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## Organizing the State: The “New Labor Law” Seen from the Bottom-Up

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# Organizing the State: The “New Labor Law” Seen from the Bottom-Up†

Michael M. Oswalt†† &

César F. Rosado Marzán†††

*U.S. labor and employment law is broken. Evidence of the decay can be gleaned from the steep decline in unions and collective bargaining, inadequate employment protections, ineffective enforcement of many employment laws, and correlative increases in income inequality and unstable work. Recent scholarship has argued that out of the ashes a “new labor law” rises, where labor, management, and state representatives share regulatory roles for the workplace, an arrangement known as “tripartism.”*

*Is this wishful thinking? To find out, we report on original data collected through an ethnographic study of inter-state (side-to-side) and state-society (up-and-down) relationships in Chicago. We identify pervasive and important collaborative partnerships in both arenas, including practices that may indeed undergird a budding tripartism in the United States. But in this nascent version, employers, the state, and unions do not necessarily collaborate on rights enhancements and enforcement. Rather, worker representatives contribute to the state’s primary role in workplace regulation, and employers are nowhere to be found. Moreover, many of the arrangements rely on the initiative and volition of unique*

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actors we call “nodal agents”—not the law. That means some of the state-based nodal agents central to interagency and inter-civil society collaboration derive their authority from inherently unstable political appointments. To the extent the “new labor law” exists in Chicago, and likely elsewhere, it is a “relational labor law” that, because it relies on informal interpersonal dynamics, is inherently precarious.

While our contribution is descriptive and explanatory, the findings strongly point to a need for more law, including civil service protections and nudges or even mandates for side-to-side and up-and-down collaboration. New enforcement agencies should also be structured as nodal agencies, i.e., institutions with legal mandates to collaborate. Given the relative absence of employers from most of the collaborative activities we report—as well as from our study itself—further research should focus on the nature of management attitudes toward tripartite arrangements and the best ways to incentivize or compel their participation in the future.

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## INTRODUCTION

Scholars agree that labor and employment law is in a state of crisis.<sup>1</sup> Workplace protections are weak, under-enforced, and have failed to keep pace with the changing economy.<sup>2</sup> The law’s inadequacies have been increasingly linked to income inequality,<sup>3</sup> a problem that, based on the last Presidential election, seems to have caught the public’s attention.<sup>4</sup> Even academic treatments of the topic have ended up on bestseller lists.<sup>5</sup>

But if the crises are clear, what comes next is not. Deep quarrels surround how labor and employment law should transform and how the changes might help resolve the American inequality quandary.<sup>6</sup>

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1. Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002) (stating that American labor law has been rendered ineffective due to its isolation from “democratic revision and renewal and from local experimentation and innovation”); Michel Coutu et al., *Broken Paradigms: Labor Law in the Wake of Globalization and The Economic Crisis*, 34 COMP. LAB. L. & POL’Y J. 565, 566–568 (noting the economic determinants of labor law’s crisis); Charles Tilly, *Globalization Threatens Labor’s Rights*, 47 INT’L LAB. & WORKING-CLASS HIST. 1 (1995) (arguing that increased market globalization and the eclipse of the national state has endangered labor rights). *But see* GUY DAVIDOV, *A PURPOSIVE APPROACH TO LABOUR LAW 1* (2016) (arguing that labor law is *perpetually* in crisis given that it has to adapt to incessant capitalist transformations).

2. David Cooper & Theresa Kroeger, *Employers Steal Billions from Workers’ Paychecks Each Year*, ECONOMIC POL’Y INSTITUTE 3-6 (May 10, 2017), <http://www.epi.org/files/pdf/125116.pdf>.

3. Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 532–33 (2011) (showing statistical analyses that link union decline to income inequality); *see also* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 8, 73 (2016).

4. *See* David Lauter, *Income Inequality Emerges as a Key Issue in the 2016 Presidential Campaign*, L.A. TIMES (Feb. 5, 2015, 4:00 AM).

5. Jia Lynn Yang, *Here’s an Unlikely Bestseller: A 700-page Book on 21st Century Economics*, THE WASHINGTON POST, WONKBLOG, (Apr. 22, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/04/22/heres-an-unlikely-bestseller-a-700-page-book-on-21st-century-economics/?utm\\_term=.26ab3ca66b33](https://www.washingtonpost.com/news/wonk/wp/2014/04/22/heres-an-unlikely-bestseller-a-700-page-book-on-21st-century-economics/?utm_term=.26ab3ca66b33).

6. The literature on how labor law should reframe itself for the twenty-first century is too vast to summarize here, but *see, e.g.*, Harry Arthurs, *Labour Law After Labour*, in THE IDEA OF LABOR LAW 13 (Guy Davidov & Brian Langille eds., 2011) (arguing that the subject of labor law, “labor,” has lost

One particular prognosis has caught recent attention, however. Professor Kate Andrias has argued that from the outdated system of U.S. labor and employment law rises a “new labor law,” where labor, management, and state representatives are providing new rights and enforcement arrangements for workers through co- or tri-party negotiations and relationships, a regime she calls “social bargaining.”<sup>7</sup> Much of this new labor law is premised on developments spurred by so-called “alt-labor” groups,<sup>8</sup> like the “Fight for \$15”<sup>9</sup> and worker centers<sup>10</sup> that advocate for employment rights absent a desire or obvious path toward traditional collective bargaining relationships. So far the list of victories includes state and local initiatives that have increased minimum wages far above the federal level and provided masses of workers with paid sick time, “fair scheduling” rules, and better “wage theft” protections.<sup>11</sup>

Andrias’s important insight is that such initiatives hint at a turning away from a bargaining model based on one employer and one workplace and a turn toward something that is more explicitly political, potentially with bigger and broader benefits.<sup>12</sup> In this respect the new labor law’s apex

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currency, requiring an altogether new type of law that protects the economically subordinate); Hugh Collins, *Is There a Third Way in Labour Law?*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 449, 469 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002) (arguing that there may be a “Third Way” for labor law that aims to improve competitiveness and promote social inclusion while rejecting equality of redistributive outcomes); DAVIDOV, *supra* note 1, at 119 (labor law should focus on remedying “democratic deficits” and worker dependency); RUTH DUKES, *THE LABOUR CONSTITUTION: THE ENDURING IDEA OF LABOUR LAW* 1, 14–17 (2014) (arguing for the revitalization of a “labor constitution” through the rebuilding of organized labor); Cynthia Estlund, *The Death of Labor Law?*, 2 *ANN. REV. L. & SOC. SCI.* 105 (2006) (explaining how collective labor law in the U.S. could be salvaged through “new governance,” or a strategy that is fundamentally contractual in nature); Cynthia Estlund, *Rebuilding The Law of The Workplace in an Era of Self-Regulation*, 105 *COLUM. L. REV.* 319, 323–24 (2005) (arguing that employment protections that guarantee individual worker “voice” can help to ameliorate the eclipse of traditional, collective labor law); Brian Langille, *Labor Law’s Theory of Justice*, in *THE IDEA OF LABOUR LAW* 101, 105–07, 111–14 (Guy Davidov & Brian Langille eds., 2011) (arguing that labor law should cast aside its entire focus on “inequality of bargaining power” as both out of date and empirically and analytically problematic and rather seek universal liberty-enhancing norms); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *MINN. L. REV.* 342, 388 (2004) (arguing for a “new governance” regime that steps beyond traditional “command and control”).

7. Andrias, *supra* note 3, at 1–2.

8. See, e.g., Josh Eidelson, *Alt-Labor*, 24 *AM. PROSPECT* (Jan. 29, 2013), <http://prospect.org/article/alt-labor> (describing “alt-labor” as “a new face of the U.S. labor movement—an . . . array of groups organizing workers without the union label”). See also Brishen Rogers, *Libertarian Corporatism is Not an Oxymoron*, 94 *TEX. L. REV.* 1623, 1631–32 (2016) (defining “alt-labor” as those groups that aim to represent workers or their interests but that diverge from the traditional Wagner Model).

9. Andrias, *supra* note 3, at 2 (internal citations omitted).

10. *Id.* Worker centers are “community-based mediating institutions that provide support to and organize among communities of low-wage workers.” JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 11 (2006).

11. See *infra* Part I.A.

12. *Id.*

seemed to come in 2015, when New York’s Governor revived a seemingly defunct law that allowed for labor, management, and state representatives to convene a “wage board” to study, and then authorize, a new minimum wage level across a particular industry (in this case, fast food).<sup>13</sup> The process seemed remarkably close to highly regarded systems of co–negotiated workplace benefits known as “tripartism” and seen mostly in Europe.

Skeptics argue that the new labor law is not really “new,” as its roots appear to be planted in earlier incarnations of “ideological unionism,” where labor committed itself to “class–wide political struggles,” as well as the more recent “social justice unionism,” which emphasizes community alliances.<sup>14</sup> Others focus on funding, suggesting that a genuine version of U.S. “social bargaining” would still be dependent on resources siphoned from conventional worksite bargaining—the very regime the new labor law seeks to progressively displace.<sup>15</sup> Threats to basic dues collections through expanded right–to–work laws and Supreme Court hostilities only worsen the matter.<sup>16</sup> Overall, the pronouncement of a labor law revival seems to some as, at best, too soon. At worst, things may be trending in the opposite direction.<sup>17</sup>

Yet, expanding the focus beyond the labor–specific literature is instructive. Administrative law scholars, for example, note that collaborations between and among state and civil society actors happen all the time. Some of this work is informal, rarely makes headlines, and, as a result, is relatively understudied, at least in law reviews. Some of it is more formal and increasingly spotlighted in the legal literature. Moreover, in the social sciences a few scholars have reported on a number of isolated yet nevertheless concrete tripartite–like relationships operating in the United States right now. While these tripartite–like arrangements do not necessarily entail collaboration between management, labor, and the state, they do provide labor with a “seat at the table,” an institutional role to regulate the workplace alongside management and the state.<sup>18</sup> Most are local–level

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13. BYRON BROWN ET AL., REPORT OF THE FAST FOOD WAGE BOARD TO THE NEW YORK STATE COMMISSIONER OF LABOR (July 31, 2015), <https://labor.ny.gov/workerprotection/laborstandards/pdfs/Fast-Food-Wage-Board-Report.pdf>.

14. Marion Crain & Ken Matheny, *The ‘New’ Labor Law*, 126 YALE L.J. FORUM 478, 478–479 (2017), <http://www.yalelawjournal.org/forum/the-new-labor-regime>.

15. Matthew Ginsburg, *Nothing New Under the Sun: “The New Labor Law” Must Still Grapple With the Traditional Challenges of Firm-Based Organizing and Building Self-Sustainable Worker Organizations*, 126 YALE L.J. FORUM 488, 489, 494 (2017), [https://www.yalelawjournal.org/pdf/GinsburgforPublication\\_p7opav41.pdf](https://www.yalelawjournal.org/pdf/GinsburgforPublication_p7opav41.pdf).

16. *Id.* at 495; Crain & Matheny, *supra* note 14, at 484.

17. Ginsburg, *supra* note 15, at 495; Crain & Matheny, *supra* note 14, at 484.

18. Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers’ Organizations*, 38 POL. & SOC’Y 552, 553, 577 n.4 (2010). Fine and Gordon use Ian Ayres and John Braithwaite’s definition of “tripartism.” As Fine and Gordon state:

initiatives that have received little sustained attention but provide genuine glimpses of how state, labor, and management can effectively co-regulate the workplace.

Our project springs from these relevant but relatively inconspicuous realities. We seek to examine the empirical nuts and bolts of labor and employment law-related partnerships both between the state and civil society, (which we call “up-and-down” collaboration) and among public enforcement agencies (which we denote “side-to-side”). Both collaborative types can bolster labor and employment law protections. Through meetings, workshops, conferences, and trainings, up-and-down activities promote information exchange, relationships, and legal strategies that may lead to new rights or better use of existing protections. When administrators work side-to-side, they heal structural incoherencies that infect workplace law, especially enforcement regimes tied to a diversity of statutes and fissured across a multiplicity of city, state, and federal agencies.<sup>19</sup>

On another, more theoretically important level, up-and-down and side-to-side collaborations can form the social organization from which tripartism may flourish or fail. If the new labor law entails labor, management, and government all working together in a formal way, or at least taking on more definite regulatory roles, how well the parties are doing that now *informally* may be the barometer necessary to get a handle on the regime’s potential and staying power in the future.

The base for our empirical work was Chicago, in part because we both live and work in the metropolitan region, so it was a convenient location for sustained study. But beyond expedience, Chicago seemed like the ideal counterpart to New York, where most of the developments suggesting the arrival of a “new labor law” have occurred. Like New York, Chicago is a big, blue city in a big, blue state and the setting for a confluence of city, state, and federal administrative offices. It is also home to a number of large

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The traditional understanding of tripartism is labor, business, and government working together. Here we are referring to a specific proposal for a republican form of tripartism put forward by Ian Ayres and John Braithwaite in *Responsive Regulation*. Their idea of tripartism is a process in which relevant public interest groups (PIGs) become what they refer to as ‘fully fledged third player[s]’ in the game of regulation. Tripartism allows PIGs to participate in three ways: (1) it grants them and their members access to all the information that the regulator has, (2) it gives the PIG a seat at the negotiating table with the firm and agency when deals are done, and (3) PIGs are granted the same standing to sue or prosecute under the regulatory statute as the regulator. *Id.* (citing IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 56–60 (1992)).

19. Matthew W. Finkin, *NAFTA/NAALC and Member Countries, United States*, in *INTERNATIONAL LABOR AND EMPLOYMENT LAWS*, 33a-2 (William L. Keller et al. eds., 3d ed. 2008) (describing U.S. labor and employment law as a tapestry of isolated statutes historically created to resolve labor problems as they surfaced); ANDREW SCHRANK & MICHAEL PIRE, *ECONOMIC COMM’N FOR LATIN AMERICA AND THE CARIBBEAN, SERIE ESTUDIOS Y PERSPECTIVAS: NORMS, REGULATIONS AND LABOR STANDARDS IN CENTRAL AMERICA*, at 14, U.N. Doc. 77, U.N. Sales No. E.07.ILG.44 (2007) (contrasting “inflexible,” “bureaucratic,” and narrowly jurisdictional Anglo-American labor and employment law enforcement systems with flexible, generalist, and unified Latin American models).

employers, associations of employers, local unions, and an especially vibrant “alt-labor” movement, including nearly a dozen worker centers and one of the original Fight for \$15 contingents.<sup>20</sup>

The research itself had two components. First, one of us spent approximately 18-months as a participant-observer at a Chicago worker center.<sup>21</sup> Second, over seven months in 2017, both of us interviewed eighteen elite subjects representing a cross-section of federal, state, and local labor and employment law-related agencies, prominent city worker centers, and major labor unions.<sup>22</sup>

Our results have notes of optimism but also caution. Despite the nation’s radically decentralized system of labor and employment law, collaboration—genuine, committed, productive partnerships—persists both side-to-side and up-and-down. The impact is significant enough to suggest that some of the social infrastructure required for tripartism exists, though it is uneven and lacking in employer participation and true collaborative spirit. Much of this finding is grounded in the presence of exceptional actors we label “nodal agents” for their relationally connective practices and strong commitment to working across administrative and civil society boundaries to enforce rights. In a quite literal sense, these actors are nodes for sharing information, building social capital, and networking with advocates and officials alike throughout the city. In essence, nodal agents organize state institutions—administrative agencies, federal, state, and local—by bringing them closer together to better enforce labor rights in Chicago.

Unfortunately, we also discovered that not all nodal agents are created equally. Some lack civil service protections and are subject to changing political winds. As repeatedly described to us first-hand, a new administration can mean a prompt exit and the end to a fruitful partnership. While replacement officials may prove to have similar characteristics, trust takes time, and it appears at least equally likely that a new administrator will be non-nodal or lacking in collaborative commitments. We call these authorities “islets” for their tendency to work alone, entrenched in their assigned agency offices and clinging to a narrow view of their enforcement and jurisdictional obligations.

These primary findings lead us to contend not only that how nodes and islets combine to enhance or block networks among agencies and groups informs collaboration in Chicago, but that the city’s collaborative culture overall depends greatly on the permanence or impermanence of their positions. In other words, an islet with strong civil service protections can

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20. Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597, 623 (2016).

21. See *infra* Part II.

22. As discussed *infra*, our attempts to interview employer representatives were either unsuccessful or formally declined.

be a continuous block, while a node without those protections can be a boon—but possibly only for a bit.

Thus, our ultimate suggestions turn on the need for more law to better protect and secure the positions of nodal agents, while at the same time promoting or requiring collaboration where possible to motivate or mandate islets into action. The latter process is likely to be naturally assisted by community groups and activists who prioritize “organizing” public officials into productive interagency and inter-society relationships. The combined efforts of civil society and state nodal agents, enhanced by laws that mandate collaboration and protect tenure, can help to “organize” the nation’s decentralized and even incoherent state.

As for the state of “new labor law” in Chicago today, our work indicates that it is premature to claim that something like the regime is here or, frankly, on the horizon. The collaborations we found were easily identified, inspiring, and sometimes profound—but also largely informal and always precarious. Simply put, a weekend workshop that brings together all sides, prompts new empathies, and even leads to new cross-party collaborative mechanisms is still not the same as a wage board. Informal, non-mandated get-togethers can be as inconspicuous as they are fleeting.

So, in the absence of tripartism or other formalized structures, and in a political climate that is often hostile to labor rights, our hope is to formalize what appears to be a *relational labor law*. We want to buttress civil service protections and promote collaboration in ways that rationalize administrative activity and bring more coherence to our otherwise fissured state. We advocate, in other words, for laws and practices that help organize the state. To offer a simple example, Chicago activists and agency officials are currently working on the creation of a “universal complaint form” that would allow a worker to file a single document with any city, state, or federal agency, no matter the alleged legal violation. While the effort is not necessarily unprecedented nor evidence of an emergent “new labor law,” it is an important collaborative advance that helps to organize the state agents responsible for guarding workers’ rights. A better organized state can also help to consolidate worker organizations into civil society regulatory actors, giving them better defined roles and authority over workplace issues.

This article proceeds as follows. Part I surveys existing discussions regarding state-society collaboration, tripartism, tripartite-like arrangements, and workers’ rights. The literature points to empirical gaps in legal scholarship’s understanding of informal administrative activities, something we seek to remedy in Part II, which describes our research methods, and in Part III, which details our results. Part III separates our findings into five categories of increasing collaborative formality: (1) highly casual “coffees and calls”; (2) planned “one-off” or finite joint

projects between and among agencies and advocates; (3) “regularized” or stable collaborative initiatives; (4) inter-agency and agency-consulate memoranda of understandings; and (5) a quasi-tripartite fact-finding and deliberative process that resulted in the 2016 Chicago Paid Sick Leave Ordinance. Part IV analyzes these results and develops a “two-by-two” matrix detailing how a “relational labor law” operates in Chicago. The work is importantly propelled by state actors we call “nodal agents,” who push collaboration against a backdrop of officials with characteristics that sometimes inhibit it, known as “islets.” As we discuss, whether these players are “permanent” or “temporary” fixtures of the landscape is a critical factor in the makeup of the Chicago’s collaborative culture overall. The article concludes with suggestions for further steps, mostly at the level of research, to bolster these and other partnerships in the future.

#### I. PERSPECTIVES ON STATE–SOCIETY RELATIONS AND THE PROMISE OF A NEW LABOR LAW

Of the many ways labor and employment law might be improved, proposals that promote the centralization of organizing, bargaining, and enforcement are some of the most promising. They are also increasingly linked to mechanisms that allow for multi-party negotiations or even partnerships.<sup>23</sup> As explained below, while formal examples of such projects are few and far between, social science and administrative law scholarship suggests that the spread of something similar—if significantly more informal—is possible, but only with the right mix of collaborative practices, political dynamics, and personal relationships between and among administrative and civil society actors.

##### *A. The New Labor Law, Lessons from Abroad, and the Question of Replicability*

In a recent article, Professor Kate Andrias identified the gradual birth of a “new labor law,” based on a conception of bargaining untethered to a single workplace and much broader than the “privatized, firm-based collective bargaining with exclusive representation that has defined American labor relations since the New Deal.”<sup>24</sup> That New Deal model developed out of the Wagner Act of 1935,<sup>25</sup> the Taft–Hartley Act of 1947,<sup>26</sup>

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23. See, e.g., MARK BARENBERG, ROOSEVELT INST., WIDENING THE SCOPE OF WORKER ORGANIZING: LEGAL REFORMS TO FACILITATE MULTI-EMPLOYER ORGANIZING, BARGAINING, AND STRIKING (2015), <http://rooseveltinstitute.org/widening-scope-worker-organizing/> (describing the difficulty of organizing and bargaining “across entire contractual supply chains, networks, industries, occupations, or regions” and proposing “four large-scale reforms to . . . actively facilitate” engagement “across multiple employers”).

24. Andrias, *supra* note 3, at 2, 8, 73.

25. Wagner Act, Pub. L. No. 198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–169 (2012)).

and other more limited amendments that make up the National Labor Relations Act (NLRA or Act), the primary statute governing labor relations in the private sector. At heart, Andrias depicts the new labor law as a resurgence of a system of governance where some combination of representatives from management, labor, and the state bargain over workplace related matters.<sup>27</sup> Fully realized, it could displace—or at least exist alongside—the NLRA’s “commitment to the employer–employee dyad,” through sectoral, industrial, regional or even national bargaining between the parties.<sup>28</sup> By including the state as a likely central player in that process, the new labor law deemphasizes the role of workplace private ordering,<sup>29</sup> a central strand in mainstream judicial interpretations of the NLRA.<sup>30</sup> While the new labor law may not totally eclipse plant–level employee representation, it might compel other organizational forms beyond the exclusive representation model given prominence under the NLRA.<sup>31</sup>

Andrias develops her prognosis for the new labor law’s development mostly by examining the experiences of the “alt–labor” campaigns spearheaded by “Organization United for Respect at Walmart (OUR Walmart)” and “Fast Food Forward” and its current incarnation, the “Fight for \$15,” in the last half–decade or so.<sup>32</sup> These efforts have ignited state and local political processes across the country that, most concretely, have led to the resetting of minimum wages far above the federal level.<sup>33</sup> Some public institutions, such as the University of California and the federal government’s contracting arm, have matched these increases, and even notoriously low–wage companies like Walmart and McDonald’s have boosted minimums, albeit not to \$15 an hour.<sup>34</sup> Most recently the momentum has carried over to the issue of workplace scheduling, and a

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26. *Id.* §§ 141–197.

