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Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States

Janice Fine

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Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States

Abstract

The crises of wage theft and industrial accidents in low-wage America reflect erosion of the social contract but they also reflect a crisis in labour standards enforcement. This article draws upon archival material, case studies, and interviews to make the case for tripartism—an enforcement regime that partners workers’ organizations with government inspectors to patrol workers’ industries and labour markets for unfair competition. It extends to the federal level previous work in which Jennifer Gordon and I have documented dynamic contemporary examples of tripartism at the state and local levels. The article explores historical precedents for tripartist collaboration on the federal level at the Department of Labor (DOL) in the Wage and Hour Division and the Occupational Safety and Health Administration. It then considers several tripartist initiatives at the DOL under the Obama administration, the legal obstacles that purportedly stand in the way of more robust approaches, and some potential solutions. The article concludes with an explanation of why formalizing partnerships matters.

Keywords

Labor laws and legislation; United States

Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States

JANICE FINE *

The crises of wage theft and industrial accidents in low-wage America reflect erosion of the social contract but they also reflect a crisis in labour standards enforcement. This article draws upon archival material, case studies, and interviews to make the case for tripartism—an enforcement regime that partners workers' organizations with government inspectors to patrol workers' industries and labour markets for unfair competition. It extends to the federal level previous work in which Jennifer Gordon and I have documented dynamic contemporary examples of tripartism at the state and local levels. The article explores historical precedents for tripartist collaboration on the federal level at the Department of Labor (DOL) in the Wage and Hour Division and the Occupational Safety and Health Administration. It then considers several tripartist initiatives at the DOL under the Obama administration, the legal obstacles that purportedly stand in the way of more robust approaches, and some potential solutions. The article concludes with an explanation of why formalizing partnerships matters.

La crise du vol des salaires et des accidents industriels chez les travailleurs à faible revenu des États-Unis témoigne de l'érosion du contrat social, mais également de la crise qui sévit dans le domaine de l'application des normes du travail. Cet article se fonde sur des

* Associate Professor, School of Management and Labor Relations, Rutgers University. The author acknowledges Jennifer Gordon of Fordham Law School, her co-author on a previous article that forms the base for this article. Thanks go to Matthew Amengual of MIT, whose scholarly work in this area along with his ideas about co-production greatly assist the ideas developed here. David Weil of Boston University, known for his foundational work in this field, is another important influence on the author's thinking. Finally, thanks go to Anne Weismann of Citizens for Ethics in Government for her legal analysis of the FACA and the ADA. An earlier version of this article was originally presented at the Voices At Work North American Workshop (16-17 March 2012), hosted at Osgoode Hall Law School, York University, Toronto and funded by the Leverhulme Trust, the Centre for Labour Management Relations at Ryerson University, and Osgoode Hall Law School.

archives, des études de cas et des entrevues pour expliquer le bien-fondé du tripartisme, régime d'application des lois qui réunit organisations de travailleurs et inspecteurs du gouvernement pour patrouiller le secteur et le marché du travail où œuvrent les travailleurs afin d'y déceler toute concurrence déloyale. Ce régime étend au palier fédéral des travaux antérieurs dans lesquels Jennifer Gordon et moi-même avons documenté des exemples contemporains dynamiques de tripartisme au niveau local et à celui de l'État. Cet article se penche sur les précédents historiques en matière de collaboration tripartite au palier fédéral, à la Wage and Hour Division et l'Occupational Safety and Health Administration du Département du Travail des États-Unis. Il examine ensuite plusieurs mesures tripartites du Département du Travail sous l'administration Obama, les obstacles juridiques qui empêchent supposément une approche plus énergique, ainsi que certaines solutions potentielles. L'article se conclut par une explication des raisons pour lesquelles il importe d'officialiser ces partenariats.

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IN A DEVELOPMENT THAT GIVES new meaning to the phrase “adding insult to injury,” many low-wage workers in the United States today—who already struggle to get by on salaries that are barely enough for basic subsistence—cannot even count on safe workplaces or on their employers properly reporting the hours they have worked and paying the wages they are owed. A recent study found that 26 per cent of low-wage workers¹ in the nation’s three largest cities suffered minimum wage violations in the week prior to its survey, and over 76 per cent of

1. Low-wage workers are defined as all workers earning less than the hourly wage that would lift a family of four above the poverty threshold, which was 11.06 American dollars or less an hour in 2011, given full-time, full-year work. See Lawrence Mishel et al, eds, *The State of Working America*, 12th ed, (Ithaca: Cornell University Press for the Economic Policy Institute, 2012) at 307, 433.

low-wage workers who laboured more than forty hours in the prior week were not paid according to overtime laws.² In some regions, the US Department of Labor (DOL) itself has recorded compliance levels with the *Fair Labor Standards Act of 1938*³ (FLSA) below 50 per cent in industries such as nursing homes, poultry processing, daycare, and restaurants.⁴

While the crises of wage theft and industrial accidents in low-wage America are indications of erosion of the social contract, they are also indicative of a crisis in labour standards enforcement. There are four mismatches at the heart of this crisis. First, government policies and strategies have not kept pace with secular shifts in industrial structures and employment relations. Second, government funding has not kept pace with the dramatic increase in the number of firms covered under the *Occupational Safety and Health Act* of 1970⁵ (OSH Act) and the FLSA. Third, there has been a mismatch between government immigration policy and private sector labour demand. Finally, as Jennifer Gordon and I argue, traditional “logics” of enforcement⁶—how government detects violators and deters employers from violating wage and hour laws—have broken down. What is needed is strategic or directed enforcement—focussing on the sectors with the biggest problems—something US President Barack Obama’s DOL has strongly embraced. But while strategic enforcement represents an important paradigm shift, it will not succeed unless it is accompanied by significant enhancement of worker voice. Simply put, problems will remain hidden unless workers speak up but most workers will not speak up in isolation.

Asymmetries of power between low-wage workers, especially immigrants, and the firms for which they work keep individual workers from stepping forward much of the time. Collective representation through labour unions, particularly for vulnerable workers, has traditionally provided a safer means for asserting rights at work and improving conditions through collective bargaining. But with the decline of unions, few private sector workers have the benefit of collective representation. In this context, the individual rights regime has gained

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2. Annette Bernhardt et al, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (Report of the University of Illinois at Chicago Center for Urban Economic Development, the National Employment Law Project, and the UCLA Institute for Research on Labor and Employment, 2009) at 2, online: <<http://www.unprotectedworkers.org>>.
 3. 29 USC § 201.
 4. US, Department of Labor, *1999-2000 Report on Initiatives* (Employment Standards Administration, Wage and Hour Division, 2001) at 7-9 [DOL, *Report on Initiatives*].
 5. 29 USC § 651 [*OSH Act*].
 6. “Strengthening Labor Standards Enforcement through Partnerships with Workers’ Organizations” (2010) 38:4 *Pol & Soc’y* 552.

importance. Worker centres (community-based, worker-organizing groups that have emerged largely since the 1990s) spend much of their efforts assisting workers in learning wage and hour and occupational health and safety laws and insisting upon their enforcement. This article makes the case for tripartism, an enforcement regime that partners workers' organizations with government inspectors to patrol their industries and labour markets for unfair competition.

In previous work, Gordon and I⁷ have documented dynamic contemporary examples of tripartism at the state and local levels. This article extends that earlier work by elaborating on tripartism on the ground at the federal level. After reviewing the regulatory mismatches identified in Part I and discussing the potential role for tripartism in labour standards enforcement in Part II, Part III explores historical precedents for tripartist collaboration in the Wage and Hour Division (WHD) and the Occupational Safety and Health Administration (OSHA) of the DOL. Part IV then considers tripartist initiatives at the DOL under the Obama administration. Part V surveys the legal obstacles that some say stand in the way of more robust approaches and poses some potential solutions. Part VI grapples with the question of how and in what ways formalizing partnerships matters. The article draws upon case studies, interviews, and informal conversations conducted with organizers, experienced labour inspectors, supervisors, high-level government officials, and attorneys familiar with labour and employment law, as well as archival material from government, unions, and worker centres to make the case for tripartism.

I. FOUR MISMATCHES AT THE HEART OF THE ENFORCEMENT CRISIS

A. GOVERNMENT POLICIES AND INVESTIGATORY STRATEGIES MISMATCH INDUSTRY STRUCTURES

Labour standards enforcement is still catching up to the growth of post-Fordist network production systems in which organizations focus on their core competencies and fulfill their remaining needs through dynamic relationships with other service providers.⁸ In low-wage industries, the vertical disaggregation of firms due to the rise of network supply chains has led to an explosion of what

7. *Ibid.*

8. See Damian Grimshaw et al, "Introduction: Fragmenting Work Across Organizational Boundaries" in Mick Marchington et al, eds, *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies* (Oxford: Oxford University Press, 2005) 1.

