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# Punishment and Work Law Compliance: Lessons from Chile

César F. Rosado Marzán, *Illinois Institute of Technology*

## PUNISHMENT AND WORK LAW COMPLIANCE: LESSONS FROM CHILE

*César F. Rosado Marzán*<sup>\*J</sup>

### I. INTRODUCTION: LEARNING FROM A “JAGUAR”

Labor and employment (hereinafter referred to as “work law”) activists and reformers find it increasingly more difficult to obtain redress for violations of workers’ rights. As American activist and legal reformer Kim Bobo has said, “wage theft” has become an epidemic in the United States.<sup>2</sup> She mentions that according to the United States Department of Labor, *all* poultry plants steal workers’ wages<sup>3</sup> and many

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\* PhD, JD. Assistant Professor of Law, Illinois Institute of Technology (“IIT”) - Chicago-Kent College of Law. Member of Regulating Markets and Labour Programme, Stockholm University, Institute for Social Private Law, Faculty of Law. This study was made possible thanks to the IIT-Chicago-Kent College of Law summer research support and the Handelsman Fund. It was also made possible thanks to the support of the Chilean Labor Directorate, whose directors, Patricia Silva and María Cecilia Sánchez, permitted me to work alongside its inspectors and use both office space and computing and information technology resources of the public institution for seven and half months with no expectations but that I share my research results once available. I thank Katherine Baker, Rodrigo Correa, Caterina Guidi, Paola Díaz, María Ester Feres, Alvaro Flores, Sergio Gamonal, Sarah Harding, Hal Krent, Marty Malin, Ariel Rosel, Verónica Riquelme, César Toledo, José Luis Ugarte, and Michael Zimmer for reading previous drafts of this article and providing comments. I also thank the participants of the Faculty Workshop of IIT-Chicago-Kent College of Law and the University of Illinois College Law for their helpful feedback. I must also thank Patrick Ferrell, Claire Alfus and the editorial board of the Hofstra Labor and Employment Law Journal for their invaluable editorial assistance. Finally, I thank the innumerable subjects that I observed and interviewed in Chile during the seven-and-a-half month ethnography that preceded this paper. All errors and omissions remain the sole responsibility of the author. Address all comments to crosado@kentlaw.edu.

1. This article contains numerous foreign language sources. The Journal edits and confirms these sources to the best of its ability but cannot guarantee the accuracy of all statements. All foreign sources are on file with the author.

2. See KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID-AND WHAT WE CAN DO ABOUT IT 8 (2009).

3. See *id.* at 7.

other industries trail closely behind.<sup>4</sup> She calls for more inspection resources and punishment tools to better police employers.<sup>5</sup> The Employee Free Choice Act (“EFCA”) was a proposed bill that the labor movement hoped would reform the collective labor laws and make it easier for workers to join unions.<sup>6</sup> Importantly, it was also based on providing the National Labor Relations Board (“NLRB”) with more powers to punish employers who violated the National Labor Relations Act (“NLRA”).<sup>7</sup>

Placing the focus on punishing violators certainly has an appeal, especially given the dire condition of workers’ rights today. Wage theft is rampant throughout multiple industries.<sup>8</sup> The capacity of workers to build and join unions as guaranteed by the NLRA, compared with the actual percentage of private sector employees who are members of a union – 24% in 1973, down to 13.5% in 2001, and dropping to less than 7% in 2010<sup>9</sup> – is also cause for grave concern for organized labor and workers who want to join unions.<sup>10</sup>

This article does not necessarily take issue with the general request for more resources and sanctions to enforce work laws. Deterrence is important. However, scholarship discussing the role of punishment in regulation and enforcement in work law, but also in many other areas of law, forces us to pause before putting too many eggs in the punishment basket. For many years we have now come to comprehend that effective enforcement requires “smart” combinations of persuasion with punishment.<sup>11</sup>

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4. *See id.*

5. *See id.* at chs. 5-6, 9.

6. *See id.* at 86.

7. *See id.*

8. *Id.* at 9.

9. Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey*, 56 INDUS. & LAB. REL. REV. 349, 352 tbl.1 (2002); Steven Greenhouse, *Union Membership in U.S. Fell to a 70-Year Low Last Year*, N.Y. TIMES, Jan. 21, 2011, [http://www.nytimes.com/2011/01/22/business/22union.html?\\_r=1](http://www.nytimes.com/2011/01/22/business/22union.html?_r=1).

10. Although clearly divided on the issue, survey data from 2005 revealed that over 50% of non-unionized American workers would like to have union representation at work. Richard B. Freeman, *Do Workers Still Want Unions? More Than Ever*, ECON. POL’Y INST. (Feb. 22, 2007), <http://www.gpn.org/bp182.html>.

11. *See generally* IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (Donald R. Harris et al. eds., 1992) [hereinafter AYRES & BRAITHWAITE]; JOHN BRAITHWAITE, *TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY* (1985) [hereinafter BRAITHWAITE, *PUNISH OR PERSUADE*]; John Braithwaite, *Responsive Regulation and Developing Economies*, 34 WORLD DEV. 884 (2006) [hereinafter Braithwaite, *Responsive Regulation*]; Roberto

I spent seven and a half months studying the labor inspectorate of Chile, a government agency that enforces work law mostly by punishing those who break the laws. That empirical study, which will be detailed in this article,<sup>12</sup> supports the view that punishment is insufficient and may even backfire when enforcing work law if not supplemented with other enforcement strategies. For example, in the 2010 incident in Chile where thirty-three miners were trapped in a mine 2300 feet below ground,<sup>13</sup> only to miraculously be rescued, a labor inspector had visited the mine before the collapse and established that it was a health and safety risk to the workers.<sup>14</sup> Yet, rather than closing the mine, as the inspector could have done under the law, he only issued a meaningless fine equaling approximately U.S. \$6000.<sup>15</sup> The workers continued to work in the mine even though it was officially considered a work hazard. The rest is history. The mine collapsed and a mix of great luck, heroic rescuers, and significant expense saved the lives of the thirty-three miners.<sup>16</sup>

Why did the labor inspector issue such a meaningless fine if he had found that the mine was a danger to workers and the inspector could close it? As detailed here, for years the Mining Ministry of Chile, supportive of mining interests, took over the jurisdiction of the mine under dubious legal grounds and kept it open.<sup>17</sup> Agencies can commonly intrude the jurisdictional space of other agencies.<sup>18</sup> Such intra-state conflicts even happen in Chile, a country where the rule of law is allegedly zealously protected.<sup>19</sup>

The San José mine incident and other cases detailed in this article

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Pires, *Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil*, 147 INT'L LAB. REV. 199 (2008).

12. See *infra* Part V.

13. *Trapped Chile Miner's Family Sues Owners and Officials*, BBC NEWS (Aug. 26, 2010), <http://www.bbc.co.uk/news/world-latin-america-11102478>.

14. César F. Rosado Marzán, *Working for Another Miracle*, CHI-KENT C.L. FAC. BLOG (Sept. 14, 2010), <http://blogs.kentlaw.edu/faculty/2010/09/working-for-another-miracle.html> [hereinafter Rosado Marzán, *Another Miracle*].

15. *Id.*

16. See Victor Herrero, *All 33 Miners Rescued from Chile Mine*, USA TODAY (Oct. 14, 2010, 12:13 AM), [http://www.usatoday.com/news/world/2010-10-12-Chile-miners\\_N.htm#.T5IP58BhJyY.email](http://www.usatoday.com/news/world/2010-10-12-Chile-miners_N.htm#.T5IP58BhJyY.email).

17. See *infra* Part VII.

18. The now classical sociologist, Max Weber, already discussed how state administrators may hold "office secrets" to hoard power and encroach on areas not under their authority. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY* 992 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1968).

19. See *infra* Part III.A.

lead me to conclude that the Chilean case supports what some legal scholars and social scientists have been finding about punishment-based, “command and control” regulation and enforcement: a culture of resistance develops when agencies insist on mostly punishing the regulated actors. Resistance can then lead to noncompliance. Participatory arrangements for workplace governance and flexible standard settings can help reduce resistance and provide a better environment for enforcement.

This article is divided in the following way:

Section II of the article describes the reasons why punishment matters for work law enforcement. Conversely, Section III describes the literature advocating for non-punishment-based strategies.

Section IV details how Chile is a country with high rule-of-law indicators. It also details its punitive administrative enforcement institution for work law enforcement. Section IV further explains why Chile is a useful case study for understanding the pros and cons of punishment strategies. Finally, the Section speaks to regulatory polemics and theories of punishment (or persuasion) detailed in Sections II and III.

Section V explains my seven-and-a-half month ethnography of the Chilean labor inspectorate and its labor courts to understand how its enforcement institutions work in practice. This ethnography lets us understand the realities and not just the formalities of regulation and enforcement.

Section VI details the likely strengths of the punitive system that I observed in Chile where labor inspectors can fine for a diversity of work law infractions due to their general competence over all sections of the labor code,<sup>20</sup> which creates a significant authority for inspectors to leverage against employers who fail to follow the country’s work laws. This punitive strategy, to fine for any and all infractions, is also useful to resolve individual termination settlements in which labor inspectors are readily involved. Although employment dismissals fall within the exclusive jurisdiction of labor courts, inspectors who believe that the employer is violating the law may seek to fine the employer for failing to provide proper documentation and other unrelated infractions during the pre-trial conciliation process. Fining increases the cost of the termination to the employer and compels the employer to settle. Finally, inspectors can also serve as mere “nuisances.” Even without fining,

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20. Some of these sections include collective labor law, individual employment law, employment discrimination, and health and safety.

their visits at workplaces get in the way of production. Since no employer wants an inspector snooping around the workplace, the mere likelihood of a visit by an inspector may deter the employer from breaking the law.

Section VII of the article details the soft “underbelly” of the DT, which spurs slack enforcement and noncompliance. Employer resistance against the DT is at the heart of this soft underbelly. Resistance is commonplace in Chile, particularly when the inspectorate imposes stiff penalties on strong employers who can fight back through legal challenges and political strategies. One example where resistance rendered the inspectorate powerless was during the inspectorate’s attempt to enforce a law that limited subcontracting. Because fining was apparently insufficient to compel compliance with the law in the important mining sector, the inspectorate ordered the publicly owned mining company, Codelco, to directly hire 5,000 employees that it had allegedly illegally subcontracted. Codelco and the subcontractors took the inspectorate to court alleging, among other things, that the inspectorate attempted to enforce an equitable remedy by commanding them to hire 5,000 workers. The employers argued correctly, that the inspectorate could only establish facts, determine a violation, and fine. The Supreme Court of Chile not only held in favor of the employers and reversed the actions of the inspectorate, but determined that the inspectorate could not even establish violations of the subcontracting law because such actions would entail interpreting labor contracts, a competence reserved only to labor courts. As a result of this decision, the anti-subcontracting law was rendered effectively unenforceable. The situation would have been different if the labor inspectorate could have coordinated bargaining between Codelco, the subcontractors, and employee representatives to bring the large company into compliance gradually. Cooperation could have worked better than a unilateral and illegal mandate made to the corporation.

A second important case shows that employers can also effectively resist even when the inspectorate acts legally. This was the case of the San José mine, as previously discussed.<sup>21</sup> There, the inspectorate had closed the mine in 2003 when a partial collapse occurred. The mine was reopened shortly thereafter by the *Servicio Nacional de Geología y Minería*, or National Service for Geology and Mining (hereinafter referred to as “Sernageomin,” its Spanish acronym), a sub agency of the Mining Ministry with the authority to close and open mines. In 2010,

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21. See discussion *supra* pp. 345-46.

weeks before the collapse that held the 33 miners captive, there was another partial collapse. The inspectorate went to the mine but did not close it, claiming that closure was under the competence of Sernageomin. Such statements were clearly inapposite to the law, as will be discussed in this article. Politics prevailed over law. I argue the case would have been different if the inspectorate not only closed the mine but had authority to negotiate with the mine owners, Sernageomin, and workers in order to persuade them on a plan for a gradual reopening of the mine that met all health and safety concerns. Strong punishment, but also cooperation, was needed as this article will argue.

Section VIII details an instance where the inspectorate experimented with a non-punitive strategy for mass compliance with the work laws. This experience related to the massive terminations ordered by employers during the terrible earthquake that struck Chile in 2010. Terminations reached about 9000 in just a few weeks. In some cities such as Concepción, unemployment reached unheard of levels of close to 20%, generating a social crisis on top of a natural disaster. Then, the inspectorate issued a simple interpretation of the termination rules. The interpretation stated that the earthquake could not be generally used to justify terminations under *force majeure*, one of the statutory defined causes for termination in Chile. As a result of that administrative interpretation, which was not legally binding but was disseminated widely by the press and government, and with support of the President of the country, more than 2600 of the 9000 terminations were voluntarily rescinded by employers in a matter of weeks. There was no need to send armies of inspectors to fine. Primarily pedagogical actions did much of the compliance work.

Section IX concludes the article by arguing how the Chilean case unambiguously supports scholarship that calls for more than just punishment for work law enforcement. Even if the country is generally highly regarded for its rule-of-law reputation, its capacity to compel employers to comply with the work laws is limited by a truncated punishment orientation. Chile should experiment with pedagogical strategies, and so should the United States and other jurisdictions still enveloped in legalistic, adversarial, and punishment-based work law compliance regimes.

## II. HOW PUNISHMENT MATTERS

The case of punishment is straightforward. It helps deter the scofflaws. Punishment in the form of sanctions, fines, and expensive

lawsuits should act as deterrents on those employers who are considering not complying with work laws.<sup>22</sup> If agencies in charge of enforcing the laws have thin resources and weak sanctioning powers, employers will quickly take the hint that noncompliance has no bottom line consequences. Paying overtime, respecting concerted activities by workers, and following health and safety rules have real costs. Noncompliance may not. Under such a structure of incentives to not comply, noncompliance may become rampant.

In the case of wage theft, for example, the Executive Director of the Interfaith Worker Justice, Kim Bobi has argued that the Department of Labor has inadequate resources to police wages and hours regulations.<sup>23</sup> She calls for more inspectors and harsher punishments.<sup>24</sup> As she told the AFL-CIO in an interview:

Most important, we need more cops on the job. There are 750 investigators for 130 million workers in the country, and it's just not enough. I believe we need to quadruple that staff. Now, some people ask how we can do that in this economic environment. But my response is that if we make it a priority, we can make it happen. After 9/11, we hired 52,000 people to go through my luggage and pull out my toothpaste. It was a priority, and we made it happen.

Finally, we need to have meaningful punishments. If you steal wages from workers, there needs to be consequences and you need to feel them. That's especially true for repeat violators. Right now, only 40 percent of repeat violators even get fined at all. Even if back wages are paid, we've found it's usually about 50 cents on the dollar. Employers are making out like bandits. If they steal wages, it's a good business plan because in the end it costs them less.<sup>25</sup>

According to Bobi, the incentives against wage theft seem to be misplaced. The noncompliance situation must be fixed by hiring more "cops" and punishing more.

In the case of the collective labor law, EFCA promised to resolve the dwindling rates of union density by providing, among other reforms, new enforcement powers to the NLRB, namely to issue punitive

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22. See BRAITHWAITE, PUNISH OR PERSUADE, *supra* note 11, at 92-93.

23. See BOBO, *supra* note 2, at 118-21.

24. See *id.*

25. Kim Bobo, *Wage Theft in America: A Crisis We Can Solve*, AFL-CIO, [http://www.rnsworkingtogether.net/mediacenter/speakout/kim\\_bobo.cfm](http://www.rnsworkingtogether.net/mediacenter/speakout/kim_bobo.cfm) (last visited Apr. 13, 2012).



damages and civil penalties against employers who violated the law.<sup>26</sup> The logic was clear: by increasing the costs of noncompliance in the form of higher penalties, noncompliance with the NLRA could be deterred.

On the health and safety front, scholars have noted the almost disastrous state of federal workplace health and safety law, particularly that related to the Occupational Health and Safety Act ("OSHA").<sup>27</sup> Even though the Occupational Health and Safety Administration was redesigned during the Clinton era, the agency has undertaken a number of compliance-based initiatives since the Reagan years, including the Voluntary Protection Program ("VPP").<sup>28</sup> The VPP provides that employers who voluntarily establish workplace safety programs and accept regular inspections by the agency will, in return, obtain laxer punishment if violations are found.<sup>29</sup> However, the Obama Administration seems to have changed course when it comes to compliance assistance at OSHA. As one publication for the professional development of management-side lawyers expressed, the Obama administration has taken a "pro-worker" stance that seems to have become more assertively punitive.<sup>30</sup> As the publication states:

The fiscal year 2010 budget funded one hundred new OSHA inspectors, and the fiscal year 2011 budget proposes to hire twenty-five more inspectors and move [thirty-five] OSHA employees from

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26. Employee Free Choice Act, H.R. 1409, 111th Cong. § 4 (2009). The other two important elements of EFCA were "cards checks" and interest arbitration for first contracts. "Card checks", or proof of majority support through documents signed by employees, usually a union card, would help unions organize workplaces out the need for time-consuming, costly and adversarial NLRB administered union elections. *See id.* §§ 2-3. The second element of the reform would have mandated interest arbitration for first contracts if the parties failed to reach a new contract within a specified period of time. *See id.* Compulsory interest arbitration for first contracts would have guaranteed that the union would obtain a contract and not find itself in endless negotiations that can destroy the momentum and support of the union at the workplace.

27. *See* Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1078 (2005) [hereinafter Lobel, *Interlocking Regulatory*]; *see also* EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 28 (1982) (describing how OSHA barely has any effect on workplace safety).

28. *See* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 343-44 (2005) [hereinafter Estlund, *Rebuilding the Law*].

29. *See id.* at 343.

30. Michael R. Blum, *The Trend for Increased Regulation of Employers Under the Current Administration*, in COMPLYING WITH EMPLOYMENT REGULATIONS 29, 51 (Eddie Fournier ed., 2010).

compliance assistance to enforcement.<sup>31</sup>

In this manner, the current Obama administration seems to be increasing resources and penalties against those who violate the law.

Such calls and policies for tougher sanctions make intuitive sense, especially given the state of (dis)organized labor, wage theft, and employer impunity in the face of health and safety law violations. However, as we will see below, there are reasons to be at least skeptical of the role of mere punishment for work law compliance.

