

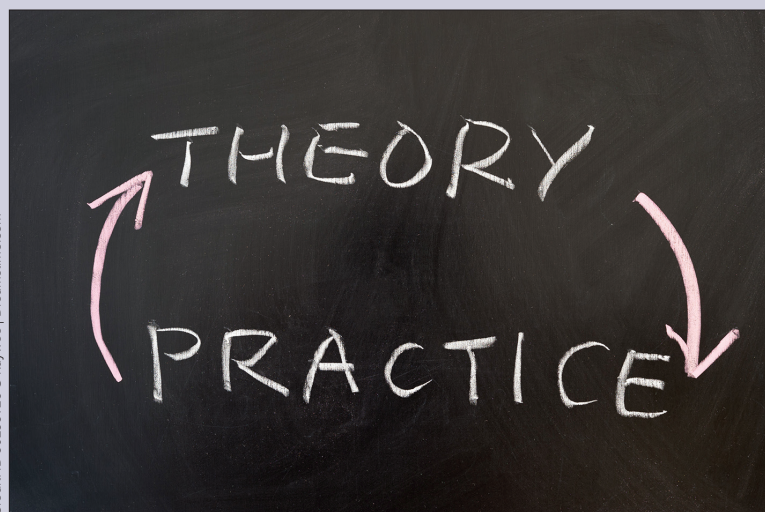


Terri Gerstein

THEORY AND PRACTICE

Why workplace scholars and enforcers should be in conversation

Dialogue between academics and government enforcers can improve both theory and practice.



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- Gerstein enforced labor laws in New York for 17 years.
- A last-minute substitute at an MIT academic conference helped balance her experience and helped her to understand the relevance of academic labor relations research in her enforcement work.
- Scholars and enforcers can — and should — inform each other's thinking.
- Familiarity with even some of the academic literature helped me think more deeply about our work in New York. It also sharpened my thinking and bolstered my ability to explain new approaches we were taking. For example, we conducted an industry-wide investigation of car washes in New York City.

I enforced workplace laws for almost a decade before I learned that there were people who studied what I did. I didn't know there was scholarship on labor enforcement, even though I had worked in some of the most innovative enforcement agencies at the time. For eight years, I'd been an assistant attorney general in the labor bureau of the New York State Attorney General's Office.

Our team in the labor bureau was committed and creative; we collaborated extensively with worker centers and unions; focused on industries with high rates of violation and lead actors within those industries; brought criminal prosecutions when the facts warranted such action; and undertook innovative approaches to enforcement, like developing a code of conduct for greengrocers after a series of successful cases, and starting a campaign focused on employers in Bushwick, Brooklyn, in conjunction with Make the Road New York.

Later, when Eliot Spitzer became governor, several of us moved to the state labor department and continued our aggressive and strategic approach to enforcing the law. I was a deputy commissioner overseeing labor standards enforcement, among other things, and was tasked with overhauling our approach after 12 years of weak enforcement under Governor Pataki.

But I didn't know there were academic articles about my field until I'd been deputy commissioner for a couple of years. The labor commissioner, Patricia Smith, couldn't make a meeting to which she'd been invited, and she asked me to attend in her place. It was a gathering of academics at MIT, to talk about enforcement.

I set off for Boston with almost no background or instructions about the meeting except that I was there



Credit: UNU-WIDER, via Wikimedia Commons

to be the “practical” person in the room. On the Amtrak train, I spent the first 10 minutes practicing my line: “That would never work in real life.” Then I delved into the readings.

They were academic papers about enforcement of labor laws. I was riveted. Those articles have stayed with me because they were excellent, but also because they were so eye-opening for me. For example, Professors Andrew Schrank and Michael Piore wrote about enforcement

schemes in certain other countries, in which highly skilled investigators conducted holistic enforcement instead of the siloed enforcement approach in the United States, where each set of laws is enforced by a different agency.

Professors Janice Fine and Jennifer Gordon wrote about approaches to enforcement that explicitly incorporated unions and worker organizations. And Professor (later Dean) David Weil wrote about strategic enforcement of workplace laws: proactive enforcement seeking to deter violations and the frequent disconnect between violation and complaint rates in different industries. (I saved the hard copy of this paper for years; It was riddled with handwritten stars, underlines, and comments like “Yes!!!”)



