



# A Model of Responsive Workplace Law

David J. Doorey

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>

 Part of the [Labor and Employment Law Commons](#)

Article

## Citation Information

Doorey, David J.. "A Model of Responsive Workplace Law." *Osgoode Hall Law Journal* 50.1 (2012) : 47-91.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol50/iss1/2>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

---

# A Model of Responsive Workplace Law

## **Abstract**

The North American model of workplace law is broken, characterized by declining frequency of collective bargaining, high levels of non-compliance with employment regulation, and political deadlock. This paper explores whether the theory of “decentred regulation” offers useful insights into the challenge of improving compliance with employment standards laws. It argues that the dominant political perspective on workplace regulation today is managerialist. Politicians with a managerialist orientation reject both the pluralist idea that collective bargaining is always preferred and the neoclassical view that it never is. Managerialists accept a role for employment regulation and unions, particularly in dealing with recalcitrant employers who mistreat their employees. The fact that managerialists and pluralists agree on this latter point creates a space for potential movement on workplace law reform. A law that encourages “high road” employment practices, while fast-tracking access to collective bargaining for “low road” employers could encourage greater compliance with employment regulation, while also facilitating collective bargaining at high-risk workplaces. This article examines lessons from scholarship on decentred regulation for the design of a legal model capable of achieving these results. In particular, it develops and assesses a dual regulatory stream model that restricts existing rights of employers to resist their employees’ efforts to unionize once they have been found in violation of targeted employment regulation.

## **Keywords**

Labor laws and legislation; Collective bargaining; Management rights

## A Model of Responsive Workplace Law

DAVID J. DOOREY\*

The North American model of workplace law is broken, characterized by declining frequency of collective bargaining, high levels of non-compliance with employment regulation, and political deadlock. This paper explores whether the theory of “decentred regulation” offers useful insights into the challenge of improving compliance with employment standards laws. It argues that the dominant political perspective on workplace regulation today is managerialist. Politicians with a managerialist orientation reject both the pluralist idea that collective bargaining is always preferred and the neoclassical view that it never is. Managerialists accept a role for employment regulation and unions, particularly in dealing with recalcitrant employers who mistreat their employees. The fact that managerialists and pluralists agree on this latter point creates a space for potential movement on workplace law reform. A law that encourages “high road” employment practices, while fast-tracking access to collective bargaining for “low road” employers could encourage greater compliance with employment regulation, while also facilitating collective bargaining at high-risk workplaces. This article examines lessons from scholarship on decentred regulation for the design of a legal model capable of achieving these results. In particular, it develops and assesses a dual regulatory stream model that restricts existing rights of employers to resist their employees’ efforts to unionize once they have been found in violation of targeted employment regulation.

On ne respecte plus le modèle nord-américain du droit du travail, en raison d’une fréquence à la baisse des négociations collectives, d’un degré élevé de non conformité aux règlements sur l’emploi et d’une impasse politique. Cet article se demande si la théorie de la « réglementation décentralisée » procure des points de vue utiles quant au défi d’améliorer la conformité aux lois sur les normes du travail. Il fait valoir que, de nos jours, la perspective politique dominante sur la réglementation du travail est gestionnariste. Les politiciens ayant une orientation gestionnariste rejettent à la fois l’idée pluraliste voulant que les négociations collectives soient toujours préférables et le point de vue néoclassique voulant qu’elles ne

---

\* Ph.D., Associate Professor, York University. Earlier versions of this article were presented at the Society of Legal Scholars Annual Conference, Cambridge University, 2011 and Le Centre de recherche interuniversitaire sur la mondialisation et le travail (CRIMT), Laval University, 2010. My thanks to Harry Arthurs, Cynthia Estlund, Kerry Rittich, Roy Adams, Bernie Adell, Mike Zimmer, and Paul Secunda for comments, suggestions, and criticisms of earlier drafts of this article. I am grateful for research funding provided by the Social Sciences & Humanities Research Council of Canada.

le soient jamais. Les gestionnaristes admettent l'utilité des règlements sur l'emploi et des syndicats, plus particulièrement lorsqu'il s'agit de traiter avec des employeurs récalcitrants qui maltraitent leur employés. Le fait que les gestionnaristes et les pluralistes s'entendent sur ce qui précède pourrait favoriser une réforme du droit du travail. Un droit privilégiant des pratiques d'emploi « normalisées » tout en accélérant l'accès aux conventions collectives pour les employeurs « non conformes » pourrait entraîner une plus grande conformité aux règlements sur l'emploi, tout en facilitant la négociation collective dans les lieux de travail à risque élevé. Cet article se penche sur les leçons tirées de la recherche universitaire sur la réglementation décentralisée pour l'élaboration d'un modèle juridique pouvant atteindre ces résultats. En particulier, il élabore et évalue un modèle réglementaire à double courant qui restreint le droit actuel des employeurs de résister aux efforts de syndicalisation de leurs employés lorsqu'il a été constaté qu'ils ont violé la réglementation d'emploi visée.

---

I.	THE DECENTRED UNDERSTANDING OF REGULATION.....	52
	A. Common Themes that Define the Decentred Understanding of Regulation .....	53
	B. Decentred Regulation as Instrumental Law .....	55
II.	IMPLICATIONS FOR REGULATORY DESIGN AND RESEARCH .....	57
	A. Internal Management Systems as a Target for Regulation .....	57
	B. Harnessing Non-State Actors and Networks Through Regulation .....	60
	C. Injecting Risk as a Regulatory Tool .....	61
III.	COMMON TOOLS OF DECENTRED REGULATION .....	62
	A. Multiple Regulatory Streams .....	63
	B. Variable Sanctioning Models .....	65
	C. Empowering and Enabling Private Actors .....	65
	D. Information Production and Dissemination .....	67
IV.	THE POLITICAL ECONOMY OF CONTEMPORARY WORKPLACE REGULATION .....	67
V.	A DECENTRED PROPOSAL FOR WORKPLACE LAW REFORM .....	76
VI.	EVALUATION AND CONCLUSIONS.....	85

---

AS THE TWENTIETH CENTURY drew to a close, there was much soul searching within academic and labour policy circles about the future of workplace law.<sup>1</sup> This period of reflection revealed an emerging consensus that the old ways of governing work were no longer effective—if ever they had been—and that new approaches were necessary. Evidence of the failure of workplace law included high levels of non-compliance with employment standards legislation,<sup>2</sup> persistent inequality of opportunities and compensation for women and minority groups,<sup>3</sup> alarming and growing levels of income inequality,<sup>4</sup> and the falling percentage of workers represented by unions.<sup>5</sup> If there was widespread agreement that the existing approach to workplace law in Canada and the United States was deficient, there was—and is—little consensus on how to fix it. There is no shortage of ideas. However, political fragmentation and indifference has meant that few proposals have advanced beyond the initial debate stage, and that those that have advanced

- 
1. Katherine VW Stone, “A Labor Law for the Digital Era: The Future of Labor and Employment Law in the United States” in Kenneth G Dau-Schmidt, Seth D Harris & Orly Lobel, eds, *Labor and Employment Law and Economics* (Cheltenham: Edward Elgar, 2009) 689; Bob Hepple, “The Future of Labour Law” (1995) 24:4 *Indus LJ* 303; Chris Engels & Manfred Weiss, *Labour Law and Industrial Relations at the Turn of the Century: Liber Amicorum in Honour of Professor Roger Blanpain* (The Hague: Kluwer Law International, 1998); John DR Craig & S Michael Lynk, eds, *Globalization and the Future of Labour Law* (Cambridge, UK: Cambridge University Press, 2006); Catherine Barnard, Simon Deakin & Gillian S Morris, eds, *The Future of Labour Law: Liber Amicorum Sir Bob Hepple, Q.C.* (Oxford: Hart, 2004); Stewart J Schwab, “Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?” (2001) 76:1 *Ind LJ* 29.
  2. See e.g. Harry W Arthurs, *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century* (Ottawa: Human Resources and Skills Development Canada, 2006) at 190-95 [Arthurs, *Fairness at Work*] (noting that 75% of federally regulated employers are in violation of federal employment standards laws); Roy J Adams, “Employment Standards in Ontario: An Industrial Relations Systems Analysis” (1987) 42:1 *RI* 46; and Mark P Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (Montreal: McGill-Queens University Press, 2009).
  3. See e.g. Sheila Block, *Ontario’s Growing Gap: The Role of Race and Gender* (Ottawa: Canadian Centre for Policy Alternatives, 2010).
  4. See Kerry Rittich, “Between Workers’ Rights and Flexibility: Labor Law in an Uncertain World” (2010) 54 *Saint Louis ULJ* 565 at 567; Michael Lynk, “Labour Law and the New Inequality” (2009) 15 *Just Lab* 125 at 129.
  5. Lance Compa, *Unfair Advantage: Workers’ Freedom of Association in the United States under International Human Rights Standards* (August 2000), online: Human Rights Watch <<http://www.hrw.org/reports/2000/uslabor/>>; Cynthia L Estlund, “The Ossification of Labor Law” (2002) 102:6 *Colum L Rev* 1527 [Estlund, “Ossification”]; Richard B Freeman & Lawrence F Katz, “Rising Wage Inequality: The United States vs Other Advanced Countries” in Richard B Freeman, ed, *Working Under Different Rules* (New York: Russell Sage, 1994) 29; Lynk, *ibid.*

represent only modest tinkering, leading to little if any measurable change in working conditions.

