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“Broken Windows,” Vulnerable Workers, and the Future of Worker Representation

David Weil

Abstract

The “broken windows” perspective suggests that the erosion of order in a neighborhood leads to elevated fear, retreat from the street, and consequently an environment where more serious crime takes root. I apply the broken windows idea to the workplace. Increasing violations of basic standards in many low-wage workplaces is perceived by workers as the breakdown of laws, making them reluctant to exercise voice in any way, in turn resulting in further erosion of conditions. Efforts to increase union representation are challenging at best under these circumstances. I provide evidence of the decline of complaints by workers over the last decade under the Fair Labor Standards Act as consistent with this story. I then argue that public policy makers and worker advocates should rethink their approach in light of broken windows, focusing on ways to improve collective exercise of basic workplace rights.

KEYWORDS: worker representation, labor unions, compliance, labor law, broken windows

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> *[I]f a window in a building is broken* and is left unrepaired, *all the rest of the windows will soon be broken…[O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing.*[1]

In a famous and controversial article on reducing crime, the late James Q. Wilson and George Kelling argued that the focus of traditional policing was misplaced given its emphasis on responding to serious crimes. "Broken windows," as the notion became popularly known, demanded that policing deal with reducing disorderly behavior and small crimes that created fear among the public. Fear of crime, rather than crime itself, led people in a neighborhood to withdraw from their critical role as guardians of civic peace. By using community policing and focused efforts to "fix broken windows" through the reduction of panhandling, graffiti, low level crimes, and other activities perceived as signs of imminent danger, residents in a community would reassert themselves in the daily life of their neighborhood, and retake their role as the glue that the famed scholar Jane Jacobs called the "small change" of urban life. In short, reducing the major crimes that dominate newspaper headlines requires controlling the street-level disorderly activities that spawn them.

The broken windows analogy is a useful one for framing the question of the future of worker representation. In many workplaces—particularly those employing a large number of low wage workers—day-to-day experience is replete with violations of very basic labor standards. People are asked to set up their workstations before punching into their shift, or clean up their area after punching out; overtime work is required at the standard rate rather than the time and one-half required by law; mandatory break times are routinely ignored. In other workplaces, being paid is an off-the-books, cash-only transaction, creating Faustian bargains between the employer and employee to flout payroll tax requirements and other required social payments. In construction, manufacturing, and other sectors where work exposes individuals to significant risks, the "word on the street" is often to ignore many safety and health requirements—tying off on roofs for construction; using proper machine guards in manufacturing; adequately ventilating a room when using cleaning solvents for janitors or maintenance workers—in order to "just get the job done." Verbal abuse, discriminatory comments, or sexist jokes by supervisors or between co-workers are left unaddressed.

Withdrawal from civic life as a result of fear also has its workplace analog. 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. If my neighbors retreat from the street

[1] Kelling and Wilson (1982), p.31.

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and lock their doors in the face of widespread "disorder," it is perfectly rational for me to do the same. Likewise, if my co-workers don't make waves in the face of small but persistent infractions of the law, why should I be any different?

Addressing the future of the labor movement requires recognizing the impact of "broken windows" in the workplace and its repercussions. It is difficult to imagine a surge in union organizing—even under a dramatically revised labor law—in many of the workplaces employing the most vulnerable members of the labor force. One must fix the broken windows in the workplace to address the larger problems that union organizing is often viewed as the sole mechanism for redress. This essay argues that the broken windows analogy should inform discussions about the future of representation in many of the workplaces where the most vulnerable workers are employed.

The Context of Broken Windows

Analyses of the future of workplace representation and of the labor movement often focus on large scale factors that have led to the erosion of union density: globalization of industries; technologic change; shifts in labor markets; and the failures of existing labor laws. Policy discussions—including the effort to pass the Employee Free Choice Act early in the Obama administration—focus on reforming the provisions of the National Labor Relations Act that have provided employers (and a burgeoning anti-union consulting industry) with relatively low cost ways to violate the law.

These accounts do not pay sufficient attention to fundamental realities on the ground, or adequately link changes in labor market conditions to the question of exercising voice. If one sees daily evidence of labor standards violations or repeated examples where those standards are flouted, and little sign of consequences for those violations, why risk taking the far more perilous jump and participate in organizing a union—or even taking the first furtive steps in that direction? In so doing, the climate allowing such actions remains unchallenged and the retreat from the workplace "street" reinforced.