### III. HOW NON-PUNITIVE ENFORCEMENT ALSO MATTERS

While stronger and tougher enforcement may deter violations of work law, scholarship based on “New Governance,” responsive regulation, and traditional “Latin” inspection suggests that more than mere punishment is needed. Participatory processes, combining persuasion with punishment, and applying standards flexibly – attuned to industry and market realities – are likely as important as punishment.

#### A. *New Governance*

New Governance is a normative movement within the law that seeks to bring together various strands of scholarly work spread across various disciplines.<sup>32</sup> It tries to fill in the gap between traditional regulation and neoliberal deregulation.<sup>33</sup> According to Professor Bradley C. Karkkainen, New Governance generally refers to a “broad family of innovative modes of public governance” in the European Union, the United States, and elsewhere that steer away from “the familiar model of command-style, fixed regulation by administrative

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31. *Id.* These statements reflect exactly the agenda that the Obama administration itself has laid out for OSHA. David Michaels, the Assistant Secretary of Labor for Occupational Safety and Health expressed that because there was “a new sheriff in town” OSHA would not only attempt to hire more inspectors but “return to the original intent of the OSH Act and make setting and enforcing workplace standards [their] central focus.” David Michaels, Assistant Sec’y of Labor for Occupational Safety & Health, Speech Delivered at the American Society of Safety Engineers Professional Development Conference & Expo (June 14, 2010) (transcript available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=SPEECHES&p\\_id=2221](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=SPEECHES&p_id=2221)). This focus included moving personnel to “enforcement.” *Id.*

32. See Bradley C. Karkkainen, Reply, “*New Governance*” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 471-72 (2004).

33. See *id.* at 471-73.

fiat” regulation, and “toward a new model of collaborative, multi-party, multi-level, adaptive, problem-solving” regulation.<sup>34</sup>

Professor Cynthia Estlund summarizes the two main characteristics of New Governance as “decentering” and “reflexive.”<sup>35</sup> Decentering refers to bringing non-state actors into the regulatory process by giving them a real say.<sup>36</sup> Reflexivity refers to replacing direct regulatory commands with “self-regulation.”<sup>37</sup> The general idea behind most strands of New Governance is that state and non-state actors participate in the acts of creating and enforcing rules.<sup>38</sup>

New Governance advocates argue that traditional regulation – one that is prescribed and enforced only by the state, and otherwise known as “command and control” – is to blame for most regulatory crises, both within and outside of the workplace.<sup>39</sup> “Command and control” is essentially a rules-based regulatory regime that reached its full expression in the Great Society programs of the 1960s and “the consumer protection and ‘environmental decade’ of the 1970s.”<sup>40</sup> Europe and other parts of the world shared similar regulatory frameworks.<sup>41</sup> In this manner, command and control suits the traditional Weberian bureaucratic characteristics.<sup>42</sup> Command and control has been:

[H]ierarchical, state-centric, bureaucratic, top-down and expert-driven. [It] attempted to microengineer solutions to societal problems through a series of fragmentary, piecemeal, and highly prescriptive regulatory

34. See *id.* at 472-73.

35. See CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 136 (2010) [hereinafter ESTLUND, *REGOVERNING THE WORKPLACE*].

36. See *id.*

37. See *id.* Exactly what scholars mean by “self-regulation” is contested. Estlund develops one view of self-regulation, “co-regulation,” where employers and employees set the rules together. *Id.* at 161. Public enforcement also matters. *Id.* at 241. Ayres and Braithwaite, scholars from whom some New Governance advocates draw their ideas, advocate for so-called “enforced self-regulation” where parties do not only cooperate to regulate themselves, but their rules can be thereafter enforced by a public body. AYRES & BRAITHWAITE, *supra* note 11, at 103; see also Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 388 (2004) [hereinafter Lobel, *The Renew Deal*] (detailing how “hard” ordering of the regulatory model should be replaced with a “soft” one and providing a more deregulatory view on New Governance).

38. See ESTLUND, *REGOVERNING THE WORKPLACE*, *supra* note 35, at 136.

39. See Lobel, *The Renew Deal*, *supra* note 37, at 357-58, 361.

40. Karkkainen, *supra* note 32, at 473-74.

41. *Id.*

42. See WEBER, *supra* note 18, at 956-1005.

interventions, and it tended to produce an impossibly complex and tangled web of rigid, uniform one-size-fits-all rules that in truth did not quite fit anyone.<sup>43</sup>

In this manner, traditional command-and-control regulation imposes rules in a top-down fashion from the state, and is oftentimes too complicated to be rationally instituted. It may be under or over-inclusive, making it ineffective.<sup>44</sup> Conversely, agencies may simply be captured and rendered agents of particularistic interests.<sup>45</sup> Regulators frequently may also count with little reliable information about the conditions of regulated parties and the impact of the regulations on those parties, making it highly ineffectual.<sup>46</sup> The emblematic case of regulatory failure is OSHA, an agency with a morass of rules made in eras with now antiquated technologies and obsolete knowledge of health, safety, and market contexts.<sup>47</sup> For most work law scholars, the unpalatable alternative that is deregulation and the potential crises associated with it has led to a “Third Way” of thought regarding regulation — New Governance.<sup>48</sup> New Governance advocates view with care policies calling for stricter penalties.<sup>49</sup> They claim that attention needs to be put not just on punishing the violators, but also on how the regulations themselves are drafted and by whom.<sup>50</sup> In fact, New Governance values removing the enforcement process from the state.<sup>51</sup> It does not leave the state devoid of a role, but infuses the regulatory and enforcement process with civil society participation. In the case of wage theft, for example, New Governance would likely focus on establishing minimum wages through participatory processes where workers and employers have a voice. Enforcement would not be left only to state enforcers, but workers would have a role to play as the eyes and ears of the state enforcers. Their whistleblower role would be zealously protected by courts and enforced through private causes of action. In the

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43. Karkkainen, *supra* note 32, at 474.

44. See Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, in *JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW* 3, 9 (Gunther Teubner ed., 1987).

45. *Id.*

46. PETER EVANS, *EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION* 31-32 (1995) (describing how mere “aloof detachment” by bureaucrats is not enough for effective public administration).

47. See Lobel, *The Renew Deal*, *supra* note 37, at 415-16.

48. *Id.* at 442.

49. In fact, Orly Lobel calls directly for “‘softer’ processes that either replace or complement the traditional ‘hard’ ordering of the regulatory model.” *Id.* at 388.

50. *Id.* at 391.

51. ESTLUND, *REGOVERNING THE WORKPLACE*, *supra* note 35, at 146.

case of collective labor law, any national reforms could be directed by participatory processes between the regulated actors – employers and workers – perhaps not too differently from the prescribed methods of tripartism promulgated by the International Labor Organization.<sup>52</sup> Similarly, effective workplace health and safety laws should require voluntary, internal health and safety plans with enforcement roles for workers.<sup>53</sup>

### *B. Responsive Regulation and Latin Inspectorates*

New Governance has been inspired by a number of heterodox regulatory perspectives including, importantly, “responsive regulation.”<sup>54</sup> Responsive regulation is a policy-making movement that stems from the work of John Braithwaite and his collaborators.<sup>55</sup> It seeks to create a regulatory strategy that protects “institutional integrity while taking into account new problems, new forces in the environment, new demands, and expectations.”<sup>56</sup> It considers the changing nature of social realities and the limits of law and regulation to accommodate and predict such changes.<sup>57</sup> In this manner, responsive regulation attempts to account for unintended consequences of the regulatory endeavor. It calls for a regulatory framework that adapts to changing realities while keeping faithful to general principles or standards.

In trying to delineate an effective regulatory enforcement strategy, responsive regulation advocates strive to combine punishment with persuasion.<sup>58</sup> According to responsive regulation adherents, punishment works only with the “bad apples.”<sup>59</sup> Enforcement strategies that focus only on punishment generate adversarial relationships with the regulated parties that may result in resistance, culminating in political conflicts against the regulators and, perhaps, against regulation generally.<sup>60</sup> Persuasion is effective for those regulated parties that want to follow the

52. See *Labour Law*, INT’L LAB. ORG., <http://www.ilo.org/ifpdial/areas-of-work/labour-law/lang—en/index.htm> (last visited June 7, 2012).

53. See generally Lobel, *Interlocking Regulatory*, *supra* note 27, at 1071.

54. See generally AYRES & BRAITHWAITE, *supra* note 11; BRAITHWAITE, *PUNISH OR PERSUADE*, *supra* note 11; Braithwaite, *Responsive Regulation*, *supra* note 11, at 884.

55. See Braithwaite, *Responsive Regulation*, *supra* note 11, at 884.

56. *Id.* at 884 (citing PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 336 (1992)).

57. See *id.* at 884-85.

58. See BRAITHWAITE, *PUNISH OR PERSUADE*, *supra* note 11.

59. See *id.*

60. BARDACH & KAGAN, *supra* note 27, at 112-16.

law but because of ignorance and related considerations cannot comply.<sup>61</sup> Responsive regulation approaches the regulated actors through an escalating strategy that starts with persuasive tactics (“carrots”) and moves to deterrent, punishment tactics (“sticks”), reserving the ultimate penalty — “incapacitation,” such as closing down operations — to those actors who persistently fail to comply.<sup>62</sup> Regulators should be “benign big guns,” the proverbial authority figures that “speak softly and carry big sticks.”<sup>63</sup> The idea is that “noncompliance comes to be seen as . . . a slippery slope that inexorably leads to a sticky end.”<sup>64</sup>

Moreover, according to Professors Ian Ayres and John Braithwaite, the state should not be left alone in the task of regulation.<sup>65</sup> Civil society should be a central part of the enforcement pyramid to serve as a check on state capture and to perform regulatory tasks such as “naming and shaming, restorative justice, consumer boycotts, strikes and litigation.”<sup>66</sup> In this manner, regulation is not a purely top-down activity, but it is also a bottom-up endeavor. It is here from where New Governance drew part of its inspiration.

The literature on “Latin” inspectorates also shares some similarities with responsive regulation, particularly that dealing with the ways regulators deal with “good and bad apples.”<sup>67</sup> “Latin” labor inspectorates are work law enforcement institutions whose main agents are labor inspectors, “street-level bureaucrats”<sup>68</sup> who function as a sort of labor police “on the beat.”<sup>69</sup> Following what could be identified as a responsive regulatory framework, Latin labor inspectors are said not to

61. AYRES & BRAITHWAITE, *supra* note 11, at 20-21.

62. Braithwaite, *Responsive Regulation*, *supra* note 11, at 887.

63. AYRES & BRAITHWAITE, *supra* note 11, at 19.

64. *Id.*

65. *See id.*

66. Braithwaite, *Responsive Regulation*, *supra* note 11, at 888.

67. *See* ANDREW SCHRANK & MICHAEL PIORE, ECLAC/MEXICO, SERIE ESTUDIOS Y PERSPECTIVAS: NORMS, REGULATIONS AND LABOR STANDARDS IN CENTRAL AMERICA, at 43-47, U.N. Doc. 77, U.N. Sales No. E.07.II.G.44 (2007), *available at* <http://www.cepal.org/publicaciones/xml/3/28113/Serie%2077.pdf> [hereinafter SCHRANK & PIORE, ECLAC/MEXICO]; Michael Piore & Andrew Schrank, *Toward a Managed Flexibility: The Revival of Labour Inspection in the Latin World*, 147 INT’L LAB. REV. 1, 14-16 (2008) [hereinafter Piore & Schrank, *Managed Flexibility*]; Pires, *supra* note 11, at 199-201; Andrew Schrank, *Professionalization and Probity in the Patrimonial State: Labor Inspectors in the Dominican Republic*, 51 LATIN AM. POL. & SOC’Y. 91, 92 (2009) [hereinafter Schrank, *Professionalism and Probity*].

68. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 2 (2007).

69. *Id.* at 4.

depend primarily on sanctions (“sticks”) to compel compliance with the work laws. They are said to use persuasive “conciliation and/or remediation” enforcement strategies.<sup>70</sup> Under this approach, labor inspectors attempt to persuade employers that work law compliance is efficient and good for their business rather than just a cost that will make the firm less competitive.<sup>71</sup> Inspectors can impose sanctions, but these are not their main or only tools to compel compliance with the law.<sup>72</sup> Following what seems to be the responsive, pyramidal structure of compliance, Latin labor inspectors reserve sanctions for the more serious cases.<sup>73</sup> They use persuasion as their main tool of compliance.<sup>74</sup> Such strategies may include everything from simply making the employer cognizant of his or her duties under the law, promoting best practices to help employers implement the law efficiently or bringing together parties to the bargaining table to develop plans on how to bring the firm into compliance gradually, but surely.<sup>75</sup>

Another important characteristic of Latin labor inspectorates is their centralized administrative structure and general competence.<sup>76</sup> They have authority to police work law compliance generally and are not limited by areas of specialization, as tends to exist in the Anglo-American world, particularly in the US.<sup>77</sup> Rather than having exclusive groups of inspectors and other agents housed in various enforcement agencies with different jurisdictions—for example the NLRB, the Equal Employment Opportunity Office, OSHA, the Wages and Hours Division of the Department of Labor, and their state-level pairs—labor inspectors in the Latin world are housed and managed from one central, and national, labor inspectorate.<sup>78</sup>

Administrative centralization is supposed to enhance the discretionary authority of labor inspectors. This enables them to strategically choose which industries and employers to focus on and to discover where more acute noncompliance problems exist. In this

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70. See Michael J. Piore, *Flexible Bureaucracies in Labor Market Regulation*, in THE IDEA OF LABOUR LAW 385, 388 (Guy Davidov & Brian Langille eds., 2011) [hereinafter Piore, *Flexible Bureaucracies*].

71. See Schrank, *Professionalization and Probity*, *supra* note 67, at 100-01.

72. See Piore, *Flexible Bureaucracies*, *supra* note 70, at 387-88.

73. Schrank, *Professionalization and Probity*, *supra* note 67, at 101-02 (detailing pedagogic and escalating sanctions in “Latin” inspection systems).

74. See Piore, *Flexible Bureaucracies*, *supra* note 70, at 388; Schrank, *Professionalization and Probity*, *supra* note 67, at 101.

75. Schrank, *Professionalization and Probity*, *supra* note 67, at 101.

76. See SCHRANK & PIORE, ECLAC/MEXICO, *supra* note 67, at 10.

77. See *id.* at 10, 14.

78. *Id.*

manner, discretion also provides the inspectorate with flexibility when applying sanctions or otherwise exerting their authority.<sup>79</sup> As Professor Michael Piore argues:

Because the inspectors cannot possibly inspect for every provision of the code, they are effectively in a position to pick and choose which provisions they will look at, where to focus their attention. They can weigh the different aspects of the law, and in effect the different goals of legislation, against each other and against the viability of the enterprise, adjusting the regulations to the particularities of each establishment and to the economic and social environment in which it operates. Their ability to work out the process through which the enterprise comes into compliance gives them further latitude to adjust the code. Thus, for example, they might enforce health and safety standards more stringently and allow less time to come into compliance in a tight labor market where unemployment is low and jobs are plentiful than in a recession, when imposing the costs of compliance risks driving the firm out of business and destroying jobs.<sup>80</sup>

According to Piore, the contrast with the United States' system is stark. In the United States, the narrow jurisdiction of an agency's officers and agents gives little wiggle room to pick and choose which rules to focus on given certain market and industry conditions and how to compel the regulated parties to comply with the law.<sup>81</sup>

A third relevant characteristic of Latin labor inspection is that the line agents, the labor inspectors, are professionals subject to review and discipline by their profession and not just by the bureaucracy for which they work.<sup>82</sup> Professional self-regulation promotes better quality work and limits the chances of capture. In the Dominican Republic, for example, one of the ways that the labor inspectorate has been successfully reformed has been by requiring new labor inspectors to have law degrees.<sup>83</sup> Because they are lawyers, the new labor inspectors are subject to review and supervision by the lawyers' bar. Indiscipline and corruption could lead to their disbarment, destroying their capacity to make a living as state agents or as private attorneys.<sup>84</sup>

With all of this being said, Latin America is not exactly known for

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79. Piore, *Flexible Bureaucracies*, *supra* note 70, at 388.

80. *Id.*

81. *Id.*

82. SCHRANK & PIORE, ECLAC/MEXICO, *supra* note 67, at 11, 15, 32.

83. *State of the Working World: Dominican Republic*, VERITÉ, <http://www.verite.org/SWW/DominicanRepublic> (last visited June 8, 2012).

84. *See id.*



its high-quality state institutions and strict adherence to the rule of law. What, then, has the “Latin” inspection system been able to do successfully in Latin America? Let us take the case of Brazil.

According to researcher Roberto Pires, the most successful cases of labor inspection in Brazil are those where inspectors “bring firms into compliance with the law by finding legal and/or technical solutions that create positive incentives for firms to improve working conditions and remain in compliance.”<sup>85</sup>

The labor inspectorate in Brazil recently identified significant noncompliance with health and safety rules in the automotive industry.<sup>86</sup> In response to these findings, the inspectorate decided to follow a strategy which aimed to persuade auto manufacturers that making significant investments in health and safety implements was desirable.<sup>87</sup> For these ends, inspectors searched for and provided information to employers regarding the existence of cost-efficient protective equipment.<sup>88</sup> They also identified subsidized credit for employers to purchase the protective machinery.<sup>89</sup> As a result of such conciliatory and remedial, even facilitative actions for compliance, 70% of the auto-manufacturing employers invested in the technologies.<sup>90</sup> Official accidents were lowered by 66%.<sup>91</sup>

In another regulatory area, wage and hour regulations, the Brazilian labor inspectorate was also able to formalize the employment contracts of so-called “*cordeiros*.”<sup>92</sup> Annually in Brazil, more than 70,000 workers are hired on a temporary basis to serve as *cordeiros* during what has become the “mega-event” of Carnival.<sup>93</sup> *Cordeiros* are the workers that hold the ropes that separate the crowds watching Carnival from the members of dancing and music troupes participating in the event.<sup>94</sup> Given the informal employment arrangements, *cordeiros* were subject to abuse.<sup>95</sup> Non-payment and underpayment of wages was common.<sup>96</sup> On the flip side, the low quality nature of the job lent itself to poor job

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85. Pires, *supra* note 11, at 206.

86. *Id.* at 209-10.

87. *See id.* at 210-11.

88. *Id.*

89. *Id.* at 211.

90. *See id.*

91. *Id.*

92. *Id.* at 208.

93. *Id.* at 207.

94. *See id.*

95. *See id.* at 207-08.

