This article presents an original analysis of newly-available data from a landmark survey of 4,387 low-wage, front-line workers in the three largest U.S. cities. We analyze data on worker claims, retaliation, and legal knowledge to investigate what we call “bottom up” workplace law enforcement, or the reliance of many labor and employment statutes on workers themselves to enforce their rights. We conclude that bottom up workplace law enforcement may fail to protect the workers who are most vulnerable to workplace rights violations, as they often lack the legal knowledge and incentives to complain that are prerequisites for enforcement activity.

INTRODUCTION

Workplace rights in the United States are generally enforced from the bottom up. With few exceptions, labor and employment laws contain private rights of action that enable workers themselves to bring lawsuits when their rights are violated.1 These private lawsuits vastly outnumber government enforcement actions against law-breaking employers.2 Even what seems to be top down
government enforcement is often bottom up enforcement in disguise, as government agencies depend in large part on worker complaints to direct their enforcement activity. Workplace law enforcement therefore depends significantly on worker “voice,” with workers themselves identifying violations of their rights and making claims to enforce them.

In theory, a bottom up system should produce an accessible, responsive, and efficient workplace law enforcement regime. The parties with the most information about violations and the greatest incentive to correct them – the

3 For example, almost all lawsuits brought by the EEOC, which enforces federal antidiscrimination statutes, begin as worker-filed charges. Though the EEOC may affirmatively initiate an investigation using a mechanism known as a commissioner charge, it is rarely used, with only twelve charges filed in fiscal year 2012. U.S. Equal Employment Opportunity Commission, Performance and Accountability Report (FY2012), “Systemic Investigations,” http://www.eeoc.gov/eeoc/plan/2012par_performance.cfm (“[I]n FY 2012, 12 new Commissioner charges were filed.”). The U.S. Department of Labor may also initiate its own affirmative “directed investigations,” but those are vastly outnumbered by complaint-driven investigations. David Weil, Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division 8 (May 2010), http://www.dol.gov/whd/resources/strategicEnforcement.pdf (reporting that over seventy-five percent of U.S. Department of Labor Wage and Hour Division investigations in 2008 arose from worker complaints, as opposed to agency-initiated complaints in accordance with the Department’s strategic enforcement priorities); Janice Fine & Jennifer Gordon, Strengthening Labor Standards Enforcement through Partnerships with Workers’ Organizations, 38 Politics & Society 552, 556 (2010) (“The [U.S. Department of Labor] is thus expending most of its resources on inspectors responding to complaints filed by individual workers, without an underlying justification that this approach is likely to be effective in detecting violators.”).

4 ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30 (1970) (defining a worker’s choices when faced with a problem within her organization as exit, voice, and loyalty: “Voice is here defined as any attempt at all to change, rather than to escape from, an objectionable state of affairs . . . “); id. at 21-25 (discussing the option to “exit,” or take one’s labor or business elsewhere); id. at 76-105 (discussing a “theory of loyalty”); see also Steven L. Willborn, Labor Enforcement Theory: The Case of Public vs. Private Enforcement 8 (April 5, 2012), http://ssrn.com/abstract=2034893 (“In private enforcement, employees are conscripted to uncover violations of labor regulations.”); Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292 (1960) (“For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied.”).
workers – drive the enforcement process.\textsuperscript{5} Workers need not wait on cumbersome, budget-strapped, or politically hamstrung government agencies, but can take enforcement duties into their own hands.\textsuperscript{6} And when government agencies do act, the bottom up system should allow them to allocate resources efficiently: the “market” in complaints should signal to agencies which employers are bad actors in need of reform.\textsuperscript{7}

However elegantly designed, there is good reason to believe that the system fails in practice, and that it fails particularly badly in the case of workers who are most vulnerable to workplace rights violations.\textsuperscript{8} The system fails these workers because it is built on two foundational, misplaced assumptions: (1) that workers have the substantive and procedural legal knowledge to identify violations of their rights and access the proper enforcement procedures, and (2) that workers have sufficient incentives to file suit or make agency complaints.\textsuperscript{9} Using a rich source of newly available survey data, this Article demonstrates that for many low-wage, front-line workers – those who earn below the median wage for the city where they live and hold non-managerial, -supervisory, or -technical jobs – neither assumption applies.

This Article analyzes data that were originally collected as part of the 2008 Unregulated Work Survey, a landmark study of 4,387 low-wage, front-line workers in the three largest U.S. cities (New York, Chicago, and Los Angeles). These data are valuable, as they include “hidden” groups such as undocumented people or day laborers who are often excluded from research due to their marginalized social, political, and economic status. The data are also important because they enable empirical analysis of the determinants of claiming behavior and the transformation of problems into legal claims, subjects of much study within the sociolegal, economic, and political science literatures.\textsuperscript{10} Finally, analyses such as these are important as a policy matter. As Steven Willborn puts

\textsuperscript{5} Gideon Yaniv, \textit{Complaining About Noncompliance with the Minimum Wage Law}, 14 INT’L REV. OF LAW AND ECON. 351, 351-52 (1994) (“Being the direct (and sole) victims of noncompliance, underpaid workers are naturally perceived as the faithful guardians of the minimum wage law.”).

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

\textsuperscript{7} David Weil & Amanda Pyles, \textit{Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U. S. Workplace}, 27 COMP. LAB. L. & POL’Y. J. 59, 70 (2005) (“Ideally, regulators would like to assume two things: (1) that the workers who are complaining are voicing legitimate grievances and representing them accurately (in other words, that employees working under lawful conditions are not complaining); and (2) that workers who are experiencing violations will complain.”) (italics in original).

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

\textsuperscript{9} Steven Willborn describes workers’ lack of legal knowledge and lack of incentives slightly differently, as problems with detection and discovery of labor regulation violations and problems with prosecution. Willborn, supra note 4 at 3.

\textsuperscript{10} See Part I, infra.
it, as “policymakers sort through the many choices available when they are deciding how to enforce a labor statute,” they should be guided by both theory and data on the flaws and benefits of our current bottom up system of workplace law enforcement.11

Our analysis, discussed at length in Part III, reveals gaps in workers’ legal knowledge and powerful incentives to stay silent in the face of workplace problems. First, the data show that more than three-quarters of workers did not know where to file a government complaint about a problem on the job, and almost sixty percent of workers misunderstood their minimum wage and overtime rights.12 The data also suggest that female and undocumented workers had less accurate legal knowledge than their male and documented counterparts.13 Legal knowledge therefore appears to decrease with a worker’s relative power and stability, and many workers simply may not have the information necessary to become workplace law enforcers.

Second, even informed workers may lack an incentive to exercise “voice” on the job. The data show that about forty-three percent of workers who had experienced a workplace problem within the twelve months prior to the survey decided not to make a claim.14 The most common reason for workers’ silence was their fear of employer retaliation; the second was their belief that their claim would have no effect.15 Their fear of retaliation was well-founded: about forty-three percent of workers reported experiencing employer retaliation as a result of their most recent claim about a justiciable workplace problem in the twelve months before the survey.16 Likewise, workers’ lack of faith in the efficacy of claiming was borne out by the data, as only about fifteen percent of employers addressed the claim or promised to address it.17

Though workplace laws offer a set of protections and inducements to entice workers to become law enforcers – what we call “operational rights”18 – these incentives are miscalibrated in the case of many low-wage, front-line

11 Willborn, supra note 4 at 1 (“The consequences of [the differences in types of] labor enforcement are under-studied empirically. Labor enforcement theory, if anything, is even less well-studied. This is unfortunate, in part, because only a well-developed theory can help policymakers sort through the many choices available when they are deciding how to enforce a labor statute. Moreover, a well-developed theory is necessary to guide researchers in their efforts to understand both general issues of labor enforcement and particular issues relating to specific legislation.”).

12 See Parts III.D and E, infra.
13 See id.
14 See Parts III.A and B, infra.
15 See Part III.B, infra.
16 See Part III.C, infra.
17 See id.
18 See Part IV.A, infra; see also Charlotte S. Alexander, Explaining Peripheral Labor: A Poultry Industry Case Study, 33 BERKELEY J. EMP. & LAB. L. 353 (2012) (using the term “operational rights” to refer to the set of incentives and protections designed to operationalize or effectuate substantive rights, to entice workers to become bottom up law enforcers).
workers, whose fear of retaliation or doubt in the efficacy of complaining outweigh the benefits that would accrue from workplace law enforcement.\textsuperscript{19}

The data suggest, then, that low-wage, front-line workers such as the cashiers, parking lot attendants, and dishwashers captured by the Unregulated Work Survey may be particularly unsuited as bottom up rights enforcers. At the same time, numerous studies have shown that workplace rights violations are extraordinarily prevalent in the very industries that employ these workers.\textsuperscript{20} Thus, the same low-wage, front-line workers who are the most likely to experience workplace rights violations may be the least likely to become rights enforcers. Workers are over-deterring from claiming and employers may be under-deterring from complying, creating a self-perpetuating enforcement gap in labor and employment law.\textsuperscript{21}

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

I. THEORETICAL FRAMEWORK

This work fits into a tradition within the sociolegal, economic, and political science literatures of studying the determinants of claiming behavior, and provides an opportunity to expand on existing models. The classic framework for

\textsuperscript{19} Yuval Feldman & Orly Lobel, The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality, 88 Tex. L. Rev. 1151, 1155 (2010) (“Legislators, as well as adjudicators, must consider tailoring the incentives embedded in the law to the misconduct and the individual that it targets as an enforcer.”).

\textsuperscript{20} See note 115, infra, and accompanying text.

\textsuperscript{21} Estlund (2005), supra note 6 at 330 (“Traditional enforcement mechanisms have often failed to raise the cost of noncompliance high enough to outweigh the immediate gains from noncompliance. Most enforcement actions secure only the back wages owed to employees (if that); that means opportunistic employers risk very little by underpaying employees and hoping - quite realistically - to avoid enforcement, either by inspection or complaint. . . Simply ignoring the law is an especially tempting strategy for marginal producers at the bottom of the production chain, who have little fixed capital or stake in their reputation, who tend to operate under the regulatory radar, and who often rely heavily on undocumented immigrant workers who are too fearful or desperate to complain.”); see also David Weil, Broken Windows, Vulnerable Workers, and the Future of Worker Representation 2, Boston U. School of Management Research Paper No. 2012-23. Available at SSRN: http://ssrn.com/abstract=2126729 (2012) (“In the presence of persistent violations, keeping one’s head down, ‘staying out of other people’s business,’ and turning a blind eye to unfair treatment of others is a survival strategy.”).
understanding the transformation of problems into legal claims comes from William Felstiner and his co-authors.\textsuperscript{22} In this view, problems move through three phases: naming, blaming, and claiming. First, a person must “say to [her]self that a particular experience has been injurious.”\textsuperscript{23} This is “naming.” Second, she must “attribute [the] injury to the fault of another individual or social entity” – “blaming.”\textsuperscript{24} Third, in the process of “claiming,” she voices her grievance “to the person or entity believed to be responsible and asks for some remedy.”\textsuperscript{25}

Richard Miller, Austin Sarat, and Marc Galanter, among others, propose a more complex dispute generation and resolution pyramid, with additional layers beyond claiming.\textsuperscript{26} The pyramid accounts for claims that are disputed by the opposing party and the resulting suit-filing and disposition in court, and the pyramid’s shape reflects the fact that many “named” problems – the wide bottom layers – never progress all the way through to litigation at the pyramid’s peak.\textsuperscript{27}

In a separate strand of economics literature, Albert Hirschman’s seminal work examines problems that arise within organizations such as the workplace.\textsuperscript{28} Hirschman posits that people have three options in such circumstances: “exit,” “voice,” and “loyalty.” “Exit” is the option to take one’s labor elsewhere; “voice” is a worker’s attempt “to change, rather than to escape from, an objectionable state of affairs”; “loyalty” can result in a decision to remain within the organization and silently withstand recognized problems.\textsuperscript{29} In many ways, Hirschman’s “voice” can be thought of as Felstiner’s “claiming.”

\begin{itemize}
\item \textsuperscript{22} William L.F. Felstiner et al., \textit{The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .}, 15 LAW & SOC’Y REV. 631, 635-36 (1981).
\item \textsuperscript{23} Id. at 635.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id. at 635-36.
\item \textsuperscript{26} Richard E. Miller & Austin Sarat, \textit{Grievances, Claims, and Disputes: Assessing the Adversary Culture}, 15 LAW. & SOC’Y REV. 525, 545 (1981); Marc Galanter, \textit{Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society}, 31 UCLA L. REV. 4 (1983); see also Laura Beth Nielsen & Robert L. Nelson, \textit{Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System}, 2005 WIS. L. REV. 663, 681 (2005) (describing the dispute resolution pyramid, “At the base of the dispute pyramid are perceived injurious experiences - the broad mass of injuries that people recognize. Some proportion of these perceived injurious experiences are grievances: injuries that involve a violation of right or entitlement... Only some grievances become claims: when an individual contacts the party allegedly responsible for the grievance. Fewer still are disputes: when the party allegedly responsible for an individual's claim initially denies their responsibility. Some number of disputes results in filings: a formal complaint (in a litigation model, a court filing). The smallest category of all is made up of trials: cases that are adjudicated.”).
\item \textsuperscript{27} Galanter, \textit{supra} note 26 at 11-26 (describing the pyramid).
\item \textsuperscript{28} HIRSCHMAN, \textit{supra} note 4.
\item \textsuperscript{29} Id. at 30 (discussing voice); id. at 21-25 (discussing exit); id. at 76-105 (discussing loyalty, which, in the alternative, might result in a decision to stay within the organization and exercise voice).
\end{itemize}
The present Article takes this prior work as the starting point for investigating the empirics of workplace dispute generation and resolution and for constructing a more complex model that incorporates workers’ legal knowledge and incentive structures. Figure 1 illustrates how such a model might look, presenting the panoply of options that workers face when identifying problems on the job and deciding whether and how to address them. The darkened arrows represent a direct path from problem identification to claim resolution using formal legal means such as a lawsuit or government agency complaint. This is the path that our current system of bottom up workplace law enforcement envisions: workers have the legal knowledge to engage in “naming”; they then “blame” the appropriate party and are incentivized and knowledgeable enough to exercise “voice,” to make a “claim” in the form of a lawsuit or agency complaint and pursue it through resolution.