27. Andrias, *supra* note 3, at 10 (citing Nelson Lichtenstein, *The Demise of Tripartite Governance and the Rise of the Corporate Social Responsibility Regime*, in *ACHIEVING WORKERS’ RIGHTS IN THE GLOBAL ECONOMY* 95 (Richard Appelbaum & Nelson Lichtenstein eds., 2016)).

28. Andrias, *supra* note 3, at 58.

29. *Id.*

30. See, e.g., Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 *MINN. L. REV.* 265, 293 (1977) (describing a contractualist reading of the NLRA by the courts).

31. *Id.* at 81, 99 (stating that members-only unions, works councils, and employee-owned firms may supplement even social bargaining under the new labor law).

32. Andrias, *supra* note 3, at 47.

33. *Id.* at 51–57. For a summary of state and local minimum wage increases since the start of OUR Walmart and Fight for \$15 in 2012, see NAT’L EMP’T LAW PROJECT, *FIGHT FOR \$15, FOUR YEARS, \$62 BILLION* (Dec. 2016) (“Of the \$61.5 billion in additional [annual] income, 66% is the result of landmark \$15 minimum wage laws that Fight for \$15 won in California, New York, Los Angeles, San Francisco, Seattle, SeaTac and Washington D.C. over the past few years.”).

34. *Id.*

number of local governments and firms have agreed to enact rules to enhance predictability and notice.<sup>35</sup>

Andrias's key turn is to suggest that out of these mobilizations, a new type of labor organization, one with the goal to engage in tripartism or "social bargaining" that would benefit all workers—union members or not—is surfacing.<sup>36</sup> In support, she highlights how "\$15 and a union" has become not simply a rallying cry but the base for an aspirational model of representation across all of low-wage work.<sup>37</sup> Fight for \$15's activism against McDonald's, additionally, has aimed at something like sectoral, or industry-wide bargaining by showing how McDonald's Corporation controls or has the right to control the terms and conditions of its franchisees' employees, raising its potential status as a "joint employer" that could be compelled to negotiate with unions trying to organize its otherwise independent restaurants.<sup>38</sup> Attempts at such sectoral bargaining, or, perhaps, quasi-sectoral bargaining, as McDonald's is only one firm, are notably coupled with state-directed demands to pass laws to improve conditions for all workers.<sup>39</sup> As Andreas recounts:

From these fledgling and evolving efforts, one can derive a glimmer of tripartism in labor relations largely abandoned since the New Deal: triangle bargaining among workers, employers, and the state over wages and benefits. The recent experience with the New York Wage Board provides the most concrete example. On May 6, 2015, after growing protests and strikes in New York organized by the Fight for \$15, Governor Andrew Cuomo announced that he would take executive action to raise wages. As Cuomo explained, New York State law permitted the labor commissioner to investigate whether wages paid in a specific industry or job classification are sufficient to provide for the life and health of those workers, and, if not, to impanel a wage board to recommend what adequate wages should be. Invoking Franklin Roosevelt's aggressive use of executive power against moneyed interests, Cuomo directed the Commissioner to exercise such authority. The next day, New York's Acting Commissioner for Labor issued a memorandum providing data to show that "a substantial number of fast-food workers in the hospitality industry are receiving wages insufficient to provide adequate maintenance and to protect their health" and began the wage board process.<sup>40</sup>

Andrias connects these developments to the truth that centralized—as opposed to firm-based—bargaining is generally more effective for both

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35. *Id.* See also Justin Miller, *In \$15's Wake, Fair Scheduling Gains Momentum*, AM. PROSPECT (Sept. 20, 2016), <http://prospect.org/article/15-wake-fair-scheduling-gains-momentum>.

36. Andrias, *supra* note 3, at 8.

37. *Id.* at 49.

38. *Id.* at 58.

39. *Id.* at 64–65.

40. *Id.*

worker organization and the creation of egalitarian redistributive policies that sustain a middle class.<sup>41</sup> Commonly known as “tripartism,” “corporatism,”<sup>42</sup> or simply centralized bargaining,<sup>43</sup> evidence supporting the arrangement’s impact on organized labor is abundant. Professor Matt Dimick has summarized how centralization helps unions by reducing employer opposition, incentivizing investments in physical and human capital through infrastructure and skill-building, and compressing wage spreads, reducing income inequality overall while also benefitting the macro-economy.<sup>44</sup> The effects hold even given the challenges of globalization. In a seminal study, sociologist Bruce Western showed how centralization had a positive effect on union membership despite the arrangement’s insertion into global markets that generally weaken collective bargaining institutions.<sup>45</sup>

Although centralized bargaining, like the wage boards board in New York, may start as a way to set wages across an industry, the gains don’t necessarily stop there. Latin American industrial relations and legal scholars have shown, for instance, that Uruguayan wage committees, established by law but convened exclusively by the country’s presidents at their discretion, have also helped to promote negotiation on an array of subjects while increasing union density in the process.<sup>46</sup> As the Uruguayan experience proves, wages inexorably relate to other terms and conditions of

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41. See BRUCE WESTERN, *BETWEEN CLASS AND MARKET* 135, 192 (1997) (describing how centralized collective bargaining supports high levels of union density while decentralization erodes it); Matthew Dimick, *Productive Unionism*, 4 U.C. IRVINE L. REV. 679, 696–98 (2013) (explaining how labor market centralization encourages unionism by dis-incentivizing employer opposition and encouraging investments in human capital, lowering income inequality overall).

42. See Philippe C. Schmitter, *Still the Century of Corporatism?*, 36 REV. POL. 85, 86 (describing corporatism as “a particular modal or ideal-typical institutional arrangement for linking the associationally organized interests of civil society with the decisional structures of the state”); Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 589–91 (2007) (describing corporatism as a system of interest representation that enfranchises individuals and organizations, creates incentives for cooperative relationships between those organized interests and the state, sets boundaries on which individuals and groups can participate, and expects that groups discipline their internal constituents). See also Brishen Rogers, *Libertarian Corporatism is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1624–25, 1637, 1640–41 (proposing a model of “libertarian corporatism” for contemporary U.S. society where individuals can select whichever bargaining representative they prefer, doing away with exclusive representation while also eliminating restrictions on unions’ concerted activities, including those related to secondary targets).

43. See WESTERN, *supra* note 41, at 8.

44. Dimick, *supra* note 41, at 695–702.

45. WESTERN, *supra* note 41, at 191–92 (detailing how countries that retained centralized collective bargaining, such as Finland, were also able to maintain high levels of unionization while labor market decentralization contributed to union decline amidst globalization).

46. HÉCTOR-HUGO BARBAGELATA ET AL., *EL CONTENIDO DE LOS CONVENIOS COLECTIVOS* (1998); SERGIO GAMONAL CONTRERAS, *DERECHO COLECTIVO DEL TRABAJO* 34 (2d ed. 2011) (citing ÓSCAR ERMIDA URIARTE, *INTRODUCCIÓN, CUARENTA ESTUDIOS SOBRE LA NUEVA LEGISLACIÓN LABORAL URUGUAYA* 8 (2010)).

employment,<sup>47</sup> and since workers recognize that increased union membership means more organized power to deliver the goods, the committees also encourage unionization itself.<sup>48</sup>

One of us has also shown that during the heyday of Puerto Rico's experiment with export-led industrialization in the 1950s, union-catalyzed tripartite committees raised wages but also added benefits in the garment sector.<sup>49</sup> At the time, the Puerto Rican garment trade was considered a "runaway industry" by U.S. unions for its on-going relocations from high wage, organized areas of the mainland east coast to the lower wage, unorganized island.<sup>50</sup> Given the open border relationship between the United States and the territory, manufacturers could move to Puerto Rico with ease.<sup>51</sup> But so could American unions. Organized labor followed industry to the Caribbean island, compelled the government to assertively use wage committee laws that included unions, and advocated for raising wages just cents below what the committees assessed were the maximum wages that the industry could support.<sup>52</sup> The unions then used their knowledge of management's capacity to pay slightly higher wages—attained through the wage committees—to negotiate marginal benefits exclusively via collective bargaining, including, importantly, health care.<sup>53</sup> In all, the combination of sectoral bargaining for wages and firm-based bargaining for marginal benefits buttressed the need for unions at both central and plant levels,<sup>54</sup> enabling unions to significantly grow in what had previously been understood in Puerto Rico to be an un-organizable sector.<sup>55</sup>

Despite the promise of centralized bargaining and Andrias' careful study and hopeful analysis of recent events, important replicability questions remain.<sup>56</sup> Andrias herself is cautious. While Fight for \$15 is active in many states, only three others—California (Sacramento),

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47. BARBAGELATA ET AL., *supra* note 46.

48. GAMONAL CONTRERAS, *supra* note 46, at 34.

49. César F. Rosado Marzán, *Successful Wage Moderation: Trust, Labor Market Centralization, and Wage Moderation in Puerto Rico's Experience With Export-Led Development*, 9 ELECTRONIC J. COMP. L. 1, 17 (2005).

50. *Id.* at 14.

51. *Id.* at 17.

52. *Id.*

53. *Id.*; See also Cesar F. Rosado Marzán, *Dependent Unionism: Resource Mobilization and Union Density in Puerto Rico* 71 (Apr. 11, 2005) (unpublished Ph.D. dissertation, Princeton University) (on file with author) (explaining how the garment worker unions in Puerto Rico bargained for marginal benefits after negotiating wages through committees).

54. Rosado Marzán, *supra* note 49, at 17.

55. *Id.*

56. See, e.g., Max Zahn, *Can the Fight for \$15 Replicate Its New York Wage Board Victory Around the Country?*, IN THESE TIMES (Oct. 15, 2015, 3:28 PM), <http://inthesetimes.com/working/entry/18516/fight-for-15-wage-board-minimum-wage> (describing the Fight for \$15's aspiration to "set up wage boards everywhere in the country").

Washington State (Tacoma and Seattle), and Illinois (Chicago)—appear to have convened something like a tripartite entity of sorts.<sup>57</sup> Even these bodies are closer to informal or ad hoc commissions than the model successfully implemented in New York.<sup>58</sup> When activists planned so-called “People’s Wage Board” hearings around the country in 2015 to generate momentum for further legislation, proponents admitted the strategy’s success is highly contingent on variable political dynamics.<sup>59</sup>

*B. Collaborating “Up-and-Down:” Tripartite Experimentalism in the U.S.*

Another way to dig into the promise of tripartism is to look below the surface of wage boards, toward more micro, local experiments. Here, the theme emerging from empirical analyses is that tripartite projects are valuable but highly exceptional.<sup>60</sup> Professors Janice Fine and Jennifer Gordon have been among the scholars who have provided the most detail through examinations of a number of tripartite-like arrangements where labor minimally has a role regulating the workplace, alongside the state and employers.<sup>61</sup> These tripartite-like arrangements include state-labor partnerships—what we call “up-and-down” collaboration—ranging from the durable and stable to the contingent and fragile.<sup>62</sup> The strongest case involves the Los Angeles Unified School District (LAUSD) and Board of Public Works Deputization Programs, where LAUSD trains and deputizes local trade union staffers to inspect public school construction sites, including non-union contractors, for violations of prevailing wage laws. The program thrives, according to Fine and Gordon, because it provides formal, legal mechanisms for collaboration between state and worker representatives to regulate the workplace.<sup>63</sup> Employers respect the deputized union inspectors because city law requires it, and unions voluntarily get

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57. Andrias, *supra* note 3, at 66.

58. *Id.* at 66–67.

59. Zahn, *supra* note 56.

60. See, e.g., Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers’ Organizations*, 38 POL. & SOC’Y 552, 558–60 (2010) (describing how existing tripartism examples have “been ad hoc rather than rooted in policy”); Janice Fine, *Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States*, 50 OSGOODE HALL L.J. 813, 840–842 (2013) (discussing the patchy U.S. history with tripartism, giving extraordinary contemporary examples, and describing the likely importance of formal law to institutionalize tripartism going forward).

61. Fine & Gordon, *supra* note 60, at 553, 553 n.4.

62. *Id.* at 563–71. We do not report on the third case dealing with the New York Wage and Hour Watch because, according to the authors, the program was in the design stage at the time of their reports. *Id.* at 569.

63. *Id.* at 564–65. See also LOS ANGELES UNIFIED SCHOOL DISTRICT FACILITIES SERVICES DIVISION, JOINT COMPLIANCE MONITORING PROGRAM LOS ANGELES UNIFIED SCHOOL DISTRICT & ALL WORK PRESERVATION GROUPS: RULES OF ENGAGEMENT (FISCAL YEAR 2017–18), [http://www.laschools.org/contractor/lc/documents/download/work-preservation/Rules\\_of\\_Engagement.pdf](http://www.laschools.org/contractor/lc/documents/download/work-preservation/Rules_of_Engagement.pdf) (last visited July 31, 2018).

involved “because their incentives are closely aligned with the” program’s goals.<sup>64</sup>

In another illustration, Fine and Gordon highlight that formal law is not necessarily a prerequisite for effective state–labor collaboration. Trust can sometimes substitute. In California, the state–run Labor Commission Janitorial Enforcement Team (JET), which enforces laws relating to the capitalization of janitorial service companies, teams up with the Maintenance Cooperation Trust Fund (MCTF), a union–backed watchdog, to bring noncompliant businesses to the state’s attention. The partnership works because MCTF has won JET’s confidence by providing quality evidence on noncompliant employers over time, greatly enhancing JET’s otherwise limited enforcement capabilities.<sup>65</sup>

Fine’s and Gordon’s work and related studies show that synergies between state and civil society actors—namely unions—to enforce labor and employment laws are possible. But advocates’ push for further diffusion and formalization of like partnerships comes with the caveat that the law–backed track record is thin,<sup>66</sup> and that all efforts require political and relational commitments that are difficult to cultivate and sustain over time.<sup>67</sup> Most obviously, the arrangements above are tripartite not in the collaborative way the new labor law envisions, but in a narrower sense, where labor plays at least a minimal regulatory role.<sup>68</sup> Other challenges include that state participants may eventually express “resentment” toward the labor groups. In a California case, some officials viewed the arrangement as impinging on their “neutrality” while enabling an inappropriate culture of activism toward employers.<sup>69</sup> Employee organizations, for their part, lamented their loss of control over cases referred to the agency and cited interpersonal frictions with the officers.<sup>70</sup>

### *C. Collaborating “Side-to-Side:” Combatting Administrative Incoherence*

Beyond some of the successful examples of up-and-down cooperation is the issue of whether government can generally be viewed as a reliable partner. A union, worker center, or other advocacy group primed to work with an agency may find that the actors best suited to represent the state are embedded in a system of structural disorganization, isolation, or disinterest,

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64. Fine & Gordon, *supra* note 60, at 565.

65. *Id.* at 568.

66. *Id.* at 561.

67. Matthew Amengual & Janice Fine, *Co-enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States*, 11 REG. & GOVERNANCE 1, 9 (2016).

68. Fine & Gordon, *supra* note 60, at 553, 553 n.4.

69. Amengual & Fine, *supra* note 67, at 7–9.

70. *Id.*

stopping collaboration in its tracks. While research suggests that this is often the case, a range of tools and practices can help facilitate “side-to-side” or lateral administrative relationships. As described below, these range from formal mechanisms, like committees and written agreements, to informal activities, like repeated personal contacts.

### *1. The Realities of State Disorganization*

It is well established that state bodies organized as bureaucracies develop internal organizational logics that decouple administrators from broad policy goals. Early on, sociologist Max Weber noted how bureaucracies have a tendency to protect “office secrets” and hoard power to safeguard internal authority.<sup>71</sup> Sociologist Vivek Chibber, who performed one of the most celebrated studies on state incoherence and effective public policy, has shown the need for so-called “nodal agencies” to stir necessarily disparate and autonomous state bodies and bureaucrats in specific, national directions.<sup>72</sup> In his study, focused on economic development in India and South Korea, Chibber explained how the Indian post-colonial state was unable to deliver on its promise to develop the Indian economy despite strong policy pronouncements, while South Korea, by many measurable ways less developed than India, transformed into a developmental powerhouse.<sup>73</sup> In both cases, the causative factors at play were complex, but India suffered from a particular weakness that made it impossible to implement favored development policies: the state was bureaucratically incoherent and thus incapable of “disciplining” the Indian capitalist class.<sup>74</sup> The capitalist class wanted the Indian state to intervene and even “plan,” but only in its interest through subsidies, credit, and procurement contracts.<sup>75</sup> These elite actors did not want to be disciplined or coerced by the state in service to a particular path of national development, and ultimately the Indian state succumbed to those pressures.<sup>76</sup> The South Korean state, on the other hand, was united. The Korean Economic Planning Board, acting as what Chibber describes as a “nodal agency” promoting order and integrity to the state’s economic development efforts, “disciplined” capitalists who opposed the centralized schemes.<sup>77</sup> Forced by the Korean Economic Planning Board to innovate, South Korea

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71. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 992 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1922).

72. VIVEK CHIBBER, *LOCKED IN PLACE: STATE-BUILDING AND LATE INDUSTRIALIZATION IN INDIA* (2004).

73. *Id.* at 1–5.

74. *Id.* at 7.

75. *Id.* at 147.

76. *Id.* at 147, 154–55.

77. *Id.* at 21.

successfully outperformed many global competitors, driving much of the nation's developmental success story.<sup>78</sup>

In many ways, the U.S. labor and employment law administrative landscape is closer to India's than South Korea's. Developed "piecemeal" over decades, relevant policies are scattered across and within state and federal agencies, often overlap, sometimes conflict, and rarely coordinate.<sup>79</sup> The system defies accessible organizing principles<sup>80</sup> and can force advocates to scrutinize procedures, practices, forums, and remedies as carefully as the merits of an overarching goal.<sup>81</sup> Sociologist Shannon Gleeson has revealed some practical effects of this incoherence, where agencies tasked with enforcing laws intimately related to workers' rights, like the National Labor Relations Board (NLRB), Equal Employment Opportunity Commission (EEOC), and Department of Labor (DOL), focus mostly on meeting narrow duties to administer their charged statutes and seldom meaningfully collaborate or coordinate activities across agencies.<sup>82</sup> The problem persists despite obvious mandate overlaps and even in the context of low-wage workers, who are most likely to experience a multiplicity of labor and employment law violations.<sup>83</sup> It can be particularly acute where workplace protections and immigration law intersect, exemplified by the infamous actions of federal Immigration and Customs Enforcement (ICE) agents who dressed up like Occupational Safety and Health Administration (OSHA) officials to question, process, and deport

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78. *Id.* at 21, 156.

79. Craig Becker, *Thoughts on the Unification of U.S. Labor and Employment Law: Is the Whole Greater than the Sum of the Parts?*, 35 YALE L. & POL'Y REV. 161, 165–67 (2017). The federal Department of Labor alone is responsible for 180 statutes with nearly two-dozen separate enforcement procedures. *Id.* at 165. See also Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 529–30 (1992) ("The jumble of procedures and remedies for individual employment rights lacks any coherent pattern.").

80. As 1994's federal "Dunlop Commission"—tasked with studying the legal framework underlying worker-management relations—concluded, the "whole field has become far too large and complex" even "for independent researchers." COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEPT'S OF LAB. & COM., FINAL REPORT 71 (1994) [hereinafter FINAL REPORT]. See also Summers, *supra* note 79, at 530–31 ("The diversity is . . . without defensible reason.").

81. See FINAL REPORT, *supra* note 80, at 84 (describing enforcement "disputes rooted in the administration of the law rather than the merits of a case"). The Dunlop Commission's fact-finding underscored this reality to sardonic effect, using a consciously convoluted narrative and chart to "offer[] a glimpse of the array of forums, procedures, and remedies available under this country's law of the workplace." *Id.* at 111, 132.

82. SHANNON GLEESON, *CONFLICTING COMMITMENTS: THE POLITICS OF ENFORCING IMMIGRANT WORKER RIGHTS IN SAN JOSE AND HOUSTON* 57–59 (2012) (describing how state agencies that enforce labor and employment rights exist as "bureaucratic islands"). See also Amengual & Fine, *supra* note 67, at 2 ("In the U.S., there is rich history of independent regulatory agencies that has evolved into an organizational culture that views collaboration in [work law] enforcement as anathema.").

83. *Id.*; SHANNON GLEESON, *PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES* 132–33 (2016).

undocumented workers who showed up to take part in a safety “training.”<sup>84</sup> Gleeson underscores the point that OSHA staff had a hard time establishing trust after that event.<sup>85</sup>

## 2. “Formal” Inter–Agency Collaboration: Learning from the Administrative Law Literature

The complexities of lateral relations have also been broadly discussed by administrative law scholars, who call “interagency coordination . . . one of the central challenges of modern governance,” with jurisdictional overlap, function sharing, dual–enforcement, and other legal “redundanc[ies]” affecting all levels of government.<sup>86</sup> The situation is “inevitable, pervasive, and stubborn.”<sup>87</sup>

Why and how these sorts of puzzles arose is subject to debate, with explanations ranging from the deliberate (to promote interagency competition, monitoring, or know–how), to the structural (a consequence of contentious and authority–seeking legislative committee systems), to the purely “accidental” (the natural result of incremental delegations over time).<sup>88</sup> Whatever the reason, a consensus position<sup>89</sup> is that today’s complex policy problems require agencies to rise above fragmentation by sharing information, expertise, and best practices to maximize productivity, minimize costs, and avoid “turf battles” that stymie good government.<sup>90</sup> That is, they need to work together.<sup>91</sup> In Weberian terms, agencies need to

84. GLEESON, CONFLICTING COMMITMENTS, *supra* note 82, at 80–81.

85. *Id.*

86. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1134 (2012).