96. *Id.* at 208.

attachment and turnover.<sup>97</sup> Many *cordeiros* would abandon their jobs, even during official working time, for better-paying work offered to them.<sup>98</sup> Informality was bad for business and for the *cordeiros*.

While both workers and employers seem to have suffered from the evils of informality, neither group felt compelled to formalize the employment relationship.<sup>99</sup> On one hand, formally hiring and terminating the employment contracts of about 1,000 *cordeiros*, which, according to Pires, was the average number of *cordeiros* hired by each employer, was administratively challenging and costly.<sup>100</sup> On the other hand, many workers did not want their *cordeiro* job to appear in their formal employment history<sup>101</sup> because of the stigma associated with such a position, so *cordeiros* preferred the evil of informality to the evil of stigmatization.<sup>102</sup>

The solution that the inspectorate found to resolve the double bind caused by informality was to target the entire Carnival industry and find a solution that addressed both worker and employer interests. In consultation with workers and employers, the labor inspectors helped to create:

[A]n alternative formal arrangement for temporary hiring – namely, a service provision contract [rather than a formal employment contract] specific to *cordeiros*, which [was] basically made up of clauses concerned with minimum daily rates, breaks, food, gloves, insurance against accidents, etc. This temporary employment contract established basic protections for workers while giving firms a viable way to formalize their labour force and provide better quality service for their patrons . . . .<sup>103</sup>

In the example of the Carnival, the inspectorate undertook a non-punitive, compliance-based, multi-party, and participatory methodology to bring employers into compliance,<sup>104</sup> the combined prescriptions of New Governance and responsive regulation.

However, contemporary labor inspection still has problems. While there is enthusiasm over the renaissance of Latin inspection, the

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97. *See id.*

98. *Id.*

99. *See id.* at 208.

100. *Id.*

101. All employees in Brazil have a formal work history called a *carteira de trabalho*. *See id.*

102. *See id.*

103. *Id.*

104. *Id.* at 199.

resurgence of Latin inspectorates in the developing world has not produced the same results everywhere.<sup>105</sup> Even Pires, for example, has identified uneven successes in Brazil.<sup>106</sup> While “sticks” seldom work alone, toothless conciliation or remedial strategies are similarly ineffective.<sup>107</sup> Researchers paying attention to Central American and Caribbean countries since the signing of the Central American and Dominican Republic Free Trade Act with the United States (CAFTA-DR) likewise have noticed mixed results after the trade agreements imposed special work law enforcement duties on the parties.<sup>108</sup> In Argentina, research has also noticed differing degrees of success determined by the role that workers have played in aiding labor inspectors,<sup>109</sup> dovetailing with New Governance and responsive regulation propositions that inclusive and participatory frameworks matter for effectiveness. To bring back Ayres and Braithwaite,<sup>110</sup> state-society relations matter.<sup>111</sup>

#### IV. THE CHILEAN CASE “ON THE BOOKS”

The case of Chile can contribute to debates regarding the utility of punishing versus persuading employers to comply with the work laws. If there is a jurisdiction in the world where punishment should be working properly, it is Chile. Chile is known for its high quality institutions and strong rule of law. The administrative orientation of work law enforcement is also strongly punitive.

##### A. Rule of Law

Some may be skeptical about lessons that could be drawn for the

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105. See SCHRANK & PIORE, ECLAC/MEXICO, *supra* note 67, at 23-29 (detailing the different approaches to the labor market regulation in Central American countries such as Costa Rica, the Dominican Republic, and Guatemala).

106. See Pires, *supra* note 11, at 203-06.

107. See *id.* at 204-06.

108. See generally SCHRANK & PIORE, ECLAC/MEXICO, *supra* note 67.

109. See Matthew Amengual, *Changes in State Capacity to Respond to Labor Standard Violations: Enforcement in the Garment Workshops of Buenos Aires*, MIT SLOAN SCHOOL OF MGMT. INST. FOR WORK & EMP. RES. 19 (Jan. 11, 2012), available at <http://web.mit.edu/amengual/www/Amengual-ILOChapter-2012-01-11.pdf>.

110. AYRES & BRAITHWAITE, *supra* note 111, at 3-4 (“If we accept that sound policy analysis is about understanding private regulation . . . and how it is interdependent with state regulation, then interesting possibilities open. . .”).

111. See also EVANS, *supra* note 46, at 29 (discussing the importance of being proactive and the cooperation of state-society relations).

United States and others from Chile, a medium-sized, if not small, still developing country. While true that Chile's geography, population, culture, wealth, and many other differences only make it an imperfect model for almost any other developed nation, we should not easily disregard lessons that can be drawn from its experiences. First, Chile is regarded as one of the most institutionally sophisticated states in the world.<sup>112</sup> Not a single country in Latin America and the Caribbean surpasses Chile's institutional qualities.<sup>113</sup> World Bank indicators<sup>114</sup> place Chile as the Latin American country with the strongest support for the rule of law.<sup>115</sup> Other World Bank indicators, such as regulatory quality and control of corruption, place Chile at the top 10th percentile globally.<sup>116</sup> Indexes by other organizations that measure rule of law in different ways also put Chile as a country with strong rule of law institutions.<sup>117</sup>

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112. *Why Chile?*, GOBIERNO DE CHILE: MINISTRY OF FINANCE, <http://www.hacienda.cl/english/investor-relations-office/why-chile.html> (last updated May 2012).

113. *See id.*

114. Daniel Kaufmann et al., *The Worldwide Governance Indicators: Methodology and Analytical Issues* 9 (The World Bank Dev. Research Grp., Working Paper No. 5430, 2009) [hereinafter referred to as Daniel Kauffman, *The Worldwide Governance Indicators*]. The World Bank reports six "governance" indicators, including "rule of law." These are measured in a units ranging from -2.5 to 2.5, with higher values corresponding to better governance outcomes. *Id.* The World Bank's rule of law index measures perceptions on "the extent to which agents have confidence in and abide by the rules of society, in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence." *Id.* at 4.

Note, "rule of law" is a contested concept, with some analysts advocating for "thin" and other "thick" accounts. *Id.* at 3. "Thin" accounts of the rule are narrowly focused on the country's adherence to rules, while a "thick" account is broader and attempts to consider higher-ordered values such as substantive justice. *Id.* In this paper, I do not take sides on this debate, as it is beside the paper's thesis. I do stress, however, that under most metrics of rule of law, Chile tends to come ahead.

115. *See Transparency and the Rule of Law in Latin America: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Int'l Relations*, 109th Cong. 127 (2005), available at [http://commdocs.house.gov/committees/intlrel/hfa21398.000/hfa21398\\_0f.htm](http://commdocs.house.gov/committees/intlrel/hfa21398.000/hfa21398_0f.htm).

116. *See Worldwide Governance Indicators: Country Data Report for CHILE, 1996-2010*, WORLD BANK INST., 5, 7, <http://info.worldbank.org/governance/wgi/pdf/c41.pdf>.

117. For example, the Bertelsmann Transformation Index (BTI) by the Bertelsmann Foundation offers a rule of law measure for developing economies that considers "democratization" and "market liberalization" and "evaluates reformers' actions, decisions and management within a country." Verónica Michel, *The Rule of Law: Definition and Measurement* (2010) (unpublished memo on file with author). The index is based on a 1-10 point scale, with 1 being the worst and 10 being the best score. *Id.* According to the BTI's survey of more than 140 developing countries in 2009, Chile

In terms of work law regulation and enforcement, Chile also seems to be at the head of the pack. A recent report showed that Chile provided relatively more resources for work law regulation and enforcement than any Latin American country, with just more than 19.25 inspectors for every 100,000 workers in the economy.<sup>118</sup> The second highest country, Guatemala, counted 7.53 inspectors per 100,000 workers.<sup>119</sup>

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ranked 9th with a score of 8.99. *Bertelsmann Transformation Index (BTI)*, BERTELSMANN FOUNDATION (Mar. 22, 2012), <http://www.bertelsmann-transformation-index.de/en/bti>. Uruguay was the only Latin American country with a higher score, with 9.25. *Id.* Another index, the Global Integrity Index (GII) measures levels of governance and anti-corruption trends. Verónica Michel, *The Rule of Law: Definition and Measurement* (2010) (unpublished memo on file with author). As part of what are defined as “anti-corruption mechanisms” this index provides a measure of “rule of law and access to justice.” *Id.* Rule of law is measured by considering “legal equality, impartiality, and access [to justice].” *Id.* However, the GII only covers a select group of countries each year, raising serious difficulties for general, comparative analysis across time. *Id.* However, even then, the evidence strongly favors a view that Chile generally respects the rule of law. In 2008, the GII measured the rule of law in five Latin American and Central American countries, Chile, Colombia, Argentina, Ecuador and Nicaragua, and placed Chile at the top of the list. Claudia Lagos Lira, *Reporter’s Notebook: Chile*, GLOBAL INTEGRITY REPORT, <http://report.globalintegrity.org/Chile/2008/notebook> (last visited June 11, 2012).

Other rules of law indexes do not contain a measure for Chile. These other indexes are the ABA’s Judicial Reform Index ([http://www.abanet.org/rol/publications/judicial\\_reform\\_index\\_factors.shtml](http://www.abanet.org/rol/publications/judicial_reform_index_factors.shtml)), Freedom House (<http://www.freedomhouse.org>), and the World Justice Project Rule of Law Index (<http://www.worldjusticeproject.org>). Verónica Michel, *The Rule of Law: Definition and Measurement* (2010) (unpublished memo on file with author) (describing the various, existing, rule of law indexes).

118. SCHRANK & PIORE, ECLAC/MEXICO, *supra* note 67, at 22. Note, however, that a recent, internal DT report established that Chile counts only 1 inspector per 18,626 workers, or 5.36 inspectors per 10,000 workers, significantly less than the amount reported by Schrank and Piore’s ECLAC report. Enrique Pérez Mendoza, *Desafíos para la profesionalización y mejoramiento de la gestión de la inspección del trabajo en Chile*, 4, 6-7 (internal DT memo, on file with author). This possible divergence in the numbers is likely explained by the fact that the occupational classification of “inspector” (*fiscalizador*) is a generic category in Chile. Many “inspectors” perform duties that have little to do with field inspections, from administrative to conciliation duties in the various DT offices. *Id.* According to the internal report, the actual number of field inspectors in Chile in 2009 was 357. *Id.* These had to serve a total of 18,626,000 workers in the country. *Id.*

Nevertheless, even if Chile only counted 5.36 inspectors per 10,000 employed workers in the country, Chile would still be among the countries with the most labor inspectors in the region, behind only to Guatemala (7.53), Uruguay (5.79), Panama (5.6), and the Dominican Republic (5.54), followed by Costa Rica (4.66), Honduras (3.97), Argentina (3.05), Paraguay (2.7), Brazil (2.45), El Salvador (2.28), Mexico (1.72), Nicaragua (1.58), Peru (1.34), Colombia (1.24), and Ecuador (.57). SCHRANK & PIORE, ECLAC/MEXICO, *supra* note 67, at 22.

119. SCHRANK & PIORE, ECLAC/MEXICO, *supra* note 67, at 22.

Chile has also increased the amount of *de oficio*, or proactive inspections, since 1990, with some years counting for as much as 50% of all labor inspections, showing strong governmental will to proactively enforce the laws.<sup>120</sup> Countries in the region with similar rates of proactive inspections only include Costa Rica, the Dominican Republic and Nicaragua, all of which hovered in the 41-47% range in 2004.<sup>121</sup>

Finally, Chile has one of the strongest economies in the developing world. In terms of gross national income (“GNI”), Chile boasted a per capita income figure of US \$9,396 in 2008, surpassed by none other in the Southern Cone and only exceeded slightly by Mexico, the Latin American leader, with US \$9,980 GNI per capita.<sup>122</sup> Such has been the success of the Chilean economy that in 2010 Chile was admitted to the exclusive ranks of the Organization for Economic Co-operation and Development (“OECD”).<sup>123</sup>

The case of “shiny” Chile—otherwise known as the Latin American “jaguar”—provides us with a case of how a well-working punitive labor inspectorate functions – or not.

### *B. A Punitive Administrative Enforcement System*

The Chilean labor inspectorate also provides us with a case of how *punitive* enforcement works. Different from its Latin peers, Chile’s labor inspection system is primarily punitive in character. In other words, *the Chilean labor inspectorate is not stereotypically “Latin” because it is punitive and not remedial or conciliatory in nature*. Hence, the Chilean case is not just about a likely, well-working inspectorate, but a punitive one, as well.

120. César F. Rosado Marzán, *Of Labor Inspectors and Judges: Chilean Labor Law Enforcement After Pinochet (and What the United States Can Do to Help)*, 54 ST. LOUIS U. L.J. 497, 506 (2010).

121. SCHRANK & PIORE, ECLAC/MEXICO, *supra* note 67, at 16.

122. *Doing Business: Measuring Business Regulations, Economy Characteristics*, THE WORLD BANK, <http://www.doingbusiness.org/data/exploreeconomies/economycharacteristics> (last visited June 11, 2012). However, some Caribbean nations boast much larger GNI numbers, such as the Bahamas with \$22,906.60, Trinidad and Tobago with \$16,538.30, Puerto Rico with \$15,629.60, and St. Kitts with 10,961.40. *Id.* However, these Caribbean countries are much smaller than Chile and do not really provide adequate comparisons. Moreover, Puerto Rico is not even an independent nation, but a U.S. territory, which also makes it difficult to compare with Chile.

123. *Accession: OECD Welcomes Chile, Estonia, Israel and Slovenia*, OECD (May 27, 2010), <http://www.oecd.org> (search “Accession: OECD welcomes Chile, Estonia, Israel and Slovenia”).

### 1. The Labor Directorate

The Decreto con Fuerza de Ley No. 2 of 1967 (“DFL No. 2”) is the law that created the *Dirección del Trabajo* or Labor Directorate of Chile (hereinafter referred to as “DT”, its Spanish acronym) as we know it today.<sup>124</sup> The DFL No. 2 states the legal mandates for labor inspection in the country.<sup>125</sup> Elsewhere I have detailed the basic contours of the DFL No. 2,<sup>126</sup> but it is worthwhile to briefly review them here to better understand labor inspection in Chile.

The DFL No. 2 was enacted to provide an “adequate economic and social development of the country,” to “scrutinize the correct application of the laws that guarantee the social rights of workers,” to implement the work laws, and to “aid the government in developing the country’s social policy.”<sup>127</sup> In this manner, the DT was created as an integrated or centralized work law enforcement agency that enforces all of the country’s work laws. This set-up is commonplace in Latin jurisdictions.<sup>128</sup>

However, the DT has an array of functions, in addition to labor inspection that makes the state agency’s competences quite broad. Its main functions include punitive labor inspection, some marginal, remedial/conciliatory inspection functions, administrative interpretation of the law, conciliation of employment termination claims, and mediation of collective bargaining disputes.<sup>129</sup> Other functions include filing specific claims in courts on behalf of workers, defending its fines in the labor courts when challenged by employers, providing a public registry (*registro*) of temporary employment agencies (“temp agencies”) and attesting documents (“*fe pública*”).<sup>130</sup> Here I will only describe the functions most relevant to this article: labor inspection, marginal conciliatory and remedial actions, conciliation and mediation, and

124. The first precursor of the current DT was the *Oficina del Trabajo* (Labor Office), created in 1907. The Oficina del Trabajo was later replaced by the *Dirección Nacional del Trabajo* (National Labor Directorate) in 1924, the DT replaced the National Directorate in 1967. Marcos Antonio Rodríguez Rojas, LA INSPECCIÓN DEL TRABAJO: SURGIMIENTO DE LA FISCALIZACIÓN LABORAL 1924-1934 26, 36-37 (Dirección del Trabajo 2010).

125. Decreto con Fuerza de Ley No. 2, pmb. [hereinafter DFL No. 2].

126. Rosado Marzán, *supra* note 120, at 500-09.

127. DFL No. 2.

128. Cód. TRAB. art. 505, available at [www.dt.gob.cl/legislacion/1611/articles-59096\\_recurso\\_2.pdf](http://www.dt.gob.cl/legislacion/1611/articles-59096_recurso_2.pdf).

129. José Luis Ugarte Cataldo, *La inspección del trabajo en Chile: vicisitudes y desafíos*, 6 REVISTA LATINOAMERICANA DE DERECHO SOCIAL 187, 193-196 (2008).

130. *Id.*

administrative interpretation of the law.

## 2. Labor Inspection

Labor inspection focuses on fines and other coercive measures, making labor inspection particularly punitive in Chile. Inspectors can visit workplaces at any time, either *de oficio*—without somebody filing a proceeding charge against the employer—or after receiving a charge.<sup>131</sup> They can inspect the physical premises and business records of employers at any time of the day or night.<sup>132</sup> Persons who interfere with the inspectors' duties can be fined.<sup>133</sup> Employers can be held directly and personally liable for such interferences, as well as for any moral, physical and material damages suffered by inspectors while performing their duties.<sup>134</sup> Inspectors can also seek the aid of public law enforcement officials, including the state police (*carabineros*) to assist them in their duties.<sup>135</sup>

Once inspectors find that an employer committed a violation of a work law, they can fine the employer, order the suspension of work activities, and even close a workplace if there is an immediate hazard to the life and health of employees, or if employers are otherwise violating the work laws.<sup>136</sup>

The internal rules of the inspections department of the DT further develop the punitive orientation of the inspectors. According to the regulations pertaining to the inspectorate, known as Circular 88, *inspectors should not assist employers on how to comply with the work laws*.<sup>137</sup> They must use labor inspection as a symbolic act that deters future infractions. As the rules state:

[I]nspection must be devoid, as a matter of principle, of any assistance characteristics that try to solve (supposedly) a multiplicity of concrete cases, one on one, with a strong conciliatory-mediating accent[.] Instead of obtaining more general levels of compliance with legislation, [assistance] presupposes that noncompliance with the law is due primarily to ignorance of the norm, disregarding other more

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131. DFL No. 2, art. 27.

132. DFL No. 2, art. 25.

133. DFL No. 2, art. 25.

134. DFL No. 2, art. 25.

135. DFL No. 2, art. 26.

136. DFL No. 2 arts. 28, 31, 34, 38.

137. Gobierno de Chile, Dirección del Trabajo, Depto. De Fiscalización, Circular 88, Generalidades acerca de la fiscalización §I(f) (July 5, 2001).



probable causes for noncompliance such as reduction of economic costs.