However, as the complexity of the diagram illustrates, there are many alternative paths. And as the diminishing size of each pyramid layer indicates, many problems “escape” along the way. Workers may not have the substantive legal knowledge to recognize justiciable problems (violations of their legal rights at work) as such.30 Workers who “name” the problems they face may nevertheless choose exit or silent loyalty over voice, or may not know whom to “blame,” as a legal matter, for the issues they face. Workers who do make claims may be faced with inaction or retaliation by their employers, at which point they may choose exit or loyalty, or may start again at the bottom of the pyramid and progress through the steps of “naming,” “blaming,” and choosing whether or not to make a retaliation “claim.” Moreover, if a claim is escalated and becomes a lawsuit or agency complaint, the worker’s incentive structure must push her to pursue the claim to resolution, in whatever form it takes (e.g., win or loss at trial, case dismissal, settlement). The costs of formal legal action in time and treasure may build over the duration of the process, and the worker may be retaliated against at any point, which then triggers its own decision tree. Throughout, the worker’s incentive structure must continue to encourage pursuit of her claim; for her to persevere through the claim’s resolution, the benefits of claiming must consistently outweigh its costs.

30 Justiciable problems are those that “raise issues in civil law, have civil legal aspects, and have consequences shaped by civil law.” Rebecca L. Sandefur, The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy, 42 Loy. L.A. L. Rev. 949, 968 (2009); see also generally HAZEL G. GENN & SARAH BEINART, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW (1999) (setting out theory of justiciable problems, unmet legal needs, and access to justice).
Figure 1: Workplace dispute pyramid

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

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

The pyramid also raises many empirical questions. Which workers have the substantive legal knowledge to recognize certain workplace problems as justiciable rights violations? Which workers have the procedural legal knowledge required to transform their claims into lawsuits or agency complaints? Which workers choose exit or silent loyalty over voice, at which stage in the process, and why? What forms of extra-legal dispute resolution might workers be accessing as alternatives to court, and how do those mechanisms work? How are workers’ incentive structures – their assessments of claiming’s costs and benefits – functioning to encourage or discourage claiming? How do those incentives shift and change over the course of the process, and do they work differently for claims of different type and magnitude? Finally, as a policy matter, how do we want
these incentive structures to function, and what are the implications for our bottom up workplace law enforcement regime?

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

II. METHODOLOGY

A. 2008 Unregulated Work Survey

The data analyzed in this Article were originally collected as part of the 2008 Unregulated Work Survey, a large-scale study of 4,387 low-wage, front-line workers in New York, Chicago, and Los Angeles. The study was conducted with foundation funding by researchers from the National Employment Law Project, the University of Illinois at Chicago’s Center for Urban Economic Development, and the UCLA Institute for Research on Labor and Employment, in partnership with researchers at Cornell University, the City University of New York, Rutgers University, and the UCLA Downtown Labor Center. The survey team originally published some of its findings in a 2009 report, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in American Cities, and released its full data set to outside researchers, including the present authors, for the first time in January 2012.

The survey targeted workers in each city who were at least eighteen years old and worked in industries where the median wage was less than eighty-five percent of the city median wage. Workers also had to hold “front-line,” or non-managerial, -supervisory, or -technical jobs. Workers surveyed included cooks and dishwashers, car wash workers, groundskeepers, maids and housekeepers, parking lot attendants, cashiers, cafeteria workers, tellers, garment workers, teacher’s assistants, and security guards. Their median hourly wage was $8.27. Each worker participated in a face-to-face interview in his or her native language, including English, Spanish, Polish, Russian, Tagalog, Chinese, French, Urdu, Hindi, Tamil, Afrikaans, and Korean.

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32 Id. at 56.
33 Id.
34 Id. at 16.
35 Id. at 13.
Many of these workers would not be reached via traditional survey methods, as they might not appear on voter registration rolls or other “official” lists from which survey respondents are typically drawn or, due to their immigration status, might be unwilling to give personal information to a stranger survey-taker. Thus, a typically drawn random sample could exclude or undersample these workers, making it extremely difficult to infer anything about their characteristics or presence in the general population. As a result, the survey team employed a sampling methodology known as Respondent Driven Sampling (RDS). First pioneered in public health research, RDS uses survey respondents’ own social networks to allow researchers to gain access to “hidden” or hard-to-reach groups.\(^{36}\) RDS methodology solves the problems of lack of access and mistrust by relying on each early respondent to recruit additional later respondents. In a RDS survey, each initial “seed” receives a limited number of coded coupons to distribute to other people in her social network. “Seeds” are compensated for their participation in the survey, as well as for each additional respondent they successfully recruit. They vouch for the integrity of the survey process, solving the trust problem, and provide researchers with an entrée to hidden communities of respondents, solving the access problem.

Though RDS allows researchers to reach respondents who would likely be missed by traditional survey methods, it creates problems of its own by generating a non-random sample of the population. Each respondent’s participation is not determined by chance, but instead by whether she is connected socially to a “seed.” Because randomness is the foundational assumption upon which all of statistical inference is built, RDS must compensate for the non-random nature of the samples that its network recruitment method generates. RDS does so by weighting each response by the size and homophily, or sameness, of that respondent’s social network. (Researchers determine size and homophily by asking a series of carefully designed questions of each respondent.\(^{37}\) Weighting produces an estimate of the prevalence of the particular variable of interest in the general population, known as the “population point estimate,” within an RDS-specified confidence interval. In other words, it allows the characteristics and experiences of the respondents who were surveyed to be generalized, roughly, to the three cities’ entire population of low-wage, front-line workers – here, approximately 1.64 million total workers.\(^{38}\)

\(^{36}\) More specifically, some populations may be too socially stigmatized to self-identify as members of the relevant group, some may live in socially insular communities that are not readily accessible to researchers, and some may be members of groups that are simply too small to be captured in a typical randomly drawn sample from the U.S. population as a whole.

\(^{37}\) A list of survey questions regarding respondents’ social networks appears in Appendix A. Researchers also map respondents’ social networks by tracking coupon codes and charting the links between seeds and recruited respondents. Researchers are then able to gauge the level of homophily of each social network along a variety of axes, to determine whether, for example, female seeds recruited exclusively female respondents and Latino/a or Hispanic seeds recruited exclusively Latino/a or Hispanic respondents.

\(^{38}\) Bernhardt, et al., \textit{supra} note 31.
Though RDS-like “snowball” or chain-referral survey methodologies have existed for years, this weighting procedure represents an innovation, allowing researchers reliably to account for the non-randomness of respondents’ inclusion in the sample. RDS methods remain an active area of research in statistics and survey design, but the methodology is generally accepted as valid and is in wide use, particularly within the fields of sociology and public health.  

B. Summary Statistics

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

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

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

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Table 1: Characteristics of Survey Respondents  
\((N = 4,387)\)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>City</strong></td>
<td></td>
</tr>
<tr>
<td>Chicago</td>
<td>1,097 (26%)</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>1,772 (42%)</td>
</tr>
<tr>
<td>New York</td>
<td>1,391 (33%)</td>
</tr>
<tr>
<td><strong>Gender</strong></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>2,250 (53%)</td>
</tr>
<tr>
<td>Male</td>
<td>2,009 (47%)</td>
</tr>
<tr>
<td><strong>Race/ethnicity</strong></td>
<td></td>
</tr>
<tr>
<td>Latino/a or Hispanic</td>
<td>2,506 (59%)</td>
</tr>
<tr>
<td>Black or African American</td>
<td>919 (22%)</td>
</tr>
<tr>
<td>Asian or other race</td>
<td>614 (14%)</td>
</tr>
<tr>
<td>White</td>
<td>214 (5%)</td>
</tr>
<tr>
<td><strong>Age</strong></td>
<td></td>
</tr>
<tr>
<td>46+ years</td>
<td>1,258 (30%)</td>
</tr>
<tr>
<td>36-45 years</td>
<td>1,071 (26%)</td>
</tr>
<tr>
<td>26-35 years</td>
<td>1,036 (25%)</td>
</tr>
<tr>
<td>18-25 years</td>
<td>785 (19%)</td>
</tr>
<tr>
<td><strong>Education</strong></td>
<td></td>
</tr>
<tr>
<td>Less than high school degree, no GED</td>
<td>1,715 (40%)</td>
</tr>
<tr>
<td>High school degree or GED</td>
<td>1,385 (33%)</td>
</tr>
<tr>
<td>Some college or associate’s degree</td>
<td>819 (19%)</td>
</tr>
<tr>
<td>College or higher degree</td>
<td>326 (8%)</td>
</tr>
<tr>
<td><strong>Nativity and immigration status</strong></td>
<td></td>
</tr>
<tr>
<td>US-born Citizen</td>
<td>1,506 (36%)</td>
</tr>
<tr>
<td>Undocumented Resident</td>
<td>1,445 (34%)</td>
</tr>
<tr>
<td>Foreign-born Citizen</td>
<td>518 (12%)</td>
</tr>
<tr>
<td>Documented Resident</td>
<td>757 (18%)</td>
</tr>
<tr>
<td><strong>Union membership</strong></td>
<td></td>
</tr>
<tr>
<td>Not a union member</td>
<td>3,911 (92%)</td>
</tr>
<tr>
<td>Union member</td>
<td>330 (8%)</td>
</tr>
<tr>
<td><strong>Occupation during previous workweek</strong></td>
<td></td>
</tr>
<tr>
<td>Service occupations</td>
<td>2,156 (51%)</td>
</tr>
<tr>
<td>Production, transportation and material</td>
<td>944 (22%)</td>
</tr>
<tr>
<td>Sales and office occupations</td>
<td>760 (18%)</td>
</tr>
<tr>
<td>Construction, extraction and maintenance</td>
<td>333 (8%)</td>
</tr>
<tr>
<td>Management, professional and related</td>
<td>66 (2%)</td>
</tr>
</tbody>
</table>

**Industry during previous workweek**

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<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arts, Entertainment, Recreation, Accommodations and Food Services</td>
<td>833 (20%)</td>
</tr>
<tr>
<td>Other Services (Except Public Administration)</td>
<td>746 (18%)</td>
</tr>
<tr>
<td>Retail Trade</td>
<td>662 (16%)</td>
</tr>
<tr>
<td>Nondurable Goods Manufacturing</td>
<td>605 (14%)</td>
</tr>
<tr>
<td>Educational, Health and Social Services</td>
<td>431 (10%)</td>
</tr>
<tr>
<td>Professional, Scientific, Management</td>
<td>411 (10%)</td>
</tr>
<tr>
<td>Construction</td>
<td>267 (6%)</td>
</tr>
<tr>
<td>Transportation and Warehousing</td>
<td>201 (5%)</td>
</tr>
<tr>
<td>Finance, Insurance, Real Estate, and Re</td>
<td>58 (1%)</td>
</tr>
<tr>
<td>Durable Goods Manufacturing</td>
<td>32 (1%)</td>
</tr>
<tr>
<td>Wholesale Trade</td>
<td>6 (0%)</td>
</tr>
<tr>
<td>Public Administration</td>
<td>4 (0%)</td>
</tr>
<tr>
<td>Information and Communications</td>
<td>3 (0%)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Job tenure</th>
<th>Frequencies (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-5 years</td>
<td>3,675 (87%)</td>
</tr>
<tr>
<td>6-10 years</td>
<td>372 (9%)</td>
</tr>
<tr>
<td>11-15 years</td>
<td>130 (3%)</td>
</tr>
<tr>
<td>16-20 years</td>
<td>29 (1%)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Employer size</th>
<th>Frequencies (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 100 employees</td>
<td>2,371 (62%)</td>
</tr>
<tr>
<td>100 employees or more</td>
<td>1,484 (38%)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>“High road” employer</th>
<th>Frequencies (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-1 “high road” indicators</td>
<td>2,967 (69%)</td>
</tr>
<tr>
<td>2+ “high road” indicators</td>
<td>1,233 (31%)</td>
</tr>
</tbody>
</table>

### C. Our Analysis

The original survey team’s 2009 *Broken Laws* report focused primarily on unpaid wages and health and safety violations experienced by low-wage, frontline workers. 43 Though the report also presented figures on the prevalence of retaliation and workers who chose not to make claims about workplace problems (variables of interest here), it did so only descriptively, without the regressions included in our analysis that allow study of the characteristics of workers who made different claiming choices. 44 Nor did the report investigate our other variables of interest: the level of workers’ substantive and procedural legal knowledge and the factors associated with workers’ being more or less informed about their rights.

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43 Bernhardt et al., supra note 31 at 2 (“This report exposes a world of work in which the core protections that many Americans take for granted—the right to be paid at least the minimum wage, the right to be paid for overtime hours, the right to take meal breaks, access to workers’ compensation when injured, and the right to advocate for better working conditions—are failing significant numbers of workers.”).

44 Id. at 24-25.
Drawing on the raw survey data, our analysis focuses on five main variables: (1) workplace problems, or the frequency with which workers reported experiencing problems on the job (the “naming” of problems); (2) claims, or the frequency with which workers engaged in claiming behavior after identifying a workplace problem; (3) retaliation, or the prevalence of retaliation against workers who made claims about justiciable problems; (4) substantive legal knowledge, or the extent to which workers knew their minimum wage and overtime rights; and (5) procedural legal knowledge, or the extent to which workers knew how to make a government complaint about a workplace problem.

Using the RDS network-size weighting process, we first generated population point estimates and confidence intervals for the five main variables. This allowed us to calculate the percentage (within a given margin of error) of the three cities’ low-wage, front-line workforce that fell into each of the five main variable categories, i.e. the approximate percentage of workers who had identified workplace problems, made claims, experienced retaliation, and had accurate substantive and procedural legal knowledge. We also generated RDS estimates for two additional variables: (1) the reasons workers gave for their decisions not to make claims; and, (2) for those who did make claims, the method(s) and subject(s) of these claims. We report these results in Part III and Table 7 in Appendix B.