David Weil has labelled the “fissuring” of the employment relationship.⁹ Fissuring occurs when companies shift the direct employment of workers to other business entities through increased reliance on strategies such as subcontracting, use of temporary employees, and independent contracting arrangements.¹⁰ Often firms are embedded in subcontracting networks in which one large firm or a few firms are setting the terms of exchange but are not the employers of record for purposes of enforcement. Most of the industries at greatest risk of FLSA and OSH Act violations are predominantly composed of establishments with fewer than twenty employees;¹¹ small businesses are less likely to have sophisticated record-keeping systems and human resources departments and to participate in regulatory communities that keep them abreast of the law. Smallness also poses great logistical challenges: If the same number of workers is employed across many small enterprises instead of one or a few large enterprises, more investigative personnel will be required to inspect them.

B. GOVERNMENT FUNDING FOR INVESTIGATORS MISMATCHES THE GROWTH IN THE NUMBER OF WORKERS AND ESTABLISHMENTS COVERED UNDER THE FLSA

When the FLSA was enacted in 1938, it covered only one-third of American workers, predominantly in manufacturing, and excluded those in service, retail, domestic, and agricultural sectors. In the decades that followed, the FLSA was gradually expanded to include a broader swath of industries and occupations. Many small businesses were also brought under the FLSA by lowering the threshold volume of annual sales that determined whether a firm had to comply with it. The past thirty years have seen a 55 per cent increase in the estimated number of workers covered and a 112 per cent increase in the number of

9. *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division* (Boston: Boston University, 2010) at 18-26, online: US Department of Labor <<http://www.dol.gov/whd/resources/strategicEnforcement.pdf>>.

10. *Ibid.*

11. See David Weil & Amanda Pyles, “Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace” (2005) 27:1 *Comp Lab L & Pol’y J* 59. Weil and Pyles use data on actual hours worked and wages received that are reported by workers in the Current Population Survey (a monthly household survey conducted by the US Census Bureau for the Bureau of Labor Statistics) to generate a list of the 33 industries at highest risk of wage and overtime violations. Gordon and I refine their findings by analyzing the composition of establishments in those high-risk industries and find that most of the industries Weil and Pyles identify at greatest risk of FLSA violations are overwhelmingly composed of establishments with fewer than twenty employees. See Fine & Gordon, *supra* note 6.

establishments covered under the FLSA.¹² Although the number of WHD inspectors doubled from about 650 in 1960 to a high-water mark of 1,343 in 1978,¹³ by 1982 the inspectorate was down to 929.¹⁴ In 2008, WHD had only 709 investigative staff.¹⁵ Even when WHD reached its highest staffing level, the economy was expanding much more rapidly, increasing the number of firms covered under the law. In the largest increase in many years, the Obama administration's 2012 congressional budget request proposed to field an inspectorate of 1,032 staff to monitor approximately 7.3 million firms.¹⁶ The 2012 budget was approved, and the 2013 request proposes a rise to 1,112 staff to monitor approximately the same number of firms.¹⁷ Numbers are harder to find for OSHA. According to the agency, a combined state and federal workforce of approximately 2,200 inspectors is responsible for the health and safety of 130 million workers at over 8 million worksites.¹⁸ This translates to about 1 compliance officer for every 59,000 workers.¹⁹

C. GOVERNMENT IMMIGRATION POLICY MISMATCHES PRIVATE SECTOR LABOUR DEMAND

Between 1990 and 2000, more immigrants arrived in the United States than during any previous period in American history.²⁰ The immigrant population grew by more than 1 million people per year, rising from 19.8 million to 31.1

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12. Brennan Center for Justice, Economic Policy Brief no 3, "Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004" by Annette Bernhardt & Siobhán McGrath (New York: New York University School of Law, 2005).
 13. Willis J Nordlund, *The Quest for a Living Wage: The History of the Federal Minimum Wage Program* (Westport, Conn: Greenwood Press, 1997) at 119, 186.
 14. *Ibid* at 186, 194-97.
 15. Official communication from the US Department of Labor in response to the author's request under the *Freedom of Information Act* [copy on file with author] (indicating that the total number of federal inspectors in 2008 was 709). See 5 USC § 552.
 16. US, Department of Labor, *FY 2012 Congressional Budget Justification: Wage and Hour Division* at 14, 19, online: <<http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V2-03.pdf>> [DOL, *FY 2012*].
 17. US, Department of Labor, *FY 2013 Congressional Budget Justification: Wage and Hour Division* at 19, online: <<http://www.dol.gov/dol/budget/2013/PDF/CBJ-2013-V2-09.pdf>> [DOL, *FY 2013*].
 18. Occupational Safety & Health Administration, "How Many Inspectors Does OSHA Have?" *OSHA Frequently Asked Questions*, online: <http://www.osha.gov/OSHA_FAQs.html>.
 19. *Ibid*.
 20. US, Census Bureau, Current Population Reports, Series P23-206, *Profile of the Foreign-Born Population in the United States: 2000* by Dianne Schmidley (Washington: US Government Printing Office, 2001) at 8-9.

million.²¹ The largest percentage of new arrivals came from Mexico and Central America.²² By 2009, foreign-born workers accounted for 15.7 per cent of the civilian labour force and included 8 million undocumented immigrants who contributed over 5 per cent of the labour force.²³

While employers have manifested a ferocious hunger for low-wage immigrant workers, national immigration policy has made it exceptionally hard for many unskilled workers to immigrate legally or to regularize their status. The liberalization of admissions policies in 1965 ended discriminatory country quotas but for the first time placed limits on migration from the western hemisphere. The temporary worker program with Mexico (the Bracero Program²⁴) also ended in the same period. Later policy changes placed a quota on Mexican immigrants of 20,000 per year, abolished the right of minor children to sponsor parents' immigration, and repealed the Texas Proviso that had exempted employers from prosecution for hiring undocumented workers. Structural adjustment policies and the adoption of the North American Free Trade Agreement (NAFTA) in 1994 had a devastating impact on Mexican agriculture and certain domestic manufacturing sectors, leading to increased levels of migration even as avenues for legal admission to and legalization once in the United States were increasingly restricted.²⁵ Although employment-based admission essentially excludes unskilled workers, Mexican workers, along with smaller but significant numbers of workers from Central America, continued to migrate to the United States for

21. *Ibid.*

22. *Ibid* at 10.

23. Rakesh Kochhar, C Soledad Espinoza & Rebecca Hinze-Pifer, *After the Great Recession: Foreign Born Gain Jobs; Native Born Lose Jobs* (Washington: Pew Hispanic Center, 2010) at 3.

24. The Bracero Program ended in 1964. At the start of the Second World War, southwestern growers and other business interests, joined by their legislative champions, complained to executive branch officials that war-induced labour shortages necessitated a new Mexican temporary worker program. In response, in 1942 the State Department negotiated a special agreement with Mexico establishing the Bracero Program that Congress quickly approved. Mexican braceros routinely received much lower wages than native US workers and endured substandard living and working conditions. Nevertheless, the Bracero Program endured for almost two decades after the war ended. Guarded by a "cozy triangle" of agribusinesses, southern and western congressional "committee barons," and a lax immigration bureaucracy, roughly 4.2 million Mexican workers were imported under the Bracero Program. For more on this program, see Kitty Calavita, *Inside the State: The Bracero Program, Immigration, and the I.N.S.* (New York: Routledge, 1992).

25. See Douglas S Massey, "The New Immigration and Ethnicity in the United States" (1995) 21:3 *Population & Dev Rev* 631; Pierrette Hondagneu-Sotelo, *Gendered Transitions: Mexican Experiences of Immigration* (Berkeley: University of California Press, 1994) at 19-33.

work at least until 2007.²⁶ America's immigration policy simultaneously made it harder for unskilled workers to immigrate legally, while casting a blind eye on employer hiring and management practices.²⁷ Increased border and workplace enforcement under both the Bush and Obama administrations may have reduced the numbers of undocumented workers coming into the United States but also certainly made them more fearful of coming forward to complain of mistreatment. Numerous studies have documented the high rates of workplace injuries and fatalities among foreign-born Latinos.²⁸

D. GOVERNMENT "LOGICS"²⁹ OF ENFORCEMENT MISMATCH THE REALITIES OF LOW-WAGE WORK³⁰

The primary logic of enforcement that emerged in the early years of the FLSA was a complaint-driven approach to detecting violations, premised on the assumption that workers would come forward and inspections would be triggered by their complaints. However, workers in precarious employment positions at small contractors are less likely to come forward and less likely to be visited by inspectors.

