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From Weight Checking to Wage Checking: Arming Workers To Combat Wage Theft

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From Weight Checking to Wage Checking: Arming Workers To Combat Wage Theft

William R. Stewart Lecture

March 5, 2014

MATTHEW W. FINKIN*

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I. WAGE THEFT

Wage theft refers to employer practices that result in employees taking home less than they are legally entitled to under federal and state law: paying below the legal minimum; not paying for time worked by having workers work “off the clock” before checking in, after clocking out, or by requiring work during unpaid break time; not paying for overtime work at the statutory overtime rate; for tipped employees, expropriating tips that should be the employee’s; or just not paying at all. In tandem with the massive shift in the economy from well-paid manufacturing jobs to low-wage service jobs, wage theft has emerged in the public forum as a significant economic and social problem.¹

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1. *See, e.g.*, 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); ANNETTE BERNHARDT, DIANA POLSON & JAMES DEFILIPPIS, *WORKING WITHOUT LAWS: A SURVEY OF EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY* (2010); KIM BOBO, *WAGE THEFT IN AMERICA* (2009); MARC DOUSSARD, *DEGRADED WORK: THE STRUGGLE AT THE BOTTOM OF THE LABOR MARKET* (2013); FAST FOOD FORWARD, *NEW YORK’S HIDDEN CRIME WAVE: WAGE THEFT AND NYC’S FAST FOOD WORKERS* (2013); STEVEN GREENHOUSE, *THE BIG SQUEEZE* (2008); ZACH SCHILLER & SARAH DECARLO, *POLICY MATTERS OHIO, INVESTIGATING WAGE THEFT: A SURVEY OF THE STATES* (2010); DAVID WEIL, *IMPROVING*

In popular culture, wage cheating is an aberration, characteristic of fly-by-night sweatshops: enterprises that lack a business address, that may not be registered, and that overwhelmingly employ undocumented workers on a casual basis. There are such enterprises.² But these employers do not define the cohort of workers subject to wage theft. David Weil has identified the employments most likely to engage in wage theft on the basis of the disproportion of federal wage-and-hour violations they display. These are set out in Table 1.

Table 1. Employments particularly prone to wage-and-hour violations

Eating and drinking—limited service (fast food) / full service
Hotel/motel
Residential construction
Janitorial services
Moving companies / logistics providers
Agricultural products—multiple sectors
Landscaping/horticultural services
Healthcare services
Home healthcare services
Grocery stores—retail trade
Retail trade—mass merchants, department stores, specialty stores

Source: DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT 2 (2010).

In turn, these employers can be further segmented in a variety of ways—for example, by size, ownership, or control—in terms of their propensity to engage in wage theft. David Weil found that fast food franchisees were more likely to be violators than franchisor-owned outlets.³ Smaller employers, those with twenty or fewer employees, were more likely to violate the law,⁴ though some large employers

WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT (2010); Ruth Milkman, Ana Luz González & Peter Ikeler, *Wage and Hour Violations in Urban Labour Markets: A Comparison of Los Angeles, New York and Chicago*, 43 *INDUS. REL. J.* 378 (2012); Catherine K. Ruckelshaus, *Labor's Wage War*, 35 *FORDHAM URB. L.J.* 373 (2008).

2. Marc Doussard has compared the use of casual and largely undocumented labor, often picked up on the street by small residential contractors, who conform to this model, with grocery store workers in midsize Hispanic food markets, who do not conform to it. DOUSSARD, *supra* note 1, at 118–24.

3. WEIL, *supra* note 1, at 44. Even within a general category—residential construction, food service—there is enormous variation. The restaurant industry alone employs ten million people, nine percent of the total U.S. workforce. ROSEMARY BATT, JAE EUN LEE & TASHLIN LAKHANI, *A NATIONAL STUDY OF HUMAN RESOURCE PRACTICES, TURNOVER, AND CUSTOMER SERVICE IN THE RESTAURANT INDUSTRY 5* (2014). This study breaks the industry down into four major categories—upscale fine dining, casual fine dining, moderately-priced, and fast food—each with its own characteristics. *Id.* at 6. Nevertheless, the study reveals some areas of commonality in human-resource policy, training, job longevity, and employee turnover.

4. Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships and Workers' Organizations*, 38 *POL. & SOC'Y* 552, 554–55 (2010). David Weil singles out one such category of small and insular workplaces to exemplify their

are not immune from the allure of cheating, as successful class claims brought against Wal-Mart, the nation's largest private-sector employer, evidence.⁵

Traditionally, a union would be expected to police an employer's adherence not only to negotiated wages and hours but to the law as well. Consequently, "Absent the presence of third-party representatives, workers face substantial impediments to effectively exercising their rights."⁶ But the employees most vulnerable to being cheated have low union density. They may have constrained alternative job opportunities due to limited language, education, or mobility; they may have limited knowledge of what their legal rights are; and, even if they do complain, they are often subject to retaliation.⁷ As a student of midsize Hispanic food markets in Chicago observes:

Grateful or just desperate to maintain a steady income, employees in Chicago's midsize supermarkets work in environments where even the most basic components of U.S. labor law and employer behavior may be disregarded at any time. . . . Although employees frequently work more than forty hours per week, overtime pay premiums are rare; even when employers promise to pay time and a half for overtime, the extra pay appears only episodically. . . .

These individual employment abuses are embedded within a broader pattern of employer retribution. Workers know that if they request overtime, take allotted lunch breaks, or request vacation time to which they are officially entitled, they may be furloughed, dismissed, or reassigned within the workplace.⁸

This depiction has been more finely tuned by Annette Bernhardt, Michael Spiller, and Diana Polson, who studied the prevalence of and reasons for wage theft in three major cities.⁹ They first addressed the group they identified as being most at risk: frontline workers in low-wage occupations. These tended to be more often female (55.6%) than male (44.4%); overwhelmingly minorities (96.5%); and, contrary to popular belief, mostly either citizens or documented aliens (61.1%).¹⁰ Also contrary to popular belief that the problem is mostly of exploited youth, the age distribution was fairly even across quintiles starting from age 18–25 to age 46+. The occupations

imperviousness to regulation—nail salons. "Many of those in the workforce are immigrants and non-English speakers, making complaining unlikely. Yet because employers are small, geographically dispersed, and under tremendous competitive pressure, it is hard to see how the WHD [Wage and Hour Division of the U.S. Department of Labor] might systematically affect behavior." WEIL, *supra* note 1, at 76.

5. See, e.g., Steven Greenhouse & Stephanie Rosenbloom, *Wal-Mart To Settle Suits over Pay for \$352 Million*, N.Y. TIMES, Dec. 24, 2008, at B1; Francie Grace, *Wal-Mart Loses Unpaid Overtime Case*, CBSNEWS.COM, Dec. 20, 2002, http://www.cbsnews.com/2100-201_162-533818.html; *Wal-Mart in \$86 Million Settlement of Wage Lawsuit*, REUTERS, May 12, 2010, available at <http://www.reuters.com/assets/print?aid=USTRE64B3MG20100512>.

6. WEIL, *supra* note 1, at 84.

7. *Id.* at 76–77.

8. DOUSSARD, *supra* note 1, at 121.

9. Annette Bernhardt, Michael W. Spiller & Diana Polson, *All Work and No Pay: Violations of Employment and Labor Laws in Chicago, Los Angeles and New York City*, 91 SOC. FORCES 725 (2013).

10. *Id.* at 732–33 tbl.1.

at risk matched up well with the employing enterprises Weil abstracted from the data of wage-and-hour violations: cleaning and maintenance (18.5%); construction, installation, and repair (16.5%); food preparation and service (16.2%); home health and child care (14.7%); and sales (11.1%)—to list the industries aggregating into the majority of such employments (77%). The median wage of those at risk (in 2008 dollars) was \$8.15 per hour. In all, this captures the 1.64 million workers in these three cities who were deemed at risk of wage theft. They constitute 15% of the total workforce in these cities and about 31% of the frontline workers in them.¹¹

Bernhardt, Spiller, and Polson further estimated the percentage of at-risk workers who actually experienced a violation in the week previous to their survey, to get some notion of the prevalence of the practice. (Those at risk of a particular violation would not in every case be 100% of the at-risk population as, for example, workers who work fewer than forty hours per week would not be at risk of unpaid overtime.) A culling of their data is set out in Table 2.

Table 2. Wage-and-hour violation rate in prior week (2008)—Chicago, Los Angeles, New York City

Violation	Workers at risk of violation	At-risk workers with a violation
Worker was paid below the minimum wage	100.0%	25.6%
Worker had unpaid or underpaid overtime	24.9%	75.3%
Worker not paid for off-the-clock work	24.8%	70.6%
Worker did not receive a paystub	100.0%	56.7%
Worker was paid late	100.0%	4.3%
Worker experienced illegal retaliation by employer for most recent complaint or for an organizing effort in the last year	12.0%	43.7%

Source: Annette Bernhardt, Michael W. Spiller & Diana Polson, *All Work and No Pay: Violations of Employment and Labor Laws in Chicago, Los Angeles and New York City*, 91 SOC. FORCES 725, 734 tbl.2 (2013).