87. *Id.* at 1136.

88. *Id.* at 1138–45.

89. See, e.g., FREDERICK M. KAISER, CONG. RESEARCH SERV., R41803, INTERAGENCY COLLABORATIVE ARRANGEMENTS AND ACTIVITIES: TYPES, RATIONALES, CONSIDERATIONS 15 (2011) [hereinafter CRS INTERAGENCY REPORT] (citing “clarion calls for improved collaboration, coordination, or clarification of functions and duties—along with other ways to enhance cooperation—among agencies with shared responsibilities and overlapping jurisdictions”).

90. *Id.* at 15–21 (noting also that “[r]ationales for interagency collaboration are multiple in number and dimensions” and that some “lend themselves to subcategories, differ in importance and currency, or overlap with and reinforce others”). See also U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-1022, MANAGING FOR RESULTS: KEY CONSIDERATIONS FOR IMPLEMENTING INTERAGENCY COLLABORATIVE MECHANISMS 1 (2012) [hereinafter GAO INTERAGENCY REPORT] (“We have reported about the importance of collaboration between federal agencies for many years. For example, we have noted that interagency mechanisms . . . may reduce potentially duplicative, overlapping, and fragmented efforts.”).

91. Professor Jason Marisam paints the big picture: “In our complex regulatory system, in which many regulatory problems implicate multiple agencies’ expertise and interests, agencies cannot afford to focus on their own tasks to the exclusion of other agencies’ agendas. Such inward-looking agencies may produce actions that achieve some core objectives. But they will miss opportunities to advance their interests through the thousands of actions taken by other agencies, and they will fail to protect their interests from negative side effects generated by other agencies’ actions. Thus, rational agencies today

stop hoarding “office secrets” and substantially promote the policies they have been mandated to foster.

Legal academics suggest that agencies are making advances on this front.<sup>92</sup> A robust literature has emerged to track this progress, much of it zeroing-in on how the work gets done.<sup>93</sup> Simply classifying the immense array of ways one agency might interact with another agency has spawned a variety of descriptors, but the most inclusive heading tends to be “collaboration,” generally defined as “any joint activity that is intended to produce more public value than could be produced when the agencies act alone.”<sup>94</sup> The devices agencies use to collaborate are also subject to categorization, most broadly whether the practice is “formal” or “informal.”<sup>95</sup>

Greatest attention has been paid to the formal side, meaning lateral relations compelled by law, an administrative or executive rule, or at least an expectation memorialized in an agreement.<sup>96</sup> Professors Jody Freeman and Jim Rossi have provided perhaps the most comprehensive accounting of the major examples at the federal level, including numerous statutes and orders that mandate or merely recommend interagency consultations or rulemaking; high-profile White House initiatives that create czars, task forces, or councils to orchestrate and oversee cross-agency relations; and

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constantly seek to influence other agencies’ actions to advance and protect their own interests.” Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 188 (2013).

92. See Richard C. Feiock & John T. Scholz, *Self-Organizing Governance of Institutional Collective Action Dilemmas: An Overview*, in SELF-ORGANIZING FEDERALISM 3 (Richard C. Feiock & John T. Scholz eds., 2010) (“In our complex, interconnected, and information-dense world, policy problems increasingly transcend the jurisdictional boundaries of governments and their specialized agencies at all levels. Examples abound of agencies working across jurisdictions, across levels of government, across agencies, and across sectors.”); CRS INTERAGENCY REPORT, *supra* note 89, at 1 (“Interagency coordinative arrangements and activities . . . appear to be growing in number, prominence, and proposals throughout virtually all individual policy areas and across-the-board.”).

93. See, e.g., Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 748–54 (2011); Freeman & Rossi, *supra* note 86, at 1134–38; Marisam, *supra* note 91, at 188–89; David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1447–51 (2014); Yoon-Ho Alex Lee, *Beyond Agency Core Mission*, 68 ADMIN. L. REV. 551, 581–83 (2016).

94. GAO INTERAGENCY REPORT, *supra* note 90, at 3. The Government Accountability Office settled on the umbrella term after concluding it was “unable to make definitive distinctions between” other common descriptors of interagency relations. CRS INTERAGENCY REPORT, *supra* note 89, at 2. See also *id.* at Summary (noting that types of interagency relations are “not defined” in law and have “lacked consistency and precision, have been used interchangeably, or have been applied to more than one category”). To the extent sub-types of collaboration can be reliably identified (an open question), they often include coordination, integration, partnering, merging, and networking. *Id.* at 3–4. “Coordination,” for example, is considered a “top-down” form of collaboration initiated, monitored, and controlled by a “lead authority.” *Id.* at 6. Even there, however, the line between directed coordination and other more voluntary collaborative practices is, in practice, elusive. *Id.* at 11–12.

95. Bradley, *supra* note 93, at 750–55.

96. See, e.g., CRS INTERAGENCY REPORT, *supra* note 89, at 1 n.1.

memos that establish frameworks for working together in the future.<sup>97</sup> Indeed, many of these tools resemble the nodal mechanisms—or at least “proto” versions of them—that Chibber argued were so central to South Korea’s economic development success.

Sometimes, all three tools—statutes, task forces, and memos—are deployed together. In combatting employment discrimination, for example, the Civil Rights Act encourages the EEOC “to cooperate with . . . State, local, and other agencies,”<sup>98</sup> while a somewhat later Executive Order specifies that DOL should “[r]ecommend to the [EEOC] . . . appropriate proceedings to be instituted under Title VII.”<sup>99</sup> Between 1966 and 1968 President Johnson convened five interagency task forces examining expansions of workplace civil rights for various groups,<sup>100</sup> and in 1974 the DOL and EEOC signed an agreement to share information, expertise, and complaints.<sup>101</sup>

### 3. Memoranda of Understanding

The “agreement” tool, widely known as a “memorandum of understanding” or “MOU,” turns out to be the workhorse of formal interagency collaboration.<sup>102</sup> As the name suggests, MOUs are short, voluntarily agreed-to documents depicting “an area of mutual interest or concern that may be addressed cooperatively” by multiple agencies, even across the local, state, and federal hierarchy.<sup>103</sup> While very little about MOUs applies universally, some common goals are information sharing, jurisdictional clarity, policy uniformity, enforcement sign-offs, and procedural streamlining.<sup>104</sup> At their best, MOUs divvy-up overlapping or otherwise duplicative responsibilities, establish performance benchmarks, and set dates for follow-up and revisions, ultimately transforming collaborative norms in the process.<sup>105</sup> At worst, the agreements are

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97. Freeman & Rossi, *supra* note 86, at 1157–78.

98. 42 U.S.C. 2000e-4(g)(1) (2012).

99. Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965).

100. Task Force Reports of the Johnson White House, 1963–1969, Research Collections in American Politics (William D. Leuchtenburg ed., 2009).

101. Emerson Elec. Co. v. Schlesinger, 609 F.2d 898, 901 (8th Cir. 1979).

102. Freeman & Rossi, *supra* note 86, at 1161 (calling MOUs “[p]erhaps the most pervasive instrument of coordination”).

103. U.S. Geological Survey, U.S. Geological Survey Domestic Memorandums of Understanding (MOU) with Other Federal Agencies or Entities, <https://www2.usgs.gov/mou/> (last visited Aug. 2, 2018). See also Freeman & Rossi, *supra* note 86, at 1161.

104. Freeman & Rossi, *supra* note 86, at 1161.

105. *Id.* at 1161–62. See also Eduard H. Cadmus, Note, *Revisiting the SEC’s Memoranda of Understanding*, 33 FORDHAM INT’L L.J. 1800, 1854 (2010) (“MOUs . . . prime regulators to cooperate.”).

aspirational to the point of irrelevance or signed and never heard from again.<sup>106</sup>

In either case, as procedural documents exempt from notice and comment and legally unenforceable, MOUs offer flexibility and low transaction costs but also inherent instability and sometimes tentativeness.<sup>107</sup> The “political winds” matter, and where storms roll in even agreements backed by motivated officials may get pushed out or reassessed.<sup>108</sup> For twenty years ICE and the DOL have had an evolving MOU coordinating enforcement to help insulate wage claims from deportation fears, but none of the iterations have empowered labor officials to kick-start the “uncomfortable conversation” necessary to stop ICE from timing raids in ways that undermine the memo’s intent.<sup>109</sup>

MOUs are also, on the whole, less transparent than the other formalized collaborative devices. Lacking a centralized database, MOUs are best identified through Google, requests under the Freedom of Information Act (FOIA) or its state equivalents, and on agency webpages, but even those avenues can be hit and miss.<sup>110</sup> Some agencies, like the U.S. Geological Survey, list active, expired, and even template MOUs on a

106. Freeman & Rossi, *supra* note 86, at 1165.

107. *Id.* at 1161, 1165, 1189–90; *See also* James W. Moeller, *Toward an SEC-FERC Memorandum of Understanding*, 15 ENERGY L.J. 31, 58 (1994) (“[An MOU] is, first and foremost, a procedural mechanism for the conduct of administrative agency business.”); Pamela Jimenez, *International Securities Enforcement Cooperation Act and Memoranda of Understanding*, 31 HARV. INT’L L.J. 295, 305 (1990) (“MOU’s are merely statements of intent . . . [and] do not establish formal obligations”). The lack of notice and comment and reviewability changes, however, where an MOU is deemed “substantive,” meaning it “affects individual rights and obligations.” *Emerson Elec. v. Schleshinger*, 609 F.2d 898, 902–04 (8th Cir. 1979).

108. *See, e.g.*, Jayesh M. Rathod, *Protecting Immigrant Workers Through Interagency Cooperation*, 53 ARIZ. L. REV. 1157, 1160 (2011) (noting the Bush administration’s “silen[ce] about the 1998 MOU between the DOL and the INS, with advocates questioning its ongoing applicability”).

109. *See* Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1121–23 (2011). *See also* Rathod, *supra* note 108, at 1166–67 (regarding more recent MOU developments that did not solve the problem). A weakness of the MOU was highlighted in 2015, when a union in active contract negotiations with an employer found its members in the middle of an ICE audit. Yana Kunichoff, *Faced with I-9 Immigration Raid During Negotiations, Chicago Meatpacking Workers Walked Off the Job*, IN THESE TIMES (Jul. 9, 2015, 4:39 PM), [http://inthesetimes.com/working/entry/18176/confronted\\_with\\_an\\_immigration\\_raid\\_during\\_negotiations\\_meatpacking\\_workers](http://inthesetimes.com/working/entry/18176/confronted_with_an_immigration_raid_during_negotiations_meatpacking_workers). The union perceived the MOU to bar immigration audits under the circumstances, yet was limited to writing a letter to the Secretary of Homeland Security urging him to enforce it. *See* Letter from D. Taylor, President, UNITE HERE, to Jeh Johnson, Secretary, U.S. Dep’t of Homeland Sec. (Nov. 18, 2015) <http://www.unitehereimmigration.org/wp-content/uploads/2015/11/ICE-LETTER-11-15-15.pdf> (“The MOU recognizes that immigration enforcement actions should not undermine effective enforcement of labor laws.”).

110. Freeman & Rossi, *supra* note 86, at 1189–90 (depicting MOUs as “less visible than other[]” interagency devices). *See also* *Emerson Elec.*, 609 F.2d at 902 (describing an interagency MOU where “[n]o public disclosure is authorized or contemplated”). The FOIA process, however, is no panacea, as some MOUs may be subject to its disclosure exemptions. *See, e.g.*, Freeman & Rossi, *supra* note 86, at 1190 n.275 (describing potentially applicable exemptions); Cadmus, *supra* note 105, at 1852–53 (noting the addition of an MOU-specific FOIA exemption enacted through other legislation).

dedicated site overseen by a “point of contact” that the public can call with questions.<sup>111</sup> Other agencies don’t publicize agreements at all.<sup>112</sup> Here, federal labor and employment law agencies are relative bright spots, with OSHA, DOL, EEOC, and NLRB all compiling MOUs online in a format that is easily searchable by date.<sup>113</sup> A recent agreement spanning the latter three was accompanied by a press release and attached fact sheet.<sup>114</sup>

#### 4. Informal Collaborative Practices

That MOUs allow for such diversity in content, disclosure, and commitment contributes to their popularity and respected status in the literature.<sup>115</sup> It also situates the agreements as somewhat of a bridge to informal collaboration, where agencies exchange information or resources on their own and in ways that can’t be traced back to a specific legal authorization or requirement.<sup>116</sup> While informal relations are assumed to be both ubiquitous and important to collaborative success overall,<sup>117</sup> they are also somewhat understudied in law reviews, where analysis, if it exists, tends to be hedged.<sup>118</sup> Even a Congressional Research Service report examining interagency practices—which called informal collaborative tools “large in number and relatively stable over time”—limited its discussion to a footnote.<sup>119</sup>

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111. U.S. Geological Survey, U.S. Geological Survey Domestic Memorandums of Understanding (MOU) with Other Federal Agencies or Entities, <https://www2.usgs.gov/mou/> (last visited Aug. 2, 2018).

112. Freeman & Rossi, *supra* note 86, at 1189–90 (“[M]any interagency agreements are unpublished . . .”).

113. EEOC, *see* Equal Employment Opportunity Commission, Memoranda of Understanding, <https://www.eeoc.gov/laws/mous/>; DOL, *see* Department of Labor, Current DOL Memorandums of Understanding, <https://www.dol.gov/whd/federal/FederalMOU.htm>; and OSHA, *see* Occupational Safety and Health Administration, Memorandums of Understanding, <https://www.osha.gov/laws-regs/mou/publicationdate>, have MOU-specific pages, while the NLRB lists the agreements alongside other “Operations-Management Memos” and includes a search box, *see* National Labor Relations Board, Operations-Management Memos, <https://www.nlr.gov/reports-guidance/operations-management-memos> (last visited Mar. 6, 2018).

114. Press Release, National Labor Relations Board, Addendum to the Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (May 2016), <https://www.nlr.gov/news-outreach/fact-sheets/iwg-addendum-fact-sheet>.

115. *See, e.g.*, Freeman & Rossi, *supra* note 86, at 1192 (calling MOUs “highly valuable”); Cadmus, *supra* note 105, at 1854–55 (lauding MOUs as a “significantly useful” collaborative tool).

116. Feiock & Scholz, *supra* note 92, at 26.

117. Freeman & Rossi assume that informal interactions are the very baseline of all interagency activities and “occur[] as a matter of course.” Freeman & Rossi, *supra* note 86, at 1156. For an overview of the important role played by informality in interagency collaboration, *see, e.g.*, Feiock & Scholz, *supra* note 92, at 12–13.

118. *See, e.g.*, Freeman & Rossi, *supra* note 86, at 1156–57 (describing informal mechanisms that “might well occur,” “seem[] likely,” or that they “suspect . . . can accomplish a great deal”).

119. CRS INTERAGENCY REPORT, *supra* note 89, at 1 n.1.

The situation may in part be attributable to the fact that studying informal practices is, relative to formal collaboration, harder to do.<sup>120</sup> Interactions unprompted by law or leadership may not leave a paper trail, and informal arrangements do not lend themselves to “fixed memberships and responsibilities” of the sort that can be easily tracked.<sup>121</sup>

But even if specific examples are, at least on a surface level, “invisible,”<sup>122</sup> the key ingredient is not. Good informal collaboration takes good relationships, because where an interaction is not required, familiarity breeds an openness to reaching out. Every positive contact breaks down the perceived costs of optional communication and adds bits of interpersonal trust.<sup>123</sup> In time, agency actors may come to see themselves as enmeshed in an “ally network” of professionals with common values, and information sharing and other exchanges can become second nature.<sup>124</sup> Indeed, a crucial finding in this area is that informal collaboration begets informal collaboration. That is, the phone calls, lunches, emails, and even chance encounters build on each other.<sup>125</sup>

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120. Feiock & Scholz, *supra* note 92, at 22 (“[T]heoretical and methodological innovation will be required before the standard individual and institutional-based analyses . . . can help us understand the critical role of these informal relationships.”).

121. CRS INTERAGENCY REPORT, *supra* note 89, at 1 n.1. (calling informal agency interactions “difficult to identify and describe authoritatively”); Freeman & Rossi, *supra* note 86, at 1156 (listing “conversations” and “unwritten agreements” as common methods of informal collaboration).

122. Freeman & Rossi, *supra* note 86, at 1156.

123. See Richard C. Feiock, *Rational Choice and Local Government*, 29 J. OF URBAN AFF. 47, 57–58 (2007) (“Dyadic interactions with other governments affect present and future cooperation as repeated interactions reduce the effort required to put additional new activities in place as partners develop norms, trust, and comfort working together over time.”); Feiock & Scholz, *supra* note 92, at 12 (describing patterns of informal relationships as “a process that potentially develops trust and reciprocal arrangements among members that is critical in reducing the costs of reaching and maintaining an agreement”). See also Chris Ansell & Alison Gash, *Collaborative Governance in Theory and Practice*, 18 J. PUB. ADMIN. RES. & THEORY 543, 558 (2007) (finding “that trust building often becomes the most prominent aspect of the early collaborative process” and, though “quite difficult to cultivate,” is possible through “face-to-face dialogue between stakeholders”).

124. Christopher M. Weible, *Collaborative Institutions, Functional Areas, and Beliefs*, in SELF-ORGANIZING FEDERALISM 179, 180 (Richard C. Feiock & John T. Scholz eds., 2010) (describing the shared “beliefs and values” in ally networks as “enabl[ing] the exchanging, pooling, and sharing of resources”); Feiock & Scholz, *supra* note 92, at 304–05 (finding that “collaborative activities like sharing information and developing joint strategies were common with . . . reported allies”).

125. Jason Marisam has identified a “reciprocity” norm between agencies, where “agencies that repeatedly interact” build up trust and “an informal obligation that favors ought to be returned.” Marisam, *supra* note 91, at 197–98. Studies examining informal collaborations specifically find something similar: “[F]requency of contacts and the intensity of the relationships . . . significantly increase the likelihood of future collaboration, suggesting that the quality of the informal relationship rather than the exchanged resources plays the stronger role in enhancing future collaboration.” Richard C. Feiock & John T. Scholz, *Self-Organizing Mechanisms for Mitigating Institutional Collective Action Dilemmas: An Assessment and Research Agenda*, in SELF-ORGANIZING FEDERALISM 285, 307 (Richard C. Feiock & John T. Scholz eds., 2010). See also Feiock & Scholz, *supra* note 92, at 13 (stating that “one successful” informal collaboration “can increase the likelihood of further efforts”); Ansell & Gash,

Of course, not all interactions are necessarily positive, and drawbacks of informal collaboration have been identified. For one, since informal collaboration is voluntary, it might not happen at all.<sup>126</sup> Some issues, moreover, may be too complex or multi-faceted to be confronted casually.<sup>127</sup> Informality can also facilitate bad outcomes. A powerful actor may spot an opening and unload a difficult problem onto a weaker agency or strong-arm it into giving up control over a more desirable policy area.<sup>128</sup> And informal relations can be afflicted by “pathologies” common to all forms of collaboration, like a preference to shirk or free ride, the failure to spot a common bias, opportunity costs, and fundamental disagreements that halt progress in its tracks.<sup>129</sup>

The bottom line is that legal scholarship has noted that collaboration is happening at all levels and through an amazing diversity of forms. The result is an administrative system more vibrant than most people probably imagine.<sup>130</sup> How that vibrancy might translate into transformative approaches to workplace regulation is central to the prospects of tripartism, or tripartite-like arrangements, and even a “new labor law.” It is also, however, strongly mediated by local political configurations and relational dynamics, as detailed in the final background section below.

#### *D. The Socio-Politics of “Up-and-Down” and “Side-to-Side” Collaboration*

Shannon Gleeson has argued that state-society relations, particularly between labor and employment law-related agencies and civil society, hinge crucially on the various configurations of municipal, state, and federal

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*supra* note 123, at 559 (describing the “commitment to collaboration” as requiring a “psychological shift”).

126. Freeman & Rossi identify a risk of refusal even in formal collaborations due to “substantive disagreements, personality clashes, or cultural conflicts.” Freeman & Rossi, *supra* note 86, at 1186–87. Scholars point out that informal collaborative channels are best developed and sustained where officials have met outside of the agency context, such as through professional development, community activities, schooling, or mutual acquaintances. Kenneth N. Bickers et al., *The Political Market for Intergovernmental Cooperation*, in SELF-ORGANIZING FEDERALISM 161, 164 (Richard C. Feiock & John T. Scholz eds., 2010).

127. Feiock & Scholz, *supra* note 92, at 13–14.

128. *Id.* at 17–18.