Several larger scale factors connected to the labor market set the context for thinking about "broken windows" in the workplace. First, there is extensive evidence of the prevalence and growth of vulnerable work in many industries. Bernhardt et al. (2009) in a survey of low wage work in three major US cities documented high rates of violations with labor standards. Overall, 26 percent of workers in their sample were paid less than the required minimum wage and 76 percent of the workers who worked more than 40 hours in the previous week had not been paid the legally required overtime rate. They also found that 70 percent of survey respondents faced "off the clock" violations, where workers were asked to come in early or stay after their shift but not paid for that time. In addition, 43

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percent of workers who were "at risk of a violation" were subjected to retaliation for complaining in some way about work conditions.[2]

The employment conditions facing low wage workers place them in a precarious position in terms of the stability of their employment and highly dependent on short term earnings for meeting basic expenses. Indicative of this are results of a 2008 survey of low wage workers by the Kaiser Family Foundation regarding the difficulty in affording household expenditures.[3] A significant majority of low wage respondents answered that it was either "somewhat difficult" or "very difficult" to meet a range of monthly expenses given current earnings, including basics like health care (65% responding somewhat or very difficult), rent (57%), child care (66%), monthly utilities (58%), and basic transportation (82%). The effects of the Great Recession intensify these pressures given increasing unemployment and underemployment rates. In such a climate, the 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.

Second, the basic nature of workplace relationships has undergone major changes over the last twenty-five years. I have called these changes "fissuring," to capture the fact that the employment relationship has been fractured so that multiple parties play roles in the setting of employment conditions (Weil 2010, 2011). Large businesses with national and international reputations that operate at the "top" of their industries continue to dominate the private sector landscape and play critical roles in shaping competition in their markets. However, they no longer directly employ legions of workers. Instead, like rocks split by the elements, employment has been *fissured* away from these market leaders and transferred to a complicated network of smaller business units. Lower-level businesses typically operate in far more competitive markets than those of the firms that shifted employment to them, often with negative consequences on employment conditions. Many of the industries employing vulnerable workers (eating and drinking, janitorial services, segments of manufacturing, residential

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[2] For other recent estimates, see Osterman and Shulman 2011, and Kalleberg 2011. There are many definitions and measures of precarious work and vulnerable workers as well as debate about their pervasiveness in different sectors. I take the existence of significant problems in low wage workplaces and labor markets as a given for this discussion.

[3] See Henry J. Kaiser Family Foundation and Harvard University conducted in conjunction with the *Washington Post*, "Survey of Low-Wage Workers," Survey conducted between June 18 and July 7, 2008 based on 1350 randomly selected low-wage workers nationwide. Low-wage workers were defined as adults ages 18 to 64 working 30 or more hours a week, no self-employed and earned no more than $27,000 in 2007. At that time the income threshold corresponded to the bottom 40 percent of the US workforce in terms of wages. Full survey results available at www.washingtonpost.com/hardesthit.

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construction, and home health care) coincide with sectors where fissuring is most advanced. Among other effects, fissuring creates a workplace where competing incentives create conditions ripe for violations small and large (and not necessarily reflective of any single party who plays a role in setting workplace conditions). The result is workplaces with a high propensity of violations but opacity in terms of who is responsible for conditions.

Third, many of the sectors mentioned above employ a significant percent of immigrant workers, a portion of whom are undocumented. This means arguing with a supervisor or speaking up for a co-worker—let alone lodging formal complaints with government agencies or participating in a union organizing drive—is a high stakes endeavor, in that they may not only involve dismissal, but deportation. Given immigrant workers' often precarious position in this country, the incentives to not step forward in the face of even significant workplace problems can be overwhelming (Gordon 2005).[4]

Finally, the long term decline of unionization in the private sector to the current level of 6.9 percent (2011) has myriad impacts, as discussed in other essays in this volume. Most germane is the role that unions play in affecting the exercise of rights granted under a variety of workplace laws. Falling density affects the incentive for workers in unionized workplaces, or workplaces with geographic, labor market, or industry-level connections to unionized workplaces to exercise statutory rights, an issue discussed below. The extent of decline means that in many workplaces and for many workers (particularly younger ones), unions simply do not register on the radar screen.[5]

Raising One's Voice

The broken windows perspective suggests that workers often do not complain when faced with the equivalent of "neighborhood disorder" at the workplace. In fact, the more challenging conditions described above may give rise to the counterintuitive result of both worsening workplace conditions and fewer worker complaints. In the face of deteriorating conditions and greater barriers to speaking out (e.g. from increased economic vulnerability), people retreat from the "unsafe street" and the likelihood of complaining decreases even further.

[4] The broken windows notion has also been applied to the area of immigration by Skerry (2006). Skerry argues that civic disorder arising in communities with high concentrations of immigrant workers or in areas where immigrant workers seek work (e.g. through day labor markets) represent a significant source of friction underlying the larger immigration debate.

[5] Budd (2010) provides some contrasting evidence, finding a surprisingly high incidence of exposure to unions by workers in the course of their work life (e.g. he finds that only one-third of workers age 41 and below have never held a job where they were represented by a union).