The “ossification” of workplace law in North America has led some scholars to investigate the potential contribution of a strand of legal theory known as “decentred regulation,” which is popular in other spheres of governance.<sup>6</sup> Decentred approaches to regulation come armed with fresh names, such as “new governance,”<sup>7</sup> “responsive regulation,”<sup>8</sup> and “reflexive law.”<sup>9</sup> A central observation shared by the various strands that fall under the umbrella of decentred regulation is the state’s frequent incapacity to “command” changes in business behaviour through the threat of sanctions. At the same time, decentred regulation points to the many forces other than the state that influence behavioural norms. It emphasizes the potential for the state to use regulation to harness private power so as to provoke and steer self-reflection and self-regulation in ways that further state objectives.

This article explores whether there are useful lessons in decentred regulation scholarship for workplace law reform. My interest is in a particular form of decentred regulation, which I will label “instrumental decentred regulation.” It is instrumental because it is policy-driven, state-made law intended to achieve public policy objectives. It is useful to make this explicit, since decentred regulation is often (mis)understood as synonymous with corporate “self-regulation” and an agenda promoting a lesser state role in the governance of business. As such, it is easily dismissed or ignored by those who favour more, not less, government

---

6. Estlund, *ibid.*

7. Orly Lobel, “The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought” (2004) 89:2 *Minn L Rev* 342 [Lobel, “Renew Deal”]; Orly Lobel, “Setting the Agenda for New Governance Research” (2004) 89:2 *Minn L Rev* 498 [Lobel, “Setting the Agenda”]; Cynthia Estlund, “Corporate Self-Regulation and the Future of Workplace Governance” (2009) 84:2 *Chicago-Kent L Rev* 617 at 622 [Estlund, “Self Regulation”]; Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven: Yale University Press, 2010) [Estlund, *Regoverning*].

8. Phillippe Nonet & Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New Brunswick, NJ: Harper Torch Books, 1978); Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992).

9. Gunther Teubner, “Substantive and Reflexive Elements in Modern Law” (1983) 17:2 *Law & Soc’y Rev* 239 [Teubner, “Modern Law”]; Ralf Rogowski & Ton Wilthagen, *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (Boston: Kluwer Law and Taxation, 1994); David Doorey, “Who Made That?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation” (2005) 43:3 *Osgoode Hall LJ* 353 [Doorey, “Who Made That”]; Eric W Orts, “Reflexive Environmental Law” (1995) 89:4 *Nw UL Rev* 1227; Michael C Dorf, “The Domain of Reflexive Law,” Book Review of *Regulating Intimacy: A New Legal Paradigm* by Jean L Cohen, (2003) 103:2 *Colum L Rev* 384.

oversight of business activities. Here, instrumental decentred regulation describes an approach to governance that is guided by a bundle of insights into the relationship between legal signals and behavioural norms, not by any particularly normative political agenda. To use workplace law as an example, the insights it draws on can be deployed to relax or strengthen employment standards and to promote or discourage collective bargaining.

In Part I, the article begins by exploring common themes that define the decentred approach to regulation. It then considers, in Part II, the implications of the decentred approach for the design of business regulation and for research agendas in regulatory studies. Part III describes four regulatory tools commonly associated with the decentred approach. The final two parts of the article are devoted to a discussion of how the insights drawn from the decentred regulatory literature could be deployed to improve compliance with employment standards legislation in Canada.

Part IV examines the contemporary political economy of workplace law reform and argues that the dominant political perspective in Canada today is best understood as managerialist. This perspective is ideologically situated somewhere between the industrial pluralist perspective, which favours a strong state and collective bargaining, and the neoclassicalist perspective, which advocates for limited government intervention in labour markets and against collective bargaining. Those who hold the managerialist perspective believe the decision by workers to unionize is a rational and acceptable response by workers to perceived mistreatment by employers, but that unionization is neither necessary nor beneficial in cases where employers act responsibly in their dealings with employees. Therefore, in contrast to the pluralist perspective, managerialists do not believe the state should encourage collective bargaining as a preferred policy model. However, contrary to the position of neoclassicalists, managerialists do accept a role for the state in ensuring that workers have access to collective bargaining when they feel mistreated.

Policies that fit within the managerialist worldview have a greater chance nowadays to gain political traction than those that speak only to pluralists or to neoclassicalists. Therefore, Part V of the paper considers a package of regulatory reforms to improve employment standards compliance that draw on insights from decentred regulatory theory and that are consistent with the managerialist worldview of the appropriate role of employment and labour law. The objective is to design a regime that would *steer* employers onto a “high road” of progressive human resource management practices by better protecting workers whose employers opt for the “low road.” Our existing legal model is deficient in both

regards. The alternative model discussed here incentivizes high road employment practices (including compliance with key employment law standards) while better enabling employees of low road employers to access collective bargaining. This model deploys the concept of a dual regulatory stream, drawn from the literature on decentred regulation, which assigns contrasting bundles of rights and obligations to employers depending upon the degree to which they comply with the state's code of responsible employment practices. This article is cautiously optimistic about the potential contribution of insights from decentred regulatory theory to the challenges of reforming workplace law in North America, and concludes by recommending further debate about and exploration of the ideas presented in the article.

## I. THE DECENTRED UNDERSTANDING OF REGULATION

Decentred regulation and new governance are umbrella terms intended to capture a subset of regulatory strands that share key premises or insights, which in turn guide their advocates towards a similar set of regulatory prescriptions.<sup>10</sup> Decentred regulation is often positioned as the alternative to more direct, top-down Command-and-Control (CAC) regulation. CAC regulation is frequently described in the literature on decentred regulatory theory as too rigid and blunt an instrument to effectively influence behaviour in complex modern societies. The reasons given for the failure of CAC regulation vary. In its most radical form, the argument forms a key component of autopoietic systems theory, as developed by Niklas Luhmann and Gunther Teubner, among others.<sup>11</sup> North American critics of CAC rely less on systems theory, but argue that modern business has become too powerful and mobile, and that many social problems

- 
10. The works of Julia Black (decentred regulation) and Orly Lobel (new governance) are particularly useful in synthesizing this literature. See Julia Black, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World" (2001) 54 *Curr Legal Problems* 103 [Black, "Decentring"]; Julia Black, "Critical Reflections on Regulation" (2002) 27 *Austl J Legal Phil* 1; Julia Black, "Proceduralizing Regulation, Part I" (2000) 20:4 *Oxford J Legal Stud* 597 [Black, "Proceduralizing Regulation"]; Lobel, "Renew Deal," *supra* note 7; Orly Lobel, "National Regulation in a Global Economy: New Governance Approaches to 21<sup>st</sup> Century Work Law" in Kenneth G Dau-Schmidt, Seth D Harris & Orly Lobel, eds, *Labor & Employment Law and Economics* (Cheltenham: Edward Elgar, 2009) 630 [Lobel, "New Governance"]; Lobel, "Setting the Agenda," *supra* note 7.
11. Niklas Luhmann, *The Differentiation of Society*, translated by Stephen Holmes & Charles Larmore (New York: Columbia University Press, 1982); Gunther Teubner, *Law as an Autopoietic System*, translated by Anne Bankowska & Ruth Adler (Oxford: Blackwell, 1993) [Teubner, *Autopoietic System*].



have become too complex to govern through a hierarchical legal system based on government commands backed by a threat of monetary sanctions.<sup>12</sup>

In the decentred account, 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 deploys law in active pursuit of social and economic policies.<sup>13</sup> Inevitably, society's problems 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>14</sup> At this point, a further evolution towards a third model of governance occurs in which the state recognizes its incapacity to engineer specific policy objectives through an array of CAC regulation and looks outwards towards other potential sources of governance that might be harnessed in pursuit of the state's policy objectives.<sup>15</sup>

#### A. COMMON THEMES THAT DEFINE THE DECENTRED UNDERSTANDING OF REGULATION

This bare-bones account of the evolutionary nature of law is sufficient to demonstrate the imperative in decentred literature for a realignment of the form of legal commands, as explained by Julia Black:

CAC regulation posits a particular role for the state against which the "decentering" analysis is counterposed. 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, others doing), based on simple cause-effect relations, and envisaging a linear progression from policy formation through to implementation. Its failings are variously identified as being, *inter alia*, that the instruments used (laws backed by sanctions) are inappropriate and unsophisticated (instrument failure), that 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 failure), that implementation of the

---

12. Estlund, *Regoverning*, *supra* note 7 at 76.

13. For an account of the evolutionary trajectory of legal systems in reflexive law, see Teubner, "Modern Law," *supra* note 9. Orly Lobel sets out a similar narrative in her description of new governance theory in Lobel, *supra* note 10 at 381-86. See also William M Sage, "Regulating Through Information: Disclosure Laws and American Health Care" (1999) 99:7 Colum L Rev 1701; Orts, *supra* note 9; Cynthia Estlund, "Rebuilding the Law of the Workplace in an Era of Self-Regulation" (2005) 105:2 Colum L Rev 319.