Addressing worker complaints is clearly an important part of the mandate of a workplace enforcement agency. The question is whether it should be the *predominant* aspect of the government's labour standards enforcement approach. An affirmative answer would be appropriate if the industries logging the most complaints were also those with the worst underlying conditions. However,

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26. See Jeffrey Passel, D'Vera Cohn & Ana Gonzalez-Barrera, *New Migration from Mexico Falls to Zero—and Perhaps Less* (Washington: Pew Hispanic Center, 2012). The authors report that migrant numbers from Mexico have decreased since 2007. Explanations for this decline range from the efficacy of government enforcement, such as increased deportations and heightened border control, to social and economic factors like lower birthrates and greater opportunities in Mexico combined with the lasting downturn in the United States.
 27. See Muzaffar Chishti, "Employer Sanctions Against Immigrant Workers" (2000) 3:6 WorkingUSA 71.
 28. For a summary of basic trends, see Bureau of Labor Statistics, Economic News Release, USDL-12-1888, "Census of Fatal Occupational Injuries Summary, 2011" (20 September 2012), online: <<http://www.bls.gov/news.release/cfoi.nr0.htm>>; Bureau of Labor Statistics, Economic News Release, USDL-12-2204, "Nonfatal Occupational Injuries and Illnesses Requiring Days Away From Work, 2011" (8 November 2012), online: <<http://www.bls.gov/news.release/osh2.nr0.htm>>.
 29. See Patricia H Thornton & William Ocasio, "Institutional Logics" in Rovston Greenwood et al, eds, *The Sage Handbook of Organizational Institutionalism* (London, UK: Sage, 2008) 99.
 30. The discussion on "logics" of enforcement in Part I(D) is drawn from my previously published work. See Fine & Gordon, *supra* note 6 at 555-58.

research by David Weil and Amanda Pyles finds little overlap between industries with the highest FLSA complaint rates and those with the highest wage and overtime non-compliance rates, suggesting that workers in industries with the worst conditions are much less likely to complain.³¹ When the vast majority of resources are taken up by complaints, as they have been, there are not enough resources available to address some of the most problematic sectors.

For a time, at least in high-wage industrial states, the number of federal inspectors was augmented by inspectors from state labour departments with sizeable inspectorates. In the second logic of enforcement, states had a large inspectorate that divided up the enforcement turf geographically and patrolled it systematically on the theory that firms would comply, in part, because they would anticipate inspection. Resource constraints have, however, taken this approach off the table. Today, state wage and hour divisions are much smaller and take an overwhelmingly complaint-based approach to enforcement.³²

Over the past quarter-century, the workplace has been a site for experimentation with various forms of “new regulatory” practice.³³ This is reflected in a trend towards industry self-regulation in the arenas of health and safety standards, wage enforcement, and discrimination, among others. The idea that employers should monitor themselves is the third logic of enforcement.

Scholars of self-regulation have recognized its limitations for small employers and low-wage workers. In the low-wage settings where wage and hour and safety and health issues abound, it is probable that without a strongly enforced public regime of penalties for non-compliance, self-regulation would contribute to the further deterioration of standards in low-wage sectors.³⁴

31. *Supra* note 11 at 4.

32. See *e.g.* Irene Lurie, “Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes” (2011) 15:2 *Employee Rts & Employment Pol’y* J 411; Jacob Meyer & Robert Greenleaf, *Enforcement of State Wage and Hour Laws: A Survey of State Regulators* (New York: National State Attorneys General Program at Columbia Law School, 2011), online: <http://www.law.columbia.edu/center_program/ag/policy/Labor/wagehour>.

33. “New regulatory” scholars have critiqued the command-and-control model of regulation as ill-suited to addressing complex societal problems. In its place, they propose more decentralized, flexible, and collaborative approaches that usually involve both public and private actors. See *e.g.* Michael C Dorf & Charles F Sabel, “A Constitution of Democratic Experimentalism” (1998) 98:2 *Colum L Rev* 267; Jody Freeman, “Collaborative Governance in the Administrative State” (1997) 45:1 *UCLA L Rev* 1 at 31; Jody Freeman, “The Private Role in Public Governance” (2000) 75:3 *NYUL Rev* 543; Susan Sturm, “Second Generation Employment Discrimination: A Structural Approach” (2001) 101:3 *Colum L Rev* 458; Cynthia Estlund, “Rebuilding the Law of the Workplace in an Era of Self-Regulation” (2005) 105:2 *Colum L Rev* 319.

34. See Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation*

Finally, since the 1940s, WHD has intermittently complemented its reliance on complaints with a focus on proactive inspections, the fourth logic of enforcement. In the case of low-wage industries, there is a strong case for federal and state departments of labour to use data on non-compliance levels to target specific industries in particular geographic areas. Although WHD strongly embraced a proactive investigation strategy alongside the complaints-based approach during the 1940s and 1950s, by 1960 the agency had begun an enduring reorientation towards the now predominant complaints-based approach.³⁵ While the fourth logic has never taken root at the DOL as the *predominant* institutional model, WHD under the Obama administration has shown an extremely strong interest in making it a major focus.³⁶

While the first logic of complaint-driven inspection will always be a part of any government enforcement strategy, it has been insufficient to address the problem of non-compliance in low-wage sectors. In an era of declining resources for state governments, the second logic of comprehensive coverage seems no longer a realistic possibility, and the third logic of self-regulation has limited use in the context of the lowest-wage work. Thanks to groundbreaking research conducted over many years by Weil³⁷ and strong leadership at the DOL, the fourth logic of strategic or directed enforcement is enjoying a renaissance. To improve compliance, it has targeted for intensive inspection specific high-risk industries that rely heavily on subcontracting, independent contracting, and temporary workers. High-risk sectors include residential construction, eating and drinking establishments (especially fast food), hotels and motels, janitorial services, landscaping and horticultural services, retail, health care and home health care services, domestic work, and agriculture.³⁸ In 2011, WHD pledged to “use its directed investigations to increase WHD presence in high risk industries, *i.e.*, those industries with high minimum wage and overtime violations and among vulnerable worker populations where complaints are not common.”³⁹

Debate (New York: Oxford University Press, 1992) at 106; Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven: Yale University Press, 2010); Orly Lobel, “Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety” (2005) 57:4 Admin L Rev 1071.

35. For a comprehensive decade-by-decade analysis of WHD’s inspection strategies, see Nordlund, *supra* note 13 at 59-119.

36. See US, Department of Labor, *FY 2011 Congressional Budget Justification: Wage and Hour Division*, online: <<http://www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V2-03.pdf>>; DOL, *FY 2012*, *supra* note 16; DOL, *FY 2013*, *supra* note 17.

37. *Supra* note 9.

38. *Ibid* at 2.

39. DOL, *FY 2012*, *supra* note 16 at 19.

WHD's strategic enforcement strategy entails pursuing approaches focussed at the top of industry structures, targeting business entities rather than individual workplaces, holding joint employers liable for violations, and expanding the use of the "hot goods" provision of the FLSA.⁴⁰

For WHD investigators to succeed in their strategic enforcement efforts, however, they must be connected to institutions of worker voice. Investigators must join forces with civil society actors who complement limited staffing resources, are intimately acquainted with the complex structures and strategies of companies in labour-intensive industries, and most importantly, have relationships with workers and engage them in reflection, education, leadership development, and action.

While starting at the top of industry structures makes sense in terms of holding the most powerful players responsible for non-compliance, most of the time the problems are manifested through workers at the bottom of supply chains—they must be the eyes, ears, mouths, and ultimately, legs of strategic enforcement. But worker voice is not a solo performance; most employees will not play this role independent of trusted organizations. Additionally, my previous analyses of worker centres' unpaid wage and occupational health and safety claims make clear that not all affected workers are employed by companies linked to larger actors at the top of industry supply chains.⁴¹ Top-down strategies are therefore not suited to these subsectors.

II. TRIPARTISM AS A STRATEGY FOR ADDRESSING LABOUR STANDARDS NON-COMPLIANCE IN THE UNITED STATES

Government must always play a central role in enforcing minimum workplace standards, but even if inspectors were more strategically deployed, there will simply never be enough of them to adequately cover labour markets. A new system of tripartism or co-produced enforcement⁴² that draws on the

40. *Ibid* at 19, 26-27.

41. Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream* (Ithaca: Cornell University Press for the Economic Policy Institute, 2006) at 72-99.

42. This very important idea comes from Matthew Amengual to describe enforcement when there are high levels of administrative capacity and strong linkages on the part of both government and civil society groups. See Matthew Amengual, "Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic" (2010) 38:3 *World Dev* 405; Matthew Amengual, *Enforcement Without Autonomy: The Politics of Labor and Environmental Regulation in Argentina* (PhD

complementary strengths of government and civil society organizations should be established.