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To see why, think of the choice facing an individual who suffers a perceived violation of a workplace law and is deciding whether or not to file a claim. First, workers must know that laws exist that provide a right to lodge complaints for underpayment of wages under the Fair Labor Standards Act, to trigger an OSHA inspection in the face of unsafe practices, or to engage in certain types of concerted activities in the face of bad treatment (whether or not they are represented by a union) under the National Labor Relations Act. A great deal of evidence suggests they do not. More than a decade ago, Freeman and Rogers (1999) showed that many workers do not realize the rights they have with respect to certain workplace rights and assume other rights (particularly regarding dismissal) that they do not have. Nonunion workers are largely unaware of the right to engage in concerted activities, even where they are not represented by a labor union, afforded to them under statutes ranging from the Fair Labor Standards Act, the Occupational Safety and Health Act, the Family Medical Leave Act, and the National Labor Relations Act.[6]

Even if workers are aware of rights, they will still tend to underutilize them. The likelihood of exercising rights should be related to the perceived benefits arising from complaining (related to the remedy produced by complaining) versus the potential costs for doing so.[7] One problem that immediately arises is the "public goods" nature of remedies: If my complaint leads my employer to change behavior, it may not only benefit me, but others in the workplace as well. This is particularly true for complaints related to matters like safety and health, where an intervention (e.g. improving ventilation; installing guards) lowers general exposure to a safety or health risk. But as it is the individual complainant who is at risk from possible employer retaliation, that individual will under-invest in complaining.

The potential costs of complaining create another major impediment to speaking out about workplace problems. The largest cost facing workers arise from potential employer reprisals. Reprisals may be subtle, such as losing desired shifts or work assignments; more substantial such as being passed over for promotion; or very high in the case of losing one's job. In their survey of low wage workers in three major US cities, Bernhardt *et al*. (2009) find a high prevalence of reported retaliation for exercise of rights among those who did and the strong perception of such retaliation among those who chose not to complain (but perceived their rights had been violated). Among the workers in the sample who had actually complained about a workplace issue or attempted to form a

[6] The literature on the lack of knowledge of statutory rights under a variety of laws is discussed in Morris (1989); Estlund (1992); Edwards (1993); DeChiara (1995); Sunstein (2001); and most recently Estlund (2011).
[7] I have developed this analysis in greater detail in Weil (2005) and Weil and Pyles (2006). See also Yaniv (2001).

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union in the prior 12 months, 43 percent reported some form of employer or supervisor retaliation. Reported forms of retaliation varied from reduction in hours or pay or being given a less desirable work assignment (reported by 62% of those who said they had been retaliated against) to threats of being fired or reported to immigration authorities (47% of those reporting retaliation) to actually being fired or suspended (35%).[8]

The perception (not the fact) that employers will retaliate also affects whether or not workers will step forward in the face of workplace problems. Bernhardt *et al*. (2009, p.24) report that 20 percent of surveyed workers did not complain during the prior year despite having "…experienced a serious problem such as dangerous working conditions, discrimination, or not being paid a minimum wage." The most common reason (cited by 51 percent of those who chose not to complain) is fear of job loss, followed by the perception that complaining would not make a difference (36 percent).

Perceptions of the potential benefits and costs of stepping forward are particularly important, since overt discrimination for exercise of rights is illegal under most major employment statutes.[9] One way for people to gauge the cost of complaining is by watching the behavior of others in the workplace: do they raise their voices when facing problems? If others do not complain in reaction to day-to-day violations of "good" workplace behavior, what does that say about the potential reaction to more egregious violation?

Complaint Behavior: Low and Declining

Given the above benefits and costs, it is perhaps not surprising that filing a formal complaint is a rare event. Bernhardt *et al.* (2009), find that a mere 1.2 percent of workers who reported taking some action to express dissatisfaction with work in the prior year did so by filing a complaint with a government agency, versus 96 percent who approached their employer. Since about 20 percent of workers in

[8] Bernhardt et al. (2009), pp. 24-25. These percentages are calculated for workers who had experienced what the researchers coded as "illegal retaliation for making a complaint or organizing a union during the year previous to the survey." Workers could report multiple forms of retaliation. Illegality was determined by the researchers, based on the respondents accounts of what had taken place given the protections of the applicable statute.

[9] For example, Section 11(c) of the Occupational Safety and Health Act prohibits discharge or any form of retaliation against employees for exercising their rights under the Act. OSHA also administers similar whistleblower protection for twenty-one statutes. Along with a number of statutes related to the workplace (e.g. the Federal Railroad Safety Act and the Surface Transportation Assistance Act regulating safety in the railroad and trucking industries respectively), this also includes whistleblower protections under the Sarbanes-Oxley, Clean Water Act, Safe Drinking Water Act and other statutes. For a complete listing of whistleblower protection program administered by OSHA, see http://www.whistleblowers.gov/index.html .