14. Teubner, "Modern Law," *supra* note 9.

15. Gunther Teubner, "Regulatory Law: Chronicle of a Death Foretold" (1992) 1:4 Soc & Leg Stud 451 at 463; Orts, *supra* note 9 at 1260.

regulation is inadequate (implementation failure), and/or that those being regulated are insufficiently inclined to comply, and those doing the regulating are insufficiently inclined to comply (motivation failure).<sup>16</sup>

Black identifies a number of common insights or “aspects” that together comprise a decentred understanding of regulation.<sup>17</sup>

First, the causes of modern social problems are said to be complex and shaped by interactions between a variety of forces that are poorly understood.<sup>18</sup> Second, no one actor, certainly not the state, possesses the knowledge or expertise to understand how normative behaviour is determined in light of this complexity (there is “fragmented knowledge”).<sup>19</sup> Third, there is a plurality of sources of normative behaviour. Formal, state-based law is one source, but often other social or economic forces are equally significant to, or more significant than, government regulation as determinants of behaviour.<sup>20</sup> Thus, decentrists are also legal pluralists.

Fourth, a decentred orientation to regulation recognizes that the targets of regulation are complex, autonomous actors with their own objectives, worldviews, and discourses. Since lawmakers cannot possibly know how every actor perceives his or her environment and, in any event, the targets of regulation are not homogeneous in this regard, regulation will cause behavioural changes and outcomes that are unintended.<sup>21</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, dynamic communication.<sup>22</sup>

---

16. Black, “Decentring,” *supra* note 10 at 106.

17. *Ibid.*

18. *Ibid.* at 106-07. See also Patrick Capps & Henrik Palmer Olsen, “Legal Autonomy and Reflexive Rationality in Complex Societies” (2002) 11:4 Soc & Leg Stud 547 at 551.

19. Orly Lobel notes that a premise of the new governance model is “that no one institution possesses the ability to regulate all aspects of contemporary public life.” See “Renew Deal,” *supra* note 7 at 380; See also Black, “Proceduralizing Regulation,” *supra* note 10 at 602.

20. Black, “Decentring,” *supra* note 10 at 108. See also Lobel, *ibid.* 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.”

21. Gunther Teubner notes that because under a regime of reflexive law the “legal control of social action is indirect and abstract,” it may produce unpredictable outcomes. See “Modern Law,” *supra* note 9 at 255.

22. See *e.g.* Lobel, “Renew Deal,” *supra* note 7 at 377 (noting that new governance “advocates ... the adoption of cooperative governance based on continuous interaction and sharing of responsibility”); Miriam Hechler Baer, “Governing Corporate Compliance” (2009) 50:4

A fifth aspect of a decentred approach to regulation is the observation that regulation fosters and relies upon interdependencies between regulator and regulated. Rather than conceiving of the state as commander and the targets of regulation as commanded in a linear, hierarchical 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>23</sup>

Last, Black explains that a decentred approach to regulation involves the “collaps[ing] of the public/private distinction” and a “rethinking of the role of formal authority in governance and regulation.”<sup>24</sup> It requires the state to move towards a regulatory strategy that encourages self-reflection and continuous learning by the targets of regulation. In addition, it 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>25</sup>

## B. DECENTRED REGULATION AS INSTRUMENTAL LAW

The phrase “regulated self-regulation,” often associated with the decentred approach, usefully captures a key philosophical foundation of the decentred orientation.<sup>26</sup> First, it emphasizes that regulation includes more than just orders

---

BCL Rev 949 at 1004; Colin J Bennett & Michael Howlett, “The Lessons of Learning: Reconciling Theories of Policy Learning and Policy Change” (1992) 25 Pol’y Sci 275 at 276 (noting that “states 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”); and Capps & Olsen, *supra* note 18 at 550.

23. Jan Kooiman argues 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.” See “Social-Political Governance: Introduction” in Jan Kooiman, ed, *Modern Governance: New Government-Society Interactions* (London, UK: SAGE, 1993) 1 at 4.
24. Black, “Decentring,” *supra* note 10 at 110.
25. *Ibid* at 112; Teubner, *supra* note 11 at 67.
26. The idea that states should “regulate self-regulation” for instrumental purposes is now a common theme in decentred regulation scholarship. Cynthia Estlund notes that “law can effectively regulate complex organizations in modern society only by shaping those organizations’ own processes of self-regulation and inducing organizations to internalize public values. Hence the turn to what is sometimes called the regulation of self-regulation.” See “Who Mops the Floor at the Fortune 500: Corporate Self-Regulation and the Low-Wage Workplace” (2008) Lewis & Clark L Rev 671 at 682.

issued by governments and backed by state-imposed penalties; it also includes private systems of rules that emerge outside of the state. This includes norms developed through attempts by firms to self-regulate, perhaps in response to incentives and risks introduced by government regulation, as well as norms that emerge through contestation, negotiation, conflict, and dialogue between firms and others actors and networks of actors.<sup>27</sup>

Secondly, the phrase “regulated self-regulation,” or “enforced 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.<sup>28</sup> The state still decides what policies to pursue. Decentred regulation, like CAC regulation, is a form of instrumental law. There is a big difference between self-regulation and decentred regulation, although this point is often misunderstood, as Bradley C. Karkkainen has noted:

One of the persistent and pervasive misconceptions about New Governance is that it is wholly reliant on “soft law” mechanisms, 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 critics as so much wishful thinking.<sup>29</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, social, or market-based sanction.<sup>30</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. This distinction is due to the very different perceptions of the operational relationship between legal signals and regulated actors’ behaviour.<sup>31</sup>

27. Estlund, *Regoverning*, *supra* note 7 at ch 5.

28. Lobel, “Setting the Agenda,” *supra* note 7 at 502 (“[new governance scholars] refuse to abandon the role of an active state in democracy”); See discussion of enforced self-regulation in Ayres & Braithwaite, *Responsive Regulation*, *supra* note 8 at ch 4.

29. “‘New Governance’ in Legal Thought and in the World: Some Splitting as an Antidote to Overzealous Lumping” (2004) 89:2 *Minn L Rev* 471 at 488-89.

30. See Robert Baldwin & Julia Black, “Really Responsive Regulation” (LSE Legal Stud Working Paper No 15, 2007), online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1033322](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1033322)> (provides 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).

31. Simon Deakin & Ralf Rogowski, “Reflexive Labour Law, Capabilities, and the Future of Social Europe” (University of Warwick School of Law Legal Studies Research Paper No 04, 2011) at 7, online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1780922](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1780922)>.

## II. IMPLICATIONS FOR REGULATORY DESIGN AND RESEARCH

A decentred approach to regulation would 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 workplace law. I will focus on three key insights associated with the decentred regulatory perspective: (1) an emphasis on how regulation can be used to influence the decision-making processes within regulated 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

Decentred regulatory theory perceives the process through which legal signals penetrate firms' decision-making processes as highly complex. Mechanisms, pressures, incentives, personalities, cultures, social norms, histories, and discourses within firms muddy legal signals or translate them to fit better with the firm's culture or the worldview of its key personnel. To use the language of reflexive legal theory, a message transmitted from the legal subsystem to the economic subsystem will be reinterpreted according to the particular binary code used within the economic subsystem.<sup>32</sup> The legal signal "pay the minimum wage," for example, may be reinterpreted by economic actors according to the language of the economic subsystem—pay or do not pay, profit or do not profit.<sup>33</sup> Perceived from the perspective of CAC regulation, the failure of the command—pay the minimum wage—reflects a failure of enforcement. This leads to proposed solutions such as raising fines for non-compliance or ensuring more effective enforcement by government inspectors. The belief is that raising the anticipated financial costs of non-compliance will improve the likelihood that otherwise non-compliant employers will then choose to comply.

A decentred approach to the problem might also support higher fines and better enforcement, particularly for persistent offenders,<sup>34</sup> but holds out little

---

32. Teubner, "Modern Law," *supra* note 9.

33. See, for example, the discussion in Hugh Collins, Book Review of *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* by Ralf Rogowski & Ton Wilthagen, eds, (1998) 61:6 Mod L Rev 916 [Collins, Book Review].

34. For example, Ian Ayres and John 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

hope that this alone will transform overall compliance levels. As Gunther Teubner asserts, a direct legal command like “pay the minimum wage” has “little chance of being obeyed when it comes into direct conflict with the profit motive.”<sup>35</sup> The higher the fines for non-compliance, the greater the incentive for firms to hide their non-compliance from the state or to exit the regulating jurisdiction, if feasible. Conscious of these limits of CAC regulation, decentrists emphasize strategies intended to realign the firms’ economic interests with the state’s interest in improving compliance with the legal standards. In Philip Selznick’s words, the objective is to use regulation to get companies “to want to do what they should do.”<sup>36</sup>

Note that in this scenario, the state does not cease to set hard standards; it still determines whether a minimum wage is appropriate and what it should be. Instrumental decentred regulation does not mean replacing fixed government standards with voluntary self-regulation. However, decentrists would propose a different way of thinking about how the legal signals should be deployed in order to effect compliance. A 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 re-orientate firms’ internal management systems and decision-making processes by influencing the context and processes through which complex decisions are made.<sup>37</sup>

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

---

the more cooperative regulatory options. See Ayres & Braithwaite, *supra* note 8 at 47-49. See also Collins, Book Review, *ibid* at 65; Estlund, “Self-Regulation,” *supra* note 7 at 624 (“effective self-regulation depends on maintaining a serious background threat of public enforcement”); Lobel, “New Governance,” *supra* note 10 at 638-39; David A Dana, “The New ‘Contractarian’ Paradigm in Environmental Regulation” (2000) 1 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 meaningfully in the new approach).

