

## DECENTRING LABOUR LAW

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*“We must now admit, however reluctantly, that collective bargaining is not, and is never likely to become, the central institution of the labour market and that its fail-safe mechanisms have failed. This admission, in turn, implicitly acknowledges the failure of the theoretical project of industrial pluralism which dominated the field for much of the post-war period.”<sup>1</sup> -- Harry Arthurs*

*“It is no secret to anyone in the field of labor law that we are at a critical juncture on the question of workplace governance, and that this is a moment of deep transformation with respect to both the context of work and the norms which govern it.”<sup>2</sup> – Kerry Rittich*

*“A forward-looking agenda for labor should embrace and try to steer the movement toward self-regulation—toward relying on, encouraging, and channeling the impulses and resources that lie within and among private firms toward public-regarding ends. The movement towards self-regulation is here to stay.”<sup>3</sup> -- Cynthia Estlund*

Workplace law has always been “decentred”, in the sense that it has rarely relied exclusively on “command and control” style regulation. Governments have long recognized the usefulness of harnessing private actors (like the “public” and unions) towards achieving employment policy goals. In one sense, therefore, contemporary scholarship on decentred regulation, or “New Governance”, might be perceived to have little to offer labour and employment law scholars. On the other hand, there may be some useful insights in this literature towards the challenge of reforming a North American labor law model based in mid-twentieth century thinking. This paper explores this potential by proposing a fundamentally different way of thinking about the contemporary objective of the Wagner model in North America. The paper considers a novel proposal for workplace law reform that involves harnessing the threat of unionization to influence the management decision-making matrix in ways that might encourage firms to improve compliance with employment-based statutes while, at the same time, carves out a potentially useful new role for union organizers and worker advocates.

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<sup>1</sup> H. Arthurs, “Landscape and Memory: Labour Law, Legal Pluralism, and Globalization” in *Advancing Theory in Labour Law*, 21-34, at 25.

<sup>2</sup> K. Rittich, “Between Workers’ Rights and Flexibility: Labor Law in an Uncertain World” Saint Louis U. L. J. (forthcoming)

<sup>3</sup> C. Estlund, *Regoverning the Workplace*, p. 237

FOR nearly a century, students of labour law have been taught that the central purpose of labour regulation is to develop a countervailing power to capital in order to achieve for workers a greater share of economic rewards (the distributive justice argument) and a more meaningful participatory role in shaping the workplace (the ‘industrial democracy’ argument) that otherwise would be produced by a common law model based on “freedom of contract”.<sup>4</sup> The regulatory response in all industrialized nations, while varying in form, scope, and timing, was twofold.<sup>5</sup> Firstly, mandatory minimum labour standards injected public policy directly into the employment contract model by restricting freedom of contract in a variety of ways, including by imposing a statutory ‘floor’ of basic employee entitlements that (often) could not be contractually waived. Secondly, collective bargaining laws—either positively or through statutory immunities from restrictive common law rules—sought to influence conditions of work indirectly by establishing frameworks through which workers could consolidate and bargain collectively with the employer, on a more equal footing than is possible under the individual contract model of employment.

Debating the extent to which this dual approach achieved its objectives has been the task of labour and employment law scholars for the past century. However, as the twentieth century drew to a close, there was much soul-searching within academic and labour policy circles about the ‘future of labour law’.<sup>6</sup> This preoccupation with the *future* of workplace law reflected an emerging consensus that the ‘old’ approaches to governing

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<sup>4</sup> See O. Kahn-Freund, .... See also: P. Weiler, *Governing the Workplace...*; G. Davidov, H. Arthurs, “Industrial Pluralism... etc.... *Webbs*, ..

<sup>5</sup> K. Stone, “The Future of Labor and Employment Law in the United States” at 2-4.

<sup>6</sup> The list of publications with some variation of the ‘future of labour law’ alone is impressive, and includes, for example: K. Stone, “The Future of Labour and Employment Law in the United States” .... ; B. Hepple, “The Future of Labour Law.....”; J. Craig & M. Lynk, (eds), *Globalization and the Future of Labour Law* ....

work were no longer effective, if ever they were, and that new approaches would be necessary going forward.

The evidence of the failure of the old approach was demonstrated in high levels of non-compliance with employment standards legislation<sup>7</sup>, in the persistent discrepancies in both career opportunities and compensation levels between genders and between majority and minority groups<sup>8</sup>, in the falling percentage of workers represented by unions<sup>9</sup>, and in the growing and alarming levels of income inequality especially in the U.S, but also in Canada.<sup>10</sup> In the United States, where unions now represent less than 7 percent of private sector workers, collective bargaining law has become ‘ossified’ and largely irrelevant to the vast majority of the workforce.<sup>11</sup> While collective bargaining has remained a stronger institution in Canada, this is due mostly to strong public sector unions; collective bargaining never made serious inroads into the private service sector, private sector unionization rates are in decline as Canada’s manufacturing sector contracts, and collective bargaining laws have been under attack by neo-liberal governments since at least the 1990s. It is in this context that Harry Arthurs, long recognized as Canada’s leading industrial pluralist, recently pronounced that the project of industrial pluralism

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<sup>7</sup> See, e.g., H. Arthurs, *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century* (Ottawa, HRSDC, 2009) [hereinafter *Fairness at Work*] at 190-195; R. Adams .. ; J. Fudge, “Reconceiving Employment Standards Legislation: Labour Law’s Little Sister and the Feminization of Labour” (1991), 7 *J. L. & Soc. Pol’y* 73;

<sup>8</sup> See, e.g., S. Block, *Ontario’s Growing Gap: The Role of Race and Gender* (Canadian Centre for Policy Alternatives, 2010)

<sup>9</sup> L. Compa, *Unfair Advantage: Workers’ Freedom of Association in the United States Under International Human Rights Standards* ...; C. Estlund, “The Ossification of Labor Law” ... add more ...

<sup>10</sup> See M. Lynk, “Labour Law and the New Inequality”; Rittich, *supra* note .

<sup>11</sup> C. Estlund, “The Ossification of Labor Law” ....

had failed.<sup>12</sup> Others, have gone further still, suggesting that the entire field of labour law “may cease to exist” as a discipline.<sup>13</sup>

At the same time, the forces said to be threatening labour law are not distinct to our field. They are symptoms of a larger transformation in the ways that societies and economies are organized, and much of that transformation is a result of deliberate political design rather than natural evolution. ‘Globalization’ is usually placed at or near the centre of this discussion.<sup>14</sup> Globalization is a contested concept, but is usually understood to include the economic, social, and legal effects of advances in communications technologies, the dismantling of trade barriers, and agreements by governments in trade agreements to subject their lawmaking powers to supranational oversight and substantive restrictions.<sup>15</sup> Together, these forces are presumed to restrict the capacity of national governments to enact new regulations to govern business activities, and to elevate the risk of capital ‘exit’ in the event that new regulations are enacted that business leaders find burdensome.

In the context of employment in particular, these meta-level transformations collided with system specific transitions in a sort of perfect storm for lawmakers.<sup>16</sup> Work has changed, and legal regulation has not kept up. *Before*, the economy was dominated by mass production undertaken in large workplaces; today, new forms of flexible production and smaller workplaces dominate. *Before*, workers and employers anticipated ‘life-long’ employment with a single employer; today, there is less expectation of job

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<sup>12</sup> Arthurs, *supra* note 1.

<sup>13</sup> R. Rogowski & T. Wilthagen, “Reflexive Labour Law: An Introduction” in ... at 3: “...changes in industrial societies actually pose a severe threat to the field of labour law as such. Labour law is indeed endangered to the extent that it may cease to exist as a separate legal discourse.”

<sup>14</sup> Add notes. H. Arthurs, “Labour Law Without the State” ....; Lobel, *supra* note ... ;

<sup>15</sup> See, e.g., B. Hepple, *Labour Laws and Global Trade* (Oxford, Hart Publishing, 2005) at 5.

<sup>16</sup> Lobel, *supra* note at 327-28; Stone, *supra* note \_ at 14-16; Rittich, *supra* note at 571-72; ...

security and longevity. *Before*, legal regulation targeted full-time ‘standard’ employment; today, atypical forms of employment are prevalent. *Before*, labour laws were primarily concerned with an ideal type of work and worker, characterized by a single (usually male) principal income earner per family unit; today, women are just as likely to be employed in the formal labour market as men, the family unit itself is more diverse and fluid, and the male-dominated, single income family has long since ceased to be descriptive of the Canadian labour force.

Contemporary dialogue about the future direction of employment regulation is taking place against this complex backdrop of social, economic, and legal change. In the wider debates among regulatory theorists interested in the governance of business firms, a rough typology of regulatory forms was developed and then used as a basis for discussion about what, if anything, needs to change going forward. The villain in this story is almost always ‘command and control’ regulation (CAC), government-made regulation characterized by substantive legal commands backed by legal sanctions. CAC is described as too rigid, too confrontational, and too dependent upon government inspectorates who lack either the will or the capacity to properly monitor compliance.<sup>17</sup>

Presented as the ‘other’ to CAC are approaches to legal regulation that purport to influence behaviour in fundamentally different ways. In contrast to the *old* ways of doing things, these approaches come with fresh names, such as ‘new governance’<sup>18</sup>, ‘responsive regulation’<sup>19</sup>, and ‘reflexive law’<sup>20</sup>. Whereas CAC places the state at the centre of the

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<sup>17</sup> Lobel, *supra* note at 277-279; Estlund, ...

<sup>18</sup> *Ibid.*; O. Lobel, “Setting the Agenda for New Governance Research” (2004), 89 *Minn. L. Rev.* 498....

<sup>19</sup> P. Nonet & P. Selznick, *Law and Society in Transition: Towards Responsive Law* (New York, Harper, 1978); I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford U. Press, 1992).

<sup>20</sup> G. Tuebner, “Reflexive Elements” ...; R. Rogowski & T. Wilthagen, *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (Boston: Kluwer, 1994); D. Doorey, “Who Made That?:

regulatory wheel, the new regulatory techniques call for a ‘decentring’ of the state from its privileged place and for a greater recognition of the norm-creating potential of private actors and of other forces in a given society or marketplace.

The various strands within decentred regulatory scholarship vary both descriptively and prescriptively, but there is nevertheless a shared narrative that goes like this: the management systems of modern firms, and the environments in which those firms function, are so complex and sophisticated that they preclude a regulatory system based on a simple hierarchy of rule-maker (the state) and rule-follower. Instead, the state needs to move away from CAC and consider a system of regulation that at once recognizes the state’s limitations and also the many forces other than the state that influence norms of behavior. The ‘new’ approaches to governance emphasize the potential for the state to use regulation to harness those sources of private power so as to cause ‘self’-reflection and self-regulation that might ultimately further state objectives.

This paper explores the potential contribution of the decentred approach to governance to the challenge of updating the Wagner model for the 21<sup>st</sup> century. I begin with a description of the common themes that define the decentred approach to regulation, drawing on the important work of Julia Black. Part II then considers three implications of the decentred approach for the design of business regulation and for research agendas in regulatory studies. In Part III, I examine four of the key regulatory tools commonly deployed or advocated for in the decentred literature.

Finally, in Parts IV and V, I focus on the relationship between decentred regulatory theory and labour law in Canada and the United States. I argue that it is

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...”; E. Orts, “Reflexive Environmental Law” (1995), 89 NW. U. L. Rev. 1127; M. Dorf, “The Domain of Reflexive Law” (2003), 103 Colum. L. Rev. 384

important to distinguish between the objective of labour legislation and the design of the legislation. Decentred regulatory theory speaks to the *design* of regulation, not to the underlying policy objective, which remains a political function. Therefore, decentred regulatory theory has little to offer debates about whether the state *should* reform laws to encourage greater unionization than has occurred under the Wagner model. Rather, the contribution of decentred regulatory theory is in relation to the question of how regulation might more effectively achieve the state's policy objective, whatever that objective happens to be.

I argue in Part IV that the policy objective of labour law in North America today is no longer to encourage unionization and collective bargaining, even in the industrial sector. If it were, it would not be difficult to identify ways to reform labour laws to better achieve that result. Rather, contemporary labour law—the system of rules governing unions, collective bargaining, and industrial conflict—serves a very different purpose. Its purpose today is to serve as the “other”, less desirable, regulatory stream to the states' preferred model of workplace governance, which is individual employment contracts interpreted against a background of the common law bolstered by a core set of default rules in employment standards regulation. The *threat* of state-sanctioned unionization is intended to deter nonunion employers from exploiting their labour market power over non-union workers in ways that the state believes are irresponsible and unfair.

Once we perceive labour law as a regulatory tool intended to deter irresponsible behaviour by nonunion employers, then a range of potential regulatory tools to strengthen that legal signal becomes evident. In Part V, I consider how decentred regulatory theory might suggest reforms to existing labour laws that could improve employer compliance

with employment standards regulation, encourage nonunion employers to treat their workers better, and at the same time put the expertise of unions and other private advocates of workers to more effective use in pursuit of the state's objectives for workplace regulation.

## **I. The Decentred Understanding of Regulation**

'Decentred' regulation is not a term used frequently in North American scholarship. In the U.S., "New Governance" has become the preferred moniker. Both labels are used as umbrella terms to capture a subset of regulatory theories or strands. I do not intend to explore any of the strands in detail here, but it is nevertheless important to consider the key premises that underlie the decentred perspective on regulation. A good place to begin is with the work of Julia Black and, in particular, her 2001 paper entitled *Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World*.<sup>21</sup>

### **A. Aspects of the Decentred Understanding of the Challenges of Regulating**

Black begins by noting that there is greater clarity about what decentred regulation is not, than there is agreement on what it is. This is because, as noted above, decentred regulation is usually positioned principally as the 'other' to CAC regulation. The reasons given for the failure of CAC vary. In its most radical form, the argument is a key component of autopoietic systems theory as developed by Niklas Luhmann and Teubner, among others.<sup>22</sup> North American critics of CAC have tended to be less

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<sup>21</sup> J. Black, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory World" 53 *Cur. Leg. Problems* 103 (2001). See also, J. Black, "Critical Reflections on Regulation" ; J. Black, "Proceduralizing Regulation, Part 1" .....