Eliot Spitzer

Credit: Timothy Krause, via Wikimedia Commons



Michael Piore



Janice Fine



David Weil

[David Weil's] work provided me with a more compelling framework and language for explaining our methods and goals.

It wasn't so much that the concepts were new to me. In fact, if anything, they largely confirmed what I had learned through my work and what we were already putting into practice, even if we didn't have terminology for it. Mostly, what I learned from the readings (and the conversation at MIT, which grew surprisingly heated at times) was that there were academics out there grappling with the same sets of questions and challenges that I was, but with a different set of skills and tools.

(If I had thought about it deeply, I might have figured this out, but workers' rights issues were not front-page news then; there was little media coverage or public discourse on these topics during most of the aughts, so yes, I was delighted and surprised that scholars focused on these issues.)

Scholars and enforcers can inform each other's thinking

Familiarity with even some of the academic literature helped me think more deeply about our work in New York. It also sharpened my thinking and bolstered my ability to explain new approaches we were taking. For example, we conducted an industrywide investigation of car washes in New York.

Our bureau of research provided us with a random sample of about 15 percent of the car washes in the state, with proportional representation geographically. Some of the career staff expressed good-faith resistance to this proactive effort: they asked the fair question, "Why are we going to worksites with no complaints when we have so many intakes from actual people, and a backlog to boot?"



Credit: Tima Miroshnichenko via Pexels

We ended up finding extensive violations at car washes in the New York City metropolitan area, with nearly 80 percent of city car washes violating minimum wage and overtime laws. Those investigations had lasting impact in various ways, including serving as part of the basis for New York City later passing a carwash registration law. I learned of Weil's research shortly after we started this initiative, and his work provided me with a more compelling framework and language for explaining our methods and goals.

I also began to think differently about measuring the impact of our work. For example, we started a revisit program, in which investigators returned to past violators. Measuring general deterrence can be challenging, but this program would at least help us assess whether our interventions had deterred future violations by the specific employers we'd pursued. The ultimate results could potentially be scathing, I realized, and perhaps these were politically unwise questions to ask.

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But if our work was not effective even for the employers we directly touched, we needed to know that and to assess what change was needed, whether in the law or in our enforcement policies. (I changed jobs shortly thereafter in 2011. I've been informed that the program ended that same year.)

Meanwhile, in the years since that long-ago meeting at MIT, I've had many followup conversations with academics who study workplace issues. It's been mutually enriching; I learn a lot, but I also believe my insights have challenged, grounded, and influenced researchers' thinking about their scholarship.

My point should be obvious by now: scholars who study enforcement should be in regular conversation with enforcers on the ground; everyone benefits from cross-pollination. Also, a finer point: researchers should focus not only on the federal government but also on state and local enforcers, since in recent years a great deal of innovative policymaking and enforcement has occurred at those levels.

This type of ongoing conversation informs scholarship and sparks research ideas.

Government agencies may be able to provide access to enforcement and other data. In some cases, enforcers might be willing to aid researchers, while contributing to their own knowledge, by adding a question to intake or complaint forms. For example, if even one or two wage and hour enforcement agencies routinely gathered information about workers' employment contracts, the results would provide a trove of information for policymakers, enforcers, and scholars. Enforcers' on-the-ground experience may offer researchers new perspectives in analyzing and interpreting their data.

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Meanwhile, the conversation can help enforcers take a bigger-picture view of their work and their mission, offering a broader understanding of the forces at play. Research can help enforcers assess how to target their efforts and determine what approaches will be most effective. It can also help policymakers (who themselves often communicate with enforcers) identify areas in need of legislation and craft well-designed proposals.

In the end, enforcers and scholars who study enforcement are grappling with the same questions: What moves the needle toward compliance? What deters violations? Which laws achieve their intended goals, and which laws don't? And what are the best ways to measure all of this?

A focus on states and cities is especially promising right now

One specific area that might be particularly fruitful today: state and local workplace policy and enforcement. In recent years, states and localities passed laws and regulations on a multitude of workplace issues: minimum wage, overtime, paid sick leave, paid family and medical leave, fair scheduling, just cause termination, and organizing rights for public employees and farmworkers. Some states and/or localities have passed industry-specific laws with worker protections for gig workers, hotel workers, domestic workers, and others. There have been laws strengthening criminal penalties for wage theft in California, Colorado, and Minnesota.