35. Teubner, *Autopoietic System*, *supra* note 11 at 91.

36. *The Communitarian Persuasion* (Washington: Woodrow Wilson Center Press, 2002) at 102; See also Christine Parker, “Meta-Regulation: Legal Accountability for Corporate Social Responsibility” in Doreen McBarnet, Aurora Voiculescu & Tom Campbell, eds, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge, UK: Cambridge University Press, 2007) 207 at 208; Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge, UK: Cambridge University Press, 2002).

37. See *e.g.* Deakin & Rogowski, *supra* note 31 at 6.

public policy are achieved.”<sup>38</sup> Scott notes similarly that “the 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>39</sup> Eric W. 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>40</sup>

One example of a regulatory model that seeks to improve compliance with government standards by targeting the design and implementation of internal management systems is the American Federal Sentencing Guidelines for Organizations.<sup>41</sup> The Guidelines allow for lesser sentences for organizations that have committed legal violations but had implemented internal compliance systems that meet the government’s established standards. The government standards for an “effective compliance program” include: (1) adoption of codes of conduct that include as a minimum compliance with all applicable laws; (2) communication and training of employees on the content of the code; (3) designation of a senior company official as responsible for compliance with the code; (4) adoption of systems designed to monitor the effectiveness of the code’s implementation; (5) adoption of incentives and disciplinary procedures designed to encourage compliance and respond to violations discovered; and (6) adoption of systems that enable confidential reporting without fear of reprisals.<sup>42</sup> The objective was to steer firms towards implementing systems the state believed would improve compliance by offering the ‘carrot’ of reduced penalties.

The concern with internal decision-making processes affects both the form of proposed regulation and the research agenda for lawmakers and regulatory

---

38. Black, “Decentring,” *supra* note 10 at 127.

39. Colin Scott, “Regulation in the Age of Governance: The Rise of the Post-Regulatory State” in Jacint Jordana & David Levi-Faur, eds, *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Northampton: Edward Elgar, 2004) 145 at 152.

40. Orts, *supra* note 9 at 1267; See also Daniel J Fiorino, “Rethinking Environmental Regulation: Perspectives on Law and Governance” (1999) 23:2 Harv Envtl L Rev 441 at 448 (noting how reflexive law seeks to “strengthen ‘reflexion mechanisms’ within the [targeted] entity to encourage the desired behaviour”).

41. See discussion in Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge: Cambridge University Press, 2002) at 259-61; Estlund, *Regoverning*, *supra* note 7 at 77-78.

42. *Ibid.*

scholars. Regulation that looks inside the managerial “black box,” to borrow Cynthia Estlund’s phrase, takes on greater prominence.<sup>43</sup> Researchers are guided towards questions that explore internal firm dynamics and cultures and how they interact with external environment forces, such as markets, culture, and business risks. The process requires a close examination of how decisions are made within organizations and of questions such as: Whose job is it to learn what the employment standards are and to decide whether those rules will be complied with throughout an organization? How is information about legal rules received and transmitted within organizations? What motivates firms’ decision makers, and how might those motivations be altered to produce a different set of incentives? A shift towards decentred regulation therefore focusses more on the dynamics of internal managerial processes and their impact on performance outcomes than is common in a CAC approach.

#### B. HARNESSING NON-STATE ACTORS AND NETWORKS THROUGH REGULATION

Legal pluralism has experienced a rebirth in parallel with the recent interest in decentred approaches to regulation.<sup>44</sup> The lens of legal pluralism opens our eyes to the complex environment in which many firms operate and to the many sources of push and pull that act upon firms at any given moment. These sources of influence are central to understanding why firms behave as they do. As Roderick A. 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>45</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. Unions are one such type of actor, but legal clinics, worker centres, faith-based organizations, activist shareholders, non-government organizations, and consumers might also be interested in labour practices. Andrew Dunsmire explains the regulatory technique of putting private sources of pressure to work in pursuit of government objectives as “collibration,” the goal of which is as follows:

---

43. Estlund, *Regoverning*, *supra* note 7 at 133.

44. Orly Lobel notes 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.” See “Renew Deal,” *supra* note 7 at 373.

45. Roderick A Macdonald, “Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism” (1998) 15:1 *Ariz J Int’l & Comp L* 69 at 77.



[T]o identify, in any area of interest, what antagonistic forces already operate, what ... configuration presently obtains, and what intervention would help create a more desirable position ... not by ... laying down a standard or a prohibition ... but by giving that degree of ad hoc support to the side which needs it as will do the trick.<sup>46</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 emphasis on the potential role of non-state actors in shaping business behaviour influences not only the form of potentially viable regulation but also the sort of research questions lawmakers and scholars should explore. The various actors, or stakeholders, must be mapped to identify their place and role within the web of influence in 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 among the various actors. By investigating and mapping these relationships, the decentrist can then begin to identify what legal signals deployed into the milieu might promote 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 external pressures and forces 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 (*e.g.*, brand reputation, market share, share price, or profitability), or to their own personal interests and ambitions (*e.g.*, poor performance evaluations, loss of bonuses, discipline, or dismissal), we anticipate that they will take steps to eliminate or reduce those risks. In theory, these risk management responses may include steps that improve the likelihood of compliance with the state's own policy objectives. This creates the possibility of using regulation to agitate internal management systems or to induce them to change by "injecting risk."<sup>47</sup>

Michael Power notes that risk management processes seek to normalize or embed greater responsiveness to potential sources of risk into the habits and routines of firms.<sup>48</sup> By deploying legal signals that economic actors will perceive as

46. "Modes of Governance" in Jan Kooiman, ed, *Modern Governance: New Government-Society Interactions* (London, UK: SAGE, 1993) at 34; See also Black, "Decentering," *supra* note 10 at 127.

47. Doorey, "Who Made That," *supra* note 9.

48. "Risk Management and the Responsible Organization" in Richard V Ericson & Aaron Doyle, eds, *Risk and Morality* (Toronto: University of Toronto Press, 2003) 145 at 153.

the introduction of a new risk, the state can activate risk management responses that might cause greater attentiveness to government regulatory standards to be embedded as a norm. The most common example of this, discussed in more detail below, is through information disclosure regulation. Requiring firms to collect and disclose information that, once made public, could harm firm reputation or be used by antagonistic actors to embarrass the firm may cause firms to design new systems to reduce the risk associated with the information disclosure.<sup>49</sup> This might include better internal monitoring of potentially harmful practices and greater responsiveness to those practices once uncovered. In this way, information disclosure regulation can help achieve public policy objectives indirectly.<sup>50</sup>

Using risk to influence internal management systems would also require a different sort of research agenda for lawmakers and workplace law scholars than what they have been used to. First, they would need to identify the sources of risk, or more specifically, what the targeted firms perceive as the sources of risk related to labour practices. Second, they would have to explore how risk signals, or how the presence of external risks, penetrate the firms' decision-making apparatus. How do managers become aware of risks and monitor them? Third, they would be interested in learning how knowledge of the risk signals translates into action within a firm: What sorts of steps do firms take to manage or reduce the risks once they have been identified? And last, they would want to consider whether regulation could be used to alter those risks, for example by elevating them, perhaps by increasing the potential damage to firms that fail to introduce precautionary measures desired by the state.

### III. COMMON TOOLS OF DECENTRED REGULATION

What are the lessons from all of this for regulatory design? Black summarizes the decentred regulatory 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

---

49. *Ibid* at 145, 153. Power observes that "risk management" creates "an inner regulatory space" within firms that has the potential to "enfranchise" external stakeholders by giving voice within the organization to their concerns and interests. See also discussion in Doorey, "Who Made That," *supra* note 9.

50. See discussion in Doorey, "Who Made That," *ibid* at 372-76.

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>51</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. MULTIPLE REGULATORY STREAMS

One technique is the use of multiple regulatory streams. This strategy draws on the insight that a “one model fits all” approach to regulation may underutilize the state’s potential to influence behaviour through a mixture of risk and reward, incentives and sanctions. In theory, if properly designed, the state can align its policy objectives with firms’ business objectives by conditioning a more favourable regulatory stream on compliance with the state’s desired norms. The state’s preferred mode of behaviour is thus incentivized.<sup>52</sup>

Orly Lobel has praised this approach in relation to American experiments in occupational health and safety regulation.<sup>53</sup> Lobel cites the Maine 200 pilot program developed in the 1990s, which sought to reduce high levels of workplace accidents in that state. The Maine area office of the federal Occupational Safety and Health Administration (OSHA) had devoted substantial resources to enforcement of the reams of rules and standards in the legislation and regulations, and yet workplace accidents remained high. Lobel notes that prior to the adoption of the Maine 200 program, Maine’s OSHA office “was imposing the most fines and still had the worst injury and illness rates in the country.”<sup>54</sup>

In 1993, the 200 firms with the highest rates of lost days due to injuries were given a choice: experience increased government inspections for compliance under existing regulations, or participate in an alternative cooperative stream in which the state would principally educate and guide self-regulation. Almost all of the organizations opted for the new program. They were required to develop and adopt a workplace safety program, aided by the OSHA. The program required

---

51. Black, “Decentring,” *supra* note 10 at 111-13.

52. This is an operational assumption in Ayres & Braithwaite, *supra* note 8. They propose a model that incentivizes effective self-regulatory schemes while threatening progressively heavier sanctions for businesses that do not effectively self-regulate.