129. Marisam, *supra* note 91, at 210–15.

130. See Niels Ejersbo & James H. Svara, *Bureaucracy and Democracy in Local Government*, in THE OXFORD HANDBOOK OF URBAN POLITICS 152, 155 (Karen Mossberger et al. eds., 2012) (“[B]ureaucracy is not static . . . . It is continuously challenged and changes on an ongoing basis. However, its essential position in governance is preserved.”) (citations omitted); Marisam, *supra* note 91, at 191 (contrasting the “conventional wisdom” of a cabined, relatively rigid administrative state with the reality of near-constant collaboration). Recently, right wing extremists have reacted to this cross-agency vibrancy with fear and suspicion, calling it the “deep state.” See, e.g., Jamie White, *Deep State Panics: America No Longer Believes Us!*, INFOWARS (Mar. 6, 2018), <https://www.infowars.com/deep-state-panics-america-no-longer-believes-us/> (last visited Aug. 2, 2018).

authorities in a particular context, or what she calls a “political field.”<sup>131</sup> Given localized political economies, even similar agencies and civil society actors in different locations may end up behaving in disparate ways.<sup>132</sup> Her study, for example, details how Houston labor unions and community groups were forced to rely on horizontal alliances to service the needs of low-wage workers in response to the city’s conservative, anti-union, and nativist elements.<sup>133</sup> While advocates did file administrative claims on workers’ behalf, greater emphasis was placed on direct action and targeting local agencies and public figures.<sup>134</sup> By contrast, in more Democratic, union strong, and immigrant-friendly San José, labor and other organizations had greater freedom to concentrate on traditional workplace and other forms of organizing because agencies seemed to more reliably enforce individual rights.<sup>135</sup> The friendlier political environment, in other words, facilitated state actors’ more specialized—and, we could add, complementary—response to legal violations.<sup>136</sup>

Gleeson’s account suggests that the fertile ground for tripartism, corporatism, or even something like the new labor law is likely to be found in politically progressive and labor-friendly enclaves. Indeed, the sheer number of successful campaigns for municipal social welfare regulation like higher minimum wages, paid sick leave, fair scheduling, and anti-wage theft ordinances<sup>137</sup> have sparked discussion about a “turn to localism,” the “rise of the progressive city,” and cities in “revolt.”<sup>138</sup> The victories have even forced scholars to reevaluate the conventional wisdom that development-centric, pro-growth forces crowd out possibilities for people—

131. GLEESON, *supra* note 82, at 16–18.

132. *Id.* at 16–23.

133. While Gleeson acknowledges that Houston is a relatively progressive city that organized labor preferred to others in the state, “red” Texas inevitably impacted the overall political context and labor’s capacity to find allies. *Id.* at 97–98.

134. *Id.* at 135–38.

135. *Id.* at 22–23.

136. *Id.*

137. For example, in just the last six years, over two dozen cities have enacted paid sick days legislation. See NAT’L P’SHP FOR WOMEN & FAMILIES, PAID SICK DAYS (updated Oct. 2018), <http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-statutes.pdf>. Since 2013, nine cities have passed \$15-an-hour wage floors—more than double the federal minimum. NAT’L EMP’T LAW PROJECT, MINIMUM WAGE LAWS: RECENT TRENDS AND ECONOMIC EVIDENCE, 1 (Apr. 2016), <http://www.nelp.org/content/uploads/City-Minimum-Wage-Laws-Recent-Trends-Economic-Evidence.pdf> (“[Weak wage growth] has prompted a record number of municipal leaders to tackle this problem locally with city minimum wage ordinances that substantially raise the wage floor for low-paid workers in their communities.”). See also RICHARD SCHRAGGER, CITY POWER URBAN GOVERNANCE IN A GLOBAL AGE 140–41 (2016).

138. See Scott L. Cummings, *Law in the Labor Movement’s Challenge to Wal-Mart*, 95 CALIF. L. REV. 1927, 1942–43 (2007); Michelle Goldberg, *The Rise of the Progressive City*, NATION, Apr. 2, 2014; Harold Meyerson, *The Revolt of the Cities*, AM. PROSPECT, Apr. 22, 2014; UNIONS AND THE CITY: NEGOTIATING URBAN CHANGE (Ian Thomas MacDonald ed., 2017).

powered redistributionist agendas in urban areas.<sup>139</sup> That stated, the San José and Silicon Valley depicted by Gleeson and the headlines generated by cutting edge ordinances in New York City, San Francisco, or Washington, D.C. are just slices of the country. The Houston experience, not to mention cities like Tuscaloosa or Chattanooga, may speak for just as large a swath of the United States.

Nevertheless, labor appears poised to push ahead, and there are reasons to feel optimistic about the efforts. One of us, applying a sociological lens similar to Gleeson's, has found that urban worker center strategies increasingly center upon attempts to close collaborative gaps between organized progressive forces (including faith-based groups and traditional unions) and elected officials, seemingly reconfiguring presumed political arrangements.<sup>140</sup> Unions, moreover, have seemingly adopted a trial-and-error approach to organizing that takes advantage of opportunities whenever and wherever they might arise.<sup>141</sup> As movement scholars Miriam Goldberg and Penny Lewis have argued, for modern activists, the city is the "new factory."<sup>142</sup>

This time, though, progress would seem to depend less on the right pro-union pitch and more on the right constellation of agency-to-agency (side-to-side) and agency-to-advocate (up-and-down) dealings. Because if the new labor law or some variant rests on government as an "active participant" and "co-negotiator in determining workers' material conditions,"<sup>143</sup> how well activists engage with the state and how efficiently the relevant bureaucracies interact to facilitate the desired aim are indicators of the strategy's likely success or failure.

And from there, relationships, again, take center stage. Professor Richard Schragger points out that while recent social bargaining successes are "components of a more comprehensive campaign to redefine the relationship between labor and capital at the municipal level," that's

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139. SCHRAGGER, *supra* note 137, at 2–7, 16–17, 164–68 (depicting cities as a mass "agglomeration of persons, goods, and capital" in a relational space that can be "responsive to values other than economic growth," including "the views of citizens across a wide range of policy areas").

140. César F. Rosado Marzán, *Worker Centers and the Moral Economy*, 17 CHI. LEGAL FORUM 409 (2017). *See also* Ruth Milkman, Introduction, *Toward a New Labor Movement? Organizing New York City's Precariat*, in *NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT* 16–17 (Ruth Milkman & Ed Ott eds., 2014) (noting how worker centers are better suited than traditional labor unions to bridge dichotomies of class identity, linking workplace issues to more political ones).

141. *See* Oswalt, *supra* note 20 (arguing that alt-labor campaigns, even if funded and orchestrated by traditional labor unions, are using a plurality of experimental tactics and strategies that can be understood as "improvisational").

142. THE CITY IS THE NEW FACTORY: NEW SOLIDARITIES AND SPATIAL STRATEGIES IN AN URBAN AGE 5–6 (Miriam Greenberg & Penny Lewis eds., 2017).

143. Andrias, *supra* note 3, at 10, 68.

because cities tend to be where the inter-personal and inter-political dynamics make rights enhancements possible.<sup>144</sup>

Indeed, the empirics on new forms of organizing and rights' enforcement suggest that in the absence of law-instigated partnerships, the future of state-society collaboration is likely to depend on factors like trust, connectedness, and inclusiveness, perhaps at first in an ad hoc way but ultimately in a primary way. Wage boards provide formality, transparency, and certainty, but also exceptionality. In the absence of boards or similar centralizing bodies, existing socio-political architecture may drive—or deter—the possibilities of U.S. tripartism, corporatism, or the incipient new labor law.

Below, we seek to excavate that sort of social blueprint. Using Chicago as a case study, our goal is not only to map relevant relations among and between advocates and administrators, but to identify and draw out the relational, institutional, and political elements likely to be central in future labor and employment law collaborations across the country.

## II. METHODS

Our investigation proceeded on two tracks. First, one of us, Professor Rosado Marzán, spent nearly a year as a participant observer at Arise Chicago, a local worker center.<sup>145</sup> Second, both of us conducted “elite”

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144. SCHRAGGER, *supra* note 137, at 141. *See also* Ejersbo & Svava, *supra* note 130, at 168–69 (describing new understandings of local governance, where “connections [between bureaucracy and citizens] have broadened and deepened . . . [and] [t]op administrators have become committed to advancing citizen participation and strengthening community attachment”). To be sure, hope that the reforms will eventually “bubble” up is essentially explicit. Claire Cain Miller, *Liberals Turn to Cities to Pass Laws and Spread Ideas*, N.Y. TIMES (Jan. 26, 2016), <https://www.nytimes.com/2016/01/26/upshot/liberals-turn-to-cities-to-pass-laws-and-spread-ideas.html> (citing a San Francisco official’s belief that the “more local jurisdictions that tackle these issues, the more momentum there is for statewide and eventually national action”). *See also* Meyerson, *supra* note 138 (describing progressive city legislation as possibly “charting a new course for American liberalism”).

145. Rosado Marzán performed one- to three-day weekly participant observations as a workplace organizer from February 2015 to September 2015 and from January 2016 to May 2016. A primary duty included intakes of workers’ alleged complaints against employers, which he analyzed to determine colorable claims and whether the center might effectively engage with the worker to initiate a campaign to remedy those grievances. Some workers had complex legal problems that could not be resolved through workplace campaigns, or at least not exclusively. Terminated workers with employer-provided housing, for example, risked immediate homelessness. In such situations, quick injunctive relief was required, often backed up by the support of other kinds of more focused community organizations such as tenant groups. Lacking strong campaign allies in the suburbs, Arise also did not generally get involved where workers lived or worked outside the Chicago metropolitan area. The worker center would also usually avoid campaigns where a complaining worker was already represented by a labor union with exclusive representation rights over the grievance. Where engaged, Arise’s workplace campaigns could include demand letters, meeting requests for a negotiated settlement, picketing, and complaining to state and local authorities. The author led a handful of such campaigns and supported others that were led by the full-time staff organizer. He also participated in weekly staff meetings to

interviews with civil society groups and federal, state, and local agency officials. Elite interviews focus on persons who are particularly knowledgeable about a substantive topic and its context.<sup>146</sup> Here, our elite subjects were representatives of government agencies and civil society organizations involved in enforcing or advocating for new labor and employment laws in Chicago or Illinois.

Arise Chicago is one of the most prominent worker centers in the United States,<sup>147</sup> and, like many, engages in both workplace and policy campaigns. Thus, the first track provided us with a direct window into cutting edge individual and broad-based advocacy, as well as a foundational sense of how activists seek to engage state agencies and how those agencies, in turn, respond.

The second track included 18 hour-long interviews with Chicago advocates and city, state, and federal agency officials.<sup>148</sup> Because we identified subjects based on their positions of authority, interviewees tended to be executive directors of civil society organizations or heads of administrative departments or even the agency itself. The second track greatly expanded (and in many cases corroborated) data gleaned from track one. Most importantly, these interviews filled-in the finer details of inter-agency collaborative work across and between many levels of government.

The agency interviews were as follows:

- (1) An official at the National Labor Relations Board, Region 13 (NLRB);
- (2) Four Chicago-based representatives of the Occupational Health and Safety Administration (OHS);
- (3) Two Chicago-based representatives, and one Minnesota-based representative, of the Wage and Hour Division of the U.S. Department of Labor (WHD);

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learn about the work of other organizers engaged in strategic work with labor unions, faith-labor solidarity activism, policy campaigns (including the paid sick time effort, *infra* Part III.E), and domestic worker organizing. He additionally participated in several policy-related activities, such as lobbying state legislators in Springfield, assisting in roundtable discussions with government agencies in charge of federal and state labor laws, and meeting agency heads and officers to request better legal enforcement. Finally, he participated in several “Know Your Rights” workshops given to all workers seeking Arise’s assistance. Rosado Marzán recorded his observations as daily “jottings” in pocket-sized reporter notebooks. He then translated the “jottings” into more formal field notes. His fieldwork also often led to short self-directed memos. These memos served as preliminary analyses of his data, where he tried to make sense of what he was experiencing and establish themes observed in the fieldwork.

146. BILL GILLHAM, RESEARCH INTERVIEWING: THE RANGE OF TECHNIQUES 54 (2010).

147. Arise Chicago, then known as the Chicago Interfaith Workers Rights Center, was a repeat player in Janice Fine’s foundational work on the U.S. worker center movement. *See* FINE, *supra* note 10, at 22, 125.

148. All interviews occurred between late 2015 and the first eight months of 2017. All interviews but one were conducted in-person, in Chicago. During six of the 18 interviews, both authors were present, asked questions, and compiled both hand-written and typed transcriptions. One subject was interviewed separately by each author. Having dual sets of notes allowed the authors to corroborate facts gathered and understood from the interviews. The one interview not conducted in-person was conducted in Chicago by both authors over the phone.

- (4) A former representative of the Illinois Department of Labor (IDOL or state DOL), who served until 2015;
- (5) An official at the Illinois Attorney General (IL AG), Workplace Rights Bureau;
- (6) An official at the City of Chicago Department of Business Affairs and Consumer Protection (BACP).

In addition to the 7 permanent staff members of Arise Chicago, the civil society interviews included representatives of the following groups:

- (1) The Chicago Federation of Labor, AFL–CIO (CFL);
- (2) The Fight for \$15;
- (3) The Chicago Workers' Collaborative (CWC);
- (4) The Restaurant Opportunities Center–Chicago (ROC Chicago);
- (5) The Raise the Floor Alliance (RTF), a coalition of seven Chicago-area worker centers.

We also made unsuccessful attempts to interview Chicago representatives of the Equal Employment Opportunity Commission, the United States Chamber of Commerce, and the Illinois Retail Merchants Association.<sup>149</sup>

Our interviews concluded once we determined we had reached a sufficient level of data “saturation,”<sup>150</sup> suggesting that further investigation was likely to lead to redundancy or at least not new or contradictory information. In fact, interviews twelve through eighteen tended mostly to confirm, expand, or add new players to details obtained through Rosado Marzán’s earlier fieldwork. The lack of employer perspectives, however, narrows the scope of our conclusions to data gleaned from agency officials and labor advocates only. Evidence and analysis presented in Parts III and IV should be understood with that limit in mind.

Finally, where possible, we attempted to triangulate data through documentary evidence such as newspaper articles and legal filings, all cited herein. This process allowed us to fill certain substantive gaps left by participant observation, interview constraints,<sup>151</sup> or the lack of employer involvement.

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149. These invitations either went unanswered or were declined.

150. IRVING SEIDMAN, *INTERVIEWING AS QUALITATIVE RESEARCH: A GUIDE FOR RESEARCHERS IN EDUCATION AND THE SOCIAL SCIENCES* 55 (4th ed. 2013) (defining saturation as a state where the interviewer receives similar information from subjects and no longer learns anything new).

151. For example, while a sixty-minute interview allows for conversation on a wide range of topics, it also generates threads that could benefit from extended discussion.

### III. THE CHICAGO STORY

Chicago, like every city,<sup>152</sup> has a work law enforcement problem.<sup>153</sup> A recent survey of low-wage city workers found that almost three-quarters could cite multiple rights violations at their current job, and an astonishing 80% reported employer backlash after trying to access the law's protections by filing a complaint with a state or federal agency.<sup>154</sup> Nearly as often workers report being scared into silence, opting not to protest at all.<sup>155</sup> A local advocacy group has placed special blame on a "complicated patchwork of enforcement frameworks" and summed up the results as proof of "more sweatshops than Starbucks" in Chicago.<sup>156</sup>

Into this setting steps a variety of unions, worker centers, non-profits, religious organizations, politicians, and city, state, and federal agencies, all with the broad aim of improving working conditions in the city. A good deal of progress has been made, and, as discussed in subpart III.E, in some ways Chicago sits at the vanguard of employee-friendly legislative reform.

Our research reveals a large number of up-and-down, side-to-side, and mixed collaborative practices (See Table 1). We categorized these practices along a continuum in order of ascending formality, from (1) forging one-on-one, interpersonal commitments; (2) to one-off projects in service of a near-term goal; (3) to routinized dealings; (4) to a diversity of MOUs; (5) to campaigns for concrete legislative enactments. The five categories will be treated in turn.

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152. One study found that over \$15 billion is stolen from workers' paychecks every year. DAVID COOPER & TERESA KROEGER, ECONOMIC POLICY INSTITUTE, EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 2, 5-6 (2017), <http://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year-survey-data-show-millions-of-workers-are-paid-less-than-the-minimum-wage-at-significant-cost-to-taxpayers-and-state-economies/>. Depending on the study, rates of routine minimum wage theft range from 17% to 26% and shoot up to 76% when overtime violations are considered. *See id.* at 2 (reporting 17%); ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS 2 (2009), [www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1](http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1) (reporting 26% "in the previous work week"). The numbers do not improve when other workplace laws are studied. *See, e.g., id.* at 4 (reporting a 50% rate of retaliation for filing a workers' compensation claim and that 33% of claimants were wrongly forced to pay bills out-of-pocket).

153. *See generally* NIK THEODORE ET AL., CENTER FOR URBAN ECONOMIC DEVELOPMENT, UNREGULATED WORK IN CHICAGO i-iv (2010) (describing failed enforcement of employment protections in Chicago).

154. BRITTANY SCOTT, NAT'L ECON. & SOC. RIGHTS INITIATIVE, CHALLENGING THE BUSINESS OF FEAR: ENDING WORKPLACE RETALIATION, ENFORCING WORKERS' RIGHTS 5, 11, 13 (2016), <http://www.raisetheflooralliance.org/report>.

155. *Id.* at 17.

156. Jeff Schuhrke, *New Study Finds 'More Sweatshops than Starbucks' in Chicago*, IN THESE TIMES (May 19, 2017, 1:24 PM), [http://inthesetimes.com/working/entry/20147/new\\_study\\_finds\\_more\\_sweatshops\\_than\\_starbucks\\_in\\_chicago](http://inthesetimes.com/working/entry/20147/new_study_finds_more_sweatshops_than_starbucks_in_chicago).

**Table 1: Observed and/or Reported Collaborative Activities in Chicago**

<b>Up-and-Down</b>	<b>Side-to-Side</b>	<b>Mixed</b>
Surveilling and documenting violations of the Day and Temporary Labor Services Act (IDOL & CWC)	Investigating the use of machine labor by minors (OSHA & fed. DOL)	Investigating and litigating wage and hour violations in Chinese buffet restaurants (IL AG/fed. DOL/IDOL & various worker centers)
Documenting and investigating ULP charges (NLRB & Fight for \$15/ARISE)	Facilitating food trucks at airports (BACP & Chicago Dept. of Aviation)	Organizing workshops on the U-Visa program (IDOL/fed. DOL/ NLRB/EEOC & various worker centers)
Filing and tracking wage complaints (IDOL & RTF)	“Blitzing” worksites for employee misclassifications (IDOL/IL AG/IL Dept. of Employment Security)	Establishing the Chicago-Area Interagency Workers’ Rights Roundtable (Various agencies and consulates & various worker advocates)
Experimenting with the IL Whistleblower Act to enforce anti-retaliation provisions (OSHA & CWC)	Staff exchanges between agencies (IDOL & IL AG)	Meetings to revive a “universal workplace complaint form” (Various agencies & various worker advocates)
Regulating electronic payroll cards (IL AG & Fight for \$15)	Referring cases between agencies to match staffing skill sets and needs (IDOL & fed. DOL)	Participating in the Working Families Task Force, leading to the Paid Sick Leave Ordinance (Various worker centers, unions, public officials, employers,

and trade associations)

Reporting workplace complaints through a “Bat Phone” at the Thompson Center (IL AG & various worker centers and unions)

Interagency MOUs:

- Referring cases and coordinating filing deadlines and remedial schemes (OSHA & NLRB; IDOL & fed. DOL)
- Transferring prior case files (NLRB & Chicago Commission on Human Relations)
- Cross-institutional trainings (fed. DOL & EEOC)
- Joint investigations (fed. DOL & EEOC; fed. DOL & IDOL)

Reporting health and safety concerns by OSHA-certified Peer Educators through the “No More Deaths” temporary worker program (OSHA & CWC)

Agency-Consular MOUs:

- Accepting, processing, and transferring complaints (NLRB/OSHA & Mexican Consulate)

#### *A. Coffees and Calls: Forging Interpersonal Commitments*

Consistently, agency officials expressed broad support for all sorts of collaborations. Handing wage and hour investigations off to a willing partner agency at the IDOL,<sup>157</sup> borrowing an expert to identify the source of a blood contaminant at OSHA,<sup>158</sup> and equipping worker centers, churches, and nurses with tools to spread legal rights education<sup>159</sup> at various state and

157. Interview with Ill. Dep’t of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

158. Interview with OSHA Experts, in Chi., Ill. (June 14, 2017).

159. Interview with Ill. Dep’t of Labor Officer, in Chi., Ill. (April 1, 2017). *See also* Interview with OSHA Experts, in Chi., Ill. (June 14, 2017); Interview with NLRB Officer, in Chi., Ill. (Feb. 9, 2017).

federal agencies<sup>160</sup> are all seen as pushing against the realities of under-resourcing and understaffing. As a federal officer explained, where a budget line can't be stretched or doesn't exist, there's just "no other way."<sup>161</sup>

But it is *how* these sorts of partnerships proceed that reveals the most pervasive up-and-down and side-to-side collaborative practice in Chicago: a commitment to repeated personal contacts. An official who recently transferred into the city is an object lesson. Forced to start from relational ground zero, he described his collaborative philosophy as "cold calls and coffee."<sup>162</sup> That is to say, he calls up counterparts at other agencies, starts conversations, and then makes an invitation to continue these conversations in person outside of the office. These are certainly "getting-to-know-you" interactions, but they are not just that. A goal is also to identify a common denominator that might ground future calls and coffees.<sup>163</sup> Often it turns out to be work-related, like a shared interest in efficiently accessing personnel files during retaliatory firing investigations.<sup>164</sup> But sometimes it is personal. A mutual family history once set the table for information sharing between state and federal labor agencies.<sup>165</sup>

As a former Illinois Department of Labor official admitted, cultivating the sorts of relationships that motivate moves across bureaucratic boundaries is not easy. It takes time and effort, of course, but also a willingness to "experiment" with different people to find the right fit.<sup>166</sup> Sometimes simple geography helps, as in three cases where a different agency or division sits downstairs or down the hall and impromptu encounters happen all the time.<sup>167</sup> For many of the state and federal officials we spoke with, dashed emails, quick calls, and harried catch-ups across agencies are routinized, prioritized, and seen as necessary for doing their jobs effectively.<sup>168</sup>

Outside groups also stress the importance of steady agency contacts to do their work, but the emphasis is mediated by the nature of advocacy in a large city like Chicago. Over and again, leaders highlighted recurring

160. Interview with NLRB Officer, in Chi., Ill. (Feb. 9, 2017); Interview with Ill. Dep't of Labor Officer, in Chi., Ill. (April 1, 2017); Interview with Ill. Att'y Gen. Officer, in Chi., Ill. (Feb. 2, 2017).