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their sample reported lodging some type of complaint (through any channel), this implies about 240 formal complaints per 100,000 workers.[10]

Weil and Pyles (2006) examine complaint rates under the Fair Labor Standards Act (FLSA) and the Occupational Safety and Health Act (OSHA) in the period 2000-2004 and find even lower complaint rates. The overall complaint rates under the two statutes were roughly in the same ball park: there were about 25 complaints for every 100,000 workers under the FLSA and about 17 complaints per 100,000 workers under OSHA. These averages mask, however, the fact that complaint rates vary significantly across industries. For example, complaint rates per 100,000 workers ranged from 195 in gas stations to 54 in eating and drinking to a mere 3.8 in private households.

One might object that these rates are not self-evidently "low" if the underlying problems giving rise to them are uncommon. To examine this, Weil and Pyles compare the number of complaints relative to measures of the underlying problems that generated them. Few people complaining in a high injury industry would raise more concerns than the same industry with low underlying injury rates.[11] On average, it takes about 130 violations of overtime provisions to elicit a complaint to the Wage and Hour Division (the federal agency that enforces FLSA) and close to 120 lost workday injuries per complaint to OSHA. Once again, these rates vary by industry. The threshold for complaints is lower in construction for OSHA (51 lost workday injuries per complaint) than for overtime violations (173 violations of overtime per complaint); the opposite is true in eating and drinking establishments, where the ratio is about 66 violations per complaint lodged under FLSA, but almost three times that level—188 injuries—per OSHA complaint.

Not only are complaint rates low, but they have declined substantially over the past decade. Using complaints filed with the US Department of Labor's Wage and Hour Division by workers under the Fair Labor Standards Act, Table 1 compares complaint rates in 2001-02 and 2007-09. [12] Complaint rates (measured

[10] The percent of complaints taken to employers versus through government agencies is reported in National Employment Law Project (2010); the 20 percent of employees who "…either made a complaint in the last year or attempted to form a union" is reported in Bernhardt et al. (2009), p. 24. Since both estimates represent complaints across all types of problems taken through a government agency, the derived probability of a complaint represents complaint rates across all potentially applicable statutes (FLSA, OSHA, NLRA, policies relating to employment discrimination, etc.).

[11] In order to create reasonably objective measures of underlying workplace conditions across industries, Weil and Pyles used lost work day injuries by industry for OSHA and a calculated rate of overtime violations per covered worker based on the Current Population Survey (CPS) for the FLSA. See Weil and Pyles (2006), pp. 66-68 for details.

[12] Complaint counts include all full and partial investigations, conciliations (complaints handled over the phone), and audits registered in 2001-2002 and 2007-2009 and closed (administratively completed) by third quarter 2010. Although most complaints filed in the 2007-09 period will have

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as the number of complaints filed by workers with the Wage and Hour Division per 100,000 workers) declined by 26 percent over this period, from 21.1 per 100,000 workers in 2001-02 to 15.6 in 2007-09. They fell even more pronouncedly in industries like health care services, retail, grocery, and moving / logistics, where complaint rates declined by more than 30 percent.[13]

Recent literature on low wage work makes it difficult to believe that the decline in complaint rates arise from a material improvement in the underlying conditions in the industries shown in Table 1. Evidence presented by Osterman and Shulman (2011), Kalleberg (2011), Bernhardt et al. (2009) and other studies of low wage industries suggest quite the opposite trend over this period.

Any discussion of improving workplace conditions through enhancing voice—whether in the form of choosing to elect unions or simply standing up for one's own rights or those of fellow workers in regard to specific problems—must begin with an acknowledgment that workers became increasingly reluctant to exercise their voice over the most recent decade, even in the face of worsening conditions.

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been closed by 2010, a small number of cases being contested or involving longer administrative activities will remain open and therefore not included in complaint tallies. This means the rate for the 2007-09 period may represent an undercount. However, prior work suggests the effect of open cases on complaint rate estimates is very small.

[13] Table 1 uses a slightly different definition for counting complaints than used in Weil and Pyles (2006). Table 1 counts the number of complaints lodged with the Wage and Hour Division for violations of the Fair Labor Standards Act only and not other statutes also overseen by that agency. In contrast, Weil and Pyles use a complaint measure also including other statutes administered by the WHD.