53. See “Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety” (2005) 57:4 Admin L Rev 1071; See also Estlund, *Regoverning*, *supra* note 7 at 78-82.

54. Lobel, *ibid* at 1117.

organizations to report problems and then work with the OSHA to address them. According to Lobel:

Maine 200 was proclaimed as a great success, winning Ford Foundation and government awards for innovation. Employers self-identified more than 14 times as many hazards as could have been cited by OSHA and significantly lowered their injuries rates.<sup>55</sup>

In the first year of the program, worker compensation claims in Maine dropped by 35%. The perceived success of the Maine project inspired the Clinton Administration, which in 1995 announced a shift in occupational safety and health enforcement “from one of command and control to one that provides employers a real choice between a partnership and a traditional enforcement relationship.”<sup>56</sup>

Cynthia Estlund has argued that preferential regulatory rules and processes, such as fewer inspections, should be offered to employers who adopt a process of self-regulation of employment practices that includes some form of independent representation by their employees.<sup>57</sup> Anticipating the objection that employers’ dislike of unions or other forms of independent representation would dissuade most employers from opting for the high road of self-regulation, she observes:

A crucial part of the calculus will be the nature of the default regime for non self-regulators. Tougher regulatory scrutiny and sanctions on low-road employers will both make the high road more appealing and protect responsible self-regulators from unfair competition.<sup>58</sup>

The state still defines what is required to qualify for the more cooperative stream, and an organization can be thrust back into the more interventionist stream upon failing to satisfy these requirements. However, organizations that opt for the more cooperative stream are given guidance, support, and education by the state and granted the opportunity to prove that they can self-regulate their conduct in accordance with the state’s rules and objectives.<sup>59</sup>

Proponents of multiple regulatory streams identify several potential benefits. One is that compliance is likely to be higher when it makes good business sense

---

55. *Ibid* at 1118.

56. *The New OSHA: Reinventing Safety and Health* (May 1996), online: United States Department of Labor <<http://www.osha.gov/doc/outreachtraining/htmlfiles/newosha.html>>; see discussion in Estlund, *Regoverning*, *supra* note 7 at 80.

57. *Regoverning*, *supra* note 7 at 148-49.

58. “A Return to Governance in the Law of the Workplace” (NYU Law School, Public Law & Legal Theory Series No 10-39, 2010) at 11, online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1640566](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640566)>.

59. Estlund, *Regoverning*, *supra* note 7 at 220.

to comply, and offering incentives for compliance as well as sanctions for non-compliance will increase the probability of more firms electing to comply. By rewarding compliance with a less interventionist state, the model is applauded for positively reinforcing the tendencies of many managers to behave responsibly. In addition, the dual regulatory stream approach can encourage a more efficient use of limited state resources by allowing the state to direct more attention at high-risk actors that show little interest in self-governing.

## B. VARIABLE SANCTIONING MODELS

A related strategy involves reduced penalties for statutory infringements when firms have taken the precautionary procedural steps the state desires. The idea is to give firms credit, in the form of lesser penalties, if they have introduced internal management checks and balances designed to reduce the possibility of a violation, and yet the violation nevertheless occurs.<sup>60</sup> Although the violation is the same in each case, the justification for punishing the former firm to a lesser degree is that it is less blameworthy, since it made reasonable efforts to avoid the problem in a manner endorsed by the state.<sup>61</sup> The expectation is that more firms will take the precautions in order to obtain the benefit of reduced penalties, and fewer violations will occur if more firms take these precautions.

## C. EMPOWERING AND ENABLING PRIVATE ACTORS

Private actors play an important role in the decentred approach to regulation. The state is encouraged to harness the norm-creating potential of non-state actors to achieve public policy goals. There are numerous ways to do this. Some examples include: certifying or importing into regulation privately developed codes of conduct; providing government funding to private agencies and actors who help promote the state's values or enforce regulations; or granting special legal privileges to organizations that perform services of value to the state.

---

60. *Ibid* at 133-35. Estlund notes 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.

61. Orly Lobel explains how the United States Supreme Court has recognized defences to workplace discrimination cases where the employer had adopted anti-discrimination or harassment policies. The cases were: *Kolstad v American Dental Association* 527 US 526 (1999) and *Burlington Industries, Inc v Ellerth* 524 US 742 (1998). See Lobel, "Renew Deal," *supra* note 7 at 421. For a criticism of this approach, see Susan 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) 22:1 Berkeley J Emp & Lab L 1.

The idea of empowering private actors to help achieve public goals is familiar to labour lawyers, who have long appreciated the importance of private norm creation in the workplace setting. For example, Michel Coutu observed recently:

[L]abour 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 area of law.<sup>62</sup>

The Wagner Act model exhibits many elements of a decentred approach to regulation. Namely, it aims to influence conditions of employment by adjusting the power relations in which employment contract terms are bargained by the actors themselves.<sup>63</sup>

Private actors can be extremely knowledgeable about the forces that influence behaviour. To use another labour and employment law example, there are a 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, legal clinics, ethnic-based advocacy groups, faith-based organizations with interests in employment practices within their communities, and even academics.<sup>64</sup> A decentred approach to regulation encourages governments to tap into the wealth of knowledge and experience within these groups in their efforts to improve labour practices.<sup>65</sup>

- 
62. “Labour Law, Legal Pluralism and State Sovereignty” (2007) 13 CLELJ 147 at 151. Gunther Teubner cited collective bargaining law as an example of reflexive law in his early work developing the theory of reflexive law. See Teubner, “Modern Law,” *supra* note 9 at 276; See also Jill Murray, “The Sound of One Hand Clapping? The ‘Ratcheting Labour Standards’ Proposal and International Labour Law” (2001) 14:3 Austl J Lab L 306 at 307; and Estlund, “Ossification,” *supra* note 5 at 1527-29.
63. William B Gould, “The Third Way: Labor Policy Beyond the New Deal” (2000) 48:4 U Kan L Rev 751 at 752.
64. For example, there is a large literature exploring “community unionism” and the efforts of poverty and outreach clinics in investigating and trying to improve compliance with employment regulation. See *e.g.* Cynthia J Cranford et al, “Community Unionism and Labour Movement Renewal: Organizing for Fair Employment” in Pradeep Kumar & Christopher Schenk, eds, *Paths to Union Renewal: Canadian Experiences* (Peterborough: Broadview Press, 2006) 237; and Andy Banks, “The Power and Promise of Community Unionism” (1991) 18 Lab Research Rev 17 at 18-20.
65. See *e.g.* Arthurs, *Fairness at Work*, *supra* note 2 at 199. Professor Arthurs recommended that the federal government consider “providing funding to clinics that advise or represent workers in connection with their employment rights.” The rationale given was this: “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.”

#### D. INFORMATION PRODUCTION AND DISSEMINATION

Information disclosure regulation is another preferred tool in the decentred regulation arsenal for reasons mentioned earlier.<sup>66</sup> Disclosure regulation is usually justified as market-correcting: it corrects information asymmetries that impede the efficient clearing of markets.<sup>67</sup> However, there is also a long history of using information regulation to influence firm behaviour in such areas as environmental and human rights practices.<sup>68</sup> Disclosure can lead to better-informed actors. It facilitates self-learning or self-referential fact-finding; a firm that does not know it is engaging in harmful behaviour is unlikely to take steps to alter that behaviour. It 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>69</sup>

Disclosure regulation can also empower private actors in their engagements with the disclosing firms. By providing information about firm behaviour to private watchdogs, it can alter the relative balance of power between the firms and the watchdogs and thereby alter the dynamic of the negotiations. If disclosing information about some aspect of firm performance could potentially influence sales or increase public appetite for more formal government oversight, then it can 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.

### IV. THE POLITICAL ECONOMY OF CONTEMPORARY WORKPLACE REGULATION

Any proposal for workplace reform will meet resistance. There will always be those on the political right who reject any form of employment regulation, and

---

66. See discussion in Doorey, "Who Made That," *supra* note 9 at 374; Lobel, "New Governance," *supra* note 16 at 641-42; Paula J Dalley, "The Use and Misuse of Disclosure as a Regulatory System" (2007) 34 Fla St UL Rev 1089; and Cynthia Estlund, "Just the Facts: The Case for Workplace Transparency" (2011) 63 Stanford L Rev 351; Archon Fung, Dara O'Rourke & Charles Sabel, *Can We Put an End to Sweatshops?* (Boston: Beacon Press 2001).

67. See Dalley, *ibid* at 1094; See also Mary Graham, *Democracy By Disclosure: The Rise of Technopopularism* (Washington: The Brookings Institution, 2002); Robert E Verrecchia, "Essays on Disclosure" (2001) 32:1-3 J Acct & Econ 97.