In this manner, inspection does not have as a goal to address infractions individually, case by case, . . . but it uses these situations or particular realities to produce a demonstration effect in the entire social context. More than resolving isolated cases, one by one, what really matters is to produce social scenarios where the most respect with the protected legality is attained. (*translation by author*).<sup>138</sup>

Not only should inspection be devoid of compliance assistance, but also the rules clearly voice skepticism as to the possibility that assistance can ever be effective.

The punitive perspective was not only confirmed by my observations in Chile and the regulations, but also by Raúl Campusano, the former Chief of Inspections of the DT who drafted the regulations cited above.<sup>139</sup> According to Campusano, he drafted the regulations to create a “strong” inspections model in Chile.<sup>140</sup> For him, compliance assistance programs are watered down enforcement policies used by “weak” agencies such as the American OSHA, an agency that in his opinion is entirely ineffective.<sup>141</sup>

### 3. Marginal Conciliatory/Remedial Inspection Programs

Notwithstanding its primary, punitive orientation, the DT has used more than mere fines to compel employer compliance with the country’s work laws. Until the late 1990s, the DT issued “*actas de instrucción*” (writs of instruction), whereby inspectors noted employer infractions and gave the employer fifteen days to comply with the law before issuing a fine.<sup>142</sup> These writs of instruction had a quasi-conciliatory or remedial element to them, as employers would be instructed about their violation and could avoid a fine by proving that they remedied the infraction and complied with the law within that fifteen-day period.<sup>143</sup> By the late 1990s, however, the DT discontinued writs of instruction and installed

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138. *Id.*

139. Fieldnotes, César F. Rosado Marzán (Mar. 22, 2010).

140. *Id.*

141. *Id.*

142. Interview with Maria Ester Feres, Dir. of Chile’s DT from 1994-2004 (May 13, 2008) (notes on file with author); see also Heleen F.P. Ietswaart, *Labor Relations Litigation: Chile, 1970-1972*, 16 L. & SOC’Y REV. 625, 642-45 (1981-82) (describing an historical account of the informal administrative practice).

143. Interview with María Ester Feres, *supra* note 142.

more formalized procedure to remedial programs including compliance<sup>144</sup> and the “training-for-fines” program.<sup>145</sup>

The compliance assistance program was formalized in 2004<sup>146</sup> and lasted at least through 2010, when the unit in charge of administering the program within the DT, the *Unidad Inspectiva Programada de Oficio* (“UIPO”), was recalled by the new government administration of Chile that came to power that year.<sup>147</sup> Directly borrowing language from the International Labor Organization (“ILO”), the general goal of the program was to develop “decent work.”<sup>148</sup> It attempted to plan programmed, *de oficio* inspections to tackle systemic violations of work laws in the country.<sup>149</sup> To do so, it would first review data previously collected by the DT, through inspections and complaints, to diagnose systematic work law infractions.<sup>150</sup> Then it would design an intervention, which would include labor inspections, technical assistance to the employers, and tripartite roundtables to search for negotiated solutions.<sup>151</sup> Through the roundtables, the UIPO attempted to promote situations where sanctions would not be issued if parties agreed to progressively improve and find definite solutions to the infractions noted.<sup>152</sup>

Again borrowing language from the ILO, the strategy promoted

144. DIRECCIÓN DEL TRABAJO, 3 ORDEN DE SERVICIO (May 14, 2004), *available at* [http://www.dt.gob.cl/1601/articles-65345\\_OS\\_3.pdf](http://www.dt.gob.cl/1601/articles-65345_OS_3.pdf).

145. CÓD. TRAB art. 506.

146. Dirección del Trabajo, 3 Orden de Servicio (May 14, 2004).

147. Fieldnotes, César F. Rosado Marzán (June 29, 2010). During my fieldwork in Chile, various attorneys that represent employers in the country told me that they thought that the UIPO was eliminated because it was the office where unions had direct access to the Director of the DT, which made the office “political.” *Id.* The employer perception of pro-employee bias at the UIPO was unfortunate given that the UIPO was the office in charge of providing training, know-how, planning and other resources for compliance-based, non-punitive inspections in the country. *Id.*

148. *See Decent Work Agenda*, INTERNATIONAL LABOR ORGANIZATION, <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang—en/index.htm> (last visited June 11, 2012). The campaign for “decent work” is derived from the International Labor Organization’s “Decent Work” Project. *See id.* It aims building a concept of work based on, “personal dignity, family stability, peace in the community, democracies that deliver for people, and economic growth that expands opportunities for productive jobs and enterprise development.” *Id.* It does this through job creation, guaranteeing rights at work, extending social protection and promoting “social dialogue” by “involving strong and independent workers’ and employers’ organizations [to increase] productivity, avoid disputes at work, and build cohesive societies.” *Id.*

149. Dirección del Trabajo, Orden de Servicio No. 3 (May 15, 2004).

150. *Id.* at § III.B.

151. Dirección del Trabajo, Orden de Servicio No. 3 (May 15, 2004).

152. *Id.*

“social dialogue” between regulated actors, including unions and employers, to find solutions to problems at work and find sustainable methods for work law compliance.<sup>153</sup> The fine was not going to be the main tool, but one of various tools in the context of social dialogue to compel compliance with the law. As the regulations for the program stated: “[a]ll strategy must, therefore, promote dialogue between the actors and their commitments for the solution to the problems detected and, if possible, maintain and provide compliance with the successes that have been achieved.”<sup>154</sup> Social dialogue, in a particular case, could thus render the sought-after fruits of compliance. The orientation of the program differed markedly to that of the general inspectorate, as established by Circular 88.<sup>155</sup>

According to the former Chief of the UIPO, Pablo Leiva Mercado, compliance assistance was limited to unionized workplaces.<sup>156</sup> With about 16% union density,<sup>157</sup> unionized employers remain a small minority of employers in Chile. The program was limited in this manner because Leiva Mercado and the DT at that time believed that compliance assistance could only be implemented when there were organized workers in the workplace. Unionized employees could bring worker concerns to the employer and, in the absence of adequate responses by the employer, the union could then contact the labor inspectorate to intervene.<sup>158</sup> In this manner, compliance assistance resembled the responsive regulation school’s pyramidal structure of enforcement, one

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153. See *Social Dialogue*, INTERNATIONAL LABOR ORGANIZATION, <http://www.ilo.org/public/english/dialogue/> (last visited on June 11, 2011). “Social dialogue” is one of the International Labor Organization’s main aims for global workplace governance. *Id.* The organization defines “social dialogue” as:

[A]ll types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy. It can exist as a tripartite process, with the government as an official party to the dialogue or it may consist of bipartite relations only between labour and management (or trade unions and employers’ organizations), with or without indirect government involvement. Concertation can be informal or institutionalized, and often it is a combination of the two. It can take place at the national, regional or at enterprise level. It can be inter-professional, sectoral or a combination of all of these.

*Id.*

154. GOBIERNO DE CHILE, DIRECCION DEL TRABAJO, ORDEN DE SERVICIO No. 3 (May 15, 2004).

155. See Circular 88, *supra* note 138.

156. Telephone interview with Pablo Leiva Mercado (Nov. 30, 2010).

157. GOBIERNO DE CHILE, CENTRO DE DOCUMENTACION LABORAL, *available at* [http://www.dt.gob.cl/documentacion/1612/articles-99379\\_recurso\\_1.pdf](http://www.dt.gob.cl/documentacion/1612/articles-99379_recurso_1.pdf) (last visited June 11, 2012).

158. Telephone interview with Pablo Leiva Mercado (Nov. 30, 2010).

where there is a “slippery slope that leads to a sticky end.” The expectation of the DT was also that compliance assistance would legitimize labor unions, make them more relevant for workers and employers, and, therefore, promote more industrial self-regulation in Chile. Compliance assistance was seen as a way out of command-and-control and for a co-regulatory, governance scheme.

Another program, the replacement of fines for training (hereinafter referred to as “fines for training”) program provides that small employers with nine employees or fewer can request assistance implementing the work laws in lieu of fines levied by a labor inspector.<sup>159</sup> Employers must correct the behavior for which they were sanctioned within thirty days of the issuance of the fine.<sup>160</sup> They also can only request such reductions in fines once a year.<sup>161</sup>

The law also provides medium-sized employers with twenty-five employees or fewer with an alternative to the fine, but only for violations of an occupational health and safety rule if the employer requests the removal of a fine after the DT issues it.<sup>162</sup> Rather than merely attending a course, mid-size employers must institute a program of voluntary compliance with the law that they violated in lieu of the fine.<sup>163</sup>

While some sources state that the training-for-fines program has been regarded as a successful program in Chile,<sup>164</sup> empirical studies show only mildly positive results.<sup>165</sup> In a study with 2004 data, researchers found no statistically significant results for law compliance for those employers who participated in the program.<sup>166</sup> However, stronger results could be gleaned for smaller employers.<sup>167</sup>

Even if mildly effective, the program remains limited to smaller

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159. CÓD. TRAB., art. 506.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. SCHRANK & PIORE, ECLAC/MEXICO, *supra* note 67, at 15 n.3.

165. Juan Chacaltana, *Economic Implications of Labour and Labor-related Laws on MSEs: A Quick Review of the Latin American Experience* 34 (Int’l Labour Office, Emp’t Sector, Working Paper No. 31, 2009), available at [http://staging2.ilo.org/wcmsp5/groups/public/—ed\\_emp/—emp\\_ent/documents/publication/wcms\\_115966.pdf](http://staging2.ilo.org/wcmsp5/groups/public/—ed_emp/—emp_ent/documents/publication/wcms_115966.pdf) (last visited June 12, 2012) (citing LUIS MONTERO, GERHARD REINECKE, DANIELA ZAPATA: SUSTITUCIÓN DE MULTAS POR CAPACITACIÓN: EVALUACIÓN DE UNA EXPERIENCIA (2006)).

166. *Id.*

167. *Id.*

employers, and few of them participate in the program.<sup>168</sup> It is truly a marginal island of compliance assistance in a sea of punishment-based compliance strategies. In 2004, 1,368 employers were trained,<sup>169</sup> while 94,981 inspections were done in the same year resulting in 48,002 fines.<sup>170</sup> The number of participating employers is dwarfed by the large amounts of inspections and fines issued in the country.<sup>171</sup> Formally non-punitive programs, in this regard, operate at the margins of centrally important punitive practices. However, as we will see below,<sup>172</sup> the DT engages in conciliatory and remedial actions through an unsuspected manner — administrative interpretations of the law that instruct the public about their rights and obligations under the law.<sup>173</sup>

#### 4. Conciliation and Mediation

The DT, through its inspectors, has the authority to summon parties and documents in order to conciliate or settle cases regarding employee terminations.<sup>174</sup> Conciliation is generally voluntary, meaning that the parties need not reach a settlement during the conciliation hearing.<sup>175</sup> Subpoenaed parties, however, must present themselves at the hearing. The inspector cannot formally adjudicate a case.<sup>176</sup> Only labor courts

168. See César F. Rosado Marzán, *Of Labor Inspectors and Judges: Chilean Labor Law Enforcement After Pinochet (and What the United States Can Do to Help)*, 54 ST. LOUIS U. L.J. 497, 504 (2010) (citing Cód. TRAB art. 506).

169. Gerhard Reinecke, Presentation at Economía Informal en Argentina, Los Desafíos de la Inclusión: Informalidad y políticas públicas: El caso de Chile 24 (Nov. 25, 2009) (Power Point slides available at <http://www.oit.org.ar/documentos/reinecke.pdf>).

170. Dirección del Trabajo, Series Estadísticas, Capítulo IV. Actividad Inspectiva, Cuadro 1 and 10a.

171. In fact, during my seven months in Chile, I only even heard about the program once, and it was not even at the DT. I heard about it when I was observing labor trials at a Santiago labor court. In that case, an employee was suing an employer for an unjust termination. In the testimony offered by the worker, she alleged that the employer had been fined by the DT for not keeping proper documentation. The employer then rebutted the testimony of the employee by stating that the DT had never sanctioned him. The employer was merely technically correct since after some more testimony it was discovered that the DT had fined the employer but then the DT replaced the fine with training under the program. The discussion of the program had little to do with the employer's compliance with the labor laws.

172. See *infra* Part III.B.4.

173. Rosado Marzán, *supra* note 120, at 501-02.

174. *Id.* at 504 (citing DFL No.2 art. 29).

175. See *id.* (noting that conciliation has recently become mandatory for only wage and salary cases in limited circumstances).

176. Cód. TRAB., arts. 506, 507.

have the competence to decide termination cases in Chile.<sup>177</sup> However, the inspector can fine any party who is summoned but fails to appear without just cause or who appears without the subpoenaed documents.<sup>178</sup> The conciliation hearing at the DT has also recently become mandatory for some categories of wage and hours cases of smaller monetary value.<sup>179</sup> Equally, labor inspectors can serve as formal mediators in collective bargaining disputes.<sup>180</sup>

### 5. Administrative Interpretation of the Law

Finally, the DFL No. 2 also provides that the Director of the DT — its head — can determine the meaning and scope of labor legislation in the country<sup>181</sup> so that its career servants can uniformly implement the law across the different regions of Chile.<sup>182</sup> This type of administrative interpretation of the law issued by the heads of some government agencies of Chile is done through *dictámenes*.<sup>183</sup> In the case of the DT, its Director issues the *dictamen*. A *dictamen* directly binds all the officers of the administrative agency.<sup>184</sup> As explained by a known Chilean legal scholar, however, *dictámenes* also informally bind private parties, as private parties must adapt their behavior using the *dictamen* as a guide if they want to reduce their chances of being fined or otherwise penalized by the government agency.<sup>185</sup> While not *de jure* binding, *dictámenes* significantly bind parties *de facto*.

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177. See *infra* Part III.C.

178. *Id.* at art. 30.

179. *Id.*

180. *Id.* at Title I(d), art. 9.

181. DFL No.2 art. 1.

182. E-MAIL WITH SERGIO MEJÍA VIEDMA, PARTNER, ARTHUR, HINZPETER, PIZARRO, HUMÉRES & CÍA (FORMER SUB-DIRECTOR, DT 1994–2000) (2008).

183. Ugarte Cataldo, *supra* note 130, at 191. Professor Ugarte Cataldo explains that the department is entrusted with the following tasks: to determine whether labor laws are being enforced; establish an office; upon request of the interested party, provide advice on the meaning and scope of labor laws; disclose the social and technical principles of labor laws; supervise the functioning of union organizations in accordance with the rules that govern unionization; and undertake any action to prevent or resolve disputes. *Id.* at 191 n.4. According to Professor Ugarte Cataldo, other Chilean administrative agencies with similar interpretative functions include the Contraloría General de la República (comptroller), Servicios de Impuestos Internos (treasury), Servicio Nacional de Aduanas (customs), and Superintendencia de Bancos e Instituciones Financieras (financial regulatory agency), among others. *Id.*

184. *Id.* at 192.

185. Luis Lizama, *La Dirección del Trabajo: una explicación de su facultad de interpretar la legislación laboral chilena* 59 (1998).

*C. The DTs Relationship with Other Work Law Enforcement  
Institutions: Courts and Labor Unions*

It is important to underline that in Chile, even though the inspectorate is centralized at the DT, work law enforcement is not handled by the DT exclusively. Courts and labor unions also play relevant roles.<sup>186</sup> Courts are the institutions where private parties seek ultimate redress for violations of the labor code. Courts adjudicate contractual controversies between workers and employers or between employers and the DT, when the employer believes that the DT has exceeded its authority under the law and violated constitutional precepts.<sup>187</sup> In Chile, trial level courts that adjudicate controversies arising under the labor code are specialized labor courts.<sup>188</sup>

The labor courts' jurisdiction include not only contractual matters but also those cases and controversies related to violations of "fundamental rights"<sup>189</sup> such as employment discrimination and unfair labor practices, and others arising out of collective bargaining and labor-management relations.<sup>190</sup>

Labor inspectors cannot adjudicate matters regarding fundamental rights or unfair labor practices, but they can investigate the claims and impose administrative fines.<sup>191</sup> The DT can also file a complaint in the courts and act as a party,<sup>192</sup> in the public interest. In other words, for workers to actually get a remedy related to a breach of their employment contract, they will have to file a complaint at the labor court. While the inspectorate may fine employers for deterrent purposes and close dangerous workplaces, and perhaps conciliate a dispute regarding a termination, the courts are the proper forum for workers to seek

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186. See Jonas Malmberg, *Enforcement of Labour Law*, in THE TRANSFORMATION OF LABOUR LAW IN EUROPE: A COMPARATIVE STUDY OF 15 COUNTRIES 1945-2004 (Bob Hepple & Bruno Veneziano eds., 2009) (standing for the proposition that comparative work law scholarship has consistently acknowledged the role of labor unions, courts (mostly specialized labor courts) and the administrative state as the three pillars of effective work law enforcement). In Europe, labor law enforcement historically combined industrial (collective bargaining), administrative, and judicial processes. One of these processes may exert primacy in particular countries at particular times. *Id.*; see also SERGIO GAMONAL C., FUNDAMENTOS DE DERECHO LABORAL 105 (2008) (offering a Chilean perspective on the issue).

187. Cód. TRAB., art. 420.

188. Cód. TRAB., art. 415.

189. *Id.* at Title VII.

190. Cód. TRAB., art. 420(e).

191. *Id.* at arts. 292, 486.

