussing unauthorized immigrants’ mistrust of even friendly or status-neutral U.S. government institutions).

identification as “Black or African American” may be positively correlated with procedural legal knowledge because African Americans may have a comparatively longer history of seeking government redress for legal wrongs than other racial or ethnic groups.

#### IV. IMPLICATIONS FOR BOTTOM-UP WORKPLACE LAW ENFORCEMENT

Taken together, the results reported in Part III suggest some conclusions about the empirics of workplace dispute generation and resolution and the functioning of our system of bottom-up workplace law enforcement. First, though our workplace law enforcement regime is designed to identify, surface, and resolve justiciable problems from the bottom up, some number of actual workplace rights violations are never even identified, or “named,” by workers. This can be seen in Figure 2, which synthesizes the findings reported in Part III and replicates a workplace dispute pyramid, turned on its side.



**Figure 2.** Workplace problems, claims, and employer responses.

\* Because of a small number of observations, RDSAT was not able to generate a population point estimate for the 42% figure, which is therefore a very rough estimate.

As the left-most column shows, though the original survey team calculated rates of actual wage and hour law violations of up to 76%, only about 33% of workers “named” a workplace problem. This slippage between actual and perceived workplace problems may be attributed to workers’ lack of substantive legal knowledge: about 59% of workers did not know their minimum wage and overtime rights. Moreover, as the workplace problem regression results in Table 2, *supra*, reflect, less politically, socially, and economically powerful and secure workers—women workers, older workers, nonunion workers—were less likely to engage in the process of “naming” workplace problems. “Naming” therefore represents a point where claims are escaping from the workplace dispute pyramid, confounding the expectations of our bottom-up system of workplace law enforcement.

Second, claiming is another point of escape from the pyramid. As the second column in Figure 2 illustrates, about 33% of workers had identified workplace problems, but 43% of those workers chose not to make claims. It is unknown from these data whether workers chose silent loyalty or exit instead of voice. However, median job tenure among survey respondents was 2.25 years,<sup>98</sup> about half the national median,<sup>99</sup> suggesting that many workers may have chosen to exit their jobs after having identified workplace problems.

Third, nearly all of the claims that workers made—represented by the second column in Figure 2—were internal, made directly to the employer, while only about 4% of workers chose to make claims in the form of a lawsuit or government complaint. This may be attributed to workers' general lack of procedural legal knowledge: only 22% knew where to file a government complaint. Yet the 4% external complaint figure suggests that even procedurally knowledgeable workers may have been unlikely to act on their knowledge, perhaps pointing to a problem with workers' incentives around claiming.<sup>100</sup>

Fourth, though we do not know from these data why some workers chose to make claims, we do know that the workers who chose not to engage in claiming behavior did so because they feared retaliation or doubted the efficacy of claims making. The third column in Figure 2 shows that these beliefs were rational: about 43% of workers who had made a justiciable claim experienced some form of retaliation for their most recent claim. In addition, when asked why they chose not to make a claim, 14% of workers reported having witnessed a coworker being retaliated against. Moreover, as Figure 2 shows, of the workers who did make claims about justiciable workplace problems, only 15% of employers addressed those claims or promised to do so, while roughly 42% simply ignored the claims or gave some other response. These statistics again suggest failures in workers' incentives to make claims.

Thus, the results reported in Part III support our contention that the bottom-up workplace law enforcement regime may be failing the very workers who most need protection. Workers do not simply progress up the workplace dispute pyramid through consecutive phases of naming, blaming, claiming, and resolution. Instead, our analysis of the Unregulated Work Survey data suggests that workers are shunted off the pyramid, at minimum, at the naming and claiming stages. We contend that this drop-off occurs because low-wage, front-line workers often lack the legal knowledge and incentives needed for bottom-up workplace law enforcement. Compounding this problem, claiming incentives and legal knowledge are distributed unevenly among workers. As our analysis suggests, the least politically, economically, and socially powerful and secure workers were the least likely to make claims, the most likely to experience retaliation, and the least likely

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98. Analysis available from authors.

99. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL 08-1344, EMPLOYEE TENURE IN 2008 1 (2008), *available at* [http://www.bls.gov/news.release/archives/tenure\\_09262008.pdf](http://www.bls.gov/news.release/archives/tenure_09262008.pdf) (“The median number of years that wage and salary workers had been with their current employer was 4.1 years in January 2008.”).

100. We do not know whether some workers who initially made internal claims later chose to pursue their claims as lawsuits or government complaints.

to have accurate substantive and procedural legal knowledge: women, workers without legal immigration status, and workers with low education levels.

These findings are consistent with other research on worker claiming behavior, retaliation patterns, and legal knowledge.<sup>101</sup> For example, David Weil and Amanda Pyles have characterized the frequency of worker complaints to the U.S. Department of Labor's Wage and Hour Division and Occupational Safety and Health Administration as "exceedingly low," concluding:

Under [the Fair Labor Standards Act], although an average of about 29,000 workers complained each year between 2001 and 2004, when deflated by the total number of workers, this amounts to an average of less than 25 complaint cases for every 100,000 workers. The rate was even lower for [complaints under the Occupational Safety and Health Act] over the same period, averaging a mere 17 complaints for every 100,000 workers.<sup>102</sup>

Weil and Pyles also echo our findings on the distribution of claiming behavior, noting that "workers [who] feel vulnerable to exploitation are less likely to use their rights—these include immigrant workers, those with less education or fewer skills, and those in smaller workplaces or in sectors prone to a high degree of informal work arrangements."<sup>103</sup> Other researchers have made similar observations in the area of employment discrimination:

[I]t is not clear that litigation protects all kinds of employees equally well. Most employment discrimination suits are brought by employees who have already left the job where the discrimination took place. Further, those ex-employees who bring suit tend to come from the ranks of managers and professionals rather than from lower-level workers.<sup>104</sup>

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101. Research on crime-victim reporting patterns is also relevant here. For example, "[r]esearch indicates that the utilization of formal support services by victims of crime is relatively low" and that victim characteristics like gender and ethnicity influence the likelihood of help seeking. Michael R. McCart, Daniel W. Smith & Genelle K. Sawyer, *Help Seeking Among Victims of Crime: A Review of the Empirical Literature*, 23 J. TRAUMATIC STRESS 198, 199–200 (2010). Thanks to Leah Daigle for identifying this literature.

102. Weil & Pyles, *supra* note 7, at 69; *see also* Michele Hoyman & Lamont Stallworth, *Suit Filing by Women: An Empirical Analysis*, 62 NOTRE DAME L. REV. 61, 76 (1986) (reporting in study of suit filing among public sector workers in Illinois that "filing is a rare event," and "[o]nly 63 of 876 people filed suits (or charges)" regarding workplace problems).

103. Weil & Pyles, *supra* note 7, at 91; *see also* Mitchell Langbert, *Voice Asymmetries in ERISA Litigation*, 16 J. LAB. RES. 455, 462–63 (1995) (noting underrepresentation of women as plaintiffs in ERISA lawsuits); Willborn, *supra* note 10, at 7 (noting that workers who sue tend to be "considerably wealthier than the average employee").

104. U.S. COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS—FINAL REPORT 49–50 (1994), available at [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace); *see also* Brake, *supra* note 72 at 36 ("[T]he social costs of



With respect to retaliation, a 2012 report by the Ethics Resource Center on the incidence of retaliation against whistleblowers (workers who uncover and report unlawful conduct within their companies) found that 45% of employees “observe misconduct each year,” 65% of those workers blow the whistle, and about one in five, or 22% of those who choose to become whistleblowers, “perceives retaliation for doing so.”<sup>105</sup> Other studies in a variety of employment settings have found that fear of retaliation is often the main driver of workers’ decisions not to confront the workplace problems they identify.<sup>106</sup>

Other researchers have also found that low-wage, front-line workers routinely misunderstand their workplace rights. A survey of low-income Latino workers in Southern states found that “[m]ost people surveyed (about eighty percent) had no idea how to contact government enforcement agencies such as the Department of Labor. Many respondents did not know such agencies even exist.”<sup>107</sup> Similarly, only about half of day laborers in an Arizona survey knew the minimum wage, while a survey of over two thousand contingent workers in twenty states and the District of Columbia found that 70% of respondents did not know where to report

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claiming discrimination are primarily reserved for low-power or stigmatized social groups.”); Lauren B. Edelman, Scott R. Eliason, Virginia Mellema, Linda H. Krieger & Catherine R. Albiston, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 904 (2011) (“Research shows that minorities and the poor face substantial obstacles in mobilizing legal rights ranging from psychological and structural barriers to filing claims, to weaker legal counsel, to structural aspects of litigation that disadvantage parties that lack social clout.” (citations omitted)); Nielsen & Nelson, *supra* note 29, at 685 (collecting studies of discrimination claims-making; noting that relatively few employees who have identified a problem with workplace discrimination made a claim).

105. ETHICS RES. CTR., RETALIATION: WHEN WHISTLEBLOWERS BECOME VICTIMS: A SUPPLEMENTAL REPORT OF THE 2011 NATIONAL BUSINESS ETHICS SURVEY 2 (2012), available at <http://www.ethics.org/nbes/index.php>.

106. Brake, *supra* note 72, at 28 (collecting citations to studies) (“Most of the research on the low level of reporting discrimination has been done in the area of sexual harassment. Social science literature on sexual harassment abounds with findings showing that sexually harassed women most often choose coping strategies of avoidance or denial and that the least likely response is to report the harassment to someone in a position of authority.”); Gleeson, *supra* note 66, at 13 (“A significant portion of workers [in a study of low-wage workers in the San Francisco, California, area] attempt to negotiate with their employer before seeking legal counsel, yet those who lack English proficiency, and those in the restaurant industry (which represents one of the largest and least unionized employers in the private sector) are more likely to have their attempts met with threats. Fear of job loss remains a big hurdle for workers, who are less likely to approach a government agency directly before coming to a law clinic if they are still employed, despite clear formal protections against retaliation.”); cf. EILEEN APPELBAUM & RUTH MILKMAN, CTR. FOR ECON. & POLICY RESEARCH, LEAVES THAT PAY: EMPLOYER AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA 4–5 (2011), available at <http://www.cepr.net/publications/reports/leaves-that-pay> (finding that over one-third of workers “for whom data are available were worried that if they took [paid family leave for which they were eligible under California law], their employer would be unhappy, that their opportunities for advancement would be affected, or that they might actually be fired”).