Along with an emphasis on strategic enforcement, this proposal for integrating worker voice into enforcement is rooted in two seminal concepts. The first is Ian Ayres and John Braithwaite's concept of tripartism, in which, along with the government regulator and the firm, a public interest group (such as a union or some other community-based worker organization) is given a formal role in the regulatory process.⁴³ The second is Joshua Cohen and Joel Rogers' theory of associative democracy,⁴⁴ which calls for government to draw on "the distinctive capacity of associations to gather local information, monitor behaviour and promote cooperation among private actors"⁴⁵ by assigning enforcement duties as well as other roles to third-party groups.

In a previous article, Gordon and I elaborated four requirements for tripartism.⁴⁶ First, partnerships must be *formalized*—the parties must openly negotiate their expectations of and commitments to each other, including the distribution of resources. This is important to render the partnerships less vulnerable to changes in agency leadership or political regime. Second, partnerships must be *sustained* so that relationships between the staff of the agency and the organizations have time to build, increasing the resilience of their bond in the face of future conflict. Lessons learned from each joint effort can also enrich the next stages of the collaboration. Third, partnerships must be *vigorous*—the role of the third-party partners is not symbolic, marginal, or merely consultative, but is instead fully integrated into the work of the agency. Finally, the partnerships must also be adequately *resourced*—government must allocate enough staff to be able to mount a credible effort and must provide a threshold

Thesis, Massachusetts Institute of Technology, 2011) [unpublished]. For more on the larger concept of institutionalized co-production in service provision, see John Alford, "A Public Management Road Less Traveled: Clients as Co-producers of Public Services" (1998) 57:4 Aust J Pub Admin 128; Taco Brandsen & Victor Pestoff, "Co-production, the Third Sector and the Delivery of Public Services" (2006) 8:4 Pub Mgmt Rev 493; Anuradha Joshi & Mick Moore, "Institutionalised Co-production: Unorthodox Public Service Delivery in Challenging Environments" (2004) 40:4 J Dev Stud 31; Elinor Ostrom, "Crossing the Great Divide: Coproduction, Synergy, and Development" (1992) 24:6 World Dev 1073; Tony Bovaird, "Beyond Engagement and Participation: User and Community Coproduction of Public Services" (2007) 67:5 Pub Admin Rev 846.

43. See *supra* note 34.

44. "Secondary Associations and Democratic Governance" (1992) 20:4 Pol & Soc'y 393.

45. Joshua Cohen & Joel Rogers, "Secondary Associations and Democratic Governance" in Joshua Cohen et al, eds, *Associations and Democracy* (New York: Verso, 1995) 45 at 45.

46. *Supra* note 6 at 561.

level of financial support to partner organizations that need it to fully participate. Government should also provide mechanisms for gaining access to accurate, complete, and timely information.

In conversations with investigators and department leaders, there was a strikingly limited understanding of the variety of means through which worker centres and unions could augment the work of government inspectors. Most saw worker organizations as a means through which to *disseminate* information to workers but not as a means through which to *gather* it. For this reason, it is worthwhile to explore in some detail four main mechanisms through which worker organizations can enhance enforcement: detection of non-compliance, outreach to workers in targeted sectors, collection of evidence to facilitate enforcement actions, and convening strategic partnerships. The following is a composite collection of dozens of real-life examples of these mechanisms culled from interviews with worker-centre and union leaders and government officials.

First, worker organizations can improve detection of non-compliance by: (a) providing inspectors with specialized knowledge of industry structures, including their range of subcontracting arrangements and employment practices; (b) providing inspectors in targeted industries with tips on employers who are not complying with wage and hour and occupational health and safety laws; (c) teaching inspectors and being a resource about specific ethnic communities by relating information on language interpretation, settlement history, key cultural practices, community institutions, neighborhoods, and leaders; (d) working through worker networks to identify workers employed in targeted firms and industries of interest to inspectors; and (e) functioning as an early-warning system in terms of problem industries and employers.

Second, worker organizations can use worker outreach to enhance enforcement by: (a) providing informational visits, training, dissemination, and one-on-one consultation in multiple languages to workers in low-compliance sectors; (b) offering office hours at centres and local unions where workers who might be intimidated by going to a government office can come to discuss their situations; and (c) providing safe space, interpretation, and facilitation for inspectors to meet with workers.

Third, worker organizations can collect evidence to facilitate enforcement by: (a) gathering information about firm practices, encouraging workers to file complaints with state and federal agencies, and providing technical assistance to them in doing so; (b) assembling the information necessary to bring cases by gathering from workers testimony and documentation about hours worked, deductions taken, and safety conditions; (c) building cases through systematic

reconstruction when workers lack pay stubs by identifying and interviewing each worker, determining which contractor employed them, and establishing the dates and hours worked; (d) identifying the full scope of the subcontractor's operations; (e) expanding cases beyond initial complainants by identifying others who have been impacted; (f) going to worksites, homes, and other locations to speak with workers during times when they are working but inspectors often are not (on nights and weekends); and (g) providing a means for workers to file concerns anonymously.

Finally, worker organizations can convene strategic partnerships to enhance enforcement by organizing industry taskforces within specific geographic labour markets that bring together key state and federal government agencies with community and labour organizations.

There are real-life examples of tripartism. Gordon and I documented state and county cases, including the Los Angeles Unified School District and Board of Public Works' joint deputization of union business agents to inspect prevailing-wage job sites⁴⁷ and the partnership between the California Labor Commissioner's Janitorial Enforcement Team and the Maintenance Cooperation Trust Fund to raise compliance levels in the building-services sector. A third example, Wage and Hour Watch (WHW) in New York, which took a "neighborhood watch" approach to improving wage and hour compliance in specific geographic areas of New York, no longer exists.⁴⁸ In contrast to these state and county cases explored in our previous research, the focus in this article is on the federal level.

The federal government plays a central role in wage and hour and occupational health and safety enforcement. The DOL under President Obama has added investigators and embraced new strategies but has been reluctant to explore more formalized and systematic partnerships. Yet, as I explore in Part III, there are important precedents for tripartism at the federal level under both Democratic and Republican administrations.

47. Prevailing wage laws at the federal and state levels mandate minimum wages based upon the median wage for specific occupations working on public or publicly funded projects in the local labour market.

48. For more on all three examples, see Fine & Gordon, *supra* note 6 at 563-71.

III. TWO HISTORICAL EXAMPLES OF COLLABORATIONS AT THE US DOL

A. OSHA SUSAN HARWOOD TRAINING GRANTS

The Susan Harwood Training Grant Program, a competitive discretionary grant program established by OSHA in 1978, is an interesting case of a long-running program that explicitly supports civil society organizations. For over thirty years, OSHA has provided approximately 10 to 11 million American dollars per year in direct funding to faith-based organizations, worker centres, unions, employer associations, and state and local government-assisted institutions of higher education to provide training and education to employers and workers “on the recognition, avoidance, and prevention of safety and health hazards in their workplaces and to inform workers of their rights and employers of their responsibilities under the Occupational Safety and Health (OSH) Act.”⁴⁹ There are three categories of grant: “capacity building,” which is intended to help organizations develop or expand their capacity to offer training; “target topic,” which provides support to organizations to offer training on a particular OSHA priority subject; and “training materials,” which supports organizational development of written curricula.⁵⁰

While the Harwood grants only support training, not enforcement activities, the fact that they support civil society actors to partner with government in the service of strengthening safety and health in American workplaces—and do so on an ongoing, formal, and resourced basis—makes them a compelling example

49. Occupational Safety & Health Administration, *Susan Harwood Training Grant Program – Program Overview*, online: <<http://www.osha.gov/dte/sharwood/overview.html>>.