About two-thirds of the at-risk workers surveyed experienced at least one pay-related violation of law the week previous to the survey. Extrapolating these data, Bernhardt, Spiller, and Polson estimate that in any given week, 1.1 million workers in these cities experience a pay-based violation. Inasmuch as the median minimum-wage violation came to \$1.52, a not-inconsequential sum to a worker at or on the cusp of the minimum wage, the authors estimate that in these cities wage theft amounts to over \$56 million in lost, that is, stolen wages per year.¹²

That wage theft is so prevalent should not surprise. It has long been the stuff of economic thought that employers will choose to violate minimum wage or other labor law when the benefits of noncompliance outweigh the likelihood of being caught and

11. *Id.* at 730.

12. *Id.* at 735–37. David Weil estimates that “there are about 130 violations for every one [Department of Labor Wage and Hour Division] complaint,” though these vary across industries. WEIL, *supra* note 1, at 84. The average back wages per employee in fast food paid by employers as a result of the DOL inspectorate’s intervention was \$197. *Id.* at 47.

the cost of compliance.¹³ So it is here, as all students of the phenomenon agree.¹⁴ The employer's proclivity to steal is exacerbated by the fragmentation of management and control by franchising and highly competitive outsourcing and by the evaporation of union representation. That, coupled with weak enforcement, makes the alternative of noncompliance an attractive business model.¹⁵ As the consequence of a refusal to pay according to law—if the employer is found out and charged—is an agreement to pay what it would otherwise have been obligated to pay, there is no reason why the employer would not cheat: the consequence of being caught, economically speaking, would render the employer no worse off than having complied to begin with.

II. PROPOSALS TO ADDRESS WAGE THEFT

As matters now stand, apart from the possibility of enforcement of wage claims by individual legal action, a chimera for the vast majority of low-wage workers absent effective class actions,¹⁶ the federal and state governments have assumed the legal obligation to eradicate wage theft. They have done so primarily through reliance on systems of labor inspection, most often triggered by employee complaint.¹⁷ This system has not proven equal to the task.¹⁸ Part of the problem may be explained by the way the inspectorate is structured and functions.¹⁹ Part is explained by the unwillingness of Congress and a great many states to devote adequate resources to inspection.²⁰ Part, beyond the scope of this discussion, lies

13. See George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970).

14. See, e.g., Bernhardt et al., *supra* note 9, at 727 (on “the presence of a competitive model in which employers treat legal compliance as a variable to be calibrated in the reduction of labor costs” as explaining the attractiveness of wage theft); WEIL, *supra* note 1, at 49. This was put by Marc Doussard, on the basis of his study of Chicago, in blunter terms: “With a low ratio of inspectors per establishment and minimal penalties for noncompliance, evading the law is not a covert competitive tactic in service industries—it’s a basic, uncontested business practice on public display.” DOUSSARD, *supra* note 1, at 233.

15. David Weil, *Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters*, 28 COMP. LAB. L. & POL’Y J. 125, 138 (2007).

16. Nantiya Ruan, *What’s Left To Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1115–24.

17. Weil, *supra* note 15, at 136.

18. See GAO’s *Undercover Investigation: Wage Theft of America’s Vulnerable Workers: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. 2 (2009); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-629, DEPARTMENT OF LABOR: WAGE AND HOUR DIVISION NEEDS IMPROVED INVESTIGATIVE PROCESSES AND ABILITY TO SUSPEND STATUTE OF LIMITATIONS TO BETTER PROTECT WORKERS AGAINST WAGE THEFT (2009).

19. David Weil has comprehensively reviewed the manner in which the U.S. Department of Labor functions and has made a set of recommendations to more systematically address the problem of wage theft. See WEIL, *supra* note 1.

20. As of 2010, there was a total of 659.5 state inspectors nationwide devoted to enforcing minimum wage and selected employee-protective laws. SCHILLER & DECARLO, *supra* note 1, at 2. On the efforts California has made, see JULIE A. SU, CAL. DEP’T OF INDUS. RELATIONS, A REPORT ON THE STATE OF THE DIVISION OF LABOR STANDARDS ENFORCEMENT (2013). According to one press account, as of the end of July 2013, New York’s Labor Department had a backlog of 14,000 wage-and-hour complaints. Jim Dwyer, *Exhausted Workers Recall*

in the laws' weaknesses.²¹

Proposals have been made for the better prioritization of inspection—that is, the devotion of resources to targeted industries and workplaces—and for addressing the responsibilities of companies further up the supply chain—that is, the enlisting of contractors to monitor the behavior of their subcontractors.²² The latter anticipates proposals for a broader role for public-private partnerships, dealt with below. Apart from proposals directed to the inspectorate alone, however, two strands of reformist thought and experimentation respectively have emerged. The first, which need not be dwelt upon at length, seeks to enlist employers in self-regulation. The second turns elsewhere in civil society, outside the firm and outside of government.

A. Self-Regulation

The basic idea is to get employer “buy-in” to the laws' obligations. The archetypical example can be found in the corporate experience in the United States with antidiscrimination law, in particular with the initially uncharted sea of the prohibition of sex discrimination. The story, told by Frank Dobbin,²³ is of how human-resource managers persuaded their companies to adopt practices these managers developed that would foster the integration of women into the firm, as being in the firm's long-term interest; how the courts became persuaded that what the managers devised was what the law required; and how, incidentally, those dual moves worked to enhance the power of human-resource managers.

This singular success evidences the ill fit of a self-regulating, “new-governance” approach to deal with wage theft. A business model rooted in the economic benefits of noncompliance is impervious to blandishment. Absent an economically powerful “or else”—or something else—there is no incentive to change. That “something else” could be a more effective system for detecting and remedying violations, coupled with more serious penalties. Or it could be rooted in an effective voice for employees monitoring employer behavior in the workplace; that is, unionization, or something union-like. On the latter, Cynthia Estlund, who has explored the idea of self-regulation in detail, has acknowledged that employee representation may well be an ineluctable element of effective intramural regulation, but that that element is notably absent in this setting and extremely difficult to achieve.²⁴

Minimal Efforts To Enforce a Minimum Wage Law, N.Y. TIMES, Nov. 8, 2013, at A28.

21. Cf. EUNICE HYUNHYE CHO, TIA KOONSE & ANTHONY MISCHEL, UCLA LABOR CTR., *HOLLOW VICTORIES: THE CRISIS IN COLLECTING UNPAID WAGES FOR CALIFORNIA'S WORKERS* (2013) (advocating a wage lien based on experience under Wisconsin law).

22. See, e.g., David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. & LAB. REL. REV. 238 (2005); David Weil & Carlos Mallo, *Regulating Labour Standards via Supply Chains: Combining Public/Private Interventions To Improve Workplace Compliance*, 45 BRIT. J. INDUS. REL. 791 (2007).

23. FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009).

24. CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE* 148–49 (2010).

A requirement of independent employee representation would sharply raise the perceived cost of opting into the self-regulatory system; the resulting costs might well outweigh the rewards of self-regulation as long as the default regulatory regime entails such a low risk and cost of enforcement. For most U.S. employers

B. Private Initiatives

Private initiatives have been mounted to deal with wage theft.²⁵ These often involve community-based “worker centers” that counsel workers, mostly immigrants, on their rights and assist them in filing claims.²⁶ They also involve unions, notably in the construction trades, that have enlisted unionized employers to contribute funds to joint labor-management committees established under the Labor Management Cooperation Act of 1978 to reduce wage cheating by nonunionized competitors.²⁷ These funds, jointly administered, can be used to hire staff to monitor nonunion employers, to serve as a channel to the inspectorate, or to pressure contractors not to deal with wage-violating subcontractors. Unions have also cooperated with worker centers; they have the language ability, access to the affected low-wage employees, and, critically, the trust of the target community.²⁸ But the basic idea driving these various initiatives is to gain better access to affected workers, to educate them about their legal rights, to secure information about their employers’ practices, and to summon the labor inspectorate’s enforcement by filing complaints.

As all students of the problem agree, these are second-best alternatives to collective representation. A union that represents the workers as their collective bargaining agent is ensconced within the firm; it draws its power from those it represents. It can require the employer to produce the names and addresses of its employees, their wages, their hours, and all other information in the employer’s possession that will enable the union to bargain for the employees and present their

most of the time, the expected cost of public enforcement may be too low to justify taking the risk that they associate with independent employee representation. Without a greater background threat of enforcement and sanctions, it will therefore be difficult to induce most employers to take meaningful steps toward independent employee representation within a system of self-regulation.

Id. at 149.

25. These are discussed by Ruckelshaus, *supra* note 1, at pt. II, and at greater length by Fine & Gordon, *supra* note 4.