68. *Ibid*; Bradley C Karkkainen, "Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?" (2001) 89:2 Geo LJ 257.

69. See *e.g.* Arthurs, *Fairness at Work*, *supra* note 2 at 81.

people on the political left who oppose reforms that fall short of overhauling capitalist relations, or that do not prioritize collective bargaining above all else. Reforms that have survived the legislative process over the past forty years have been forged in modest dimensions from the middle ground between these positions. One test for decentred regulatory theory is whether it offers any insight into the challenge of steering workplace law out of its slumber in ways that could ultimately improve working conditions. This does not require consensus across the political and ideological spectrum—an impossible feat—but sufficient movement in the centre-left and centre-right within that spectrum to develop a critical mass of political and public support for innovative and useful reforms.

As a preliminary exercise, it is useful to consider the political landscape as it pertains to workplace law in Canada today. The “hegemony of industrial pluralism” that dominated since the early 1950s has been eroding since the 1980s.<sup>70</sup> By the turn of the century, industrial pluralism, and its preference for collective bargaining, had fallen so far from favour that one of its leading voices, Harry Arthurs, had pronounced its death.<sup>71</sup> Pluralism came under attack from the neoclassical perspective;<sup>72</sup> neoclassicalists reject state-sponsored support for collective bargaining on the grounds that it distorts the free operation of labour markets, producing harmful economic outcomes.<sup>73</sup> They argue for limited state involvement in the regulation of the employment relationship in order to permit “free” markets to establish equilibrium conditions of employment.<sup>74</sup> The ascendancy of the law and economics model associated with the neoclassical

70. Judy Fudge & Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Toronto: Oxford University Press Canada, 2001) at 302-03; Paul Weiler, “Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA” (1983) 96:8 *Harvard L Rev* 1769 at 1769; Leo Panitch & Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, 3d ed (Toronto: Garamond Press, 2003) ch 9.

71. “Landscape and Memory: Labour Law, Legal Pluralism, and Globalization” in Ton Wilthagen, ed, *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (Amsterdam: Koninklijke Nederlandse Akademie van Wetenschappen, 1998) 21 at 25.

72. Paul C Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Cambridge: Harvard University Press, 1990) at 118-24 [Weiler, *Governing*]; Panitch & Swartz, *supra* note 70; Dan Crow & Greg Albo, “Neo-Liberalism, NAFTA, and the State of the North American Labour Movements” (2005) 6 & 7 *Just Lab* 12.

73. See e.g. Richard A Posner, “Some Economics of Labor Law” (1984) 51:4 *U Chicago L Rev* 988; Richard A Epstein, *Simple Rules for a Complex World* (Cambridge: Harvard University Press, 1995) at 162-63; Richard A Epstein, “A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation” (1983) 92:8 *Yale LJ* 1357; Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 12-15; Weiler, *Governing*, *ibid* at 122-24.

74. *Ibid.*



perspective from the 1980s is an important part of the story of the stagnation of labour law in both countries over the past quarter century.

But it is only part of the story. The prescriptions of the neoclassical school have not been adopted, except at the margins. Work remains among the most regulated of relationships and collective bargaining remains embedded in labour statutes. The ascendancy of the neoclassical perspective manifests itself in more subtle ways, such as a reduced emphasis on enforcement of employment regulation, budget cuts to labour ministries, and an unwillingness to modernize existing legislation to make it more effective as the nature of work has evolved. A full frontal attack on government intervention in the employment relationship of the sort called for by neoclassicalists would have no political legs.

The dominant perspective on workplace law today is neither neoclassical nor pluralist. Industrial pluralism has given way to a perspective approximating what the industrial relations literature describes as the unitarist or managerialist perspective.<sup>75</sup> The managerialist perspective is closely aligned with contemporary Human Resources Management (HRM). It describes collective bargaining in mostly negative terms, as rigid, confrontational, and costly for employers. These attributes are said to be particularly harmful in the hyper-competitive era of economic globalization, when managerial flexibility is crucial. In this climate, high levels of trust are required between employee and employer so that employers can tap into employee knowledge.<sup>76</sup> The managerialist believes that employers can design human resource systems that foster trust by creating work environments in which employees are treated with decency, fairness, and respect, and that it is preferable to do this without collective bargaining.

The defining feature of the managerialist position on labour and employment law is the belief that, ideally, neither is necessary. Employers have an economic interest in treating workers fairly, since engaged, satisfied workers are more productive workers who are also more likely to buy into the organization's goals and to share useful information.<sup>77</sup> Regulation can be useful insofar as it

---

75. See e.g. John Godard, *Industrial Relations, the Economy, and Society*, 3d ed (Concord: Captus Press, 2005) at 12-15; John W Budd & Devashresh Bhava, "The Employment Relationship" in Adrian Wilkinson et al, eds, *The SAGE Handbook of Human Resource Management* (London, UK: SAGE, 2010) 51.

76. Hugh Collins, "Is There a Third Way in Labour Law?" in Anthony Giddens, ed, *The Global Third Way Debate* (Cambridge, UK: Polity Press, 2001) 300 at 306 [Collins, "Labour Law"].

77. This idea can be traced to the early work of Elton Mayo, in which he argued that industrial democracy movements in Britain and the United States would enthrone "collective mediocrity" within the industry," (at 56) while also arguing that business methods that "take no account of human nature and social motives" would lead to "strikes and sabotage"

encourages employers to adopt progressive HRM policies and supports their efforts to do so. However, the fact that the state perceives a need for employment regulation and supportive collective bargaining legislation is perceived as a failure of management, as John W. Budd and Devasheesh Bhave describe:

Labor unions and government-mandated labor standards are viewed as unnecessary in the [managerialist] employment relationship. When employers successfully align their interests with their employees' interests through effective human resource management practices, employees will be satisfied and will not support a labor union or need-mandated employment standards. The presence of a union or employment law is taken as a signal of failed human resource management practices. Unions are further seen as outside third parties that add conflict to what should be a conflict-free employment relationship.<sup>78</sup>

The view that unionization is a response to poor management and weak HRM practices is widely held among contemporary North American managers. It is espoused regularly in management and HRM literature<sup>79</sup> and captured in popular HRM slogans, such as “you get the union you deserve.”

Richard B. Freeman and Joel Rogers found that about one-third of American managers believed that a decision by workers under their supervision to unionize would reflect poorly on their managerial skills and harm their careers.<sup>80</sup> Not surprisingly, therefore, the HRM profession encourages managers to develop employment practices that will remove the incentive for employees to unionize.

---

as an ordinary aspect of commerce (at 53). See *Democracy and Freedom: An Essay in Social Logic* (Melbourne: Macmillan & Co, 1919). His later work, including his studies in the famous Hawthorne experiments, set the foundation for the human relations and later human resource management schools. See *The Human Problems of an Industrial Civilization* (New York: The Macmillan Company, 1933); see also Paul Edwards, “The Employment Relationship and the Field of Industrial Relations” in Paul Edwards, ed, *Industrial Relations: Theory and Practice*, 2d ed (Malden: Blackwell, 2003) 1 at 10-11; Alan Fox, *Industrial Sociology and Industrial Relations* (London, Her Majesty's Stationary Office, 1966) at 5-6.

78. *Supra* note 75 at 64.

79. A common theme in human resources literature and scholarship is that employers can avoid unionization by removing employee demand for unionization through human resource policies. This strategy is often labeled “union substitution” or “union avoidance” in the Human Resources Management (HRM) and industrial relations literature. See Jon Peirce & Karen Joy Bentham, *Canadian Industrial Relations*, 3d ed (Toronto: Pearson Prentice Hall, 2007) at 41. For example, one leading Canadian human resources textbook advises that “[t]he 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.” See Monica Belcourt, George Bohlander & Scott Snell, *Managing Human Resources*, 6th ed (Toronto: Nelson Education, 2010) at 556.

80. See *What Workers Want* (Ithaca: Cornell University Press, 2006) at 116.

For example, a leading professional HRM association in Canada holds regular seminars designed to teach managers what policies will achieve this result. A recent seminar flyer included the following instructive:

If you are union-free, you should try to stay that way. This is not a matter of magic, legal trickery or blind luck. It takes consistent and effective management practiced day-in and day-out, based on a long-term plan. The union only has to succeed once. To remain union-free, management has to succeed every single day, forever and always.<sup>81</sup>

HRM instructs managers to avoid unions by “offering employees many services provided by union workplaces.”<sup>82</sup> In other words, the unionized workplace is a source of information in the managerialist perspective about decent and fair employment practices.

The perspective that workers join unions primarily as a response to perceived unfair treatment at the hands of their employer finds support in surveys of workers too. For example, the Freeman and Rogers survey measured the demand for unionization by non-union American workers, and found the following:

- 90% of employees want a union when relations between employees and employers are either Poor (50%) or Fair (40%), whereas only 20% of employees want a union when employee-employer relations are excellent.
- 57% of employees want a union when they perceive management to be untrustworthy, whereas only 20% want a union when they have a lot of trust in management.
- 71% of employees want a union when management shows little concern for employees, whereas only 27% want a union when management shows a high level of concern for employees.
- 69% of employees want a union when their perceive management is unwilling to share power with employees, whereas only 18% want a union when they perceive management’s willingness to share power is excellent.<sup>83</sup>

---

81. Human Resources Professionals Association, *Protecting Your Organization from Unionization: How to keep your workplace union-free* (10 November 2010), online: Canadian HR Reporter <<http://www.hrreporter.com/DynamicData/AttachedImages/Webinar/html/Browser-ProtectingYourOrgNov10-2010.html>>.