50. Examples from among the many 2010 and 2011 awardees include El Comité de Apoyo a los Trabajadores Agrícolas, District 1199C Training and Upgrading Fund, Casa Latina, Clergy and Laity United for Economic Justice, Make the Road NY, Rutgers University, University of Massachusetts Lowell, Farmworker Justice, LIUNA Training and Education Fund, American Federation of Teachers Educational Foundation, United Auto Workers, Service Employee International Union Education and Support Fund, Casa de Maryland, Inc (Central American Solidarity Association), Compacion Foundation Inc, Hispanic Contractors Association de Tejas, National Day Laborer Organizing Network, and Interfaith Worker Justice. See Occupational Safety & Health Administration, *OSHA Susan Harwood Training Grant Program – 2010 Susan Harwood Grant Awardees*, online: <http://www.osha.gov/dte/sharwood/2010_grant_recipients.html>; Occupational Safety & Health Administration, *OSHA Susan Harwood Training Grant Program – FY 2011 Susan Harwood Grant Awardees*, online: <http://www.osha.gov/dte/sharwood/2011_grant_recipients.html>.

of tripartism. Perhaps because it was enacted during a period of concerted consumer and labour advocacy and organizing between 1969 and 1974,⁵¹ the OSH Act embodied a more proactive vision of safety and health administration, undertaken in partnership with civil society actors. This is reflected in the statutory language itself. For example, section 21 of the original *Occupational Safety and Health Act* of 1970⁵² enabled civil society actors to play a role by mandating that OSHA engage in the provision of training and employee education either directly or through grants or contracts.⁵³ Also, formal collaborative programs exist in “state plan” states where OSHA delegates its authority to enforce health and safety standards to state governments that propose standards and strategies “at least as effective” as OSHA’s.⁵⁴ Several of these states require certain types of businesses to develop health and safety committees at each worksite.⁵⁵

B. MEMORANDA OF UNDERSTANDING AT WHD

In 1999, hoping to leverage limited enforcement resources, WHD under the Bush administration began signing partnership agreements with sister federal agencies, state governments, employer groups, worker associations, and foreign consulates. Between 1999 and 2007, the Bush DOL signed 78 partnership agreements with federal agencies, a diverse set of state departments of labour (including Florida, Texas, New York, Colorado, and Pennsylvania), employer associations (such as the Texas Produce Association, Korean Apparel Manufacturers Association, Labor Ready, Tennessee Foresters Association, and the American Mushroom Institute), and foreign consulates based in north-eastern, midwestern, and southern cities.⁵⁶ Agreements were also signed with community organizations, including the Los Angeles coalition Employment Education and Outreach (EMPLEO), the Las Vegas Interfaith Council for Worker Justice Worker Rights Centre, the Roman Catholic Archdiocese of Newark, and Justice and Equality in the Workplace in Orlando, Florida and Houston, Texas.

51. See Kitty Calavita, “The Demise of the Occupational Safety and Health Administration: A Case Study in Symbolic Action” (1983) 30:4 Soc Prob 437; David Vogel, “The Power of Business in America: A Re-appraisal” (1983) 13:1 Brit J Pol Sci 19; William T Gormley Jr, “Regulatory Issue Networks in a Federal System” (1986) 18:4 Polity 595.

52. 29 USC § 670.

53. *Ibid.*

54. *OSH Act*, *supra* note 5, § 667(c)(2).

55. *Ibid.*, §§ 667(c)(4), 667(c)(6). See also Occupational Safety & Health Administration, *State Occupational Safety and Health Plans*, online: <<http://www.osha.gov/dcsp/osp/index.html>>.

56. The full list of organizations is on file with the author.

Sixty-seven of the partnerships were still in place as of March 2008 when the Government Accountability Office (GAO) issued a report evaluating them.⁵⁷

The most common partnership activity was education (94 per cent), including WHD attendance at seminars and training sessions and the distribution of pamphlets and other materials to workers and employers. In addition to education, a majority of agreements encouraged partner groups to refer complaints to WHD. A much smaller number entailed monitoring agreements, which provided guidelines for employers to monitor themselves or their contractors for potential FLSA violations and to report these to WHD.⁵⁸

In the view of one long-time high-level administrator, who was at WHD throughout the Bush administration, it is important to parse the different types of partnership agreements that were being signed during this period. She recalled that many agreements were signed with national employer associations under which the associations would mail out information to all of their members about the child labour or wage and hour laws and WHD would make presentations to their annual conventions.⁵⁹ In her view, these types of efforts were “largely fluff.”⁶⁰ But other partnership agreements, such as those put in place in Houston and Dallas among WHD, the Mexican Consulate, and a local worker centre were much more substantial because each partner committed to carrying out specific activities such as staffing a worker hotline.⁶¹

In Houston, the partnership agreement was signed with Justice and Equality in the Workplace, a coalition that included WHD; OSHA; the US Equal Employment Opportunity Commission; the Office of Federal Contract Compliance Programs; the Mexican American Legal Defense and Education Fund; the Mayor’s Office of Immigrant and Refugee Affairs; the Catholic Archdiocese; the Harris County chapter of the American Federation of Labor and Congress of Industrial Organizations; the Hispanic Contractors Association; and the Mexican, Colombian, Salvadoran, Guatemalan and Honduran consulates. The parties agreed to a set of activities that included: holding educational programs on workplace rights targeted to the Latino community in Houston; distributing educational program materials; participating in activities

57. US, Government Accountability Office, Testimony before the Committee on Education and Labor, House of Representatives, GAO-08-962T, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance* (Washington: GAO, 2008) (Anne-Marie Lasowski).

58. *Ibid* at 12-13.

59. Interview of Rae Glass (24 February 2009) [copy on file with author].

60. *Ibid*.

61. *Ibid*.

such as press events, community educational training, seminars, conferences, and consulate training; providing financial support for the initiative; strengthening agreements among government agencies, consulates, and community groups in order to promote workers' rights and responsibilities; publicizing the campaign through the media; designating a contact person; conducting meetings to evaluate the campaign; and completing annual evaluations of the "statistical success"⁶² of the initiative.⁶³ A partnership with a similar set of players and activities was signed in 2004 in Los Angeles.

According to the GAO report, "Partnerships and outreach represent a small proportion of WHD's compliance activities, constituting about 19 percent of all WHD staff time from 2000 to 2007."⁶⁴ The percentage of staff time devoted to outreach events decreased from 22 per cent in 2000 to 13 per cent in 2007.⁶⁵ Between 2003 and 2007, outreach mostly targeted employers, although during this period more diverse groups were also targeted for outreach, including "schools, government agencies and community-based organizations."⁶⁶ After reading through the agreements and interviewing agency leaders, the GAO found the large majority of these agreements to have entailed outreach as opposed to actual joint enforcement activities. In fact, joint enforcement activities were mentioned in only a small proportion of the agreements, and it is unclear how many of these were actually implemented. The GAO report therefore concluded that "time spent on partnerships was almost completely accounted for in outreach event time . . ."⁶⁷ While it cannot be claimed that these agreements are complete examples of the tripartism advocated in this article, the Obama administration could build upon them to develop something stronger that extends beyond outreach and education to enforcement.

The Secretary of Labor was one of the last cabinet positions to be nominated and confirmed after the election of President Obama in 2008, but several of the leaders named to top posts hail from states with extensive experience with partnerships between unions, worker centres, and government investigators. Other appointees are veteran labour lawyers, administrators, and organizers. From the time of their nominations, many of these officials and the DOL in general have

62. This language comes from the partnership agreement and means that the parties would try to quantify their interventions by tracking how many trainings they conducted, how many "know your rights" brochures were distributed, et cetera.

63. Partnership agreement on file with the author.

64. *Supra* note 57 at 11 [citations omitted].

65. *Ibid* at 12.

66. *Ibid* at 12-13.

67. *Ibid* at 11, n 22.

been the targets of an assault on the part of the right that has seen interest groups and members of Congress join forces to attempt to block agency appointments and publicly criticize initiatives. For this reason, there was no permanent WHD Administrator for the entire first term of the Obama presidency. This brutal climate has made it difficult for the DOL to function at all, let alone to undertake new initiatives.

IV. TRIPARTISM AND THE OBAMA DEPARTMENT OF LABOR

In 2010, the Obama administration moved to appoint two of the architects of New York Wage and Hour Watch (WHW), Patricia Smith and Lorelei Boylan, to the posts of Solicitor General and WHD Administrator, respectively. Republicans in Congress attempted to block both appointments and although Smith was eventually confirmed, it was only after a bruising process in which the nominees' involvement in WHW was a major focus. During the appointment hearings, the right-wing advocacy group Americans for Limited Government claimed, "This initiative could very likely be a model used by Smith and Boyland [*sic*] on a national level [I]t could turn tens of thousands of 'community organizers' into raving vigilantes nationwide."⁶⁸ During Smith's confirmation hearings, Senator Mike Enzi claimed WHW gave "community-activist groups like ACORN [Association of Community Organizations for Reform Now] vigilante power and credentials authorizing their targeting of small nonunion businesses."⁶⁹

To what, exactly, were Enzi and Americans for Limited Government objecting? In the summer of 2009, the New York State DOL and six organizations signed a memorandum of agreement committing the groups to identify and train some of their leaders to serve as "Wage and Hour Watch Members" for two years. In their "Wage and Hour Watch Zone," these leaders would provide at least fifty businesses per quarter with labour law compliance brochures and hold informational sessions about labour laws for the public. WHW groups were also charged with referring potential labour law violations to the DOL. Members would not, however, carry out inspections. The DOL

68. Americans for Limited Government, "Who Are M Patricia Smith and Lorelei Boylan?" *NomineeAlert* (May 2009) at 1, online: Americans for Limited Government <http://www.getliberty.org/Files/NomineeAlert%20-%20M_%20Patricia%20Smith%20and%20Lorelei%20Boylan%20-%20DOL%20%2005_14_09.pdf>.