26. Steven Greenhouse, *A Union in Spirit*, N.Y. TIMES, Aug. 11, 2013, at B1. *See generally* DOUSSARD, *supra* note 1. According to a letter sent by the Chairman of the House Committee on Education and the Workforce and the Chairman of the House Subcommittee on Health, Employment, Labor, and Pensions to the Secretary of Labor on July 23, 2013, there are at least 139 “worker centers” in thirty-two states. These are “community-based and community-led organizations that engage in a combination of service, advocacy, and organizing to provide support to low-wage workers.” Gayle Cinquegrani, *House Republicans Ask Perez To Clarify LMRDA Filing Terms for Worker Centers*, BLOOMBERG BNA DAILY LAB. REP., Aug. 1, 2013, at A-13. These House leaders claimed that worker centers are labor organizations that should be required to file reports with the Secretary of Labor under the Labor Management Reporting and Disclosure Act (LMRDA), a characterization and consequence that worker centers reject. The letter can be found at <http://op.bna.com/dlrcases.nsf/r?Open=gcii-9a6n2g>.

27. *See* Labor Management Cooperation Act of 1978, Pub. L. No. 95-524, § 6, 92 Stat. 1909, 2020–21 (codified as amended at 29 U.S.C. § 175a (2012)).

28. *See* DOUSSARD, *supra* note 1, at 207; Fine & Gordon, *supra* note 4, at 560.

grievances for adjustment.²⁹ The union's agents may have direct access to the worksite "for reasonable periods at reasonable times" to investigate working conditions.³⁰ So too might a government agency, but unlike a union, a government agency is subject to the Fourth Amendment: it may be required to secure a warrant to inspect and may be liable for violation of the target's constitutional rights.³¹ Labor-management cooperative committees and worker centers as private actors have neither representational rights nor governmental power. Consequently, they have no legal right of access to the workers or the workplace.³²

C. Public-Private Partnership

Janice Fine and Jennifer Gordon have essayed a system of public-private partnership. They propose that public-interest groups—worker centers and unions—augment the labor inspectorate by being given a clear role in the detection of violators.³³ One legal possibility is to "deputize" these groups to inspect.³⁴ Such would scarcely be radical, they note, pointing to the deputization of humane societies to inspect private premises to assure that animals have adequate food, shelter, and water.³⁵ Fine and Gordon doubt the political, not the legal, feasibility of this delegation. But a word on law here is a useful predicate for the proposal to be essayed later on.

The deputization of public police authority to private parties to redress animal cruelty goes back to 1829 and became widely followed.³⁶ There is no question but

29. See generally ROBERT A. GORMAN & MATTHEW W. FINKIN, *LABOR LAW ANALYSIS AND ADVOCACY* § 20.5 (2013).

30. *Id.* § 20.5, at 661 (reviewing authority).

31. See generally 5 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.2 (5th ed. 2012). On the requirement of a warrant, see *Patel v. City of Los Angeles*, 738 F.3d 1058 (9th Cir. 2013) (en banc) (finding city ordinance for a warrantless inspection of hotel guest records facially invalid under the Fourth Amendment), *cert. granted*, No. 13-1175, 2014 WL 1254566 (Oct. 20, 2014).

32. Fine and Gordon note that joint labor-management monitoring of construction contractors has been hobbled by the power of contractors to refuse access. Fine & Gordon, *supra* note 4, at 565. The International Transport Workers Federation (ITF), a federation of national maritime unions, has established a set of standards that it insists are applicable whether or not the ship owner is a signatory to a domestic union contract. ITF inspectors routinely come aboard newly arrived ships, particularly those flying flags of convenience, to interview the crew and observe living conditions. See NATHAN LILLIE, *A GLOBAL UNION FOR GLOBAL WORKERS* 70–76 (2006); see also LEON FINK, *SWEATSHOPS AT SEA* 188–94 (2011). Absent contractual authorization, these inspectors have no legal right to do so. A captain may, figuratively speaking, have the ITF inspector pitched overboard. But the sanction the ITF relies on to secure compliance is sympathetic action by dock workers that, lawful or not, by causing delay, may be more costly than allowing the inspector access and dealing with any problem the inspector presents. The ITF's inspection program is a paradigmatic case of self-help, enabled, however, by a unique condition of a strategic workplace situation.

33. Fine & Gordon, *supra* note 4, at 559.

34. *Id.* at 561.

35. *Id.* at 573 n.123 (citing *Hand v. Stray Haven Humane Soc'y*, 799 N.Y.S.2d 628 (App. Div. 2005)).

36. See Elizabeth R. Rumley & Rusty W. Rumley, *Enforcing Animal Welfare Statutes:*

that the persons so clothed are constrained by the Constitution as any other public authority would be.³⁷ Thus, the legal aspects of this idea that give pause are the constitutional constraints on entry for inspection and the potential for liability should these constraints be breached.

Fine and Gordon point instead to two insuperable political obstacles. First, members of the political right would oppose deputization, seeing it as an opening wedge for unionization. A far more modest proposal merely to enlist community groups to report wage theft in New York was denounced as “government-approved vigilantism.”³⁸ Far greater stridency would be expected in response to any proposed deputization.

Second, formal delegation would inevitably break on the shoal of resistance from the inspectorate.³⁹ But more than hostile foot dragging (or loss of “turf”) is involved, for legal deputization would import obligations of training, supervision, and coordination adjunct to the loss of control that might complicate the inspection process considerably.

From what appears, what Fine and Gordon propose is simply greater reliance on these private agencies in a more structured and ongoing way, not as delegates of government, but to serve as a community liaison with it. These civil institutions would be doing no more than what they currently do or could do on an ad hoc basis, save to do it more systematically. That sort of reliance would not necessarily render the private agency an extension of the state and so would avoid the constitutional limitations that apply were they to be deputized by or acting directly at the behest of public authority.

These various proposals, directed to the inspectorate or to civil bodies, call for more effective means of reaching the workforce from the outside—that is, in a proactive address to a passive workforce. Perhaps because most, but by no means all, of these workplaces are small and employ a large proportion of workers vulnerable to exploitation and, critically, to retaliation, rather little of this takes up the idea of power flowing to the workers themselves. Indeed, the work setting’s relative imperviousness to unionization is taken to rule out, up front, so to speak, the most obvious and effective monitoring system, one that draws its authority not from delegation by the state but by those most immediately affected. Yet it should be a larger social goal, transcending

In Many States, It’s Still the Wild West, 21 SAN JOAQUIN AGRIC. L. REV. 21, 24 (2012).

37. See, e.g., *Kauffman v. Pa. Soc’y for the Prevention of Cruelty to Animals*, 766 F. Supp. 2d 555 (E.D. Pa. 2011); *Allen v. Pa. Soc’y for the Prevention of Cruelty to Animals*, 488 F. Supp. 2d 450 (M.D. Penn. 2007); see also Comment, *Private Police Forces: Legal Powers and Limitations*, 38 U. CHI. L. REV. 555 (1971).

38. Fine & Gordon, *supra* note 4, at 572 (quoting the criticism that Americans for Limited Government made of New York’s “Wage Watch” program). New York’s Department of Labor had proposed to enlist community groups in reporting wage theft just as we might expect the community to report other crimes. See Press Release, N.Y. State Dep’t of Labor, Labor Department Initiative Empowers Ordinary People To Join the Fight Against Wage Theft (Jan. 26, 2009), available at http://www.labor.ny.gov/pressreleases/2009/Jan26_2009.htm. This proposal resulted in the charge of “vigilantism” by opponents.

39. Fine & Gordon, *supra* note 4, at 569 (reporting the strong resistance of the U.S. Department of Labor and the union representing the federal inspectorate to the idea of deputization). They observe in conclusion: “[W]e know that organizational cultures can be major barriers to innovation [C]hange at the top will never be enough. . . . Our conversations with labor-standards administrators in New York, New Jersey, and California affirm the centrality of the challenge of organizational culture.” *Id.* at 575.

adherence to wage-and-hour law, to clothe these, the marginalized working poor, with agency, with the capacity to act on their own behalf.⁴⁰ Is there no way this can be done? Is there nothing in between collective bargaining and nonrepresentation?