Next, we explored which groups of workers were more and less likely to identify problems, make claims, experience retaliation, and have accurate substantive and procedural legal knowledge. Using logistic regression, we modeled the associations between these dependent variables and a number of independent variables, including worker demographics and job characteristics. Though logistic regression does not allow us to identify causal relationships, it does enable us to identify whether workers with certain characteristics – women

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

46 The original survey asked only whether workers knew where to file a government complaint and not how to engage in other methods of formal claiming such as contacting an attorney, union representative, or other third party. Relevant survey questions are reproduced in Appendix A.

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

48 For other uses and explanations of logistic regression methods and interpretation, see Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation, 90 VA. L. REV. 301 (2004) (using logistic regression to investigate the relationship between a judge’s ideology and voting patterns); James J. Brudney, Sara Schiavoni & Deborah J. Merritt, Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern, 60 OHIO ST. L.J. 1675, 1694-1713 (1999) (using logistic regression to model the effect of a variety of independent variables on judicial voting in cases involving unions).
or undocumented workers, for example – were more or less likely, holding all else constant, to identify problems, make claims, experience retaliation, or have accurate substantive and procedural legal knowledge. Part III and Tables 8-12 in Appendix C present the results of our logistic regression models.

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

Second, the data are now relatively old, as they were collected in 2008, five years ago at the time of this writing. However, 2008 was after the onset of the Great Recession, the effects of which low-wage, front-line workers are still feeling today. To the extent that depressed economic conditions have an impact on workers’ claiming behavior, conditions are still relatively depressed, and re-administering the survey today would likely produce substantially similar results. In fact, some commentators have observed that conditions for low-wage, front-line workers have worsened since 2008, as employers increasingly

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49 We used Stata to run all regressions. We chose to use a logit model because our dependent variables are binary, i.e. have two values (0,1). To test model fit, we used a non-linear version of the Hausman test (a combination of the suest and testn1 commands in Stata) compare the logit and OLS coefficients. The null hypothesis of the test is that the coefficients from both estimators are not significantly different from each other so the OLS estimator is consistent and efficient, versus an alternative hypothesis that the coefficients from both estimators are significantly different from each other so the OLS estimator would be inconsistent. The test results for our regressions lead us to reject the null hypothesis, indicating that logit is the better model. In addition, we used probability weights provided by the original survey team in estimating the logistic regression equations to correct for the sample bias introduced by the RDS sampling methodology. These weights also took into account the under-sampling of certain races/ethnicities among survey respondents. For a further explanation of the weighting process, see Spiller et al., supra note 39 at 13. Finally, following the protocol recommended by the original survey team, we dropped from our analysis all respondents identified as home health workers, due to changing coverage of this occupational category under federal and state wage and hour law.


51 Willborn, supra note 4 at 8 (postulating that “economic downturns may . . . affect discovery of violations through private enforcement”).
use temporary, part-time, and other contingent work arrangements and union density continues to decline.\footnote{52 Weil, supra note 3 at 9-11 (discussing the breakup, or “fissuring” of the traditional employment relationship, declining unionization rates, and other factors contributing to the degradation of conditions for low-wage, front-line workers).}

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

III. RESULTS

This Part, along with the tables in Appendices B and C,\footnote{53 Table 7 in Appendix B reports the RDS population point estimates and confidence intervals for the five main variables (workplace problems, claims, retaliation, substantive legal knowledge, and procedural legal knowledge), along with the reasons workers gave for their decisions not to make claims, and, for those who did engage in claims-making, the method(s) and subject(s) of their claims. Tables 8-12 in Appendix C show the full results of our logistic regression equations for the workplace problems, claims, retaliation, and substantive and procedural legal knowledge variables.} reports the results of our analysis of the survey data. The subsequent Part discusses possible explanations for our findings and considers the implications for bottom up workplace law enforcement.

A. Workplace Problems

About one third of low-wage, front-line workers identified a problem on the job in the twelve months before the survey.\footnote{54 The original survey did not ask respondents directly about workplace problem identification. As a result, we calculated the rate of problem identification by adding together the workers who had made a claim about a problem with the workers who had identified a problem but did not make a claim (two separate survey questions, reproduced in Appendix A).} In Felstiner’s terms, these are the workers who perceived, or “named” problems. However, the occurrence of actual workplace problems was probably much higher. The original survey team gathered respondents’ raw wage and hour data and calculated that twenty-six percent of workers had been paid less than the minimum wage during the previous workweek and seventy-six percent of workers who had worked more than forty hours had not been paid proper overtime.\footnote{55 Bernhardt et al., supra note 31 at 2-3.} Thirty percent of tipped workers had not been paid lawfully, and seventy percent of workers who had worked beyond their scheduled shift were not paid for this extra working time.\footnote{56 Id.}
These calculations focus only on violations of wage and hour laws; occurrences of actual workplace problems may have been higher if other rights violations were also considered.

The difference between the one third of workers who identified workplace problems and the higher rates of actual problems points to issues with “naming”: workers were not “say[ing] to [themselves] that a particular experience has been injurious.” As explored further below, the discrepancy may also be explained by workers’ lack of substantive legal knowledge, creating an inability to identify justiciable problems and an under-reporting of problems at work.58

Table 2 lists the characteristics of the workers who were more and less likely to identify workplace problems, all else equal. This and subsequent tables in this Part list only the regression results that are statistically significant, that likely can be explained by an actual association between the independent variables (worker characteristics) and dependent variable (workplace problems) rather than by chance. These results are indicated by asterisks. The table also lists results that are just outside the bounds of significance, but appear to be intuitively correct, indicated by a dagger. Full regression results for workplace problems are reported in Table 8 in Appendix C.59

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

57 Felstiner et al., supra note 22 at 635.
58 The discrepancy might also be explained by respondents’ reluctance to identify workplace problems to survey-takers, out of a fear that their complaints might somehow reach their employers’ ears.
59 Throughout this Part, we have chosen only to examine the sign, or direction, of the association between independent and dependent variables, rather than the relative strength of that association. Though additional work could be done (using odds ratios or marginal effects) to rank the relative impact of each independent variable on the dependent variables, because many of our results lack statistical significance, we have chosen to restrict our analysis to an examination of only the sign or direction of the coefficient and not its relative magnitude.
Table 2: Workplace Problems  
(N = 3,620)

<table>
<thead>
<tr>
<th>Less likely to identify workplace problem</th>
<th>More likely to identify workplace problem</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female**</td>
<td>Education***</td>
</tr>
<tr>
<td>Age***</td>
<td>Does not know where to file</td>
</tr>
<tr>
<td>Not a union member†</td>
<td>government complaint (procedural</td>
</tr>
<tr>
<td></td>
<td>legal knowledge)**</td>
</tr>
<tr>
<td>Job tenure of fewer than 12 months*</td>
<td>Employer is not “high road”***</td>
</tr>
<tr>
<td>Employer has fewer than 100 employees***</td>
<td></td>
</tr>
</tbody>
</table>

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

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

The results with respect to gender, union membership, and increasing age appear generally to follow from theory. Women, non-union members, and older workers, who tend to hold less powerful positions in the workplace and society as a whole, may be less accustomed to taking the relatively transgressive step of “naming” workplace problems, to “say[ing] to [themselves] that a particular experience has been injurious.”60 These groups of workers may also have less legal knowledge than other worker groups to enable them to identify problems at work. For example, Table 5, infra, reports that each increasing year of a respondent’s age was associated with a lower chance that a worker knew her minimum wage and overtime rights. In addition, labor unions may serve an educational or consciousness-raising function, enabling their members to engage in more “naming” of workplace problems than their non-union counterparts.61 Social science research has also shown that women in particular may be reluctant to “name” workplace problems as such, “to perceive themselves as targets of discrimination [or sexual harassment], notwithstanding evidence” that these workplace problems have occurred.62 Researchers posit that this may be a self-esteem preservation strategy: if women workers’ failings are the result of personal deficiencies, rather than their gender, their self-esteem may suffer in the “performance domain,” but may be intact with respect to their standing in society as a whole.63 Such a dynamic may be at play in the results reported in Table 2, where women workers were less likely than men to “name” workplace problems.

60 Felstiner et al., supra note 22 at 635.
61 The results reported in Table 5, infra, complicate this narrative somewhat.
62 Deborah L. Brake, Retaliation, 90 Minn. L. Rev. 18, 26 (2005) (collecting social science research).
63 Id.
With respect to job tenure, this result may merely be a consequence of exposure: workers who had been employed for less than a full year may have had fewer opportunities to experience, and to identify, a problem on the job during that year. Alternatively, workers with shorter job tenures may have had less experience in the workplace generally, and be less aware of and able to identify workplace problems when they occurred.

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

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

The result with respect to lack of procedural legal knowledge is harder to explain, as one might expect that workers who did not know where to file a government complaint would be less likely to have identified a workplace problem in the previous twelve months. However, this result may in fact signal the importance of a worker’s having both substantive and procedural legal knowledge in order to progress up the dispute identification and resolution pyramid. Without knowledge of her substantive legal rights in the workplace, procedural legal knowledge alone – knowing where or how to file a workplace complaint with the government – may not help a worker take the initial step of “say[ing] to [herself] that a particular experience has been injurious.”64

64 Felstiner et al., supra note 22 at 635.
B. Claims

Of the workers who had identified a workplace problem within the year prior to the survey, about fifty-seven percent decided to make a claim of some type.65 Almost all workers (ninety-six percent) chose to make a claim to their employer, while very few complained directly to a government agency or to an intermediary such as an attorney or union representative. Sixty-five percent of workers’ claims were about justiciable workplace problems, i.e. violations of workers’ legal rights around pay, discrimination, harassment, abuse, or occupational safety. The remaining claims were non-justiciable, centering on quality of worklife (e.g. commute time, workload, and work schedule) and benefits. Of all workers who had identified a workplace problem, then, approximately thirty-seven percent made a claim about a justiciable problem, twenty percent made a non-justiciable claim, and forty-three percent made no claim at all.

Of the forty-three percent of workers who decided not to make a claim about an identified workplace problem, the top two reasons workers gave for their decision were a fear of being fired and a belief that the claim would make no difference.66 The next two reasons (apart from “other”) were also retaliation-related: the worker’s fear of having her wages or hours cut and the worker’s having seen co-workers retaliated against for claiming behavior. The next reason points to a lack of procedural legal knowledge: uncertainty as to how to make a claim.

Table 3 lists the worker characteristics that were associated with a greater or lesser likelihood of claims-making. Full regression results for the claims model are reported in Table 9 in Appendix C.

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

66 Workers were asked, “During the past 12 months, were there times when you DID NOT complain, even though you had a problem at your job with dangerous working conditions, discrimination, not being paid the minimum wage or not being paid overtime?” and “What stopped you from complaining?” The menu of choices is listed in Appendix A.
Table 3: Claims
\[(N = 1,422)\]

<table>
<thead>
<tr>
<th>Less likely to make claim</th>
<th>More likely to make claim</th>
</tr>
</thead>
<tbody>
<tr>
<td>▪ Does not know minimum wage and</td>
<td>▪ No results</td>
</tr>
<tr>
<td>overtime rights (substantive legal knowledge)*</td>
<td></td>
</tr>
<tr>
<td>▪ Does not know where to file a</td>
<td></td>
</tr>
<tr>
<td>government complaint (procedural legal knowledge)**</td>
<td></td>
</tr>
<tr>
<td>▪ Employer is not “high road”**</td>
<td></td>
</tr>
<tr>
<td>▪ Not a union member†</td>
<td></td>
</tr>
<tr>
<td>▪ Age†</td>
<td></td>
</tr>
<tr>
<td>▪ Job tenure of fewer than 12 months***</td>
<td></td>
</tr>
<tr>
<td>▪ Asian or other race‡</td>
<td></td>
</tr>
</tbody>
</table>

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

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

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

In addition, workers who were employed by non-“high road” employers were less likely to make claims than their counterparts in the base category. At first glance, this result may seem counterintuitive: workers at non-“high road” companies would presumably have more to complain about than their counterparts who receive benefits and pay raises. However, non-“high road” employers may hire a less empowered workforce to begin with, or might send

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67 “Other races” include any worker who did not identify as “white,” “Black or African American,” or “Latino/a or Hispanic.”
signals, either explicitly or implicitly by providing substandard wages and working conditions, that worker claims would be futile.

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

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

Finally, it is difficult to explain why workers who identified as “Asian or other race” were less likely to make claims than other workers who identified as “white,” “Black or African American,” or “Latino/a or Hispanic.” Perhaps these workers face stronger social or cultural norms against claiming behavior than members of other races or ethnic groups. In addition, as Tables 5 and 6 show, workers who identified as “Asian or other race” were less likely than members of other racial and ethnic groups to have accurate substantive and procedural legal knowledge. This lack of legal knowledge – itself an interesting result – probably contributes to these workers’ lower likelihood of engaging in claiming behavior.

C. Retaliation

Of the workers who had made claims about justiciable problems in the twelve months before the survey, about forty-three percent experienced some form of employer reprisal in response to their most recent complaint. Of these reprisals, roughly thirty-five percent constituted unlawful retaliation in violation of labor and employment laws, including termination or suspension, calls to the police or immigration, decreases in hours, and abuse and harassment. The remaining reprisals were acts such as threats that likely did not rise to the level of

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

69 To identify unlawful retaliation, the original survey team analyzed respondents’ descriptions of the reprisals they experienced and counted only those acts that would be actionable under the relevant labor and employment laws. Spiller et al., supra note 39 at 25-26 (describing criteria used).
an “adverse employment action,” a requirement for retaliation to be unlawful, 70 but nevertheless likely had a silencing effect on workers.