107. S. POVERTY LAW CTR., UNDER SIEGE: LIFE FOR LOW-INCOME LATINOS IN THE SOUTH 6 (2009), available at <http://www.splcenter.org/sites/default/files/downloads/UnderSiege.pdf>.

workplace abuses.<sup>108</sup> Likewise, a study of the sexual harassment policy of a large Midwestern university reported that many administrative and clerical women employees—relatively more powerful, secure employees compared to the low-wage, front-line workers surveyed here—were confused about sexual harassment law as it applied to them.<sup>109</sup>

Stephen Lee has written about the conditions that give rise to inaccurate substantive and procedural legal knowledge among low-wage, front-line immigrant workers in particular. As he has observed, undocumented workers may perceive government enforcers of labor rights as enforcers of immigration law as well.<sup>110</sup> As a result, they may choose not to report a workplace problem to a government agency for fear that the report will trigger immigration consequences. Immigrant workers may also import legal knowledge from their home countries that is inapplicable in their U.S. workplaces and derive inaccurate beliefs about their workplace rights from relatively insular information “islands” and ethnic networks.<sup>111</sup>

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108. Mary Nell Trautner, Erin Hatton & Kelly E. Smith, *What Workers Want Depends: Legal Knowledge and the Desire for Workplace Change Among Day Laborers*, 35 LAW & POL’Y 319 (2013); ABEL VALENZUELA JR., NIK THEODORE, EDWIN MELÉNDEZ & ANA LUZ GONZALEZ, ON THE CORNER: DAY LABOR IN THE UNITED STATES 16 tbl.7 (2006), available at [http://www.urbanecconomy.org/sites/default/files/ontheCorner\\_daylaborinUS\\_39p\\_2006.pdf](http://www.urbanecconomy.org/sites/default/files/ontheCorner_daylaborinUS_39p_2006.pdf) (cited in Gleeson, *supra* note 94 at 562).

109. Anna-Maria Marshall, *Idle Rights: Employees’ Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC’Y REV. 83, 115 (2005); see also Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110, 133 (1998) (quizzing over 330 unemployed workers on knowledge of at-will employment legal rules and finding that workers gave correct answers only 51% of the time on average); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers’ Legal Knowledge*, 1999 U. ILL. L. REV. 447, 458 (administering the same survey in multiple additional states; finding corresponding correct answer rates ranging from 25.2% to 40%); Weil, *supra* note 23, at 5 n.6 (summarizing the “literature on the lack of knowledge of statutory rights under a variety of laws”).

110. See Lee, *supra* note 97, at 1101–03 (discussing unauthorized immigrants’ mistrust of even friendly or status-neutral U.S. government institutions). This mistrust is rational, given immigration agents’ history of such tactics as disguising themselves as labor officials in order to locate, detain, and deport undocumented workers. See *U.S. Ends Job “Safety” Immigration Raids*, ASSOCIATED PRESS, Mar. 29, 2006, available at <http://www.apnewsarchive.com/2006/U-S-Ends-Job-Safety-Immigration-Raids/id-e2324a8e97a434063791bb95b30ff419> (describing immigration agents masquerading as occupational health and safety workers). The mistrust persists despite a Memorandum of Understanding between the U.S. Departments of Labor and Homeland Security that requires immigration authorities to proceed with caution in detaining and deporting workers involved in a labor dispute. U.S. DEP’T OF LABOR & U.S. DEP’T OF HOMELAND SEC., REVISED MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF HOMELAND SECURITY AND LABOR CONCERNING ENFORCEMENT ACTIVITIES AT WORKSITES (2011), available at [http://www.dol.gov/\\_sec/media/reports/HispanicLaborForce/DHS-DOL-MOU.pdf](http://www.dol.gov/_sec/media/reports/HispanicLaborForce/DHS-DOL-MOU.pdf).

111. As Jennifer Gordon, R.A. Lenhardt, and Shannon Gleeson have observed, undocumented workers may also lack the legal consciousness, or view of themselves in relation to the law, to make claims. Gleeson, *supra* note 94, at 590 (“When asked why they

*A. The Failure of Operational Rights*

The drafters of the major federal labor and employment laws were not blind to the possibility that workers would need incentives to become the drivers of workplace law enforcement in a bottom-up system.<sup>112</sup> As a result, they wrote into the laws a set of protections and inducements that were meant to tip workers' cost-benefit scales in the direction of claims making. We call these "operational rights" because they operationalize or effectuate substantive statutory protections.<sup>113</sup>

Operational rights implicitly acknowledge a major contention of this Article, that workers' incentives are a key determinant of claiming behavior.<sup>114</sup> More precisely, workers assess the size of the possible benefit they might receive as a result of a claim, the certainty of receiving that benefit, and how costly the benefit will be to achieve. They weigh these factors against the benefits and costs of their

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chose not to come forward about long days or dangerous working conditions, many undocumented workers repeatedly explained that to do so would simply not be characteristic of a good worker, championing their willingness to do work others would not." (emphasis omitted)); Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1223 (2008) (labeling undocumented workers' view of themselves as hardworking and uncomplaining "identity work designed to respond in some way to the negative stereotypes and stigma associated with their particular groups"); see also Catherine R. Albiston, *Legal Consciousness and Workplace Rights*, in NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH 55, 56 (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006) (defining legal consciousness as "the dynamic process through which actors draw on legal discourse to construct their understanding of and relation to the social world, but that process takes place within a social context already structured in part by the law itself").

112. See, e.g., *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("Congress did not seek to secure compliance with [the FLSA's] prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. This ends the prohibition of [the statute] against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. By the proscription of retaliatory acts set forth in [the FLSA] . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced." (citation omitted)).

113. Alexander, *supra* note 20, at 386; see also Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 783 (2011) (discussing "suit boosters" or incentives offered to plaintiffs and their attorneys to bring private litigation).

114. See also Hoyman & Stallworth, *supra* note 102, at 63 ("The three factors which determine whether women will file are: 1) expected benefits which are a function of future positions (job property rights) available in jobs without discrimination; 2) expected costs of relief (financial and other); 3) resources which are used to file suit rather than pursue other jobs."); *id.* at 62 ("An employee calculates the cost of filing a complaint based on an estimate of the risks associated with any action to seek relief from discrimination."); Weil & Pyles, *supra* note 7, at 91 ("The likelihood that workers exercise their rights depends on both the benefits and the risks of doing so. . . .").

other options: exit or silent loyalty. Operational rights attempt to increase the size and certainty of the benefit and reduce the costs of achieving it.<sup>115</sup>

In the context of private lawsuits, operational rights offer payment (sometimes double<sup>116</sup>) for violations of a plaintiff's rights and extra payments to class representatives.<sup>117</sup> These supplement the benefits that would accrue anyway to plaintiffs who are successful in a workplace lawsuit: the opportunity to work for an employer who now complies with the law and the chance to see justice done. Operational rights also seek to minimize the costs of claiming. They offer the chance for reimbursed attorneys' fees for prevailing plaintiffs, and they outlaw retaliation and provide a private right of action for workers who have been retaliated against.<sup>118</sup> They also allow workers to band together in class or collective actions to bring joint claims against their employer.<sup>119</sup>

In the context of government complaints, operational rights also include agencies' ability to litigate claims on workers' behalf at no financial cost to the worker, their capacity to collect workers' back pay and other damages owed to them,<sup>120</sup> and agencies' promise to keep complainants' identities confidential, at least during the initial, prelitigation phases of an investigation.<sup>121</sup>

Yet our analysis of the Unregulated Work Survey data suggests that, despite their promise, operational rights may be largely ineffective in tipping many workers' cost-benefit analyses in the direction of claims. Indeed, those workers who did make claims nearly universally did so internally, and never filed a lawsuit

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115. See Weil & Pyles, *supra* note 7, at 91–92.

116. Under the Fair Labor Standards Act, plaintiffs may collect double their lost wages as liquidated damages, unless the defendant shows that its violation of the FLSA was in good faith. 29 U.S.C. §§ 216, 260 (2006).

117. *Cobell v. Salazar*, 679 F.3d 909, 922 (D.C. Cir. 2012) (describing class representative incentive payments).

118. See, e.g., 42 U.S.C. § 2000e-5 (2006) (Title VII of the Civil Rights Act of 1964's fee shifting provision); 29 U.S.C. § 216(b) (same for the FLSA); 42 U.S.C. § 2000e-3(a) (2006) (Title VII's antiretaliation provision); 29 U.S.C. § 215(a)(3) (2006) (same for the FLSA); see also *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (describing the purpose of antiretaliation protections in encouraging lawsuits).

119. 29 U.S.C. § 216(b) (allowing FLSA plaintiffs to form collective actions by individually opting into a lawsuit); FED. R. CIV. P. 23 (allowing plaintiff class actions).

120. For a description of the U.S. Department of Labor's Wage and Hour Division's ability to litigate on behalf of and collect workers' unpaid back wages, see WEIL, *supra* note 3, *passim*. For a description of the Equal Employment Opportunity Commission's capabilities in these areas, see *Administrative Enforcement and Litigation*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [http://www.eeoc.gov/eeoc/enforcement\\_litigation.cfm](http://www.eeoc.gov/eeoc/enforcement_litigation.cfm).

121. For example, Title VII of the Civil Rights Act of 1964 requires that the Equal Employment Opportunity Commission keep employee charges of discrimination confidential from the public (though not from the defendant), under penalty of a \$1,000 fine or imprisonment of up to one year. 42 U.S.C. § 2000e-5(b). See also *Solis v. Seafood Peddler of San Rafael*, No. C 12-0116 PJH, 2012 U.S. Dist. LEXIS 172137, at \*3–4 (N.D. Cal. Dec. 4, 2012) (noting that the U.S. Department of Labor may “use the ‘confidential informant’s privilege’ to shield the identity of the reporting employee(s),” but that “even plaintiff concedes that the defendants will eventually need to learn the identities of the informants ‘for purposes of trial preparation and impeachment’”).

or made a government complaint. For low-wage, front-line workers, the costs of this sort of external, formal claim may be too great, and on the other side of the scale, the benefits too small.<sup>122</sup>

First, statutory antiretaliation provisions often do not work, and workers know this. As Emily Spieler has observed in the context of workers' compensation, "[r]etaliatory discharge lawsuits are a useful tool primarily for professionals, managerial, and other upper income workers," but not for the low-wage, front-line workers studied here.<sup>123</sup> Likewise, Pauline Kim points out, quoting Cynthia Estlund:

Anti-retaliation remedies can be invoked only after the employee has suffered discharge or discipline, and offer, at best, the possibility of an uncertain remedy after a long delay. . . . Given the difficulties of pursuing a retaliation claim, [Estlund] argues, "all but the most intrepid employees will be deterred, or 'chilled' from speaking out in ways that might provoke the employer's displeasure."