III. AN ALTERNATIVE MODEL: CHECKWEIGHMEN LAW

For as long as there has been wage labor there has been wage theft.⁴¹ In the middle ages, some English employers could not resist the temptation to pay their workers in the goods they made, debasing payment by fobbing off the shoddy or unmerchantable. In England, this problem was addressed piecemeal starting in the late fifteenth century and then, after these discrete laws piled on one another, in the Truck Act of 1831, requiring that all wages be paid in the coin of the realm.⁴² Baron Bramwell addressed the argument that, if required to pay in money, an employer could just as well refuse to pay at all. “The answer,” he opined, is “that such a cheat is too barefaced, and would certainly be successfully resisted; while more or less of inferiority in the quality or value of goods might be endured, or, if contested, would give rise to more doubtful inquiries.”⁴³ The United States followed suit a half century later in a spate of state wage-payment laws requiring regular payment in money, not company scrip or goods, paid at regular intervals and paid out in full on termination of employment.⁴⁴

One industry that was especially prone to wage cheating in the late nineteenth and early twentieth centuries was coal mining. Coal was a critical commodity at the time. Miners were commonly paid on a piece-rate basis, by the carload or the ton. Indeed, skilled miners often demanded to be paid on that basis, which, in the former case, required the volume of the car to be accounted for accurately and, in the latter, for the coal accurately to be graded and weighed.⁴⁵ The opportunity for the company to cheat—to underweigh or misgrade—was palpable. Cheating was universally suspected and commonly practiced.⁴⁶

40. See generally JOSHUA COHEN & JOEL ROGERS, ASSOCIATIONS AND DEMOCRACY (1995).

41. The most famous strike in Pharaonic Egypt was over the accumulation of unpaid wages. William F. Edgerton, *The Strikes in Ramses III's Twenty-Ninth Year*, 10 J. NEAR E. STUD. 137 (1951). Jewish law required the prompt payment of the wages of day laborers, by sundown. *Deuteronomy* 24:15; *Leviticus* 19:13. The very biblical repetition manifests a deep reality.

42. Truck Act, 1831, 1 & 2 Will. 4, c. 37 (Eng.). “Truck” was common usage for barter or exchange.

43. *Archer v. James*, (1859) 121 Eng. Rep. 998 (Exch.) 1006; 2 B. & S. 67, 89 (referencing Adam Smith's *Wealth of Nations*, bk. 1, ch. 10, in support of the law).

44. See ROBERT GILDERSLEEVE PATERSON, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 229, WAGE-PAYMENT LEGISLATION IN THE UNITED STATES (1917).

45. On the complexity of payment and the suspicions of the miners, see PERRY K. BLATZ, *DEMOCRATIC MINERS: WORK AND LABOR RELATIONS IN THE ANTHRACITE COAL INDUSTRY, 1875–1925*, at 141–69 (1994); KATHERINE A. HARVEY, *THE BEST-DRESSED MINERS: LIFE AND LABOR IN THE MARYLAND COAL REGION, 1835–1910*, at 58–73 (1969).

46. See BLATZ, *supra* note 45, at 148; HARVEY, *supra* note 45, at 69; see also DONALD L. MILLER & RICHARD E. SHARPLESS, *THE KINGDOM OF COAL: WORK, ENTERPRISE, AND ETHNIC COMMUNITIES IN THE MINE FIELDS* 149 (1985) (writing of the anthracite mines in Pennsylvania in the late nineteenth century). Irving Bernstein describes the “Catastrophe in Coal” in Kentucky in the late twenties and early thirties. IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER 1920–1933*, at 361 (1960) (“A common method of

The legislative response throughout the coalfield was the adoption of checkweighmen laws. Commonly, these laws provided in a couple of short strokes that the miners could, if they wished, select and pay at their own expense a weighman to check the scales and be present when the coal was weighed; sometimes these weighmen were made coadjutors with the company's weighman. The West Virginia law, first enacted in 1901 and on the books still, is fairly typical save that it extends beyond coal mining and specifies the means of selection:

Where the amount of wages paid to any of the persons employed in any manufacturing, mining, or other enterprise employing labor, depends upon the amount produced by weight or measure, the persons so employed may, at their own cost, station or appoint at each place appointed for the weighing or measuring of the products of their labor a checkweighman or measurer, who shall in all cases be appointed by a majority ballot of the workmen employed at the works where he is appointed to act as such checkweighman or measurer.⁴⁷

Table 3 lists the states that had and those that still retain these laws.⁴⁸ The full texts are appended at the close of this discussion.

Table 3. Checkweighmen laws

	Election	Access/inspection
Alabama*		X
Arkansas	X	
Colorado	X	X
Illinois*		X
Indiana		
Kansas		
Kentucky	X	X
Missouri*		X
Ohio	X	X
Oklahoma		X
Pennsylvania (anthracite)*		
Pennsylvania (bituminous)*	X	X
Tennessee*	X	X
Texas		
Utah		X
Washington		
West Virginia*	X	
Wyoming		

Asterisk (*) indicates provision is retained in current law.

cutting wages where miners were paid by the car or the ton was the falsification of weights.”).

47. W. VA. CODE ANN. § 21-5-8 (LexisNexis 2013).

48. I am much indebted to Paul Gatz of the Texas Tech University School of Law for assembling these laws. Thanks also to the staff of the *Indiana Law Journal* for updating the statutes as set out in the Appendix.

A few of these laws were a bit more specific on the issue of the checkweighman's access, using words such as "full access" (Alabama and Ohio) or explicitly prohibiting employer interference in access (Oklahoma, where interference was a crime, and Kentucky). A few were a bit more specific in the manner of selection: Pennsylvania's bituminous coal law allows selection by a majority attending a meeting called for that purpose, as does Tennessee's law; West Virginia requires an "election" *simpliciter*—all, apparently, still in effect. Colorado was more specific still: it required a secret ballot at a convenient place near the mouth of the mine and provided for intervention by the state inspector where an election was in dispute.

Some employers resisted compliance.⁴⁹ Sometimes the miners declined to exercise their right because they sensed no need or did not care to bear the cost.⁵⁰ But, from what appears, the miners thought the measure effective, nor is there reference to widespread employer obstruction. When Congress, following the demise of the National Industrial Recovery Act, stepped in specifically to rationalize the coal industry—an industry suffering in the extreme from massive overproduction, the reduction of wages to penurious levels, and, even then, rampant wage cheating—it included the right of miners to select a checkweighman.⁵¹ In a last gasp before the Court reversed its course on economic regulation, the Act as a whole was held unconstitutional,⁵² but, as a practical matter, the issue of short weighing faded away

49. BLATZ, *supra* note 45, at 148; HARVEY, *supra* note 45, at 329–30. The Supreme Court of Tennessee held that the law was not infringing were a mine owner to close, or threaten to close, the mine should the miners exercise their right to select a checkweighman. *State v. Jenkins*, 18 S.W. 249 (Tenn. 1891). This, in anticipation of what the Supreme Court would hold nearly three-quarters of a century later: that the closing of an entire plant out of unwillingness to deal with a union was not a violation of the National Labor Relations Act, *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), nor was it a violation to threaten to do so, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

50. See HARVEY, *supra* note 45, at 69.

51. Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991, *invalidated by Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (the "Guffey Coal Act"). Code members or district coal boards were directed to have their codes include that

[e]mployees shall have the right of peaceable assemblage for the discussion of the principles of collective bargaining, shall be entitled to select their own checkweighman to inspect the weighing or measuring of coal, and shall not be required as a condition of employment to live in company houses or to trade at the store of the employer.

§ 4, pt. III(b), 49 Stat. at 1001.

52. *Carter Coal*, 298 U.S. 238. Robert L. Stern described how the *Carter Coal* case arose. Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 HARV. L. REV. 645, 664–74 (1946). He recounted a moment of drama in the trial when counsel for the coal company cross-examined Philip Murray, vice president of the United Mine Workers. The Company's lawyer

challengingly and persistently prodded [Murray] into giving at least one example, by name and date, of a case in which miners had been cheated through the false weighing of their coal. After some hesitation, Mr. Murray, in a low voice, told of a sixteen-year-old boy who in 1903 had been deprived of 40 per cent of the weight of his coal, of how he protested and was discharged, and how his father and entire family were immediately thrown out of their company-owned house into the street. "The name of the family evicted from their home

as the mechanization of coal production eliminated tonnage payment.⁵³

IV. BUILDING ON THE HISTORICAL FOUNDATION

Legislative precedent, particularly if widespread and of long standing, evidences that what is proposed is concordant with and indeed draws deeply from the wellspring of our political and legal tradition. In this case, we have a substantial body of legislation directed to the specific issue of wage theft that addressed it by giving the workers the power to select a representative, independent of the employer and accountable to them, to see that they were being paid their due. The basic idea, more than a hundred years old and legislated throughout the coal-producing states, can scarcely be considered to be coming from left field, so to speak. The question is whether it can be adapted to contemporary circumstances. Attention should accordingly be paid to the law's substance and to its legal and political feasibility.

A. The Law's Substance

A modern wage-checker law should address four issues foreshadowed in prior law: eligibility for selection as wage checker; the scope of the checker's authority; the manner of selection; and the means of financing. These issues can be addressed explicitly in the law's text or effected by administrative regulation following sufficiently directive statutory guidance. The system's ends by either route are explored in what follows.