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Table 1: Change in Complaint Rates, Fair Labor Standards Act, 2007-09 versus 2001-02 (Ranked by 2007-09 Employment)

Industry [a]	*2007-2009 Total Employment (Average)* [b]	*2007-09 Complaint Rate: (Cases/Emp) x 100,000* [c]	*2001-02 Complaint Rate: (Cases/Emp) x 100,000* [d]	*% Change, 2001-02 to 2007-09*
TOTAL / WEIGHTED AVERAGE, whole economy	**111,175,322**	**15.6**	**21.1**	**-26.4%**
Retail – All	15,120,711	13.7	20.5	-33.2%
Health care services (does not include state hospitals)	13,196,814	11.6	16.3	-28.9%
Retail: mass merchants; department stores; specialty stores	9,315,599	10.2	16.2	-37.1%
Restaurants: Limited service & Full service	7,968,326	30.4	35.2	-13.5%
Construction	6,879,048	26.2	30.7	-14.8%
Grocery stores	2,484,572	10.2	15.0	-32.2%
Gasoline stations / Auto repair	1,687,929	42.3	52.5	-19.4%
Hotel and motel	1,459,546	37.9	47.0	-19.4%
Recreation	1,418,641	14.7	19.8	-26.0%
Trucking	1,364,638	48.4	54.4	-11.0%
Agriculture	1,159,168	13.7	16.0	-14.4%
Moving companies / logistics providers	1,017,273	9.0	14.3	-37.0%
Home health care	966,772	14.7	21.3	-31.0%
Janitorial services	934,009	39.6	42.7	-7.2%
Residential construction	796,325	47.6	24.3	95.5%
Landscaping services	647,415	20.7	27.3	-23.9%
Nail, barber and beauty shops	490,139	16.7	13.9	20.2%
Apparel manufacturing	193,367	44.1	35.7	23.5%
Car washes	140,657	44.3	45.3	-2.1%

[a] Industry based on 3-, 4-, and /or 5-digit NAICs (available from the author). [b] Total Employment: Extract from BLS Quarterly Census of Employment and Wages (QCEW), Private Employment Only, 3-digit industries with more than 100,000 employees 2007-09; [c] Complaint rate based on average annual number of complaints lodged with WHD classified as pertaining to Fair Labor Standards Act. Includes all full and partial investigations, conciliations, and audits registered in 2007-2009 and closed by third quarter 2010 (June 10, 2010); [d] Complaints registered in 2001-2002 and closed by third quarter 2010.

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Creating Public Peace in the Workplace

In 1961, Jane Jacobs described what defined "public peace" in a city:

> *The first thing to understand is that the public peace—the sidewalk and street peace—of cities is not kept primarily by the police, necessary as police are. It is kept primarily by an intricate, almost unconscious, network of voluntary control and standards among the people themselves, and enforced by people themselves. In some city areas…the keeping of public sidewalk law and order is left almost entirely to the police and special guards. Such places are jungles. No amount of police can enforce civilization where the normal, causal enforcement of it has broken down.*
> Jane Jacobs, *The Death and Life of Great American Cities*, pp. 31-32.

Unfair workplaces are like bad streets: they reflect a breakdown of many systems that are essential to providing civil society in the context of a workplace. On the employer side, they reflect firms competing in fiercely competitive product markets, but also where a significant number of employers have decided to skirt the law as a socially acceptable response ("everyone else is doing it"). This may in some cases reflect cultural factors; in others it might reflect the work of social networks. It might also reflect the *de facto* result of employment fissuring: the absence of clear lines of responsibility over employment conditions. On the employee side, bad streets reflect the factors that end up reducing voice in any workplace: systemic perception that the costs of exercising rights are larger than the benefits of doing so.

A frequent assumption in union organizing is that it may have a higher likelihood of success in workplaces with poor conditions. But this assumption ignores the "broken windows" problem. Workers facing day-to-day violations of workplace standards may be particularly unlikely to take the much greater risk entailed in participating in a union organizing effort. In this sense, increasing workers' willingness to participate in organizing efforts presumes that the messages sent by the "workplace street" have been altered. This seems unlikely absent some other changes in those conditions.[14] A broken windows perspective suggests a different focus for efforts to change the climate in which worker representation occurs. These include reducing the prevalence of non-compliance with workplace laws through new forms of enforcement; finding new avenues to

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[14] This discussion suggests an important empirical research question: How does the prevalence of infractions of a variety of labor laws affect the likelihood of organizing efforts and the winning of elections by labor unions? Research on worker perceptions of their rights and the status of compliance (building on the work of Freeman and Rogers 1999) would also be useful in testing the "broken windows" framework for the workplace.

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inform workers of their rights; and strengthening institutions in and out of the workplace that affect the exercise of voice.