82. Anil Verma, “What Do Unions Do to the Workplace? Union Effects on Management and HRM Policies” (2005) 26:3 J Lab Research 415 at 443 (and studies cited therein).

83. Freeman & Rogers, *supra* note 80 at 110.

These results support the managerialist claim that progressive HRM strategies lessen the demand for union representation. They also demonstrate that there is a high level of demand for unionization among employees of employers who do not adopt such policies and who treat their employees unfairly. In short, employees of “low road” employers have a high demand for unionization, as the managerialist perspective predicts.

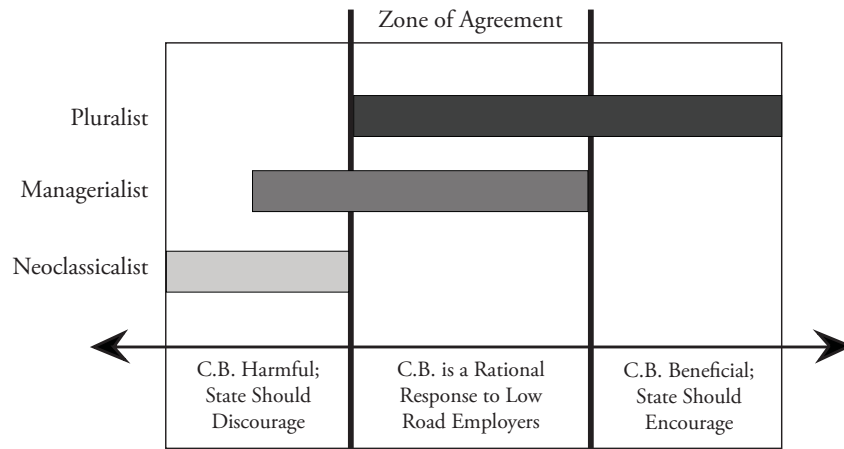
The position that unions are principally a response to bad management has obvious political attractions. The neoclassical position that collective bargaining and employment regulation are *always* bad is too polarizing or extreme for many politicians and voters. The notion that unions serve a useful purpose by providing employees of bad, low road employers with “voice” as an alternative to “exit”<sup>84</sup> allows such politicians and voters to straddle a middle political ground. They are not against unions and collective bargaining *per se*, but nor do they believe the state should aggressively promote wide-scale unionization. Rather, they argue that the state’s role should be to encourage employers to treat their employees responsibly—to be high road employers—since this will improve productivity and employee (voter) contentment and contribute to the goal of a reasonable distribution of wealth while still giving workers access to collective bargaining when their employers mistreat them. Supporting unionization of low road employers demonstrates empathy with working people, while not *privileging* collective bargaining over the non-union, individual bargaining model.

This outlook leads managerialists to co-opt the language of employee choice and workplace democracy in order to emphasize their view that opting for unionization is an unusual decision. The managerialist assumes that most employers are “good” (that is, respectful, fair, and law-abiding) and that employees of a good employer will not unionize unless they are somehow misled or confused about the decision they are making. Thus, laws are needed to encourage and facilitate employer communications about unionization, and to ensure that employees have a right to a secret ballot vote on unionization and de-unionization (or decertification). If these conditions are satisfied, and a majority of employees still select unionization, then the managerialist presumes that workers were treated so unfairly that they felt unionization was their best option short of quitting. In that case, the managerialist believes that the state is justified in imposing collective bargaining and a duty to bargain on the employer.

---

84. Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge: Harvard University Press, 1970).

FIGURE 1: PERSPECTIVES ON THE BENEFITS OF UNIONS AND COLLECTIVE BARGAINING (CB)



This brief recounting of the managerialist perspective was intended to demonstrate a potential overlap with the pluralist perspective. Although there is profound disagreement about the overall utility of unions and collective bargaining, there is agreement that collective bargaining is a rational mechanism to deal with low road employers. Both perspectives agree that unionization may actually improve the situation at low road employers—certainly for employees, but perhaps also for the business. Industrial relations research demonstrates that unionization can shock employers into adopting more effective management techniques as well as introducing more employee training and better systems of communication with employees.<sup>85</sup>

A basis for an uneasy political alliance between supporters of the managerialist and pluralist perspectives emerges, as demonstrated in Figure 1. Dominant perspectives on the appropriate role of unions and collective bargaining today range along a continuum. For our purposes, we can place the neoclassical perspective at one end and the pluralist at the other. Neoclassicalists reject any useful role for unions and collective bargaining and argue that the invisible hand of the market will deal with truly bad employers who mistreat employees. Pluralists, on the other hand, believe that unions and collective bargaining are necessary to counter the inherent imbalance of power in the employment relationship and to provide employees with a real voice in the workplace, and as such have intrinsic value.

85. Anil Verma summarizes the extensive literature looking at the impact of unionization. See Verma, *supra* note 82.

The managerialist perspective falls between these positions. It is sympathetic to the neoclassical position that collective bargaining is unnecessary and potentially disruptive to the economic goals of productivity, flexibility, and profitability. However, managerialists place their trust in enlightened employers, not in theoretical economic models to ensure workplaces that are productive and efficient, but also equitable to workers. Thus, as Figure 1 demonstrates, there is a potential zone of agreement between the managerialist and pluralist perspectives when it comes to dealing with recalcitrant, low road employers who treat their employees poorly.

The political majority no longer accepts the pluralist claim that workers *need* collective bargaining. Neither does the majority accept the claims of neoclassicalists that the state should get out of the business of regulating employment contracts and abolish unions and collective bargaining. Instead, the prevailing view lies in the shared space that accepts a legitimate role for collective bargaining but a considerably more limited one than was the dominant view for most of the post-war period.<sup>86</sup>

The managerialist perspective that I have just described as politically dominant is nevertheless highly controversial. It is attacked from both the political left and right. If one believes that collective labour rights are fundamental human rights, for example, then the claim that employees do not need union representation so long as their employer maintains 'progressive' HRM policies is highly offensive.<sup>87</sup> Critical scholars and pluralists find preposterous the claim that a combination of markets and unilateral management practices can protect workers' interests.<sup>88</sup>

---

86. This dynamic is evident in political discourse surrounding recent labour law reform initiatives, such as the 12 August 1992 exchange between an Ontario Conservative Party opposition member (Elizabeth Witmer) and a Director of the United Steelworkers of America (Henry Hynd) during labour law reform consultations in the early 1990s. See Ontario, Legislative Assembly, *Standing Committee on Resources Development*, "Bill 40, Labour Relations and Employment Statute Amendment Act, 1992" (12 August 1992), online: <[http://www.ontla.on.ca/web/committee-proceedings/committee\\_transcripts\\_details.do?locale=en&Date=1992-08-12&ParlCommID=499&BillID=&Business=Bill+40%2C+Labour+Relations+and+Employment+Statute+Law+Amendment+Act%2C+1992&DocumentID=17907](http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&Date=1992-08-12&ParlCommID=499&BillID=&Business=Bill+40%2C+Labour+Relations+and+Employment+Statute+Law+Amendment+Act%2C+1992&DocumentID=17907)>. Both speakers—a conservative politician and a labour leader—agreed that employees would be unlikely to want a union if their employer treats them decently, and that employees would be more likely to opt for unionization if their employer treats them unfairly.

87. See e.g. James A Gross, ed, *Workers' Rights as Human Rights* (Ithaca: Cornell University Press, 2003); Roy J Adams, *Labour Left Out: Canada's Failure to Protect and Promote Collective Bargaining as a Human Right* (Ottawa: Canadian Centre for Policy Alternatives, 2006).

88. See e.g. Eric Tucker, "Industry and Humanity Revisited: Everything Old is New Again," Book Review of *Governing the Workplace: The Future of Labor and Employment Law* by Paul C Weiler (1991) 36:4 McGill LJ 1481; Weiler, *Governing*, *supra* note 72 at 218, 235-36.

Pluralists and neoclassicalists alike reject the claim that the principal role for unions and collective bargaining should be to deal with ‘bad’ employers, but for very different reasons. Pluralists perceive inherent value in collective bargaining for all employees (and employers as well),<sup>89</sup> whereas the neoclassicalists argue that market forces alone will discipline ‘bad’ employers.<sup>90</sup>

My point is not that the managerialist perspective is correct. The managerialist position that collective bargaining is unnecessary but nevertheless a rational response by employees to poor HR practices has become politically dominant only because it carves out enough common space from the various perspectives to erect an uneasy political middle ground. Centrists with a neoclassicalist bent can tolerate the limited role for unions in the managerialist perspective since it accepts that the non-union model is preferable. For centrists who lean more towards the pluralist approach, the managerialist perspective at least affirms a legitimate role for collective bargaining and unions.