To put the point more directly, speaking out at the workplace in the ways that the law encourages is hard.<sup>124</sup>

Indeed, in our analysis, about 43% of workers who had made claims in the twelve months prior to the survey had been retaliated against for their most recent claim. The workers who chose not to make claims listed retaliation-related issues (a fear of being fired, a fear of having wages or hours cut, and the worker's knowledge of retaliation against other workers who had made claims) as three of the top four reasons they decided to stay silent.

Statutory antiretaliation provisions are simply too narrow and too back-loaded to be effective in protecting low-wage, front-line workers. The "remedy" that labor and employment law offers workers who have been retaliated against is a chance to bring a retaliation claim in court, which may or may not be successful, and which may be cold (and late) comfort to a worker who has already lost her job, been deported, or suffered other adverse employment actions. And with the exception of the FLSA, which offers double damages, a successful retaliation plaintiff is only restored to her position *ex ante*, receiving back pay and possibly reinstatement, and often is not compensated for the costs of the retaliation itself.

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122. Weil, *supra* note 23, at 3 ("[T]he need to keep one's job trumps other considerations such as being denied overtime pay or potential exposures to health hazards, let alone issues related to supervisory treatment that may have no direct legal consequence.").

123. Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 230 (1994); *see also* Langbert, *supra* note 103, at 459 ("Like other individual rights regulation, ERISA's emphasis on court remedies may prove to be of mostly symbolic value for plaintiffs most in need of protection: those who are low-wage.").

124. Pauline T. Kim, *Electronic Privacy and Employee Speech*, 87 CHI.-KENT L. REV. 901, 928 (2012) (quoting Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 135 (1995)); *see also* Brake, *supra* note 72, at 20 ("To a large extent, the effectiveness and very legitimacy of discrimination law turns on people's ability to raise concerns about discrimination without fear of retaliation.").

In addition, despite some recent broadening of retaliation protections under Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act by the U.S. Supreme Court,<sup>125</sup> retaliation's definition in workplace statutes and its interpretation by courts tends to be quite narrow. For example, an employer's threats to retaliate may not themselves be actionable, even though they may be just as effective in silencing workers as when threats are carried out.<sup>126</sup> Moreover, employers may effectively retaliate against one complaining worker as an example to the rest of the workforce: that one worker may have a cause of action for retaliation, but her coworkers, who are now scared silent, have no remedy.

For plaintiffs who are undocumented or hold work-contingent visas, the consequences of retaliation may be especially severe. These workers risk losing not only their job as a result of a workplace claim, but also their home, as their employers may report them to immigration authorities.<sup>127</sup> Because the downsides include not only job loss, but also loss of a visa and removal from the country, workplace claiming becomes even more risky in the transnational labor market in which immigrants work.<sup>128</sup>

Second, while complaining to a government agency offers some increased level of protection—a guarantee of confidentiality, at least initially—a complainant's identity must eventually be revealed to an employer once a case moves into litigation or another form of dispute resolution.<sup>129</sup> In this way, a worker's costs may increase over the course of the claiming process, requiring the worker to repeatedly reassess the costs and benefits of claims making. In addition, incompetence and processing delays may render government agencies an unattractive forum for workers seeking effective and timely redress for workplace problems.<sup>130</sup>

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125. See, e.g., *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011) (holding that an oral complaint under the FLSA counted as a protected activity for purposes of the statute's antiretaliation provisions); *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 867–68 (2011) (holding that Title VII's antiretaliation provisions covered “third-party retaliation,” or reprisals against people associated with the worker who engaged in protected activity).

126. See, e.g., *Baloch v. Kempthorne*, 550 F.3d 1191, 1199 (D.C. Cir. 2008) (finding in a Title VII case that an employer's threats to suspend an employee did not amount to “material adversity” that was actionable under the statute's antiretaliation provisions).

127. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 886–87 (1984) (describing employer's retaliatory reporting of undocumented workers who had engaged in union organizing to immigration authorities, which either deported the workers or accepted their voluntary departure from the United States).

128. Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 *BERKELEY J. EMP. & LAB. L.* 353, 378–79 (2012) (discussing consequences of retaliation for immigrant workers).

129. See, e.g., *Confidentiality*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/confidentiality.cfm> (“Once a charge is filed, the individual's name and basic information about the allegations of discrimination will be disclosed to the employer.”).

130. See, e.g., *Highlights to U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-458T, WAGE AND HOUR DIVISION'S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT (2009)* (“[The Government Accountability Office's] overall assessment of the [Wage and Hour Division] complaint intake, conciliation,

Against these costs, the benefits of claiming appear paltry. Though back pay may be available to a plaintiff at the end of a lawsuit, if that amount is insufficiently large—and for plaintiffs who sue because they were paid less than the minimum wage, back pay awards will, by definition, be quite small—then enduring the uncertain, stressful, drawn-out process of litigation may not be worth it.<sup>131</sup> Moreover, our analysis reveals that workers doubt the certainty of the benefit they might receive from claims making: the second-most frequent reason for workers' choices not to make claims was that workers doubted their claims would make any difference. (On top of this, some measure of substantive and procedural legal knowledge may be necessary for workers even to know what benefits may be available to them at the end of a lawsuit or government complaint process.)

Changing legal standards have also made it harder for groups of workers to bring claims as class actions and access the benefit of joint representation.<sup>132</sup> In addition, the Fair Labor Standards Act, Equal Pay Act, and Age Discrimination in Employment Act have never allowed traditional class actions, in which a few named plaintiffs represent a largely anonymous class, but instead require each individual additional plaintiff to affirmatively opt into a case.<sup>133</sup> As a result, workers are increasingly forced to bring cases alone or in small groups, with each worker's identity exposed, setting the stage for retaliation by unscrupulous employers.

Thus, the failure of operational rights to create appropriate incentives in either the context of private lawsuits or government complaints means that the risk associated with enforcement is shifted to the parties who can least bear it. The workers who are most vulnerable to workplace rights violations in the first place are also especially unable to bear the costs associated with claiming. As a result, the would-be law enforcers for whom costs are particularly heavy, the low-wage, front-line workers studied here, may choose simply to stay silent or to exit and drop out of the workplace dispute pyramid altogether.

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and investigation processes found an ineffective system that discourages wage theft complaints.”).

131. Willborn, *supra* note 10, at 7 (“[V]ictims with larger potential awards will be more likely to enforce for a number of related reasons, such as their ability to obtain counsel, the likelihood that the award will be larger than the pecuniary and non-pecuniary costs of suit, and the likelihood that the expected recovery will still exceed expected costs even as the probability of winning decreases.”).

132. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012) (discussing *Wal-Mart v. Dukes* and *AT&T Mobility Limited Liability Company v. Concepcion*, which narrowed the availability of class actions to employment plaintiffs); *see also* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 187 (discussing multiple ways that court decisions have narrowed the ability of private individuals to bring suit to seek redress for rights violations).

133. 29 U.S.C. § 206(d) (2006) (incorporating the FLSA's opt-in requirement into the Equal Pay Act, which in any case is technically a part of the FLSA); 29 U.S.C. § 216(b) (2006) (“No employee shall be a party plaintiff to any [FLSA] action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”); 29 U.S.C. § 626(d) (2006) (incorporating the FLSA's opt-in requirement into the Age Discrimination in Employment Act).

*B. Self-Perpetuating Enforcement Gap*

Despite this gloomy picture of workplace law enforcement, it is important to note that workplace claiming does occur. In fact, private claims under the Fair Labor Standards Act have risen dramatically over the past decade.<sup>134</sup> However, research has shown that only about 15% of eligible workers opt into, or participate in, each case.<sup>135</sup> This suggests a claiming gap: 85% of workers who could become bottom-up enforcers of the FLSA and demand their unpaid minimum wage or overtime pay choose instead not to participate in litigation.<sup>136</sup>

Likewise, workers do complain to government agencies about workplace problems, but those complaints may not be coming from the workplaces most in need of agency enforcement. For example, an analysis of wage and hour complaints to the U.S. Department of Labor found an “average of less than 25 complaint cases for every 100,000 workers” and “only modest overlap” between complaints and employers’ compliance with Fair Labor Standards Act requirements.<sup>137</sup> In other words, the “market” in complaints may be failing to identify the workplaces most in need of agency intervention.<sup>138</sup>

This produces, in the end, a self-perpetuating enforcement gap in low-wage workplaces, in which worker claims are the driver of workplace law enforcement but only about half of workers are likely to make claims. Employers know this, and the unscrupulous among them feel free to underpay workers’ wages, discriminate,

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134. See Table C-2A: *U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2008 Through 2012*, U.S. CTS., <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C02ASep12.pdf> (listing 5393 Fair Labor Standards Act cases filed in federal court in fiscal year 2008 compared to 8152 cases filed in fiscal year 2012).

135. Charlotte S. Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act*, 80 MISS. L.J. 443, 466 (2010) (reporting opt-in rate in FLSA cases of 15%); see also *Rutti v. Lojack Corp.*, No. SACV 06-350 DOC (JCx), 2012 U.S. Dist. LEXIS 107677, \*14–20 (C.D. Cal. July 31, 2012) (noting problems with the FLSA opt-in structure that tend to discourage opting in by fearful, apathetic, inertia-bound workers, and those who lack legal knowledge).

136. Moreover, most of the FLSA suits that are filed are likely brought by managers claiming to have been illegally misclassified as exempt from overtime, not by low-wage, front-line workers who are making minimum wage claims.

137. Weil & Pyles, *supra* note 7, at 69, 73.

138. For statistics on the background level of workplace rights violations in low-wage workplaces, see BERNHARDT ET AL., *supra* note 35, at 2 (“We found that many employment and labor laws are regularly and systematically violated, impacting a significant part of the low-wage labor force in the nation’s largest cities.”); Donald M. Kerwin with Kristin McCabe, *Labor Standards Enforcement and Low-Wage Immigrants: Creating an Effective Enforcement System*, MIGRATION POL’Y INST. 21 (2011) (claiming that “there is substantial evidence that unauthorized immigrants work at high rates in industries with long track records of labor standards violations” and listing agriculture, meat, poultry, and fish processing, garment assembly, and sewing as industries in which wage and hour violations are “endemic”); Siobhán McGrath, *A Survey of Literature Estimating the Prevalence of Employment and Labor Law Violations in the U.S.*, BRENNAN CTR. FOR JUST. (Apr. 15, 2005), [http://brennan.3cdn.net/bdeabea099b7581a26\\_srm6br9zf.pdf](http://brennan.3cdn.net/bdeabea099b7581a26_srm6br9zf.pdf).



maintain unsafe working conditions, engage in unfair labor practices, and otherwise violate workers' rights with relative impunity.<sup>139</sup> Workers are overdeterred from claiming, while employers are underdeterred from complying.