<sup>22</sup> N. Luhmann, *The Differentiation of Society* (N.Y.: Columbia U. Press, 1982); Teubner, *Law as Autopoietic System* (Oxford: Blackwell, 1993)

theoretical than the European systems theorists, while generally accepting the latter's basic account of the evolutionary nature of law. That account explains how legal systems evolve from an initial focus on "formal" laws that support the basic requirements of private ordering, including contract and property law, to a system of "substantive" legal regulation in which the state pursues social and economic policies through regulatory guidance in the form of centralized state control.<sup>23</sup>

Inevitably, society's problems are said to become too complex for the substantive legal regime to manage, or subsystems within societies become over-legalized, creating a "crisis of the regulatory state".<sup>24</sup> At this point, a further evolution towards a third model of governance must occur in which the state recognizes its incapacity to engineer a specific set of policy objectives through an array of command and control regulations, and looks outwards towards other potential sources of 'governance' that might be harnessed in pursuit of the state's policy objectives.

Therefore, the usual justification for exploring the potential contribution of a decentred approach to regulation is that the alternative models of formal and substantive regulation are no longer sufficient in today's complex world, as Black explains:

CAC regulation posits a particular role for the state against which the 'decentring' analysis is counter posed. It is 'centred' in that it assumes the state to have the capacity to command and control, to be the only commander and controller, and to be potentially effective in commanding and controlling. It is assumed to be unilateral in its approach (governments telling, other doing), to be based on simple cause-effect relations, and to envisage a linear progression from policy formation through to implementation. Its failings are variously identified as including the following: that the instruments used (laws backed by sanctions)

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<sup>23</sup> For an account of the evolutionary trajectory of legal systems in reflexive law, see Teubner, *supra* at \_\_\_\_\_. Lobel sets out a similar narrative in her description of New Governance theory in Lobel, *supra* note at 281-286. See also W. Sage, "Regulating Through Information: Disclosure Laws and American Health Care" (1999), 99 Colum. L.J. 1701; Orts, *supra* note; C. Estlund, "Rebuilding the Law of the Workplace in an Era of Self-Regulation" .. at 92

<sup>24</sup> Teubner, ....

are inappropriate and unsophisticated (instrument failure), that the government has insufficient knowledge to be able to identify the causes of problems, to design solutions that are appropriate, and to identify non-compliance (information and knowledge failure), that implementation of the regulation is inadequate (implementation failure), and that those being regulated are insufficiently inclined to comply, and those doing the regulating are insufficiently motivated to regulate in the public interest (motivation failure and capture theory).<sup>25</sup>

Black identifies common themes or ‘aspects’ that together comprise a ‘decentred’ understanding of regulation.

Firstly, the causes of modern social problems are said to be extremely complex, and shaped by interactions between a variety of forces which are poorly understood.<sup>26</sup> Secondly, no one actor, not even the government, possesses the knowledge or expertise to understand how normative behaviour is determined in light of this complexity (there is “fragmented knowledge”).<sup>27</sup> A third aspect of the decentred approach to regulation is a belief that there is a plurality of sources of normative behaviour. Formal, state-based law is one source, but often other social or economic forces are equal or more significant determinants of behaviour than government regulation.<sup>28</sup> In other words, ‘decentrists’ are also legal pluralists.

Fourthly, a decentred orientation to regulation recognizes that the targets of regulation are complex, autonomous actors, with their own objectives, world-views, and discourses. Since lawmakers cannot possibly know how every actor perceives their environment, and in any event, the targets of regulation are not homogeneous in this

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<sup>25</sup> Black, *supra* note at 106.

<sup>26</sup> *Ibid.* at 106-107. See also, e.g., P. Capps & H. Olsen, “Legal Autonomy and Reflexive Rationality in Complex Societies” (2002), 11 *Soc. & Leg. Stud.* 547 at 551

<sup>27</sup> J. Black, “Proceduralizing Regulation: Part 1”, (2000) *Oxford J. Leg. Stud.* 597 at 602.; Lobel, *supra* note at 300 (noting that a premise of the New Governance model is “that no one institution possesses the ability to regulate all aspects of contemporary public life.”)

<sup>28</sup> *Ibid.* at 108. See also Lobel, “Renew Deal”, *supra* note at 373, explaining that a New Governance approach is a regime “based on engaging multiple actors and shifting citizens from passive to active roles. The exercise of normative authority is pluralized.”

regard, it is anticipated that regulation will cause behavioural changes and outcomes that are unintended.<sup>29</sup> Decentred regulatory theory therefore requires the state to be engaged in a process of continuous learning through feedback loops; the state transmits legal signals, observes how actors and subsystems react, seeks input and counsel from knowledgeable actors, and then adjusts the signals accordingly in a process of ongoing communication.<sup>30</sup>

A fifth aspect of a decentred approach to regulation is the observation that regulation is a process that fosters and relies upon interdependencies between regulator and regulated. Rather than conceiving the state as commander, and the targets of regulation as ‘commanded’ in a sort of linear, subordinate relationship, a decentred orientation embraces the notion that “interdependencies and interactions exist between government and social actors”, and that each is dependent on the other for the resolution of complex social problems.<sup>31</sup>

Lastly, Black explains that a decentred orientation to regulation involves the ‘collapsing of the public/private distinction’ and a “rethinking of the role of formal

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<sup>29</sup> See Tuebner, “Reflexive Elements”, supra note at 255, noting that because under a regime of reflexive law the “legal control of social action is indirect and abstract”, it may produce unpredictable outcomes.

<sup>30</sup> See, e.g., Lobel, supra note at 297-98 (noting that New Governance “advocates ... the adoption of cooperative governance based on continuous interaction and sharing of responsibility”); C. Bennett & M. Howlett, “The Lessons of Learning: Reconciling Theories of Policy Learning and Policy Change” (1992), 25 Pol’y Sci. 275 at 276 (noting that “state can learn from their experiences and ... can modify their present actions on the basis of their interpretation of how previous actions have fared in the past”); P. Capps & H. Olsen, “Legal Autonomy and Reflexive Rationality in Complex Societies” (2002), 11 Soc. & Legal Stud. 547 at 550:

...the cognitive openness of the legal system makes it possible for it to ‘learn’ and thereby adapt to the regulatory needs of a changing social landscape... In a changing and diverse social environment, it is crucial that the legal system develops a regulatory strategy that is based on a form of legal rationality which as a greater potential to learn ...

<sup>31</sup> See J. Kooiman, “Social Political Governance: Introduction in *Modern Governance: New Government Society Interactions* (J. Kooiman, ed.) at 3: arguing that there is a shift from the conception of regulation as “one-way traffic from those governing to those governed” and towards “a two-way traffic model in which aspects, qualities, problems and opportunities of both the governing system and the system to be governed are taken into account.”

authority in governance and regulation.”<sup>32</sup> It requires the state to move towards a regulatory strategy that encourages self-reflection and continuous learning by the targets of regulation, and that influences the contextual conditions of self-regulation and ‘co-regulation’ with the aim of encouraging the private creation of substantive norms from the periphery of social and economic interactions by discovering ways to use law to influence communications and interactions between private actors.<sup>33</sup>

## **B. Decentred Regulation is Instrumental Law**

The idea of ‘regulated self-regulation’, often associated with the decentred approach, usefully captures the key philosophical basis of the decentred orientation.<sup>34</sup> Firstly, it emphasizes that ‘regulation’ includes more than just orders issued by governments and backed by state-imposed penalties: it includes also *private systems of rules* that emerge outside of the state. This includes norms developed through the attempts by firms to ‘self’ regulate, as well as those that emerge through contestation, negotiation, and dialogue between firms and others actors and networks of actors.

Secondly, “regulated self-regulation” reminds us that, in the decentred approach to regulation, the state continues to play a significant role and continues to pursue public policy objectives. Decentred regulation, like command and control regulation, is instrumental law. In other words, there is a big difference between ‘self-regulation’ and ‘decentred regulation’, although this is a point often misunderstood, as Karkkainen has noted:

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<sup>32</sup> Ibid. at 110.

<sup>33</sup> Ibid. at 112. G. Tuebner, *Law as Autopoietic System*, *supra* note at 67; Lobel, *Renew Deal*, *supra* note at 373.

<sup>34</sup> The idea that states should ‘regulate self-regulation’ for instrumental purposes is now a common theme in decentred scholarship. It is found in Teubner’s work on reflexive law, .. See also Estlund, *supra* note , Chapter 10 (discussing regulated self-regulation in the labour practices domain); Black, *supra* note at

One of the persistent and pervasive misconceptions about New Governance is that it is wholly reliant on ‘soft law’, and therefore ultimately dependent on the good intentions and voluntary actions of parties who heretofore have shown little inclination toward acting in the desired directions. On those grounds, it is easily dismissed by its misinformed as so much wishful thinking.<sup>35</sup>

Self-regulation describes self-imposed and self-defined rules by private actors that may or may not be consistent with government policy objectives, and which may or may not be backed by some form of legal, moral, or market-based sanction.<sup>36</sup> Decentred regulation, on the other hand, is government regulation in pursuit of public policy objectives, although the form of regulation that is expected to be effective varies from that in a CAC regime due to the very different perceptions of the operational relationship between legal signals, on the one hand, and human and firm behaviour, on the other hand.

## **II. Implications for Regulatory Design and Research**

These observations about the nature of the relationship between the state, the legal system, and individual and firm behaviour shape how a decentred theorist perceives the challenge of regulating business. A decentred approach to regulation would be expected to redefine and redeploy the range of appropriate regulatory tools that have traditionally been used in regimes characterized by CAC. This has implications not only for regulatory design, but also for research in regulation, including in labour and employment law. In particular, I suggest that there are three key insights associated with the decentered orientation that have important implications for both design and research in workplace regulation: (1) the emphasis on how regulation can be used to influence the

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<sup>35</sup> B. Karkkainen, “New Governance in Legal Thought and in the World” (2004), 89 Minn. L. Rev. 471 at 488. See also Lobel, *Renew Deal*, *supra* note at 502.

<sup>36</sup> See J. Black & R. Baldwin, “Really Responsive Regulation” \_\_\_\_\_ for a discussion of the distinction between state-based regulation that aims to influence behaviour indirectly, and purely private regulatory systems in which the state plays no direct role.

decision-making processes within firms; (2) an awareness that non-state actors and networks of actors might be harnessed in pursuit of public policy goals; and (3) the potential benefits of risk-based regulation towards influencing firm behaviour.

**A. *Internal Management Systems as a Target for Regulation***

A CAC model assumes that a legal command (i.e. “employers must pay at least \$10 per hour”) is received as a simple and unambiguous directive in a linear process from the commander (state) to the targeted actor. A decentred understanding of regulation, in contrast, perceives the process through which legal signals penetrate a firms’ decision-making processes to be far more complex. There are mechanisms, pressures, personalities, cultures, and discourses within firms that can muddy the legal signal, or that translate it in order to make it fit better with the firm’s own worldview, or those of its key personnel.<sup>37</sup>

To use the language of reflexive legal theory, a message transmitted from the legal subsystem to the economic subsystem will be reinterpreted according the particular binary code used within the economic subsystem. So, to give a relatively straightforward example, the legal signal “pay the minimum wage” is reinterpreted by economic actors according to the language of the economic subsystem—pay or do not pay, profit or not profit.<sup>38</sup> The signal becomes something like, “what will it cost me to pay the minimum wage as opposed to not paying it”, considering the potential to get caught and the sanction if I do not comply with the legal command.

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<sup>37</sup> Estlund, *supra* note at ; Teubner, ...; ....

<sup>38</sup> See, for example, the discussion in H. Collins, “Reflexive Labour Law: Book Review” (1998) 61 Mod. L. Rev. 91

There is wide-spread agreement that there are high levels of non-compliance with existing minimum wage laws in both the U.S. and Canada.<sup>39</sup> For example, a recent report on Federal labour standards in Canada found that, “about 25% of all federal employers were not in compliance with most [of the employment standards] obligations ... and that 75% of these employers were not in compliance with at least one provision...”<sup>40</sup> Perceived from the perspective of CAC style regulation, the failure of the regulation reflects a failure of enforcement. This would tend to lead to suggested ‘fixes’ such as raising fines for non-compliance, or building more effective enforcement by government inspectors. The idea would be to raise the anticipated costs of non-compliance in the hope that this will improve the likelihood that ‘bad’ employers will chose to comply. Fundamental to a CAC response would be the persistent belief that the state can invoke compliance with its legal command by improving the inspection process or increasing the monetary penalty for non-compliance.

A decentred approach to the problem might also support higher fines and better enforcement (if the government were prepared to fund this), particularly for persistent offenders<sup>41</sup>, but would hold out little hope that this alone will make much difference in overall compliance levels. As Teubner asserts, a direct legal command (like ‘pay the minimum wage’) has, ‘little chance of being obeyed when it comes into direct conflict

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<sup>39</sup> There is a substantial body of research looking at minimum wage compliance levels. See, e.g., D. Card, “Do minimum wages reduce employment? A case study of California, 1987–89”, (1992), 46 *Ind. & Labour Rel. Rev.* 38 (only 46% of eligible workers in California actually received their entitled minimum wage); Estlund, *supra* note ;

<sup>40</sup> *Fairness at Work*, *supra* note at 192.