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

Thus, in sum, of all workers who had made claims about justiciable workplace problems, about fifteen percent experienced unlawful retaliation, twenty-eight percent experienced some other form of reprisal, another fifteen percent had their claims addressed or promised to be addressed, and forty-two percent were met with employer inaction or some other response.

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

Table 4: Retaliation
(N = 560)

<table>
<thead>
<tr>
<th>Less likely to experience retaliation</th>
<th>More likely to experience retaliation</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Made claim alone*</td>
<td>• No results</td>
</tr>
</tbody>
</table>

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

As Table 4 shows, we achieved only one statistically significant result with respect to retaliation. We suspect that a smaller number of observations (560 as opposed to between 1,422 and 3,620 for the other dependent variables) may be driving this outcome. It also may be explained by the very nature of retaliation. Individual-level worker characteristics such as gender and race/ethnicity may not be associated strongly with the experience of reprisals because an employer’s retaliatory threats or acts may be directed toward the workforce generally, as opposed to singling out a particular worker or workers. 71 For example, an employer may gather the entire low-wage, front-line workforce and threaten them about the negative consequences of claiming behavior. 72 Such threats may have a silencing effect across the workforce, without regard to individual worker

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71 Thanks to Pauline Kim for this insight.

72 *See*, e.g. Part V.A, infra, recounting a circumstance in which an entire workforce was likely silenced by an employer’s threats.
characteristics, and may therefore not register in the regression analyses performed in this Part.

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

D. Substantive Legal Knowledge

Approximately forty-one percent of workers had accurate substantive legal knowledge in the area of wage and hour law, meaning that fifty-nine percent misunderstood their minimum wage and overtime rights.73 With respect to the minimum wage, workers were asked to name the current applicable minimum wage in their city, and the original survey team checked the responses for accuracy based on the federal, state, and local laws in place at the time. Workers over- and under-estimated the required minimum wage in about equal numbers: twenty-five percent gave a number below the required minimum, while twenty-one percent gave a number above.

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

Table 5: Substantive Legal Knowledge
\( (N = 3,620) \)

<table>
<thead>
<tr>
<th>Less likely to know minimum wage and overtime rights</th>
<th>More likely to know minimum wage and overtime rights</th>
</tr>
</thead>
<tbody>
<tr>
<td><img src="image1" alt="Employer has fewer than 100 employees***" /></td>
<td><img src="image2" alt="Not a union member*" /></td>
</tr>
<tr>
<td><img src="image3" alt="Age***" /></td>
<td><img src="image4" alt="No legal immigration status†" /></td>
</tr>
<tr>
<td><img src="image5" alt="Black or African American***" /></td>
<td></td>
</tr>
<tr>
<td><img src="image6" alt="White***" /></td>
<td></td>
</tr>
<tr>
<td><img src="image7" alt="Asian or other race†" /></td>
<td></td>
</tr>
</tbody>
</table>

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

Here, workers who worked for relatively small employers (those with one hundred or fewer employees) were less likely than employees of larger companies to know their minimum wage and overtime rights. As workers reported higher

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73 Workers were asked, “As far as you know, what is the current minimum wage in [CITY]?” and “As far as you know, do employers have to pay workers more than their usual wage when they work more than 40 hours in a week?”
ages, the likelihood that they had accurate substantive legal knowledge also fell. In addition, workers who identified as “Black or African American,” “white,” or “Asian or other race” were less likely to know their minimum wage and overtime rights than those who identified as Latino/a or Hispanic. On the other hand, workers who were not union members and who had no legal immigration status, i.e. were undocumented workers, were more likely to report accurate knowledge of their wage and hour rights.

The result with respect to employer size is relatively intuitive: smaller companies that lack human resources departments or formal employee screening procedures may hire a less sophisticated workforce with lower levels of legal knowledge. Alternatively, smaller companies may do a worse job than larger companies of educating their employees about workplace laws through training and compliance programs.

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

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

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75 See, e.g., Janelle Jones & John Schmitt, Center for Economic Policy and Research, Low-Wage Latino Workers (Apr. 4, 2012), http://www.cepr.net/index.php/blogs/cepr-blog/lower-wage-latino-workers (concluding that, given their overall presence in the population, “Latinos are indeed over-represented among low-wage workers,” defined as those who earn $10 per hour or less).
advocacy groups, designed to inform Latino workers of their substantive legal rights.

Finally, the two variables associated with a greater likelihood of a worker’s knowing her substantive minimum wage and overtime rights, “not a union member” and “no legal immigration status,” appear initially to be counterintuitive. However, it may be that workers who are union members tend to earn relatively high wages under their particular collective bargaining agreements, and are therefore less informed about universally applicable minimum wage requirements under the law. In addition, undocumented workers, who, like Latino/a and Hispanic workers, hold a disproportionate number of low-wage, front-line jobs,76 may be the recipients of the same sort of targeted “know-your-rights” outreach efforts by advocacy groups discussed above. Undocumented workers may also be less complacent about knowing the law than their documented counterparts, as the law shapes their existence to a great extent, with the risk of arrest, detention, and deportation looming large in their working lives.77

E. Procedural Legal Knowledge

Approximately twenty-three percent of workers had accurate procedural legal knowledge; a corresponding seventy-seven percent did not know where to file a workplace complaint with the government. Interestingly, even those workers who knew how to make a government complaint were unlikely to act on that knowledge, as ninety-six percent of workers who did make a claim on the job made it directly to their employers, rather than to a government agency or other third party. Moreover, the twenty-three percent result may actually be inflated, as a worker’s knowledge of government complaint procedures was self-reported, with no way for researchers to test the accuracy of workers’ responses.78

Table 6 lists the variables that were associated with higher and lower likelihoods of a worker’s knowing where to file a government complaint. Full procedural legal knowledge regression results are reported in Table 12 in Appendix C.

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76 Randy Capps et al., Immigrant Families and Workers: Facts and Perspectives (Brief No. 4), A Profile of the Low-Wage Immigrant Workforce 1 (Nov. 2003) (finding that “[i]migrants compose an increasingly large share of the U.S. labor force and a growing share of low-wage workers” and “[t]wo of every five low-wage immigrant workers are undocumented”).

77 Shannon Gleeson, Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making, 35 LAW & SOC. INQUIRY 561, 562 (2010) (contending that, “like the holistic experiences of race, class, and gender,” “undocumented status is similarly a master status that is constructed by the law and that in turn shapes an individual's relationship to the law”).

78 Workers were asked, “Do you know where to file a complaint with the government if you are having a problem with an employer?”
Table 6: Procedural Legal Knowledge
\((N = 3,606)\)

<table>
<thead>
<tr>
<th>Less likely to know where to file government complaint</th>
<th>More likely to know where to file government complaint</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female***</td>
<td>Age***</td>
</tr>
<tr>
<td>No legal immigration status***</td>
<td>Education**</td>
</tr>
<tr>
<td>Employer is not “high road”***</td>
<td>Black or African American**</td>
</tr>
<tr>
<td>Asian or other race**</td>
<td></td>
</tr>
</tbody>
</table>

***p \leq 0.01; **p \leq 0.05; *p \leq 0.10; \dagger p \leq 0.15

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

These results generally follow from theory. Low-wage, front-line women, who have lower social standing than their male counterparts, may have had less exposure than men to information about government complaint procedures. And undocumented workers, despite having relatively greater substantive legal knowledge, might not know how to make a government complaint because of an overarching view that government contact of any sort would risk of detection and deportation.\(^79\)

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

On the flip side, age, education, and identification as “Black or African American” were positively associated with accurate procedural legal knowledge. With respect to age, unlike the substantive wage and hour laws, channels for government complaint tend not to change over time. One would therefore expect procedural legal knowledge to increase as workers grow older and have more

exposure to workplace problems and channels for complaint. In addition, workers with higher levels of education overall may know more about how to lodge a government complaint than those with fewer years of schooling. Finally, workers’ identification as “Black or African American” may be positively correlated with procedural legal knowledge because African Americans may have a comparatively longer history of seeking government redress for legal wrongs than other racial or ethnic groups.

IV. IMPLICATIONS FOR BOTTOM UP WORKPLACE LAW ENFORCEMENT

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

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

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

Second, claiming is another point of escape from the pyramid. As the second column in Figure 2 illustrates, about thirty-three percent of workers had identified workplace problems, but forty-three percent of those workers chose not to make claims. It is unknown from these data whether workers chose silent loyalty or exit instead of voice. However, median job tenure among survey respondents was 2.25 years, about half the national median,80 suggesting that many workers may have chosen to exit their jobs after having identified workplace problems.

Third, nearly all of the claims that workers made—represented by the second column in Figure 2—were internal, made directly to the employer, while only about four percent of workers chose to make claims in the form of a lawsuit or government complaint. This may be attributed to workers’ general lack of procedural legal knowledge: only twenty-two percent knew where to file a government complaint. Yet the four percent external complaint figure suggests that even procedurally knowledgeable workers may have been unlikely to act on their knowledge, perhaps pointing to a problem with workers’ incentives around claiming.\footnote{We do not know whether some workers who initially made internal claims later chose to pursue their claims as lawsuits or government complaints.}

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

Thus, the results reported in Part III support our contention that the bottom up workplace law enforcement regime may be failing the very workers who most need protection. Workers do not simply progress up the workplace dispute pyramid through consecutive phases of naming, blaming, claiming, and resolution. Instead, our analysis of the Unregulated Work Survey data suggests that workers are shunted off the pyramid at, at minimum, the naming and claiming stages. We contend that this drop-off occurs because low-wage, frontline workers often lack the legal knowledge and incentives needed for bottom up workplace law enforcement. Compounding this problem, claiming incentives and legal knowledge are distributed unevenly among workers. As our analysis suggests, the least politically, economically, and socially powerful and secure were the least likely to make claims, the most likely to experience retaliation, and the least likely to have accurate substantive and procedural legal knowledge: women, workers without legal immigration status, and workers with low education levels.
These findings are consistent with other research on worker claiming behavior, retaliation patterns, and legal knowledge. For example, David Weil and Amanda Pyles have characterized the frequency of worker complaints to the U.S. Department of Labor’s Wage and Hour Division and Occupational Safety and Health Administration as “exceedingly low,” concluding:

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

Weil and Pyles also echo our findings on the distribution of claiming behavior, noting that “workers [who] feel vulnerable to exploitation are less likely to use their rights- these include immigrant workers, those with less education or fewer skills, and those in smaller workplaces or in sectors prone to a high degree of informal work arrangements.”

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

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

84 Weil & Pyles, supra note 7 at 91; see also Willborn, supra note 4 at 7 (noting that workers who sue tend to be “considerably wealthier than the average employee”); Mitchell Langbert, *Voice Asymmetries in ERISA Litigation*, 16 J. LAB. RESEARCH 455, 462-63 (1996) (noting underrepresentation of women as plaintiffs in ERISA lawsuits).

85 U.S. Commission on the Future of Worker-Management Relations, *The Dunlop Commission on the Future of Worker-Management Relations - Final Report* 49-50 (1994), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace; see also Nielsen & Nelson, supra note 26 at 685 (collecting studies of discrimination claims-making; noting that relatively few employees who have identified a problem with workplace discrimination made a claim); Brake, supra note 62 at 36 (“[T]he social costs of claiming discrimination are primarily reserved for low-power or stigmatized social groups.”); Lauren B. Edelman, et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment*
With respect to retaliation, a 2012 report by the Ethics Resource Center on the incidence of retaliation against whistleblowers (workers who uncover and report unlawful conduct within their companies) found that forty-five percent of employees “observe misconduct each year,” sixty-five percent of those workers blow the whistle, and one in five, or twenty-two percent of those who choose to become whistleblowers “perceives retaliation for doing so.” Other studies in a variety of employment settings have found that fear of retaliation is often the main driver of workers’ decisions not to confront the workplace problems they identify.

Other researchers have also found that low-wage, front-line workers routinely misunderstand their workplace rights. A survey of low-income Latino workers in Southern states found that “Most people surveyed (about 80 percent) had no idea how to contact government enforcement agencies such as the Department of Labor. Many respondents did not know such agencies even exist.” Similarly, only about half of day laborers in an Arizona survey knew the minimum wage, while a survey of over two-thousand contingent workers in twenty states and the District of Columbia found that seventy percent of respondents did not know where to report workplace abuses. Likewise, a study of the sexual harassment policy of a large Midwestern university reported that many administrative and clerical women employees – relatively more powerful, secure employees compared to the low-wage, front-line articles surveyed here – were confused about sexual harassment law as it applied to them.

Structures, 117 AM. J. OF SOCIOLOGY 888, 904 (2011) (“Research shows that minorities and the poor face substantial obstacles in mobilizing legal rights ranging from psychological and structural barriers to filing claims, to weaker legal counsel, to structural aspects of litigation that disadvantage parties that lack social clout.”) (internal citations omitted).


87 Brake, supra note 62 at 28 (collecting citations to studies and noting that, “Most of the research on the low level of reporting discrimination has been done in the area of sexual harassment. Social science literature on sexual harassment abounds with findings showing that sexually harassed women most often choose coping strategies of avoidance or denial and that the least likely response is to report the harassment to someone in a position of authority.”).


90 Anna-Maria Marshall, Idle Rights: Employees’ Rights Consciousness and the Construction of Sexual Harassment Policies, 39 LAW & SOCIETY REV. 83, 115 (2005); see also Pauline T. Kim, Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World, 83 CORNELL L. REV. 105, 133 (1998) (quizzing over 330 unemployed workers on knowledge of at-will employment legal rules and finding that workers gave correct answers only fifty-one percent of the time on average); Pauline T. Kim, Norms,
Stephen Lee has written about the conditions that give rise to inaccurate substantive and procedural legal knowledge among low-wage, front-line immigrant workers in particular. As he has observed, undocumented workers may perceive government enforcers of labor rights as enforcers of immigration law as well. As a result, they may choose not to report a workplace problem to a government agency for fear that the report will trigger immigration consequences. Immigrant workers may also import legal knowledge from their home countries that is inapplicable in their United States workplaces and derive inaccurate beliefs about their workplace rights from relatively insular information “islands” and ethnic networks.