## V. ALTERNATIVES

This Part examines alternatives to the current bottom-up workplace law enforcement regime. Heeding John Coffee's admonition that "the academic reformer has a duty to specify not only what the optimal solution is, but what the first tentative steps are that should be taken toward it,"<sup>140</sup> we first propose reforms that would address the problems of lack of legal knowledge and claiming incentives among low-wage, front-line workers. These changes would preserve the bottom-up structure of workplace law enforcement, but would attempt to do a better job of increasing benefits and decreasing costs than the present system of operational rights, thereby preventing claims from escaping the workplace dispute pyramid.

Possible reforms include minimizing bottom-up enforcers' costs by strengthening retaliation protections, eliminating the opt-in requirement of some employment statutes, and establishing an arbitration system that workers could choose to access to achieve a quick resolution of their claims. On the benefits side, we consider sweetening the proverbial pot by lifting damages caps, offering treble damages, and making punitive damages more readily available.<sup>141</sup>

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139. As Weil and Pyles put it, "an intrinsic [sic] problem arising from the statutory structure of workplace rights is that if left to the decision of an individual worker, the threshold for exercise of rights lies above the threshold optimal from the workplace—and societal—level." Weil & Pyles, *supra* note 7, at 86.

140. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 286 (1983).

141. Each of these solutions focuses specifically on reforming bottom-up workplace law enforcement rather than empowering workers generally to change conditions at work. If this were the broader goal, then union organizing and worker centers, among other solidarity-building strategies, would certainly need to be added to the mix. See, e.g., Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995) (describing the operation of a worker center in advocating for worker rights and empowerment). In fact, Allison Morantz has demonstrated that the unionization of a workplace can not only empower workers, but also increase legal compliance, at least in the area of mine health and safety. Alison D. Morantz, *Coal Mine Safety: Do Unions Make a Difference?*, 66 INDUS. & LAB. REL. REV. 88 (2013). In addition, other reform methods harnessing technology and market discipline are possible. For example, the U.S. Department of Labor has recently developed a smartphone app that allows consumers to research whether a particular business owes its employees back wages or has been cited for health and safety violations. R. Moore, *Eat Shop Sleep*, iTUNES, <http://itunes.apple.com/us/app/eat-shop-sleep/id465262611?mt=8> (app updated Mar. 19, 2012). Similarly, the new initiative Coworker.org allows workers to launch online petitions and organize themselves virtually across companies and industries to call attention to problems on the job. COWORKER.ORG, <http://www.coworker.org/>. Finally, including better measures of job quality in corporate social responsibility (CSR) indices might recruit activist consumers to the project of improving low-wage work by directing

Second, we consider workplace law enforcement regimes that would rely less heavily on workers themselves to initiate claims. Here, we propose increasing top-down, government investigative, and prosecutorial activity, and setting government enforcement priorities such that agencies take action in the workplaces where workers are least likely to step forward themselves. This set of proposals is far from comprehensive, and is meant to complement calls for reform previously suggested by other scholars and advocates.<sup>142</sup>

Of course, proposals to increase the level of workplace law enforcement beg the question of what the desirable level of enforcement is in the first place.<sup>143</sup> One's answer might depend on whether one is an employer or an employee, or whether one is more likely to become a claimant in a workplace dispute or the target of such a claim. Nevertheless, increased enforcement of labor and employment standards would likely benefit both employers and employees. Employees benefit from lawful pay, safe working conditions, and nondiscriminatory policies; employers benefit by operating on a level playing field, without being undercut by competitors who save money by paying lower wages, skimping on costly safety measures, or otherwise disregarding their legal obligations. Indeed, though one might argue that increased workplace law enforcement could increase employers' costs and thereby eliminate jobs, legal compliance should not be an optional cost. At the very least, any given employer's legal compliance should not hinge on the characteristics of its workforce, with employers of low-wage, front-line workers particularly able to evade detection by silencing potential claims.<sup>144</sup>

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their dollars toward companies with high CSR values in the labor and employment category. *See, e.g.,* Leonardo Becchetti & Rocco Ciciretti, *Corporate Social Responsibility and Stock Market Performance*, 19 APPLIED FIN. ECON. 1283 (2009) (describing corporate social responsibility rankings issued by RiskMetrics-KLD, which include items around employee relations).

142. *See, e.g.,* NAT'L EMP'T LAW PROJECT, JUST PAY: IMPROVING WAGE AND HOUR ENFORCEMENT AT THE UNITED STATES DEPARTMENT OF LABOR (2010), available at <http://www.nelp.org/page/-/Justice/2010/JustPayReport2010.pdf?nocdn=1> (proposing improvements to the U.S. Department of Labor's operations); Estlund, *supra* note 6, at 319 (proposing monitored self-regulation of company compliance with labor standards); Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179 (1994) (making a series of proposals for FLSA reform); Daniel C. Lopez, Note, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 HASTINGS L.J. 275, 308 (2009) (same); WEIL, *supra* note 3 (proposing improvements to the U.S. Department of Labor's operations).

143. For an attempt to identify rational criteria for enforcement of laws, see, for example, George J. Stigler, *The Optimum Enforcement of Laws*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 55 (Gary S. Becker & William M. Landes eds., 1974); *see also* Margaret H. Lemos & Alex Stein, *Strategic Enforcement*, 95 MINN. L. REV. 9 (2010) (discussing methods of optimizing law enforcement).

144. The question of whether increased workplace law enforcement would in fact decrease employment levels is an empirical one that merits study. Similar predictions have been made with respect to the negative effects of a minimum wage increase on employment levels, but repeated studies have called these theories into question. *See, e.g.,* Liana Fox, *Minimum Wage Trends: Understanding Past and Contemporary Research* at 1 (Econ. Policy Inst., Briefing Paper No. 178, 2006) ("There is a growing view among economists that the minimum wage offers substantial benefits to low-wage workers without negative effect. Although there are still dissenters, the best recent research has shown that the job loss

*A. Disseminating Legal Knowledge*

At first glance, the goal of disseminating legal knowledge—a necessary condition for workplace claims—would seem to be low hanging policy fruit. However, educating workers effectively about their substantive and procedural legal rights is a relatively complex and difficult endeavor. Many employers, including those covered by the Unregulated Work Survey, are already required to post information on a variety of workers' rights. In fact, the U.S. Department of Labor provides eleven different “know your rights” posters, in a variety of languages, that employers may be required to display in the workplace.<sup>145</sup> Yet our findings that approximately 59% of low-wage, front-line workers did not know their minimum wage and overtime rights and 78% did not know how to file a government complaint (both subjects of Department of Labor posters) suggest that this method of disseminating legal knowledge is highly ineffective. Moreover, Pauline Kim's theory that powerful social norms can override explicit employer-provided messages about legal rights calls into question whether the workplace is the most appropriate place for educating workers about their legal rights and protections.<sup>146</sup>

Instead, advocacy groups, unions, worker centers, and government agencies should distribute materials, hang posters, give presentations, perform skits, and make announcements in the places where workers are otherwise accustomed to receiving information: at places of worship, at community centers, at festivals and fairs, on the radio, and on television. These outreach efforts could specifically

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reported in earlier analyses does not, in fact, occur when the minimum wage is increased.”).

145. See *Poster Page: Workplace Poster Requirements for Small Businesses and Other Employers*, U.S. DEP'T OF LABOR, <http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm>. States have also experimented with notice and posting requirements of various specificity. See, e.g., Division of Labor Standards Enforcement, *Wage Theft Protection Act*, CA.GOV (Apr. 2013), [http://www.dir.ca.gov/dlse/Governor\\_signs\\_Wage\\_Theft\\_Protection\\_Act\\_of\\_2011.html](http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html) (describing California's notice template requiring specific information on rates of pay, pay schedules, workers' compensation, and overtime); *Notice of Pay Rate*, N.Y. ST. DEP'T OF LABOR, <http://www.labor.ny.gov/workerprotection/laborstandards/employer/wage-theft-prevention-act.shtm> (describing the notice requirements of New York's Wage Theft Prevention Act, which requires disclosure of detailed pay information in English and in the worker's native language; making notices available in Spanish, Chinese, Haitian Creole, Korean, Polish, or Russian).

146. Kim, *Bargaining with Imperfect Information*, *supra* note 109, at 110 (“[R]espondents overwhelmingly misunderstand the background legal rules governing the employment relationship. More specifically, they consistently overestimate the degree of job protection afforded by law, believing that employees have far greater rights not to be fired without good cause than they in fact have.” (emphasis omitted)); Kim, *Norms, Learning, and Law*, *supra* note 109, at 447 (“Contrary to the assumption commonly made by defenders of the at-will rule, [surveys of workers in Missouri, New York, and California] indicate that workers do not understand the default presumption [of at-will employment], but erroneously believe that the law affords them protection akin to a just cause contract, when, in fact, they can be dismissed at will.”); see also Gleeson, *supra* note 94, at 562 (“[I]t is clear that immigrant workers, like the average low-wage worker, often lack sufficient knowledge about the laws governing work in America. Language barriers and lack of culturally appropriate information intensify this barrier.”).

target the groups of workers shown by our analysis to be less likely to have accurate substantive and procedural legal knowledge: undocumented workers, those employed by relatively small or low-road employers, and women workers. The U.S. Department of Labor's "We Can Help" initiative is an example of this sort of campaign, incorporating language-appropriate public service announcements and materials designed specifically to assure undocumented workers that they have substantive workplace rights and to educate them on enforcement procedures.<sup>147</sup> Perhaps in this way accurate substantive and procedural legal knowledge will find its way into the web of information that workers carry with them into the workplace and that influences their ability and willingness to make claims on the job.

Because lawyers themselves can also be sources of information about the law, access to legal advice and representation may be a key component to increasing workers' legal knowledge. Though the phenomenon of lawyers ginning up cases by recruiting potential plaintiffs is often portrayed negatively by the media and academic commentators, little attention is paid to the potentially salutary function of so-called ambulance chasers and bounty hunters.<sup>148</sup> Lawyers who take an active role in outreach efforts, whether to recruit clients or merely to perform a public service, serve a valuable education and empowerment function. Increasing access to legal services may then help address the legal knowledge deficit suggested by the data analyzed in this Article. (Though the survey data do not answer the question of whether lawyers were available to the respondents, lawyer usage was likely very low, as only 4% of workers chose to take their claims to any third party or intermediary outside the company.)<sup>149</sup>

However, legal knowledge alone, even when paired with attorney access, is not enough to set the wheels of bottom-up workplace law enforcement into motion and send claims up the dispute resolution pyramid. Even the most informed worker may still choose not to make a claim, because the costs of claiming outweigh the benefits. A brief story, recounted in a Human Rights Watch report, illustrates this point.<sup>150</sup> In 1999, 500 men came to North Carolina from Mexico with temporary, H-2A "guestworker" visas to work as farm laborers. Before they arrived, staff from a legal services organization had given them information booklets written in Spanish that described the U.S. laws that governed their wages and working

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147. See Wage & Hour Div., *supra* note 91.