192. *Id.*

personal, monetary remedies and equitable relief. If workers cannot afford a lawyer to represent them, they can be referred to the Defensoría Laboral, a subagency that provides lawyers, free of charge, to indigent employees filing claims in the labor courts.<sup>193</sup> Labor court decisions can be appealed to the appropriate Court of Appeals and thereafter to the Supreme Court of Chile.<sup>194</sup>

Unions in Chile group themselves into federations and other supra-union agglomerations such as centrals,<sup>195</sup> but only plant-level unions have the right to bargain collectively for workers.<sup>196</sup> By far, the principal labor union central of Chile is the Central Unitaria de Trabajadores (“CUT”), with 2,667 affiliated organizations.<sup>197</sup> The second most important organization is the Union Nacional de Trabajadores (“UNT”) with only 279 affiliated organizations.<sup>198</sup> Finally, the third most important organization is the Central Autónoma de Trabajadores (“CAT”) with 270 affiliated organizations.<sup>199</sup> However, more than half of all Chilean labor unions are not affiliated to a union central.<sup>200</sup> Out of a total of about one million organized workers in Chile (including the public sector), more than 600,000 are not part of a labor union affiliated to a central.<sup>201</sup>

Private labor union density rates in Chile in 2010 stood at less than 16%.<sup>202</sup> It has remained at or near that level since the mid-1990s.<sup>203</sup> The lack of strong protections for collective organization and bargaining have been blamed for that low rate, as well as for the even lower percentage of workers covered by a collective instrument of any kind,

193. See Rosado Marzán, *supra* note 120, at 512.

194. Cataldo, *supra* note 130, at 193-94.

195. Cód. Trab., art. 213.

196. See *infra* Part V.C.

197. Pablo Obregón Castro, *Sólo el 22% de los sindicatos del país pertenecen a la CUT*, *Economía y Negocios*, (Sept. 4, 2011), <http://www.economiaynegocios.cl/noticias/noticias.asp?id=88206>.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Diego López Fernández, *La ineficacia de derecho de negociar colectivamente*, *NEGOCIACIÓN COLECTIVA EN CHILE, LA DEBILIDAD DE UN DERECHO IMPRESCINDIBLE* 43, 44-46 (2010). Numbers for 2009 and 2010 were directly obtained from Dirección del Trabajo, *Compendio de Series Estadísticas, 1990-2010*, available at [http://www.dt.gob.cl/documentacion/1612/articles-62614\\_recurso\\_1.pdf](http://www.dt.gob.cl/documentacion/1612/articles-62614_recurso_1.pdf) (last visited on June 12, 2012).

203. Dirección del Trabajo, *Compendio de Series Estadísticas, 1990-2010*, available at [http://www.dt.gob.cl/documentacion/1612/articles-62614\\_recurso\\_1.pdf](http://www.dt.gob.cl/documentacion/1612/articles-62614_recurso_1.pdf) (last visited June 12, 2012).



which stood at 12% in 2008 even though union density stood at 16% in that same year.<sup>204</sup> The negative gap between coverage and representation makes Chile a unique country since representation gaps are normally positive – more workers are covered by collective instruments than there are union member – as in France.<sup>205</sup>

The right to strike, the right that workers have to strike without fear of permanently losing their employment or receive any other negative sanctions from the employer or the state, exists in a limited form in Chile. Strikes are also highly regulated.<sup>206</sup> Workers can only legally strike after turning down management's final offer during a regulated bargaining and must begin their strike within three days after turning down the offer.<sup>207</sup> The employer can hire replacement workers.<sup>208</sup> However, different from the United States, replacement workers in Chile cannot be permanent. They can be hired only to provide the employer with the necessary services required during the strike.<sup>209</sup>

All this said, labor unions in Chile exist for the general purpose of *auto tutela*,<sup>210</sup> or self-protection. The Labor Code establishes these self-protection purposes, including: representing its members in collective

204. ENCLA 2008, Resultado de la Sexta Encuesta Laboral, 158 (2008). The rate of collective bargaining between 2004 and 2008 in the private sector has been an average of 10.7%, excluding domestic service. Gonzalo Durán Sanhueza, *Resultados Económicos de la Negociación Colectiva en Chile*, Fundación Sol, available at [http://www.fundacionsol.cl/wp-content/uploads/2010/09/Ensayo\\_2.pdf](http://www.fundacionsol.cl/wp-content/uploads/2010/09/Ensayo_2.pdf) (last visited June 12, 2012). The weakness of collective bargaining in Chile is also reflected in wages, whereas 10% of the richest earn fifty-three times more than the poorest 10%, and even large companies have made large gains over the years while economic growth has remained constant in Chile. *Id.* Wages in large firms have fallen by 18% between 1994 and 2006. *Id.* Lack of protections for unions is also reflected in how convenient it is for the employer to pursue and destroy the union, as demonstrated in a study by the Labor Directorate of Chile on the illegal dismissal of workers and its direct impact on the weakening of the labor movement. Jorge Salinero, *La Destrucción del Sindicato: Intolerancia a un Derecho Fundamental*, Cuaderno de Investigación N° 20, Santiago, Departamento de Estudios, Dirección del Trabajo 97-98 (2004).

205. ROGER BLANPAIN ET AL., *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW, CASES AND MATERIALS* 450 (Cambridge Univ. Press 2007).

206. *See Chile*, U.S. DEP'T OF STATE, Bureau of Democracy, Human Rights, & Labor (Mar. 6, 2007), <http://www.state.gov/j/drl/rls/hrrpt/2006/78884.htm>.

207. *Chile – Annual Survey of Violations of Trade Union Rights*, INT'L TRADE UNION CONFEDERATION, [HTTP://SURVEY.ITUC-CSI.ORG/CHILE.HTML?LANG=EN#TABS-3](http://survey.ituc-csi.org/chile.html?lang=en#tabs-3) (last visited June 29, 2012).

208. *Id.*

209. CÓD. TRAB. art. 381.

210. SERGIO GAMONAL C., *DERECHO COLECTIVO DEL TRABAJO* 28 (2nd ed. Abeledo Perrot 2011); FRANCISCO J. TAPIA GUERRERO, *SINDICATOS EN EL DERECHO CHILENO DEL TRABAJO* 311 (2d ed. Abeledo Perrot 2007).

negotiations, enforce collective contracts,<sup>211</sup> represent their members in the exercise of their rights under their individual employment contracts, if the members so desire,<sup>212</sup> aid in the compliance of all workplace laws and social security, file complaints of violations and noncompliance to the adequate administrative and judicial authorities and act as parties in the relevant controversies, when required,<sup>213</sup> among other social, educational, labor-management cooperation functions.<sup>214</sup>

However, the legal texts do not answer if there a gap between “law in the books and law in practice,”<sup>215</sup> as is commonly found in work law. How do all of these pieces fit together in practice? Is the DT effective? Does punishment work? To these questions we turn next, after explaining how I gathered the information reported.

## V. METHODOLOGY

The American Bar Foundations’ 1970 report, *The Legal Profession in the US*, established that “[t]he law of the US is today largely embodied in, shaped by, or effectuated through the rules, regulations, programs and policies of governmental agencies.”<sup>216</sup> This rings as true today as it did four decades ago. As Robert Kagan pointed out, most of these rules, regulations, programs and policies, “are rarely reviewed by courts, or reported in newspapers, or examined by scholars.”<sup>217</sup> Given that these agencies’ practices are “buried in filing cabinets,”<sup>218</sup> and that most administrator’s decisions are made “informally, undramatically, and deep in the recesses of bureaucracies,”<sup>219</sup> many American legal academics generally know relatively little of the real practices of American public administrators and how they apply the law. In the case of labor regulation in Latin America, our knowledge mostly stems from lawyers who have focused on legal texts, not empirical evidence or the practice of law.<sup>220</sup> Making quality, comparative scholarship is extremely

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211. Cód. TRAB. art. 220(1).

212. Cód. TRAB. art. 220(1).

213. Cód. TRAB. art. 220(3)-(4).

214. See *id.* at 220(5)-(12).

215. Roscoe Pound, *Law In Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910).

216. ROBERT KAGAN, *REGULATORY JUSTICE: IMPLEMENTING A WAGE-PRICE FREEZE IX* (1980) (quoting AMERICAN BAR FOUNDATION, *THE LEGAL PROFESSION IN THE US* (2nd ed. 1970)).

217. KAGAN, *supra* note 216, at ix.

218. *Id.*

219. *Id.*

220. See Piore, *Flexible Bureaucracies*, *supra* note 70, at 387.

difficult when we have little real knowledge of the law in practice.

Therefore, to understand labor regulation in Chile, I used an ethnographic research approach consisting of participant observation, key informant interviews and legal and journalistic document analysis. Participant observation lasted for 29 weeks, or about seven and a half months.<sup>221</sup> During most of those seven and a half months in Chile, I had an office space at the national headquarters of the DT, located in downtown Santiago. The Director of the DT granted the office space to me after I formally requested the space, via letter, to perform an ethnographic study of the institution.

In my downtown Santiago office, I answered to Omar, the direct office supervisor<sup>222</sup> and to the Chief of the Research Department of the DT, who was interested that I share my findings once the study was concluded. I was given a cubicle located in an office where five labor inspectors, and one supporting attorney and Omar worked. At my request, Omar assigned me to labor inspections and other meetings undertaken by his staff. He also scheduled labor inspections for me to observe outside of Santiago, with inspectors of various regional offices.

I was able to visit workplaces with the DT inspectors about a dozen and a half times, and observe the manner in which the inspectors performed their work. I visited workplaces located in commercial, industrial, transportation, and entertainment (television stations) establishments in Santiago. I also visited two very large mines in the north of the country and one agricultural field in the central part of the country.

At the DT I also observed “conciliations” settlements of unfair dismissals. The conciliation hearings that I observed all took place at DT offices in Santiago and Concepción. They were chaired by a labor inspector who heard oral evidence and reviewed documents regarding the alleged unfair dismissals. I observed more than thirty such hearings in the time span of about three discontinuous weeks.

Finally, during my fieldwork in Chile, I also observed labor trials at the labor courts of Santiago, as well as the country’s second largest city of Concepción, the port town of Valparaíso, and the mining cities of Antofagasta and Calama. In total I spent about two and half months observing hearings. I observed hearings regarding, among other subjects, unfair dismissals, employment discrimination, unfair labor

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221. One week in May of 2008, ten weeks in 2009 (June–July and two weeks in December), and sixteen weeks in 2010 (March–April and July–August).

222. Omar is the pseudonym given to the Supervisor to protect his identity.

practices by unions and employers, disputes over wages and hours, and cases regarding the revision of fines issued by the DT against employers.

The fieldwork at the DT and the courts helped me to better understand the jurisdictional demarcations of the DT inspectors and the labor judges, the two main state actors in Chile with the ministerial duties to enforce the country's work laws. Both at the DT and at the labor courts I established close, collegial relationships with a handful of labor inspectors and judges who served as my key informants including Omar. I interviewed these key informants formally and informally throughout my fieldwork. Before and/or after inspections of trials, I also was able to interview labor inspectors, judges and some of the lawyers for workers and employers involved in the various cases.

Finally, I did significant document collection and review, including studying the Labor Code, parts of the Civil Procedural Code, the DFL No. 2 and internal DT regulations and manuals cited herein. I read the main newspapers, *El Mercurio*, *La Nación*, *La Segunda*, and *La Tercera* on a regular basis to follow stories related to labor inspection and work law in the country. Some of the stories widely discussed in the press, such as the 2010 mining incident and the 2008 Codelco cases regarding subcontracting, are discussed herein.

I recorded my observations as daily "jottings"<sup>223</sup> during the day in pocket-sized reporter notebooks.<sup>224</sup> Almost every evening I spent at least two hours passing down my "jottings" into more formal notes in my computer. At certain times during my fieldwork, I also wrote short memos to myself. These memos served as preliminary analyses of my data where I tried to make sense of what I was experiencing and establish themes observed in my fieldwork. In total, I collected 347 pages of mostly single-spaced, typed notes.

Collecting data for this study through participant observation, interviews and document materials helped me to validate or invalidate some of my judgments made during my daily observations, or perform what social scientists call "triangulation."<sup>225</sup>

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223. "Jottings translate to-be-remembered observations into writing on paper as quickly remembered notes about actions and dialogue. A word or two written at the moment or soon afterwards will jog the memory later in the day and enable the fieldworker to catch significant actions and to construct evocative descriptions of the scene." ROBERT M. EMERSON ET AL., *WRITING ETHNOGRAPHIC FIELDNOTES* 19-20 (1995).

224. For more detail on fieldwork note taking and methodology see *id.* at 17-38.

225. BRYAN S. TURNER, *THE CAMBRIDGE DICTIONARY OF SOCIOLOGY* 638 (2006).

## VI. THE CHILEAN MODEL “IN PRACTICE”

“I like military governments, they keep everyone straight.”

Businesswoman overheard by author during flight to Chile, March 2010.

“Well, tell her to come here [to the Labor Directorate], we’ll keep her very straight!”

Nato,<sup>226</sup> Labor Inspector, responding to my comment regarding the above-stated quote.

While the “Latin” work law regulation and enforcement administrative system is oriented towards remediation and conciliation of issues, Chile’s is punitive. The quotations above capture the attitude against employers that I noticed among many labor inspectors.<sup>227</sup> Inspectors employ a variety of sanctions and punishment tools to compel employer compliance with the country’s work laws. However, punishment fails to work well when employers resist and mobilize other institutional players such as courts and other ministries against the inspectorate. This said, the DT seems to use some remedial tools effectively, particularly the *dictamen*. Although merely an administrative legal interpretation of the labor code, *dictámenes* are sometimes used as a persuasive tool for work law compliance.<sup>228</sup> Evidence points towards the need to continue to experiment with such strategies. Including civil society in the regulatory and enforcement processes should also prove effective.

## A. A First Strength?: Fine for Everything

When the inspector reaches the workplace, she generally identifies

226. Nato is the pseudonym given to one of the labor inspectors I regularly interacted with in Chile.

227. The sarcasm in the inspector’s response when I told him what I overheard the businesswoman say also captures the tone of the public discourse regarding the conflicts between employers and the DT under the administration of the *Concertación* (1990-2010), where employers were depicted having been pro-dictatorship and right wing, and the DT and labor advocates opponents of that dictatorship; pro-Concertación and pro-DT.

228. See César F. Rosado Marzán, *Of Labor Inspectors and Judges: Chilean Labor Law Enforcement After Pinochet (and What the United States Can Do to Help)*, 54 ST. LOUIS U. L.J. 497, 504 (2010).

herself as a labor inspector, asks the guard or other person at the gate or entrance of the workplace to take her to their manager or supervisor, and then informs the manager that she is there to do a labor inspection. Usually, the labor inspector does not state what she came to inspect — health and safety, or payment of wages, for example. Simply, she tells the employer to provide her with records, usually attendance records, internal health and safety rules, labor contracts and payment stubs for all the employees or a group of them, among other records and documents that the employer must keep. While the employer obtains the documents, the inspector requests to speak with the union representatives, if any, the health and safety committee members<sup>229</sup> and/or with individual employees, or simply starts walking inside the workplace interviewing individual employees, taking notes about possible violations that are perceptible to the naked eye, such as lack of safety signs or expired fire extinguishers and other health and safety equipment.

Meetings with workers usually concern specific issues related to the original complaint filed at the DT or policy guiding a proactive inspection. Inspectors also use worker meetings to learn if there are any other grievances that the workers may have. Inspectors also tend to ask about other issues outside those in the original complaint, if a complaint motivated the inspection. They may ask workers if they have any specific gripes or complaints that they would want to air at that moment. The inspector takes notes and anything that she hears or sees in violation of the law may form the basis of a fine.

At meetings with the union, inspectors usually discuss the same topics as those conferred in meetings with individual employees. Meetings with the health and safety committee<sup>230</sup> focus on the formalities: Has the health and safety committee met? Where are the minutes (that are legally required to be on file)? Who has met? All of these questions try to get at the formal requisites for health and safety committees at each workplace in Chile.

When the inspector finally meets with the employer representative to inspect the books and other documents, she may disclose the main reason why she visited the workplace, although seldom will she say who

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229. The health and safety committees (*comités paritarios de higiene y seguridad*) must be established by the employer in any workplace with more than twenty-five workers. See Chile Law 16.744 of 1968. They are composed of three worker representatives and three employer representatives. Their incumbency lasts for two years. See Chile Decreto Supremo No. 54.

230. Every workplace with twenty-six workers or more must have a workplace health and safety committee (*comité paritario*). Chile Law No. 16.744 of 1968, art. 66.

filed the complaint if the visit was triggered by a complaint. She will then inspect the books and will likely fine for incomplete records and any other violations noted during her visit. Sometimes, fines totally unrelated to the violations that the inspector initially went to inspect are the ones that most “bite.” It also seems that inspectors use this discretionary power to fine “for everything” strategically.

This strategy of fining for unrelated violations is reminiscent of the United States Federal Bureau of Investigations and the Attorney General’s strategies to catch the mob.<sup>231</sup> Those officers had a difficult time breaking organized crime until they devised an alternative route to convict the criminals – forget the murders and other violent crimes where no witnesses could be produced. Rather, catch the mob through tax evasion.<sup>232</sup> The strategy was to get the criminals through unrelated charges.

There is nothing necessarily illegal in using such circuitous routes to meet the organizational goals of an administrative agency. These types of innovations can be classified as “judicial” modes of rule application. Robert Kagan originally coined this term. Judicial modes of rule application:

[C]alls for a two-step method of rule application. The decision maker is expected first to “look backward” to preexisting rules (as conventionally interpreted in the system) to find the one applicable to the case at hand. Secondly, the decision maker should “look forward” to assess the consequences of applying the literally applicable rule or each arguably applicable rule. He must ensure that the result of applying the literally applicable rule “makes sense” in terms of existing public policy and conventional notions of fairness.<sup>233</sup>

According to Kagan, the judicial mode is the expected and desirable way that public administrators should make sense of mandated rules and seeks compliance with overall goals of their agency.<sup>234</sup> It helps the agency attain its original goals – to “catch the crooks” – without altering the standards and rules given to the administrators to reach that goal.

In Chile, the general jurisdiction of labor inspectors enables them to

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231. See D. Larry Crumley & Nicholas Apostolou, *America’s First (and Most Fearless) High-profile Forensic Accountant*, THE VALUE EXAMINER, Sept./Oct. 2007, at 16-18.

232. See *id.*

233. KAGAN, *supra* note 217, at 91.

234. *Id.*

use similar strategies when they do not have the legal authority or other capacities to fine an employer for a specific infraction or to otherwise compel it to comply with a particular rule.<sup>235</sup> For example, in Chile, employers can only subcontract workers to perform very specific jobs: the tasks of an employee in a temporary leave; for extraordinary events of the employer, such as the organization of a conference; for new and specific projects; during the initial days of a new enterprise; when demand suddenly and temporarily increases; and “urgent” tasks.<sup>236</sup> However, under some controversial Supreme Court cases in Chile, a labor inspector cannot officially determine whether an employer legally or illegally has subcontracted a worker.<sup>237</sup> Only courts can make those adjudications because they require the interpretation of *contractual* terms. Contracts are constitutionally protected in Chile, so only courts of law can interpret contractual terms, not street level bureaucrats on the beat, such as labor inspectors.<sup>238</sup>

However, some labor inspectors attempt to innovate in order to enforce the law albeit without clear guidelines on how to do so. Inspectors fine employers for the unrelated infraction of “informality” and other similarly unrelated infractions to enforce the anti-subcontracting law.