<sup>41</sup> For example, Ayres and Braithwaite proposed the idea of the ‘benign big gun’, by which they meant that a responsive regulatory model required serious sanctions be in place to punish persistent offenders and to act as the ultimate incentive for firms to opt for the more cooperative regulatory options. See also Collins, at 65; Estlund, ...; Lobel, *supra* note at 371-72; D. Dana, “The New Contractarian Paradigm in Environmental Regulation” (2000), U. Ill. L. Rev. 35 at 47 (noting that New Governance-style regulatory models still depend upon the existence of a strong government penalty to act as a threat to those businesses that do not participate meaningful in the new approach).

with the profit motive.”<sup>42</sup> High levels of non-compliance with the legal command in North American lend support to that prediction. Therefore, the decentrist would be more concerned with strategies intended to align the firms’ economic interests with the government’s interest in having the minimum wage paid.

This process requires a close examination of how decisions are actually made within organizations, such as whether or not to comply with a legal command. Whose job is it within a firm to learn what the employment standards rules are, and to decide whether those rules will be complied with throughout an organization? What motivates those people, and how might those motivations be altered to produce a different set of incentives? Are there cultural factors within organizations, or external social or economic forces acting upon managers or firms that influence how managers interpret the legal commands? If so, what are those forces, and what factors determine how significant an impact they have on management’s decisions about how to respond to legal commands targeting work practices?

Answers to these sorts of questions are important to decentred regulatory theory, because the fundamental objective of a decentred regulatory strategy is to infiltrate the firms’ decision-making matrices and erect signposts that direct decision-makers towards the state’s desired course of action. That is why a common theme found in the decentred scholarship is the potential for regulation to influence management systems and the decision-making processes within firms. Black observes, for example, that, “one of the roles of reflexive law is to set the decision-making procedures within organizations in such a way that the goals of public policy are achieved.”<sup>43</sup> Scott notes similarly that, “the

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<sup>42</sup> Tuebner, *Autopoietic Systems*, at 91.

<sup>43</sup> Black, *Decentring*, *supra* note at 126.

modest conception of law's capabilities [in decentred regulatory theory] has led to a concern with targeting the internal management systems of regulated entities in order to secure compliance with regulatory goals.<sup>44</sup> Orts identified as a reflexive law strategy the aim of 'channeling communications within the organizational structure of social institutions' with the expectation that influencing how information is gathered and used in an organization can influence how organizations respond to that information.<sup>45</sup>

The concern with decision-making processes within firms in decentred regulatory theory effects both the form of proposed regulation, and also the research agenda for lawmakers and regulatory scholars. Regulation that looks inside the managerial 'black box', to borrow Estlunds' phrase, takes on greater prominence.<sup>46</sup> Researchers are guided towards questions that explore internal firm dynamics and cultures, and with how they interact with environment forces, such as markets, culture, and business risks. A shift towards decentred regulation would therefore also drive a shift towards greater study of the dynamics of internal managerial processes and performance outcomes.

## **B. *Harnessing Non-State Actors and Networks Through Regulation***

A second key insight of the decentred approach to regulation is that the many private actors already engaged in efforts to influence firm behaviour may have something to offer the state in its pursuit of policy objectives. Legal pluralism has experienced a rebirth in a development that has paralleled recent interest in decentred approaches to regulation.<sup>47</sup> The lens of legal pluralism opens our eyes to the complex environment in

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<sup>44</sup> C. Scott, "Regulation in the Age of Governance: The Rise of the Post-Regulatory State) at 9.

<sup>45</sup> Orts, supra note at 1267. See also Fiorino, supra note at 448, noting how reflexive law seeks to "strengthen reflexion mechanisms within the 'targeted' entity to encourage the desired behaviour."

<sup>46</sup> Estlund, supra note at \_\_. See also Doorey, *Nike*, (discussing how decentred regulation targeting supply chain management systems might influence supplier labour practices.)

<sup>47</sup> Lobel, supra note at 294 (noting that the New Governance approach is "based on engaging multiple actors and shifting citizens from passive to active roles. The exercise of normative authority is pluralized).

which many firms operate, to the many sources of push and pull that act upon firms at any given moment. These sources of influence are not peripheral to a decentred orientation, but are crucial to understanding why firms behave as they do. As Rod Macdonald has noted, the “rediscovery of legal pluralism” means that, “to understand the role that State law actually plays in a given social field, it is necessary to understand the character and operation of multiple regimes of unofficial law in the same field.”<sup>48</sup>

This in turn requires the state to learn about those private actors that have an interest in firm behaviour in particular spheres, such as workplace practices. For example, if firm managers are concerned about consumer or investor boycotts, or by negative publicity campaigns waged by worker activists, then a decentred approach would encourage the state to perceive those activities as potential sources of power that could be harnessed towards attainment of government objectives. Dunsmire explains the regulatory technique of putting private sources of pressure to work in pursuit of government objectives as “colliberation”, the goal of which is to:

...identify in any area what antagonistic forces already operate, what configuration of them provides the current stability, and what intervention would help to change the stability to an alternate one which is more in line with the policy makers’ objectives, not by laying down a standard, but by giving that degree of *ad hoc* support to the side that it needs to do the trick.<sup>49</sup>

All of the firms’ stakeholders—friend and foe—become potential sources of influence that might be put to use to help the state achieve its public policy goals.

Again, this perspective influences not only the form of potentially viable regulation, but also the sort of research questions that lawmakers and scholars should

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<sup>48</sup> R. Macdonald. “Metaphors of Multiplicity: Civil Society, Regimes, and Legal Pluralism” (1998), 15 *Ariz. J. Int.’l & Comp. L.* 69 at 76-77.

<sup>49</sup> A. Dunsmire, “Modes of Governance” in J. Kooiman (ed.), *Modern Governance: New Government-Society Interactions* (London, 1993) at 34. See also, Black, Decentring, *supra* note at 127.

investigate. The various actors, or stakeholders, must be identified and mapped to identify their place and role within the “web of influence” within the particular sphere of conduct being targeted by the state. The nature of the relationship between the many private actors and the firms needs to be investigated, as do the relationships between the various actors. By investigating and mapping these relationships, the decentrist can then begin to identify what legal signals deployed into the milieu might cause the sorts of changes in behaviour the state desires.

### ***C. Injecting Risk as a Regulatory Tool***

The third insight flows from the first two. By recognizing that firms can be induced or provoked by private (non-state) pressures to make useful changes to their internal management systems, a decentred orientation alerts us to the possibility of using *risk* as a regulatory tool. When managers identify risks to the firms’ economic objectives (brand reputation, market share, share price, profitability) or to their own personal circumstances (poor performance evaluations, loss of bonuses, discipline or dismissal), they would be expected to take steps to eliminate or reduce the risk. In theory, these risk management responses may include steps that are ultimately beneficial to the states’ objectives. This creates the possibility of using regulation to agitate or induce internal management systems change by “injecting risk”.<sup>50</sup>

Michael Power has identified the link between risk management processes within firms and the threat posed by external actors who monitor firm practices and pressure them to alter those practices. He argued that “risk management” creates “an inner regulatory space” within firms that has the potential to “enfranchise” external actors by

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<sup>50</sup> Doorey, *supra* note at \_\_

giving voice within the organization to their concerns and interests.<sup>51</sup> Power argues that “social concerns”, often lumped under the label of corporate social responsibility, have crept into corporate decision-making through the mechanism of “reputation management” and risk management.<sup>52</sup> He notes that, while stakeholder interests have not always made their way into formal legislative reforms, “they are entering via the back door of risk management and ‘reputational assurance’.”<sup>53</sup>

Power asserts that risk management processes seek to normalize or embed into the “habits and routines” of firms actions and decisions that will reduce threats to corporate objectives and reputation. This often involves the development of management systems that ensure greater internal corporate responsiveness to potential sources of risk to the firm. In this way, a “linkage between risk and morality is emerging from the language and aspirations of risk management and not from some superimposed form of command and control regulation.”<sup>54</sup>

Recent developments in relation to global supply chain labour practices provide one example of how external pressures can influence firm behaviour through the mechanism of risk management. Sustained pressure by non-state actors (including NGOs, unions, journalists, consumers, investors, academics) active in investigating and publicly reporting incidents of labour abuses in supplier factories of multinational corporations has caused many of these corporations to take a variety of steps to reduce

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<sup>51</sup> M. Power, “Risk Management and the Responsible Organization” in R. Ericson (ed.), *Risk and Morality* (U. Toronto Press, 2003) 145 at 153.

<sup>52</sup> Ibid. at 154.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid. at 157.

the risk to brand reputation that could result from being linked to ‘sweatshop’ labour practices.<sup>55</sup>

For example, firms that have been targeted by labour activists (or fear being targeted) have responded by developing monitoring systems, creating new global labour compliance departments, introducing new supplier codes of conduct, joining multi-stakeholder labour rights initiatives (like the Fair Labor Association and the Workers’ Rights Consortium), entering into dialogue with NGOs and unions about root causes of poor labour conditions within global supply chains, and by disclosing the identity and location of their global suppliers.<sup>56</sup> These innovations are on the whole positive and improve the likelihood that global firms will learn of labour abuses by their suppliers and take steps to correct them.

In this way, “risk management” processes within firms may become a source of internal change in matters related to the firms’ labour practices. Risk as labour law. This is a new way of thinking about the governance of work, and it opens new possibilities of labour regulation. I have argued elsewhere that disclosure regulation targeting supply chain labour practices could act like a ‘risk virus’ injected in the firm’s ‘bloodstream’ that could provoke firms to take steps similar to those described in the preceding paragraph in an attempt to control the risks associated with being publicly linked with sweatshop

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<sup>55</sup> See, e.g. Doorey, Nike, *supra* note ; D. O’Rourke, “Outsourcing Regulation” ; K. Kolben, “Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes” (2007), 48 Harv. Int’l L. Rev. 208 ...

<sup>56</sup> I have discussed these developments in detail in .. See also: D. Murphy & D. Mathew, “Nike and Global Labor Practices” (New Academy Business Innovation Network for Socially Responsible Government); B. Kytte & J. Ruggie, “Corporate Social Responsibility and Risk Management” (Working Paper No. 10, CSR Initiative (March 2005); M. Conroy, *Branded: How the Certification Revolution is Transforming Global Corporations* (New Society Publishers, 2007); A. Ross, *No Sweat: Fashion, Free Trade and the Rights of Garment Workers* (London, Verso, 1997) .... more

labour.<sup>57</sup> The same basic philosophy—exploiting risk management as employment regulation—could be applied to the challenge of improving compliance with domestic labour laws and policy objectives.

But this too would require a different sort of research agenda for lawmakers and scholars than what we have been used to. Firstly, we need to identify the sources of risk, or more specifically, what the targeted firms perceive as the sources of risk related to labour practices. Secondly, we must explore how risk signals, or how the presence of external risks, penetrate the firms’ decision-making apparatus. How do managers become aware of the risk and monitor them? Thirdly, we would be interested in learning how knowledge of the risk signals translate into action within a firm—in other words, what sorts of steps do firms take to manage or reduce the risks once they have been identified. And then, lastly, we would want to consider whether regulation could be used to alter those risks, for example, by elevating them, such as by increasing the potential damage to firms that fail to introduce precautionary measures that the state desires.

These questions require an exploration of the internal processes of firms of the sort I already mentioned in subsection A, above: How do managers within these firms perceive their external environment, including legal signals, risks, and opportunities, and how are they likely to respond to changes in those external signals? This research agenda rejects the notion that legal commands (“pay the minimum wage”, “do not discriminate”, *et cetera*) present to firm managers as unambiguous signals, while at the same time it recognizes the complexity of the environment in which those managers function and make decisions. The challenge for lawmakers and researchers interested in regulation is to decipher the webs of influence that ultimately determine firm behaviour and to then

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<sup>57</sup> Doorey, *supra* note ; ...

figure out what strands of the web to tug on in order to provoke changes consistent with state objectives.

### **III. Common Tools of Decentred Regulation**

This is no easy task. However, as noted earlier, the decentred approach also encourages a process of continuous learning and information feedback loops. Lawmakers need to anticipate the unanticipated; since the state's knowledge is fragmented, it cannot know for sure what effects, if any, its legal signals will produce.<sup>58</sup> However, the state can observe how actors (or systems) respond to particular legal signals, and it can then adjust or repeal those signals, or introduce new ones, based on its continuous observations. Regulation is perceived as a process in continuous learning, experimentation, and evolution.

What are the lessons from all of this for regulatory design? Black summarizes the decentred strategy as follows:

The hallmarks of the regulatory strategies advocated are that they are hybrid (combining governmental and non-governmental actors), multi-faceted (using a number of different strategies simultaneously or sequentially), and indirect... Essentially, decentred regulation involves a shift ... in the locus of the activity of 'regulating' from the state to other, multiple, locations, and the adoption on the part of the state of particular strategies of regulation.... [G]overnments should not row and cannot steer, at least not directly. Rather they have to create the conditions in which firms, markets, etc. steer themselves, but in the direction that governments want them to go...<sup>59</sup>

The range of regulatory tools proposed to perform this steering role is varied, but there are a number of techniques that have come to define the approach most clearly.

#### **A. Dual Regulatory Streams**

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<sup>58</sup> See references cited in note \_\_, *supra*.

<sup>59</sup> Black, *supra* note at 111, 112, 113.

One is the use of dual regulatory ‘streams’. At the core of this idea is the belief that ‘good’ actors should be rewarded with regulatory benefits not available to ‘bad’ actors, and that firms can be induced by incentives to support state objectives. The perceived benefit of this approach is twofold: (1) it makes more efficient use of limited state resources by targeting inspections at high risk firms that show little interest in self-governing themselves; and (2) it recognizes and reinforces those tendencies within many firms to behave responsibly by rewarding them for doing so.