69. Jake Blumgart, "The Long Fight for Labor" *The American Prospect* (9 March 2010), online: <<http://prospect.org/article/long-fight-labor-0www.prospect.org>>.

committed to designate a WHW contact within the Division of Labor Standards to administer the program, take complaints, communicate with organizations regarding the status of investigations “to the extent allowable by law,” provide a page on the DOL’s website describing project participants and their areas of work, and participate in quarterly telephone calls with the groups.⁷⁰ The New York State DOL had weathered deep budget cuts as a result of the fiscal crisis and so was unable to provide any funding to participating groups. Smith was eventually confirmed but, after nine months in limbo, Boylan withdrew her candidacy and returned to New York.

Despite the deeply polarized atmosphere in Washington, WHD continued to sharpen its strategies for protecting vulnerable workers by strengthening compliance in targeted industries. It added over 250 new field investigators and strongly embraced strategic enforcement. In fact, according to WHD, the percentage of directed investigations (as opposed to responding to complaints) increased from 22 per cent in the first quarter of fiscal year 2011 to 35.7 per cent in the fourth quarter—a ratio almost unprecedented in the seventy-four-year history of the FLSA.⁷¹

There are worker organizations focussing on almost all of WHD’s targeted industries, and many of them have met with WHD to discuss their concerns. Under the Obama administration, the DOL has held several listening sessions with the Excluded Workers Congress, a coalition of national networks of worker centres including the National Day Labourer Organizing Network, the National Domestic Workers Alliance, Restaurant Opportunities Center United, and other workers’ rights organizations that have been working to have previously excluded categories of workers protected under the FLSA.

Since 2010, WHD has repeatedly stated in its strategic plans and budget justifications its intention to work with worker advocacy groups and other community organizations. In fact, the 2012 *Congressional Budget Justification* submitted to Congress stated:

WHD will leverage its partnership arrangements with other federal, state and local agencies, and with worker and community-based organizations to satisfy the following criteria: the partnership must represent the collective benefit of the workforce, be a means for disseminating information on rights and/or obligations, and mitigate the fear of retaliation among workers who seek assistance in remedying violations. Stakeholder coordination will provide avenues for information gathering

70. Memorandum of understanding and other draft documents provided by Terri Gerstein, New York State Department of Labor [copies on file with author].

71. DOL, *FY 2013*, *supra* note 17 at 22.

on compliance issues and will provide opportunities to develop meaningful compliance assistance tools.⁷²

WHD officials say they want to engender these policies in the day-to-day practices of career investigators, striving to move beyond political appointees in the Washington office.⁷³ In 2011, WHD began the process of hiring Community Outreach and Resource Specialists (CORPS) in twenty-three regional offices. These are full-time outreach positions intended to institutionalize working with community organizations in the field. Most of the hiring was internal, although some positions were posted for outside applicants. WHD's stated goal is for these outreach workers to work with worker centres, unions, and community organizations on campaigns related to WHD's targeted industries, both before and after investigations.⁷⁴

Although it is too early to evaluate the effectiveness of these new positions, there was some early tension about how CORPS was conceptualized. Concerned that CORPS would be quickly overwhelmed if viewed as general liaisons, initially WHD decided not to make the contact information of CORPS investigators public, saying that it wanted them to focus on targeted industries rather than serving in a more overarching outreach capacity. Instead, WHD leaders said that investigators would reach out to specific organizations on an as-needed basis when seeking to cooperate on individual strategic campaigns. There was some feeling in the advocacy community that limiting contact at the outset was not a good idea because fruitful collaborations were more likely to grow if investigators were consistently accessible to organizations and because working with organizations on an ongoing basis would be the best way to foster relationships of trust and reciprocity.⁷⁵

A draft MOU between WHD and the Workers Defense Project (WDP) in Austin, Texas⁷⁶ would seem to be a model of tripartism. The collaboration targets two problem industries with systemic wage and hour violations (at present,

72. DOL, *FY 2012*, *supra* note 16 at 19-20.

73. Interviews of WHD officials [fall and early winter 2009].

74. DOL officials say, due to confidentiality issues, they cannot work with organizations during investigations.

75. See Grant McConnell, *Private Power and American Democracy* (New York: Knopf, 1966) at 30-50; Daniel T Rodgers, "In Search of Progressivism" (1982) 10:4 *Rev Am Hist* 113.

76. [Copy on file with author]. The draft MOU was never finalized but was kept in place and was operational. Interviews of Cristina Tzintzun, Executive Director, Workers Defense Project (October 2011 and May 2013). The reason for this state of affairs is unclear.

construction and restaurants). It involves WDP members and volunteers conducting surveys to find violations and reporting these to WHD for investigation. It also involves WHD officials coming regularly to meet with workers at the WDP office, attending monthly worker meetings, accepting complaints directly from the WDP (in cases where workers are not comfortable), going out to specific construction sites and restaurants when the WDP identifies problems through its worksite surveys, and providing regular status updates on cases.

While WHD under Obama has been mounting strategic enforcement initiatives in targeted industries and asserting the importance of collaborations in its congressional budget requests, there has been reluctance to formalize partnerships and engage in activities along the lines suggested above. In fact, during the Obama administration's first term, the DOL decided to stop initiating the memoranda of understanding with organizations begun under the Bush administration. The Austin MOU, rather than being the first of a new and improved breed of partnership agreements, appears to be the only one of its kind. Likewise, beginning in 2009, OSHA dropped the word "partnership" from its press materials regarding the Susan Harwood grants.⁷⁷ What is behind these changes?

77. Throughout the George W Bush years, annual press releases announcing grantees described the program this way:

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing a safe and healthful workplace for their employees. OSHA's role is to assure the safety and health of America's working men and women by setting and enforcing standards; providing training, outreach, and education; establishing partnerships; and encouraging continual process improvement in workplace safety and health. For more information, visit www.osha.gov.

See *e.g.* Occupational Safety & Health Administration, Trade News Release, "OSHA Seeking Nominations for National Advisory Committee on Occupational Safety and Health" (30 January 2008), online: <https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=1493<http://www.osha.gov>>. Since 2009, under the Obama Administration, they now read: "Under the OSH Act, OSHA's role is to promote safe and healthful working conditions for America's men and women by setting and enforcing standards, and providing training, outreach and education. For more information, visit <http://www.osha.gov>." See *e.g.* Occupational Safety & Health Administration, Region 7 News Release, 09-1295-KAN, "US Labor Department's OSHA Cites Crane and Grain Service LLC of York, Neb., for Violations of the Occupational Safety and Health Act" (27 October 2009), online: <https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=1665<http://www.osha.gov>>.

V. TRIPARTISM KILLERS? THE *FEDERAL ADVISORY COMMITTEE AND ANTI-DEFICIENCY ACTS*

Key players at the DOL have repeatedly cited concerns that partnerships like the ones in New York and California that were briefly described above in Part IV may violate the *Federal Advisory Committee Act*⁷⁸ (FACA) as well as the *Anti-Deficiency Act*⁷⁹ (ADA).

Enacted as part of a set of “openness in government” reforms in 1972 (which also included the *Government in the Sunshine Act*,⁸⁰ the *Freedom of Information Act*,⁸¹ and the *Administrative Procedures Act*⁸²), the FACA’s goal was to limit the unbalanced influence on public policy of special interests acting through advisory committees while, at the same time, providing government with low-cost and relatively unbiased expert advice.⁸³ Specifically, the FACA is supposed to keep Congress and the public informed about the number, purpose, membership, and activities of the federal government.⁸⁴ The FACA was explicitly intended to stop the proliferation of such committees and has been used to eliminate them by setting per agency ceilings on the number of committees that could be established. Agencies that reach their limit would have to eliminate some committees in order to be able to create new ones.⁸⁵

An onerous process is required in order to establish and administer an advisory committee. First, an advisory committee cannot meet or become active until a charter has been filed with the head of the agency establishing the committee and approval has been obtained from the General Services Administration (GSA), the

78. 5 USC § 1 [*FACA*].

79. 31 USC § 1341.

80. 5 USC § 552b.

81. *Supra* note 15.

82. 5 USC § 551.

83. See US, Bureau of Land Management, National Policy for the Federal Advisory Committee Act, *What BLM Staff Need to Know When Working with ADR-Based Collaborative Community Working Groups* (Washington: BLM Alternative Dispute Resolution and Conflict Prevention Program, 2005), online: <http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/general_publications/faca.Par.76214.File.dat/ADR-FACA_Guide_textonly.pdf<http://www.blm.gov>>; Henry H Perritt Jr & James A Wilkinson, “Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years” (1975) 63:3 *Geo LJ* 725.