161. Interview with NLRB Officer, in Chi., Ill. (Feb. 9, 2017); Interview with Ill. Dep't of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

162. Interview with NLRB Officer, in Chi., Ill. (Feb. 9, 2017).

163. *See id.*

164. *Id.*

165. *Id.*

166. Interview with Ill. Dep't of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

167. Interview with Ill. Att'y Gen. Officer, in Chi., Ill. (Feb. 2, 2017); Interview with Ill. Dep't of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

168. Interview with NLRB Officer, in Chi., Ill. (Feb. 9, 2017); Interview with Ill. Dep't of Labor Officer, in Chi., Ill. (Apr. 1, 2017). *See also* Interview with Ill. Att'y Gen. Officer, in Chi., Ill. (Feb. 2, 2017).

interactions with specific officials, but almost invariably accompanied by an aside about the person's roots in the activist community. The most striking example involves the Illinois Department of Labor, where the past Manager of the Fair Labor Standards Division had at various times worked for Raise the Floor, a worker center coalition; the Chicago Workers Collaborative (CWC), a worker center; UNITE-HERE, a union; and a well-known local progressive politician.<sup>169</sup>

Biographies like these come not only with ready-made credibility and pre-scripted introductions, they also facilitate natural outreach. Indeed, the IDOL official's name arose repeatedly in stories of agency contacts, where her tenure was marked by uniformly glowing descriptors.<sup>170</sup> Community rootedness also seems to create uniquely fertile terrain for recurrent communications. The official explained how an influx of colleagues with similar non-profit backgrounds sparked an incredible vibrancy at the agency, with discussions often centered on how best to welcome "groups to the table."<sup>171</sup>

When the contacts click, it can create a kind of collaborative symbiosis. By the early 2000s, both advocates and the IDOL had grown frustrated by the existing minimum wage law's inability to deter employer abuses in Illinois's booming temporary services industry.<sup>172</sup> The fix was an industry-specific law pushed by a coalition spearheaded by the CWC at the express suggestion of an IDOL official—but not just any agency official.<sup>173</sup> Having previously served as an AFL-CIO executive who deftly mediated a friction between the budding worker center and the federation many years earlier, she was central to the CWC's lore.<sup>174</sup> Once passed, the Day and Temporary Services Act became a mutual inflection point for the CWC's organizing and the IDOL's enforcement agenda.

Synergies are also found at the NLRB, where an official who has been called "cutting edge" for his inclusive approach to communication with outside groups<sup>175</sup> expressed appreciation for Fight for \$15's and ARISE's careful documentation and vetting of unfair labor practice filings.<sup>176</sup> Not only do well-evidenced charges increase agency efficiency, the official believes the groups' active engagement in the process improves the performance of the NLRB's officers by raising issues and factual nuances

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169. Interview with Raise the Floor All. Staffer, in Chi., Ill. (Feb. 14, 2017).

170. *Id.*; Interview with Arise Chi. Officer, in Chi., Ill. (Mar. 3, 2017).

171. Interview with Ill. Dep't of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

172. Interview with Chi. Workers' Collaborative Staffer, in Chi., Ill. (June 2, 2017); Interview with Raise the Floor All. Staffer in Chi., Ill. (Feb. 14, 2017).

173. Interview with Chi. Workers' Collaborative Staffer, in Chi., Ill. (June 2, 2017).

174. *Id.*

175. *Id.* See also Interview with NLRB Officer, in Chi., Ill. (Feb. 9, 2017).

176. Interview with NLRB Officer, in Chi., Ill. (Feb. 9, 2017).

that might otherwise be overlooked.<sup>177</sup> The groups, in turn, see the official as an ally when they believe an agency is not following procedural rules, such as the right for a non-lawyer to file a Notice of Appearance and attend a witness interview.<sup>178</sup>

Thus, where durable commitments to outreach are found, highly informal—but also meaningful—collaboration can follow. The problem is that sometimes that commitment can't be found, and other times it is not so durable. Most obviously, not everyone is interested in a call, let alone coffee. An official committed to reaching out in these ways admitted that his voicemails sometimes go unanswered.<sup>179</sup> When a team of advocates once publicly inquired why federal agencies did not routinely share facts relevant to joint-employer findings, an administrator responded with a quip about twenty-year old computer technology.<sup>180</sup> Hence, in the absence of legal mandates for collaborative administrative practice, relationships matter, but relationships are difficult to kindle.

Also, people are transitory. Chicago's BACP, the sole entity responsible for policing the municipal minimum wage, has had four Commissioners in four years.<sup>181</sup> Sometimes the changes are forced. The 2014 election of a new governor prompted a wave of high-level departures at the IDOL that shattered relationships across the advocate community.<sup>182</sup> Much of Raise the Floor's pre-2015 work, for example, revolved around the filing and tracking of wage complaints filed by its eight associated worker centers.<sup>183</sup> Early on, the process was scattershot as claims proceeded or got dismissed and even lost without centralized tracking or sometimes

177. *Id.* A federal DOL official made a similar point with respect to wage and hour charges referred by local unions. Interview with U.S. Dep't of Labor Officers, in Chi., Ill. (July 19, 2017). Advocates at both ROC Chicago and Fight for \$15 stated that they took pride in their organization's work in bringing well-constructed legal charges. Interview with Rest. Opportunities Ctr. Chi. Staffer, in Chi., Ill. (July 21, 2017); Telephone Interview with Fight for \$15 Officer (Apr. 19, 2017).

178. *Id.* at 4; Field notes from César F. Rosado Marzán (June 22, 2016) (on file with author). *See also* Interview with Raise the Floor Staffer, in Chi., Ill. (Feb. 14, 2017).

179. Interview with NLRB Officer, in Chi., Ill. (Feb. 9, 2017).

180. Field notes from César F. Rosado Marzán (June 22, 2016) (on file with author).

181. *See* Press Release, Office of the Mayor of the City of Chicago, Mayor Emanuel Announces Maria Guerra Lapacek to be New Commissioner of the Department of Business Affairs and Consumer Protection (Jan. 2, 2014), <https://www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2014/January/1.2.14Guerra.pdf>; Fran Spielman, *Emanuel shuffles cabinet after appointment of city clerk*, Chi. Sun Times (Dec. 19, 2016, 5:08 PM), <https://chicago.suntimes.com/news/emanuel-shuffles-cabinet-after-appointment-of-city-clerk/> (replacing the Commissioner); Press Release, Office of the Mayor of the City of Chicago, Mayor Emanuel Introduces Financial and Regulatory Cabinet Appointments to City Council (May 24, 2017), [https://www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2017/May/052417\\_CabinetAppointments.pdf](https://www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2017/May/052417_CabinetAppointments.pdf) (replacing the Commissioner).

182. Interview with Ill. Dep't of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

183. Interview with Raise the Floor All. Staffer, in Chi., Ill. (Feb. 14, 2017).

notification.<sup>184</sup> Eventually, though, the agency arranged a point person for all the RTF-related claims and in-person monthly meetings were established to provide feedback on individual cases.<sup>185</sup> As the relationship deepened, the official became a sounding board for RTF commentaries on the agency's general functioning, including critiques of the claim submittal form itself.<sup>186</sup> "We felt heard," said a RTF leader before noting that the agency promptly fixed the form.<sup>187</sup> When IDOL later asked RTF to gather testimony in favor of pending Wage Payment and Collection Act regulations, the group agreed to help because of the agency's commitment to inclusion.<sup>188</sup>

Yet, by 2015, the new governor was in, the politically-appointed IDOL official was out, and the meetings were discontinued.<sup>189</sup> Since then the agency has unilaterally altered the claim form and instituted a new requirement that workers submit evidence directly to their employers, a process RTF believes is intimidating to employees and confusing to employers.<sup>190</sup> Requests to reverse the change have not been successful.<sup>191</sup>

It is probably not surprising that highly personalized, contact-based collaboration might suffer when a favored official departs, but repairing the damage can be harder than might be expected. That is because advocates evince a baseline distrust of agencies that even biography cannot—at least initially—overcome. Having been hired directly from the activist community, one state official was shocked to find her recent colleagues reacting coolly to her early attempts at outreach: "Even me!" she stressed.<sup>192</sup> Absent an established tie, worker center representatives expressed a generalized caution in their administrative dealings, with one likening the best-case scenario to casual friends who will never be "best buddies."<sup>193</sup> Another activist warned of "deadwood" officers, long-time civil servants unwilling to collaborate with activists or pursue damages with even the best of facts.<sup>194</sup> A third thought impotence was endemic to the structure of bureaucracy and that even a "revolutionary" ensconced at the top of an agency could not do much to impact widespread wage theft.<sup>195</sup>

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184. Interview with Ill. Dep't of Labor Officer, in Chi., Ill. (Apr. 1, 2017). *See also* Interview with Arise Chi. Staffer, in Chi., Ill. (March 3, 2017) (recounting lost claims and checks).

185. Interview with Raise the Floor All. Staffer, in Chi., Ill. (Feb. 14, 2017).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Interview with Ill. Dep't of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

193. Field notes from César F. Rosado Marzán (June 23, 2016) (on file with author).

194. Interview with Chi. Workers' Collaborative Staffer, in Chi., Ill. (June 2, 2017).

195. Interview with Arise Chi. Staffer, in Chi., Ill. (Mar. 3, 2017).

Still, if a theme emerged across and between advocates and agencies, it was relational optimism in a sense suggested by a veteran labor advocate: anybody can be organized. Even, apparently, in our decentralized and perhaps even incoherent administrative state.<sup>196</sup> This faith in organizing echoed clearly in the disappointment expressed by the departed IDOL official that the monthly claim meetings so central to her former work had ended.<sup>197</sup> She was confident the relationship could have continued, but it would have taken “calls” from “day 1.”<sup>198</sup> Even now, having wanted to see the ritual become part of the older administration’s legacy, she hoped neither side would “give up.”<sup>199</sup> RTF, for its part, says it will keep trying.<sup>200</sup>

Thus, it appears that agencies and civil society groups do relate and work together to enforce certain labor rights. However, the relationships are difficult to maintain. As we discovered, a change in government administration can destroy four years of relationships. And at other times, ensconced bureaucrats, the so-called “deadwood” detailed by one activist, may create permanent obstacles to collaboration.

### B. One-Offs

The most accessible benefit of an established, mutual commitment to outreach appears to be the eased opportunity to work together on narrowly-defined, isolated, or time-limited projects, a collaborative practice we shorthand with the term “one-offs.” Many were found in Chicago. The greatest number of one-offs are interagency and arise out of naturally overlapping legal issues, harkening back to something remarked on by both agency and worker center representatives: where there’s one employment law violation, others are waiting to be found.<sup>201</sup>

A good example is the Illinois Attorney General’s suit against a number of Chinese buffet restaurants. Worker centers and legal aid groups identified initial wage violations, triggering investigations by the state and federal DOL and cross-agency calls to the AG’s Workplace Rights Bureau, which followed up with administrative subpoenas.<sup>202</sup> That work ensnared more defendants, including employment agencies using Chinese newspapers to advertise the availability of “good Mexican workers.”<sup>203</sup>

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196. Interview with Chi. Workers’ Collaborative Staffer, in Chi., Ill. (June 2, 2017).

197. Interview with Ill. Dep’t of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

198. *Id.*

199. *Id.*

200. Interview with Raise the Floor All. Staffer, in Chi., Ill. (Feb. 14, 2017).

201. Interview with OSHA Experts, in Chi., Ill. (June 14, 2017).

202. Interview with Ill. Att’y Gen. Officer, in Chi., Ill. (Feb. 2, 2017). *See also* Interview with Ill. Dep’t of Labor Officer, in Chi., Ill. (April 1, 2017).

203. *Id.* *See also* Complaint at 20, *People v. Xing Ying Emp’t Agency*, No. 15-cv-10235 (N.D. Ill. Apr. 22, 2016) [hereinafter “Complaint”].

Once matched with an employer, employees owed “commissions” to the agencies and rent to the buffets, all remitted back through wages ranging from \$3.00 to \$6.00 an hour.<sup>204</sup> A handful of EEOC right-to-sue letters later, the AG’s ultimate complaint canvassed a slew of state and federal wage, break, and civil rights claims.<sup>205</sup>

Similar examples abound. OSHA investigations of machinery used by minors prompts outreach to the child labor wing at Wage and Hour;<sup>206</sup> the BACP wants to station food trucks at the airport to help feed long-sitting cabbies and works on a plan with the Chicago Department of Aviation,<sup>207</sup> or an IDOL/IL AG tag team plan a misclassification “blitz” on worksites armed with Illinois Department of Employment Security data on big businesses purporting to employ no one.<sup>208</sup>

But across-the-board, greatest enthusiasm was expressed not for projects sparked by statute or jurisdiction but by affinities built up between two people. Relationships, again, matter. For example, one worker center representative expressed extreme frustration with the Occupational Safety and Health Act’s weakness, particularly its failure to protect vulnerable workers from retaliation after submitting claims.<sup>209</sup> He also, however, had deep ties to a local regional director, and his tone brightened in noting that the director had encouraged the center to “experiment” with the state’s new Whistleblower Act, which applies to federal claims and includes compensatory damages and attorney’s fees.<sup>210</sup> From OSHA to workers’ compensation, this tip has universally altered the center’s attitude toward a range of weak retaliatory frameworks.<sup>211</sup>

A unique relationship also shaped the state Attorney General’s office approach to the regulation of payroll cards, where employers save money—and workers get charged—to have pay put on debit cards instead of directly in a bank account or on a check.<sup>212</sup> Existing law was silent on the practice,

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204. See Interview with Ill. Att’y Gen. Officer, in Chi., Ill. (Feb. 2, 2017); Complaint, *supra* note 203, at 3, 16–18 (“Most Latino employees sleep on the floor or on dirty mattresses that they have retrieved from garbage dumpsters. Rooms are infested with bed bugs, rats, or other vermin.”).

205. Interview with Ill. Att’y Gen. Officer, in Chi., Ill. (Feb. 2, 2017); Complaint, *supra* note 203, at 4.

206. Interview with OSHA Experts, in Chi., Ill. (June 14, 2017); Interview with U.S. Dep’t of Labor Officers, in Chi., Ill. (July 19, 2017).

207. Interview with City of Chi. Dep’t of Business Affairs & Consumer Prot. Official, in Chi., Ill. (June 22, 2017).

208. Interview with Ill. Dep’t of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

209. Interview with Chi. Workers’ Collaborative Staffer, in Chi., Ill. (June 2, 2017).

210. *Id.* See also 740 ILL. COMP. STAT. 174/15, 30 (2018).

211. Interview with Chi. Workers’ Collaborative Staffer, in Chi., Ill. (June 2, 2017).

212. See, e.g., Alejandra Cancino, *Gov. Quinn Signs Payroll Cards Bill into Law*, CHI. TRIB. (Aug. 6, 2014, 2:14 PM), <https://www.chicagotribune.com/business/chi-illinois-payroll-cards-bill-20140806-story.html> (“Businesses prefer the cards because they save \$2.75 each time they electronically load the card instead of cutting a check.”).

and while there was general agreement that it was abusive, the remedy was shaped by the head of the Workplace Rights Bureau's encounter with fast food workers, thanks to Fight for \$15.<sup>213</sup> In short, a lot of workers liked the cards.<sup>214</sup> Without a bank account, direct deposit is useless and checks have fees too. The official was especially struck by one worker's story of her restaurant's switch from checks to payroll cards: the checks were delivered by oft-delayed trucks that, living paycheck-to-paycheck, sometimes left her family in dire financial straits, while the cards were loaded electronically, like clockwork.<sup>215</sup> Ultimately the Attorney General pushed for a bill that allowed the cards if employees opted-in, but also prohibited nearly all fees.<sup>216</sup>

Finally, an almost associational multiplier effect can be observed in a much-discussed workshop on the federal U-Visa program, which can provide legal status to undocumented victims of serious crimes who assist law enforcement.<sup>217</sup> As a former IDOL official admitted, workplace lawyers can be reticent to delve deeply into notoriously complex immigration law, and visas were not an issue of interest in the agency at the time.<sup>218</sup> But worker centers' mostly immigrant membership cared deeply about residency rules, and one leader began shopping the idea of a workshop to close contacts at a variety of agencies.<sup>219</sup> When a critical mass agreed, the event, which included the IDOL, federal DOL, NLRB, and other agencies, was on.<sup>220</sup> An IDOL official recalled the workshop as a turning point in attorneys' openness to confronting immigration issues in their work. By the end of the day, a cross-agency consensus emerged on how U-Visa questions and facts arising from investigations should be handled, highlighted by the creation of a "point person" at every agency to assure confidentiality and policy uniformity.<sup>221</sup> The momentum carried over to a panel discussion at DePaul University, where the law school's legal clinic later compiled a summary of administrative best practices<sup>222</sup> and published

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213. Interview with Ill. Att'y Gen. Officer, in Chi., Ill. (Feb. 2, 2017).

214. *Id.*

215. *Id.*

216. Cancino, *supra* note 212. *See also* 820 ILL. COMP. STAT. 115/14.5 (2018).

217. U.S. DEP'T OF HOMELAND SEC., *Victims of Criminal Activity: U Nonimmigrant Status*, <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last visited Aug. 2, 2018).

218. Interview with Ill. Dep't of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

219. *Id.*

220. *Id.*

221. *Id.* An advocate from the CWC noted that the EEOC, in particular, has since done an impressive job processing U-Visas. Interview with Chi. Workers' Collaborative Staffer, in Chi., Ill. (June 2, 2017).

222. ASYLUM & IMMIGRATION LAW CLINIC AT DEPAUL UNIVERSITY COLLEGE OF LAW, THE U-VISA: A NONIMMIGRANT STATUS FOR CRIME VICTIMS, <https://law.depaul.edu/academics/experiential->

a study highlighting discrepancies in U–Visa certification rates depending on where in Illinois the underlying crime was committed.<sup>223</sup>

In these and other instances, interpersonal ties can be viewed as catalyzing or adding special value to a one–off project. But they probably also serve a connective function, gluing participants together where it might feel easier to go at it alone. Hints of this are apparent in the ways that even people who support working together implied that agency staff and advocates are not a natural fit. Agencies, for example, pushed back against any perception that collaboration entailed diminished control over their agendas. “We develop our own strategies and priorities,” was one of the more direct responses to a query about the influence of outside groups.<sup>224</sup> An EEOC official suggested that groups were sometimes naïve in assuming that agencies could simply pivot from an on–going task to another without added resources or revision to a statutory mandate.<sup>225</sup> Most staffers can’t “pick and choose” their work, said another.<sup>226</sup>

This line of tension came to a head during a large meeting in early 2016 between four worker centers and five federal agencies on the potential for coordinated investigations, where a government representative described the two sides as embodying competing agendas: power and organizing versus law enforcement.<sup>227</sup> Though the official had hoped to underscore the importance of nurturing trust that had been developing between the parties, at least one advocate was offended and a second jumped–in to suggest that “debriefing” was needed after cases settled so that each side could learn more about the others’ motives and constraints.<sup>228</sup>

The friction played out concretely in negotiations between worker centers and the IDOL over the 2016 Illinois Domestic Workers’ Bill of Rights Act.<sup>229</sup> Long an advocate priority and backed by rising national momentum, by 2015 it became clear that a bill adding home, child, and

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learning/legal-clinics/clinics/asylum-immigration/confia/Documents/3.%20The%20U%20Visa-%20A%20Nonimmigrant%20Status%20for%20Crime%20Victims%20(English).pdf.

223. See GERALDINE ARRUELA ET AL., DEPAUL UNIVERSITY ASYLUM & IMMIGRATION LAW CLINIC, UNEQUAL PROTECTION: DISPARATE TREATMENT OF IMMIGRANT CRIME VICTIMS IN COOK, THE COLLAR COUNTIES & BEYOND (2015), <https://law.depaul.edu/about/news/Documents/unequal-protection—disparate-treatment-of-immigrant-crime-victims-in-cook-the-collar-counties-and-beyond-pdf.pdf>.

224. Interview with Ill. Att’y Gen. Officer, in Chi., Ill. (Feb. 2, 2017). A DOL official signaled an openness to strategic suggestions from outside groups before noting that the agency won’t always “act the way they want.” Interview with U.S. Dep’t of Labor Officers, in Chi., Ill. (July 19, 2017).

225. Field notes from César F. Rosado Marzán (June 23, 2016) (on file with author).

226. Interview with Ill. Att’y Gen. Officer, in Chi., Ill. (Feb. 2, 2017).

227. Field notes from César F. Rosado Marzán (June 23, 2016) (on file with author).

228. *Id.* Interview with Chi. Workers’ Collaborative Staffer, in Chi., Ill. (June 2, 2017).