The benefits to firms associated with opting for the “good actor” regulatory stream may include a less confrontational and more cooperative regulatory scheme, such as being subjected to fewer or less comprehensive government inspections, as explained by Estlund:

... effective self-regulators should be subject to a less adversarial, more trusting regulatory regime while others—non self-regulators and those whose self-regulatory programs fall short—should encounter tougher and more intense regulatory scrutiny.<sup>60</sup>

Ayres and Braithwaite’s version of *Responsive Regulation* proposes a similar model in which effective self-regulatory arrangements are met with a more conciliatory government regulatory approach, but firms that do not effectively self-regulate are targeted for more intense regulatory oversight.<sup>61</sup>

In order to access the more favourable regulatory stream, the actor is required to take certain steps defined by the state. For example, a business could be subjected to fewer government inspections on condition that they take all or some of the following steps: adopt a code of conduct that includes certain promises defined by the state; publish the code; allow inspections by third-party monitors; report on all or some aspects

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<sup>60</sup> Estlund, *Regoverning*, *supra* note at 220.

<sup>61</sup> Ayres & Braithwaite, *supra* note 60-68.

of the monitors' findings; and share information with the state or with a private actor or agency endorsed by the state. Firms that declined to take those steps would be subjected to more frequent government inspections and fines. The central idea is that firms can be encouraged to regulate themselves if the alternative is a more restrictive, potential more costly, and more onerous oversight process.

Harry Arthurs comments favourably in *Fairness at Work* on a model that would work in this manner as a way to improve compliance with labour standards. He wrote:

...some employer organizations reported that their formal codes of conduct or membership policy statements already require compliance with all relevant laws; others said they were prepared to adopt similar documents. This is an approach to voluntary compliance that is well worth exploring. However, as Profs. Michael Trebilcock and Patrick Macklem note...codes of conduct and voluntary compliance strategies are most likely to succeed when the alternative confronting employers is real likelihood of serious legal repercussions.<sup>62</sup>

Arthurs stops short of proposing a direct link between effective monitoring of a voluntary code and escalating statutory penalties, but he does recommend that the government encourage firms to adopt codes expressing their commitment to compliance and to assist the firms in developing monitoring systems.

#### **B. *Variable Sanctioning Models***

A related option is to provide for reduced penalties for statutory infringements when firms have taken certain precautionary procedural steps. Estlund describes this approach as “looking inside the black box”.<sup>63</sup> The idea is to give firms credit, in terms of lesser penalties, if they have introduced internal management checks and balances designed to reduce the possibility of a wrong occurring, and yet the wrong nevertheless

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<sup>62</sup> *Fairness at Work*, *supra* note at 198.

<sup>63</sup> Estlund, *supra* note .

occurs.<sup>64</sup> Although the wrong is the same in each case, the justification for punishing the former firm less is that it is less blameworthy, since it at had made reasonable efforts to avoid the problem.<sup>65</sup> The expectation is that more firms will take the precautions in order to obtain the benefit of reduced penalties, and that if more firms take the precautions, there will be fewer of the wrongs occurring.

Ayres and Braithwaites' 'benign big gun' concept shares a similar philosophy. They argue that firms can be induced to take useful steps to curb undesirable conduct by the looming presence of a heavy hammer laying in wait for persistent underperformers.<sup>66</sup> Indeed, the possibility of government inspection and of severe sanctions for chronic violators of legal standards is a necessary component of decentred regulatory strategies.<sup>67</sup> It is this possibility that distinguishes decentred regulation from corporate self-regulation, and it is also one of the tools (along with access to more preferential enforcement schemes) that is intended to persuade firms that taking the precautionary steps desired by the state is in their own economic interests.

### **C. *Harnessing Private Actors***

Private actors play an important role in the decentred approach to regulation. They are often extremely knowledgeable about the forces that influence particular aspects of behaviour. For example, to use a labour and employment law example, there are a

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<sup>64</sup> See Estlund, *ibid.* at 133-135, noting that a decentred approach to regulation would consider not only the outcomes of firm behaviour, but would also consider as relevant to the assessment of damages steps taken *within the firm* to reduce the likelihood of wrongs occurring.

<sup>65</sup> Lobel, *supra* note at 341-342, explains how the U.S. Supreme Court has recognized defenses to workplace discrimination cases where the employer had adopted anti-discrimination or harassment policies. The cases were: *Kolstad v. American Dental Ass.* 527 U.S. 526 (1999), and *Burlington Industries*, 524 U.S. 742 (1998). For a criticism of this approach, see: S. Bisom-Rapp, "An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law", (2001) 22 *Berk. J. Employ. & Labor L.* 1

<sup>66</sup> Ayres & Braithwaite, *supra* note .

<sup>67</sup> See also discussion in Lobel, *supra* note at 371-372.

number of private stakeholders or actors that can have intimate knowledge of the reasons for low compliance with employment-related laws. These include workers and employers, but also unions, employee advocacy organizations and legal clinics, ethnic-based advocacy groups, faith-based organizations with interests in employment practices within their communities, and even academics. A decentred orientation encourages governments to tap into the wealth of knowledge and experience within these groups in their efforts to improve labour practices.

There are various ways that law might be used to do that. For example, if the objective is to encourage workers to speak up about workplace problems they encounter, there are a number of possible regulatory responses. One might be better whistle-blower and reprisal protection that protect worker who raise concerns about legal violations by their employer.<sup>68</sup> Alternatively, a legal model that facilitates employee class actions for non-compliance with legal standards would enable more employees to come forward, create a potential role for employee advocates, and create a risk to companies that might encourage them to pay closer attention to their employment practices.<sup>69</sup> Subsidies or tax incentives could be used to support organizations that the state believes are providing a useful contribution to the challenge of influencing firm behaviour.<sup>70</sup> Or access to a preferred regulatory stream or to lesser sanctions may be made contingent upon a firm

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<sup>68</sup> Estlund, *supra* note ... ; H. Collins, *Regulating Contracts*. ....

<sup>69</sup> See Estlund, *supra* note .. at , noting the growth in employee class action lawsuits for violation of employment regulation in the U.S. ; add others .. In Canada, there has also been a recent flurry of employee class action suites mostly claiming unpaid statutory overtime pay. The courts have been cautious in certifying these claims under the class action criteria, although in one recent case, an Ontario court did certify the action against the Bank of Nova Scotia (add cite). Reform of class action criteria that more easily identified aggrieved employees as an appropriate class would create a strong incentive for large employers to pay close attention to their employment practices....

<sup>70</sup> For example, Professor Arthurs recommended in *Fairness at Work*, *supra* note at 199, that the Federal government consider “providing funding to clinics that advise and represent workers in connection with their employment rights”. The rationale given was this (*ibid.*): “Clearly, if advocacy and advice-giving organizations were better funded, workers would be better informed [about their legislative entitlements] and their rights under the statute would be better protected.”

entering into an arrangement of some sort with one of the government's preferred private organizations. Estlund argues, for example, that only unionized firms, or nonunion firms that agree to independent monitoring and reporting should be entitled to the more favorable employment law stream.<sup>71</sup>

#### **D. *Information Production and Dissemination***

Information disclosure regulation is another common tool in the decentred regulation arsenal.<sup>72</sup> Most often, disclosure regulation is justified as market-correcting; it 'corrects' information asymmetries that impede the efficient clearing of markets.<sup>73</sup> However, there is also a long history of using information regulation to influence firm behaviour in such areas environmental and human rights practices.<sup>74</sup> Information disclosure regulation has a history as a workplace law tool as well, although labour and employment law scholars have largely ignored it in recent decades.<sup>75</sup> Decentred regulatory theory redirects our attention to the potential usefulness of informational regulatory strategies.

The first anticipated benefit of a requirement to produce information is that it will lead to better informed actors. For example, it will cause the actor responsible for disclosure to gather information that they might otherwise have ignored. In other words, it facilitates 'self-learning' or self-referential fact-finding; a firm that does not know it is

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<sup>71</sup> Estlund, *supra* note at \_\_\_.

<sup>72</sup> See discussion in Doorey, *Who Made That*, at p. 374; Lobel, *supra* note at 374-376; D. Hess, ... ; Orts. .... ; Daley, "The Use and Misuse of Information Disclosure Regulation"...

<sup>73</sup> Add sources ...

<sup>74</sup> Add some notes on environmental disclosure, and reference, e.g., the Home Mortgage Disclosure Act and pay equity reporting re human rights

<sup>75</sup> See discussion in Part IV about the historical use of disclosure regulation in industrial conflict law. The potential contribution of disclosure regulation to workplace law has been discussed recently by C. Estlund, "Just the Facts: The Case for Workplace Transparency"; Doorey, *Who Made That*, .. ; Doorey, *Transnational Domestic Labour Law*, *supra* note at D. Hess, ... for Workplace Transparency" ...;"...

engaging in harmful behaviour is unlikely to take steps to alter that behaviour. In addition, disclosure regulation can clarify the expectations of contracting parties, which can reduce the possibility of the more powerful contracting party taking advantage of the weaker party.<sup>76</sup> In the employment context, for example, many employees are not aware of either the terms of the employment or their entitlements under the common law or statutory law, which can have the effect of making those contracts and their legal entitlements illusory.

Secondly, information disclosure regulation may facilitate ‘self-reflection’, particularly when the information to be disclosed may cause embarrassment, harm to reputation, loss of market share, or legal sanction. If disclosing information about some aspect of firm performance could potentially influence sales or increase public appetite for more formal government oversight, then it might encourage corporate leaders to take a more personal interest in the firm’s performance, and perhaps to introduce more effective systems to ensure that the firm’s performance improves relative to other similarly situated firms.<sup>77</sup>

Thirdly, information disclosure can empower private actors in their engagements with the disclosing firms in ways that could lead to changes in firm behaviour consistent

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<sup>76</sup> See, for example, *Fairness at Work*, *supra* note at 79, for the comments of Commissioner Harry Arthurs, explaining his proposal to introduce a legislated requirement for employers to provide the employee with a written summary of their terms and conditions of employment at the point of hiring:

Clear understandings will reduce the likelihood of disputes between the parties by focussing their minds on the content of their bargain — the things they need to know to carry on their relationship on a daily basis, such as wages, benefits, duties and hours of work. Clear understandings also increases the likelihood of compliance with public policies enshrined in Part III and other statutes by reminding employers of their obligation to obey the law, and by alerting employees to the possibility of taking remedial action if the law is violated. And if disputes should arise, or if violations of Part III should occur, clear understandings will facilitate legal recourse for the injured party and perhaps make the job of the defendant easier.

<sup>77</sup> See discussion in Doorey, *ibid.*; G. Coombe, “Multinational Codes of Conduct and Corporate Accountability: New . (see note 83, who made that)

with public goals. By providing information about firm behaviour to private watchdogs, disclosure regulation can alter the relative balance of power between the firms and the watchdogs and thereby alter the dynamic of the negotiations. It may also uncover harmful practices that have been hidden from scrutiny. Whether this happens, and whether if it does, it leads to the sorts of changes the government wants, will depend on a variety of factors that may be difficult to measure.

#### **IV. Decentring Labour Law**

We have seen that a decentred orientation envisages the state using its legitimate political force to shape, steer, and promote self-regulation that is consistent with public policy goals. This might be done by rewarding private schemes that are consistent with, or that show evidence of producing outcomes that are consistent with, the state's own policy objectives. Alternatively, it might mean sanctioning those schemes that are inconsistent with government objectives. And because it recognizes the potential for firm practices to be influenced by forces other than the threat of state sanctions, decentred regulatory theory also encourages an exploration of environmental factors that, in practice, already shape firm behaviour, or have the potential to do so. Once those forces are identified, the state can consider how they might be harnessed to help achieve the governments objectives.

##### **A. The Decentred Nature of the Wagner Model**

Much of this probably rings familiar to labour lawyers. Labour law, perhaps more than any other field of governance, has a long history of employing "indirect" forms of regulation to influence labour practices. In fact, we can find elements of so-called "new" governance strategies dating back over a century. For example, in late 19<sup>th</sup>

century Britain<sup>78</sup> and America<sup>79</sup>, legislators urged the use of regulation to harness “public opinion” towards influencing unions and employers to behave responsibly in collective bargaining, and to limit the number and duration of industrial conflict.

Probably the most obvious demonstration of this confidence in the power of harnessing private forces to influence industrial relations is seen in early 20<sup>th</sup> century Canadian legislation prepared under the guidance of Mackenzie King, who argued in 1918 that “industrial wrings” fall into “a class of evils which publicity is more effective to remove than penalty.”<sup>80</sup> Key labour legislation introduced in the first decade of the 20<sup>th</sup> century required mandatory government conciliation and a “cooling off” period prior to a strike, and granted the Minister of Labour the power to distribute copies of the

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<sup>78</sup> D. Brodie, *A History of British Labour Law, 1867-1945* (Oxford, Hart Publishing, 2003) at 46: “many people...seemed to have viewed public opinion as a neutral force, but at the same time, as a potent weapon that could be deployed to help resolve [industrial] disputes”. See also H. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (U. Toronto Press, 1985) at 106-07, 112-113, noting that in mid 19<sup>th</sup> century Britain, labour inspectors relied on “accurate reporting and effective publicity” about workplace practices to encourage compliance with legal rules through the “pressure of public opinion rather than the threat of legal sanctions.”

<sup>79</sup> For example, legislation governing the railway industry in Massachusetts in 1869, drafted by Charles Francis Adams, required railway companies to disclose information to a Board of Commissioners “at all times, on demand”. Adams explained that the Board had “no power except to recommend and report”, and that the idea behind the legislation was to create a means by which “the otherwise scattered rays of public opinion could be concentrated to focus and brought to bear upon a given point. The legislation, and the philosophy behind it, are discussed in: T. McGraw, *Prophets of Regulation* (Cambridge, Harv. U. Press, 1984) at 18-56.