A. The Failure of Operational Rights

The drafters of the major federal labor and employment laws were not blind to the possibility that workers would need incentives to become the drivers of workplace law enforcement in a bottom up system. As a result, they wrote

*Learning, and Law: Exploring the Influences on Workers’ Legal Knowledge*, 1999 U. ILL. L. REV. 447, 458 (1999) (administrating the same survey in multiple additional states; finding corresponding correct answer rates ranging from 25.2% to forty percent); Weil, supra note 21 at 5 n.6 (summarizing the “literature on the lack of knowledge of statutory rights under a variety of laws”).


92 As Jennifer Gordon, R.A. Lenhardt, and Shannon Gleeson have observed, undocumented workers may also lack the legal consciousness, or view of themselves in relation to the law, to make claims. Gleeson, supra note 77 at 133 (“When asked why they chose not to come forward about long days or dangerous working conditions, many undocumented workers repeatedly explained that to do so would simply not be characteristic of a good worker, championing their willingness to do work that others would not.”); Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. Rev. 1161, 1223 (2008) (labeling undocumented workers’ view of themselves as hard-working and uncomplaining “identity work designed to respond in some way to the negative stereotypes and stigma associated with their particular groups”); see also Catherine R. Albiston, *Legal Consciousness and Workplace Rights*, in *NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH* 56 (Benjamin Fleury-Steiner & Laura Beth Nielsen, eds. 2006) (defining legal consciousness as “the dynamic process through which actors draw on legal discourse to construct their understanding of and relation to the social world, but that process takes place within a social context already structured in part by the law itself”).

93 See, e.g., *Mitchell*, 361 U.S. at 292 (“Congress did not seek to secure compliance with [the FLSA’s] prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather, it chose to rely on information and complaints received from employees seeking
into the laws a set of protections and inducements that were meant to tip workers’ cost-benefit scales in the direction of claims-making. We call these “operational rights” because they operationalize or effectuate substantive statutory protections.94

Operational rights implicitly acknowledge a major contention of this Article, that workers’ incentives are a key determinant of claiming behavior.95 More precisely, workers assess the size of the possible benefit they might receive as a result of a claim, the certainty of receiving that benefit, and how costly the benefit will be to achieve. They weigh these factors against the benefits and costs of their other options: exit or silent loyalty. Operational rights attempt to increase the size and certainty of the benefit and reduce the costs of achieving it.

In the context of private lawsuits, operational rights offer payment (sometimes double96) for violations of a plaintiff’s rights and extra payments to class representatives.97 These supplement the benefits that would accrue anyway to plaintiffs who are successful in a workplace lawsuit: the opportunity to work for an employer who now complies with the law; the chance to see justice done. Operational rights also seek to minimize the costs of claiming. They offer the chance for reimbursed attorneys’ fees for prevailing plaintiffs and they outlaw retaliation and provide a private right of action for workers who have been retaliated against.98 They also allow workers to band together in class or collective actions to bring joint claims against their employer.99

94 Alexander (2012), supra note 18; see also Margaret H. Lemos, Special Incentives to Sue, 95 Minn. L. Rev. 782 (2011) (discussing “suit boosters” or incentives offered to plaintiffs and their attorneys to bring private litigation).

95 See also Weil & Pyles, supra note 7 at 91 (“The likelihood that workers exercise their rights depends on both the benefits and the risks of doing so. . . . An employee calculates the cost of filing a complaint based on an estimate of the risks associated with any action to seek relief from discrimination.”); Hoyman & Stallworth, supra note 83 at 63 (“The three factors which determine whether women will file are: 1) expected benefits which are a function of future positions (job property rights) available in jobs without discrimination; 2) expected costs of relief (financial and other); 3) resources which are used to file suit rather than pursue other jobs.”).

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


98 See, e.g., 42 U.S.C. § 2000e-5 (Title VII of the Civil Rights Act of 1964’s fee shifting provision); 29 U.S.C. § 216(b) (same for the FLSA); 42 U.S.C. § 2000e-3(a) (Title VII’s anti-retaliation provision); 29 U.S.C. § 215(a)(3) (same for the FLSA); see also Mitchell, 361 U.S. at 292 (“For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls.
In the context of government complaints, operational rights also include agencies’ ability to litigate claims on workers’ behalf at no financial cost to the worker, their capacity to collect workers’ back pay and other damages owed to them, and agencies’ promise to keep complainants’ identities confidential, at least during the initial, pre-litigation phases of an investigation.

Yet our analysis of the Unregulated Work Survey data suggests that, despite their promise, operational rights may be largely ineffective in tipping many workers’ cost-benefit analyses in the direction of claims. Indeed, those workers who did make claims nearly universally did so internally, and never filed a lawsuit or made a government complaint. For low-wage, front-line workers, the costs of this sort of external, formal claim may be too great, and on the other side of the scale, the benefits too small.

First, statutory anti-retaliation provisions often do not work, and workers know this. As Emily Spieler has observed in the context of workers’ compensation, “retaliatory discharge lawsuits [may be] a useful tool primarily for professionals, managerial, and other upper income workers,” but not for the low-wage, front-line workers studied here. Likewise, Pauline Kim points out, quoting Cynthia Estlund:

Anti-retaliation remedies can be invoked only after the employee has suffered discharge or discipline, and offer, at best, the

Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. This end the prohibition of [the FLSA] against discharges and other discriminatory practices was designed to serve.

For a description of the U.S. Department of Labor’s Wage and Hour Division’s ability to litigate on behalf of and collect workers’ unpaid back wages, see Weil, supra note 3, passim. For a description of the Equal Employment Opportunity Commission’s capabilities in these areas, see U.S. Equal Employment Opportunity Commission, Administrative Enforcement and Litigation, http://www.eeoc.gov/eeoc/enforcement_litigation.cfm.

For example, Title VII of the Civil Rights Act of 1964 requires that the Equal Employment Opportunity Commission keep employee charges of discrimination confidential from the public (though not from the defendant), under penalty of a $1,000 fine or imprisonment of up to one year. 42 U.S.C. § 2000e-5(b). See also Solis v. Seafood Peddler of San Rafael, 2012 U.S. Dist. LEXIS 172137 (N.D. Cal. Dec. 4, 2012) (noting that the U.S. Department of Labor may “use the ‘confidential informant’s privilege’ to shield the identity of the reporting employee(s),” but that “even plaintiff concedes that the defendants will eventually need to learn the identities of the informants for purposes of trial preparation and impeachment”).

Weil, supra note 21 at 3 (“[T]he need to keep one’s job trumps other considerations such as being denied overtime pay or potential exposures to health hazards, let alone issues related to supervisory treatment that may have no direct legal consequence.”).

Emily A. Spieler, Perpetuating Risk? Workers’ Compensation and the Persistence of Occupational Injuries, 31 HOUSTON L. REV. 119, 230 (1994); see also Langbert, supra note 84 at 459 (“Like other individual rights regulation, ERISA’s emphasis on court remedies may prove to be of mostly symbolic value for plaintiffs most in need of protection: those who are low-wage.”).
possibility of an uncertain remedy after a long delay. . . Given the
difficulties of pursuing a retaliation claim, [Estlund] argues, ‘all but
the most intrepid employees will be deterred, or chilled from
speaking out in ways that might provoke the employer’s
displeasure.’ To put the point more directly, speaking out at the
workplace in the ways that the law encourages is hard.\textsuperscript{104}

Indeed, in our analysis, about forty-three percent of workers who had
made claims in the twelve months prior to the survey had been retaliated against
for their most recent claim. The workers who chose not to make claims listed
retaliation-related issues as three of the top four reasons they decided to stay silent.

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

In addition, despite some recent broadening of retaliation protections
under Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act
by the U.S. Supreme Court,\textsuperscript{105} retaliation’s definition in workplace statutes and
interpretation by courts tends to be quite narrow. For example, an employer’s
threats to retaliate may not themselves be actionable, even though they may be
just as effective in silencing workers as when threats are carried out.\textsuperscript{106}
Moreover, employers may effectively retaliate against one complaining worker as
an example to the rest of the workforce; that one worker may have a cause of
action for retaliation, but her co-workers, who are now scared silent, have no
remedy.

\textsuperscript{104} Pauline Kim, \textit{Electronic Privacy and Employee Speech}, 87 Chicago-Kent L. Rev. 901,
928 (2012), quoting Cynthia L. Estlund, \textit{Free Speech and Due Process in the Workplace}, 71 Ind.
L.J. 101, 135 (1995); see also Brake, supra note 62 at 20 (“To a large extent, the effectiveness and
very legitimacy of discrimination law turns on people's ability to raise concerns about
discrimination without fear of retaliation.”).

that Title VII’s anti-retaliation provisions covered “third party retaliation,” or reprisals against
people associated with the worker who engaged in protected activity); \textit{Kasten v. Saint-Gobain
Performance Plastics Corp.}, 131 S. Ct. 1325 (2011) (holding that an oral complaint under the
FLSA counted as a protected activity for purposes of the statute’s anti-retaliation provisions).

\textsuperscript{106} See, e.g., \textit{Baloch v. Kempthorne}, 550 F.3d 1191, 1199 (D.C. Cir. 2008) (finding in
Title VII case that employer’s threats to suspend an employee did not amount to “material
adversity” that was actionable under the statute’s anti-retaliation provisions).
For plaintiffs who are undocumented or hold work-contingent visas, the consequences of retaliation may be especially severe. These workers risk losing not only their job as a result of a workplace claim, but also their home, as their employers may report them to immigration authorities. Because the downsides include not only job loss, but also loss of a visa and removal from the country, workplace claiming becomes even more risky in the transnational labor market in which immigrants work.

Second, while complaining to a government agency offers some increased level of protection – a guarantee of confidentiality, at least initially – a complainant’s identity must eventually be revealed to an employer once a case moves into litigation or another form of dispute resolution. In this way, a worker’s costs may increase over the course of the claiming process, requiring the worker repeatedly to reassess the costs and benefits of claims-making. In addition, incompetence and processing delays may render government agencies an unattractive forum for workers seeking effective and timely redress for workplace problems.107

Against these costs, the benefits of claiming appear paltry. Though back pay may be available to a plaintiff at the end of a lawsuit, if that amount is insufficiently large – and for plaintiffs who sue because they were paid less than the minimum wage, back pay awards will, by definition, be quite small – then enduring the uncertain, stressful, drawn-out process of litigation may not be worth it.108 Moreover, our analysis reveals that workers doubt the certainty of the benefit they might receive from claims-making: the second-most frequent reason for workers’ choice not to make claims was that workers doubted their claims would make any difference. (On top of this, some measure of substantive and procedural legal knowledge may be necessary for workers even to know what benefits may be available to them at the end of a lawsuit or government complaint process.)

Changing legal standards have also made it harder for groups of workers to bring claims as class actions and access the benefit of joint representation.109

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108 See Willborn, supra note 4 at 7 (“Victims with larger potential awards will be more likely to enforce for a number of related reasons, such as their ability to obtain counsel, the likelihood that the award will be larger than the pecuniary and non-pecuniary costs of suit, and the likelihood that the expected recovery will still exceed expected costs even as the probability of winning decreases.”).

109 Myriam E. Gilles & Gary B. Friedman, After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion, 79 U. Chi. L. Rev. 623 (2012) (discussing Wal-Mart v. Dukes and AT&T Mobility Limited Liability Company v. Concepcion, which narrowed the availability of class actions to employment plaintiffs); see also Pamela S. Karlan, Disarming the Private
In addition, the Fair Labor Standards Act, Equal Pay Act, and Age Discrimination in Employment Act have never allowed traditional class actions, in which a few named plaintiffs represent a largely anonymous class, but instead require each individual additional plaintiff affirmatively to opt into a case. As a result, workers are increasingly forced to bring cases alone or in small groups, with each worker’s identity exposed, setting the stage for retaliation by unscrupulous employers.

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

B. Self-Perpetuating Enforcement Gap

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

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110 29 U.S.C. § 216(b) (“No employee shall be a party plaintiff to any [FLSA] action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”); 29 U.S.C. § 626(d) (incorporating the FLSA’s opt in requirement into the ADEA); 29 U.S.C. § 206(d) (incorporating the FLSA’s opt in requirement into the EPA, which in any case is technically a part of the FLSA).


113 Moreover, most of the FLSA suits that are filed are likely brought by managers claiming to have been illegally misclassified as exempt from overtime, not by low-wage, front-line workers who are making minimum wage claims.
Likewise, workers do complain to government agencies about workplace problems, but those complaints may not be coming from the workplaces most in need of agency enforcement. For example, an analysis of wage and hour complaints to the U.S. Department of Labor found an “average of less than 25 complaint cases for every 100,000 workers” and “only modest overlap” between complaints and employers’ compliance with Fair Labor Standards Act requirements.\(^\text{114}\) In other words, the “market” in complaints may be failing to identify the workplaces most in need of agency intervention.\(^\text{115}\)

This produces, in the end, a self-perpetuating enforcement gap in low-wage workplaces, in which worker claims are the driver of workplace law enforcement but only about half of workers are likely to make claims. Employers know this, and the unscrupulous among them feel free to underpay workers’ wages, discriminate, maintain unsafe working conditions, engage in unfair labor practices, and otherwise violate workers’ rights with relative impunity.\(^\text{116}\) Workers are over-deterred from claiming, while employers are under-deterred from complying.

V. ALTERNATIVES

This Part examines alternatives to the current bottom up workplace law enforcement regime. Heeding John Coffee’s admonition that “the academic reformer has a duty to specify not only what the optimal solution is, but what the first tentative steps are that should be taken toward it,”\(^\text{117}\) we first propose reforms that would address the problems of lack of legal knowledge and claiming incentives among low-wage, front-line workers. These changes would preserve the bottom up structure of workplace law enforcement, but would attempt to do a better job of increasing benefits and decreasing costs than the present system of operational rights, thereby preventing claims from escaping the workplace dispute pyramid. Possible reforms include minimizing bottom up enforcers’ costs by

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\(^{114}\) Weil & Pyles, supra note 7 at 69, 73.