148. See, e.g., Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006) (describing and countering criticisms of plaintiffs' class action lawyers).

149. Study after study has documented the gulf between civil legal needs and lawyer availability, particularly for *ex ante* legal advice. See, e.g., Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the Corporate Practice of Law 1* (Ctr. in Law, Econ. & Org., Research Papers Series No. C12-16, 2012) (gathering studies and noting that "ordinary people are largely shut out from legal assistance; the great majority of legal work is done for corporations, organizations and governments").

150. HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 218-25 (2000), available at <http://www.hrw.org/reports/pdfs/u/us/uslbr008.pdf>.

conditions and explained the process of obtaining free legal services if their rights were violated.

When the workers arrived in North Carolina, they attended an orientation session. Their employer warned them that the legal services organization was their enemy, to be avoided.<sup>151</sup> He then told them to throw away their booklets and distributed an employee handbook, which warned:

FLS [Farmworker Legal Services] has a hidden motive when they approach you. They say that they are your friends and they are concerned about your rights and well being [sic], but in reality their motive is to destroy the program which brings you to North Carolina legally . . . FLS discourage [sic] the growers with excessive suits which are for the most part without merit. The history of FLS shows that the workers who have talked with them have harmed themselves. Don't be fooled and allow them to take away your jobs.<sup>152</sup>

On the wall at the orientation site also hung a banner which read, in Spanish, "Legal Services Want to Destroy the H-2A Program" and "Don't be a puppet of Legal Services."<sup>153</sup> Workers reported feeling that "if they keep [the] booklets or if they are ever seen with one of [the] booklets, they will be fired or have serious problems" with their employer.<sup>154</sup>

In the eyes of worker advocates, the story of the legal services booklet describes a nearly perfectly-executed "know-your-rights" campaign.<sup>155</sup> Workers received language-appropriate materials that fully explained their substantive and procedural legal rights. They even knew whom to call to get free legal representation if they ran into a problem. Yet even full substantive and procedural legal knowledge was likely neutralized by employer threats. Though we do not know from the report, it would be surprising if any of the North Carolina H-2A workers actually made claims about workplace problems that harvest season. Instead, in Hirschman's construction, they likely chose exit or silent loyalty over voice.

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151. *Id.* at 218 ("[The workers' employer] spoke at length about the Farmworker Unit of Legal Services of North Carolina . . . He told the workers that Legal Services was their 'enemy.' He told the workers they should avoid Legal Services.").

152. *Id.* at 218–19 ("Mr. Hill then held up a copy of the 'Know Your Rights' booklet produced by Legal Services. He ordered workers to toss the 'Know Your Rights' booklet into the trash can. . . . Following Hill's admonition, workers discarded their booklets *en masse*." (emphasis in original)).

153. *Id.* at 221.

154. *Id.* at 220.

155. *See, e.g.*, Margaret Martin Barry, A. Rachel Camp, Margaret E. Johnson, Catherine F. Klein & Lisa V. Martin, *Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics*, 18 CLINICAL L. REV. 401, 404 (2012) (characterizing effective community legal education, including know-your-rights campaigns, as that which "encourag[es] planning on the basis of legal rights and obligations"; "mobiliz[es] individuals and groups to pursue their rights"; "facilitat[es] and strengthen[s] community organizations"; "foster[s] self-help activities for which lawyers will not be necessary"; and "demystif[ies] the law").

*B. Minimizing the Costs*

How, then, can workers be convinced to make claims? Part III has illustrated that roughly 48% of workers in the Unregulated Work Survey who had identified workplace problems chose not to make claims; Part IV has detailed the failure of the current system of operational rights to maximize workers' benefits and minimize the costs of claiming. We suggest the following strategies to further minimize the risks faced by would-be bottom-up workplace law enforcers.

First, Congress and the courts should strengthen existing retaliation protections within labor and employment laws by broadening the definition of "adverse employment action" to unambiguously include threats.<sup>156</sup> This would acknowledge the chilling effect that such threats, even if never executed, have on workplace claiming behavior. It would also likely address the prevalence of non-actionable reprisals in the workplace, as illustrated by the 28% of workers in this analysis who made claims about justiciable workplace problems and then faced forms of retaliation that fell outside the coverage of labor and employment law.

However, it is important to note that even legal regimes with extremely robust anti-retaliation provisions can fail to protect claimants and encourage claiming behavior. For example, Richard Moberly has reviewed the success of the Sarbanes-Oxley Public Company Accounting Reform and Corporate Responsibility Act, which concerns corporate accounting standards and is considered the "gold standard" among retaliation protections in encouraging whistleblower claims.<sup>157</sup> He reports that "the percentage of employee tips actually *decreased* after Sarbanes-Oxley" and that "the Act often failed to protect [whistleblowers] from reprisals and failed to compensate them consistently for the retaliation they suffered."<sup>158</sup>

To make it harder for employers to identify the workers to retaliate against, then, our second proposal is that Congress should eliminate the opt-in requirement of the Fair Labor Standards Act, the Equal Pay Act, and the Age Discrimination in Employment Act. Particularly for low-wage, front-line workers, the opt-in requirement acts as a barrier to participation in litigation because it requires workers to take the very public step of joining a lawsuit, rather than being part of an anonymous class represented by a few named plaintiffs.<sup>159</sup> Anonymous class

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156. Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779 (2013) (arguing that courts should recognize a cause of action for "per se" or "facial" violations of statutory anti-retaliation provisions to cover threats by employers designed to silence workers' future potential protected activity). See generally Levinson, *supra* note 84; Clemons, *supra* note 84.

157. Public Company Accounting Reform and Corporate Responsibility (Sarbanes-Oxley) Act, 15 U.S.C. § 7201 (2012); Estlund, *supra* note 6, at 376 ("Sarbanes-Oxley represents the gold standard in protection of employee whistleblowers, with both criminal sanctions and fully compensatory private civil remedies against reprisals.")

158. Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 27-29 (2012) (emphasis in original) (noting that only 1.8% of employees who made claims of retaliation won their case before an administrative body, and no employee won for three straight years).

159. Alexander, *supra* note 135, at 484 ("In many ways, the opt in requirement of the

membership protects workers from retaliation, because employers may not be able to identify with certainty which particular workers are participating in a lawsuit. Moreover, workers have some measure of deniability, because they are included in the plaintiff class not because they chose to join, but rather because they fall into the class definition. Of course, this feature of the opt-out class action available under Federal Rule of Civil Procedure 23 has been criticized for being undemocratic and discouraging plaintiff autonomy.<sup>160</sup> However, this criticism fails to recognize the benefits of the anonymous, automatic nature of the traditional class action for low-wage, front-line plaintiffs who are extremely susceptible to retaliation.<sup>161</sup> Thus, all areas of employment law should be made consistent with the great majority of federal statutes, in which plaintiffs are permitted to use the class action device of Federal Rule of Civil Procedure 23 and receive the protection of relative anonymity within the class.<sup>162</sup>

Third, we propose an alternative method of claim resolution. For justiciable workplace claims that are not already covered by an administrative exhaustion requirement, the U.S. Department of Labor should establish an optional, one-way binding arbitration system, modeled on a program in place at The Coca-Cola Company, that would give workers a forum for speedy claim resolution.<sup>163</sup> This

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FLSA seems to eliminate any possibility of collective action, making the FLSA enforceable only by individuals or very small groups. The opt in requirement may, therefore, undermine the project of law enforcement generally, dissuading plaintiffs from acting collectively as private attorneys general to enforce the FLSA's minimum wage and overtime mandates."'). At the very least, courts should permit language in the opt-in notice that advises undocumented workers that their immigration status is not relevant to the case. *See, e.g.,* *Enriquez v. Cherry Hill Market Corp.*, Case No. 10-CV-5616-FB-MDG, (E.D.N.Y. Feb. 10, 2012), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nyedce/1:2010cv05616/312066/36/0.pdf?ts=1328966650> (order approving FLSA opt-in notice language informing potential opt-in plaintiffs that their immigration status is irrelevant).

160. *See, e.g.,* Alexander, *supra* note 135, at 484–86 (summarizing criticisms of Fed. R. Civ. P. 23 class actions).

161. Research is being conducted on the benefits of anonymity in the analogous whistleblower context and one study has found that “anonymity, trust, and risk are highly salient in the [whistle-blowing reporting system] context.” Paul Benjamin Lowry, Gregory D. Moody, Dennis F. Galletta & Anthony Vance, *The Drivers in the Use of Online Whistle-Blowing Reporting Systems*, 30 J. MGMT. INFO. SYS. 153, 154 (2013); *see also* Weil, *supra* note 23, at 13 (noting “over two decades of evidence that shows that workers are more likely to exercise rights given the presence of a collective workplace actor”).

162. We acknowledge that class members' identities are often exposed at the end of a lawsuit when they must collect their portion of settlement or judgment proceeds. However, the risk of retaliation at this point is relatively low, as the litigation has already concluded. We also acknowledge that courts have restricted the Rule 23 class action as a vehicle for collective complaint, but we nevertheless think it preferable to the current opt-in regime in place in the Fair Labor Standards Act, Equal Pay Act, and Age Discrimination in Employment Act.

163. Suzette M. Malveaux, *Is It the “Real Thing”? How Coke’s One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77, 78 (2009) (“This unilateral arrangement—voluntarily adopted by the Coca-Cola Company following its historic employment discrimination class action settlement—is a groundbreaking and novel approach to promoting arbitration, while also protecting employee choice and access to the court system. One-way binding arbitration also offers employers an

system would not increase the size or certainty of the benefits of claiming, but would reduce the costs associated with trying to achieve those benefits. The program could be funded by civil monetary penalties collected by the Department from law-breaking employers, and arbitration would be free for workers who could demonstrate financial need, much as *in forma pauperis* determinations are made. The parties could choose to use this system at their discretion, and, as in Coca-Cola's system, the arbitrator's decision would be binding on the employer only.<sup>164</sup> Particularly for workers who have been fired in retaliation for claims making, this system would allow them to collect back pay and/or return to their jobs more quickly than in a typical lawsuit, without requiring them to relinquish their right to file their claim in court. Employers, too, would benefit from the speed and efficiency of arbitration.<sup>165</sup> (Employees with group claims, however, would still have to pursue their claims in court, as arbitration would not be well-suited for resolutions of collective or class actions.<sup>166</sup>)

Each of these proposals seeks to lower the costs of claims making by increasing retaliation protections, facilitating group action by plaintiffs, and speeding up the process of workplace dispute resolution. However, as Steven Willborn has observed, minimizing worker costs may not be effective in and of itself in encouraging claims; increasing the benefits may also be necessary.<sup>167</sup>

### C. Maximizing the Benefits

Workers might also be incentivized to act if there were greater benefits associated with making claims. Here, Congress could lift the cap on Title VII

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opportunity to forge new ground. Companies can enjoy all of the benefits of arbitration—such as efficiency, privacy, cost savings and litigation avoidance—while bolstering workplace relations that may enhance profitability.”); *see also* David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73 (1999) (arguing that employees should reconsider arbitration as a tool for speedy resolution of disputes).