84. See Richard O Levine, “The Federal Advisory Committee Act” (1973) 10:2 *Harv J on Legis* 217; Jerry W Markham, “The Federal Advisory Committee Act” (1974) 35:3 *U Pitt L Rev* 557.

85. See Steven P Croley & William F Funk, “The Federal Advisory Committee Act and Good Government” (1997) 14:2 *Yale J on Reg* 451.

Office of Management and Budget (OMB), and the standing committees of the Senate and House with jurisdiction over the relevant agency. Second, Congress is required to ensure that each advisory group has a “fairly balanced membership,”⁸⁶ which is to be determined by OMB and GSA (and each member must be vetted for conflicts of interest). Third, each group must conduct open public meetings; interested persons are entitled to attend, appear before, or file statements with any advisory committee and to have an opportunity to provide public comment. (Advisory committees may close meetings to the public if the President or the head of the agency determines that one of the exceptions to the *Government in the Sunshine Act* applies.) Fourth, each group must announce meetings fifteen to thirty days in advance in the Federal Register and must prepare detailed minutes that are made available to the public. Fifth, each group must be provided with “adequate”⁸⁷ staff, quarters, and funds. Finally, unless the enabling statutes provide otherwise, each group must terminate at the end of two years.⁸⁸

It has been argued, particularly by environmental observers, that the “internal paradox” of the FACA is that its rigid procedural requirements have ended up chilling public participation rather than encouraging it. Rebecca J. Long and Thomas C. Beierle find that organizations that would be constructive participants in environmental decision making end up being too daunted by the FACA to press for inclusion.⁸⁹ On the government side, these scholars observe that ambiguities about the FACA’s requirements and fear of litigation have resulted in “FACA-phobia” with agencies dreading engagement with organizations and fearing “any type of public involvement with entities not chartered under the FACA.”⁹⁰ Government officials opt not to have contact with outside organizations in ad hoc meetings because they are not certain of whether the FACA would apply. In a 1994 study of the forestry sector, for example, respondents identified the FACA as the most significant barrier to ecosystem management.⁹¹

86. 5 USC App 2, § 5(b)(2).

87. *FACA*, *supra* note 78, § 568(c).

88. See Rebecca J Long & Thomas C Beierle, *The Federal Advisory Committee Act and Public Participation in Environmental Policy*, Discussion Paper 99-17 (Washington: Resources for the Future, 1999), online: <<http://www.rff.org/rff/Documents/RFF-DP-99-17.pdf>> at 4.

89. *Ibid.*

90. *Ibid* at 3, 9.

91. See Daniel B Schlager & Wayne A Freimund, “Legal and Institutional Obstacles to Implementing Ecosystem Management” in H Ken Cordell, ed, *Integrating Social Science and Ecosystem Management: A National Challenge* (Proceedings of the Conference on Integrating Social Sciences and Ecosystem Management, Helen, Ga, 12-14 December 1995) 57, cited in Long & Beierle, *supra* note 88 at 9, n 24.

In the case of tripartism, which is envisioned to strengthen compliance with the FLSA, it would certainly seem that the FACA's requirements of balance,⁹² advance notice for meetings, and detailed minutes to be made public would almost certainly stymie strategic collaboration in real time.

The *Anti-Deficiency Act* was passed in 1982 but has been around in some form since 1884.⁹³ It was enacted by Congress to ensure that the federal government would not spend money it did not have permission to spend. As a consequence of the law, agencies must plan their expenditures to avoid making obligations in excess of their appropriations. When agency budgets are tight, the ADA may require an agency to curtail or suspend certain discretionary programs or activities. Specifically, the ADA prohibits federal employees from: making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law; involving the government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise allowed by law; accepting voluntary services for the United States, or employing personal services not authorized by law, except in cases of emergency; and making obligations or expenditures in excess of an apportionment or reappropriation, or in excess of agency regulations.⁹⁴

Are the FACA and the ADA really barriers to tripartism at the US DOL? Preliminary opinions solicited by the author from the GAO⁹⁵ as well as Citizens for Responsibility and Ethics in Washington (CREW)⁹⁶ suggest that the FACA would not be triggered by the tripartism described in Part IV, above. From CREW's perspective, while the FACA applies to committees established

92. See Croley & Funk, *supra* note 85 at 500 [citations omitted]. In exploring the "balance" requirement of the FACA, § 5(b), Croley and Funk find that there is some ambiguity in terms of what is required of Congress versus the federal agencies themselves in ensuring balance. They explain:

[B]ecause section 5 specifies not agencies', but rather Congress's, responsibilities under the Act, and furthermore because 5(c) conditions its applicability with the language "to the extent possible"—without specifying who shall determine the extent to which observance of 5(b) is possible—it is not clear how much 5(b) actually constrains agencies.

On the other hand, the General Service Administration's regulations do require agencies to seek a balanced membership.

93. See Maj Gary L Hopkins & Lt Col Robert M Nutt, "The Anti-Deficiency Act (Revised Statutes 3679): and Funding Federal Contracts: An Analysis" (1978) 80 Mil L Rev 51.

94. *Supra* note 79, §§ 1341(a)(1)(A), 1341(a)(1)(B), 1342, 1517(a).

95. Private correspondence with the GAO (10 January 2012) [copy on file with author].

96. Private correspondence with CREW (1 January 2012) [copy on file with author].

to give advice and recommendations, the training, information sharing, and cooperation on enforcement activities that tripartism envisions do not fall under this category. Critically for our purposes, the FACA also appears not to apply when the government asks for the assistance of third parties to *enforce* the law rather than for advice.⁹⁷

When asked to provide an opinion, attorneys at the GAO said that the DOL is not expressly prohibited from engaging in these partnerships; rather, the department's financial situation may have become so limited that it could not spend additional resources on making these partnerships without exceeding its budgetary limitations.⁹⁸ This is where the ADA comes into play. CREW's response was that while it is true that the ADA prohibits the government's acceptance of voluntary services, a distinction has been recognized between voluntary and gratuitous services, with gratuitous services being permitted.⁹⁹

Both the GAO and CREW took the position that the vision of tripartism advanced here would not trigger either the FACA or ADA, but if DOL leaders continue to believe that these statutes do apply, there are simple strategies that could be adopted to clear the way. First, in terms of the FACA, it seems that the question of *who sets the table* is definitive: If worker centres or unions were to convene the taskforces and organize the meetings that bring together investigators with civil society organizations, WHD would be able to send representatives to participate in those initiatives without triggering the FACA. In terms of the ADA, under a Comptroller General opinion, voluntary services are defined as "those which are not rendered pursuant to a prior contract, or under advance agreement that they will be gratuitous."¹⁰⁰ Federal agencies have been permitted to accept from private entities gratuitous services rendered under a cooperative agreement specifying that the services would be free of cost to the government.¹⁰¹

97. See General Services Administration, 41 CFR Parts 101-6 and 102-3, "Federal Advisory Committee Management: Final Rule" (2001) 66:139 Federal Register 37728 at 37734, §§ 101-3.25. See also *ibid* at 37735, §§ 101-3.40(k) (listing as an example of a group *not* covered by the FACA, "Any committee established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically authorized by statute ... such as making or implementing Government decisions or policy").

98. *Supra* note 95.

99. *Supra* note 96.

100. US, Comptroller General, Decision in the Matter of: "Army's authority to accept services from the American Association of Retired Persons/National Retired Teachers Association," File no B-204326 (26 July 1982).

101. US, Office of Management and Budget, *CIRCULAR A-110 REVISED 11/19/93 As Further Amended 9/30/99*, online: The White House <http://www.whitehouse.gov/omb/circulars_a110>.

In other words, if worker centres and unions took this approach—clearly spelling out that there was no expectation of payment now or in the future—they would avoid the prohibition in the ADA.

The bottom line is that even if the US DOL embraces the most conservative interpretations of the FACA and the ADA, it could still participate in an effort convened by a worker centre or union without triggering the FACA, and as long as it makes clear there is no expectation of funding, without triggering the ADA. Of course, the question remains how worker centres in particular will fund the work it would take to set these tables and to oversee and participate in the ongoing collaboration. Government funding is justified, and precedents exist for the DOL providing financial support to community partners (such as the Susan Harwood Training Grants Program); ideally these efforts should be funded in order to maximize their impact.

In analyzing cases of institutional co-production in the provision of public services through regular, long-term relationships between state agencies and organized groups of citizens, Anuradha Joshi and Mick Moore argue that as long as resources are available, co-production need not involve contractual or quasi-contractual arrangements and that the actual relationship might be undefined, informal, and renegotiated almost continually.¹⁰² The limitations of voluntary unfunded programs can be identified as a primary reason why it was relatively easy for New York's Wage and Hour Watch to be discontinued. Some of the participating organizations said that because the program was never resourced it was difficult for them to devote the time to it.¹⁰³ Organizations that had other avenues to the DOL decided to rely on those rather than devoting time to a program that had not been built up and whose main agency proponents were on the way out.