\(^{115}\) For statistics on the background level of workplace rights violations in low-wage workplaces, see Bernhardt et al., supra note 31 at 2 (“We found that many employment and labor laws are regularly and systematically violated, impacting a significant part of the low-wage labor force in the nation’s largest cities.”); Donald M. Kerwin & Kristin McCabe, Labor Standards Enforcement and Low-Wage Immigrants, Migration Policy Institute 21 (July 2011) (“[T]here is substantial evidence that unauthorized immigrants work at high rates in industries with long track records of labor standards violations” and listing agriculture, meat, poultry, and fish processing, garment assembly, and sewing as industries in which wage and hour violations are “endemic”); Siobhán McGrath, A Survey of Literature Estimating the Prevalence of Employment and Labor Law Violations in the U.S., Brennan Center for Justice (Apr. 15, 2005), http://brennan.3cdn.net/bdeabec099b7581a26_srm6br9zf.pdf.

\(^{116}\) As Weil and Pyles put it, “an intrinsic problem arising from the statutory structure of workplace rights is that if left to the decision of an individual worker, the threshold for exercise of rights lies above the threshold optimal from the workplace-and societal-level.” Weil & Pyles, supra note 7 at 86.

strengthening retaliation protections, eliminating the opt in requirement of some employment statutes, and establishing an arbitration system that workers could choose to access to achieve a quick resolution of their claims. On the benefits side, we consider sweetening the proverbial pot by lifting damages caps, offering treble damages, and making punitive damages more readily available.118

Second, we consider workplace law enforcement regimes that would rely less heavily on workers themselves to initiate claims. Here, we propose increasing top down, government investigative and prosecutorial activity and setting government enforcement priorities such that agencies take action in the workplaces where workers are least likely to step forward themselves. This set of proposals is far from comprehensive, and is meant to complement calls for reform previously suggested by other scholars and advocates.119

118 Each of these solutions focuses specifically on reforming bottom up workplace law enforcement rather than empowering workers generally to change conditions at work. If this were the broader goal, then union organizing and worker centers, among other solidarity-building strategies, would certainly need to be added to the mix. See Jennifer Gordon, We Make the Road by Walking: Immigrant Workers, the Workplace Project and the Struggle for Social Change, 30 HARV. C.R.-C.L. L. REV. 407 (1995) (describing the operation of a worker center in advocating for worker rights and empowerment). In fact, Allison Morantz has demonstrated that the unionization of a workplace can not only empower workers, but also increase legal compliance, at least in the area of mine health and safety. Alison D. Morantz, Coal Mine Safety: Do Unions Make a Difference? (May 29, 2012). INDUSTRIAL AND LABOR RELATIONS REVIEW, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1846700 or http://dx.doi.org/10.2139/ssrn.1846700. In addition, other reform methods harnessing technology and market discipline are possible. For example, the U.S. Department of Labor has recently developed a smartphone app that allows consumers to research whether a particular business owes its employees back wages or has been cited for health and safety violations. Eat Shop Sleep, http://itunes.apple.com/us/app/eat-shop-sleep/id465262617?mt=8. Similarly, the new initiative Coworker.org allows workers to launch online petitions and organize themselves virtually across companies and industries to call attention to problems on the job. http://signup.coworker.org/. Finally, including better measures of job quality in corporate social responsibility (CSR) indices might recruit activist consumers to the project of improving low-wage work by directing their dollars toward companies with high CSR values in the labor and employment category. See, e.g., Leonardo Becchetti, et al., Corporate Social Responsibility and Stock Market Performance. CEIS Working Paper No. 79. Available at SSRN: http://ssrn.com/abstract=897499 or http://dx.doi.org/10.2139/ssrn.897499 (2006) (describing corporate social responsibility rankings issued by RiskMetrics-KLD, “one of the most widely adopted CSR scoring standards,” which includes items around employee relations).

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

A. Disseminating Legal Knowledge

At first glance, the goal of disseminating legal knowledge – a necessary condition for workplace claims – would seem to be low hanging policy fruit. However, educating workers effectively about their substantive and procedural legal rights is a relatively complex and difficult endeavor. Many employers, including those covered by the Unregulated Work Survey, are already required to post information on a variety of workers’ rights. In fact, the U.S. Department of Labor provides eleven different “know your rights” posters, in a variety of languages, that employers may be required to display in the workplace. Yet

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

121 The question of whether increased workplace law enforcement would in fact decrease employment levels is an empirical one that merits study. Similar predictions have been made with respect to the negative effects of a minimum wage increase on employment levels, but repeated studies have called these theories into question. See, e.g., Liana Fox, Minimum Wage Trends: Understanding Past and Contemporary Research, Economic Policy Institute Briefing Paper No. 178 at 1 (Nov. 8, 2006) (examining research since the 1970s and concluding, “[T]here is a growing view among economists that the minimum wage offers substantial benefits to low-wage workers without negative effect. Although there are still dissenters, the best recent research has shown that the job loss reported in earlier analyses does not, in fact, occur when the minimum wage is increased.”).

our findings that approximately fifty-nine percent of low-wage, front-line workers did not know their minimum wage and overtime rights and seventy-eight percent did not know how to file a government complaint (both subjects of Department of Labor posters) suggest that this method of disseminating legal knowledge is highly ineffective. Moreover, Pauline Kim’s theory that powerful social norms can override explicit employer-provided messages about legal rights calls into question whether the workplace is the most appropriate place for educating workers about their legal rights and protections.123

Instead, advocacy groups, unions, worker centers, and government agencies should distribute materials, hang posters, give presentations, perform skits, and make announcements in the places where workers are otherwise accustomed to receiving information: at places of worship, at community centers, at festivals and fairs, on the radio, and on television. These outreach efforts could specifically target the groups of workers shown by our analysis to be less likely to have accurate substantive and procedural legal knowledge: undocumented workers, those employed by relatively small or non-“high road” employers, and women workers. The U.S. Department of Labor’s “We Can Help” initiative is an example of this sort of campaign, incorporating language-appropriate public service announcements and materials designed specifically to assure undocumented workers that they have substantive workplace rights and to educate them on enforcement procedures.124 Perhaps in this way accurate substantive and procedural legal knowledge will find its way into the web of information that workers carry with them into the workplace and that influences their ability and willingness to make claims on the job.

Because lawyers themselves can also be sources of information about the law, access to legal advice and representation may be a key component to increasing workers’ legal knowledge. Though the phenomenon of lawyers ginning up cases by recruiting potential plaintiffs is often portrayed negatively by the media and academic commentators, little attention is paid to the potentially

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123 Kim (1998), supra note 90 at 110 (1998) (“[R]espondents overwhelmingly misunderstand the background legal rules governing the employment relationship. More specifically, they consistently overestimate the degree of job protection afforded by law, believing that employees have far greater rights not to be fired without good cause than they in fact have.”); Kim (1999), supra note 90 at 447 (“Contrary to the assumption commonly made by defenders of the at-will rule, [surveys of workers in Missouri, New York, and California] indicate that workers do not understand the default presumption [of at-will employment], but erroneously believe that the law affords them protection akin to a just cause contract, when, in fact, they can be dismissed at will.”); see also Gleeson, supra note 77 at 562 (“It is clear that immigrant workers, like the average low-wage worker, often lack sufficient knowledge about the laws governing work in America. Language barriers and lack of culturally appropriate information intensify this barrier.”).

salutary function of so-called ambulance chasers and bounty hunters. Lawyers who take an active role in outreach efforts, whether to recruit clients or merely to perform a public service, serve a valuable education and empowerment function. Increasing access to legal services may then help address the legal knowledge deficit suggested by the data analyzed in this Article. (Though the survey data do not answer the question of whether lawyers were available to the respondents, lawyer usage was likely very low, as only four percent of workers chose to take their claims to any third party or intermediary outside the company.)

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

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

FLS [Farmworker Legal Services] has a hidden motive when they approach you. They say that they are your friends and they are concerned about your rights and well being, but in reality their motive is to destroy the program which brings you to North Carolina legally . . . FLS discourage [sic] the growers with excessive suits which are for the most part without merit. The history of FLS shows that the workers who have talked with them

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126 Study after study has documented the gulf between civil legal needs and lawyer availability, particularly for ex ante legal advice. See, e.g., Gillian K. Hadfield, The Cost of Law: Promoting Access to Justice Through the Corporate Practice of Law, Center in Law, Economics and Organization Research Papers Series No. C’12-16 1 (Dec. 7, 2012) (gathering studies and noting that “ordinary people are largely shut out from legal assistance; the great majority of legal work is done for corporations, organizations, and governments”).


128 Id. at 218 (“[The workers’ employer] spoke at length about the Farmworker Unit of Legal Services of North Carolina . . . He told the workers that Legal Services was their enemy. He told the workers they should avoid Legal Services.”).
have harmed themselves. Don’t be fooled and allow them to take away your jobs.129

On the wall at the orientation site also hung a banner which read, in Spanish, “Legal Services Want to Destroy the H-2A Program” and “Don’t be a puppet of Legal Services.”130 Workers reported feeling that if they “keep [the] booklets or if they are ever seen with one of [the] booklets, they will be fired or have serious problems” with their employer.131

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

B. Minimizing the Costs

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

First, Congress and the courts should strengthen existing retaliation protections within labor and employment laws by broadening the definition of “adverse employment action” unambiguously to include threats.132 This would acknowledge the chilling effect that such threats, even if never executed, have on workplace claiming behavior. It would also likely address the prevalence of non-actionable reprisals in the workplace, as illustrated by the twenty-eight percent of workers in this analysis who made claims about justiciable workplace problems

129 Id. at 218-19 (“Mr. Hill then held up a copy of the ‘Know Your Rights’ booklet produced by Legal Services. He ordered workers to toss the ‘Know Your Rights’ booklet into the trash can. . . Following Hill’s admonition, workers discarded their booklets en masse.”).
130 Id. at 221.
131 Id. at 220.
132 Charlotte S. Alexander, Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce (February 6, 2013) http://ssrn.com/abstract=2212763 (arguing that courts should recognize a cause of action for “per se” or “facial” violations of statutory anti-retaliation provisions to cover threats by employers designed to silence workers’ future potential protected activity); Levinson, supra note 70; Clemons, supra note 70.
and then faced forms of retaliation that fell outside the coverage of labor and employment law.

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

To make it harder for employers to identify the workers to retaliate against, then, our second proposal is that Congress should eliminate the opt in requirement of the Fair Labor Standards Act, the Equal Pay Act, and the Age Discrimination in Employment Act. Particularly for low-wage, front-line workers, the opt in requirement acts as a barrier to participation in litigation because it requires workers to take the very public step of joining a lawsuit, rather than being part of an anonymous class represented by a few named plaintiffs. Anonymous class membership protects workers from retaliation, because employers may not be able to identify with certainty which particular workers are participating in a lawsuit. Moreover, workers have some measure of deniability, because they are included in the plaintiff class not because they chose to join, but rather because they fall into the class definition. Of course, this feature of the opt out Fed. R. Civ. P. 23 class action has been criticized for being un-democratic and

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133 Public Company Accounting Reform and Corporate Responsibility Act (“Sarbanes-Oxley”), 15 U.S.C. § 7201 et seq. (2012); Estlund (2005), supra note 6 at 376 (“Sarbanes-Oxley represents the gold standard in protection of employee whistleblowers, with both criminal sanctions and fully compensatory private civil remedies against reprisals.”).


135 Alexander (2010), supra note 112 at 484 (“In many ways, the opt in requirement of the FLSA seems to eliminate any possibility of collective action, making the FLSA enforceable only by individuals or very small groups. The opt in requirement may, therefore, undermine the project of law enforcement generally, dissuading plaintiffs from acting collectively as private attorneys general to enforce the FLSA’s minimum wage and overtime mandates.”). At the very least, courts should permit language in the opt in notice that advises undocumented workers that their immigration status is not relevant to the case. See, e.g., Enriquez v. Cherry Hill Market Corp., Case No. 10-CV-5616 (FB) (ALC), Memorandum and Order (E.D.N.Y. Feb. 10, 2012), http://docs.justia.com/cases/federal/district-courts/new-york/nyedce/1:2010cv5616/312066/36/0.pdf?ts=1328966650 (approving FLSA opt in notice language informing potential opt in plaintiffs that their immigration status is irrelevant).
discouraging plaintiff autonomy.\textsuperscript{136} However, this criticism fails to recognize the benefits of the anonymous, automatic nature of the traditional class action for low-wage, front-line plaintiffs who are extremely susceptible to retaliation.\textsuperscript{137} Thus, all areas of employment law should be made consistent with the great majority of federal statutes, in which plaintiffs are permitted to use the class action device of Fed. R. Civ. P. 23 and receive the protection of relative anonymity within the class.\textsuperscript{138}

Third, we propose an alternative method of claim resolution. For justiciable workplace claims that are not already covered by an administrative exhaustion requirement, the U.S. Department of Labor should establish an optional, one-way binding arbitration system, modeled on a program in place at The Coca-Cola Company, that would give workers a forum for speedy claim resolution.\textsuperscript{139} This system would not increase the size or certainty of the benefits of claiming, but would reduce the costs associated with trying to achieve those benefits. The program could be funded by civil monetary penalties collected by the Department from law-breaking employers, and arbitration would be free for workers who could demonstrate financial need, much as \textit{in forma pauperis} determinations are made. The parties could choose to use this system at their discretion, and, as in Coca-Cola’s system, the arbitrator’s decision would be binding on the employer only. Particularly for workers who have been fired in retaliation for claims-making, this system would allow them to collect back pay and/or return to their jobs more quickly than in a typical lawsuit, without

\textsuperscript{136} See, e.g., Alexander (2010), \textit{supra} note 112 (summarizing criticisms of Fed. R. Civ. P. 23 class actions).