164. Malveaux, *supra* note 163, at 78–79 (describing Coca-Cola's “one-way binding arbitration” program).

165. *Id.* at 119–20 (describing benefits to employers of one-way binding arbitration system including speed, efficiency, improved employee perception, and advantage in future litigation).

166. *Id.* at 134–35 (“Finally, while [Coca-Cola's] *Solutions* program may be appropriate for addressing *individual* employee work-related matters, it is not appropriate for resolving class actions or other actions alleging systemic corporate misbehavior. Because of the important role the courts play in resolving cases with larger societal implications, employees must be permitted to challenge an employer's pattern or practice of conduct without having to go through an internal company resolution process. The judiciary's unique public function and procedural attributes make it especially well-suited for addressing large-scale employment issues.”) (emphasis in original).

167. Willborn, *supra* note 10, at 12–13 (“[E]ven with retaliation protection, individuals are more likely to come forward in situations in which there is little risk of retaliation than in situations where they have to rely on retaliation protections. In turn, this implies that positive inducements, rather than protection against negative consequences, may be necessary to produce adequate private enforcement in some circumstances.”).



damages,<sup>168</sup> make punitive damages more readily available to plaintiffs, especially in cases of retaliation,<sup>169</sup> and allow plaintiffs to collect treble damages, perhaps upon a showing of outrageous conduct and/or recidivism by the defendant.<sup>170</sup>

Federal statutes in areas other than labor and employment provide models for offering increased incentives to expose wrongdoing. For example, the Internal Revenue Service entices people to report tax fraud by offering between 15% and 30% of the back taxes and other funds ultimately collected by the Service;<sup>171</sup> the Dodd-Frank Wall Street Reform and Consumer Protection Act offers whistleblowers between 10% and 30% of monies recovered as a result of tips about insider trading and other violations of securities law;<sup>172</sup> the qui tam provision of the False Claims Act allows people who report fraud against the federal government to collect up to 30% of recovered damages.<sup>173</sup>

However, in practice, such incentives may not be very effective at encouraging claims making. A study of federal statutory whistleblower incentives reveals that, “although [individual] rewards under existing whistleblower programs may be substantial, general use of the programs is not high.”<sup>174</sup> This, again, points to the

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168. 42 U.S.C. § 1981a(b)(3) (2006) (imposing caps on Title VII damages of between \$50,000 and \$300,000 depending on employer size).

169. At present, punitive damages are generally not available for retaliation claims under the FLSA, the National Labor Relations Act, the Family and Medical Leave Act, and the Americans with Disabilities Act, and are available, but with statutory caps, under Title VII. 42 U.S.C. § 1981a(b)(1) (“A complaining party [under Title VII] may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”); see also 42 U.S.C. § 1981a(b)(3) (capping Title VII damages at between \$50,000 and \$300,000 depending on employer size); *Jackson v. Estelle’s Place, LLC*, 391 Fed. Appx. 239, 247 (4th Cir. 2010) (noting that punitive damages “are not available for claims under the FLSA”); *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1265, 1270 (9th Cir. 2009) (noting courts’ “divergent approaches” to availability of punitive damages for ADA retaliation claims and holding that punitive damages are not available); *Farrell v. Tri-Cnty. Metro. Transp. Dist.*, 530 F.3d 1023, 1025 (9th Cir. 2008) (“It is well-settled that the FMLA, by its terms, ‘only provides for compensatory damages and not punitive damages.’” (quoting *Liu v. Amway Corp.*, 347 F.3d 1125, 1133 n.6 (9th Cir. 2003))); *NLRB v. Pepsi Cola Bottling Co. of Fayetteville, Inc.*, 258 F.3d 305, 314 (4th Cir. 2001) (holding that “an explicitly punitive method of calculation [of backpay] is contrary to the purposes of the [National Labor Relations] Act”).

170. The Fair Labor Standards Act already allows plaintiffs to collect double or liquidated damages. 29 U.S.C. § 260 (2006). The Sherman Anti-Trust Act and Racketeer Influenced and Corrupt Organizations Act both allow collection of treble damages. *Trusts in Restraint of Trade Illegal*, 15 U.S.C. § 1 (2006); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (2006).

171. Karie Davis-Nozemack & Sarah Webber, *Paying the IRS Whistleblower: A Critical Analysis of Collected Proceeds*, 32 VA. TAX REV. 77, 86 (2012).

172. Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 1957 (2010).

173. Civil Actions for False Claims, 31 U.S.C. § 3730(c)–(d) (2006).

174. Jonathan L. Awner & Denise Dickins, *Will There Be Whistleblowers?*, 34 REG. 36, 39 (2011). At the time of writing, the Dodd-Frank Act was still fairly new, and so the success of its whistleblower incentive provisions are still relatively untested. In addition, in 2012, an IRS

tricky problem of cost and benefit: if existing reward programs targeting sophisticated potential whistleblowers in the financial sector have been relatively unsuccessful in incentivizing claims,<sup>175</sup> it is likely that the analog in the labor and employment law context—offering much higher damages awards as an increased potential benefit for plaintiffs—may also fail to encourage low-wage, front-line workers to exercise voice.<sup>176</sup>

#### D. Increasing Government Enforcement

Each of the foregoing reforms would preserve the fundamental bottom-up nature of workplace law enforcement, while attempting to improve workers' legal knowledge and recalibrate their incentive structures such that low-wage, front-line workers might be enabled to act as enforcers of their workplace rights. However, given the fundamental problems with bottom-up enforcement suggested by the Unregulated Work Survey data, such tinkering around the margins might be insufficient, akin to rearranging the deck chairs on the Titanic.

A more fundamental reform would advocate shifting more enforcement from the bottom to the top, increasing government investigation and oversight rather than relying so heavily on workers themselves to be the drivers of enforcement activity. After all, government enforcement agents are insulated from many of the risks faced by worker-claimants: their salaries are paid regardless of the outcome of a lawsuit, and they are unaffected by defendant retaliation.<sup>177</sup>

Michael Waterstone has made just such a proposal in the disability law context. He argues that certain case types—failure to hire and public accessibility—are particularly well suited to public enforcement.<sup>178</sup> In the labor and employment context, Steven Willborn has suggested case types that would be appropriate for increased government enforcement, in areas where private litigation leaves gaps: “low-damages cases, large cases which involve heavy litigation-related investments, and violations not producing wage losses.”<sup>179</sup> Likewise, David Weil has advocated that the U.S. Department of Labor’s Wage and Hour Division focus its investigative resources on “fissured” industries, in which businesses employ

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tipster received an unprecedented award of \$104 million. Paul Sullivan, *The Price Whistle-Blowers Pay for Secrets*, N.Y. TIMES, Sept. 22, 2012, at B1. It remains to be seen whether this highly-publicized award will increase the level of IRS whistleblower activity.

175. See, e.g., Sullivan, *supra* note 174 (describing the costs that whistleblowers pay, “If you look at the field of whistle-blowers, you see a high degree of bankruptcies. You may find yourself unemployable. Home foreclosures, divorce, suicide and depression all go with this territory.”).

176. In addition, research has shown that, among the options of rewards, liabilities, duties, and protections, the availability of rewards for reporting illegal conduct may trigger “less reporting than merely offering protection or establishing a duty.” Feldman & Lobel, *supra* note 21, at 1155.

177. See Yaniv, *supra* note 5, at 352 (“While the expected gain from complaining is obvious, there is a serious risk involved: losing one’s job. However, when a worker’s complaint is placed anonymously (or when the enforcement agency is bound not to disclose his identity), there is no reason to expect a personal reaction on the part of his employer.”).

178. Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 437 (2007).

179. Willborn, *supra* note 10, at 13.

high numbers of subcontractors and other contingent workers and disclaim any legal responsibility for wages and working conditions.<sup>180</sup>

To these lists we add cases in which workers would be particularly unlikely to complain on their own, where workers have low levels of substantive and procedural legal knowledge, and where workers are highly susceptible to retaliation. Indeed, the U.S. Equal Employment Opportunity Commission's most recent Strategic Enforcement Plan (SEP) names as an enforcement priority "[p]rotecting [i]mmigrant, [m]igrant, and [o]ther [v]ulnerable [w]orkers," and calls for a focus on "[i]ssues affecting workers who may lack an awareness of their legal protections, or who may be reluctant or unable to exercise their rights."<sup>181</sup>

In implementing goals such as these, government enforcers could develop a sort of "vulnerability index," taking into account workers' wages, immigration status, unionization levels, and education levels within a particular industry.<sup>182</sup> Industries with high vulnerability index scores could be prioritized in agencies' strategic enforcement plans.<sup>183</sup> Likewise, agencies might prioritize retaliation cases and send a message to unscrupulous employers that they will not be permitted to silence worker claims through threatened and actual reprisals.

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180. WEIL, *supra* note 3, at 18–26.

181. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN: FY 2013–2016, 1, 8 (2012), *available at* <http://www.eeoc.gov/eeoc/plan/sep.cfm>. The EEOC has also explored using the commissioner's charge mechanism strategically, considering "factors such as current economic conditions, demographic data, relevant labor markets, industry data, underserved areas or populations and charge data." LESLIE E. SILVERMAN ET AL., SYSTEMIC TASK FORCE REPORT: TO THE CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 15 (2006), *available at* [http://www.eeoc.gov/eeoc/task\\_reports/systemic.cfm](http://www.eeoc.gov/eeoc/task_reports/systemic.cfm).