Eligibility. In the ordinary course, one would expect unions to avail themselves of the access to employees that the law affords and be well positioned, by their experience and available professional resources, to function as the law anticipates. Nevertheless, there is no reason to restrict the scope of employee choice to labor organizations. A wage checker could be defined as any entity—an unincorporated association, corporation, or partnership; a law firm; an accounting firm; a legal clinic; or even a single person (as, in fact, most of these laws contemplate)—so long as it is not subject to the control or influence of the employer or any employer-supported group or management consultancy.⁵⁴ As a facility, the state could, upon application, list qualified agencies. Such listing would be determinative of the agency's eligibility.

Checkweighmen law, antedating by decades the National Labor Relations Act's principle of majority rule, assured that only one agent per mine could be chosen. This

without notice was Murray. The head of that family's name was William. His son was Philip. I am the individual that was involved."

Id. at 669 (footnote omitted).

53. MORTON S. BARATZ, *THE UNION AND THE COAL INDUSTRY* 66–67 (1955).

54. The Kentucky law hedged the selection of the check weighman thusly: "Provided, the person so employed has the reputation of being an honest, trustworthy, discreet and upright man. The appointment under the provision of this act of each inspector and assistant weigher shall be approved by the judge of the county court of the county wherein the same is made." KY. STAT. § 2738q-1 (1922) (amended 1934) (repealed 1996). In *Jaybee Jellico Coal Co. v. Carter*, 270 S.W. 768 (Ky. 1925), the mine owner objected to the court that the elected checkman was not honest, trustworthy, discreet, and upright; he was sued by the checkman for defamation.

principle, extended to any office, store, outlet, or facility, reduces any accommodative burden on the employer's part.

Authority. The authority of the wage checker should be straightforward. The wage checker should be entitled to the names, addresses, telephone or cell phone numbers, or other contact information of the employees on whose behalf it functions; it should also be entitled, at its request, to copies of all records retained by the employer that contain information concerning the employees' wages and hours. This is the same information employers are commonly required by law to maintain and that federal law requires the employer to turn over to a union, were one to be in place.

In addition, the checker should be given the authority to enter the premises to inspect records and to conduct inspections of the workforce in a reasonable manner at a reasonable time; the checker should have access to the employees in nonwork areas on nonwork time. Again, this is the same access that federal law provides a union, were one to be in place. The experience under the Labor Act underlines both the need for and the practicability of information sharing and access to those whom the agent represents. Union informational and access rights have been in place for decades; they have not worked an undue interference in the operation of the enterprise.

The law should also provide, lest there be any doubt, that the checker is authorized to seek any necessary enforcement of the Act as well as to pursue any legal avenue for redress of any violation of state wage and hour law it believes has occurred or is occurring. The law should further provide that any interference, threat, or coercion by an employer in the exercise of the employees' rights under the law is actionable, by the state or by private action, and subject to suitably effective remedies and attorney fees.

Selection. Selection presents a more difficult question for two reasons. This is not because the law would apply to a myriad of scattered workplaces.⁵⁵ It is because, first, the affected enterprises tend to be small. Those whose employees are most at risk employ on average twenty or fewer employees. That alone is not an insuperable obstacle, however; coal mines at the time could have relatively small complements of miners. But coal miners could readily gather at the mine's mouth, weigh station, or some area closely adjacent, or even at the union hall if there was one. Miners lived near the mine, often in company housing. Gathering them together to select their checkweighman was not a problem. The urban workers of concern here come and go, often with considerably varying work hours, frequently having second (or third) jobs and long commutes. Reaching them in order for them to select a wage checker is a more challenging task.

Second, and closely related, as the little case law under these checkweighmen laws evidences, the selection of a named checkman was typically done without much ado; the result was rarely contested. It was a simple matter,⁵⁶ in a simpler time. The

55. In 1885, the first and second anthracite fields in Pennsylvania contained 149 collieries, most operated as single shafts by individual companies. THOMAS J. STEWART, OFFICE OF THE SEC'Y OF INTERNAL AFFAIRS, REPORTS OF THE INSPECTORS OF MINES OF THE ANTHRACITE AND BITUMINOUS COAL REGIONS OF PENNSYLVANIA, FOR THE YEAR 1890, at 11-23, 87-95 (1891). These employed a total of 26,100 "inside" workers, man and boy. The mean comes to 175 inside workers per colliery, but these varied from a high of 423 to a low of nine. *See id.*

56. *See Porter Coal Co. v. Davis*, 165 So. 93, 95 (Ala. 1935) (sustaining the constitutionality of the weighman law) ("We see no interest which the statute conserves for the coal company in respect to the manner in which the weighman is selected, so long as there

times have become less simple. We have witnessed over the course of the twentieth century, both here and abroad, a creeping juridification in labor matters. The term, more in use in Europe than in the United States—*Verrechtlichung* in German, *juridicisme* in French⁵⁷—has at least two meanings. One involves the drenching of civilian society in legal norms. This is not necessarily undesirable. We expect motorists to stop at red lights, citizens to pay their taxes, and employers to pay their employees what they are owed. But another meaning refers to the routinization of recourse to law, and so of the law's delay and transaction costs.

This, the negative face of juridification, is displayed in the history of the Labor Act. The drafters of the law gave the National Labor Relations Board (“Labor Board”) the power to decide whether employees desired union representation in any manner the Board saw fit.⁵⁸ The designation or selection of a bargaining agent, as section 9 sets it out,⁵⁹ was not conceived of as a war for the hearts and minds of the workforce; it was to be a matter of course, administratively to be expedited.⁶⁰ In 1947, the Republican-controlled Congress overrode President Truman's veto to mandate an election when the Labor Board found a question concerning representation to be presented. Over time, the role of a Board-run election took on a

is no question about his selection, or his capacity and conduct.”); *Jaybee Jellico Coal Co.*, 270 S.W. 768.

57. See generally JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW (Gunther Teubner ed., 1987); Spiros Simitis, *The Juridification of Labor Relations*, 7 COMP. LAB. L. 93 (1986).

58. In an undated memorandum from Philip Levy, a young lawyer on Senator Wagner's staff, to Calvert Magruder, General Counsel of the old Labor Board, engaged in the drafting of the Labor Act, Levy's section-by-section critique set out the following with respect to the then-proposed section 9(c):

At the hearings last year there was considerable opposition on the part of some protagonists of the bill, to giving the Board the power to certify representatives in the absence of an election by secret ballot. The argument was made that at some future time the Board might come under the influence of an anti-labor administration or that it will use its power to freeze out independent or progressive groups. Senator Borah particularly objected to this although he later voted to report the Walsh draft, to which the same objection could be made, out of the Committee. We feel that the argument is unsound; *first, it is extremely important that the Board have the power to certify or to determine representation in any manner it sees fit*, and secondly, if the Board is going to be pro-employer, the jig is up.

Memorandum from Philip Levy to Calvert Magruder, Gen. Counsel, NLRB (on file with the Indiana Law Journal) (emphasis added). The Board's discretion to certify a union was retained in section 9(c).

59. National Labor Relations Act, ch. 372, § 9(c), 49 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. § 159 (2012)).

60. Until 1939, the Board would certify a union as an exclusive bargaining agent on the basis of a majority having signed cards to that effect. See *Cudahy Packing Co.*, 13 N.L.R.B. 526, 533 (1939) (Member Smith dissenting on the change of policy). In 1945, the Board's rules allowed for an instant election ordered by a regional director where “no substantial issues” were present. 29 C.F.R. § 203.3 n.1 (Supp. 1945).

meaning it was never meant to have and became a focal point for contestation and delay, for juridification.⁶¹

That history serves as a sobering caution: even as the role of the proposed wage checker and the employer's responsibilities are far more narrowly circumscribed than in the case of collective bargaining representation—all the wage checker does is assure compliance with wage payment and wage-and-hour law—resistance to the law by resort to law has to be anticipated. The model of a century ago, of employees assembling at the worksite, selecting a weighman, and being done with it even as the weighman went about his, that is, the employees' business without let or hindrance seems quaint, perhaps even surreal today. Nevertheless, expedition ought be an imperative, to be achieved as best any law can in a juridified world. In doing that, the Labor Act's experience is instructive on what not to do.

Echoing the early experience under the Labor Act, the law could simply delegate to the state agency the power to determine, "by any means it deems most expedient," whether the employees wish to have a checking agency. What follows is suggestive of how the state might implement that authorization.

If a wage-checking agency satisfies the state that a majority of employees in any plant, office, store, or the like has chosen it, the state would inform the employer to that effect. At that point the question of selection would be resolved. However, this would place a burden on the checking agency to secure that support in an environment where access to the employees, to inform them of their rights and to offer them wage-checking representation, is difficult.