<sup>80</sup> W.L.M. King, *Industry and Humanity* (Toronto, U. Toronto Press, 1913) at 328. The full quotation is this:

If I have sought to promote legislation which would make investigations available in many directions, it is because I have faith in the power of Public Opinion to remove any injustice and to redress any wrong. There is a class of evils which publicity is more effective to remove than penalty. Most industrial wrongs belong to that class.

Much has been written about King’s belief in the power of public opinion (see, e.g., P. Craven, *An Impartial Umpire: Industrial Relations and the Canadian State, 1900-1911* (Toronto, U. Toronto Press, 1980) at 293; B. Selekmán, *Postponing Strikes: A Study of the Industrial Disputes Investigation Act of Canada* (New York: Russell Sage, 1927) at 122; H.D. Woods, *Labour Policy in Canada* (Toronto, MacMillan of Canada, 1973) at 164), and the reasons why this policy in fact was not successful (J. Fudge & E. Tucker, *Labour Before the Law* (...) at 56-57; Craven, *ibid.* at 299; Selekmán, *ibid.* at 16).

conciliator's report to the public and the media "in such manner as to him seems most desirable as a means of securing compliance with the [conciliation board's] recommendation."<sup>81</sup>

There are many other examples of regulatory devices that have shared characteristics of what we today describe as decentred in orientation. For example, the 1959 *Labor-Management Reporting and Disclosure Act* required employers and management consultants to report the amount of money spent on efforts to influence employees' choice about whether to support unionization.<sup>82</sup> Mandatory health and safety and pay equity committees have sought to harness employee participation and involvement in policy design and regulatory enforcement.<sup>83</sup>

But more importantly for our purposes, the *Wagner Act* model of collective bargaining law itself exhibits many elements of a decentred orientation. It is 'procedural' regulation: it establishes mechanisms to enable workers to join together for the purposes of bargaining with the employer as a single collective in order to address an inherent imbalance of bargaining power between employer and employee. In other words, it seeks to influence conditions of employment not by imposing contract terms and working conditions (as does "substantive" employment regulation), but by influencing the context in which employment contract terms are bargained privately, by the actors themselves. It seeks to alter power relations by creating legal obligations on the more powerful actor

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<sup>81</sup> The legislation was the 1903 *Railway Labour Disputes Act Act* and the 1907 *Industrial Trades Dispute Resolution Act*.

<sup>82</sup> See discussion in J. Beaird, "Employer and Consultant Reporting Under the LRMRA" (1986), 20 *Georg. L. Rev.* 533 at 539. Beaird notes that Congress "wanted to avoid governmental regulation and instead provide employees with sufficient information so they could initiate corrective actions through self-help measures".

<sup>83</sup> See *Responsive Regulation*, *supra* note for a discussion of health and safety regulation.

(employers) to recognize the employees as a collective, to bargain collectively, to provide information to the employees and their bargaining representatives, and by conferring a legally sanctioned right of workers to push their point by collectively withholding their labour.

In light of this history of demonstrative support for the notion of using regulation to influence the private development of workplace norms and rules, it is hardly surprising that many labour law scholars have noted a feeling a *deja vu* when encountering contemporary decentred regulation writings. For example, Jill Murray noted in a 2001 paper that the “long history of regulatory innovation in labour relations...has for over 100 years exhibited at least some of the characteristics of the recently proclaimed ‘new’ techniques of regulation.”<sup>84</sup> Coutu makes a similar point:

...labour law continues to have some features of what Gunther Teubner has called reflexive law—that is, a form of interaction between state and private ordering in which private parties are expected to reflect on their own conduct and to regulate it in a way that is consistent with the social objectives of the particular areas of law.<sup>85</sup>

Arthurs has reminded us recently that the central goal of labour law has always been to ‘regulate and reform the indigenous production and enforcement of norms within the

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<sup>84</sup> J. Murray, “The Sound of One Hand Clapping? The Ratcheting Labour Standards Proposal and International Labour Law” (2001), 14 Aust. J. Lab. L. 306 at 308. See also: W. Gould, “The Third Way: Labor Policy Beyond the New Deal” (2000), 48 U. Kan. L. Rev. 751 at 752 (describing the “genius of the Wagner Act” as being its fundamental presumption that responsibility for the social contract should be placed, “in the hands of the parties themselves to be resolved through collective bargaining”); Estlund, *supra* note at ; Lobel, *supra* note at 369; C. Estlund, “The Ossification of American Labor Law” (2002), 102 Colum. L. Rev. 1527 at 1527-29: “collective bargaining law would seem to represent a promising ‘third way’ between the harsh regimen of individual contract and the much-maligned paradigm of centralized ‘command and control’”; R. Stewart, “Recostitutive Law” (1986), 46 Md. L. Rev. 86 at 94.

<sup>85</sup> M. Coutu, “Legal Pluralism, Labour Law, and the Sovereign State” (2007), 13 C.L.E.L.J. 169 at 173

workplace.”<sup>86</sup> Even Teubner cited collective bargaining law as a quintessential example of reflexive law in his early work developing the theory of reflexive law.<sup>87</sup>

## **B. The Changing Policy Objectives of the Wagner Model**

However, while the Wagner model exhibits many features associated with a decentred orientation, it is certainly not a function of continuous regulatory innovation and policy learning that is one of the hallmarks of the decentred approach. As many labor law scholars have recognized in both Canada and the U.S., the model was designed to influence working conditions in a different era characterized by large industrial workplaces with a full-time, relatively homogeneous workforce.<sup>88</sup> For example, Stone has argued that, “because the labor and employment laws were tailored to the job structures of the industrial era of the 20<sup>th</sup> century, they have become obsolete.”<sup>89</sup> That the structures of work would change over time is predictable, and yet neither country has engaged in a project of substantial labor law reform since the 1940s, despite major transformations in the institution of employment.

Therefore, while the Wagner model contains elements of what we recognize today as decentred regulation, it is nevertheless a model that has failed to adapt to fundamental changes in the institution that it was designed to influence. But that is only part of the story. Another part deals with the question of why labor law has been so slow to evolve. The answer is obviously not that governments failed to notice the structural changes in the labour markets, or the increased hostility of employers towards their employees’

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<sup>86</sup> Arthurs, *supra* note at

<sup>87</sup> *Reflexive Elements*, *supra* note at 276.

<sup>88</sup> See Estlund, *Ossification*, *supra* note ; Lobel, *supra* note at 288; Stone, *supra* note at 2-5; Doorey, *Neutrality Agreements*, .. J. Fudge .....

<sup>89</sup> *Ibid.* at 14. See also: Rittich, *supra* note at 573.

attempts to unionize<sup>90</sup>, or the falling rates of collective bargaining coverage. Rather, lawmakers on both sides of the border have elected not to reform labour laws *despite* their knowledge of these facts.

That tells us something. It goes to the question of whether the Wagner model should be characterized—as it often is—as *ineffective* regulation? When we describe regulation as ineffective, we are assigning to the regulation a particular normative agenda, a policy objective, and then making the claim that the regulation has failed to achieve its assigned agenda. But what is the policy objective of the Wagner model today? If the objective of the Wagner model is to guide workers towards unions and embed collective bargaining as the dominant means of workplace governance, then clearly the model has failed to achieve that outcome. The very low levels of unionization in the U.S. is all the evidence that is needed to make that point. It is on this basis that the Wagner model is often derided as a failure, or at least as a relic of bygone era.<sup>91</sup>

However, even if we were prepared to accept that encouraging unionization and collective bargaining as the dominant model of workplace governance was the objective of the Wagner model at some point in history, that has long since ceased to be the case. If the governments of the U.S. and Canada actually wanted collective bargaining to be the dominant form of workplace ordering, there are lots of regulatory reforms that have been proposed that could encourage that result.

For example, the state could reverse the general presumption in the existing law that assumes workers do not want a union until a majority of them vote for representation. Instead, the law could assume a union represents the workers, until a

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<sup>90</sup> This was described in the seminal work by T. Kochan, H. Katz, M. McKersie, *The Transformation of American Industrial Relations* .....

<sup>91</sup> Rittich, *supra* note at 573.

clear majority of workers elect to ‘decertify’.<sup>92</sup> Or governments could legalize minority unions and require employers to bargain with them instead of the Wagner model approach, which gives legal status only to majority unions.<sup>93</sup> Governments could also make greater use of industry-wide collective agreements or decree systems that extend collective agreement coverage to all employees in an industry, regardless of whether the individual workers are union members. Less dramatic changes that could encourage the spread of collective bargaining include returning to the “card-check” method of establishing majority support<sup>94</sup>, legislating greater union access to employees during organizing campaigns<sup>95</sup>, allowing multiple bargaining units of the same employer to be combined at the instigation of unions<sup>96</sup>, restricting employer speech rights during campaigns<sup>97</sup>, recognizing a broader right to strike<sup>98</sup>, or instituting harsher penalties for employers who commit unfair labour practices during unionization campaigns<sup>99</sup>. All of these reforms and more have been proposed before, but mostly ignored by governments.

The point is that the lack of substantial labour law reform in Canada and the U.S. over the past 70 years is not due to a paucity of ideas about how to revitalize collective bargaining, but to a lack of political will to go in that direction. Whereas in the mid 20<sup>th</sup> century, governments in Canada and the U.S. may have believed that collective bargaining was the best way forward for the economy and society, that has clearly not

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<sup>92</sup> This was a proposal put forward by labour law professors Eric Tucker and Harry Glasbeek during government consultations on labour law reform in Ontario in the early 1990s.

<sup>93</sup> Roy Adams has argued for this development ....

<sup>94</sup> Numerous studies have tracked increased unionization rates under card-check as opposed to mandatory ballot models. See, e.g. C. Riddell .....

<sup>95</sup> D. Doorey, “Union Access Through the Lens of B.C. Health Services” ...

<sup>96</sup> This was actually the law in Ontario for a brief moment in the 1990s ....

<sup>97</sup> Add references on Er speech

<sup>98</sup> L. Panitch & D. Swartz, .....

<sup>99</sup> Add references on the need for stiffer ULP penalties

been the prevailing view since the 1980s (with the occasional exception in Canada<sup>100</sup>). There occurred a transformative change in how governments perceive the role of workplace law. For the past thirty years, it has been clear (most of the time) that lawmakers do not prefer collective bargaining to individual bargaining. In fact, the opposite is true. Collective bargaining is perceived as a less flexible, more confrontational, and more costly alternative to the preferred model of individual employment contracts and the common law rules that govern them, propped up by a set of government-imposed default terms in the form of minimum employment standards.<sup>101</sup>

### **C. A New Perspective on the Decentred Nature of the Wagner Model**

The basic elements of the Wagner model have remained in place, of course, but the legislation assumed a different purpose than originally intended. The objective of the Wagner model today is not to encourage collective bargaining, but to act as a deterrent, as a threat to discourage employers from abusing their considerable market-based power over workers. Put another way, *the possibility of state-supported unionization is today intended to encourage employers to exercise their power and authority responsibly within a market-based system of ordering*. The ‘majoritism principal’—that access to collective bargaining is contingent on a majority of workers expressing their desire to be represented by a union—has become a legislative proxy of sorts to signal when an employer’s treatment of workers has fallen below what an average, reasonable employee would expect in the circumstances.<sup>102</sup> When that occurs, the state is justified in

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<sup>100</sup> Occasionally, the provincial New Democratic Party has won election and advanced pro-labour legal reforms, only to then lose power and see those reforms repealed. This has happened in Ontario, Saskatchewan, Manitoba, and British Columbia in the past twenty years.

<sup>101</sup> See Rittich, *supra* note at 575-577; ....

<sup>102</sup> This idea is captured in the following speech by a representative of the Ontario New Democratic Party (Randy Hope, M.P.P.) during debates over labour law reform in 1992:

supporting a model of employee representation that introduces restrictions on employer prerogative through the mechanism of third-party employee representation.

Perceived in this manner, the threat of unions and collective bargaining is intended to act as a form of deterrent to abusive or unfair management practices. It is one of the government's "sticks" to encourage employers to exercise their considerable market-based power over workers in a responsible manner by obeying government (employment regulation) and court (common law) rules, and by giving workers a reasonable share of the economic benefits of their labour, considering market conditions. Governments assume at first instance that: unions are unnecessary; that employees do not naturally gravitate towards unionization, but will look favourably at union representation if provoked by an abusive employer; and that employers should be given an opportunity to demonstrate their good faith to employees and to show them that 'third-party' representation is not necessary.

This perception is very evident in the public discourse about labour law reform in both countries since the 1980s. I will give one of many Canadian examples, from my home province of Ontario, which underwent a series of labour law reforms during the 1990s.<sup>103</sup> In the following very typical exchange during consultations leading to labour friendly reforms in 1992, the soon-to-become Minister of Labour—who was then an opposition party member in the Conservative Party—emphasized to the Director of the Ontario region of the United Steelworkers of American (Hynd) that if employers treat

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One of the things we always have to remember is that the people will not organize a workplace unless they've been mistreated. When they've been mistreated by an employer, that's the time they will seek representation on a collective right. Remember that it's not only one individual at the workplace who has been mistreated, but over 50% of the population employed there has been mistreated and wants fair representation, and that's why they want collective representation.

<sup>103</sup> For a discussion of these reforms generally, see B. Burkett, "The Politicization of Labour Law in Ontario"....

their employees well, the employees will not want a union, and that lawmakers “need to be careful”. Mr. Hynd agrees that workers who are treated well will be very difficult to organize:

**Mrs Witmer:** I received a letter from the employees of the hardware store...indicating that they do feel very much a part of the workplace and are able to communicate with their employer. They are not looking for union involvement. I think we have to be careful, because I think there are many employers in this province who do have a very good workplace environment where there is communication that takes place. We need to make sure that we allow all workers to make that decision very freely.