They've passed laws creating new restrictions of noncompetes in multiple states: bans on nondisclosure agreements in New Jersey and California; laws in Colorado and New York City requiring job postings to include salary ranges; antidiscrimination protections expanded to cover formerly incarcerated people; Crown Act laws prohibiting discrimination based on hairstyles.

There are responsible contractor ordinances requiring disclosure of past violations by applicants for public contracts and barring those with poor records; statutes allowing restaurant and other licenses to be denied or suspended if the licensee commits wage theft; laws in response to COVID-19 pandemic issues, including hazard pay, safety and health, antiretaliation, and right-to-recall laws. The list goes on and on. And there have also been negative developments, such as state preemption in Florida, Texas, and elsewhere, of local worker protection laws.

From all this activity, one thing is clear: some of the most interesting action in workplace policymaking right now is in states and localities. All over the country, national experiments are occurring, ripe for research and scholarship, waiting to be mined. Better still: research on these topics would have the potential to affect policy going forward.

Along with new policies, new state and local enforcers have stepped up in some jurisdictions, generally in governmental offices that

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haven't traditionally enforced workplace laws: state attorneys general, cities and localities, and district attorneys and other criminal prosecutors. These and other state and local agencies are often nimble and sometimes open to experimentation or collaboration on research projects.

Research questions can inform enforcement practice



Matthew Johnson

These new enforcers would benefit from research providing practical guidance on significant enforcement. One particularly helpful example of this type of applicable research is an article by Matthew Johnson of Duke's Sanford School of Public Policy, "Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety Laws."

Johnson studied the impact of OSHA press releases on peer employers (for example, employers in the same industry and geographic vicinity). During the Obama administration, OSHA began routinely issuing press releases on all cases in which penalties exceeded a certain threshold dollar amount; this had not previously been OSHA's practice, and this change in policy created a natural experiment allowing Johnson to assess the effect of the press releases.

He found that the press releases made a tremendous impact: "Publicizing a facility's violations led other facilities to substantially improve their compliance and experience fewer occupational injuries." Most notably, he found that "OSHA would need to conduct 210 additional inspections to achieve the same improvement in compliance as achieved with a single press release."

The study powerfully confirmed something many enforcers sense intuitively. We had anecdotal evidence about this: after media coverage of an enforcement case, our phones rang off the hook with calls from workers and sometimes from employers and trade associations. But Johnson's study provided a different kind of proof.

I currently work extensively with state and local enforcement agencies, and not all of them publicize their work. Sometimes a person in the chain of command feels uncomfortable with the idea: press releases about enforcement may feel unfair for some inarticulable reason; perhaps they feel political or like evidence of bias. But Johnson's study changes such people's thinking. In fact, his work

(which I've shared obsessively) makes it clear that government officials would be poor stewards of public resources if they failed to use this extremely cost-effective and simple method of promoting workplace compliance.

Here's another question waiting to be explored, with the potential for real-world impact: What is the effect of criminal prosecution of workplace violations, as opposed to civil enforcement only? Based on my experience in the field, my strong intuition is that — while it should be used only in a limited cases with compelling and egregious facts — prosecution has a uniquely powerful deterrent effect. Even in this moment of reassessment of our criminal justice system, being arrested has a fundamentally different meaning than being sued or receiving a fine.

Employers who commit egregious acts don't generally seem to consider their conduct criminal. (In fact, defense lawyers representing employers in our early prosecutions at the state attorney general's office often initially scoffed at our cases: "This is really a civil matter.") As Orley Ashenfelter and Robert S. Smith wrote in 1979 in "Compliance with the Minimum Wage Law," "Employers will not comply with the law if the expected penalties are small either because it is easy to escape detection or because assessed penalties are small." Criminal prosecution could change an employer's conduct considerably: it increases both the likelihood of detection and the employer's perceived likelihood of detection (because such prosecutions typically receive media coverage).