229. Alexia Elejalde-Ruiz, *Rauner Signs Law Extending Labor Protections to Domestic Workers*, CHI. TRIB. (Aug. 15, 2016, 3:32 PM), <http://www.chicagotribune.com/business/ct-rauner-signs-domestic-workers-bill-0816-biz-20160815-story.html>.

elder care workers to the state's basic labor protections could pass, but only without new funding.<sup>230</sup> IDOL urged caution, fearing a paper tiger of new rights that the already strapped agency would not be able to adequately enforce.<sup>231</sup> That domestic workers are cloistered in private residences and isolated from each other heightened anxiety that absent additional officers and outreach the law would be, as an IDOL official stated, "setting us up for failure."<sup>232</sup> The groups saw things differently. From their perspective, rights badly enforced are still rights. And any right, an ARISE worker center leader explained, offers a "pressure point" for activism.<sup>233</sup> Protests, demand letters, and petitions, in other words, can bring even paper tigers to life.<sup>234</sup>

Ultimately, the bill passed without either side fully understanding the other's position.<sup>235</sup> Yet, the key players moved on—an official depicted the episode like a rift that was forgiven but not forgotten—and other collaborative efforts carried on.<sup>236</sup>

Sometimes, though, the mismatch is more basic and the breach becomes permanent. For all the excitement generated by Chicago's recent minimum wage enhancements, the city's worker centers have effectively given up on the existing enforcement entity, the BACP.<sup>237</sup> That is in great part because BACP was not originally set up to enforce employment law. Instead, BACP has long been the place where entrepreneurs head for licenses and consumers go for fraud.<sup>238</sup> When the city "dumped" three new employment laws—but not new staff—onto its portfolio in 2015, the results were as bad as one, according to the former BACP Commissioner herself, might have predicted: "[W]e had a bit of a learning curve . . . as we don't deal with labor issues as it is."<sup>239</sup> From ARISE's perspective, it shouldn't.<sup>240</sup>

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230. Interview with Ill. Dep't of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

231. *Id.*

232. *Id.* Early discussions also included in-home space and food provisions that officials thought would be impossible to police even with more money. *Id.*

233. See Interview with Arise Chi. Staffer, in Chi., Ill. (Mar. 3, 2017).

234. *Id.*

235. Interview with Ill. Dep't of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

236. *Id.*

237. See Justin Miller, *Chicago Activists and Aldermen Call for New Office to Enforce Labor Laws*, IN THESE TIMES (Feb. 28, 2017, 4:25 PM), [http://inthesetimes.com/working/entry/19932/chicago\\_activists\\_and\\_aldermen\\_call\\_for\\_new\\_office\\_to\\_enforce\\_labor\\_laws](http://inthesetimes.com/working/entry/19932/chicago_activists_and_aldermen_call_for_new_office_to_enforce_labor_laws) (calling for a replacement agency); Interview with Arise Chi. Staffer, in Chi., Ill. (Mar. 3, 2017).

238. John Byrne, *Emanuel to Rely on Worker Complaints to Enforce Higher Minimum Wage*, CHI. TRIB. (June 10, 2015, 4:35 PM), <http://www.chicagotribune.com/news/local/politics/ct-chicago-minimum-wage-increase-enforcement-met-0611-20150610-story.html>.

239. *Id.* See also Melissa Sanchez, *Chicago's Lax Enforcement of Minimum Wage Hike Leaves Workers in the Lurch*, CHI. REP. (Feb. 8, 2017), <https://www.chicagoreporter.com/chicagos-lax-enforcement-of-minimum-wage-hike-leaves-workers-in-the-lurch/> ("[T]he city department responsible

The worker center and allied groups have since called for transferring BACP's enforcement responsibilities to a newly created employment law-specific agency, a Chicago Office of Labor Standards.<sup>241</sup> "Enforcing employment laws is not [BACP's] job," explained an ARISE leader, "but with the new office we want to make it someone's job."<sup>242</sup>

In sum, these sorts of "one-off" stories grow out of and thematically draw upon the "coffee and calls" by continuing to highlight the importance—and difficulty—of kindling and maintaining relationships in service to workers' rights in Chicago. Even for isolated projects, parties are difficult to get together and to keep together, as all kinds of misunderstandings, conflicting purposes, and agendas can enter the picture. All of it, though, can be fixed through relationships, which remain the prime engine of up-and-down and side-to-side collaborations.

### C. On the Regular

Of course, sometimes people just really like working together. In those special instances, collaboration can become regularized. For many officials, this is an express goal, at least in select settings. The state Attorney General's office, for instance, sits high atop a 17-story atrium in the polarizing Thompson Center, a massive postmodern mix of glitter and Jetson-*alia*<sup>243</sup> that, home to many elected and appointed officials, also employs layers of security simply to monitor the elevator. The overall effect is, as an IL AG representative stated, "not . . . welcoming," and the attorneys want to be in routine contact with outsiders to shepherd the uninitiated through their doors.<sup>244</sup> "Have us on your Bat Phone," she tells advocates.<sup>245</sup> A federal DOL official, similarly, stressed that the agency's mandate required that officers have their "head's up" when groups make noise about an employer or an industry.<sup>246</sup> Workers get scared silent, but their advocates don't, so "we can't sit back" and wait for individual complaints, he said.<sup>247</sup> OSHA actually uses the number of trainings

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for enforcement has investigated just a quarter of 454 wage complaints, recovered lost pay for only a few dozen people and has yet to fine a single company for violating the ordinance.").

240. Interview with Arise Chi. Staffer, in Chi., Ill. (Mar. 3, 2017).

241. Miller, *supra* note 237.

242. Interview with Arise Chi. Staffer, in Chi., Ill. (Mar. 3, 2017).

243. See Blair Kamin, *Thompson Center Sale Shouldn't Automatically Mean Demolition*, CHI. TRIB. (June 4, 2017), <https://www.chicagotribune.com/news/columnists/ct-thompson-center-kamin-met-0602-2-20170602-column.html> (describing the James R. Thompson Center as a "spaceship-shaped glitter palace").

244. Interview with Ill. Att'y Gen. Officer, in Chi., Ill. (Feb. 2, 2017).

245. *Id.*

246. Interview with U.S. Dep't of Labor Officers, in Chi., Ill. (July 19, 2017).

247. *Id.*

conducted with outside groups as an informal metric for year-to-year outreach.<sup>248</sup>

Regularization can also develop between agencies. The IDOL and IL AG “borrow[ ]” staff in both directions.<sup>249</sup> “Literally one person can make a difference,” stressed a former state official before conceding that it can be a “balancing act” when it was time for her office to reciprocate.<sup>250</sup> Those sorts of collaborations, too, can be relationally contingent. Where the jurisdiction fits, the IDOL can refer wage and hour cases to the federal DOL, and early in a former IDOL official’s tenure the feds encouraged just that, hoping to increase the caseload of a number of newly hired bilingual officers.<sup>251</sup> Beyond the resource assistance, the arrangement helped state officials get to know their federal partners on a personal level, and, over time, two officers became favorites for their aggressive enforcement approach.<sup>252</sup> Eventually, a senior state official called his federal counterpart, and the two hashed out a system for funneling state referrals to those specific officers going forward.<sup>253</sup>

Where a good relationship exists, routine collaborations can form even from below. In 2011, Carlos Centeno, a temporary worker assigned to a factory in southwest Chicago, was scalded to death while cleaning a 500-gallon chemical tank.<sup>254</sup> Though burned over 80% of his body, management didn’t call 911 and filled out paperwork before having a co-worker drive him to a local clinic instead of a hospital.<sup>255</sup> The events galvanized CWC and its temp-heavy membership to create the “No More Deaths” campaign, a flourishing advocate-OSHA partnership.<sup>256</sup> Initially CWC simply asked for health and safety trainings to help newly-branded “Peer Educators” spot and share safety issues with coworkers.<sup>257</sup> The organizing impact of just that first step inspired the workers to turn some of the examples into narratives that were eventually recounted face-to-face up the agency ladder, from line officers, to the Regional Director, to Dr. David Michaels, the Assistant Secretary of Labor at the time.<sup>258</sup> After several meetings, in 2013 Michaels

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248. Interview with OSHA Experts, in Chi., Ill. (June 14, 2017).

249. Interview with Ill. Dep’t of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

250. *Id.*

251. *Id.* See also Interview with U.S. Dep’t of Labor Officers, in Chi., Ill. (July 19, 2017).

252. Interview with Ill. Dep’t of Labor Officer, in Chi., Ill. (Apr. 1, 2017).

253. *Id.*

254. Jim Morris, *They Were Not Thinking of Him as a Human Being*, CTR. FOR PUB. INTEGRITY (Dec. 20, 2012), <https://www.publicintegrity.org/2012/12/20/11925/they-were-not-thinking-him-human-being>.

255. *Id.*

256. Interview with Chi. Workers’ Collaborative Staffer, in Chi., Ill. (June 2, 2017).

257. *Id.*

258. *Id.*

spearheaded OSHA's formalized Temporary Worker Initiative.<sup>259</sup> Today, CWC's Peer Educators are equipped with OSHA certification cards earned after ten course hours at the University of Illinois–Chicago School of Public Health, meet periodically with the agency's Labor Liaison, and are in the room with OSHA's district director when colleagues file complaints in-person.<sup>260</sup>

The best repeat collaboration examples meld the bottom-up with the side-to-side. A powerful example is the "Chicago–Area Interagency Workers' Rights Roundtable," which convenes three to four times a year to bring a large cross-section of city, state, and federal agency officials and consulates together with over twenty community, legal, and advocacy organizations.<sup>261</sup> Though in some ways tied to an earlier venture that stretches back to 2000, the current Roundtable began in 2013, rotates agency hosts, and is designed to help all parties coordinate outreach, procedures, and enforcement.<sup>262</sup>

In the advocacy community, a high-ranking federal official is perceived as the leader behind the initiative.<sup>263</sup> He is certainly the glue. "He says let's do it, and people follow the lead," said one advocate.<sup>264</sup> "I can even just call him on his cell," said another.<sup>265</sup> When explaining how his organization developed such loyalty to the local agency, a CWC staffer replied, "He called us."<sup>266</sup>

The official's commitment to the roundtable format may be rooted in seeing it succeed at a previous position in a different part of the country.<sup>267</sup> Critical to its effectiveness in Chicago, though, is the inclusivity his leadership cultivates. For a 2016 Roundtable the official invited local worker centers to help set the agenda, and the event transformed into an agency-to-agency/advocate-to-agency workshop centered on small and large group discussion of multi-jurisdictional enforcement fact patterns written by the centers but loosely based on real cases.<sup>268</sup> The idea was to bring bureaucracy to life in a way that allowed every stakeholder to share a

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259. *Id.* See also Press Release, OSHA, OSHA Launches Initiative to Protect Temporary Workers (Apr. 29, 2013), <https://www.osha.gov/news/newsreleases/national/04292013>.

260. Interview with Chi. Workers' Collaborative Staffer, in Chi., Ill. (June 2, 2017).

261. Field notes from César F. Rosado Marzán (June 22, 2016) (on file with author). See also Interview with U.S. Dep't of Labor Officers, in Chi., Ill. (July 19, 2017); Interview with Raise the Floor All. Staffer, in Chi., Ill. (Feb. 14, 2017).

262. Field notes from César F. Rosado Marzán (June 22, 2016) (on file with author).

263. Interview with Raise the Floor All. Staffer, in Chi., Ill. (Feb. 14, 2017).

264. *Id.*

265. Interview with Arise Chi. Staffer, in Chi., Ill. (Mar. 3, 2017).

266. Interview with Chi. Workers' Collaborative Staffer, in Chi., Ill. (June 2, 2017).

267. Interview with NLRB Officer, in Chi., Ill. (Feb. 9, 2017).

268. Interview with Raise the Floor All. Staffer, in Chi., Ill. (Feb. 14, 2017).

vision for collaboration up, down, and side-to-side.<sup>269</sup> For ROC-Chicago that meant, first, offering a dose of reality: “You all don’t talk to each other!” a leader described thinking in the meeting’s lead-up.<sup>270</sup> But, he added, the agencies won’t change unless they “know the flaws up front,” and worker centers were in a good position to convey them if the agencies would listen.<sup>271</sup>

Basing the discussion in stylized, yet very real, worker experiences seemed to be the right mix of narrative detachment and hard truths that improved collaboration (and preserved relations) going forward.<sup>272</sup> Reflecting back, the ROC-Chicago leader called the meeting a “dawning moment” for the agencies.<sup>273</sup> A Raise the Floor official who helped write the hypos labeled the exercise a “pivot point” that generated a sort of cross-border empathy.<sup>274</sup> agencies saw that worker centers’ have expertise to offer, and the centers learned why interagency work that seems intuitive may not be—but that a little encouragement helps.<sup>275</sup>

Currently, Roundtable participants are trying to revive the idea of a universal complaint form that could be filed with one agency, cite overlapping legal violations, and then get passed around to the jurisdictionally-appropriate officers.<sup>276</sup> The attempt itself is fundamentally hopeful, suggesting that everybody—or, at least, everybody who meets regularly—is focused on collaborative enforcement. In individualized settings, DOL officials expressed pride in a bound book of inter-agency contacts that never leaves the intake desk so that anyone on duty can call the right jurisdictional official and make an immediate referral.<sup>277</sup> Finishing the job means making sure the worker knows precisely why the DOL can’t help, who can, and then connecting them personally.<sup>278</sup> OSHA, similarly, has a “One-Door” philosophy where if someone with, for example, a discrimination claim stops by, the agency is already prepared with an EEOC referral, navigational support, and a commitment to follow-up.<sup>279</sup>

But the factor that points most strongly to enduring ties may be the readiness of groups and agencies to keep experimenting with collaboration.

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269. *Id.*

270. Interview with Rest. Opportunities Ctr. Chi. Staffer, in Chi., Ill. (July 21, 2017).

271. *Id.*

272. *Id.*

273. *Id.*

274. Interview with Raise the Floor All. Staffer, in Chi., Ill. (Feb. 14, 2017).

275. *Id.*

276. Field notes from César F. Rosado Marzán (June 22, 2016) (on file with author); Interview with U.S. Dep’t of Labor Officers, in Chi., Ill. (July 19, 2017).

277. Interview with U.S. Dep’t of Labor Officers, in Chi., Ill. (July 19, 2017).

278. *Id.*

279. Field notes from César F. Rosado Marzán (June 22, 2016) (on file with author).

Agencies liked to describe advocates as their “eyes and ears.”<sup>280</sup> Advocates were willing to accept the role,<sup>281</sup> but for the arrangement to really work, some flexibility is required. That might mean hiring summer interns at the agency to collate and map a sudden inundation of jpegs when the CWC sets about photographing temp agencies that refuse to register with the state.<sup>282</sup> It could also mean securing an unmarked car with tinted windows and a camera to catch vans stopping at currency exchanges to extract illegal fees from day laborers for rides to anonymous factories.<sup>283</sup> As a federal official noted, any workplace violation, from losing money that’s earmarked for rent to losing a job completely, can be dire.<sup>284</sup> In that moment, multiple calls to multiple agencies that lead more to frustration than assistance, can break someone.<sup>285</sup> Good collaboration means a long-term commitment—no matter the facts and sometimes on the fly—to figuring out how to avoid even the first fruitless contact.<sup>286</sup> But it is the willingness to experiment that gives the commitment long-term life.

#### *D. Sparks of Formalization: The Many Faces of Chicago MOUs*

As discussed in Part III, agencies sometimes try to actively move beyond casual collaboration through the use of MOUs, a self-regulating, “soft law” attempt to formalize interagency dealings.

In Chicago, we identified agreements that structured three types of interagency activities: (1) the referral of workers to other agencies, (2) the sharing of information between agencies, which sometimes includes training staffers across agencies, and (3) the facilitation of joint investigations. Some agencies also use MOUs to foster relationships with international consulates, which then serve as intermediaries with foreign workers and employers in the U.S.

If a through-line across the diversity of agreements emerged, it was a sense that, while a malleable catalyst for interagency case referrals, knowledge diffusion, and even friendly conversations, Chicago MOUs tend to be vague, pop-up only intermittently, and exist as an uncertain foundation for deep and sustained collaboration. Put differently, MOUs are *really* “soft” law.

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280. *Id.*; Interview with Ill. Att’y Gen. Officer, in Chi., Ill. (Feb. 2, 2017); Interview with U.S. Dep’t of Labor Officers, in Chi., Ill. (July 19, 2017).

281. Interview with Rest. Opportunities Ctr. Chi. Staffer, in Chi., Ill. (July 21, 2017).

282. Interview with Chi. Workers’ Collaborative Staffer, in Chi., Ill. (June 2, 2017).

283. *Id.*

284. Interview with NLRB Officer, in Chi., Ill. (Feb. 9, 2017).

285. *Id.*

286. *See id.*

### 1. *At the Creation: Ad Hoc and Pragmatic*

We found Chicago MOUs to be essentially ad hoc creations.<sup>287</sup> Most of the agreements began as creatures of pragmatism justified, at least in part, by broader government policies to conserve resources and increase efficiency in regulatory areas where there are overlapping functions or too few resources to perform even ministerial duties.<sup>288</sup> At times, an MOU drafted at an agency's D.C. headquarters is simply transposed by the agency's regional officers in Chicago.<sup>289</sup> Even there, however, local implementation of the agreements is not automatic. Sometimes a motivated agency official will implement the "cold calls and coffee" tactic previously discussed to spark local inter-agency buy-in.<sup>290</sup> In those cases, behind what may seem like template language can be important leadership initiatives by key officials who take their jobs and enforcement mandates seriously.

Enterprising officials also report using MOUs to concretize already-existing collaborative practices and promote institutional continuity. One agency head reported doing just that to protect collaborations where an interagency partner retires, is replaced, or moves elsewhere.<sup>291</sup> "It's harder to dispose of paper than a person," he suggested.<sup>292</sup>

### 2. *Referrals*

The simplest MOUs we encountered encouraged case referrals where another agency appeared to also have jurisdiction over a worker's claim. An OSHA-NLRB Memorandum created in 2014 is representative, stating that that if an officer believes that a complaint touches on a violation policed by the other agency, the official should inform the worker and direct them to the relevant website to file another complaint.<sup>293</sup> That policy supplements a slightly earlier and more specific agreement that directed OSHA agents

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287. See, e.g., Interview with NLRB Officer, in Chi., Ill. (Feb. 9, 2017).

288. See, e.g., *id.* Some agencies memorialize specific procedures for collaboration in MOUs. The Illinois Department of Employment Security (IDES), which handles unemployment claims, has agreements addressing how it should interact with federal agencies when the latter requests information possessed by IDES regarding certain employers and employees. 820 ILL. COMP. STAT. 405/1706 (2018). However, state law also protects information it collects from employees and employers. See 405/1900; 405/1900.1. As such, unlike many other agencies, IDES provides detailed information to the public on the types of entities that may request certain IDES investigatory data. ILL. DEP'T OF EMP'T SEC., *IDES Shared Data Agreements*, <http://www.ides.illinois.gov/Pages/Shared-Data-Agreements.aspx> (last visited July 15, 2017).

289. Interview with NLRB Officer, in Chi., Ill. (Feb. 9, 2017).

290. *Id.*

291. *Id.*

292. *Id.*

293. Anne Purcell, National Labor Relations Board Memorandum OM 14-77, Procedure in Cases Involving Potential OSHA and Wage and Hour Issues (Aug. 8, 2014).

encountering untimely retaliation claims to inform workers that an NLRB unfair labor practice charge might still be available.<sup>294</sup>

A commonality in these sorts of referral MOUs is a striking lack of substance, which seems to limit the assistance provided to employees. The first iteration of the OSHA–NLRB MOU came with “talking points briefly describing the NLRB and providing [NLRB] contact information for use in telephone or in–person conversations with complainants with untimely whistleblower claims [under OSHA].”<sup>295</sup> But nothing else. The official is not, for example, encouraged to show the worker a sample NLRB charge, recommend a known counterpart at the other agency, or even email the appropriate website link. While the MOUs seemingly ensure that officials will not remain silent in the face of a viable alternative legal claim, the actual collaboration it facilitates is surface–level, at best.<sup>296</sup>

### 3. Information Sharing and Cross–Training

Not every MOU is so limited. Some give better instructions for information sharing and actually require officials to affirmatively interact

294. William Donovan & Lafe Solomon, National Labor Relations Board Memorandum OM 14-60, Referring Untimely 11(c) Complainants to the NLRB (May 21, 2014).

295. *Id.*

296. An interesting variation on the OSHA–NLRB MOU is an agreement between the Illinois Department of Labor and the federal Department of Labor. U.S. Dep’t of Labor & Ill. Dep’t of Labor, Partnership Agreement Between the U.S. Department of Labor, Wage and Hour Division and the Illinois Department of Labor (2011) [hereinafter Illinois & U.S. DOL MOU]. In our interviews, federal officers emphasized that where state law was better for workers than federal law, they would push to have the case taken up by the state agency. Illinois’s Employee Classification Act, for example, provides for stronger remedies where workers are wrongly classified as independent contractors.

The Act states that an individual who performs work for a contractor in Illinois will be considered an employee of the putative employer unless the putative employer can prove that:

(1) the individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the individual’s contract of service and in fact; (2) the service performed by the individual is outside the usual course of services performed by the contractor; and (3) the individual is engaged in an independently established trade, occupation, profession or business; or (4) the individual is deemed a legitimate sole proprietor or partnership under subsection (c) of [the law].

820 ILL. COMP. STAT. 185/1(b) (2018).

Employers who misclassify employees risk sanctions of up to \$1,000 per employee, per day misclassified, if the violation is found by the Illinois Department of Labor in a first audit. The penalty may increase to twice that amount, or \$2,000 per day, per employee misclassified if found in a second audit. *See* 820 ILL. COMP. STAT. 185/40(a) (2018).