**Mr Hynd:** I didn't suggest anywhere in my brief that workers wouldn't make that decision. The workers in that hardware store would make a decision whether or not to belong to a union. If they're quite satisfied with their employment relationship and they do have a good relationship with that employer, they probably won't want to belong to a union.

**Mrs Witmer:** No, that's certainly what they indicated....

**Mr Hynd:** For those employers who are considered good employers by their employees, I doubt that union is going to be successful in organizing.

**Mrs Witmer:** I think we need to be careful and understand that there are employers today who do have a very strong organization and are very supportive of their employees.<sup>104</sup>

When three years later Witmer was Minister of Labour in the Conservative government, she introduced legislation that ushered in mandatory certification ballots for the first time ever in Ontario, replacing the card-check model, and that, among other reforms, repealed the legislative ban on replacement workers and “de-consolidated” bargaining units in the retail sector so that retail employers would be able to bargain with unions on a store by store basis.<sup>105</sup> In her introductory remarks, she explained the rationale for the legislation as follows:

This legislation is designed to revitalize Ontario’s economy, create new jobs and enhance and promote individual rights in the workplace. These changes are absolutely necessary if Ontario is to attract new business.<sup>106</sup>

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<sup>104</sup> Hansard Reports, 12 August 1992, available on-line at: URL: [http://www.ontla.on.ca/web/committee-proceedings/committee\\_transcripts\\_details.do?locale=en&Date=1992-08-13&ParlCommID=499&BillID=&Business=Bill+40%2C+Labour+Relations+and+Employment+Statute+Law+Amendment+Act%2C+1992&DocumentID=17905](http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&Date=1992-08-13&ParlCommID=499&BillID=&Business=Bill+40%2C+Labour+Relations+and+Employment+Statute+Law+Amendment+Act%2C+1992&DocumentID=17905)

<sup>105</sup> Bill 7, *Labour Relations and Employment Statute Amendment Act, 1995*. See discussion in: ...

<sup>106</sup> Hansard Reports, 31 October 1995, [2040], available on-line at: [http://www.ontla.on.ca/web/house-proceedings/house\\_detail.do?Date=1995-10-31&Parl=36&Sess=1&locale=en](http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=1995-10-31&Parl=36&Sess=1&locale=en)

These sentiments—that unions and collective bargaining impede investment and destroy jobs and that an individual employment law model is preferable—were expressed repeatedly in defense of labour law reforms across Canada over the past twenty years.

The basic model of labour law was retained; workers could still join unions and the state would still require employers to bargain with certified majority unions. However, the state deliberately set out to make it more difficult for workers to access those rights. The unionization option was no longer perceived as desirable in of itself, but as a necessary evil to deal with the relatively few employers who fail to properly govern themselves in accordance with the prevailing values of decent employment practices. The threat of unionization is believed to deter ‘bad’ employers from abusing their position of power over workers, and to encourage ‘good’ employers to continue on that path. In this way, the government hopes that most employers will seek to remain under the more favourable, less confrontational stream offered by the common law model of individual employment contracts.

In theory, this could steer employers towards workplace practices that discourage the ‘demand for unionization’, such as progressive human resources policies that remove the incentive for workers to turn to collective bargaining.<sup>107</sup> This understanding of modern collective labour law is captured in common human resource management

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<sup>107</sup> A common theme in human resources literature and scholarship is that employers can “avoid unionization” by removing the demand for unionization. For example, one leading Canadian human resources textbook advises that: “The best work environment, and the least receptive to unionization, is one that treats the individual with respect, dignity, and fairness, while encouraging participation in decision making”: M. Belcourt, G. Bohlander, & S. Snell, *Managing Human Resources* (6<sup>th</sup> Ed.) (Nelson Education, 2010) at 558. There is a huge literature on “union avoidance” strategies that dates mostly from the 1980’s of which the following are a small sample: Kochan, Katz, & McKersie, *supra* note ; J. Lawler & R. West, “Impact of Union-Avoidance Strategy in Representation Elections”, (2008) 24 Ind. Rel. 406;

[add sources]

expressions, such as, “unions are a response to the failure of management”, “unions are not inevitable”<sup>108</sup>, and “you get the union you deserve”. These sentiments have evolved from human resource management talking points to become a driving ideological force behind the Wagner model in the U.S. and Canada over the past two decades.

Once we perceive the purpose of labour law from this alternative perspective, it is no longer obvious that the Wagner model has ‘failed’. Low rates of unionization may simply reflect low demand for unionization due to the prevalence of so many employers that are, by their nature, ‘good’ employers, or to the fact that the mere threat of unionization is *steering* otherwise ‘bad’ employers to take at least those minimal steps necessary to keep their employees from seeking the help of a union. Indeed, on this account, the Wagner model could be perceived as a successful piece of regulatory engineering.

Of course, few people actually describe the Wagner model in such favorable terms. There are, and have always been, strong voices in both countries that argue against the state’s support for collective bargaining and unionization in any situation, because unions are inefficient or coercive.<sup>109</sup> Others decry the passive nature of the state’s support for collective bargaining. For example, those supportive of the “labour rights as human rights” movement assert that governments have an obligation to actively

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<sup>108</sup> See L. Field, *Unions are Not Inevitable: A Guide to Positive Employee Relations* (Waterloo: Brock Learning Resources, 4<sup>th</sup> Ed.). The author’s website explains the philosophy of his “best-selling” book first published in 1975 in these terms: “...it should be noted that neither Lloyd nor his book are anti-union. The position taken is that if employers build their employee relations practices on dignity, trust, respect, and integrity, employees will see little, if any, need for a union.” Available at: <<http://www.lloydfield.com/author.php#unions>>

<sup>109</sup> See, e.g., R. Epstein, “The Case Against the Employee Free Choice Act” ... ; S. Friedman & C. Weller, “One More Time: Labor Market Flexibility, Aggregate Demand, and Comparative Employment Growth in the U.S. and Europe”, (1998) 19 *Comp. Lab. L. & Pol’y. J.* 307; ....

encourage collective bargaining as a preferred model of economic ordering.<sup>110</sup> This is very different from the approach I have just described, which perceives collective bargaining as a form of sanction against ‘bad’ employers, or a means by which employees unfortunate enough to work for bad employers can respond through voice mechanisms, rather than by the exit option.<sup>111</sup>

Still others point to the decline in real wages in the U.S. and Canada over the past twenty years as evidence that the entire package of labour and employment laws are conferring more and more of the nation’s economic wealth in the hands of a shrinking number of people.<sup>112</sup> When that observation is combined with studies indicating that there is a high unfulfilled demand for union representation<sup>113</sup>, there is a reasonable argument that falling unionization levels do not indicate employee satisfaction with their non-union status and the system of workplace rules that govern them at all. Instead, it might demonstrate that workers feel that the model is so heavily skewed in employers’ interests that resistance is futile, or it might demonstrate the difficulty workers experience in making the transition from the non-union model to the collective bargaining model under the existing rules that governing unionization.<sup>114</sup>

Note that these three critiques challenge the existing labour and employment law regime in different ways. The first two assert that the government’s *policy objective* is

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<sup>110</sup> R. Adams, *Labour Left Out ..* ; J. Gross, *Workers’ Rights as Human Rights ...*

<sup>111</sup> This fundamental disagreement about the basic objective of labour law explains why Canadian and American governments so frequently run afoul of ILO core principles on freedom of association. Add sources, including B. Burkett & J. Craig, “Canada and the ILO ....” ; R. Adams, “Labour Left Out ....”; J. Gross, .....

<sup>112</sup> M. Lynk, “Labour Law and the New Inequality”; Rittich, *supra* note at 569-70; OECD ...

<sup>113</sup> Add sources

<sup>114</sup> Numerous studies suggest this is the case, including those that have concluded that the principal explanation for the difference in unionization rates in Canada and the U.S. since the 1980’s is the “more favourable” regulatory model in Canada that made it easier for workers to join unions. See, e.g., C. Riddell, “Unionization in Canada and the United States: A Tale of Two Countries” in D. Card & R. Freeman, *Small Differences That Matter: Labor Markets and Income Maintenance in Canada and the United States* (NBER, 1993), pp. 109-148.

flawed: the first argues that employment policy should never include state encouragement of collective bargaining, whereas the second asserts that the state should more actively promote collective bargaining. The latter critique, on the other hand, does not directly challenge the policy of using collective bargaining as a deterrent to encourage employers to treat employees fairly and reasonably within a non-union model. Rather, it argues that the existing legal framework is in fact not successfully achieving the objective. Since many employers are in fact not complying with employment standards and income inequality is growing, and yet workers seem unable to join unions in response under the existing labour laws, the model is failing on all accounts: it is not ensuring compliance with reasonable legal standards; it is not making it easy for employees to respond to abusive treatment by unionizing; and, therefore, it is not acting as an effective deterrent to bad employer behaviour, or as an effective incentive for employers to opt for the more favourable non-union regulatory path.

## **V. The Pursuit of a Decentred Labour Law Reform Agenda**

The preceding discussion demonstrates the following point. Debates about labour law reform often merge discussions about what the policy objective of labour law *should be*, with discussions about how to reform existing laws to better achieve the stated objectives. So, for example, many commentators assert or just assume that the challenge for labour law is to expand the reach of collective bargaining. As I noted above, if that is the objective, then I do not think there is any great mystery about what sorts of legal reforms might advance that objective. The difficulty for advocates of collective bargaining is not dreaming up ways to reform labour law, but to persuade lawmakers that

they should actively encourage unionization. This has proven to be a formidable task over the past three decades in both countries, and decentred regulatory theory does not offer any great answer to that challenge. A government that objects to unions and collective bargaining will not suddenly change their colours once they drink the holy water of the decentred approach to regulating.

Yet that does not mean that decentred regulatory theory has nothing to contribute to the discussion about the future of workplace law. There will always be debates about the value and contribution of unions and collective bargaining to societies and economies, and for advocates of collective bargaining, it is important to continue to make the case for collective representation. There may indeed be moments in the future when popular and political opinion swings back towards collective bargaining again. Indeed, maybe the election of President Obama, with his stated support for collective bargaining is a sign that the pendulum is beginning to shift already (although the hostile resistance by industry and within the Senate suggests the pendulum is swinging very slowly indeed).

In the meantime, however, are there any lessons in the decentred regulation literature for more immediate reforms? In the remainder of this paper, I will consider that question with reference to two case studies. The first involves an attempt by governments in Australia to improve compliance with labour standards by employers of homeworkers within the apparel, textile, and footwear industries. The second will consider some possibilities for reforming Canadian labour law that are decentred in philosophy. I will assume for the purpose of that discussion that the objective of the current labour law model is to encourage fair and reasonable treatment of workers by

employers within the non-union model that the state prefers. In other words, if unions and collective bargaining are today intended to serve as the *less desirable regulatory* stream in order to encourage employers to comply with government standards and treat employees fairly and responsibly, then how might law be used more effectively to achieve that result?

#### **A. The Australian Outworkers' Regime**

In the 1990s, research disclosed that there was widespread non-compliance with mandatory industry-wide arbitration awards in the apparel, textile, and footwear industries in Australia. Of particular concern was the treatment of the many home workers, or “outworkers”, who toiled at the bottom of the supply chains producing goods from their homes for retailers and major brands.<sup>115</sup> The government realized that these workers were often hidden from both government inspectors and union representatives. Many of the workers were not even clear who their employer was, since they were engaged under non-transparent arrangements characterized by multiple entities and individuals sub-contracting through various levels of the supply chains. The traditional government inspection systems were failing these workers.

The government of New South Wales was the first to respond in 2001, although other provinces soon followed with similar legislation. The legislative response includes a number of innovative regulatory tools that are decentred in

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<sup>115</sup> The initial legislation comes from New South Wales, the *Industrial Relations (Ethical Clothing Trades) Act 2001* and the Ethical Clothing Trades Extended Responsibility Scheme (Scheme) made under authority of Part 3 of that legislation. The Scheme is available on-line at: < <http://www.industrialrelations.nsw.gov.au/resources/ethical+clothing+trades.pdf>>. See discussions in M. Rawling, “Generic Model of Regulating Supply Chain Outsourcing” in C. Arup *et al* (eds.), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Market and Work Relationships* (Sydney, Federation Press, 2006), 520; Nossar, *Contract Networks*, *ibid*.

nature.<sup>116</sup> The first thing to note is that the model was designed in large measure by an employee of the national garment workers union, the Textile, Clothing, and Footwear Union of Australia (TCFUA), who had given considerable thought to the challenges of how to enforce the labour laws in the case of these complex supply chains.<sup>117</sup> The state recognized the limitations of its existing model, and was prepared to tap into the knowledge of industry experts when it began to consider new regulatory approaches.