182. Martha Albertson Fineman's extensive work on vulnerability provides a theoretical backdrop for creation of a vulnerability index; Kerry Rittich's work on employee vulnerability is informative as well. *See, e.g.*, Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 20–21 (2008) ("The vulnerability inquiry examines the ways in which societal resources are channeled to see if the result is to privilege and protect some while tolerating the disadvantage and vulnerability of others. This focus on the structuring of societal institutions reflects the fact that the state has an affirmative obligation not to privilege any group of citizens over others and to actively structure conditions for equality."); KERRY RITTICH, LAW COMM'N OF CAN., VULNERABILITY AT WORK: LEGAL AND POLICY ISSUES IN THE NEW ECONOMY 3 (2004) ("Vulnerability and insecurity at work can arise from: 1) the distribution of risks, costs, benefits and powers among workers and employers; 2) the (in)capacity of workers to conform to or perform according to workplace rules and norms; 3) the allocation of work among workers, including unpaid work; 4) (in)access to resources; 5) discrimination, either *directly* on the basis of a particular characteristics or grounds or through their intersectional operation or *indirectly*, because of the connection between these grounds and the factors listed above.").

183. The U.S. Department of Labor's public communications speak of advocacy on behalf of "vulnerable workers" such as homeless people, but do not appear to define that term. *See, e.g.*, *Vulnerable Workers*, U.S. DEP'T LAB. NEWS BRIEF, Oct. 18, 2012, *available at* [http://www.dol.gov/\\_sec/newsletter/2012/20121018.pdf](http://www.dol.gov/_sec/newsletter/2012/20121018.pdf) (reporting on "roundtable discussions" between U.S. Secretary of Labor Hilda Solis and "representatives of vulnerable communities in Seattle, New Orleans and San Francisco").

However, as Cynthia Estlund has observed, it may not be realistic to expect “regulators’ sights . . . to remain permanently fixed on the targeted sectors,” as there will “simply never be enough government inspectors to do the job alone.”<sup>184</sup> Nor would a completely top-down labor and employment inspectorate-type system be desirable, as it would throw the benefits of bottom-up enforcement out with the proverbial bathwater.<sup>185</sup> Public and private workplace law enforcement should exist in a complementary relationship, in which one mode of enforcement compensates for the failings and inadequacies of the other. We have argued here that the current system of bottom-up workplace law enforcement relies too heavily on workers themselves to be claims-makers. A reinvigorated, targeted, top-down enforcement regime, along with reforms to the bottom-up system to expand workers’ legal knowledge and offer better incentives for claims making, would draw on the strengths of both modes of enforcement and, we hope, ultimately improve conditions for low-wage, front-line workers.

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184. Estlund, *supra* note 6, at 362, 403.

185. *See supra* Introduction (outlining bottom-up enforcement’s theoretical benefits); *see also* Kevin Kolben, *The WTO Distraction*, 21 STAN. L. & POL’Y REV. 461, 483 (2010) (describing problems in countries with top-down labor inspectorate systems of “weak enforcement and poor compliance by the regulated, [and] almost negligible, understaffed, and corrupt labor inspectorates”).

## APPENDIX A: UNREGULATED WORK SURVEY QUESTIONS

*Survey Questions Related to Workplace Problems and Claims*

1. During the last 12 months, did you make a complaint, either by yourself or with co-workers, about your working conditions, by going to your employer, supervisor or going to a government agency? Don't tell me yet about any attempts you may have made to form a labor union, we'll get to that later.
  - a. Yes
  - b. No
  
2. How many times did you make a complaint, either alone or with your co-workers, over the past 12 months? Remember, I'm talking about complaints that you made about a job here in CITY.
  - a. None, never made complaint
  - b. 1–96 times
  - c. More than 96 times (SPECIFY)
  
3. Tell me about the most recent complaint you made. What specifically did you complain about? Choose all that apply.
  - a. Paid below the minimum wage
  - b. Not paid for all hours worked
  - c. Forced to work off the clock
  - d. Not paid for overtime
  - e. Not paid on time
  - f. Improper deductions from paycheck
  - g. Dangerous working conditions
  - h. Discrimination
  - i. Abuse or harassment by supervisor
  - j. Abuse or harassment by co-worker
  - k. No breaks, or not enough breaks
  - l. Bad schedule/shift
  - m. Needed a raise/pay is too low
  - n. Lack of health insurance or paid sick days
  - o. Increased workloads—made me/us work more
  - p. Other (SPECIFY)
  
4. Did you make this complaint by yourself, or with your co-workers?
  - a. Myself
  - b. With co-workers
  - c. Both<sup>186</sup>

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186. We coded “both” responses as claims made with co-workers rather than alone.

5. When did you make this most recent complaint?
  - a. ENTER YEAR (2006–2008):
  - b. ENTER MONTH (1–12):
  
6. How did you make this complaint? Choose all that apply.
  - a. Discussed the problem with supervisor or employer.
  - b. Asked a lawyer, union representative, worker center, or other community group to complain to employer on your behalf.
  - c. Filed a complaint with an agency, like the Department of Labor or OSHA
  - d. Testified at a hearing/participated in an official investigation into a claim
  - e. Other (SPECIFY)
  
7. During the past 12 months, were there times when you DID NOT complain, even though you had a problem at your job with dangerous working conditions, discrimination, not being paid the minimum wage or not being paid overtime? Again, I'm only talking about jobs you've held here in CITY.
  - a. Yes
  - b. No
  
8. What stopped you from complaining? Choose all that apply.
  - a. Afraid of losing your job
  - b. Afraid to say anything because of immigration status
  - c. Afraid of getting hours or wages cut
  - d. Afraid the company would close down
  - e. Seen other co-workers disciplined (fired, threatened or treated badly) for speaking up
  - f. Did not know who to talk to or where to take the complaint
  - g. Employer made threats to you or your coworkers—if you filed a complaint they would fire you, report you to immigration, etc
  - h. Didn't think it would make a difference (tried in the past but didn't get anywhere)
  - i. Other (SPECIFY)

*Survey Questions Related to Retaliation*

*Note:* At this point in the survey, the respondent is being asked to focus on his or her most recent complaint made within the past twelve months.

1. Did your employer or supervisor know you made this complaint?
  - a. Yes
  - b. No

2. Did your employer or supervisor do any of the following as a direct result of this complaint? Choose all that apply.
  - a. Did your employer or supervisor threaten to fire you or your co-workers?
  - b. Did they threaten to call the police or immigration?
  - c. (Did they) threaten to close or move the company?
  - d. (Did they) fire you or your co-workers?
  - e. (Did they) suspend you or your co-workers?
  
3. How about any of these? (Did your employer or supervisor do any of the following as a direct result of this complaint?) Choose all that apply.
  - a. (Did they) cut your or your co-workers' hours, or change your schedules?
  - b. (Did they) cut your or your co-workers' pay?
  - c. (Did they) give you or your co-workers worse work assignments?
  - d. (Did they) harass or abuse you or your co-workers?
  - e. Did your employer ignore you & did nothing?
  - f. Did your employer do anything else that I haven't mentioned? (SPECIFY)

*Survey Questions Related to Substantive and Procedural Legal Knowledge*

1. Do you know where to file a complaint with the government if you are having a problem with an employer?
  - a. Yes
  - b. No
  
2. As far as you know, what is the current minimum wage in CITY?
  - a. ENTER AMOUNT
  
3. As far as you know, do employers have to pay workers more than their usual wage when they work more than 40 hours in a week?
  - a. Yes
  - b. No
  
4. As far as you know, does the law allow employers to pay undocumented workers less than the minimum wage?
  - a. Yes
  - b. No

*Survey Questions Related to Social Networks*

1. First, I want you to think about ALL the people that you know PERSONALLY. That means your family, your relatives and your friends, but ALSO co-workers and people you know who you have seen in the past SIX MONTHS. Don't just tell me about people who you know really well, but also people you see often or speak with regularly, including people in your neighborhood. Now I'm going to read you a list of jobs, and ask you

how many people you know who do each type of job. They should be people who:

- a. ARE 18 YEARS OLD OR OLDER.
  - b. ARE WORKING FOR SOMEONE ELSE: So if they own their own business, or if they manage or supervise other people, don't count them.
  - c. ARE CURRENTLY WORKING here in LOCATION. You can count people who are working off the books, and people who don't have their immigration papers. Here's a map of LOCATION.
2. I'm going to read you a type of job, and for each, tell me how many people you know who are currently working that type of job:
- a. How about, security guards?
  - b. Teacher's aides? Please do not count teachers, just teacher's aides.
  - c. People who work in private homes as nannies, domestic workers, or housekeepers. Please don't count teenagers or people who babysit once in a while.
  - d. What about other child care workers, who either work in a day care center, or take children into their own homes?
  - e. People who are housekeepers in hotels?
  - f. People who work in restaurants, bars, fast food places, cafeterias, and other places where food or drinks are served. For example, cooks, dishwashers, cashiers, bus boys, and waiters and waitresses, and people who deliver food for restaurants.
  - g. Janitors or cleaners in buildings, hotels, or stores.
  - h. People who work in hair salons and nail salons. Please don't count people who own their own businesses.
  - i. People who work in residential construction, building or remodeling single family homes or small apartment buildings. This would include painters, laborers, drywall installers, and roofers. Please do not count subcontractors, managers or crew leaders, or skilled trades like electricians and plumbers.
  - j. Gardeners and landscapers. Please do not count subcontractors, managers, or crew leaders.
  - k. People who work in car washes or as gas station attendants.
  - l. People who work as nursing aides in nursing homes
  - m. What about home health care workers, who take care of patients in the patients' homes?
  - n. People who work for dry cleaners or laundries, including laundry plants.
  - o. People who work in food manufacturing, like meatpacking, food processing and baking. Please count workers who operate machines, work on assembly lines, pack products into boxes, or move or ship those products. And please count people who work at home doing food preparation for a company or restaurant.
  - p. People who work making clothes for companies. Please count workers who sew, cut fabric, pack clothing into boxes or onto hangers, and inspect finished products. And please count people



who work in factories and also those who work out of their home for a company.

- q. People who work in furniture factories. Please don't count managers, just people who work on the shop floor.
- r. People who do packing and moving jobs in warehouses.
- s. People who work in grocery stores, drug stores, or supermarkets. For example, cashiers and baggers, people who wash and sort produce or who work in the stock room, as well as people who make deliveries. Please do not count managers, pharmacists, butchers or other specialty foodworkers, or people who work as janitors and cleaners.
- t. People who work in other kinds of retail stores, like department stores, clothing stores, office supply stores, furniture stores, or auto supply stores. Again, we are interested in people who work as cashiers, on the shop floor helping customers, who make deliveries, or who work in the stock room—but not janitors. And don't count people who work in a car dealership.
- u. People who work as bank tellers.
- v. People who repair cars. For example, people who do body work, change tires, and make engine repairs, but who do not work for an auto dealership.
- w. People who work in parking garages, parking lots or as valet parkers.