The U.S. Department of Labor’s Wage and Hour Division (WHD) also refers workers to the IDOL where an employer is too small to be covered by the Fair Labor Standards Act (FLSA). Interview with Wage & Hour Div., U.S. Dep’t of Labor Experts, in Chi., Ill. (July 19, 2017). The FLSA applies to all employers and individuals engaged in interstate commerce (among others). *See* 29 C.F.R. § 783.18. Enterprises that make more than \$500,000 in yearly revenues will also be covered by the FLSA even if they are not directly involved in interstate commerce. 29 U.S.C. § 203(s)(1)(A)(ii). Illinois minimum wage law, however, applies to all Illinois employers who employ more than two employees in a calendar year. 820 ILL. COMP. STAT. 105/3(c) (2018). Illinois law, therefore, is broader and potentially covers more wage and hour violations.

with other agencies.<sup>297</sup> An MOU signed by the NLRB and the City of Chicago Commission on Human Relations, for example, provides for the transfer of files where either agency requests it in writing, describes the claim before it, and lists the assigned attorney.<sup>298</sup> Common in such MOUs is an acknowledgement of independent limits on information sharing. Requests that the NLRB share affidavits, documents, or notes, for instance, must comply with the agency's own rules on evidence sharing.<sup>299</sup> The Chicago Commission on Human Relations will divulge information only as allowed by the Illinois Freedom of Information Act,<sup>300</sup> the Illinois Local Records Act,<sup>301</sup> and other applicable laws.<sup>302</sup> Importantly, the MOU emphasizes that neither party's authority can be diminished by the document,<sup>303</sup> a provision that could serve to artificially block some initiatives, as collaboration itself arguably diverts agencies from path dependent activities to partnerships likely to be focused on some other type of project, draining resources in the process.<sup>304</sup> Some information sharing MOUs also include provisions for cross-institution trainings on each agency's operations and animating legal principles, which perhaps have the salutary effect of increasing inter-agency affinities and thus the likelihood of future interactions.<sup>305</sup>

While short and sometimes vague, the mere existence of an information sharing MOU may give officers the confidence needed to pick up the phone and make a connection. A piece of paper providing assurance that transmitting information between agencies is not just authorized but encouraged may increase the level of collaboration overall, certainly

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297. See, e.g., EEOC and Dep't of Justice Office of Special Counsel for Immigration Related Unfair Emp't Practices, Memorandum of Understanding Between The Equal Employment Opportunity Comm'n and The Office of Special Counsel for Immigration Related Unfair Employment Practices (last modified July 6, 2000); NLRB & U.S. Dep't of Labor, Occupational Safety and Health Admin., Memorandum of Understanding Between the NLRB and OSHA (2017); U.S. Dep't of Labor, Wage & Hour Div. & EEOC, Memorandum of Understanding Between the U.S. Department of Labor, Wage and Hour Division and the U.S. EEOC (2017) [hereinafter MOU between the U.S. DOL, WHD and the U.S. EEOC].

298. NLRB & City of Chi. Comm'n on Human Relations, Memorandum of Understanding Between Region 13 of the NLRB and the City of Chicago Comm'n on Human Relations 2 (2014) [hereinafter NLRB-Chicago CHR Memo].

299. *Id.* See also 29 C.F.R. § 102.118 (providing for strict limits on when NLRB officers may provide testimony and other evidence).

300. NLRB-Chicago CHR Memo, *supra* note 298.

301. *Id.*

302. *Id.*

303. *Id.* at 3.

304. Cf. Freeman & Rossi, *supra* note 86, at 1181–82 (suggesting that “up-front investments” in agency collaborations “might be substantial” relative to “a baseline of agencies deciding policy matters independently”).

305. NLRB-Chicago CHR Memo, *supra* note 298, at 3; MOU between the U.S. DOL, WHD and the U.S. EEOC, *supra* note 297, at ¶ C.

relative to documents that merely instruct officers to tell workers to go talk to someone else. That effect could be limited, however, by the other internal agency rules on confidentiality that give officers the impression that their true authority to share information is less than what is suggested in an agreement.

#### 4. Joint Investigations

A particularly fervent hope expressed by advocates during our research was for city, state, or federal agencies to plan coordinated enforcement “raids” on notoriously bad employment sectors or companies.<sup>306</sup> One worker center representative stressed how an inordinate amount of the group’s work centered on a row of ethnic restaurants on a single Chicago street. Each week seemed to bring a new wage, hour, discrimination, labor organizing, or health and safety complaint to the intake desk.<sup>307</sup> A one-day blitz by multiple enforcement agencies, he thought, was in order.<sup>308</sup> The wish has not materialized.

Indeed, while sketching out the contours of something like a joint or multi-party investigation would seem to be a good subject for an MOU, our interviews revealed only a few relevant documents. The most prominent was an MOU between the DOL and EEOC spearheaded by David Weil, the head of the Department of Labor’s Wage and Hour Division under the Obama Administration.<sup>309</sup> In it, the agencies agreed to coordinate investigations where it appeared employers were violating the laws of each agency.<sup>310</sup> But President Trump has since named new DOL officials and the eventual fate of the MOU is unknown. The U.S. DOL also has an agreement with its Illinois counterpart that calls for information sharing, quarterly meetings, and, finally, joint investigations.<sup>311</sup> The federal officials we interviewed, however, described the MOU as primarily a vehicle for data diffusion and did not offer examples of coordinated investigations.<sup>312</sup>

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306. Field notes from César F. Rosado Marzán (Feb. 23, 2016) (on file with author).

307. Interview with Arise Chi. Staffer, in Chi., Ill. (Mar. 3, 2017).

308. An example of the effectiveness of multi-enforcement efforts is the 2013–2014 California Labor Enforcement Task Force, which combined the Division of Labor Standards Enforcement, the Employment Development Department, and the California Occupational Safety and Health Administration, which discovered that 40% of the 216 businesses inspected had violated laws enforced by all three of the agencies. GLEESON, *supra* note 83, at 132.

309. See MOU between the U.S. DOL, WHD and the U.S. EEOC, *supra* note 297.

310. *Id.* at ¶ C.

311. Illinois & U.S. DOL MOU, *supra* note 296, at 1–2.

312. Interview with Wage & Hour Div., U.S. Dep’t of Labor Experts, in Chi., Ill. (July 19, 2017).

### 5. *The Special Case of Consular MOUs*

In some ways the most intriguing MOUs in Chicago are not inter-agency but between agencies and foreign government consulates, which have become important transnational advocacy organizations for nationals living abroad.<sup>313</sup> The offices bridge language and trust divides, particularly for undocumented workers who may, with increasing justification, fear contact with any U.S. federal or state government institution.<sup>314</sup> In Chicago, the Mexican consulate stands out as uniquely proactive, as it has instituted a “Labor Window” (*Ventanilla Laboral*) system of actually accepting, processing, and then transferring workers’ legal claims to the right domestic agency.<sup>315</sup> Mexican consulate officials are even willing to serve as formal interlocutors during this process.<sup>316</sup>

Federal wage and hour officials were especially enthusiastic about this relationship, noting that an MOU signed with the Mexican government made the consulate one of the agency’s most effective intermediaries with respect to getting money into workers’ hands following a successful judgment.<sup>317</sup> The NLRB and OSHA have similar documents.<sup>318</sup> Under the NLRB’s agreement, the agency stresses its interest in educating not just workers and employers, but also consular officials, who are viewed as critical conduits of labor rights information to Mexican nationals living in Chicago.<sup>319</sup> Indeed, consular offices are a favored location for legal workshops organized by agency officials in Chicago<sup>320</sup> and beyond.<sup>321</sup>

313. See, e.g., GLEESON, *supra* note 83, at 164.

314. *Id.* See also Liz Robbins, *A Game of Cat and Mouse With High Stakes: Deportation*, N.Y. TIMES (Aug. 3, 2017) (describing “judges, defense lawyers and clients” on “high alert . . . watching to see if immigration enforcement officers, many in plain clothes, are in a courthouse”).

315. Xóchitl Bada & Shannon Gleeson, *A New Approach to Migrant Labor Rights Enforcement: The Crisis of Undocumented Worker Abuse and Mexican Consular Advocacy in the United States*, 40 LAB. STUD. J. 32, 44–45 (2014).

316. *Id.*

317. Interview with Wage & Hour Div., U.S. Dep’t of Labor Experts, in Chi., Ill. (July 19, 2017).

318. NLRB & Ministry of Foreign Affairs of the United Mexican States, Letter of Agreement Between the Office of The General Counsel of the NLRB and the Ministry of Foreign Affairs of the United Mexican States (2013), [https://www.nlr.gov/sites/default/files/attachments/basic-page/node-4573/loa\\_-\\_english\\_-\\_signed%20Mexico\\_0.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-4573/loa_-_english_-_signed%20Mexico_0.pdf); NLRB, Region 13 & Consulate General of Mexico, Agreement Establishing an understanding between the Chicago Regional Office (Region 13) of the NLRB and the Consulate General of Mexico in Chicago, Illinois (on file with authors); OSHA & Consulate General Of Mexico in Chi., Ill., Arrangement Establishing an Alliance Between the U.S. Department of Labor’s Occupational Safety and Health Administration, Illinois and Wisconsin Area Offices and the Consulate General of Mexico in Chicago, Illinois (2010), [https://www.osha.gov/dosp/alliances/regional/reg5/mexico\\_il\\_final.html](https://www.osha.gov/dosp/alliances/regional/reg5/mexico_il_final.html).

319. NLRB, Region 13 and Consulate General of Mexico, *supra* note 318, at \*2–3.

320. Interview with OSHA Experts, in Chi., Ill. (June 14, 2017).

321. GLEESON, *supra* note 82, at 173, 177 (noting the role of Mexican consular offices in San Jose and Houston); See also Bada & Gleeson, *supra* note 315, at 44–45.

### 6. Lingerin<sup>g</sup> Skepticism

Not every agency official valued MOUs as a collaborative device.<sup>322</sup> Skeptics underscored that many investigative files have confidential information that should never be disclosed, MOU or not.<sup>323</sup> In fact, the MOUs we found generally included targeted confidentiality protections, even where the agreement envisioned joint investigations of the identical employer.<sup>324</sup> At the same time, officials who advocated for more meaningful interagency interactions suggested that confidentiality concerns were sometimes invoked reflexively or unnecessarily overemphasized.<sup>325</sup>

We also heard at least one officer suggest that where an institutional incentive conflicts with a collaborative goal expressed in an MOU, the incentive is sure to win out.<sup>326</sup> Officials may have to meet case resolution quotas, for example, pressure that is likely to crowd out an admonition contained in a three-year old agreement to spend time referring cases to other agencies.<sup>327</sup> Rarely do agency budgets include a line item for interagency activities.<sup>328</sup>

And, of course, as non-binding agreements, MOUs are as powerful as the leaders willing to spend time reminding people to follow them. As noted, the end of David Weil's time as the DOL Wage and Hour Division head may also spell the end of the DOL-EEOC memorandum.

### E. Tripartite Chicago? Behind the Paid Sick Leave Ordinance of 2016

The passage of legislation can sometimes be viewed as a product of a matured collaborative culture. Where groups and agencies work together to identify a legal gap, and the legislative branch runs with it, some combination of coffees, one-offs, regularized contacts, and agreements may have coalesced to help create something new. Chicago itself has been a hotbed for innovative employment law enhancements in recent years.<sup>329</sup> To

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322. Field notes from César F. Rosado Marzán (Feb. 23, 2016) (on file with author).

323. *Id.*; Interview with Ill. Att'y Gen. Officer, in Chi., Ill. (Feb. 2, 2017).

324. MOU between the U.S. DOL, WHD and the U.S. EEOC, *supra* note 297, at ¶ E. See also Ill. Dep't of Labor & U.S. Dep't of Labor, Wage & Hour Div., Amendment No 1. To Partnership Agreement Between The U.S. Department Of Labor, Wage And Hour Division And Illinois Department Of Labor (2014), [https://www.dol.gov/whd/workers/MOU/il\\_1.pdf](https://www.dol.gov/whd/workers/MOU/il_1.pdf) (last accessed Aug. 2, 2018).

325. Interview with Ill. Att'y Gen. Officer, in Chi., Ill. (Feb. 2, 2017).

326. Field notes from César F. Rosado Marzán (Feb. 23, 2016) (on file with author); see also Interview with NLRB officer, in Chi., Ill. (Feb. 9, 2017).

327. Interview with NLRB officer, in Chi., Ill. (Feb. 9, 2017).

328. *Id.*

329. In 2014, Chicago upped the local minimum wage far beyond the federal level. See Hal Dardick et al., *City Council Raises Chicago Minimum Wage to \$13 by 2019*, CHI. TRIB. (Dec. 2, 2014, 7:30 PM) <https://www.chicagotribune.com/news/local/politics/chi-chicago-minimum-wage-increase-13-20141202-story.html>). In 2013 and 2015, the city and its encompassing county, Cook County, enacted ordinances specifically to deter and punish wage theft. See Kevin Solari, *Why the New Law Combating Wage Theft in Chicago's Cook County is a Big Deal*, IN THESE TIMES (Feb. 17, 2015, 12:22 PM),

examine some of the collaborative threads behind these new laws, we zeroed in on the 2016 passage of the Earned Sick Leave Ordinance, for two reasons. First, relative to minimum wage laws, paid sick leave regulations are less well-known and somewhat novel, on the books in just 8 states and 29 cities.<sup>330</sup> Second, Chicago's ordinance has attracted scholarly attention as an exemplar of the shift toward tripartite relationships and social bargaining in the United States.<sup>331</sup>

But as we learned, while labor and management did indeed take part in a structured, city-initiated, and formalized negotiation process, the largest and most powerful employer groups ultimately opposed the bill. Advocates themselves surmised that the other prominent business leaders and moderate politicians who stayed on the sidelines did so for public relations reasons, not because they were mollified by or even neutral about the process or outcome. In other words, the true cogs responsible for the ordinance's enactment were the usual suspects—unions, worker centers, liberal-progressive groups, and Democratic politicians—packaged together with business on an ad hoc task force for political expedience. Ultimately, these long established political relationships of ideologically consistent allies appeared to matter more than any genuinely collaborative, tripartite alignment.

### 1. *The Ordinance*

The earned sick days ordinance provides every private sector employee who works over eighty hours for a Chicago employer in a 120-day period the right to accrue paid sick time.<sup>332</sup> Covered employees can accrue one hour of paid sick leave for every forty hours worked for one employer, capped at forty hours per year.<sup>333</sup> Employees may carry over up to twenty hours of unused paid sick time to the next calendar year,<sup>334</sup> and employers who violate the law are liable for up to three times the amount of denied time off, along with attorneys' fees and other legal costs.<sup>335</sup> In all, the ordinance covers around 400,000 employees in Chicago.<sup>336</sup>

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[http://inthesetimes.com/working/entry/17648/workers\\_advocates\\_celebrate\\_new\\_chicago\\_law\\_that\\_could\\_punish\\_businesses\\_wh](http://inthesetimes.com/working/entry/17648/workers_advocates_celebrate_new_chicago_law_that_could_punish_businesses_wh).

330. *Paid Sick Time Legislative Successes*, A BETTER BALANCE (May 21, 2018), <http://www.abetterbalance.org/resources/paid-sick-time-legislative-successes/>.

331. Andrias, *supra* note 3, at 65–67.

332. See Chi., Ill. Ordinance 2016-2678. There are various exceptions covering certain kinds of employers and employees.

333. See *id.* at 1-24-045(b)(2-4).

334. See *id.* at 1-24-045(b)(5).

335. See *id.* at 1-24-110.

336. See WORKING FAMILIES TASK FORCE, FINAL REPORT 5–9 (2016), <https://www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2016/April/Working-Families-Task-Force-Final-Report.pdf> [<https://perma.cc/BE2X-ZQFT>].

Stark, on-the-ground inequalities appeared to justify the legislative effort.<sup>337</sup> Studies had revealed that, in general, only workers on the city's highest salary rungs had access to paid time off for illnesses.<sup>338</sup> This created significant challenges for low-wage workers already struggling to balance family and work obligations in the best of health.<sup>339</sup> As the Working Families Task Force report examining the issue concluded, the lack of access to paid time off for illness in Chicago led to physical, emotional, and economic problems for employees and definitive public health risks for residents.<sup>340</sup> Not only were the economic costs of sick leave slight in comparison, data suggested that there were actually economic gains to be made by the policy.<sup>341</sup>

## 2. Enactment

A group calling itself the Chicago Earned Sick Time Coalition led the legislative march toward the new city policy.<sup>342</sup> Its constituents were unsurprising and included two worker centers, the Restaurant Opportunities Center of Chicago, and Arise Chicago,<sup>343</sup> two policy groups, Women Employed and the Shriver Center,<sup>344</sup> and a prominent labor union, the United Food and Commercial Workers (UFCW) Union Local 881.<sup>345</sup> The effort was also backed by labor-friendly Democratic aldermen, including Toni Foulkes, a former supermarket employee and UFCW Local 881 member, and Ameya Pawar, an alderman who had frequently supported Arise Chicago's campaigns in the past.<sup>346</sup>

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337. *See id.*

338. *Id.* at 10–11.

339. *See id.*

340. *See id.* at 7, 19; *See also* Chi., Ill. Ordinance 2016-2678 at 1.

341. *See* WORKING FAMILIES TASK FORCE, *supra* note 336, at 10–17.

342. Interview with Arise Chi. Staffer, in Chi., Ill. (Apr. 5, 2016); E-mail from Arise Chi. staffer to author (Dec. 22, 2016) (on file with author).

343. *Id.*

344. *Id.*

345. Officially, the Chicago Earned Sick Time coalition had dozens of members. *See* PAID SICK TIME CHICAGO, <http://sicktimechicago.org/about-2/> (last visited in July 23, 2017). However, in his field research, the author observed only a handful of organizations that were actually active in the campaign, rather than passive supporters. Those organizations are the ones listed herein. Interview with Arise Chi. Staffer, in Chi., Ill. (Apr. 26, 2016). Interview with Chi. Fed'n of Labor Staffer, in Chi., Ill. (June 12, 2017). Interview with Rest. Opportunities Ctr. Chi. Staffer, in Chi., Ill. (July 22, 2017). Coalition partners stated that UFCW was the most important member of the coalition, perhaps because of its resources and political ties. Interview with Chi. Fed'n of Labor Staffer, in Chi., Ill. (June 12, 2017). Interview with Rest. Opportunities Ctr. Chi. Staffer, in Chi., Ill. (July 22, 2017).

346. *See* Fran Spielman, *Council Says Most City Businesses Must Provide 5 Sick Days a Year*, CHI. SUN-TIMES (June 22, 2016), <http://chicago.suntimes.com/news/council-says-most-city-businesses-must-provide-5-sick-days-a-year>; Alexia Elejalde-Ruiz, *Proposed Ordinance Would Mandate Five Paid Sick Days a Year in Chicago*, CHI. TRIB. (Apr. 13, 2016, 4:52 PM), <http://www.chicagotribune.com/business/ct-paid-sick-leave-ordinance-0414-biz-20160413-story.html>. On Ameya Pawar's relationship with Arise Chicago *see, e.g.*, Adam Kader, *Arise Chicago Leads*

Though the coalition suspected that the election of rising mayoral star Bill de Blasio, who made sick leave a key campaign plank in New York City, might spark Chicago mayor Rahm Emmanuel's competitive instincts and soften any hesitancy toward employee-protective legislation,<sup>347</sup> the Coalition could not persuade City Hall to push a bill absent a wider—and more balanced—pool of proponents.<sup>348</sup> So instead, and against the wishes of coalition members who thought the research was already clear, the Mayor convened a stakeholder group to study the issue.<sup>349</sup> The group became known as the Working Families Task Force.<sup>350</sup>

The Task Force included moderate public officials and business representatives,<sup>351</sup> and fully assembled it boasted 26 members spanning labor, management, and the city government.<sup>352</sup> Importantly, large employer representatives were on board, including the Chicagoland Chamber of Commerce, the Illinois Restaurant Association, and the Illinois Retail Merchants Association.<sup>353</sup> Other businesses, large and small, were also present: Rush University Medical Center and the supermarket chain Roundy's (known as "Mariano's" in Chicago) on the big side,<sup>354</sup> and Honey Butter Fried Chicken (a restaurant), 7Wire Ventures (a venture fund), and S&C Electric (a manufacturer of equipment and services for electric power systems) on the other end.<sup>355</sup>

While the Task Force's make-up provided a patina of collaborative tripartism, there is a counter-narrative. The big employer representatives, namely the Chicagoland Chamber of Commerce and the Illinois Retail Merchants Association, came out against the measure, warning of increased operating costs.<sup>356</sup> One labor activist suspected that the equally massive Illinois Restaurant Association and food industry-friendly aldermen remained neutral because of how effectively the coalition had framed the

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*Campaign to Pass Anti-Wage Theft Ordinance*, DIGNITY AT WORK (Jan. 24, 2013), <https://dignityatwork.wordpress.com/2013/01/24/arise-chicago-behind-chicagos-anti-wage-theft-campaign/> (last visited July 19, 2017).

347. Interview with Arise Chi. Staffer, in Chi., Ill. (Mar. 3, 2017).

348. At least one member of the Chicago Earned Sick Time Coalition, ROC Chicago, emphasized the need to seek stakeholder input and participation in the ordinance, something that ROC Chicago, as an industry-specific worker center, attempts to do as part of its overall strategy. Interview with Rest. Opportunities Ctr. Chi. Staffer, in Chi., Ill. (July 21, 2017).