Consequently, the administrative regulation should provide that, upon notice from the checking agency to the state labor department that the agency is seeking the employees' designation, the employer would be required to turn over a list of its employees and their addresses, phone or cell phone numbers, work locations, shifts, and other means of identification, to the state agency, which, in turn, would release that information to the proposed wage-checking agency. (Again, analogous experience of long standing under the Labor Act evidences the want of any significant burden on employers.⁶²) Thereafter, if the checking agency satisfies the state that a majority desire to have it serve, or if the state by, for example, the conduct of a poll—by mail, telephone, in a meeting, or otherwise—is satisfied that a majority of employees participating desire to have the wage checker, the state would certify to that effect. Certification would not be judicially reviewable and, upon its issuance, the wage checker would be authorized to act. Inasmuch as the workers' indication of a desire for a wage checker would not be shared with the employer, the possibility of individual retaliation for the exercise of that right would be reduced. This approach reduces as well the prospect of a dispute over whether employees will select a wage checker and preserves the anonymity of those employees who desire wage checking.

Finances. All these laws provided that the checkweighman would be retained by the employees at their expense. The purpose was to assure the checkweighman's independence and also to assure that the employer bore no responsibility for the checkweighman, his wages, or worker's compensation for any injury. In actual operation,

61. See DUNLOP COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT § 3 (1994).

62. See *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236 (1966).

the checkweighmen were usually employed by the mine workers' union.⁶³ Where miners chose not to have a checkweighman, it seems that union politics, antiunion sentiment, or the unwillingness to pay union dues were the main motivators.⁶⁴

Inasmuch as the cohort of workers targeted here earn wages at or not much above the minimum wage, and inasmuch as no collective bargaining agreement with a dues deduction clause is involved, as a practical matter one would not expect these employees actually to bear any financial responsibility. (However, legal fees paid as the result of litigation or settlements secured by the checker could be used to support the agency.) The advantage to labor organizations in these laws is not financial; in fact, they would incur some cost. The advantage is the direct access to the workforce the law affords, access available under federal law only after considerable support for collective bargaining representation has already been secured. It is conceivable that, over time, a union could aggregate these small-enterprise working forces—of twenty employees, plus or minus, here and there—into larger economically sustainable groups for the eventual purpose of shared contract negotiation and shared contract administration, should the relationship ripen from wage-and-hour checking into collective bargaining.

B. Legal Feasibility

There is no doubt of the constitutionality of such a law.⁶⁵ The only other conceivable challenge to the capacity of the state to enact this approach to wage theft would be predicated on federal preemption. The argument would run thusly: inasmuch as federal law provides for employee representation and gives the administration of the statutory scheme over to a federal administrative agency, the state's entry into the matter of employee representation impermissibly intrudes into a zone of regulation reserved exclusively to federal authority.

The Labor Act has no preemption clause. It plays out on a field of employment law occupied primarily by the states; its reach is therefore partial. For example, when the Labor Act was passed, these checkweighmen laws were on the books, Congress had echoed them in the Guffey Coal Act of 1935, and nothing in the Labor Act or its legislative history suggests that these prior laws were to be eclipsed; in fact, they were never mentioned.

The Labor Act provides for the selection of an exclusive representative for the purposes of bargaining about the employees' wages, hours, and working conditions. If a bargaining agent is selected, the employer may not act on wages, hours, and working conditions without notifying the union of its desire to do so and, at the

63. *E.g.*, *Mouell v. Local No. 7635, United Mine Workers of Am.*, 81 F. Supp. 151 (S.D. W. Va. 1948); *Williams v. United Mine Workers of Am.*, 172 S.W.2d 202 (Ky. 1943).

64. *See* BORIS EMMET, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 361, LABOR RELATIONS IN THE FAIRMONT, WEST VIRGINIA BITUMINOUS COAL FIELD 82–83 (1924); H.M. GITELMAN, LEGACY OF THE LUDLOW MASSACRE 107–08 (1988).

65. The challenge of impermissible delegation failed even in an era more open to wrongful delegation than today. *Porter Coal Co. v. Davis*, 165 So. 93 (Ala. 1935). To the extent access to property is concerned, there would seem to be little doubt that the state, under whose law the right of property is defined, can afford such rights. *Cf. Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742 (Cal. 2007).

union's request, bargaining with it in good faith. Until a lawful impasse is reached, the employer may not implement any change in these matters unless, of course, it has reached an agreement. Further, the terms of a collective agreement can have a substantial impact on the conduct of the business: on a day-to-day basis, in scheduling, assignment, promotion, and pay; and in the company's competitiveness, profitability, and share value going forward. So, too, would a cost of disagreement over the contract's terms—a lockout or a strike—have a significant effect on the firm. For these reasons the law allows an employer to address its workers on their decision to collectivize the relationship, so long as it does not threaten reprisal for their having chosen to do so.⁶⁶

The wage checker's function is different. The selection of a wage checker works no change in the nature of the employment relationship. The checker does not bargain to establish terms and conditions of employment; there is no constraint on change in wages or hours. The checker's function is simply to assure that the workers are being paid what they are legally owed. For this reason the employer should have no greater opportunity to dissuade employees from exercising this statutory right than it would to dissuade them from deciding to consult or retain legal counsel, individually or collectively, about their wages. Should a group action for wages due be brought, it would be an act of concerted activity for mutual aid or protection, but that that is so does not mean that an action for retaliation for participation in the group suit would be preempted by the Labor Act.

[C]lass or group actions brought to vindicate a labor protective law or an employer-generated collective good necessarily engenders a form of members-only collective representation, albeit one geared to the vindication of those specific legal claims. It could not seriously be entertained that [the representational function performed in bringing those actions or] a state-mandated judicial mediation adjunct to such litigation must be disallowed on preemption grounds because it necessarily contemplates a different method of worker representation than that provided in the Labor Act.⁶⁷

Under the current state of preemption doctrine, the state may not be able to afford relief against retaliation for engagement in concerted activity for mutual aid and protection *simpliciter*, as an end protected by the state's public policy; but the state can extend protection where those collective efforts are directed to some other end protected by state law,⁶⁸ which would include state wage-and-hour and wage-payment law. Nothing in the reach or structure of the Labor Act would prevent the state from allowing employees to be represented for that purpose.

66. 29 U.S.C. § 158(c) (2012).

67. Matthew W. Finkin, *Bridging the "Representation Gap,"* 3 U. PA. J. LAB. & EMP. L. 391, 411–12 (2001).

68. *Compare* Luke v. Collotype Labels USA, Inc., 72 Cal. Rptr. 3d 440 (Ct. App. 2008) (holding that the NLRA preempts state wrongful-termination suits where employees are discharged for activities protected by the NLRA), *with* Inter-Modal Rail Emps. Ass'n v. Burlington N. & Santa Fe Ry. Co., 87 Cal. Rptr. 2d 60, 64 (Ct. App. 1999) (holding that the NLRA does not generally preempt state actions for matters "deeply rooted in local feeling and responsibility").

Nor is a law affording representation unique in the state's tool kit of labor-protective law. A number of states afford individual employees the right to inspect their personnel records, for example, and four expressly allow agents designated by the employee or employees to have access to these records on the employer's premises.⁶⁹ That access, which the instant proposal echoes, does not trench on the federal field of collective bargaining representation even though employees may designate a union as their representative. The question is not whether a state can lawfully extend the coal-mining precedent but whether it has the political will to do so.

C. Political Feasibility

Fine and Gordon are quite correct in directing attention to what is politically achievable. In the current and foreseeable political environment, nothing can be done legislatively at the federal level. Accordingly, this proposal is directed to the states. Inasmuch as what is proposed provides a tool that could assist union organizing, state legislatures in the hands of antiunion forces can quickly be put to one side. The "red/blue" distinction is richly displayed in state labor law.⁷⁰ The question is whether fertile ground can be found in union-friendly jurisdictions. It may be well to advert briefly to the key players whose resolution of forces will play a major, perhaps determinative, role in any legislative contest.

The likely players are (1) unions and supporting public interest groups, including those representing the working poor for whatever influence they might be able to muster by appeal to public sentiment; (2) employers and their associations; and (3) the state executives and departments of labor.

Unions. Unions and allied groups should be keen for this measure. It holds the promise of ameliorating wage theft, and, as an ancillary consequence, it would also afford access to employees that unions may wish to organize.

Employers. One should expect opposition, virulent opposition, from employers, their associations, and their allies. The adjective may seem hyperbolic. After all, the selection of a wage checker would only challenge the business model of wage-cheating employers. Employers who play fair should have no fear that their employees will see a need to exercise this right. And so it is not obvious why "high-road" employers would make common cause with—and be publicly identified as supporting—predators of the poor.⁷¹ Moreover, to the extent there is competition between the law-abiding and the law-evading employers, the former would doubtless desire to have their competitors on an even field of play.

But the slate is not clean. Worker centers that educate the working poor and help them perfect their legal rights have been targeted by mainstream business interests such as the United States Chamber of Commerce and the National Restaurant

69. See 820 ILL. COMP. STAT. ANN. 40/5 (West 2008); ME. REV. STAT. ANN. tit. 26, § 631 (2007); 43 PA. CONS. STAT. ANN. § 1322.1 (West 2009); WIS. STAT. ANN. § 103.13(3) (West 2012).