## APPENDIX B

**Table 7.** RDS Population Point Estimates and Confidence Intervals

Variable	Population point estimate	Lower confidence interval	Upper confidence interval
Identified (perceived) workplace problem in past 12 months	33.10%	30.71%	35.49%
Made claim about workplace problem in past 12 months	56.87%	50.79%	62.95%
Made claim about <i>justiciable</i> workplace problem in past 12 months	65.12%	57.95%	72.28%
Method(s) of claiming <sup>187</sup>			
To employer	95.87%	95.87%	95.87%
To lawyer, union rep, or other Intermediary	—	—	—
To government agency	—	—	—
Subject(s) of claim			
Quality of worklife, e.g. commute time, workload, work schedule	44.51%	35.13%	53.88%
Pay	39.73%	32.35%	47.11%
Discrimination, harassment, or abuse	27.42%	19.34%	35.49%
Unsafe working conditions	—	—	—
Benefits	—	—	—

187. Because survey respondents were given the opportunity to choose more than one answer to the questions concerning method of claiming, subject of claim, and the reason why some respondents did not make a claim, those population point estimates refer to the percentage of responses, not the percentage of respondents.

**Table 7** (continued)

Variable	Population point estimate	Lower confidence interval	Upper confidence interval
Reason(s) for not making claim			
Afraid would be fired	59.77%	55.90%	63.65%
Did not think claim would make a difference	45.92%	42.35%	49.49%
Some other/miscellaneous reason	25.48%	19.59%	31.36%
Saw others retaliated against for making claims	14.28%	9.02%	19.53%
Afraid of hours/wages being cut	11.97%	8.35%	15.59%
Did not know how to make a claim	11.82%	5.73%	17.92%
Afraid due to immigration status	—	—	—
Afraid due to employer threats	—	—	—
Afraid company would close	—	—	—
Employer response to most recent claim about justiciable problem in past 12 months			
Reprisals	43.05%	39.80%	46.29%
Unlawful retaliation	34.73%	27.57%	41.89%
Addressed/promised to address claim (resolution)	14.92%	9.64%	20.19%
Inaction/other response	—	—	—
Knows minimum wage and overtime rights (substantive legal knowledge)	41.01%	38.47%	43.55%
Knows where to file government complaint (procedural legal knowledge)	22.23%	20.05%	24.41%

*Note:* Because population point estimates are *estimates*, within upper and lower confidence intervals, not all sets of figures for a given variable will sum to 100%. In addition, some variables had too few observations within the data set for RDSAT to generate a population point estimate. These are indicated with a dash in the relevant field.

## APPENDIX C

**Table 8.** Logistic Regression Results: Workplace Problems

Independent variable	Coefficient	Robust standard error	Statistical significance (p-value)
Female	-.2064162**	.0935926	0.027
Black or African American	-.1831411	.1394766	0.189
Asian or other race	-.0692085	.1399979	0.621
White	-.1969036	.209114	0.346
Age (log)	-.3902301***	.1420976	0.006
Years of education (log)	.2263875***	.0826076	0.006
No legal immigration status	.1579034	.1187964	0.184
Does not know minimum wage and overtime rights (substantive legal knowledge)	-.0122081	.095769	0.899
Does not know where to file government complaint procedural legal knowledge)	.2377473**	.1098959	0.031
Not a union member	-.2904993 <sup>†</sup>	.1879356	0.122
Job tenure of fewer than 12 months	-.2210349*	.1168781	0.059
Employer has fewer than 100 employees	-.322473***	.1033499	0.002
Employer is not "high road"	.4308615***	.1103767	0.000
Constant	.5335444	.6071023	0.379

*Note:* Dependent variable = Respondent identified workplace problem in 12 months before survey (0,1).

\*\*\* $p \leq 0.01$ ; \*\* $p \leq 0.05$ ; \* $p \leq 0.10$ ; <sup>†</sup> $p \leq 0.15$

Number of observations	3620
Wald chi2(13)	59.60
Prob > chi2	0.0000
Pseudo R2	0.0216
Log pseudolikelihood	-2237.3288
Base category (constant)	Male; Latino/a or Hispanic; legal immigration status; has substantive legal knowledge; has procedural legal knowledge; union member; job tenure of 12 or more months; employer has 100 or more employees; employer is "high road"

**Table 9.** Logistic Regression Results: Claims

Independent variable	Coefficient	Robust standard error	Statistical significance (p-value)
Female	-0.0527787	0.1440536	0.714
Black or African American	-0.0707228	0.2309246	0.759
Asian or other race	-0.3814158 <sup>†</sup>	0.2337536	0.103
White	0.0757693	0.3396625	0.823
Age (log)	-0.3275930 <sup>†</sup>	0.2170615	0.131
Years of education (log)	0.1323876	0.1239154	0.285
No legal immigration status	-0.1132518	0.1902730	0.552
Does not know minimum wage and overtime rights (substantive legal knowledge)	-0.2655614*	0.1484176	0.074
Does not know where to file government complaint (procedural legal knowledge)	-0.3736151**	0.1823592	0.040
Not a union member	-0.4599542 <sup>†</sup>	0.3175203	0.147
Job tenure of fewer than 12 months	-0.5530929***	0.1740706	0.001
Employer has fewer than 100 employees	-0.0815789	0.1637656	0.618
Employer is not "high road"	-0.3828674*	0.1961185	0.051
Constant	2.7929570	0.9305910	0.003

*Note:* Dependent variable = Respondent made claim about workplace problem in 12 months before survey (0,1).

\*\*\* $p \leq 0.01$ ; \*\* $p \leq 0.05$ ; \* $p \leq 0.10$ ; <sup>†</sup> $p \leq 0.15$

Number of observations	1422
Wald chi2(13)	38.84
Prob > chi2	0.0002
Pseudo R2	0.0380
Log pseudolikelihood	-901.68482
Base category (constant)	Male; Latino/a or Hispanic; legal immigration status; has substantive legal knowledge; has procedural legal knowledge; union member; job tenure of 12 or more months; employer has 100 or more employees; employer is "high road."

**Table 10.** Logistic Regression Results: Retaliation

Independent variable	Coefficient	Robust standard error	Statistical significance (p-value)
Female	-0.2982914	0.2634372	0.258
Black or African American	-0.5121672	0.3697562	0.166
Asian or other race	0.2198756	0.4566514	0.630
White	-0.0897640	0.4907023	0.855
Age (log)	0.4817006	0.3979467	0.226
Years of education (log)	-0.1829480	0.2287591	0.424
No legal immigration status	0.4604266	0.3412907	0.177
Not a union member	-0.7078947	0.5087682	0.164
Job tenure of fewer than 12 months	-0.1129911	0.3613206	0.754
Employer has fewer than 100 employees	-0.0887306	0.3109330	0.775
Employer is not "high road"	0.4319436	0.3192539	0.176
Made claim alone	-0.4446391*	0.2584028	0.085
Constant	0.2221966	1.5574580	0.887

*Note:* Dependent variable = Respondent experienced retaliation as a result of most recent claim about justiciable workplace problem within 12 months before survey (0,1).

\*\*\* $p \leq 0.01$ ; \*\* $p \leq 0.05$ ; \* $p \leq 0.10$ ; †  $p \leq 0.15$

Number of observations	560
Wald chi2(12)	17.55
Prob > chi2	0.1301
Pseudo R2	0.0430
Log pseudolikelihood	-313.31388
Base category (constant)	Male; Latino/a or Hispanic; legal immigration status; union member; job tenure of 12 or more months; employer has 100 or more employees; employer is "high road"; made claim with other workers.

**Table 11.** Logistic Regression Results: Substantive Legal Knowledge

Independent variable	Coefficient	Robust standard error	Statistical significance (p-value)
Female	0.0120387	0.0929117	0.897
Black or African American	-0.5531989***	0.1376899	0.000
Asian or other race	-0.2072459 <sup>†</sup>	0.1411088	0.142
White	-0.8291724***	0.2288281	0.000
Age (log)	-0.5192653***	0.1412215	0.000
Years of education (log)	-0.0775112	0.0796029	0.330
No legal immigration status	0.1742892 <sup>†</sup>	0.1202510	0.147
Does not know where to file government complaint (procedural legal knowledge)	-0.0930504	0.1068239	0.384
Not a union member	0.3069922*	0.1849017	0.097
Job tenure of fewer than 12 months	0.0398983	0.1148611	0.728
Employer has fewer than 100 employees	-0.6794804***	0.1029398	0.000
Employer is not "high road"	0.1127068	0.1101022	0.306
Constant	1.8517130	0.6169684	0.003

Note: Dependent variable = Respondent knows minimum wage and overtime rights (0,1).

\*\*\* $p \leq 0.01$ ; \*\* $p \leq 0.05$ ; \* $p \leq 0.10$ ; <sup>†</sup> $p \leq 0.15$

Number of observations	3620
Wald chi2(12)	96.42
Prob > chi2	0.0000
Pseudo R2	0.0356
Log pseudolikelihood	-2302.8753
Base category (constant)	Male; Latino/a or Hispanic; legal immigration status; has procedural legal knowledge; union member; job tenure of 12 or more months; employer has 100 or more employees; employer is "high road."

**Table 12.** Logistic Regression Results: Procedural Legal Knowledge

Independent variable	Coefficient	Robust standard error	Statistical significance (p-value)
Female	-0.5572914***	0.1060106	0.000
Black or African American	0.3197659**	0.1425108	0.025
Asian or other race	-0.3812027**	0.1536963	0.013
White	0.0593975	0.2199687	0.787
Age (log)	0.7814716***	0.1601408	0.000
Years of education (log)	0.2641330**	0.1036941	0.011
No legal immigration status	-0.9870480***	0.1465031	0.000
Does not know minimum wage and overtime rights (substantive legal knowledge)	-0.0816583	0.1071086	0.446
Not a union member	-0.2234331	0.1967807	0.256
Job tenure of fewer than 12 months	-0.1341045	0.1382338	0.332
Employer has fewer than 100 employees	-0.1500885	0.1172208	0.200
Employer is not "high road"	-0.3894764***	0.1199624	0.001
Constant	-3.1797170	0.6946226	0.000

*Note:* Dependent variable = Respondent knows where to file government complaint (0,1).

\*\*\* $p \leq 0.01$ ; \*\* $p \leq 0.05$ ; \* $p \leq 0.10$ ; † $p \leq 0.15$

Number of observations	3606
Wald chi2(12)	198.28
Prob > chi2	0.0000
Pseudo R2	0.0921
Log pseudolikelihood	-1787.7217
Base category (constant)	Male; Latino/a or Hispanic; legal immigration status; has substantive legal knowledge; union member; job tenure of 12 or more months; employer has 100 or more employees; employer is "high road."