Reducing “Disorder” through Strategic Enforcement

The original “broken windows” essay by Kelling and Wilson (and by Kelling and Coles 1996) calls for shifting police resources from reactive, serious-crime response towards more proactive forms of intervention. The analog to the workplace is reassessing how government inspectors in agencies like OSHA and the Wage and Hour Division undertake enforcement. Policies to shift enforcement from reactive response to strategic enforcement that has the potential to change employer behavior on a wider scale require separate treatment, but several general points can be made here.

Reducing non-compliance in the industries employing large numbers of vulnerable workers given the context described—particularly in regards to fissured employment—requires a different approach to enforcement than the workplace-by-workplace method characterizing traditional inspection strategy. Strategic enforcement requires inspectors that understand both the forces that drive non-compliance as well as which players on the workplace street are most likely to cause problems. This implies an enforcement policy that seeks to change underlying employer behavior rather than focusing on goals like the collection of back wages or health and safety citations (Weil 2009, 2010). Decreasing the prevalence of basic violations sends the same message that reducing small crimes does in the context of broken windows: reducing fear and reestablishing the important role played by workers in assuring fair treatment.

The broken windows framework also argues for a different relationship between the police and the neighborhoods they protect. In particular, it calls for community policing, where the cop-on-the-beat establishes close relationships with people in the neighborhoods. The workplace analog is building better bridges between government agencies and community groups, worker centers, and worker advocates. These efforts can range from long-standing efforts by the US Department of Labor agencies to reach out to unions, community groups, and religious organizations to more extensive collaborations that would allow problem solving around persistent problems of non-compliance in specific labor markets or industries.[15]

[15] See Gordon and Fine (2010) for a discussion of three cases of state- and local- partnerships between community and workers organizations and government agencies.

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Educating about Basic Rights

Overcoming the broken windows problem at the workplace requires improving knowledge about workplace rights.[16] The basic idea is to make sure that workers are well informed of their rights under statutes, particularly those related to file complaints for alleged violations and protections against retaliation.

Notification about employee rights is required by the Fair Labor Standards Act; the Occupational Safety and Health Act; the Migrant and Seasonal Workers protection Act; Title VII of the Civil Rights Act of 1964; the Americans with Disabilities Act; and the Family Medical Leave Act as well as other federal workplace laws.[17] However, the legal requirement to post rights is not synonymous with an understanding of them.

The US Department of Labor has sought to better inform workers of their rights with respect to laws, even where posting is required. These initiatives span Republican and Democratic administrations, going back in some cases to the passage of laws such as OSHA. The Department of Labor during the Obama administration has renewed outreach efforts in its “We Can Help” campaign through social media and by translating materials into Spanish and other languages.[18] The “We Can Help” campaign therefore seeks to supplement required posting with information about basic rights provided via the web, targeted advertising campaigns, and the creation of more engaging materials.

The effort, however, has provoked responses from Congressional Republicans, the business community, and the conservative media. Criticisms focus particularly on parts of the efforts directed to Hispanic workers, under the premise that this results in informing undocumented workers of their rights under workplace laws.[19] The highly politicized reaction to a straightforward educational effort (and one pursued by prior administrations) well illustrates the charged nature of workplace policy at this time.[20]

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[16] This step has been advocated by a number of labor law scholars, such as Wissinger (2003) in regards to rights under the National Labor Relations Act and Estlund (2011) more generally.

[17] In some cases, like the Occupational Safety and Health Act, the requirement is built into the statute. In others, like the Fair Labor Standards Act, the requirement arose from regulations issued after passage of the Act.

[18] See the “We Can Help” campaign by the Wage and Hours Division of the US Department of Labor (http://www.dol.gov/wecanhelp/).

[19] The Fair Labor Standards Act and other federal workplace policies cover all workers regardless of their immigration status.

[20] The sharp criticism of the “We Can Help” campaign led the Department of Labor to post the following public statement on its site as part of the campaign material: “Through Democratic and Republican administrations, the Department of Labor consistently has held that the country's minimum wage and overtime law protects workers regardless of their immigration status. To argue otherwise diminishes the value of work in this country.” See http://www.dol.gov/opa/media/press/whd/WHD20100890.htm .

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Informing workers of their rights under the National Labor Relations Act (NLRA) offers its own unique challenges. The NLRA is the only major Federal workplace statute that does not currently require that employers post notices for workers regarding their rights under the law. In 2010, the National Labor Relations Board announced a proposed rule to redress this longstanding situation. The rule requires covered employers to post workplace notices informing employees of their rights.[21] Not surprisingly given the highly contested environment of labor law reform, the proposed NLRB rule elicited heated reactions from the business community and critics of the Board, ultimately resulting in over 7000 comments during the public response period. In March 2012, a federal District Court for Washington, DC affirmed the right of the NLRB to issue the notification requirement. However, the court also ruled that the Board does not have the authority to make failure to post the notice an unfair labor practice.[22] The decision has been appealed, but the posting requirement takes effect on April 30, 2012.