The regulation targetted a number of the common obstacles faced by traditional command-and-control style employment legislation when applied to non-standard work arrangements. For example, the legislation addresses the problem of employers treating workers as independent contractors by deeming all outworkers to be “employees”, thus avoiding the complexities and uncertainties of the common law tests of employment status. Then, in a creative turn, the legislation permits those employees to file claims for unpaid entitlements against any business entity within the supply chain that they believe to be their employer. The named entity (called the “apparent employer”) is then confronted with a reverse onus in which it must either prove that the employee was treated in accordance with required standards or that the employee did not do the work, or identify another employer (the “actual employer”) who is prepared to accept liability. If the other employer does not accept

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<sup>116</sup> *Industrial Relations (Ethical Clothing Trades) Act, 2001 (NSW) No. 128, (IRECTA).*

<sup>117</sup> The individual was Igor Nossar, who has written a number of article explaining the origins and details of the law. See discussion in I. Nossar, “The Scope of Appropriate Cross-Jurisdictional Regulation on International Contract Networks” (Speech made to ILO Workshop “*Better Health and Safety for Suppliers*” held in Toronto on Tuesday 17th April 2007), on file with author (“Contract Networks”). See also: I. Nossar, ‘Cross-Jurisdictional Regulation of Commercial Contracts for Work Beyond the Traditional Relationship’ in C. Arup, *et al* (eds.), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Market and Work Relationships* (Sydney, Federation Press,2006), 202; I. Nossar, R. Johnstone, & M. Quinlan, “Regulating Supply Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment” (2004), 17 Aust. J. Labour L. 137.

responsibility, then the “apparent employer” must compensate the worker for any amounts owing.<sup>118</sup>

This arrangement serves a number of useful purposes. Firstly, it avoids the difficulty employees have proving an employment relationship exists and who their employer is. Secondly, it attempts to provoke changes in the ways that companies manage labour issues within their supply chains. The state has injected risk into the supply chain apparatus by making it far more likely that the business entity at, or near the top, of the supply chain will be held responsible for illegal labour practices by its subcontractors. This device could provoke changes in the ways that those companies organize their affairs.

For example, the company placing the order (like Nike, for example), which can now be held liable for legal wrongdoing by one of its subcontractors, would be expected to pay closer attention to what is going on at its suppliers’ factories. Nike would presumably try to avoid contractors notorious for ignoring employment laws, and might also include expressed clauses in their supplier agreements that clarify which business entity will be responsible if it is named as an “apparent employer”. Contractors that value Nike’s business may in turn wish to avoid embarrassing Nike by violating employment laws, and risking the workers naming Nike as the apparent employer.

In other words, the legal model creates incentives for companies to pay closer attention to how employees are being treated down the supply chain, a process that might lead to substantive changes in practice that have direct impact on labour conditions, as noted by Michael Rawling:

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<sup>118</sup> Nossar, *ibid.* at 14.

By introducing the influence of public instrumental law in to the organizational life of businesses at or near the top of supply chains, the newly enacted provisions imposing principal contractor liabilities may ultimately have normative effects that reconfigure the supply chain structure. This kind of regulation may actually influence whether firms will decide to contract out work at all.<sup>119</sup>

By extending the scope of potential liability for violations of labour standards throughout the supply chain, the legislation may also provoke changes in how contracts are tendered and priced. For example, the legislation also requires that the terms of supplier contracts be provided to the union. This may focus greater attention on the ‘root causes’ of poor labour practices, such as very low profit margins due to the original tendering demands that make it almost impossible for those firms lower in the supply chain to produce the order profitability without cutting corners on labour costs. Those firms (like Nike) at the top of the food chain may be pressured by unions, activists, and even governments to pay contractors rates that permit reasonable profits when labour laws are complied with.

The legislation also imposes a duty on clothing retailers to disclose to the TCFUA on a quarterly basis the names and addresses of every contractor and subcontractor involved in production throughout the entire supply chain.<sup>120</sup> The task of collecting this information is aided by a requirement for the suppliers to inform retailers of every contractor used, including outworkers.<sup>121</sup> The regulation also requires sourcing companies to ensure that all subcontractors permit “access by the

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<sup>119</sup> Rawling, *supra* note at 18. See also, A. Greig, “The Struggle for Outwork in the Australian Clothing Industry” (2002), 49 *J. of Australian Pol. Econ.* 5 at 27.

<sup>120</sup> See the *Ethical Clothing Trades Extended Responsibility Scheme*, introduced pursuant to Section 12 of the *IRECTA*, *supra* note **Error! Bookmark not defined.**, clauses 11, 12(3), 12(4), and 20(8).

<sup>121</sup> See Scheme, *ibid.*, at Section 12.

relevant trade union to those sites, without any requirement for prior notification of inspections.”<sup>122</sup>

An obvious intent of the regulatory scheme is to shine a spotlight on supply chains in order to drag the workers out of the shadows. The state then harnesses the power of the major union to assist in the enforcement of the employment laws by ensuring that the union has all of the information needed to locate and communicate with the workers, including access to the workplace. Nossar, a leading expert on the scheme, explains how the law taps the union’s expertise to help improve overall compliance levels:

...these provisions together empower the trade union to exercise effective regulatory oversight over the entire clothing supply chain in relation to compliance with labour law minimum standards.... More specifically, these provisions together require all clothing retailers to proactively inform the relevant trade union about all parties with whom the retailers contract for the supply of clothing products. In addition, these provisions also empower the relevant trade union to have complete access to all details of the consequent contracts.<sup>123</sup>

This process not only increases the probability that violations will be identified, but also removes the incentive for ‘bad’ employers to try and structure their production arrangements by hiding their workplaces from union, government, and public view.

The Australian response to the problem of non-compliance with labour standards in the apparel, textile, and footwear industries includes many decentred elements. It employs a mix of disclosure requirements, deliberate empowerment of

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<sup>122</sup> Nossar, *Contract Networks*, supra note **Error! Bookmark not defined.** at 15. There is also a new disclosure requirement in the NSW workers’ compensation legislation that requires businesses to disclose the details, including names and addresses, of all of their contractors and subcontractors. Failure to do so results in the business being held liable for any premiums not paid by any of those contractors: *Workers Compensation Act (NSW)*, s. 175B

<sup>123</sup> *Ibid.* at 16.

private actors (here, a union), and creative legislative reforms that seek to influence the internal management of supply chains and the business sourcing model itself. No comprehensive study has been done yet to evaluate its success rate, so it is too early to evaluate the program as a whole. And it is worth noting too that the Australian labour law model is quite different from the Wagner model, in particular, its use of industry wide arbitration awards that give a broader representative mandate for the industry level unions. Nevertheless, the design of the model, and the philosophical approach that drives it, provides us with some helpful insights into possible reforms for North American labour law.

#### **B. A Decentred Approach to Reforming Canadian Labour Law**

I argued earlier that contemporary labour law in North America acts principally as an incentive for employers to treat employees responsibly within the common law model, as underpinned by some basic legislative employment standards. The state hopes to facilitate a reasonable distribution of wealth and encourage decent workplace practices within a non-union market model. The objective of labour law is not to encourage the spread of collective bargaining. The collective labour law model, and the regulatory machinery associated with it, is considered to be the less desirable regulatory route for employers. Lawmakers would prefer that employers seek to avoid the collective model by eliminating the “demand for unionization” through the use of progressive human resource policies.

Therefore, the “problem” with the Wagner model in both countries is not that unionization and collective bargaining coverage levels are falling. It is that they are falling at the same time that: income inequality is growing; average real income levels are

falling; gender and racial segregation as measured by employment rates and income levels remains high; rates of non-compliance with employment regulation, and incidence of “unfair labour practices” designed to thwart employee attempts to unionize, are both high. These issues create concerns about social, political, and economic stability, and raise real doubts about whether the current regulatory mix is actually achieving its objective of creating a fair distribution of wealth and decent workplaces.

Is there another route that might better achieve the states’ objectives? I begin to explore that question by assuming firstly that governments in North America are unlikely to suddenly look upon unions and collective bargaining as the best solution to the challenges of regulatory work in the 21<sup>st</sup> century. We have already identified a list of regulatory reforms they could introduce were they prepared to do so. Much more probable is that they will continue to prefer a non-union model, which they perceive to facilitate more productive, more flexible, and more profitable firms.

I will assume further that unions will continue to exist, as will laws that recognize the rights of workers to unionize, to engage in collective bargaining, and to strike. Indeed, in Canada, we appear to be moving closer to having all of these rights enshrined in some form in our Constitution.<sup>124</sup> Further, I assume that employers will continue to resist unionization on both ideological and economic grounds—because they perceive unions to impede efficiency, flexibility, and profits. Taking these assumptions as a starting point, the question I want to consider is whether a decentred orientation offers any new insight into how the relationship between the two alternative models (nonunion and union) might be influenced to both improve compliance with employment regulations and encourage

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<sup>124</sup> See, e.g., B. Langille, ....; R. Adams, ... *B.C. Health Services ...*; *Fraser v. Ontario ...*

responsible employer behaviour, while at the same time make better use of the expertise and contributions of unions and labour activist organizations.

I will use the challenge of improving compliance with employment regulation (employment standards, human rights laws, occupational health and safety; pay equity, *et cetera*) as my case study. This is not ideal for a number of reasons. Most notably, it may be that compliance with employment regulation is setting the bar very low, since much of this regulation provides only minimal protections to workers, and there may be pressures on states to lower those standards in the face of increased competition from other jurisdictions.<sup>125</sup> Nevertheless, we need to start somewhere, and improving compliance with basic employment regulation is a reasonable place to begin a discussion about reforming workplace law.

The state wants employers to comply with rules defined in government statutes because those rules comprise part of the overall policy of encouraging a reasonable distribution of wealth and decent employment practices. While most employers comply with legislation (and many exceed requirements in the legislation), there are a decent sized segment of ‘bad’ employers who do not. Enforcement of the rules against these bad employers has proven difficult for a number of reasons. Workers are often unaware of their rights, and even when they are aware, unrepresented workers are often unwilling to file complaints against their existing employers for reasons I believe are obvious.<sup>126</sup> Even when an employee does file a complaint, and succeeds after an investigation by

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<sup>125</sup> H. Arthurs, ... (arguing that compliance with domestic labour and employment laws can no longer be accepted as strong evidence of good labour practices in light of the downward pressures on those laws brought about by globalization)

<sup>126</sup> See for example, *Fairness at Work*, *supra* note at 192, noting that 92% of all complaints under the federal labour standards statute in Canada are filed by workers who are no longer employed in the same workplace.

government inspectors or a hearing, their employers (or, more likely, ex-employers) sometimes disappear, or file for bankruptcy, only to reappear later in a different business form.

A decentred approach to the problem encourages lawmakers to consider what legal signals might provoke those ‘bad’ employers to comply with the legal rule. This requires an examination of how those employers “think”. It seems obvious, for example, that “bad” employers feel able to ignore employment laws because they anticipate little down-side in non-compliance, or little upside from complying. They feel it is unlikely that an employee will learn of their legal entitlements or file a complaint for non-compliance, or that a government inspector will just happen to stumble upon them; they feel the penalty in the unlikely event that they are caught is insufficiently high to justify the cost of complying; they feel that complying with the law may make their business unprofitable, and therefore that they have little choice but to ignore it; they feel that if they are caught and ordered to pay back wages or a fine, that they can simply declare bankruptcy and start over.

The question for regulation is how to respond in ways that will address this worldview of the bad employers. One fairly obvious reform would require employers to provide each employee with a document setting out the terms of their employment, and a notice from the state (the Ministry of Labour) informing them of their statutory entitlements and rights.<sup>127</sup> This very simple rule would go a long way towards addressing the problem of bad employers who seek to exploit their employees’ ignorance of the law. It would also force employers to learn what are their legal obligations, it is low cost, and would help avoid many of the disputes that regularly occur before courts and tribunals

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<sup>127</sup> See Arthurs, *Fairness at Work*, *supra* note at 81.

about what the terms of employment are. Indeed, it is difficult to come up with any sensible argument against this proposal. Moreover, as will be discussed below, the legal model could also create legal implications that would flow from a failure by an employer to comply with this simple disclosure requirement.

A decentred approach encourages us to think about what bad employers might fear. Put another way, what are the sources of *risk* they perceive lurking within their internal and external environments? *One risk is unionization.* Most non-union employers deeply fear the prospect of unionization. Indeed, if I am correct in my assertion that the objective of labour law is to encourage employers to exercise their market powers over employees in a reasonable manner, then in fact the state already exploits this fear in its labour policy. If employers fear unions, then one way the law might influence their behaviour is by elevating the risk of unionization for employers who act irresponsibly.

It is not difficult to think of ways that regulation might do that. If the state accepts that it is rational, fair, and even desirable, for employees of bad employers to unionize, then we can take that rationale much further than what our current laws do. For example, with some limited exceptions, the Wagner model grants employers significant contractual and proprietary powers to impede union organizing campaigns. Employers can exclude union organizers from their property, prevent employees from discussing union issues during work, and discipline employees who do so.<sup>128</sup> On the other hand, employers are free to proselytize anti-union messages to their employees at work or at home, providing they do not use threats or promises. In Canada, unions are not entitled

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<sup>128</sup> Doorey, “Union Access Rights Through the Lens of *B.C. Health Services*” (2009), *Can. Labour & Employment L. J.* .... ; many others ....

to home addresses, phone numbers, or emails to communicate with workers, and while American unions are eventually entitled to home addresses, that right comes very late in the organizing campaign.<sup>129</sup>

Regulation could better exploit employer fears of unionization by linking these favourable contract and property rights to compliance with government employment regulations. This is in keeping with ideas expressed by Ayres and Braithwaite, who have argued in favour of dual regulatory streams to distinguish good employers from bad ones, and Estlund, who proposes that access to a beneficial regulatory stream should be contingent upon the employees having union representation or some other form of employee association bolstered by independent monitoring of workplace practices.<sup>130</sup> The right to throw up roadblocks to discourage their employees from seeking union representation should be the preserve of employers who at the very least comply with employment legislation.

Once an employer has been found guilty of non-compliance with an employment-related statute, they have demonstrated their unwillingness to self-regulate and to exercise their market powers over employees in the responsible manner the state desires. This includes employers who violate unfair labour practice provisions that prohibit employers from interfering with employee efforts to organize unions, since we are operating on the assumption that unionization is a healthy response by employees to treatment by a bad employer. Therefore, the model must permit workers to join unions in the face of anticipated hostile resistance by bad employers. Otherwise its deterrent power breaks

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<sup>129</sup> Add sources

<sup>130</sup> Ayres & Braithwaite, *supra* note ; Estlund, *supra* note at 216-218.

down, along with the entire philosophical foundation of the regulatory scheme. A model of labour law in which unionization is perceived as a legitimate and healthy response by employees to unlawful and unreasonable employer behaviour requires strong protections against the anti-union tendencies of bad employers. This means the law must ensure a prompt response to complaints that allege dismissal or retaliation against employees attempting to unionize, something that existing laws or procedures in both countries often fail to do at present.