Informality generally includes fining employers for not producing an array of documents, such as employment contracts and attendance records that employers must always have on file, in the premises, and

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235. César F. Rosado Marzán, *Of Labor Inspectors and Judges: Chilean Labor Law Enforcement After Pinochet (And What the United States Can Do To Help)*, 54 SAINT LOUIS U. L. J. 497, 518 (2010).

236. Cód. TRAB. art. 183-Ñ.

237. Supreme Court of Chile Rol. Nos. 877-2008, 953-2008, 1062-2008, 1063-2008, 1073-2008, 1074-2008, 1075-2008, 1076-2008, 1150-2008, May 12, 2008. *See also*, Ugarte Cataldo, *supra* note 129, at 188 (2008). Conservative scholarship of the dictatorship era promoted a narrow view of administrative adjudicatory power, taking the position that only courts have “jurisdictional” authority, not administrative agencies. According to this scholarship, administrative agencies, different from courts, lack independence and impartiality. Therefore, when administrative agencies judge matters regarding “facts, conduct or behavior,” that can affect the “patrimony,” “honor and prestige” of a person, because they lack such independence and impartiality, they act as illegal “special commissions”—a sort of Kangaroo Court—under the Chilean constitution. Eduardo Soto Klos, *El Recurso De Proteccion: Origenes, Doctrina y Jurisprudencia* 114-115 (1981). This narrow view of administrative adjudications has traction in Chile, albeit not without prominent critics. *See* Ugarte Cataldo, *supra* note 129, at 196-203.

238. Supreme Court of Chile Rol. Nos. 877-2008, 953-2008, 1062-2008, 1063-2008, 1073-2008, 1074-2008, 1075-2008, 1076-2008, 1150-2008, May 12, 2008. Eduardo Soto Klos, *Recurso De Proteccion: Origenes, Doctrina y Jurisprudencia* 114-115 (1981).



ready to be viewed by inspectors. In some of my visits, inspectors tried to compel employer-principals to stop the practice of illegal subcontracting by requesting copies of contracts between the employer-principal and the subcontractor (agent) that had directly hired the employees. When the principal failed to produce the requested contracts, and many times they were not produced because subcontractors are many times informal agents, inspectors proceeded to fine the principal and the subcontractor for “informality” on grounds that they lacked written contracts specified by law.<sup>239</sup> Such fines are capped at 5 *Unidades Tributarias Mensales* (“UTMs”)<sup>240</sup> per month, or about US \$380 (more than a Chilean minimum wage, which today stands at Chile \$182,000<sup>241</sup> or US \$360) per worker. These fines could add up when the employer had dozens or hundreds of workers without formal contracts. In this manner, the punitive orientation, when coupled by the generalist powers of the inspectorate – they can fine for “anything” – provides the inspectorate with leverage to use against employers who may be violating a particular law egregiously.

There is no hard data that can help us establish whether fining for unrelated infractions works or not in Chile. However, we can see how in particular cases it could help inspectors coerce an employer into complying with the law. This coercion, however, could also support a culture of resistance against the labor inspectors, as we will see below in Section VII.

### *B. A Second Strength?: Fining to “Conciliate”*

In addition to inspecting workplaces, as stated above, labor inspectors in Chile can conciliate individual employee termination cases where the employees allege an unfair dismissal. Under Chilean law, if employers cannot justify a worker’s termination under one of the various causes for terminations,<sup>242</sup> they have to pay severance pay equaling one

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239. Under Chilean law, all employers must provide employees with written contracts. Cód. TRAB. art. 9. Failure to do so makes the employer liable to fines. *Id.*

240. A UTM literally means a Monthly Tax Unit. *See* Chile Decreto Ley N° 830 Sobre Código Tributario, art. 8. It is a measure that is monthly adjusted for inflation used by the Chilean treasury (*Hacienda*) to stipulate taxes, fines and other. *See id.* One UTM is worth Chile \$ 38,557.00, or US \$76.25. Five UTMs were thus worth about US \$ 381.25. (Currency converted using the American Express currency calculator at <http://www.oanda.com/convert/classic> (last visited June 12, 2012)).

241. DIRECCIÓN DEL TRABAJO, PORTAL INSTITUCIONAL, <http://www.dt.gob.cl> (last visited June 12, 2012).

242. An employment contract terminates – which means, without right for severance

month of pay for every year worked by the employee, for a maximum payment equaling eleven months of wages.

Conciliations normally take place in hearing rooms specially arranged for such purposes in DT offices. There are conciliation offices across the Chilean national territory. During my approximately three weeks of conciliation observations, procedures were almost always identical. Offices opened early in the morning, at or around 8 a.m. By then, there already was a rather long line of people (perhaps with two to three dozen people) waiting outside the offices of the DT, many of whom were attending conciliation, or settlement, of employment termination cases. In the Santiago offices, which are likely the largest ones in the country, there were fifteen inspectors performing conciliations each day. Each inspector was scheduled to hear about eight cases per day, for a total of 120 cases handled daily by that Santiago office. Each hearing was scheduled for fifty-five minutes.<sup>243</sup> The workload and quality of the workplace of the inspectors was similar in other cities, such as Concepción, where I also sat in conciliations. La Serena and Antofagasta had similar offices but I did not sit in conciliations in those cities even though I did visit the installations.

It is important to underline that in Chile labor courts have exclusive jurisdiction over the adjudication of these controversies, but employees may request that the DT conciliate the dispute extra-judicially prior to filing a complaint in court. Even though the conciliation is formally voluntary, the DT will subpoena the employer to a hearing. The employer not only has to appear at the hearing, but also must present pertinent documents such as employment contracts, assistance records, payment stubs, proof of health and pension contribution payments, and

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– under mutual agreement of the parties, resignation of the employee, death of the employee, end of the term of employment under the contract, end of the work or service for which the employee was required, and for Acts of God or *force majeure*. Cód. TRAB. art. 159. The employer may also terminate the employee without requirement to pay severance under one of the following causes: misconduct of grave character including probity in the performance of his duties, sexual harassment, illegal acts taken against the employer or coworker, insults made against the employer, and immoral conduct by the employee that affects the employer. Other reasons include: competitive practices against the employees that could have been prohibited by the employer in the employment contact; two missed absences without just cause by the employee, or on two Mondays in a month, or a total of three days in the same amount of time, or the unjustified absence without prior motive that gravely perturbs the activities of the employee; abandonment of the job by the employee; reckless acts or omissions that affect the security and functioning of the employer or the security or activity of the workers; intentional torts against the property of the employer; and grave noncompliance with the contractual obligations. Cód. TRAB. art. 160.

243. Fieldnotes, César F. Rosado Marzán (June 15, 2009).

other documents.

While the employer need not reach an agreement with the employee, sometimes the inspectors push them to do so through the use of fines. The inspectors that I worked with told me that when they performed conciliations, they would fine employers at the hearing in order to compel a settlement if they thought that the employer had broken the law.<sup>244</sup> I actually observed one inspector do this during my observations in Chile. The case related to the earthquake that shook the country in February of 2010. The employee of a furniture store alleged that she was fired unfairly after the earthquake. She alleged that the employer terminated her even though the furniture store was going to reopen with many of the former employees.<sup>245</sup>

The employer claimed that the termination was legal and did not require severance pay under Article 159(6) of the labor code, *force majeure*,<sup>246</sup> given that his store had been damaged and that he had to rebuild his business from the ground up.

Rather than merely reconciling the interests in both sides – *conciliating*–, the inspector went into legal reasoning and “held” for employee. The inspector told the employer that under a very recent and public *dictamen* issued by the Director of the DT, the earthquake could not be used as grounds for alleging *force majeure* unless the business had been totally destroyed. *Force majeure* applied only to unforeseeable events. Chile was a highly seismic country and the earthquake was foreseeable. Since the business was not totally destroyed, because it was going to reopen, *force majeure* did not excuse the employer from making the severance payment. Under the law, the inspector said that the employer had to keep his employees on the payroll or terminate them with severance pay. The employer should have foreseen the risk of paying severance as a result of the calamity. If making such payments was too onerous for the employer, he should have purchased insurance for earthquake damages, as many other employers had done in Chile.<sup>247</sup>

Once the employer verbalized his disapproval of the inspector’s determinations, the inspector requested from the employer the employment contract of the employee, proof that he had made all legal payments to the employee, and the assistance record. The employer did not bring any of the documents because he thought that the meeting was “just conciliation” – a voluntary settlement driven by the reconciliation

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244. Fieldnotes, César F. Rosado Marzán (June 25, 2009).

245. Fieldnotes, César F. Rosado Marzán (Apr. 28, 2010).

246. COD. TRAB. art. 159(6).

247. Fieldnotes, César F. Rosado Marzán (Apr. 28, 2010).

of conflicting viewpoints. Almost as to give material effect to her informal adjudication to compel a settlement, the inspector proceeded to tell the employer that she would fine him for lacking the requested paperwork. The fines would be steeper than the amount of money claimed by the worker.<sup>248</sup>

The employer became quite upset and said, “This government provides zero support to employers.” He further mentioned that the “inflexibility” of work laws in Chile was a real problem. The inspector was unmoved. In total, she was going to fine the employer 30 UTM’s, or about Chile \$1.14 million (about US \$2,300). Because the worker was only requesting Chile \$618,000 in severance payments, or about US \$1,240, the employer paid the alleged debt to the worker and settled the case, but not without making further protestations.<sup>249</sup>

Even though inspectors cannot decide liability in termination cases, the threat of fines by the inspector was not illegal. A particular regulation of the DT, Circular No. 125 of December 17, 2008, gives the inspector authority to fine during the conciliation process. With language much different than Circular 88,<sup>250</sup> Circular No. 125 stated that effective public administration requires “discretion” and “flexibility” to solve particular cases. As the regulation states: “The administrative authority enjoys certain discretion to exercise greater flexibility . . . to attain more efficient administration in benefit of the users of the [conciliation] system . . .” (*translation by author*).<sup>251</sup>

The regulation thereafter states that inspectors can fine employers using their discretion when conciliating individual termination cases. In determining whether to issue fines, the inspectors must consider the results of the process (whether conciliation was reached or not) and whether or not the employer was going to correct infractions.<sup>252</sup> Apparently, rules to conciliate termination cases follow a very different philosophy than those regarding general labor inspection.

It is important to underline that my observation regarding using fines to force conciliations was not unique. Not only had other inspectors told me that they did this in the past, but in 1970-72 Heleen F.P. Ietswaart, a Yale SJD student doing dissertation work in Chile regarding labor courts and labor inspection in Chile, reported that labor inspectors

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248. *Id.*

249. *Id.*

250. See Circular 88, *supra* note 137.

251. Dirección del Trabajo, Departamento Jurídico, Unidad de Conciliación Individual, Circular No. 125 § 1.12.

252. *Id.*

would informally adjudicate cases even if the labor courts had the formal adjudicatory functions.<sup>253</sup> Inspectors exerted all the authority they could muster to compel employers to settle cases at the DT when they thought that the employer had broken the law.<sup>254</sup>

Fining during conciliations is legal, even if harsh, and apparently has a long tradition in Chile. Inspectors follow the letter of the law, and help the inspectors obtain the DT's objectives – compel compliance with the country's work laws. However, fining for unrelated infractions is not the type of flexibility advocated by students of Latin labor inspection, where the inspectors target particularly problematic law-breakers and tailor the rules to the particular circumstances of the regulated parties. To the extent that these inspectors' discretion provides them with flexibility, it is only to punish employers into complying with existing rules.

The "pro-worker" environment that some employers and their representatives faced at these conciliations was cause of protest of employer representatives that I interviewed. In this particular case regarding the earthquake, the employer constantly looked at me seeking sympathy. In another conciliation where an employee failed to show up to work without providing notice, the labor inspector attempted to persuade the employer to settle the case, albeit without making any legal interpretations. The lawyer told me that the inspectors readily sided with the workers and rarely, in his estimation, applied the law.<sup>255</sup> Even if this management attorney's perceptions were incorrect, his words showed suspicion of labor inspectors. In fact, on more than one occasion I saw employers so upset about the conciliation process that they preferred to pay fines and face the likelihood of a lawsuit than pay workers who, in their judgment, were terminated for cause.<sup>256</sup>

### *C. Maybe a Third Strength?: Simply Being a Nuisance*

One particular way that labor inspectors, consciously or not, put pressure on employers is by being a stone in an employer's shoe. Generally speaking, employers seldom desire anyone entering their workplace to challenge their authority and halt or slow production. However, this is exactly what the labor inspectors do when they enter

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253. Heleen F.P. Ietswaart, *The Handling of Dismissal Grievances in Chile: A Socio Legal Study*, 273 (1977) (unpublished dissertation on file with author).

254. *Id.* at 138.

255. Fieldnotes, César F. Rosado Marzán (June 24, 2009).

256. Fieldnotes, César F. Rosado Marzán (June 25, 2009).

the workplace. They become a nuisance for the employer when they request that the employer produce records, provide time and space to speak with the employees, and perform ocular inspections of the entire workplace. This “nuisance card” also seems perfectly legal and helps inspectors attain the agency’s goal of compelling general compliance with the work laws.

I observed a particularly telling example of the “nuisance card” in one inspection of a retail store’s consumer credit division. I accompanied the inspector at about 5 p.m., or at closing time, to make a significant information request to the employer related to alleged illegal changes made to the employment contracts of the employees. We walked to the workplace in downtown Santiago and asked the human resources manager of the credit division to provide copies of the personnel files of his employees, including the labor contracts. The manager asked, “For which ones, we have more than one hundred employees.” The labor inspector responded, “For all!” The human resource manager was upset at the request since he was about to go home when the inspector arrived. He now had to photocopy hundreds, if not thousands of pages for the inspector. He called his secretary to help him, but she had been called by an executive to serve coffee and refreshments, so she could not help him. Therefore, the human resource manager was all but happy with the request.

This “nuisance card” that I detail had also been observed by Heleen Ietswaart in the 1970s, when she did a study similar to mine.<sup>257</sup> Then, she recounted that,

In addition, it should be emphasized that the enforcement power of the Inspectorate goes beyond impositions of fines. A finally enforceable fine is, after all, not a very strong weapon. But the inspectorate disposes over something better: the hassle. Labor inspectors may interrupt work, investigate books, summon people to their office, and initiate court proceedings.<sup>258</sup>

What I call here “the nuisance card,” is exactly the same phenomenon as “the hassle” that Ietswaart noted in her study. Inspectors can be just one big and expensive “pain in the neck.”

I did not stay in Chile long enough to observe the results of the matter detailed above. Without knowing the results, the case still shows that at least some labor inspectors use their discretion to innovate within

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257. Ietswaart, *supra* note 142, at 138.

258. *Id.*

the boundaries of a punishment orientation to seek work law compliance. But while discretion gives the inspector some leeway to punish employers into compliance, the punishment orientation does not seem to enable them to devise ways of adapting the regulations to particular circumstances that make compliance “good for business” as traditional Latin inspection is supposed to do. Employers need to comply or risk some sort of punishment, plain and simple. Nobody likes nuisances and hassles. As we will see below, such adversarial relationships do foment a culture of resistance against the work law enforcers. Such a culture can be detrimental to law compliance.

#### VII. THE UNDERBELLY: EMPLOYERS RESIST, INSPECTORS ROUT, AND WORKERS SUFFER

Punishment may sometimes help inspectors obtain leverage to compel employers to comply with the work laws. However, some inspectors also told me that they think that fining is not sufficient to compel compliance with the law. Some inspectors told me that some employers simply choose to pay the fine and remain noncompliant. In fact, the human resource manager of a large mine that I inspected in Chile told me that his firm made so much money, over one billion U.S. dollars in pure profits each year, that fines were meaningless to its bottom line.<sup>259</sup> Other employers fail to comply and then challenge the fine administratively and judicially to get it removed or substantially lowered. In this manner, labor inspectors note what social-legal scholars have also realized: that resource-rich actors tend to use the legal system to persuade adjudicators of the correctness of their actions, creating a system of justice where “haves” tend to come ahead of the “have-nots.”<sup>260</sup>

As a result of the insufficiency of the fine itself as a deterrent tool, sometimes inspectors attempt to *threaten* with a fine, rather than issue it on the spot, as they are required to do under the law, to compel compliance with the law. The law does not provide inspectors, generally, with the right to threaten with a fine.<sup>261</sup> Especially ever since the DT eliminated the practice of the writs of instruction, inspectors have

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259. Fieldnotes, César F. Rosado Marzán (July 23, 2009).

260. See generally Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (analyzing how litigation can be “redistributive”).

261. Circular 88, *supra* note 138, at § II.5.4.8.

to fine immediately once the violation has been noted.<sup>262</sup> In this manner, threats are unauthorized uses of discretion. According to Professor Robert Kagan, unauthorized discretion is when administrators value goal attainment but ignore the rules mandated by law to attain such goals.<sup>263</sup> Administrators using unauthorized discretion focus on producing the results they esteem are mandated by law without regard to the rules provided to reach those results.<sup>264</sup> In Chile, while many, if not most unauthorized threats may go unrecorded and unnoticed, some are aired by employers and challenged. Sometimes, such challenges result in court reversals against the DT, hurting the legitimacy of the institution.<sup>265</sup>

Zealot inspectors may also use their “big stick” — suspension of work or workplace closure to — incapacitate the employer. This “big stick” may create the deterrent effect sought. However, work suspensions and plant closings may also trigger employer resistance through the mobilization of legal and extra-legal resources. In some instances, employer resistance effectively neutralizes the actions of the inspectorate.

As we will see below, both unauthorized uses of discretion and incapacitation — suspending production or closing the workplace — may result in opposition that then compels the inspectors to essentially “give up.” In my fieldwork, labor inspectors “gave up” through legalistic enforcement of the law. As Professor Robert Kagan has also described, legalism implies that regulators strictly apply existing rules without regard to whether or not results make sense with the agency’s goals.<sup>266</sup> In Chile, some legalistic enforcement of the rules also comes close to “retreatism,” another term used by Professor Kagan to describe administrative action. Retreatism implies that administrators do not respect the official goals and rules mandated for the agency at all.<sup>267</sup> They stopped enforcing the law.

Unauthorized discretion, legalism, and retreatism, spurred by employer resistance, form what I here call the “underbelly” of the Chilean DT.<sup>268</sup> Unauthorized discretion and legalism coexist with

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262. *Id.*

263. KAGAN, *supra* note 216, at 92-96.

264. *Id.* at 92-96.

265. See Rosado Marzán, *supra* note 120, at 510.

266. KAGAN, *supra* note 216.

267. *Id.* at 94-95.