Addressing the Collective Action Problem

As noted above, one reason that people are reluctant to exercise their rights is that they often receive only part of the benefit of complaining, but fully bear the potential costs. They therefore complain too little from the perspective of fellow workers. The solution to a classic public goods problem where others gain from the creation of an individual action is through some form of collective action. Addressing the collective action problem is therefore critical to fixing broken windows in the workplace.

Olson (1965) long ago established why it is difficult to overcome collective action problems, principally because individual incentives continue to dominate. This problem also highlights a central conundrum of much of workplace policy: it is individually-focused, but requires collective action to be effective (Weil 2005). There is now over two decades of evidence that shows that workers are more likely to exercise rights given the presence of a collective workplace actor, particularly a labor union (e.g. Weil 1991; 2005; Morantz 2011; Fine and Gordon 2011).

One institution that is sometimes mentioned as standing in for workers in the absence of unions or other collective agents is the plaintiff bar. Many

[21] See 75 Federal Register 80410. The rule, supporting materials, and links to comments can be found at https://www.federalregister.gov/articles/2010/12/22/2010-32019/proposed-rules-governing-notification-of-employee-rights-under-the-national-labor-relations-act#p-12.
The NLRB poster listing worker rights can be found at http://www.nlrb.gov/poster.

[22] National Association of Manufacturers Association v. NLRB, Civil Action No. 11-1629 (ABJ) (D.C.D.C., March 2, 2012).

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workplace policies allow individual and class action claims arising from statutory violations. Lawyers acting on behalf of workers can press claims against employers for back wages, restitution for discrimination, and other civil remedies. This particular avenue has grown significantly over the last two decades. The number of civil cases filed in U.S. District Courts for all workplace laws went from 13,841 in 1990 to 14,142 in 2000 and 18,824 by 2010.[23] Pursuing complaints in this way creates incentives for employer compliance. It is unclear, however, whether it changes the propensity for workers to exercise rights at the workplaces where suits are filed, thereby changing the atmosphere for voice. It seems unlikely (although largely unexplored) that law suits or even class actions have spill-over effects on worker voice or employer compliance in other workplaces. What is more, the right of workers to pursue individual claims or class actions in employment litigation is in significant flux. In particular, recent Supreme Court rulings have upheld pre-hire agreements where workers waive their right to pursue grievances/actions on statutory claims as a condition of employment.[24]

As a result, the practical question is how does one overcome collective action problems in largely nonunion workplaces, where individual complainants have lots to lose by stepping forward? A useful analogy is the problem of a crowd standing around an outdoor swimming pool on a cool day: everyone has the incentive to wait and hope that someone else will be the first to jump in the water to see if it is warm enough for a swim. The collective action problem requires finding ways to induce people to dip their toes in the water. If even a few people can be convinced to do so, that may inspire others to further test the water—convincing someone to put their whole foot in, and, upon seeing that, to dangle their legs in the pool, and ultimately jump in. This represents a slower, but more tractable solution than trying to get one brave soul to cannonball into the center of the pool initially.

Finding collective agents is therefore essential in encouraging workers to exercise their rights and voice in the workplace. Since the likely institution for solving this problem (labor unions) is usually absent in private sector workplaces, efforts to encourage greater use of rights and voice must look towards other organizations, linked to but not necessarily residing in the workplace, such as worker centers, community organizations, immigrant rights groups, and other

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[23] Labor laws include the Fair Labor Standards Act, the Labor Management Relation Act, the Railway Labor Act, and ERISA. Based on Annual Reports of the Director, Judicial Business of the United States Courts, Table 4.4
(see http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table404.pdf).

[24] See Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001). More recently, the Court upheld the primacy of the Federal Arbitration Act in AT&T Mobility LLC v. Concepcion, 584 F. 3d 84 (2011).

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advocacy groups. These organizations already play a variety of informational and educational roles for workers (Fine 2006). Some also function as labor market intermediaries, particularly in day labor markets (Theodore *et al*. 2008).[25] However, both legal restrictions and the practical fact that worker centers and related organizations operate outside the walls of the workplace complicate their role in this regard.

Undertaking the role of collective agent therefore requires worker centers and related groups to operate through labor markets and the social networks embedded in them. The supply side of a labor market is affected by where people live, learn, socialize, and search for work. Wage expectations are affected by one's peers at work and by reference groups within geographic, ethnic, and immigrant communities. Recent labor market studies find that social networks of low wage workers with geographic proximity have important affects on how people find work and who is hired, particularly in some ethnic communities (e.g. Hellerstein *et al*. 2011). The social networks that are embedded in a labor market also shape norms that are acted on by people once employed. Attitudes about when to speak out in the workplace are an intrinsic part of the information set conveyed in these networks. [26]

The social network for an immigrant worker group, for example, may foster attitudes that may encourage or discourage the exercise of rights and voice at the workplace. Attitudes will be shaped by factors like immigrant workers' experiences with unions and government institutions in their home country and the US; the role of religious organizations in the community; and the strength of ties within the community and back to family and friends in countries of origin (Levitt 2001). The challenge facing organizations like worker centers is to influence these social networks in order to encourage greater exercise of rights and use of voice at the workplace over time.