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Criminal prosecution, even without jail time, also increases the financial, reputational, and other costs of detection. (A discussion about mass incarceration or incarceration in general is beyond the scope of this article, but even without any prospect of jail time, the cost of arrest and prosecution is significant and different in kind than being sued civilly.) It seems likely that a few well selected, publicly announced criminal prosecutions would result in considerable deterrence.

But there are no studies on this specific topic yet. One opponent of prosecuting wage theft has cited, for example, studies about capital punishment or lengthy incarceration failing to deter murder or violent crimes. But these situations are hardly analogous. Studies of criminal tax enforcement, a better comparator, do show some deterrence.

Meanwhile, so many questions are waiting to be explored: Does criminal prosecution of wage theft, payroll fraud, and other employer crimes deter violations by peer employers more than civil enforcement or lawsuits? And if so, does it matter whether the employer is sentenced to incarceration or not; whether the case is a misdemeanor or felony; whether an individual is charged or only the corporation? (Also, what are prosecutors' views on these cases?)

It's an interesting puzzle to consider how to attack these questions. Scholars could conduct qualitative research, such as interviews with peer employers, or review unemployment insurance filings or wage theft findings after a well-publicized prosecution. Or they could compare repeat violation rates of employers who have faced criminal prosecution with those who have been pursued only civilly. And enforcers on the ground could help with that research design question. State and local enforcers have some research questions of their own.

In fact, state and local enforcers can help not only with design but also with ideas for research questions. I asked several people who enforce workplace laws at state attorney general and city labor standards offices what studies would be helpful for their enforcement work, in a practical and applicable manner. They responded with a flood of suggestions.

Many of their questions boil down to "What works?" Enforcers want to be effective. They'd like to know what approaches bring the most deterrence. Penalties, criminal prosecution, bad publicity? At what point do penalties (as opposed to liability for wages and liquidated damages) have a deterrent effect on employers? How big does a penalty have to be before it changes behavior?

What impact do licensing or permitting consequences have? What impact do strategic partnerships, directed investigations, and/or co-enforcement models have on employer compliance? How common are repeat violations, and what drives them? How can enforcement's impact be measured, beyond the commonly used metric of back wages collected? How do employers make their decisions about workplace policies, such as how much to pay workers? Is the answer different depending on employer size? How do employers learn about existing and newly passed workplace laws?

They also had questions about reaching workers, particularly those who face obstacles in accessing government. What are the best ways to reach workers who have limited English proficiency? Or those who are otherwise particularly vulnerable? In addition to building relationships with established worker organizations and unions, what other methods should agencies use to reach workers?

What kinds of social media vehicles are most effective for these purposes? How do most workers who complain to government

agencies learn about this avenue for help? How could agencies identify workers facing violations who don't complain? And what factors influence workers' decisions to report violations?

State and local enforcers had questions about misclassification: What are the statistical trends? What are the lost benefits to workers and the state? What are the illegitimate savings and competitive advantage by companies that misclassify workers? And how much money do gig workers actually make?

They also wanted to know how to target investigations. They sought research about geographic and industry trends: Where are actual violations occurring most often? What are injury rates, worker's compensation violations, and incidence of wage theft in heavily fissured industries? And what relationship exists between wage theft and other kinds of workplace violations? Between workplace violations and violations of environmental, tax, antifraud, and other laws? How has the pandemic changed the landscape?

It is indeed a moment for action.

That long-ago MIT gathering was in the before times: before everyone was on Twitter, pre-webinar and pre-Zoom. Although many research questions were the same, it was much harder to make connections between scholars and enforcers on the ground. That's not the case anymore.

I quickly realized that some of these academics' ideas would work in real life; later, some of them did.

There's exciting potential for interesting and influential research through dialogue and conversation between these two groups. And there's a wealth of possibilities for study, theory, and practice at the state and local levels, where innovation and experimentation abound, and smart people start each day thinking about how to protect working people.

A final note: During the entire meeting at MIT, I never got to say my practiced line: "That would never work in real life." I quickly realized that some of these academics' ideas would work in real life; later, some of them did. ■

Terri Gerstein is director of the State and Local Enforcement Project at the Harvard Labor and Worklife Program and a senior fellow at the Economic Policy Institute. She was previously the Labor Bureau Chief in the New York State Attorney General's Office and a Deputy Commissioner in the New York State Department of Labor.