70. Note, for example, the rather stark differences in labor protection between Indiana and Minnesota. Matthew W. Finkin, *International Governance and Domestic Convergence in Labor Law as Seen from the American Midwest*, 76 IND. L.J. 143, 158–64 (2001).

71. Cf. Cynthia Estlund, Essay, *Labor Law Reform Again? Reframing Labor Law as a Regulatory Project*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 383 (2013).

Association.⁷² They have been subjected to political⁷³ and well-funded public attack.⁷⁴ These mainstream employer organizations fear the erosion of a different business model than the wage thieves: maintaining “union-free” workplaces. The money expended to blunt a law that could make it easier for unions to organize would doubtless dwarf what would be spent on wage increases in the event of successful unionization. It would be naïve to think that solidarity is the exclusive province of the working class.

Even so, were such laws to be introduced, American businesses would have to attempt to persuade the public why practical assistance should be denied to those most at risk of having their wages stolen by unscrupulous employers. Business interests would have to attack a legal model, widely enacted a century before and still on the books in several states, that gives employees the same right to be represented for legal purposes that employers have. The ensuing public discourse might not be edifying, but there is something to be said for having labor policy, employee representation, and the rights of the working poor brought into the public forum.

The state. The state executive’s interest in collecting taxes lost by wage theft is palpable. The executive should have an obvious interest in supporting the measure. The closer question is whether the state’s bureaucracy can be persuaded, not to delegate its authority to private parties, but to do something it has never done—to play a role in the statutory representation scheme. Once a representative is in place, the inspectorate should be expected to achieve a *modus vivendi* with it just as it has with unions at unionized enterprises. In contrast to public deputization, no loss of authority or conflict in roles is involved.

Table 4 sets out the states that either have had or still have checkweighmen laws and the number of state labor inspectors in each as of 2010, including those devoted specifically to minimum-wage violations. It is not obvious that in these states, or in any other state, the inspectorate would be unwilling to assume a new function—for which some training would be required—that would reduce wage theft by both the direct intervention of wage-checking agencies and the deterrent effect of their presence.

A word of caution. The proposal provides only a partial bite on the problem of wage theft, for it assumes the presence of a relatively stable and reasonably accessible complement of workers. It cannot reach the fly-by-night, the unregistered contractor that picks up its workforce from a street corner on a daily basis, or the like. Nevertheless, given the dimension of the problem discussed at the outset, even partial redress is not to be scouted.

Table 4. Number of labor inspectors in states that had or have checkweighmen (2010)

State (population)	Total labor inspectors	Minimum-wage inspectors
Alabama (4,779,736)	N/A	0
Arkansas (2,915,918)	9	0
Colorado (5,029,196)	8	0

72. Steven Greenhouse, *Advocates for Workers Raise the Ire of Business*, N.Y. TIMES, Jan. 17, 2014, at B1.

73. *See supra* note 26.

74. *See Greenhouse, supra* note 72; *cf.* Stephanie Strom, *Nonprofit Advocate Carves out a For-Profit Niche*, N.Y. TIMES, June 18, 2010, at A16.

Table 4 (continued)

State (population)	Total labor inspectors	Minimum-wage inspectors
Illinois (12,830,632)	13	0
Indiana (6,483,802)	6	4
Kansas (2,853,118)	4	0
Kentucky (4,339,367)	18	0
Missouri (5,998,927)	7	0
Ohio (11,536,504)	9	0
Oklahoma (3,751,351)	12	7
Pennsylvania (12,702,379)	31	0
Tennessee (6,346,105)	N/A	0
Texas (25,145,561)	32	0
Utah (2,763,885)	3	0
Washington (6,724,540)	19	0
West Virginia (1,852,994)	12	0
Wyoming (563,626)	6	0

Sources: ZACH SCHILLER & SARAH DECARLO, POLICY MATTERS OHIO, INVESTIGATING WAGE THEFT: A SURVEY OF THE STATES (2010); *State and County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (last modified July 8, 2014) (2010 data).

V. A CONCLUDING THOUGHT ON AGENCY

It will not have escaped the reader that although this Essay opened with an aspiration for doing more than finding a better way simply to reach at-risk workers in order to facilitate law enforcement, the proposed law might seem to do just that, if, perhaps, in a more structured and sustained way, to echo Fine and Gordon's desiderata. There may be more than meets the eye, however, for there may be a significant difference between a more systematic means of soliciting targeted employees to come forward with their wage complaints and giving them the choice of a representative to monitor their wage payment as part of an ongoing relationship with them.⁷⁵ To be given that choice is to possess a modicum of agency, of control over one's life. To select a wage checker and to engage with it over time may well have carryover effects, particularly if, as would be expected, the representative is not a law firm or a law school clinic but a democratically governed sodality. That exercise of agency, however modest to begin with, may manifest the possible and stimulate the desire for something more⁷⁶ to be achieved by collective representation: better health and safety conditions; a more stable work life, not subject to sudden changes in scheduled time; and freedom from abuse and retaliation.⁷⁷

75. One study of the ITF's inspection system, *see supra* note 32, is critical of it on the ground that the crews subject to the ITF's inspection did not choose to be represented by it. Herbert R. Northrup & Peter B. Scrase, *The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995*, 23 *TRANSP. L.J.* 369 (1996).

76. *See* MARC LENDLER, *JUST THE WORKING LIFE* 75 (1990). On the larger social implications, *see supra* note 32.

77. As Marc Doussard argues, these concerns run even deeper than income lost by wage theft. DOUSSARD, *supra* note 1, at 25-27.

The current legal landscape for employee representation in the United States is basically this: either collective representation or, unless the employee has secured counsel to deal with the employer in a legal dispute, nothing.⁷⁸ These checkweighmen laws present us with another model of workplace representation, albeit one geared to the realization of some specific public purpose. Even so grounded, this model holds the promise to eventually create conditions for the broader exercise of voice.

78. Matthew W. Finkin, *Employee Self-Representation and the Law in the United States*, 50 OSGOODE HALL L.J. 937 (2013).

APPENDIX: CHECKWEIGHMEN LAWS

ALA. CODE § 25-9-342 (LexisNexis 2007)

In all coal mines the miners employed and working therein may furnish a check weighman or check measurer who shall at all times have full access to and the right to examine the scales, and to see all measures and weights and accounts kept of same, and shall keep an accurate account of the coal, but not more than the above authorized persons shall have such right of access, examination and inspection of scales, measures and accounts at the same time.

ARK. CODE ANN. § 15-59-111(b) (1994) (repealed 2009)

The miners engaged in working any mine shall have the privilege, if they so desire, of selecting, by a majority vote, and employing, at their own expense, a checkweighman, who shall in like manner take an oath, who shall have like rights, powers, and privileges in attending and seeing that coal is correctly weighed and who shall be subject to the same penalties as the regular weighman. Each weighman shall keep account of all coal weighed at the mines in a well-bound book kept for that purpose.

COLO. REV. STAT. § 34-29-123 (1984) (repealed 1988)

At each coal mine, at the option of the majority of miners working on a tonnage basis therein, there shall be employed from among the employees of said mine one or more checkweighmen, whose wages shall be paid by the miners therein employed on a tonnage basis.

The election of a checkweighman shall be by secret ballot, taken at some convenient place near the mouth of the mine or at the check cabin, under conditions which will insure a free and impartial vote. In the event that the owner of the mine and the employees entitled to vote are unable to agree upon a method of election, the matter may be referred to the chief inspector of coal mines, who may prescribe the method, and, if requested by the owner or the miners entitled to vote, he or one of his district inspectors shall supervise the election. Only those miners who produce coal on a tonnage basis and who contribute to the wages of a checkweighman shall be entitled to vote. The person having the highest number of votes shall be elected checkweighman.

Said checkweighman shall run a coal check and shall deduct a sufficient and equal amount from each ton of coal weighed to guarantee him the wages agreed upon between said checkweighman and said miners. The checkweighman shall be paid by the owner in the same manner and at the same rate per ton as other employees running coal checks. The duty of such checkweighman is to see that all coal mined in the mine at which he is employed is correctly weighed and accredited, and for that purpose, every such owner shall give to such checkweighman access to all scales and weights used for that purpose, and to all books wherein the weights of the coal mined by the miners of said mines are recorded. The owner shall provide a convenient and suitable office on the tippel for weighing coal, which said office shall be kept in a comfortable and sanitary condition.

225 ILL. COMP. STAT. ANN. 705/32.03 (West 2007)

The miners at work in any coal mine may employ a check weighman at their option and at their own expense, whose duty it shall be to balance the scales and see that the coal is properly weighed, and that a correct account of the same is kept, and for this purpose he shall have access at all times to the beam box of the scales, and be afforded every facility for verifying the weights while the weighing is being done. The check weighman so employed by the miners shall be a citizen of the United States, and before entering upon his duties, shall make and subscribe to an oath before some person duly authorized to administer oaths, that he will faithfully discharge his duties as check weighman, and such oath shall be kept conspicuously posted at the place of weighing.