\textsuperscript{137} Research is being conducted on the benefits of anonymity in the analogous whistleblower context and one study has found that “anonymity, trust, and risk are high salient in the [whistle-blowing reporting system] context.” Paul Benjamin Lowry et al., \textit{The Drivers in the Use of Online Whistle-Blowing Reporting Systems}, Journal of Management Information Systems, forthcoming (Nov. 6, 2012), available at SSRN: http://ssrn.com/abstract=2173643; see also Weil, \textit{supra} note 21 at 13 (noting “over two decades of evidence that shows that workers are more likely to exercise rights given the presence of a collective workplace actor”).

\textsuperscript{138} We acknowledge that class members’ identities are often exposed at the end of a lawsuit when they must collect their portion of settlement or judgment proceeds. However, the risk of retaliation at this point is relatively low, as the litigation has already concluded. We also acknowledge that courts have restricted the Rule 23 class action as a vehicle for collective complaint, but we nevertheless think it preferable to the current opt in regime in place in the FLSA, EPA, and ADEA.

\textsuperscript{139} Suzette M. Malveaux, \textit{Is it the “Real Thing”? How Coke’s One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration}, 2009 J. DISP. RESOL. 77, 78 (2009) (“This unilateral arrangement-voluntarily adopted by the Coca-Cola Company following its historic employment discrimination class action settlement—is a groundbreaking and novel approach to promoting arbitration, while also protecting employee choice and access to the court system. One-way binding arbitration also offers employers an opportunity to forge new ground. Companies can enjoy all of the benefits of arbitration--such as efficiency, privacy, cost savings and litigation avoidance-while bolstering workplace relations that may enhance profitability.”); see also David Sherwyn, J. Bruce Tracey & Zev J. Eigen, \textit{In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process}, 2 U. PA. J. LAB. & EMP. L. 73 (1999) (arguing that employees should reconsider arbitration as a tool for speedy resolution of disputes).
requiring them to relinquish their right to file their claim in court. Employers, too, would benefit from the speed and efficiency of arbitration. (Employees with group claims, however, would still have to pursue their claims in court, as arbitration would not be well-suited for resolutions of collective or class actions.\footnote{Malveaux, supra note 139 at 134-35 (“Finally, while [Coca-Cola’s] Solutions program may be appropriate for addressing individual employee work-related matters, it is not appropriate for resolving class actions or other actions alleging systemic corporate misbehavior. Because of the important role the courts play in resolving cases with larger societal implications, employees must be permitted to challenge an employer’s pattern or practice of conduct without having to go through an internal company resolution process. The judiciary’s unique public function and procedural attributes make it especially well-suited for addressing large-scale employment issues.”).})

Each of these proposals seeks to lower the costs of claims-making by increasing retaliation protections, facilitating group action by plaintiffs, and speeding the process of workplace dispute resolution. However, as Steven Willborn has observed, minimizing worker costs may not be effective in and of itself in encouraging claims; increasing the benefits may also be necessary.\footnote{Willborn, supra note 4 at 12-13 (“[E]ven with retaliation protection, individuals are more likely to come forward in situations in which there is little risk of retaliation than in situations where they have to rely on retaliation protections. In turn, this implies that positive inducements, rather than protection against negative consequences, may be necessary to produce adequate private enforcement in some circumstances.”).}

\section*{C. Maximizing the Benefits}

Workers might also be incentivized to act if there were greater benefits associated with making claims. Here, Congress could lift the cap on Title VII damages,\footnote{42 U.S.C. § 1981a(b)(3) (imposing caps on Title VII damages of between $50,000 and $300,000 depending on employer size).} make punitive damages more readily available to plaintiffs, especially in cases of retaliation,\footnote{At present, punitive damages are generally not available for retaliation claims under the FLSA, the National Labor Relations Act, the Family and Medical Leave Act, and the Americans with Disabilities Act, and are available, but with statutory caps, under Title VII. Jackson v. Estelle's Place, LLC, 391 Fed. Appx. 239, 247 (4th Cir. 2010) (noting that punitive damages “are not available for claims under the FLSA”); NLRB v. Pepsi Cola Bottling Co. of Fayetteville, Inc., 258 F.3d 305 (4th Cir. 2001) (holding that “an explicitly punitive method of calculation [of backpay] is contrary to the purposes of the [National Labor Relations] Act”); Farrell v. Tri-County Metro. Transp. Dist., 530 F.3d 1023, 1025 (9th Cir. 2008) (“It is well-settled that the FMLA, by its terms, only provides for compensatory damages and not punitive damages.”); Alvarado v. Cajun Operating Co., 588 F.3d 1261, 1265 (9th Cir. 2009) (noting courts’ “divergent approaches” to availability of punitive damages for ADA retaliation claims and holding that punitive damages are not available); 42 U.S.C. § 1981a(b)(1) (“A complaining party [under Title VII] may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”); 42 U.S.C. § 1981a(b)(3) (capping Title VII damages at between $50,000 and $300,000 depending on employer size).} and allow plaintiffs to collect treble damages,
perhaps upon a showing of outrageous conduct and/ or recidivism by the defendant.\footnote{144}

Federal statutes in areas other than labor and employment provide models for offering increased incentives to expose wrongdoing. For example, the Internal Revenue Service entices people to report tax fraud by offering between fifteen and thirty percent of the back taxes and other funds ultimately collected by the Service;\footnote{145} the Dodd-Frank Wall Street Reform and Consumer Protection Act offers whistleblowers between ten and thirty percent of monies recovered as a result of tips about insider trading and other violations of securities law;\footnote{146} the \textit{qui tam} provision of the False Claims Act allows people who report fraud against the federal government to collect up to thirty percent of recovered damages.\footnote{147}

However, in practice, such incentives may not be very effective at encouraging claims-making. A study of federal statutory whistleblower incentives reveals that, “though [individual] rewards under existing whistleblower programs may be substantial, general use of the programs is not high.”\footnote{148} This, again, points to the tricky problem of cost and benefit: if existing reward programs targeting sophisticated potential whistleblowers in the financial sector have been relatively unsuccessful in incentivizing claims,\footnote{149} it is likely that the analog in the labor and employment law context – offering much higher damages awards as an increased potential benefit for plaintiffs – may also fail to encourage low-wage, front-line workers to exercise voice.\footnote{150}

\section*{D. Increasing Government Enforcement}


\footnote{147} 31 U.S.C. §§ 3729-3733.

\footnote{148} Jonathan L. Awner & Denise Dickins, \textit{Will There Be Whistleblowers? REGULATION} 36 (Summer 2010). At the time of writing, the Dodd-Frank Act was still fairly new, and so the success of its whistleblower incentive provisions are still relatively untested. In addition, in 2012, an IRS tipster received an unprecedented award of $104 million. Paul Sullivan, \textit{The Price Whistle-Blowers Pay for Secrets}, The New York Times (Sept. 21, 2012). It remains to be seen whether this highly-publicized award will increase the level of IRS whistleblower activity.

\footnote{149} \textit{See, e.g.,} Sullivan, \textit{supra} note 148 (describing the costs that whistleblowers pay, “‘If you look at the field of whistle-blowers, you see a high degree of bankruptcies. You may find yourself unemployable. Home foreclosures, divorce, suicide and depression all go with this territory.’”).

\footnote{150} In addition, research has shown that, among the options of rewards, liabilities, duties, and protections, the availability of rewards for reporting illegal conduct may trigger “less reporting than merely offering protection or establishing a duty.” Feldman & Lobel, \textit{supra} note 19 at 1155.
Each of the foregoing reforms would preserve the fundamental bottom up nature of workplace law enforcement, while attempting to improve workers’ legal knowledge and recalibrate their incentive structures such that low-wage, front-line workers might be enabled to act as enforcers of their workplace rights. However, given the fundamental problems with bottom up enforcement suggested by the Unregulated Work Survey data, such tinkering around the margins might be insufficient, akin to rearranging the deck chairs on the Titanic.

A more fundamental reform would advocate shifting more enforcement from the bottom to the top, increasing government investigation and oversight rather than relying so heavily on workers themselves to be the drivers of enforcement activity. After all, government enforcement agents are insulated from many of the risks faced by worker-claimants: their salaries are paid regardless of the outcome of a lawsuit; they are unaffected by defendant retaliation.151

Michael Waterstone has made just such a proposal in the disability law context, arguing that certain case types – failure to hire and public accessibility – are particularly well suited to public enforcement.152 In the labor and employment context, Steven Willborn has suggested case types that would be appropriate for increased government enforcement, in areas where private litigation leaves gaps: “low-damages cases, large cases which involve heavy litigation-related investments, and violations not producing wage losses.”153 Likewise, David Weil has advocated that the U.S. Department of Labor’s Wage and Hour Division focus its investigative resources on “fissured” industries, in which businesses employ high numbers of subcontractors and other contingent workers and disclaim any legal responsibility for wages and working conditions.154

To these lists we add cases in which workers would be particularly unlikely to complain on their own, where workers have low levels of substantive and procedural legal knowledge, and where workers are highly susceptible to retaliation. Indeed, the U.S. Equal Employment Opportunity Commission’s most recent Strategic Enforcement Plan (SEP) names as an enforcement priority “protecting immigrant, migrant, and other vulnerable workers,” and calls for a focus on “[i]ssues affecting workers who may lack an awareness of their legal protections, or who may be reluctant or unable to exercise their rights.”155

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151 See Yaniv, supra note 5 at 352 (“While the expected gain from complaining is obvious, there is a serious risk involved: losing one’s job. However, when a worker’s complaint is placed anonymously (or when the enforcement agency is bound not to disclose his identity), there is no reason to expect a personal reaction on the part of the employer.”).
153 Willborn, supra note 4 at 13.
154 Weil, supra note 3 at 18-26.
In implementing goals such as these, government enforcers could develop a sort of “vulnerability index,” taking into account workers’ wages, immigration status, unionization levels, and education levels within a particular industry.\footnote{Martha Albertson Fineman’s extensive work on vulnerability provides a theoretical backdrop for creation of a vulnerability index; Kerry Rittich’s work on employee vulnerability is informative as well. See, e.g., Martha Albertson Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, 20 Yale J.L. & Feminism 1, 20-21 (2008) ("The vulnerability inquiry examines the ways in which societal resources are channeled to see if the result is to privilege and protect some while tolerating the disadvantage and vulnerability of others. This focus on the structuring of societal institutions reflects the fact that the state has an affirmative obligation not to privilege any group of citizens over others and to actively structure conditions for equality."); Kerry Rittich, Vulnerability at Work: Legal and Policy Issues in the New Economy, Report for the Law Commission of Canada 4 (Jan. 25, 2004) ("Vulnerability and insecurity at work can arise from: 1) the distribution of risks, costs, benefits and powers among workers and employers; 2) the (in)capacity of workers to conform to or perform according to workplace rules and norms; 3) the allocation of work among workers, including unpaid work; 4) (in) access to resources; 5) discrimination, either directly on the basis of a particular characteristics or grounds or through their intersectional operation or indirectly, because of the connection between these grounds and the factors listed above").} Industries with high vulnerability index scores could be prioritized in agencies’ strategic enforcement plans.\footnote{The U.S. Department of Labor’s public communications speak of advocacy on behalf of “vulnerable workers” such as homeless people, but do not appear to define that term. See, e.g., DOL News Brief (Oct. 18, 2012) (reporting on “roundtable discussions” between U.S. Secretary of Labor Hilda Solis and “representatives of vulnerable communities in Seattle, New Orleans, and San Francisco”).} Likewise, agencies might prioritize retaliation cases, sending a message to unscrupulous employers that they will not be permitted to silence worker claims through threatened and actual reprisals.

However, as Cynthia Estlund has observed, it may not be realistic to expect ‘regulators’ sights . . . to remain permanently fixed on the targeted sectors,” as there will “simply never be enough government inspectors to do the job alone.”\footnote{Estlund (2005), supra note 6 at 362.} Nor would a completely top-down labor and employment inspectorate-type system be desirable, as it would throw the benefits of bottom up enforcement out with the proverbial bathwater.\footnote{See Introduction, supra, outlining bottom up enforcement’s benefits; see also Kevin Kolben, International Labor Standards: The WTO Distraction, 21 Stan. L. & Pol’y Rev 461, 483 (2010) (describing problems in countries with top-down labor inspectorate systems of “weak enforcement and poor compliance by the regulated, [and] almost negligible, understaffed, and corrupt labor inspectorates”).} Public and private workplace law enforcement should exist in a complementary relationship, in which one mode of enforcement compensates for the failings and inadequacies of the other. We have argued here that the current system of bottom up workplace law enforcement relies too heavily on workers themselves to be claims-makers. A
reinvigorated, targeted top down enforcement regime, along with reforms to the bottom up system to expand workers’ legal knowledge and offer better incentives for claims-making, would draw on the strengths of both modes of enforcement and, we hope, ultimately improve conditions for low-wage, front-line workers.
APPENDIX A: UNREGULATED WORK SURVEY QUESTIONS

Survey Questions Related to Workplace Problems and Claims

1. During the last 12 months, did you make a complaint, either by yourself or with co-workers, about your working conditions, by going to your employer, supervisor or going to a government agency? Don't tell me yet about any attempts you may have made to form a labor union, we'll get to that later.
   a. Yes
   b. No

2. How many times did you make a complaint, either alone or with your co-workers, over the past 12 months? Remember, I'm talking about complaints that you made about a job here in CITY.
   a. None, never made complaint
   b. 1-96 times
   c. More than 96 times (SPECIFY)

3. Tell me about the most recent complaint you made. What specifically did you complain about? Choose all that apply.
   a. Paid below the minimum wage
   b. Not paid for all hours worked
   c. Forced to work off the clock
   d. Not paid for overtime
   e. Not paid on time
   f. Improper deductions from paycheck
   g. Dangerous working conditions
   h. Discrimination
   i. Abuse or harassment by supervisor
   j. Abuse or harassment by co-worker
   k. No breaks, or not enough breaks
   l. Bad schedule/shift
   m. Needed a raise/pay is too low
   n. Lack of health insurance or paid sick days
   o. Increased workloads – made me/us work more
   p. Other (SPECIFY)

4. Did you make this complaint by yourself, or with your co-workers?
   a. Myself
   b. With co-workers
   c. Both

5. When did you make this most recent complaint?
   b. ENTER MONTH (1-12):

6. How did you make this complaint? Choose all that apply.
   a. Discussed the problem with supervisor or employer.

---

\[160\] We coded “both” responses as claims made with co-workers rather than alone.
b. Asked a lawyer, union representative, worker center, or other community
group to complain to employer on your behalf.
c. Filed a complaint with an agency, like the Department of Labor or
OSHA
d. Testified at a hearing / participated in an official investigation into a
claim
e. Other (SPECIFY)

7. During the past 12 months, were there times when you DID NOT complain, even
though you had a problem at your job with dangerous working conditions,
discrimination, not being paid the minimum wage or not being paid overtime?
Again, I'm only talking about jobs you've held here in CITY.
   a. Yes
   b. No

8. What stopped you from complaining? Choose all that apply.
   a. Afraid of losing your job
   b. Afraid to say anything because of immigration status
   c. Afraid of getting hours or wages cut
   d. Afraid the company would close down
   e. Seen other co-workers disciplined (fired, threatened or treated badly) for
      speaking up
   f. Did not know who to talk to or where to take the complaint
   g. Employer made threats to you or your co-workers -- if you filed a
      complaint they would fire you, report you to immigration, etc
   h. Didn't think it would make a difference (tried in the past but didn't get
      anywhere)
   i. Other (SPECIFY)

Survey Questions Related to Retaliation

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

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

2. Did your employer or supervisor do any of the following as a direct result of this
complaint? Choose all that apply.
   a. Did your employer or supervisor threaten to fire you or your co-workers?
   b. Did they threaten to call the police or immigration?
   c. (Did they) threaten to close or move the company?
   d. (Did they) fire you or your co-workers?
   e. (Did they) suspend you or your co-workers?