268. The term “underbelly” has been inspired by what sociologist Erving Goffman has called the “underlife” of an organization, where informal practices contradict the expected and formally defined practices of the organization. See ERVING GOFFMAN,



effective and legitimate judicial innovations for work law enforcement as discussed earlier. Altogether, the DT has two sides created by its punitive orientation: a front of “tough enforcement,” and a soft underbelly where noncompliance is rampant as a result of effective employer resistance.

### A. Resisting Illegal Threats

The Chilean labor inspector may issue fines on the spot, by law.<sup>269</sup> Inspectors cannot order employers to actually comply with the law.<sup>270</sup> However, while Chilean law provides that an inspector issue fines as the main tool of compliance compulsion, the inspector has discretion to determine the relative gravity of the infraction and monetary value of the fine.<sup>271</sup> In this manner, the Chilean labor inspector, just as any other “street-level bureaucrat,” has discretion “in determining the nature, amount, and quality of benefits and sanctions provided by their agencies.”<sup>272</sup>

Notwithstanding inspector discretion, the DT attempts to establish rules to limit it. These are contained in an internal regulations document called Circular 88, a sprawling document with more than 173 legal-sized pages in ten-point font.<sup>273</sup> Appendixes 6 and 7 of Circular 88 — which state the rules to consider when applying sanctions and typify infractions and possible fines — are 43 pages long.<sup>274</sup> The rules are so voluminous that inspectors, as “street-level bureaucrats,” have no choice but to invoke them selectively and pragmatically.<sup>275</sup> Sometimes, inspectors do not even fine. Rather, they *threaten* employers in order to meet their ministerial goal of enforcing the work law. This is crass abuse of discretion.

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ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 304-05 (1961). The underlife stems from “habitual arrangement[s] by which a member of an organization employs unauthorized means, or obtains unauthorized ends, or both, thus getting around the organization’s assumptions as to what he should do and get and hence what he should be,” and “[t]hese practices together comprise what can be called the *underlife* of the institution, being to a social establishment what an underworld is to a city.” *Id.* at 189, 199 (emphasis in original).

269. See Rosado Marzán, *supra* note 120, at 502.

270. See *id.*

271. See Circular 88, *supra* note 137, at § II.5.4.8, Anexo VI-VII; see also CÓD. TRAB. art. 506-07; DFL No. 2, arts. 25, 30, 32, 34.

272. LIPSKY, *supra* note 68, at 13.

273. See generally Circular 88, *supra* note 137.

274. Circular 88, *supra* note 137, at Anexos VI–VII.

275. LIPSKY, *supra* note 68, at 14.

But threats do not always work. As threats are essentially unauthorized uses of discretion, they may even backfire leading the agency to revert to legalistic enforcement of the law. For example, in a recent high profile case regarding subcontracting, employers of the mining industry, among them Codelco, the state-owned mining company that owns most mines in Chile, complained to the Supreme Court of Chile that the DT illegally adjudicated contractual controversies and threatened them with fines.<sup>276</sup>

It all started when the DT attempted to compel Codelco to hire 5000 subcontracted employees that the DT alleged had been illegally subcontracted.<sup>277</sup> Codelco and a number of private contractors filed a *recurso de protección*, or writ of protection, in court against the DT alleging that the DT violated its constitutional rights by instructing it to hire 5000 workers.<sup>278</sup> Codelco and a number of private contractors alleged that DT did not have the authority to adjudicate contractual disputes including those related to the subcontracting arrangements.<sup>279</sup> The challenges against the DT were first filed in various Courts of Appeals, where *recursos de protección* must be filed, and all but one of those cases was held in favor of Codelco and the other plaintiffs.<sup>280</sup>

When all the cases reached the Supreme Court and were consolidated for review, the Supreme Court decided that the DT had violated the constitutional rights of Codelco and its contractors, including the right of persons to be judged by a court rather than “special commissions,” the right to freely make labor contracts, the right to engage in legal economic activities, and the right to private property.<sup>281</sup> Moreover, the court determined that the DT had exceeded its jurisdiction by adjudicating (*calificar*) contractual matters, something reserved only to the authority of the courts.<sup>282</sup> Finally, the Supreme Court deemed the actions of the DT arbitrary and illegal because the DT did not allow the subcontractors to participate in the proceedings that led to the order that Codelco to hire the 5000 workers.<sup>283</sup>

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276. See generally Rosado Marzán, *supra* note 120, at 515-17. (discussing the Codelco decisions from 2008).

277. *Id.* at 515.

278. *Id.*

279. *Id.*

280. *Id.* at 515-17.

281. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 12 mayo 2008, Rol de la causa: 877-2008, 953-2008, 1062-2008, 1063-2008, 1073-2008, 1074-2008, 1075-2008, 1076-2008, 1150-2008.

282. *Id.*

283. In a concurring opinion, one justice agreed with the majority’s result, reasoning

The case was widely reported in the media and discussed in the country's editorials. Many of those opinions stated that the DT had suffered a huge setback and, given that the dispute included three government players, the DT, Codelco and the Supreme Court, it reported that the government was "divided" as a result of these decisions.<sup>284</sup> After those decisions, DT leaders decided not to enforce the subcontracting law. Heads of the DT during that period told me that the DT could not continue to be seen in constant conflict with other government and state actors such as Codelco and the Supreme Court. Therefore, the DT had to take a low profile regarding subcontracting. It would limit its enforcement of the subcontracting law merely to stating factual matters in inspection reports and leaving it up to the individual workers to sue their employers, as improbable as it may be that the law could be effectively enforced in such a manner. As such, the DT's response was legalistic. It met the narrow, formal requirements of the law without regard to the goals of enforcing the anti-subcontracting statute.

It is important to note that such decisions by the Chilean Supreme Court narrowing the powers of the labor inspectorate are not uncommon. Chilean law professor José Luis Ugarte has already written about this phenomenon.<sup>285</sup> He has argued that narrowed powers for the DT have

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that Codelco had appropriately hired the employees under the anti-subcontracting law. However, the concurring opinion distanced itself from the majority by arguing that the DT had the authority to decide whether or not an employer was violating the anti-subcontracting law. According to the concurring justice, the DT performed an otherwise legitimate "administrative act" when it attempted to determine if Codelco violated the anti-subcontracting law; therefore, the DT's decision did not amount to an unconstitutional act of a "special commission." Additionally, the concurring opinion stated that the DT was especially justified in adjudicating the matter given its lack of standing to take subcontracting cases to the courts. The concurring judge said that because the Supreme Court took away the DT's authority to adjudicate matters through the administrative process, the Supreme Court was effectively making it impossible to enforce the anti-subcontracting law except through the complaints of individual workers, a remedy he considered "illusory." The judge likely found that enforcing the anti-subcontracting law through individual complaints would be "illusory" due to classic collective action problems associated with large groups of plaintiffs who have individual claims worth relatively little compared to the cost of the suit. Also, workers would possibly fear losing their jobs by bringing their claims to the courts as individuals. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 12 mayo 2008, Rol de la causa: 877-2008, 953-2008, 1062-2008, 1063-2008, 1073-2008, 1074-2008, 1075-2008, 1076-2008, 1150-2008.

284. See, e.g., G. Orellana et al., *Justicia da Duro Golpe a la Dirección del Trabajo y Revierte Dictámenes Contra Codelco*, ECONOMÍA Y NEGOCIOS ONLINE (May 13, 2008), <http://www.economiaynegocios.cl/noticias/noticias.asp?id=46981>.

285. Ugarte Cataldo, *supra* note 129, at 203.

rendered some laws unenforceable, leading to flexible employment relations not by the will of the people, but that of the courts. He states that:

Indeed, this institutional mess that the [courts] have created, based mostly on ritually elliptical decisions, is allowing something unexpected for the world of labor relations in Chile: hard and fast labor flexibility, sustained by the weakening of the regulatory powers of labor inspection, to such an extent that most legal standards that protect workers could be unenforceable.<sup>286</sup>

While we may agree or disagree over the legal correctness of the Supreme Court decisions, the truth is that some of its decisions are, in fact, rendering some parts of Chilean work law unenforceable. Here, I argue that part of the problem may lie in the punitive orientation of the inspectorate and not just conservative jurisprudence.

What could the DT have done differently? Negotiate a plan for gradual compliance with the firm and the subcontractors. In fact, this is precisely what the DT did prior to the Codelco case. When the DT first attempted to enforce the subcontracting law it targeted the banking and retail industry. It developed a plan to perform industry-wide, *de oficio* inspections to ascertain violations of the anti-subcontracting law. Labor inspectors were sent across the Chilean territory inspecting banks and commercial establishments to make such findings. After finding systemic violations, the inspectors issued fines against the employers. The fines were steep and the DT used the fines to leverage a settlement with the employers focused on compliance with the law. Employers of these two industries acceded to hire workers in return for a reduction in the fines.<sup>287</sup>

Different from the Codelco case, the DT did not order the banking and retail employers to hire the workers. A negotiated solution proved effective. While my sources could not confirm to me why the strategy for Codelco differed – no fine was issued but, rather, a mere threat thereof was made – they did agree that there were heated discussions at the DT on how to approach the Codelco problem. Some inspectors wanted to follow the same strategy used for banking and retail, but different opinions coming from superior levels of the institution, levels that also had to manage political pressures from the state-owned

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286. *Id.* at 203 (translation by author).

287. César F. Rosado Marzán, fieldnotes of July 4, 2009.

company and Presidency, prevailed.<sup>288</sup> The different strategy proved, however, fateful for the DT.

At least until the last days of August of 2010, when I finished my fieldwork in Chile, the DT did not proactively or meaningfully enforce the anti-subcontracting law. Unauthorized discretion against a powerful employer backfired. Some inspectors, as detailed previously, attempted to enforce the law through the blunt tool of indirect fining for unrelated infractions, such as informality. While fining for unrelated infractions shows inspectors' innovative capacities within a punitive framework, there is no evidence that this strategy is leading to compliance with the anti-subcontracting law. In fact, the OECD has already faulted Chile for being noncompliant with its own subcontracting rules.<sup>289</sup>

*B. The Case of the 33 Miners in the San José Mine: Effective Resistance Even When Punishment is Legal*

In Chile, when the health and safety of employees is in danger, or employers persist in violating the law, labor inspectors may suspend work and even close a workplace.<sup>290</sup> In a number of inspections that I attended, the inspectors partially suspended work when they observed situations where the health and safety of workers was at stake. In one of these inspections, an inspection of a truck garage and repair shop in the industrial commune of Quilicura in Santiago, a worker was using a diesel-operated forklift that emanated fumes in an enclosed work area. The labor inspector ordered that the machine be stopped immediately. He even threatened management with calling the state police (*carabineros*) if the machine was not stopped. As a result, the employer stopped the machine.

In a separate inspection at a different workplace, the same inspector stopped a worker from working on the ceiling of the workplace while hoisted on a forklift. According to the inspector, forklifts were made to hoist things, not people. They were not safety ladders and workers could get severely hurt if hoisted by the machine. As a result, the worker came down.

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288. *Id.*

289. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD REVIEWS OF LABOUR MARKET AND SOCIAL POLICIES: CHILE (2009); see Diego López, *El Informe Laboral de la OCDE 2009: Es Necesaria Más Deliberación Política y Menos Recetas*, FRIEDRICH EBERT STIFTUNG, <http://library.fes.de/pdf-files/bueros/chile/06785.pdf> (last visited June 8, 2012).

290. Rosado Marzán, *Another Miracle*, *supra* note 14.

While stopping work is a powerful tool, labor inspectors are very careful when ordering work suspensions. Workplace closings and suspension of work have faced stiff opposition from employers, making them controversial and sometimes placing the DT in the political spotlight.

For example, in October of 2010, the world watched the incredible rescue of thirty-three Chilean miners buried under 2300 feet of solid rock.<sup>291</sup> However, the international media said little about a piece of news that may have dampened the carnival feel of the event, but would have showed how the entire incident could have been easily averted. Only three weeks before the incident, a labor inspector had found serious structural deficiencies in the mine yet did little to avert the disaster.<sup>292</sup> The inspector reported these deficiencies after visiting the mine, confirming that a number of partial collapses in the mine had already caused grave injuries to some workers.<sup>293</sup> In one case, a worker even suffered an amputation of his limbs.<sup>294</sup> The inspector's official report stated that the mine had violated Chilean work law by:

Not fortifying the ceiling, having noted that there was no fortification, reason why a ceiling sheet fell, not evaluating a risk situation . . . . Such fact constitutes noncompliance with the general conditions of safety in the workplace and implies not taking the necessary measures to protect life, health and the general physical integrity of the workers.<sup>295</sup>

This crass violation of the health and safety regulations was punished with merely a fine equaling approximately U.S. \$6,000.<sup>296</sup> While the fine fell within the formal confines of the law, it could have been much higher.

Even more troubling was the fact that while the Chilean DT had authority to suspend work when the health and safety of the workers had been at risk, the DT did not order the mine to suspend work.<sup>297</sup> After the news media in Chile discovered that the DT had not closed the mine, the

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291. See Victor Herrero, *All 33 Miners Rescued from Chile Mine*, USA TODAY (Oct. 14, 2010, 12:13 AM), [http://www.usatoday.com/news/world/2010-10-12-Chile-miners\\_N.htm#.T5lP58BhJyY.email](http://www.usatoday.com/news/world/2010-10-12-Chile-miners_N.htm#.T5lP58BhJyY.email).

292. Rosado Marzán, *Another Miracle*, *supra* note 14.

293. *Id.*

294. *Id.*

295. DT, Resolución de Multa No. 6279/10/42 (July 9, 2010) (translation by author).

296. Rosado Marzán, *Another Miracle*, *supra* note 14.

297. *Id.*

DT responded that it did not have authority to close the mine.<sup>298</sup> According to the DT, the Sernageomin, a sub-agency of the Mining Ministry, which has less than 20 inspectors<sup>299</sup> for the entire 2,600 mile-long country,<sup>300</sup> should have taken on the task of suspending work. The President of the Republic, through his spokesperson, echoed the same words.<sup>301</sup>

Certainly, there is some language in the regulations of the Sernageomin that provided the government with a legal hook for its declarations.<sup>302</sup> The Sernageomin specializes in geological and mining matters to produce and provide geological information and products, to exercise public oversight of the health and safety in the mines as a general matter, among other functions.<sup>303</sup> Its regulations state in Article 13 that it has “exclusive jurisdiction” to, among other things, “investigate work accidents, including those causing injuries to persons, grave injuries to property as the Service deems convenient . . . .”<sup>304</sup> The Sernageomin can also compel mines to comply with the corrective actions that the agency mandates.<sup>305</sup>

However, nowhere in the regulations does it state that the Sernageomin has exclusive jurisdiction over the general health and safety in the mines, including proactive and preventative inspections and actions to guarantee the health and lives of workers, as does the DT. In

298. *Dirección del Trabajo: Sernageomin Autorizó Reabrir la Mina San José*, LA NACION.CL (Aug. 17, 2010), <http://www.lanacion.cl/noticias/site/artic/20100817/pags/20100817100426.html>.

299. *Diputado Robles Pide al Gobierno Aumentar Fiscalizadores del Sernageomin*, LA TERCERA (Aug. 24, 2010), <http://latercera.com/noticia/politica/2010/08/674-286293-9-diputado-robles-pide-al-gobierno-aumentar-fiscalizadores-del-sernageomin.shtml>; *Encuentro de Seguridad Minera de Sernageomin Destacó Aumento de Fiscalizadores*, AREA MINERA (Oct. 13, 2011), <http://www.aminera.com/mas-noticias-nacionales/36049.html>.

300. Chile is about 4,300 kilometers long, which translates to about 2,671 miles. *Chile Guide: Practical Information, Tips and Tricks for Chile*, CONTACT CHILE, <http://www.contactchile.cl/en/chile-guide.php> (last visited June 9, 2012).

301. Ricardo Salazar, *Ex Director de Sernageomin: “No Quise Ni Accedí a Reabrir” la Mina San José*, RADIO.UCHILE.CL (Aug. 17, 2010), <http://radio.uchile.cl/noticias/78897>.

302. See *¿Qué es Sernageomin?*, SERVICIO NACIONAL DE GEOLOGÍA Y MINERÍA, [http://www.wold.sernageomin.cl/index.php?option=com\\_content&task=view&id=13&Itemid=135](http://www.wold.sernageomin.cl/index.php?option=com_content&task=view&id=13&Itemid=135), (last visited June 9, 2012).

303. *Id.*

304. Law No. 132, Diciembre 30, 2002, DIARIO OFICIAL [D.O.], § Art. 13 (a) - (b), available at [http://www.sernageomin.cl/pdf/mineria/seguridad/reglamentos\\_seguridad\\_minera/DS13\\_2\\_Reglamento\\_SEGMIN.pdf](http://www.sernageomin.cl/pdf/mineria/seguridad/reglamentos_seguridad_minera/DS13_2_Reglamento_SEGMIN.pdf) (translation by author).

305. *Id.*

fact, the DT inspected the mine and issued fines, which shows that it certainly has jurisdiction over health and safety concerns in the mines, as in all workplaces. Moreover, the rules giving the Sernageomin exclusive jurisdiction over *ex post* investigations involving workplace accidents in the mines were drafted as regulations produced by executive fiat – by a *Supremo Decreto*, or Supreme Decree — while the DFL No. 2, the governing statute of the DT and general labor inspection in Chile, is a *Decreto con Fuerza de Ley* (“DFL”), or Decree with the Force of Law – a law that rests higher in the legal hierarchy in Chile.<sup>306</sup> DFLs, while issued by the executive of the country, have been authorized *ex ante*, as a blank check by the Chilean Parliament. Supremo Decretos are, plain and simple, executive-mandated rules that cannot override a DFL<sup>307</sup>

Finally, the government’s interpretation of Chilean law was at odds with the clear meaning of the DFL No. 2, the general labor inspection statute, which states in relevant part that, “Labor Inspectors can order the immediate suspension of work that in their opinion constitute imminent danger for the health or life of workers . . . .”<sup>308</sup> Therefore, on July 9, 2010 the labor inspector could have ordered the suspension of work in the mine after the inspector found the workplace to be hazardous. The inspector did not take such action. Rather, the DT abdicated to the Sernageomin’s alleged exclusive jurisdiction on the subject, which is at odds with the law.