349. Interview with Arise Chi. Staffer, in Chi., Ill. (Mar. 3, 2017).

350. Interview with Arise Chi. Staffer, in Chi., Ill. (Apr. 5, 2016).

351. *Id.*

352. See WORKING FAMILIES TASK FORCE, *supra* note 336, at 4.

353. *Id.*

354. *Id.*

355. *Id.*

356. Hal Dardick, *City Council Approves 5 Paid Sick Days*, CHI. TRIB. (June 23, 2016), [http://digitaledition.chicagotribune.com/tribune/article\\_popover.aspx?guid=d12d0286-783d-4392-98f0-d6719bc89806](http://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=d12d0286-783d-4392-98f0-d6719bc89806).

issue: the dangers of infected food.<sup>357</sup> An ARISE staffer felt that the message had so thoroughly invaded public consciousness that open opposition risked a perception of being “in favor of sick chefs and servers.”<sup>358</sup> The Chamber of Commerce and Retail Association, he thought, ended up looking “out of touch.”<sup>359</sup>

The fact that important employer groups rejected the measure, and that others may have self-censored for public relations reasons, suggests that credit for the ordinance’s enactment goes less to the Task Force and more to the work of those most interested in paid sick leave at the outset: like-minded progressive groups and politicians.<sup>360</sup> In hindsight, the Task Force might most credibly be viewed as legislative cover for passage of a bill the liberal coalition wanted all along. While some of the smaller businesses involved, especially Honey Butter Fried Chicken, openly pressed for passage, ROC-Chicago, a key coalition and Task Force member, had cultivated the restaurant as a “high-road” partner long before the campaign began.<sup>361</sup>

That is not to say that the corporate members of the Task Force had no impact. In the eyes of the Chicago Federation of Labor (itself a member), employer participation helped modify the ordinance’s language to be more palatable to business, which further diminished political opposition and perhaps the likelihood of later court challenges.<sup>362</sup> But it is also true that ordinance’s commitment to near-universal coverage—including oft-excluded groups like nannies, day laborers, in-home care assistants, and employees without co-workers—make the end result a liberal landmark.<sup>363</sup>

So while one could argue that the law’s legislative narrative represents a move toward tripartism, this is only true in a limited sense. A more standard story of activism, partisan alignments, and public framing in a big, blue American city may be more accurate. As an ARISE staffer rather plainly implied: We won.<sup>364</sup>

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357. Interview with Arise Chi. Staffer, in Chi., Ill. (Mar. 3, 2017).

358. *Id.*

359. *Id.*

360. On the history of community activism and City Hall ties in Chicago, see, e.g., PIERRE CLAVEL, *ACTIVISTS IN CITY HALL: THE PROGRESSIVE RESPONSE TO THE REAGAN ERA IN BOSTON AND CHICAGO* (2010).

361. Interview with Rest. Opportunities Ctr. Chi. Staffer, in Chi., Ill. (July 21, 2017).

362. Interview with Chi. Fed’n of Labor Staffer, in Chi., Ill. (June 12, 2017).

363. Elizabeth J. Kennedy & Michael B. Runnels, *Bringing New Governance Home: The Need for Regulation in the Domestic Workplace*, 81 UMKC L. REV. 899, 901 (2013) (“[T]he twentieth-century employment law paradigm has left many low-wage workers in a ‘representation gap,’ unable to improve their own working conditions or enjoy the protection of universal and enforceable labor standards.”).

364. Interview with Arise Chi. Staffer, in Chi., Ill. (Mar. 3, 2017).

#### IV. DISCUSSION: NODAL AGENTS AND A RELATIONAL—BUT NOT “NEW”—LABOR LAW

What picture materializes from our accounts of relationships that start as coffees or a call and may grow into discreet or regularized projects, MOUs, or sometimes laws that extend new rights to workers? First, the good news. Even in our decentralized<sup>365</sup> administrative system—one that scholars expressly contrast with European models that retain a durable semblance of corporatism—the Chicago story suggests that effective collaboration, both up-and-down and side-to-side, exists. In our city, key workplace enforcement officials are not all administrative islands knotted to narrow mandates and clinging to Weberian “office secrets.” If anything, our study exposed the nuts-and-bolts, insider work of some public servants we call “nodal agents”<sup>366</sup> for their powerfully connective and centripetal relational practices. The NLRB officer who arrived in Chicago and made calls and coffee his first order of business is a prime example. His meetings resonated throughout our interviews and made an express mark in the community through participation in the Interagency Workers’ Rights Roundtable, and an implicit mark by building up advocates’ faith in the administrative state. The IL AG’s Workplace Rights Bureau officer who wants advocates to treat her office line like a “Bat Phone” is another nodal agent. Civil society actors, including labor activists, worker center leaders, Democratic politicians, and others who coalesce and actively reach out to administrators are nodes in their own right.

Whether springing from a devotion to good government, justice, or a job well done, this sort of personal commitment to collaboration fuels critical interactive processes among agency officers and between agency officers and civil society. The effect can be strong enough that at times a personal commitment to collaboration seems to work better than a mandate. At the NLRB, for example, advocates had a “paper” right to attend witness interviews, but it took a state nodal agent to meet with worker centers, look into their concern that not all agents followed the procedure, and honor the concern by clarifying the rule inside the agency.

Sometimes the commitment involves a willingness to accept that activists can add real value to the administrative process. No regulation teaches that certain advocacy groups closely vet allegations for meritorious charges, document evidence, keep track of witnesses, and generally help officers do their jobs better. Figuring that out takes routine advocate

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365. See Marisam, *supra* note 91, at 193–94.

366. “Nodal agent” is a play on Vivek Chibber’s use of the term “nodal agency,” here adapted and applied to public officials instead of public institutions. See *supra* note 72, at 20. Characteristics of nodal agents can be seen in Chris Ansell’s and Alison Gash’s study finding that collaborative governance requires “facilitative leadership,” “face-to-face dialogue,” “trust building,” and a “commitment to the process.” Ansell & Gash, *supra* note 123, at 554–59. Our nodal agents exhibited these traits.

interactions and an acceptance that the “experts” do not have a monopoly on expertise.<sup>367</sup> Today payroll cards—*fair* payroll cards—exist because the AG’s Workplace Rights Bureau office let a fast food worker tell her story and took it seriously.

Nodal agents, moreover, don’t hoard power or jurisdiction. Shared investigations make for good law enforcement, as various Chinese buffets and their labor suppliers found out, courtesy of the AG’s Workplace Rights Bureau and the Illinois Department of Labor. Temp agencies and their clients may soon learn this too, thanks to a federal OSHA officer with the humility to suggest that the Chicago Workers’ Collaborative experiment with a state law protection against retaliation.

For nodal agents, MOUs can be more than memorialized aspirations. They are also a device to recruit, reinforce, and construct new relationships—a sort of bureaucratic collaborative manifesto in the absence of regulation. Legally, MOUs don’t require information sharing, but their existence may be a reminder that a phone call is worth the time. Legally, MOUs can’t mandate revival of a time-barred claim with cross-agency charge, but they can encourage the conversation and ease it with talking points. And MOUs can turn an exploited, undocumented worker’s trip to the Mexican consulate into a “window” of U.S. labor and employment enforcement options, complete with personalized help in making contact with the DOL, EEOC, AG, or any other agency.

In short, and in our most optimistic form, we found the inklings of something that might be thought of as, if not a “new labor law,” a heavily *relational* labor law where officials and worker advocates look for any hook—background, biography, or business matter—to work together to better enforce or expand openings for new law.

The discovery of an interagency model that proceeds hydraulically, that is, wherever relationships allow collaborations to proceed, is not necessarily a new discovery. As noted, administrative law scholars have talked about “informal” dealings for a long time. Here we have simply confirmed its dominance in Chicago and, through our interviews, provided some unique detail. Nevertheless, this finding should be a fundamentally hopeful one for labor advocates across the country. Where participants are willing to take the time, the sorts of relationships that pave the way for partnerships could arise in any city or, really, any public administrative setting.

But the good news has limits. If nodal agents are the glue that binds a relational labor law, it is more of the Elmer’s than Super variety. This is

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367. See Fine & Gordon, *supra* note 60, at 575–76 (finding that “worker centers and unions have access to information about sectors that are otherwise hard for the government to penetrate, knowledge about industry structures, and the capacity to reach workers and document complicated cases”).

because a bureaucratic ethic of coffees, workshops, roundtables, and task forces, even with employer involvement, is profoundly contingent on the interests of people not mandated to do any of it. It is also contingent on their availability. Collaboration may dissipate when a nodal actor moves, retires, or is forced out for political reasons. So, while the NLRB official of such connective importance to the Chicago story is a careerist with civil service protection and a more or less permanent feature of the inter-agency and inter-advocate landscape, the opposite was true at the IDOL, where a gubernatorial election brought collaborative upheaval. There, the nodal agent was temporary, and when the agent left, the relational circuit shorted. Similarly, in hindsight, the sick leave Task Force turned out to be a political triumph, but it also surfaced hardened opposition that might have won the day under a different Mayor. New City Hall leadership could also endanger the implementation and enforcement of the law further down the line.

Thus, not all nodes are created equal. We suggest there are permanent nodal agents, or “perm nodes,” and there are temporary nodal agents, or “temp nodes.” Temp nodes can underlie a collaborative network of effective labor and employment rights enforcement, but that network is inherently precarious. A temporary node is, obviously, better than nothing, but permanent nodes are more stable and, therefore, superior.

That is not to say perm nodes do not face challenges. Even the best of the best may not get their calls returned. Moreover, permanence may not always be good for collaboration. Some advocates complained of “deadwood” at various agencies, uncooperative civil servants ensconced in their offices. These “perm islets,” as we call them, can become a persistent barrier.<sup>368</sup>

Table 2 diagrams these basic principles in practice on two axes. Horizontally, it queries if the actor in question shares commitments to collaborate or not. Vertically, it asks if the actor is a permanent or temporary civil servant, e.g., if the official is protected by civil service laws or is vulnerable to political changes. Hence, the first quadrant denotes “perm nodes,” or actors with commitments to collaborate who are also permanently embedded in the bureaucracy and in the labor and employment rights network through civil service protection. Below them, in quadrant three, are “temp nodes.” Like “perm nodes” these actors are committed synergies with other agencies and with civil society actors, but their jobs are politically vulnerable. Next to quadrant one, in quadrant two, are “perm islets,” officials who have little to no interest in working with other agencies or with advocates but, impervious to political change, may become stable obstacles to collaboration. Finally, in quadrant four, are the “temp

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368. Recognizing this reality, Jody Freeman & Jim Rossi have suggested adding legal heft to MOUs to better guarantee that agencies do not shirk duties in times of transition. *See* Freeman & Rossi, *supra* note 86, at 1188.

islets.” These actors lack collaborative commitments, but because their posts are politically or contractually dependent, the impediment may be temporary.

**Table 2: Types of Collaborative State Agents**

		<i>Collaborative commitments</i>	
		YES	NO
<i>Civil service protections</i>	YES	1. PERM NODES	2. PERM ISLETS
	NO	3. TEMP NODES	4. TEMP ISLETS

The table underscores that rights of way, but also potholes, mark the path of a relational labor law. If a coordinated, multi-agency investigation of a notorious local employer is on a group’s agenda, getting it done quickly may require a phalanx of quadrant 1 state actors, the administrative law equivalent of a winning BINGO card. Likewise, a motivated civil servant may be on the cusp of winning support for a cross-agency training and file sharing agreement, but someone less interested, a quadrant 4 islet, may unexpectedly replace her negotiating partner.

These sorts of problem scenarios play out all the time in Chicago. Advocates are currently pushing a universal complaint form that, conspicuously, used to actually exist. Arise Chicago was a prime mover behind all of the recent workplace legislative victories in the city, but now that it has experienced the BACP’s scattered investigative responsibilities in action, it wants a new agency dedicated to employment law. Turnover at the IDOL changed its advocacy relationships profoundly.

That is not to say that a relational labor law cannot work or even that it cannot often work. Where activists seek a cabined, short-term victory, an assemblage of quadrants 1 and 3 nodal agents, permanent and temporary, may suffice. Indeed, as we found, sometimes different quadrants mesh effectively. Perhaps there is a perm islet somewhere inside the Mexican Consulate, but, if so, there seem to be enough perm nodes or rotating temp nodes around to overcome it. From every angle, but especially from the Department of Labor’s vantage, the Consulate’s *Ventanilla Laboral* system is a collaborative success story. So too are worker centers’ efforts to persuade the IDOL, federal DOL, and NLRB to coordinate U-Visa processing, even in the face of initial disinterest. And if we take the Chicago Workers’ Collaborative at its word, with the right approach *any* official can be organized, an ethic perhaps exemplified by its innovative

“No More Deaths” partnership with OSHA where workers are quasi-deputized as health and safety inspectors and coordinate with the agency.

As these and other quadrant permutations suggest, in a sense the table can be thought of as a version of Shannon Gleeson’s “political field” theory, only here the expansion and enforcement of labor rights depends less on precise political alignments and more on collaborative commitments and job protections.

## V. CONCLUSION AND NEXT STEPS

Our research has tried to map and understand how collaboration, both up-and-down and side-to-side, operates in Chicago. In doing so, we hoped to both identify tripartite-*like* arrangements and investigate the continued emergence of the “new labor law” in a big, “Blue” American city. As inequality rises, and as traditional forms of labor and employment protections remain weak or even become less effective,<sup>369</sup> the domestic and international track record of tripartism—broadly defined—suggests the project is important.

While the stark lack of formal tripartite institutions in the United States would indicate that positive conclusions should be hard to come by, we end our work with some optimism. In an important respect, we found informal activity aiming to organize the otherwise fragmented American state, at least in Chicago. While the labor and labor relations literature generally discusses labor organizing and, more recently, organizing employers into arrangements suited for multi-employer bargaining schemes, here we discovered an interesting twist: the work of “organizing” the state. The organizational activity we identify proceeds interpersonally, goes both “up-and-down” and “side-to-side,” and is characterized by various conflagrations of nodes and islets and perm and temp tenures that make its effectiveness vary by times and places.

Throughout, we have argued in favor of all types of collaboration for better, more effective enforcement of labor and employment rights. Detractors, including some agency officials themselves, may object and point to partnerships that have already been tried and failed. Collaboration, it can also be argued, wastes the limited time and resources of overstretched agencies. As so-called “nodes” busy themselves with coffees, calls, and conferences, cases accumulate, forcing workers to wait longer for their rightful wages, for resolution of health and safety grievances, or for

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369. As Politico recently investigated, six states do not employ wage investigators and twenty-six have fewer than ten. Marianne Levine, *Behind the Minimum Wage Fight, A Sweeping Failure to Enforce the Law*, POLITICO (Feb. 18, 2018, 10:40 AM EST), <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644>. In some states, legislative takeovers lead to the shuttering of enforcement agencies altogether. *Id.*

investigation of ongoing discrimination. Overeager nodes might even carelessly transmit private claimant information across agencies. Hence, the story may go, nodes are idealistic blunderers at best and unethical, perhaps law-breaking, agents at worst.

We would disagree. It is true that certain collaborative initiatives have failed, like the universal complaint form that some are trying to restart today in Chicago. But evidence from other cities, and from Chicago itself, prove that collaborative projects can produce great results. It is also true that, when done well, collaboration helps agencies pool resources, which can conserve time, staff, and money. And while some claimant information may need to be kept private, the level of protection required can be determined case-by-case. Genuinely confidential information can be shielded and, in those cases, collaboration should indeed be limited. But just because some information needs to be withheld sometimes does not mean that collaboration is suspect in all cases.

Short of formalizing a complete system of up-and-down and side-to-side governance, the best way to improve, clarify, and ultimately maximize collaboration may be through tripartite boards or labor unions strong enough to force all parties to the table.<sup>370</sup> We support those options, but wish to consider a nearer-term solution based more directly on our findings: new laws that stabilize or enhance relationships.<sup>371</sup> This is because the moral of our stories seems to be the importance of undergirding collaborative intent with legal structures. Even the most gifted collaborators we spoke with, for example, did not want more partnerships—they wanted more law. Arise Chicago does not want workshops with the city’s current and jurisdictionally-scattered workplace officers, it wants a new and dedicated agency to enforce local labor and employment protections full time. The former IDOL official, who we identified as a temp node, agreed with advocates that domestic workers urgently needed new rights, but she also could not see an innovative way that the agency could effectively implement a bill that contained a zero-dollar enforcement budget. She

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370. Michael Wachter, for example, explains that U.S. labor unions were able to expand and effectively bargain collectively on behalf of workers in the corporatist contexts created by the New Deal, which enfranchised private bargaining through law. However, post-World War II, U.S. policy returned to favoring individual over collective actors, such as corporate shareholders. Other policies, such as the deregulation of heavily unionized industries and antitrust doctrines that limited the capacity of corporate actors to act in concert to set prices and output quotas, also severely debilitated American corporatism. Wachter, *supra* note 42, at 588–90, 628. Corporatism is thus not simply an attitude or orientation. It is structured by formal institutions, including law. See also Rogers, *supra* note 42, at 1624–25, 1637, 1640–41 (proposing a model of “libertarian corporatism” for contemporary U.S. society where law and public institutions would play a fundamental role, providing individuals and labor unions specific rights).

371. Cf. DUKES, *supra* note 6, at 4–5 (arguing that even the most assertive twentieth century European corporatist thinkers, such as Hugo Sinzheimer, recognized the importance of law and the state to democratize the economy by providing labor rights).

wanted a different law with funds attached to maintain the agency's good relationship with the groups. And an NLRB official we laud as a quintessential permanent node made clear that what is needed is not more chit-chat but some kind of stable interagency liaison to institutionalize what he puts into daily practice—because he knows his relational efforts are not enough.

Out of these and other stories, here we advocate specifically for more relationally-stabilizing law in the form of enhanced civil service protections, as well as mandates or incentives for collaboration generally. Influential public administration and administrative law scholars have been calling for American expansion of professional bureaucracy given that our civil servant corps has remained in a numeric slump for decades.<sup>372</sup> Career, professional bureaucrats have been largely replaced by private contractors who lack the skills and experience for the complex tasks of government. They also lack vocation for public service. While we value the contributions of civil society to regulate the workplace, government should better formalize relational labor law to foment more effective and transparent partnerships and to protect the nodal agents that emerge.

We also suggest that new, mostly local labor rights agencies, such as the one being advanced in Chicago or currently existing in San Francisco, be “nodally” structured. A fundamental agency aim of the new labor law should be to collaborate formally and informally with other city, state, and federal institutions, including the sharing of resources to better enforce existing law. A true nodal agency would be empowered and expected to carry out targeted, joint, multi-jurisdictional inspections while pooling information to aid in the enforcement of other unrelated laws in the process. Ideally it would also receive reciprocal support from other local, state, and federal agencies, some perhaps with more and better resources.

Further research should thus focus on the regulatory architecture best suited to these micro (agent) and macro (agency) relational goals. How might law best build collaborative interpersonal and interagency commitments? Positive incentives like monetary awards, benefit grants, or even ceremonial honors may be one possibility. Proactive collaborative mandates or the installation of local, state, or federal czars charged with fostering administrative coherence may be another. A key question is whether there are ways to draw the employer community into the mix. Our research suggests that absent some sort of affirmative command or clear

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372. PAUL R. VERKUIL, *VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT* (2017); JOHN J. DIJULIO JR., *BRING BACK THE BUREAUCRATS: WHY MORE FEDERAL WORKERS WILL LEAD TO BETTER (AND SMALLER!) GOVERNMENT* (2014).

economic benefit employers may not be interested in partnerships. If a tripartite, new labor law is to flourish, employers need to be included.<sup>373</sup>

We also need to know how nodal agents should be identified for some sort of tenure protection. Performance reviews that include commentary from colleagues at other agencies or groups is one possibility. Perhaps all officials at a certain level of bureaucracy should be shielded from political turnover, or maybe only those with access to information most amenable to joint projects or investigations, like investigative files. There may be a danger, of course, that turnover constraints would also entrench islets. Whether a permanent islet can transform over time to take on a more collaborative posture is unclear, but the best advocates will surely leverage their organizing prowess to find out. Research that will answer these sorts of questions awaits.

Finally, skeptics of a relational labor law might argue that while state-society collaboration might be effective in liberal cities like Chicago, the opposite effects might be found in politically conservative locations. In Chicago the DOL might work with the Mexican consulate and worker centers to combat wage theft, but in Tucson the collaboration might be between DOL and ICE, and the result may be deportations and the tarnishing of an important worker protective agency. We accept this critique but see it as further evidence of the need for legal prompts and guardrails. If the state is to be organized both coherently and in ways that better safeguards workers' rights, we need more and clear law delimiting which agencies collaborate, and for what kinds of programs and goals. Otherwise, the law will blow according to the relational winds, which are variable, unstable, and often stormy.

In all, below the formally decentralized, even incoherent American administrative state, far away from its more corporatist European counterparts and the New York wage board experience, lies an unofficial organizational reality that deserves more attention. Renewed focus on the informal life of agencies is needed not only to better understand the American administrative experience, but to nurture its positive aspects and perhaps even formalize them for a stronger relational labor law. In the meantime, it is likely that nodal agents, both in and outside of government, will be leading the charge for collaboration-enhancing reforms. Whatever their official titles, these actors are organizers in every sense of the term.

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373. Critics of a collaborative tripartism where business shares regulatory roles with labor and the state may be concerned that employers will seek to thwart every initiative that will expand workers' rights. Perhaps such skepticism is correct. But obstruction is not inevitable. International and even American historical examples of collaborative, effective tripartism—some cited in this article—abound, and the International Labour Organization has consistently heralded tripartism as the key operating orientation for effective worker rights. See *Tripartite Constituents*, INT'L LABOUR ORG. (2018), <http://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang-en/index.htm> (last visited Aug. 3, 2018).

And as scholars continue to probe and question the possible emergence of a new labor law, these agents will be busy—amid variable politics and despite obstacles like islets—pulling disparate people together, one relationship at a time.