When an employer is found to have violated an employment statute, the state should guide workers towards the alternative model of collective bargaining, and employees should be supported in a test run of the collective bargaining option.<sup>131</sup> A bundle of special rules should kick in once an employer has been found in violation of an employment statute. Firstly, the state should pay special attention to the bad employer's conduct during any subsequent union organizing campaign. A theme in decentred regulatory writings is that the state needs to direct its scarce resources at high-risk actors. In the case of bad employers who have demonstrated their willingness to violate employment regulation, the state should assign specific personnel (like a Labour Relations Officer) to act as a resource to employees, employers, and unions during an organizing campaign with the authority to oversee the campaign and monitor the employer's compliance with the new restrictions I am about to describe.

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<sup>131</sup> In Canada, labour laws usually require mandatory ratification of collective agreements, and mandatory strike votes. Thus, there is ample opportunity for employees to voice their opinion about the union's efforts in collective bargaining. That is why that argument that employers must play a significant role in the certification process in order to protect workers from unreasonable union promises is a very weak one. Union certification merely gives the union a "license to bargain", to use Paul Weiler's words. The real test for the union comes later, when it needs to demonstrate its value to workers in the form of a good collective agreement.

Bad employers should be ordered to provide the employees with a notice prepared by the Ministry of Labour outlining the process for organizing a union and rules governing the employer's behaviour during an organizing campaign, rules that will be more restrictive of the 'bad' employer's rights than of the "good" (statute complying) employer. The law should then restrict existing contractual and property rights that currently aid employers' efforts to resist unionization and that make it difficult for workers to obtain information about from unions.

For example, the employer could be ordered to produce a list of the employees' names and their jobs, as well as the employees' personal contact information, and make it available to a union organizing its workers.<sup>132</sup> A bad employer should also forfeit its existing right to exclude union organizers from company property, so that union organizers would be entitled to communicate with workers in non-working locations within the workplace.<sup>133</sup> In addition, the right of employers to hold captive audience meetings and to communicate with employees about their decision whether to support the collective bargaining stream should be curtailed or forbidden altogether.<sup>134</sup> An employer that has demonstrated its willingness to violate employment regulations has lost both the

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<sup>132</sup> As noted earlier, unions in the U.S. are entitled to this information at a late stage in organizing campaigns, whereas Canadian unions are not entitled to personal information of employees until after they have been certified or recognized by the employer. In Britain, the union certification law requires the employer to provide the government agency with the home address information and that agency mails union literature to the homes directly in order to avoid concerns about employee privacy. That is an option for Canadian law as well.

<sup>133</sup> This too is a requirement of existing law in Britain. Moreover, union access to the workplace is a remedy already ordered by Canadian labour boards when employers are found in violation of unfair labour practice provisions. See for example *Baron Metal* ....

<sup>134</sup> The Federal jurisdiction in Canada already prohibits employers from proselytizing against unionization: see *Bank of Montreal*.. ; Doorey, *supra* note ... Employers may challenge a law that restricts their expression during an organizing campaign as an infringement of their freedom of expression under section 2(b) of the *Charter*. However, given earlier cases considering legislative restrictions on employer expression, my guess would be that such arguments would fail, and that a restriction on expression by employers who have broken the law would be justified under Section 1. See, e.g., *Cardinal Klassen*, BCLRB ; *Bank of Montreal* ... (check cites)

credibility and the moral authority to proselytize to workers they are better off being unrepresented, and so the state should silence that sort of communication.

An employer that has been found in violation of an employment-related statute should also forfeit its right to insist on a mandatory ballot as the only means of establishing majority union support. In the U.S. and in most Canadian jurisdictions, access to collective bargaining is now contingent on a two-step process whereby the union must first collect union membership cards on behalf of some threshold percentage of workers in order to obtain the right to a vote, and then the union must win the vote. It did not use to be this way, in either country. The NLRB initially permitted certification upon presentation of evidence of majority support in the form of union membership cards, and this was the model in most Canadian provinces until the 1990s, when the policy shift away from collective bargaining began to manifest itself in labour law reforms. The shift from “card-check” to mandatory ballots was intended to make it more difficult for unions to organize workers by ensuring that employers were given an opportunity to campaign against the union. The empirical evidence shows that unions do have a harder organizing under a vote system.<sup>135</sup>

Since the state is supportive of employees of bad employers joining unions, there would be no policy reason to maintain the additional step of requiring the union to win a vote in order to facilitate the employer’s ability to persuade workers to remain under the nonunion model. As already noted, bad employers should have no right to campaign against unionization, and a card-check certification model should govern them, while good employers would remain under the vote model. If the hysterical reaction of employers to proposals to introduce card-check certification in both countries is any

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<sup>135</sup> See Riddell, *supra* note ...; S. Slinn, ...

indication of the extent to which employers fear card-check, then there is good reason to anticipate that a legal model that harnesses this threat to encourage greater compliance with employment regulation would be quite effective.

Finally, because bad employers are at high risk of becoming bad collective bargainers, the law should give significance to the employer's illegal behaviour under the bad faith bargaining and first contract arbitration provisions of labour legislation. Prior illegal conduct by an employer is relevant in assessing whether an employer is "surface bargaining" under Canadian law<sup>136</sup>, but to make the legal signal stronger, access to first contract arbitration should be made easier in the case of an employer who has previously violated employment statutes. First collective agreement arbitration has been a feature of Canadian labour law for many years, but access to it has become exceedingly difficult over the years.<sup>137</sup> It is common in Canadian law for the eligibility requirements to include evidence of illegal behavior by an employer.<sup>138</sup> It would be very easy to clarify that one condition that expedites access to first contract arbitration is a finding that the employer previously violated an employment regulation.

An intriguing aspect of the model I have proposed here is that it mirrors common terms negotiated 'voluntarily' by employers and unions in neutrality agreements over the

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<sup>136</sup> The leading case is *Radio-Shack* .....

<sup>137</sup> add notes

<sup>138</sup> See for example, Section 43 of the Ontario Labour Relations Act instructs the Board to consider, when deciding whether to refer a bargaining dispute to first contract arbitration, the following four factors:

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

past twenty years.<sup>139</sup> Unions and employers in both countries (though mostly in the U.S.) have been negotiating private contracts that provide unions with access to workers, require employers to ‘remain neutral’ during organizing campaigns, require employers to voluntarily recognize unions based on a private card-check model, and that include expedited access to first contract arbitration processes. These neutrality agreements reflect the response of the industrial relations actors to the existing legal environment, and the terms demonstrate the parties’ understanding of what sorts of reforms are needed to facilitate more successful union organizing. My proposal draws on this experience and incorporates it into a new system of legal signals intended to both discourage “bad” behaviour by employers and facilitate easier access to collective bargaining for employees of those bad employers.

Of course, there would be details to work out. For example, we would need to sort out whether the organizing benefits (access, employee lists, neutrality requirements, card-check) apply to all unions that seek to organize employees of a bad employer, or only one union. One possibility is to make the benefits available to all unions when no one union represented the workers in their complaint, but when a union actually brings the complaint on behalf of the employees, then only to that union. For example, if the United Steelworkers represents a group of non-union employees of Wal-Mart in a successful complaint for non-payment of statutory overtime pay, then only the United Steelworkers will be given the organizing benefits. This approach would have several benefits.

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<sup>139</sup> Doorey, Neutrality Agreements, *supra* note ; .. C. Estlund, “The Death of Labor Law?” ... ; Brudner, ...

Firstly, it would encourage unions to put their expertise to use in helping the state uncover employment law violations within non-union workplaces. Unions or union federations might create “hotlines” for nonunion employees to report employment law violations if they believed helping remedy the violations may lead them to new members and new bargaining units. Other private actors interested in the welfare of workers may also chose to seek out bad employers or to represent their employees—such as poverty or labour rights law clinics, journalists, law firms using class action proceedings, or even law professors—in the hope of shaming the employer, recovering money, or making it easier for the workers to unionize.<sup>140</sup> In this way, the proposed model would create an incentive for unions and others to act as a form of private inspectorate, and to build bridges to nonunion workers who are in need of skilled advocacy. Secondly, nonunion employees would have the benefit of professional representation if unions take on their cases. Employees might still fear (and confront) employer retaliation if they report violations to a union, but anti-reprisal laws are already in place and will be more meaningful if a union has an interest in protecting the employment of those workers who come to then for help.

Finally, to discourage bad employers from simply disappearing or declaring bankruptcy whenever a complaint is brought or confirmed, the law needs to ensure that the principals of the companies carry with them the baggage of former violations. This may require piercing the corporate veil and preventing principals of bad firms from starting new businesses until all outstanding amounts and fines resulting from previous

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<sup>140</sup> See for example the examples of local advocacy groups participating in private labour governance schemes in the California apparel industry and New York Green Grocers Code described by Estlund, *supra* note ... The United Students Against Sweatshop is an example of an NGO that has been active in advocating for workers, as well as the Workers’ Rights Consortium that USAW developed, which includes leading labour law academics, among others. (clean this up...)

employment law violations are satisfied. It may require that the preferential union organizing rules carry over to any new businesses opened by the same principals(s), on the theory that these people remain ‘bad’ employers. The right to operate a business and to be an employer should be contingent upon demonstrating a commitment to being a responsible, good employer. I would go further, and require those persons to disclose to all applicants for employment at the new businesses that they have been found guilty in the past of violating employment statutes, and to provide new employees with documentation describing their legal entitlements including their right to join a union.

### **Conclusions**

The model I described in the preceding section is actually quite modest. The novelty lies only in the idea that “bad” employers should be subjected to a much more friendly climate for union organizing than “good” employers. However, even that idea is just a take on the dual regulatory stream approach advocated in much of the decentred regulatory literature. The restrictions I have proposed on the rights of bad employers to resist unionization are not themselves novel or radical. They are taken mostly from existing or past laws or practices in North America and Britain, and from the terms of privately negotiated neutrality agreements that emerged on the industrial landscape in North America without any notable contribution of the state.

However, while relatively modest, the proposal does require a different way of thinking about labour law and role of unions and collective bargaining. Some readers may find controversial my assertion that North American governments today perceive unions and collective bargaining not as positives as such, but as components of an alternative, less desirable regulatory stream to the government preferred non-union

model. I do not agree with that perspective, but I find strong evidence in support of it in the simple fact that governments have made amendments to labour relations statutes in recent decades that have made it more (not less) difficult for workers to join unions, and that they have been content to allow collective bargaining to stagnate and decline, when regulatory reforms that could halt or even reverse this course are easy to identify. However, one does not need to accept this aspect of my argument to accept the more fundamental premise that employers fear unionization, and that this fear could be put to use in ways intended to influence employer behaviour and encourage a greater role for unions and worker advocates in pushing for improved compliance with employment law rules.

Because decentred regulatory theory is about regulatory design, and not about how states come to decide upon their policy objectives, I have taken what I perceive to be the contemporary objective of labour law in Canada and the U.S. as a given. Arguing against that objective is for another time. If the purpose of labour law today is to act as a disincentive for employers to abuse their market power over workers under the non-union model, then the law could be amended to make that signal to employers considerably stronger.

A decentred approach to regulation provides some useful insights into how that might be done. One lesson is that there is potential for influencing firm behaviour by targeting risk centers within firms. In the Australian outworkers' model, the law injected risk into the supply chain management process in ways that are likely to influence how the businesses within those chains organize their affairs. In my proposal, the risk comes in the form of greater potential for unionization. We can anticipate that firms that prefer

to remain nonunion will respond to that risk by taking steps to ensure that they do not run afoul of the legislation that could potentially trigger the bundle of rules that make organizing easier. It is not fear of fines or a sudden enlightenment that will motivate this behavioral change, but the fear of losing the discretion employers enjoy under the common law, nonunion model.

Another lesson of decentred regulatory theory is that private sources of expertise and power can be tapped in furtherance of state objectives. In the Australian model, the law co-opts the textile union into the task of supervising compliance with the employment standards. My proposal does the same, albeit on a smaller scale. The aim is to design a law that motivates unions (and other worker advocates) to seek out those ‘bad’ employers and to represent workers who otherwise might be disenfranchised and subject to abuse by the employer. The proposal would reward unions that successfully identify bad employers by providing them with a bundle of rights taken from (“neutrality”) agreements that unions and employers have been bargaining themselves in order to create more favourable environments for union organizing. Thus, the law would incorporate aspects that it has “learned” about by observing private systems of ordering.

Of course, we cannot know what effect, if any, a proposal like this would have once implemented. We would have to make the changes and then watch, learn, and respond. It may be that a model like the one proposed would persuade bad employers to behave, good employers to remain good, and employers on the fence to join the good team. It could also indirectly lead to higher levels of unionization and build new relations between unions and the non-union sector. On the other hand, the law might have no impact, because fundamentally it does not alter the overriding power relations in

capitalists' societies that permit, if not encourage, a subordinated worker class. It could also have other less desirable effects. For example, it may institutionalize the perspective that unions are bad and unnecessary interventions in the free market system, which could further stigmatize the labour movement and contribute to its further decline.

These are the complexities we deal with when designing new forms of labour regulation, but they are not only problems for the domain of decentred regulation. The real challenge for those of us interested in using workplace law to alter the distribution of wealth and power in society is in identifying legal rules that might not only produce useful change, but that also have some possibility of actually garnering sufficient political support to be enacted. This necessarily leads the pragmatist towards compromise and more modest proposals that might initially lead to improvements at the margins and perhaps over time to more fundamental transformations.