Several recent cases suggest it is possible to do so. Nail salons are notorious for high rates of labor standards violations, exposures to chemical health risks, and generally poor working conditions. Ethnic dynamics between owners and workers have often diminished the likelihood that workers step forward and complain about these conditions (Eckstein and Nguyen 2010). Nonetheless, in December 2009, a small group of nail salon workers in New York

[25] Skerry (2008) offers a more skeptical view of the potential for this type of organization in immigrant communities to exert a significant role, however, given their legal and political vulnerability. As with other issues raised in this paper, future empirical studies on the role of worker centers and related groups in affecting the exercise of rights among workers affiliated with them would be of significant interest.

[26] Budd's findings (2010) that two-thirds of individuals under 40 have worked, at least once, in a unionized workplace is germane here. Of particular salience are the attitudes that such exposure leaves individuals with regarding voice and exercise of rights in workplaces with and without unions.

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City (all Chinese immigrants) brought suit against their employers for violations of minimum wage laws and abusive behavior. After a protracted legal battle, a jury in March 2012 awarded the workers $250,000 in back wage compensation. The ongoing legal effort and related efforts by activists have had ripple effects in the tight knit communities surrounding the industry. As Sarah Ahn, an organizer in a coalition of advocacy groups working with the salon workers noted, "Organizing within the nail salon industry has been difficult…Victories show there is a way that if you come forward, you can fight and win."[27]

The ongoing work of the Taxi Workers' Alliance in New York City also suggests the possibilities of building new kinds of collective agents by tapping into the social networks that surround a workplace. Because of their designation as independent contractors, taxi drivers are not covered by the National Labor Relations Act. Nonetheless, since 1993 the Taxi Workers' Alliance, led by Bhairavi Desai, has brought together drivers from diverse immigrant communities by focusing their efforts on issues of common interest. This has led the organization to take on a range of issues of growing scope and scale from safety and disciplinary matters, to responding to the economic downturn following 9/11, to involvement in rate setting proceedings that fundamentally affect drivers' earnings (Widdicombe 2011). In 2011, the Taxi Workers' Alliance became the first worker organization not directly engaged in collective bargaining to become a full affiliate of the AFL-CIO in nearly fifty years.[28]

The trajectory of these efforts (and other recent cases involving car wash employees, day laborers, and domestic workers) illustrate the importance of building individual and collective resolve to exercise voice as essential foundations for longer term efforts to represent workers in more significant ways over time. The impact of such efforts on the prospects of worker representation requires a longer term perspective on the varied roles of workplace organizations and a greater appreciation of the benefits of improving the climate for exercising voice along the way.

Evolving Fair Workplaces

The broken windows analogy—and Jacob's related peaceful street imagery—suggests that community safety improves over time through an evolution of civic conditions. As disorder declines, people come back and begin to participate in public life on the street. Economic activity fills in, neighborhood groups form,

[27] Sarah Maslin Nir, "Aided by Court Victory, Nail Salon Workers Rally." *New York Times*, April 11, 2012, p. A18.

[28] Daniel Massey, "City Taxi Drivers' Organization Joins AFL-CIO." *Crain's New York Business* October 20, 2011, http://www.crainsnewyork.com/article/20111020/LABOR_UNIONS/111029995 .

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civic pride rises. As vibrancy returns to the street, individuals and institutions change their roles in ways that reinforce civic engagement and safety. Jacob’s “peaceful streets” that emerge over time would be unrecognizable from where they began.

What is the end point of fixing broken windows and creating peaceful streets in workplace settings? It is not seeking to increase complaint rates as an end in itself. Instead, its aim is altering perceptions about the common willingness to take affirmative steps to address workplace problems large and small. Just as in Jacobs’ safe street, neighbors less encumbered by fear begin to look after other neighbors allowing civic life to deepen, changing the climate for exercising voice in the workplace can alter assumptions about what is acceptable behavior in domains regulated by law (e.g. labor standard requirements) and not (basic treatment at work).

A workplace with fewer broken windows would create a different starting point for representation. It would involve new roles for the government agencies charged with enforcing laws and for institutions like labor unions and worker advocates. Fixing broken windows now could eventually lead to an expansion of the opportunities for all parties, including employers, to assure more fair and productive workplaces going forward.

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