If organizations view the work as a priority, some may be able to provide or find the funds for their participation. In both the Maintenance Cooperation Trust Fund and Los Angeles Unified School District and Board of Public Works cases, discussed above in Part II, unions and unionized employers financially support the work either through providing contributions or staff because it is in their direct self-interest to police their labour markets and penalize bad actors. In the case of worker centres that generally rely on foundation funding for the bulk

102. *Supra* note 42.

103. There was agreement among all parties that it was not resourced and government officials never claimed otherwise. Personal communication with Terri Gerstein and Deborah Axt from Make the Road and Jeff Eichler from Retail, Wholesale and Department Store Union (RWDSU) [spring 2011].

of their support, there would have to be clear prioritization and communication with funders about why this work is so instrumental to alleviate poverty and empower low-wage workers. Ideally, WHD would establish a program similar to the Harwood grants to support tripartism in enforcement efforts on the ground. While legality is arguably not a barrier to participation, one barrier could well be political viability during a period of extreme partisanship.

VI. DOES FORMALITY MATTER?

Tripartism as envisioned by Ayres and Braithwaite¹⁰⁴ provides a specific public interest organization with a formal and ongoing role in enforcement. Ayres and Braithwaite propose that relevant organizations be made fully fledged partners in enforcement, which involves providing them clearly delineated and publicly recognized responsibilities; access to the information the regulator has about non-compliance; the same standing as the regulator to sue or prosecute under the regulatory statute; and a seat at the table along with investigators and firms in negotiations regarding improvements, fines, and penalties.¹⁰⁵ This is the maximal program, but it flies in the face of some strong inherited traditions. The Weberian ethos of rational-legal authority¹⁰⁶ has deep resonance in the United States and it, along with the Progressive Era ideal of the independent civil bureaucracy,¹⁰⁷ is deeply encoded in the culture of government administration. These norms likely underlie reflexive negative reactions to the idea of explicit and formalized investigatory partnerships.

Given that the implementation of even a limited version of tripartism will be a fight and that it may expose the Obama Labor Department to even more criticism, is formality important enough to struggle for? As a general rule, organizations are more likely to adopt a policy or program (especially if it is controversial) if the measure is institutionalized through law, but it can also come about through the gradual diffusion of best practices.¹⁰⁸ Perhaps if agency

104. *Supra* note 34.

105. *Ibid* at 56-60.

106. See Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed by Guenther Roth & Claus Wittich, translated by Ephraim Fischoff et al (New York: Bedminster Press, 1968).

107. See Otis A Pease, "Urban Reformers in the Progressive Era: A Reassessment" (1971) 62:2 *Pac NW Q* 49.

108. Scholars distinguish between early adopters of innovations in formal structures and later adopters, finding that early adopters do so out of a desire to improve internal processes whereas later adopters do so because, once historical continuity has established the efficacy of the change, they feel they must do so in order to retain societal legitimacy. See Pamela S Tolbert &

personnel and organizations have ongoing relationships and these organizations have the power and resources to push WHD regional administrators, formal partnership may not be as important. In fact, because of what the government might feel it must leave out, formal partnerships may turn out to be weaker than informal ones on the ground with strong groups. Finally, in a polarized political environment, informal arrangements are more likely to allow for getting things done by “flying under the radar.”

But there are strong arguments in favour of formalization as well. Weaker organizations that lack the resources and power to establish strong informal relationships with government agencies may need the formal partnership in order to compel their recognition and inclusion in enforcement collaborations. Additionally, effective informal cooperation is reliant upon relationships between individuals at a specific political moment and, thus, it is always contingent and temporary. The temporal nature of individual relationships lowers the probability that organizations will be able to establish permanent structural changes regarding how enforcement is done, at least potentially leading to a culture of compliance among low-wage employers in their labour markets. Finally, concern on the part of government officials that close collaboration with civil society organizations could lead to charges of cronyism or favouritism is perhaps the most important argument for formalization of the collaborative relationship with a clear set of rules and procedures.

But while formalization is necessary, it is not sufficient when the depth of the collaboration is weak. WHW was formalized, but it never really took off. When Patricia Smith and Lorelei Boylan were nominated for federal positions and WHW became a target of attack for Republicans in the Senate, the New York State DOL paused the program so as not to undermine the nominees’ chances at confirmation. The program was never resumed. Formalization alone was not enough. Organizations said that they did not fight for the program because its limitations meant it was not worth the work they would have to invest to revive it.¹⁰⁹

Although one might reasonably assert as a general rule that formalizing and specifying the role of organizations in the labour standards enforcement process would be preferable to informality, it is clear that efforts to formalize participation can backfire when they are too rigid. Ultimately, however, this is a question of getting the institutional design and ongoing interpretation right

Lynne G Zucker, “Institutional Sources of Change in the Formal Structure of Organizations: The Diffusion of Civil Service Reform, 1880-1935” (1983) 28:1 *Admin Sci Q* 22.

109. Interview of organizational leaders from Make the Road and the RWDSU [spring 2011].

rather than being a problem of formality itself. It is also about politics: In the deeply polarized environment that prevails in Washington today, even with evidence of the efficacy of the enforcement strategy coupled with clearly defined roles and objectives, objections are more likely to be motivated by partisan political considerations than by policy disagreements.

VII. CONCLUSION

While it would be a great step forward if tripartism were to be legislated or if a powerful executive were to mandate it, self-interest is probably the most potent force for persuading government investigators on the ground to engage in partnerships. In California and New York, support for partnerships seems to have grown when investigators had positive concrete experiences with individual organizations that helped them put together stronger cases, when they served under agency leaders who were pursuing reform agendas, or when they themselves came out of a civil society background. Even in cases where investigators were positively inclined, effective working partnerships required patience, goodwill, and results.

In his study of labour standards enforcement in Argentina, Matthew Amengual concludes that in states with weak and politicized inspectorates, bureaucrats generate resources for enforcement through their relationships with civil society organizations.¹¹⁰ These state-society linkages include routinized processes of consultation, formal and informal agreements, and interpersonal networks that facilitate direct interaction between labour inspectors and civil society organizations promoting enforcement. In fact, Amengual finds that strong relationships between labour inspectors and civil society organizations committed to enforcement helped bureaucrats overcome resistance by organized interests seeking to block enforcement.¹¹¹ In the United States, a strong state with weak enforcement capacity, the case can be made that these relationships will make a critical difference.

Given the divergent perspectives and organizational cultures of government investigators, worker centres, and unions, it is critical to invest in a process of relationship building. Parties must get to know each other, openly discuss and negotiate expectations, and identify goals and mechanisms for collaboration. Clear agreement must be reached about how cases coming from worker centres

110. "Pathways to Enforcement: Labor Inspectors Leveraging Linkages with Society in Argentina," *Indus & Lab Rel Rev* [forthcoming].

111. *Ibid.*

or unions will be handled, including how priority will be assigned and by what methods organizations will be kept up to date about investigations. Liaisons should be designated who are in regular contact and are actively engaged in sharing information and reporting on progress with cases. The parties need to meet regularly and investigators should hold meetings on-site at worker centres and union offices. There must be accountability and timely follow-up on both sides. Fundamentally, all parties must be clear about their roles and be willing to accept a dynamic tension in the relationship: Civic actors will push for as much information and aggressive action as they can get, and their activism will help galvanize investigators to do more; in contrast, government actors will be more cautious, more focussed on getting the employer's perspective, and more motivated to keep some of the details of their investigations confidential. This will be a constructive tension.

There is a lot at stake. Occupational projections by the US Bureau of Labor Statistics¹¹² predict that by 2016, half of all jobs will require only modest on-the-job training and little if any post-secondary education. Studies by the US DOL and academic researchers have found that these jobs, in sectors including retail, food preparation, home healthcare, building, and grounds cleaning and maintenance are rife with wage theft.¹¹³ Election to a second term of office puts President Obama in a position to take greater risks in the service of fundamental change. Articulating and putting into practice a vision of tripartism that marries the DOL's focus on strategic enforcement with the power of civil society institutions may be what it will take to make firms in low-wage labour markets compliant with wage, overtime, and health and safety standards.

112. See "Projections Overview" *Occupational Outlook Handbook, 2012-13 Edition* (29 March 2012), online: <<http://www.bls.gov/ooh/about/projections-overview.htm>>.

113. See *e.g.* Bernhardt et al, *supra* note 2; DOL, *Report on Initiatives*, *supra* note 4 at 7-9.