IND. CODE ANN. § 22-10-11-12 (West 1986) (repealed 1987)

Whenever the mining of coal is paid for by weight, the miners employed in mining the same shall have the right of selecting and keeping in the weigh office, or at the place of weighing the coal, a check-weighman, who shall be vested with the same rights as described in section 11(b) [22-10-11-11(b)] of this chapter, said check-weighman to be paid by said miners.

KAN. STAT. ANN. § 49-303 (1976) (repealed 1977)

The miners employed by or engaged in working for any mine owner, operator or lessee in this state shall have the privilege, if they so desire, of employing at their own expense a check-weighman, who shall have like rights and privileges in the weighing of coal as the regular weighman, and be subject to the same oath and penalties as the regular weighman.

KY. REV. STAT. ANN. § 352.530 (LexisNexis 1993) (repealed 1996)

When a majority of the miners in any mine request the operator of the mine to allow the miners to employ at their own expense a check weighman to inspect the weights at the mine, and see that all coal or clay mined is properly weighed and accounted for, and perform only such other duties as will insure that the coal or clay is properly weighed and correctly accounted for, the operator shall permit a check weighman to be employed by the miners making the request, provided the person so employed has the reputation of being an honest, trustworthy, discreet, sober, and upright man. The check weighman shall be an employee of the mine, unless no employee is a suitable person, in which case the miners may, by agreement with the operator, elect some other person who is suitable. No check weighman shall hold any other office or have any other duties than as check weighman. The check weighman shall be elected by a majority of the employees engaged in mining and loading coal or clay and the election shall be properly conducted by secret ballot at the principal entrance to the mine. The election of each check weighman shall be approved by the county judge/executive of the county, on presentation of an affidavit stating that the check weighman has been duly and properly elected in accordance with the provisions of this section.

The check weighman shall have free access to the mine scales while the mine is in operation or the scales are being tested. No agent or employee of the operator shall hinder or prevent the check weighman in the performance of his duties in a proper manner, and no check weighman shall prevent the weighman or other employee of the operator from performing his duties in a proper manner.

MO. REV. STAT. § 293.420(4) (2005)

Miners employed in any coal mine have the power, if they desire, of employing at their own expense, a check-weighmaster, who shall have the right to be present and observe the weighing of coal by the weighmaster, to examine and test the scales, to inspect the records made by the weighmaster; and to be subject to the same qualifications, oath and penalties as the weighmaster.

OHIO REV. CODE ANN. § 1565.18 (LexisNexis 1997) (repealed 1999)

At all mines where the earnings of the miners employed depend upon the weight of the coal mined, the majority of the miners employed in such mine may at their own cost appoint a person as check weighman. The person so employed must be an employee of such mine, a citizen of the United States, and able to read and write the English language. When all of the miners do not concur with the majority in the employment of such check weighman, he shall only be required to furnish weights to the miners who concur in his employment, and who contribute to the payment of his salary or wages. The operator of such mine shall permit such check weighman on the tippie or at any other place where the scales used for determining weights upon which wages are fixed at such mine are located. At all proper times, such check weighman has the full right of access to and examination of the scales, machinery, or apparatus used at such mine to determine the correct weight of coal mined. The operator shall not interfere with such check weighman in the performance of his duty which is to see the coal weighed and make a correct record of such weight. Not more than one person, on behalf of the miners collectively shall have such right at the same time at one mine. The check weighman shall not interfere with or impede the speed of weighing of the coal or the operation of the mine.

No person shall refuse or neglect to comply with this section.

OKLA. STAT. ANN. TIT. 45, § 213 (West 1979) (repealed 1982)

The miners employed by or engaged in working for any mine owner, operator or lessee of any mine in this state shall have the privilege, if they desire, of employing, at their own expense, a check weighman who shall have equal rights, powers and privileges in the weighing of coal as the regular weighman. Any regular weigher or check weigher so employed, who shall knowingly violate any of the provisions of this Article in the discharge of his duties, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00) for each offense or by imprisonment of not less than thirty (30) days nor more than six (6) months, proceedings to be instituted in any court having competent jurisdiction. Whenever the district mine inspector shall be satisfied that the provisions of this Section have been violated, it shall be his duty to prosecute the person or persons guilty thereof,

and upon conviction therefor, such person or persons shall be punished as provided in this Section.

52 PA. STAT. ANN. § 651 (West 1998) (anthracite)

[T]he miners in each mine shall have the right to employ, at their own expense, and keep a weigh master at each of said scales to inspect said scales, and also keep an account of the number of pounds of coal mined by each miner

52 PA. STAT. ANN. § 1387 (West 1998) (bituminous coal)

At every bituminous coal mine in this Commonwealth where coal is mined by weight or measure, the miners whose wages are paid on the basis of tonnage mined, whether weighed or measured, or a majority of such miners present at a meeting called by them for that purpose, shall have the right to employ a competent person as checkweighman or check-measurer, as the case may require, who shall be permitted at all times to be present at the weighing or measurement of coal, also have power to weigh or measure the same, and during the regular working hours to have the privilege to balance and examine the scales or measure the cars. All such balancing and examination of scales shall be done in such a way and at such time as in no way to interfere with the regular workings of the mine. Such checkweighman shall be paid such compensation as may be fixed by the miners attending such meeting, which shall be paid by the operator to such checkweighman or checkmeasurer from deductions made from the wages of all miners employed at such mine whose wages are paid on the basis of tonnage, whether weighed or measured, an equal deduction being made from the compensation of such wages per ton or per measure, as directed by the checkweighman or checkmeasurer. Any person, association, copartnership or corporation who, as operator, shall refuse to permit any checkweighman or checkmeasurer, so selected, to weigh and measure coal as provided by this act, or shall fail or refuse to pay the wages of such checkweighman or checkmeasurer as required by this act, or shall interfere with, restrain or coerce employes in the exercise of the right to elect such checkweighman or checkmeasurer, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of five hundred dollars (\$500) per day for each day of such refusal or violation.

TENN. CODE ANN. § 59-11-101(a) (2013)

At every coal or other mine in this state, where coal or other minerals are mined by weight or measure, the miners, or a majority of those present at a meeting called for that purpose, shall have the right to employ a competent person as checkweigher or checkmeasurer, as the case may require, who shall be permitted at all times to be present at the weighing or measuring of coal, and who shall have power to weigh or measure the same, and, during the regular working hours, have the privilege to balance and examine the scales or measure the cars; provided, that all such balancing and examination of scales shall only be done in such way and in such time as in no way to interfere with the regular working of the mines; and such person shall not be considered a trespasser during working hours while attending to the interest of such person's employers, and in no manner shall such person be interfered with or intimidated by any person, agent, or owner, or miner.

TEX. REV. CIV. STAT. ANN. art. 5913 (West 1962) (repealed 1989)

The employees in any mine shall have the right to employ a check weighmen [sic] at their own option and their own expense.

UTAH CODE ANN. § 40-3-3 (LexisNexis 1988) (repealed 1991)

In all coal mines the miners employed and working therein may furnish a competent check-weighman at their own expense, who shall at all proper times have full right of access to and examination of such scales or machinery and right of inspection of measuring apparatus, and weights of coal mined and accounts kept of the same; provided, that not more than one person on behalf of the miners collectively shall have such right of access, examination and inspection of scales, measures and accounts at the same time, and that such person shall cause no unnecessary interference with the use of such scales, machinery or apparatus. Such agent of the miners shall before entering upon his duties take and subscribe an oath that he is duly qualified and will faithfully discharge the duties of check-weighman. Such oath shall be kept conspicuously posted at the place of weighing.

WASH. REV. CODE ANN. § 78.40.723(2) (West 1996) (repealed 1997)

The miners employed by or engaged in working at any coal mine in this state shall have the privilege, if they desire, of employing at their expense a check weigher, whose compensation shall be deducted by the mine operator before paying the wages due the miner, and who shall have like rights, powers and privileges in the weighing of coal as the regular weigher, and be subject to the same oath and penalties as the regular weigher. Said oath or affirmation shall be conspicuously posted in the weigh office.

W. VA. CODE ANN. § 21-5-8 (LexisNexis 2013)

Where the amount of wages paid to any of the persons employed in any manufacturing, mining, or other enterprise employing labor, depends upon the amount produced by weight or measure, the persons so employed may, at their own cost, station or appoint at each place appointed for the weighing or measuring of the products of their labor a checkweighman or measurer, who shall in all cases be appointed by a majority ballot of the workmen employed at the works where he is appointed to act as such checkweighman or measurer.

WYO. STAT. ANN. § 30-3-107 (LexisNexis 1977) (repealed 1983)

The miners employed by or engaged in working for any mine owner, lessee, operator, agent or company in this state shall have the privilege, if they so desire, of employing at their own expense a check weighman, who shall have like rights and privileges in the weighing of coal as the regular weighman and be subject to the same oath and penalties as the regular weighman.