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

Survey Questions Related to Substantive and Procedural Legal Knowledge

1. Do you know where to file a complaint with the government if you are having a 
   problem with an employer?
   a. Yes
   b. No

2. As far as you know, what is the current minimum wage in CITY?
   a. ENTER AMOUNT

3. As far as you know, do employers have to pay workers more than their usual 
   wage when they work more than 40 hours in a week?
   a. Yes
   b. No

4. As far as you know, does the law allow employers to pay undocumented workers 
   less than the minimum wage?
   a. Yes
   b. No

Survey Questions Related to Social Networks

1. First, I want you to think about ALL the people that you know PERSONALLY. 
   That means your family, your relatives and your friends, but ALSO co-workers 
   and people you know who you have seen in the past SIX MONTHS. Don't just 
   tell me about people who you know really well, but also people you see often or 
   speak with regularly, including people in your neighborhood. Now I'm going to 
   read you a list of jobs, and ask you how many people you know who do each 
   type of job. They should be people who:
   a. ARE 18 YEARS OLD OR OLDER.
   b. ARE WORKING FOR SOMEONE ELSE: So if they own their own 
      business, or if they manage or supervise other people, don't count them.
   c. ARE CURRENTLY WORKING here in LOCATION. You can count 
      people who are working off the books, and people who don't have their 
      immigration papers. Here's a map of LOCATION.

2. I'm going to read you a type of job, and for each, tell me how many people you 
   know who are currently working that type of job:
   a. How about, Security guards?
   b. Teacher's aides? Please do not count teachers, just teacher's aides.
   c. People who work in private homes as nannies, domestic workers, or 
      housekeepers. Please don't count teenagers or people who babysit 
      once in a while.
   d. What about other child care workers, who either work in a day care 
      center, or take children into their own homes?
   e. People who are housekeepers in hotels?
f. People who work in restaurants, bars, fast food places, cafeterias, and other places where food or drinks are served. For example, cooks, dishwashers, cashiers, bus boys, and waiters and waitresses, and people who deliver food for restaurants.

g. Janitors or cleaners in buildings, hotels, or stores.

h. People who work in hair salons and nail salons. Please don't count people who own their own businesses.

i. People who work in residential construction, building or remodeling single family homes or small apartment buildings. This would include painters, laborers, drywall installers, and roofers. Please do not count subcontractors, managers or crew leaders, or skilled trades like electricians and plumbers.

j. Gardeners and landscapers. Please do not count subcontractors, managers, or crew leaders.

k. People who work in car washes or as gas station attendants.

l. People who work as nursing aides in nursing homes

m. What about home health care workers, who take care of patients in the patients' homes?

n. People who work for dry cleaners or laundries, including laundry plants.

o. People who work in food manufacturing, like meatpacking, food processing and baking. Please count workers who operate machines, work on assembly lines, pack products into boxes, or move or ship those products. And please count people who work at home doing food preparation for a company or restaurant.

p. People who work making clothes for companies. Please count workers who sew, cut fabric, pack clothing into boxes or onto hangers, and inspect finished products. And please count people who work in factories and also those who work out of their home for a company.

q. People who work in furniture factories. Please don't count managers, just people who work on the shop floor.

r. People who do packing and moving jobs in warehouses.

s. People who work in grocery stores, drug stores, or supermarkets. For example, cashiers and baggers, people who wash and sort produce or who work in the stock room, as well as people who make deliveries. Please do not count managers, pharmacists, butchers or other specialty foodworkers, or people who work as janitors and cleaners.

t. People who work in other kinds of retail stores, like department stores, clothing stores, office supply stores, furniture stores, or auto supply stores. Again, we are interested in people who work as cashiers, on the shop floor helping customers, who make deliveries, or who work in the stock room - but not janitors. And don't count people who work in a car dealership.

u. People who work as bank tellers.

v. People who repair cars. For example, people who do body work, change tires, and make engine repairs, but who do not work for an auto dealership.

w. People who work in parking garages, parking lots or as valet parkers.
**APPENDIX B**

Table 7: RDS Population Point Estimates and Confidence Intervals

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

<table>
<thead>
<tr>
<th>Variable</th>
<th>Population Point Estimate</th>
<th>Lower Confidence Interval</th>
<th>Upper Confidence Interval</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identified (perceived) workplace problem in past 12 months</td>
<td>33.10%</td>
<td>30.71%</td>
<td>35.49%</td>
</tr>
<tr>
<td>Made claim about workplace problem in past 12 months</td>
<td>56.87%</td>
<td>50.79%</td>
<td>62.95%</td>
</tr>
<tr>
<td>Made claim about <em>justiciable</em> workplace problem in past 12 months</td>
<td>65.12%</td>
<td>57.95%</td>
<td>72.28%</td>
</tr>
<tr>
<td>Method(s) of claiming&lt;sup&gt;161&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>To employer</td>
<td>95.87%</td>
<td>95.87%</td>
<td>95.87%</td>
</tr>
<tr>
<td>To lawyer, union rep, or other intermediary</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>To government agency</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Subject(s) of claim</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Quality of worklife, e.g. commute time, workload, work schedule</td>
<td>44.51%</td>
<td>35.13%</td>
<td>53.88%</td>
</tr>
<tr>
<td>Pay</td>
<td>39.73%</td>
<td>32.35%</td>
<td>47.11%</td>
</tr>
<tr>
<td>Discrimination, harassment, or abuse</td>
<td>27.42%</td>
<td>19.34%</td>
<td>35.49%</td>
</tr>
<tr>
<td>Unsafe working conditions</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Benefits</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Reason(s) for not making claim</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Afraid would be fired</td>
<td>59.77%</td>
<td>55.90%</td>
<td>63.65%</td>
</tr>
<tr>
<td>Did not think claim would make a difference</td>
<td>45.92%</td>
<td>42.35%</td>
<td>49.49%</td>
</tr>
<tr>
<td>Some other/ miscellaneous reason</td>
<td>25.48%</td>
<td>19.59%</td>
<td>31.36%</td>
</tr>
<tr>
<td>Seen others retaliated against making claims</td>
<td>14.28%</td>
<td>9.02%</td>
<td>19.53%</td>
</tr>
<tr>
<td>Afraid of hours/ wages being cut</td>
<td>11.97%</td>
<td>8.35%</td>
<td>15.59%</td>
</tr>
<tr>
<td>Did not know how to make a claim</td>
<td>11.82%</td>
<td>5.73%</td>
<td>17.92%</td>
</tr>
<tr>
<td>Afraid due to immigration status</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Afraid due to employer threats</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Afraid company would close</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

<sup>161</sup> Because survey respondents were given the opportunity to choose more than one answer to the questions concerning method of claiming, subject of claim, and the reason why some respondents did not make a claim, those population point estimates refer to the percentage of responses, not the percentage of respondents.
<table>
<thead>
<tr>
<th>Variable</th>
<th>Population Point Estimate</th>
<th>Lower Confidence Interval</th>
<th>Upper Confidence Interval</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employer response to most recent claim about justiciable problem in past 12 months</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reprisals</td>
<td>43.05%</td>
<td>39.80%</td>
<td>46.29%</td>
</tr>
<tr>
<td>Unlawful retaliation</td>
<td>34.73%</td>
<td>27.57%</td>
<td>41.89%</td>
</tr>
<tr>
<td>Addressed/ promised to address claim (resolution)</td>
<td>14.92%</td>
<td>9.64%</td>
<td>20.19%</td>
</tr>
<tr>
<td>Inaction/ other response</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Knows minimum wage and overtime rights (substantive legal knowledge)</td>
<td>41.01%</td>
<td>38.47%</td>
<td>43.55%</td>
</tr>
<tr>
<td>Knows where to file government complaint (procedural legal knowledge)</td>
<td>22.23%</td>
<td>20.05%</td>
<td>24.41%</td>
</tr>
</tbody>
</table>
### Table 8: Logistic Regression Results: Workplace Problems

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

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Coefficient</th>
<th>Robust Standard Error</th>
<th>Statistical Significance (p-value)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>-.2064162**</td>
<td>.0935926</td>
<td>0.027</td>
</tr>
<tr>
<td>Black or African American</td>
<td>-.1831411</td>
<td>.1394766</td>
<td>0.189</td>
</tr>
<tr>
<td>Asian or other race</td>
<td>-.0692085</td>
<td>.1399979</td>
<td>0.621</td>
</tr>
<tr>
<td>White</td>
<td>-.1969036</td>
<td>.209114</td>
<td>0.346</td>
</tr>
<tr>
<td>Age (log)</td>
<td>-.3902301***</td>
<td>.1420976</td>
<td>0.006</td>
</tr>
<tr>
<td>Years of education (log)</td>
<td>.2263875***</td>
<td>.0826076</td>
<td>0.006</td>
</tr>
<tr>
<td>No legal immigration status</td>
<td>.1579034</td>
<td>.1187964</td>
<td>0.184</td>
</tr>
<tr>
<td>Does not know minimum wage and overtime rights (substantive legal knowledge)</td>
<td>-.0122081</td>
<td>.095769</td>
<td>0.899</td>
</tr>
<tr>
<td>Does not know where to file government complaint (procedural legal knowledge)</td>
<td>.2377473**</td>
<td>1.098959</td>
<td>0.031</td>
</tr>
<tr>
<td>Not a union member</td>
<td>.2904993†</td>
<td>.1879356</td>
<td>0.122</td>
</tr>
<tr>
<td>Job tenure of fewer than 12 months</td>
<td>-.2210349*</td>
<td>.1168781</td>
<td>0.059</td>
</tr>
<tr>
<td>Employer has fewer than 100 employees</td>
<td>-.322473***</td>
<td>.1033499</td>
<td>0.002</td>
</tr>
<tr>
<td>Employer is not “high road”</td>
<td>.4308615***</td>
<td>.1103767</td>
<td>0.000</td>
</tr>
<tr>
<td>Constant</td>
<td>.5335444</td>
<td>.6071023</td>
<td>0.379</td>
</tr>
</tbody>
</table>

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

- Number of observations: 3620
- Wald chi2(13): 59.60
- Prob > chi2: 0.0000
- Pseudo R2: 0.0216
- Log pseudolikelihood: -2237.3288

Base category (constant): Male; Latino/a or Hispanic; legal immigration status; has substantive legal knowledge; has procedural legal knowledge; union member; job tenure of 12 or more months; employer has 100 or more employees; employer is “high road”
Table 9: Logistic Regression Results: Claims

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

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

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

Number of observations 1422
Wald chi2(13) 38.84
Prob > chi2 0.0002
Pseudo R2 0.0380
Log pseudolikelihood -901.68482

Base category (constant) Male; Latino/a or Hispanic; legal immigration status; has substantive legal knowledge; has procedural legal knowledge; union member; job tenure of 12 or more months; employer has 100 or more employees; employer is “high road”
Table 10: Logistic Regression Results: Retaliation

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

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

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

Number of observations 560
Wald chi2(12) 17.55
Prob > chi2 0.1301
Pseudo R2 0.0430
Log pseudolikelihood -313.31388

Base category (constant) Male; Latino/a or Hispanic; legal immigration status; union member; job tenure of 12 or more months; employer has 100 or more employees; employer is “high road”; made claim with other workers
Table 11: Logistic Regression Results: Substantive Legal Knowledge

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

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

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

Number of observations: 3620
Wald chi²(12): 96.42
Prob > chi²: 0.0000
Pseudo R²: 0.0356
Log pseudolikelihood: -2302.8753

Base category (constant): Male; Latino/a or Hispanic; legal immigration status; has procedural legal knowledge; union member; job tenure of 12 or more months; employer has 100 or more employees; employer is “high road”
Table 12: Logistic Regression Results: Procedural Legal Knowledge

Dependent variable = Respondent knows where to file government complaint (0,1)

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

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

Number of observations 3606
Wald chi2(12) 198.28
Prob > chi2 0.0000
Pseudo R2 0.0921
Log pseudolikelihood -1787.7217

Base category (constant) Male; Latino/a or Hispanic; legal immigration status; has substantive legal knowledge; union member; job tenure of 12 or more months; employer has 100 or more employees; employer is “high road”