Politics and power sometimes speak much more eloquently than legal text. The main reason for the DT’s apprehension in disciplining the mine resulted from long-standing conflict between the DT and the mining industry, including that particular mine. In 2003, the DT, under the direction of María Ester Feres, a former, particularly assertive Director and prominent work lawyer who cut her teeth during the Allende years, had actually closed the same mine after various accidents were reported there.<sup>309</sup> However, as she confirmed to me, the mine was reopened shortly thereafter by the Sernageomin, which is known in

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306. See generally Sergio Endress Gómez, *Essential Issues of the Chilean Legal System*, GLOBALLEX, [http://www.nyulawglobal.org/Globalex/Chile.htm#\\_Types\\_of\\_Legislation](http://www.nyulawglobal.org/Globalex/Chile.htm#_Types_of_Legislation) (last visited June 11, 2012).

307. See *id.*

308. DFL No. 2, art. 28. The original Spanish text reads: “los Inspectores del Trabajo podrán ordenar la suspensión inmediata de las labores que a su juicio constituyen peligro inminente para la salud o vida de los trabajadores . . . .”

309. Email from María Ester Feres (Oct. 1, 2011) (on file with author) [hereinafter Feres].



Chile for being friendly to mining economic interests.<sup>310</sup> Government pressures were put on the DT to not close the mine in order to protect “job creation.”<sup>311</sup>

Such “pressures” from other government and state actors – likely influenced by employers – is not uncommon at the DT. María Ester Feres told me via email that she was pressured during her tenure as Director to keep the San José mine open.<sup>312</sup> She also felt pressured to issue *dictámenes* that would weaken the work laws.<sup>313</sup> Other labor inspectors normally would complain to me about the interventions that the Treasury Department, the purse of Chile put on the DT, particularly when the public mining corporation would have to pay higher labor costs, reducing its profits and the contributions that it could make to the state coffers.<sup>314</sup>

In 2010, the mine most likely opposed the punitive actions of the DT. It mobilized resources so that other arms of the state, in this case, a sub-agency of the Mining Ministry, exercised jurisdiction over mine safety and closures. Outgunned by the Mining Ministry, which is among the most powerful ministries in the Chile given the importance of the mining industry in the country, and without further support from the Presidency, the DT felt its hands tied.<sup>315</sup> Thereafter it “gave up” on policing mine safety in that mine. Rather than pursuing a proactive agenda to protect health and safety in the mine, it abdicated to the Mining Ministry’s alleged exclusive jurisdiction over health and safety in mines, again, a claim of competency unsupported by the law, and merely fined the mine the equivalent of U.S. \$6,000. The DT’s actions narrowly met legal mandates because it fined the mine under the law, but disregarded workplace safety in the mine by issuing a practically meaningless fine.

As these examples showed, the South American “jaguar” has an “underbelly” characterized by unauthorized discretion, particularly the

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310. I heard about these interagency conflicts not only with the Mining Ministry, but also with the Treasury Department and the Supreme Court of Chile, which is known for striking down some of the actions of the DT. César F. Rosado Marzán, fieldnotes of July 4, 2009.

311. Feres, *supra* note 309; *Ex Directora del Trabajo: No Pudimos Cerrar San José en 2001 por Presiones del Sector Minero*, COOPERATIVA.CL (Oct. 18, 2010), [http://www.cooperativa.cl/prontus\\_notas/site/artic/20100818/pags/20100818192921.html?comentpage=1&ts\\_arart=20100818192921#inicio\\_lista](http://www.cooperativa.cl/prontus_notas/site/artic/20100818/pags/20100818192921.html?comentpage=1&ts_arart=20100818192921#inicio_lista). The date mentioned in the article, 2001, is a typographical error.

312. Feres, *supra* note 309.

313. César F. Rosado Marzán, fieldnotes of July 28, 2009.

314. César F. Rosado Marzán, fieldnotes of July 4, 2009.

315. Feres, *supra* note 309.

use of illegal threats and legalism that coexist with the legitimate, judicial modes of innovation for rule-application. The jaguar may pounce, but its soft underbelly is there, encumbering its effectiveness.

#### VIII. THE PROMISE OF REMEDIAL STRATEGIES BACKED BY “BIG GUNS”

While the inspectorate of Chile primarily employs punishment as a strategy for compliance, it does have some remedial and conciliatory strategies, albeit developed in the interstices of the agency. As mentioned earlier, formal conciliatory and remedial, but marginal, inspection programs have existed and currently exist at the DT. However, *dictámenes*, mere guides interpreting the work laws binding only to the labor inspectors, also seem to serve important conciliatory and remedial roles.

*Dictámenes* are formal roadmaps for the labor inspectors issued by their boss, the Director. The DT's Director issues *dictámenes* so that inspectors can understand the law and interpret and enforce it homogenously in the country. As Chilean Professor Luis Lizama has already noted, while not directly binding on parties — and less so on the labor courts, which can impose their own interpretation of laws — *dictámenes* indirectly bind the public.<sup>316</sup> *Dictámenes* provide the regulated actors with knowledge about how the DT interprets a particular law and how they should act to escape administratively imposed liability.<sup>317</sup>

While in Chile, I experienced one event where it was clear that *dictámenes* could be quite effective in helping the DT compel employers to comply with work laws. On February 27, 2010, Chile experienced one of the most powerful and destructive earthquakes in recorded human history, measuring 8.8 on the Richter scale.<sup>318</sup> The earthquake and the tidal wave that it produced destroyed significant infrastructure and killed hundreds of people.<sup>319</sup> To make matters worse, during the days after the calamity, the economy came to a standstill in some parts of the country, looting took over major cities, and panic and anarchy ruled over many locations. Employers began to massively terminate employees claiming that the economic calamity rose to the level of *force majeure*. *Force*

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316. Lizama, *supra* note 185, at 59.

317. *Id.*

318. Alexei Barrionuevo, *1.5 Million Displaced After Chile Quake*, NY TIMES (Feb. 27, 2010), <http://www.nytimes.com/2010/02/28/world/americas/28chile.html?pagewanted=all>.

319. *Id.*

*majeure* provides legal justification for dismissal in Chile without payment of mandatory severance pay. Official statistics showed that employers justified about 9000 terminations as a result of the earthquake.<sup>320</sup> Such terminations led to social crisis in some areas that already faced major physical destruction as a result of the earthquake. In Concepción, Chile's second largest city, experts estimated a 19% unemployment rate shortly after the earthquake in a country where a 7 to 10% unemployment rate had been the norm for ten years.<sup>321</sup>

In response to the possible social crisis, the President of the Country, Sebastián Piñera, ordered the DT to promulgate a *dictamen* limiting the scope of terminations that could be justified under *force majeure* as a result of the earthquake.<sup>322</sup> The DT issued the *dictamen* on March 19, 2010.<sup>323</sup> It essentially stated that employers could only use *force majeure* to justify terminations in cases where the earthquake directly damaged the business and rendered productive activity impossible.<sup>324</sup> In April 2010, the DT claimed that as a result of the *dictamen*, Chilean employers had voluntarily rescinded about 2600 terminations out of a total of 9000 terminations reported after the earthquake.<sup>325</sup> The *dictamen* thus proved useful to inform employers about *force majeure* terminations in the context of an earthquake and led many to act commensurately with such administrative interpretations of the law.

320. *Gobierno Enviará Proyecto de Ley para Precisar Despidos por Fuerza Mayor*, LA SEGUNDA (Apr. 27, 2010), <http://www.nexchannel.cl/nexchannel/noticias/pdf.php?ver=4945892>.

321. *Tasa de Desempleo Llegará a 19% en el Gran Concepción por Crisis de Empresas y Comercio*, DIARIO AUSTRAL REGIÓN DE LOS RÍOS (Apr. 22, 2010), [http://www.australvaldivia.cl/prontus4\\_nots/site/artic/20100422/pags/20100422084541.html](http://www.australvaldivia.cl/prontus4_nots/site/artic/20100422/pags/20100422084541.html). See generally DIRECCIÓN DEL TRABAJO, INEQUIDADES Y BRECHAS DE GÉNERO EN EL EMPLEO: ANÁLISIS DE LOS RESULTADOS DE LA ENCUESTA NACIONAL DE COYUNTURA LABORAL ENCLA 2008 (6th ed. 2009), available at [http://www.dt.gob.cl/1601/articles-97629\\_recurso\\_1.pdf](http://www.dt.gob.cl/1601/articles-97629_recurso_1.pdf) (providing general unemployment levels in Chile).

322. César F. Rosado Marzán, fieldnotes of Apr. 22, 2010 (interviewing the Sub-Secretary of the Ministry of Labor, Marcelo Soto). See also *Piñera Restringe Norma que Permite Despidos de Trabajadores en Zonas Afectadas por Terremoto*, EL MERCURIO (Mar. 22, 2010), [http://www.nexchannel.cl/nexchannel/noticias/noticia\\_pescrita.php?nota=4819450](http://www.nexchannel.cl/nexchannel/noticias/noticia_pescrita.php?nota=4819450). President Sebastián Piñera told the press that he will personally guarantee that the *dictamen* is enforced. *Id.*

323. DIRECCIÓN DEL TRABAJO, ORD. No. 1412/021 (Mar. 19, 2010), available at <http://www.dt.gob.cl/legislacion/1611/w3-printer-97663.html>.

324. *Id.*

325. *Gobierno Enviará Proyecto de Ley para Precisar Despidos por Fuerza Mayor*, LA SEGUNDA (Apr. 27, 2010), <http://www.nexchannel.cl/nexchannel/noticias/pdf.php?ver=4945892>.

We can categorize the use of the *dictamen* as a judicial innovation by the DT to instruct employees and employers of their rights and obligations under the work laws as well as a device to obtain compliance results. As Professor Lizama has stated it can *de facto* bind parties.<sup>326</sup> It can also serve as a “teaching” tool.

But let’s not forget, also, that the President of the country put all his weight on the publication and implementation of the *dictamen*. The earthquake *dictamen* was not a regulation buried in an arcane publication solely for consumption by lawyers, such as the American *Federal Register*. The earthquake *dictamen* was turned into a political tool of the Presidency, not just of the DT, and was publicized and discussed publicly when it was issued. The message was clear: it may not be binding, but the government would enforce it if workers complained of an unfair termination. The DT, thanks to government backing, could “speak softly and carry a big stick.” Classic “responsive regulation,” and even conciliatory and remedial Latin inspection, was put to work for a change.

We should not take the Chilean *dictámen*’s pedagogical elements too far, however. It is still a top-down, state-centric tool where the regulated actors play no formal part in determining its content. It does not conform to ideal New Governance, responsive regulation, or “Latin” remedial/conciliatory strategies. Its use does attest to the insufficiency of mere punishment by a labor inspector as a tool of work law enforcement, validating claims made by New Governance, responsive regulation, and Latin inspection scholars that punishment-based regulation is insufficient at best. Therefore, further experimentation with remedial strategies, and perhaps with more participatory ones, seems warranted.

## IX. CONCLUSION: AGAIN, BEYOND PUNISHMENT

Sometimes, as in all areas of law enforcement, the inspector will better serve the people he seeks to protect by persuasive or educative appeals to the better nature of offenders than by prosecution. . . . [However, a] growing body of evidence suggests that in many countries the community has a surprisingly punitive attitude toward corporate offenses that cause loss of life or serious injury to persons. It follows from the argument in this book that, if the community wants to indulge these sentiments fully, it will do so at the expense of further loss of life

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326. Lizama, *supra* note 185, at 59.

and limb. It will also be argued, however, that a far more punitive approach than presently exists in any country is needed . . . .<sup>327</sup>

It is in the manner cited above that Professor John Braithwaite begins his now classic book, precursor of the responsive regulation school, *To Punish or Persuade*. Those words, almost 30 years old, ring true today as they rung true back then. In the case of Chile, there is no doubt that the San José mine needed to be closed by the labor inspectorate weeks before it collapsed. It had to be treated much more harshly by the inspector. It needed to be “incapacitated” with the inspector’s “big gun.” It had to be shut down. However, the inspectors simply gave a fine equaling U.S. \$6,000 – chump change for a copper mine. Why? Part of the story has to do with the general punitive orientation of enforcement in Chile. The DT was incapable of doing much else other than fine or close the workplace. It had already closed the mine in 2003, only to see it reopened by Sernageomin, a move likely pressured by mining interests. The intrusion of the sub-agency of the Mining Ministry led the DT to abdicate on the issue of closing the mine. When the second accident happened in 2010, the DT, pressured to keep the mine open and incapable of doing anything other than to impose a fine, chose to simply fine the mine narrowly under the law. The mine then collapsed.

The story of the mine would have been different if the DT would have been able to close the mine, convene the workers and owners of the mine, and perhaps even Sernageomin to structure a process to reopen the mine only after it met all health and safety standards. But the DT did not have those powers. It could only fine the mine or suspend work at the workplace. The decision to reopen the workplace was handed down to another ministry whose main objective was not to provide safe workplaces, but rather, had an immediate urgency to keep jobs, which were later all lost once the mine totally collapsed. Sernageomin retained authority over the mine with power, not law, on its side.

We can tell a similar story with the Codelco case of 2008. There, the DT should have had the power to order the mine to employ the 5000 employees if they had, in fact, been illegally subcontracted by the state firm. But the DT could not make such an order, and they were reprimanded by the Supreme Court of Chile for doing so. The DT should have fined the mine and nothing else. Whether the fine was paid or not, and whether DT could compel Codelco to comply in the future

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327. BRAITHWAITE, *PUNISH OR PERSUADE*, *supra* note 11, at 2-3 (1985) (internal citation omitted).

was outside the bounds of the DT's competencies. The situation could have been handled differently. The DT, armed with the capacity to compel the firm to hire the workers and with other powers to request Codelco, the subcontractors, and workers' representatives to meet and bargain a settlement to bring the company into compliance within an agreeable period of time could have been a more effective measure than that provided by the blunt mechanism of the fine and making illegal threats.

In contrast to the Codelco and San José mining cases, the manner in which the DT handled the massive terminations during the 2010 earthquake show that persuasion can work as a tactic of first order. There, the president of the country publicly supported a mere *dictamen*, an administrative interpretation of the law that is binding to no one but the labor inspectors. Courts did not need to defer to it, but the *dictamen* was published widely and reported by the media. Even though not binding, thousands of termination decisions were voluntarily rescinded by employers. Perhaps it decided that retaining the employees was cheaper than facing the risk of fines and litigation. Maybe they were persuaded of the correctness and desirability of the *dictamen's* interpretation. Whatever the reasons, employers seem to have complied with the termination laws. While the *dictamen* did not involve civil society in its promulgation—it was clearly a top-down state mandate—it did use persuasion to make employers comply with the law. Rather than sending armies of inspectors to examine workplaces and fine employers, the government “spoke softly but carried a big stick.” The strategy seems to have worked.

The case of Chile continues to remind us that the use of mere punishment as a main tool to seek compliance with workplace laws is insufficient at best and counterproductive at worst. Punishment is important. Ensuring that tough sanctions are available for lawbreakers is truly important. But punishment should not be the first and main method to get employers to comply with the work laws.

Given the failures of Chile's punitive approach, current legal scholarship calls for New Governance approaches, including responsive regulation and its elements, found in traditional Latin inspection. For example, in wage theft cases, intentional violators of the law deserve nothing less than punishment. Increasing sanctions against those lawbreakers matters. However, it also matters greatly whether or not employers are violating the law merely out of ignorance. In these cases, pedagogical inspections may help. Furthermore, tripartite wage setting may also prove useful in setting minimum wages that are sensitive to

industry and market contexts.

In the case of collective labor law, reform has proven impossible for almost thirty years. Even if something like the EFCA is ever enacted, the efficacy of the statute will be quite uncertain if employers resist it through actions such as reorganizing production, litigation, and political jockeying, just like what occurred with the Wagner Act, which was resisted, challenged, and eventually deradicalized.<sup>328</sup> Collective labor law reform through tripartite negotiations, as would be suggested by New Governance and an “old” governance institution, such as the International Labor Organization,<sup>329</sup> seems warranted now more urgently than ever.

Finally, swinging the pendulum back to a stricter OSHA will likely be as useless as the last similar swing. Solutions to OSHA enforcement that include voluntary codes and the participation of workers in enforcement,<sup>330</sup> continue to be one of the best prescriptions for change in health and safety law enforcement in the United States.

Some scholars and others on the Right may argue that my approach here, as any regulatory approach, distorts markets and makes everyone worse off. To these critics we only need to show the recent failure of deregulation spurring the Great Recession as proof that a regulatory agenda is still needed. On the other hand, some scholars and others on the Left may view my arguments here as hidden forms of deregulation. They are far from the truth. Governance, responsive and “Latin” labor market regulation requires significant state investment in only the best, most professional regulatory agents possible who can skillfully exert themselves in particular regulatory problems.<sup>331</sup>

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328. See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 293 (1978). See also JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 2 (1983) (arguing inherent property rights, needs of capital mobility, and the interests of continued productivity have led American courts to narrow the scope of labor rights under the National Labor Relations Act); ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* 21 (2006) (claiming that the common law is incompatible with labor law, and the fact that judges are trained in the common law has led to an erosion of worker's rights under the NLRA by the court system).

329. Labour Law, INT'L LAB. ORG., <http://www.ilo.org/ifpdial/areas-of-work/labour-law/lang-en/index.htm> (last visited June 11, 2012).

330. See *supra* text accompanying note 27.

331. We only need to think back to the Gramscian “war of position” (trench warfare)—of strategically deploying resources, “on many fronts, in many trenches, with shifting lines of battle, where victories and defeats occur side by side in the same day”, where even obtaining state power is not enough as such power is contested and constantly challenged to realize that what I am advocating for here has a rich tradition in Left, working class advocacy — a “softer” cultural side for social change. Clyde W.

The South American jaguar provides punitive tools to its labor inspectorate to enforce the country's work laws. Yet, the punitive orientation hides, albeit in plain view, an underbelly of noncompliance where workers cannot be protected and work laws are violated with impunity. We should expect the same in the United States and beyond if we focus too narrowly on punishment. Let us give the regulators and enforcers more power to sanction, but also more diversified toolkits so that they can utilize their authority in smarter, more effective ways.

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Barrow, The Miliband-Poulantzas Debate: An Intellectual History, in STANLEY ARONOWITZ AND PETER BRATSI (EDS.), PARADIGM LOST: STATE THEORY RECONSIDERED 3, 20 (2002). *See also* ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS, (International Publishers 1971); RALPH MILIBAND, THE STATE IN CAPITALIST SOCIETY 77 (1969).