The ascendancy of the managerialist perspective shapes the range of viable legislative reforms in workplace law, just as the Pluralist perspective guided the development of the Wagner Act model in the post-war era.<sup>91</sup> Reforms most likely to gain traction are those that can be molded to fit within the worldview of the managerialist perspective. Managerialists are ambivalent towards employment standards laws.<sup>92</sup> A reasonable set of base norms set down in regulation can act as a signal to employers identifying the minimum expected level of decent employment practices within a jurisdiction. Managerialists will argue against standards perceived to be too high or too inflexible to be useful as a base default, but they also expect employers to comply with those standards that the government has fixed. Obeying employment laws is part and parcel of the techniques a responsible employer deploys in order to attract the loyalty, trust, and commitment from employees that is necessary to exact maximum output.

As discussed above, while managerialists reject calls for aggressive state intervention to promote wide-scale collective bargaining, they are more sympathetic to the argument that the state should ensure that mistreated workers have access to collective bargaining. If they do not, and employment standards regulation continues to be poorly implemented, then these workers will either

---

89. Weiler, *ibid*; Guy Davidov, “The (Changing?) Idea of Labour Law” (2007) 146:3-4 *Int’l Lab Rev* 311.

90. Armen A Alchian & William R Allen, *University Economics*, 3d ed (Belmont: Wadsworth, 1972) at 407; Milton Friedman & Rose Friedman, *Free to Choose: A Personal Statement* (New York: Harcourt Brace Jovanovich, 1980) at 218, 235-36.

91. Weiler, *Governing*, *supra* note 72 at 121.

92. Godard, *supra* note 75 at 15.

quit or be left to toil under poor and abusive working conditions. Neither outcome is acceptable to the managerialist because both produce inefficient workplaces staffed by unmotivated and disloyal workers. This is the antithesis of what the managerialist perceives to be necessary for the modern high performance workplace.

## V. A DECENTRED PROPOSAL FOR WORKPLACE LAW REFORM

It is possible to design a workplace law reform package that draws on the lessons of decentred regulation and that is consistent with the dominant managerialist perspective. The principal objectives would be twofold:

1. To encourage employers to adopt high road HRM practices (including, at least, compliance with the government's minimum employment standards); and
2. To ensure that non-union workers whose employers fail to adopt those high road HRM practices have access to collective bargaining to protect their interests.

Our existing laws are inadequate on both accounts. First, as noted previously, there are persistent high levels of non-compliance with even minimum employment standards regulation.<sup>93</sup> This demonstrates that many employers are either ignorant of their statutory obligations or unmotivated to comply with them and that the existing legal model is failing to remedy this problem.

Second, the existing union certification model is heavily stacked against employees who desire collective bargaining, particularly when their employer is prepared to wage a heavy campaign against unionization. Even the worst low road employers, those that persistently violate employment laws for example, are still permitted to wage a pitched battle against their employees' efforts to secure collective bargaining. They have at their disposal every legal right to resist such efforts that is available to the best of the high road, law-abiding employers. From a decentred perspective, this represents a significant wasted opportunity to steer employers towards greater attentiveness to employment standards. Employers who can ignore basic employment standards laws and still effectively impede their workers from unionizing also pose a problem for the managerialist. Workers of those low road employers have no viable voice mechanism<sup>94</sup> to improve

---

93. *Supra* note 2.

94. *Supra* note 84.



their working conditions: They will either quit, causing high turnover, or toil under poor conditions—neither of which will produce the efficient workplaces managerialists desire.

One decentred response to this problem becomes immediately evident: create two regulatory streams, one for law-abiding employers who obey the state's employment standards (the low-risk stream), and another for employers who demonstrate a lack of capacity or willingness to comply with the state's basic employment laws (the high-risk stream). This model would require a clear statement of what rules need to be complied with in order to qualify for the more favourable low-risk stream. Should breach of any work-related statute put an employer in the high-risk stream? Or, would the state wish to place special emphasis only on the breach of some special subset of rules?

One option that would be consistent with the decentred approach would be to allow private actors themselves to develop a code that defines the bundle of rules that must be complied with in order to remain in the low-risk stream, perhaps working within parameters set down by the state. For example, a coalition of employers could engage in discussions with the major union organization (such as the provincial labour federation) and representatives of organizations that represent non-union workers. The code of conduct that emerges could then form the basis for the law's distinctive treatment of high and low-risk employers.<sup>95</sup> If the actors cannot agree on a model code, the state would implement its own, creating an incentive for employers to negotiate a voluntary agreement.

This is not as farfetched as it might at first sound. Recent Australian legislation instructed key players in the textile and clothing industries, including producers, retailers, and the textile union, to negotiate a code of practice for the employment of home workers. Failing voluntary agreement, the legislation provided that the state would impose its own mandatory code that would govern employment practices in the industries.<sup>96</sup> When the legislation was introduced, the government representative explained this aspect of the legislation as follows:

---

95. The New York City Greengrocer Code of Conduct operates in this way: In exchange for a conditional amnesty on some past employment standards violations, grocery employers were encouraged to bargain a code of conduct for employment practices with union and NGO representatives that would serve as the basis for ongoing government inspections. See Estlund, *Regoverning*, *supra* note 7 at 112.

96. See discussions in Michael Rawling, "A Generic Model of Regulating Supply Chain Outsourcing" in Christopher Arup et al, eds, *Labour Law and Labour Market Regulation* (Annandale: Federation Press, 2006) 520; Shelley Marshall, "Australian Textile Clothing and Footwear Supply Chain Regulation" in Colin Fenwick & Tonia Novitz, eds, *Human Rights at Work: Perspectives on Law and Regulation* (Oxford: Hart, 2010) 555.

The introduction of a mandatory code of practice for the clothing industry is provided for in the bill. However, it is not the Government's preferred option. A mandatory code will only proceed if the self-regulatory mechanisms fail to deliver lawful entitlements to outworkers or the industry participants are not attempting in good faith to negotiate improvements or extensions to those mechanisms.<sup>97</sup>

A voluntary code was agreed upon, which the state then incorporated into law, making it mandatory. A benefit of this approach is that it would include employer buy-in. Presumably, the standards that emerged would be ones that industry itself accepts as reasonable and attainable.

However, we can keep our model simple for the purpose of this general discussion. Even if the state were to contract out the development of a code of conduct, what emerged would certainly include a requirement to comply at least with some of the most obvious and important existing employment-related rules. It could include more than this, but it would surely include at least this much. So we can begin with that. The state could select a bundle of core laws that it wishes to emphasize and identify those laws as the "Base Code of Responsible Employment Practices" ("Code"), similar to the American government's "effective compliance program" used to define which companies are granted preferential sentencing, mentioned earlier in Part II.<sup>98</sup> This Code might include, for example, the following important rules governing employment practices:

- Minimum wage
- Overtime pay rules
- Hours of work restrictions
- Termination and severance pay requirements
- Unfair labour practices governing union organizing campaigns

The latter refers to legislative restrictions found in labour relations statutes that prohibit employers from interfering with employees' decisions about whether to unionize through threats, intimidation, promises, or coercion (including dismissals or punishment of union supporters).<sup>99</sup>

While violating laws not included in the Code will still attract the usual array of sanctions (fines, back pay orders, et cetera), an employer that violates one of the laws included in the Code would, in addition to the normal remedies, forfeit

97. See New South Wales, Legislative Council, *Hansard* (11 December 2001) at 1959 (Hon John Della Bosca), online: <<http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LC20011211037>>.

98. See discussion in Parker, *supra* note 41.

99. See, for example, the *Labour Relations Act*, SO 1995, c 1, ss 70, 72, 76 [*OLRA*] (which sets out the relevant restrictions in Ontario).

a bundle of additional legal rights and benefits available only to employers who have earned their place in the low-risk stream by demonstrating responsible, law-abiding behaviour. This alone is a very different way of thinking about workplace law than what we are used to in Canada. It blurs the distinction between the employment standards and labour relations regimes in a way we are not used to. But it is consistent with the decentred approach to regulation: It uses sticks *and* carrots to steer behaviour, and it deploys the risk of forfeiting valued rights to resist collective bargaining with the expectation that employers averse to collective bargaining will find greater value in learning and complying with the Code and will accordingly adjust their internal management systems to promote legal compliance. It also harnesses the knowledge and power of private actors, including unions and other actors interested in protecting workers' interests in ways I will explain below.

Having explored how the law might differentiate between high- and low-risk employers, we can now flesh out how the two regulatory streams might vary. What would law-abiding, low-risk employers receive to encourage continued legal compliance? What rights would law-breaking, high-risk employers forfeit under this model? The distinction needs to be sufficiently stark to create an incentive to comply with the Code, while also facilitating access to collective bargaining for employees of high-risk employers. Some familiar possibilities come to mind. For example, high-risk employers could be disqualified from receiving various government benefits, such as procurement possibilities in government tenders, government business licenses needed to conduct various types of activities, and tax incentives.<sup>100</sup> Government inspections of employment law compliance could be more frequent for high-risk employers on the theory that they pose a greater risk of non-compliance.<sup>101</sup> This would assist governments in targeting scarce resources at high-risk areas. Transparency could be useful here too; the state could publish a "sunshine list" of employers who violate the Code as a form of public shaming, which could motivate some employers who are sensitive to negative publicity.<sup>102</sup>

---

100. Interestingly, the Ontario Minister of Labour recently contacted the Mayor of Nashville to request that an employer that had violated Ontario's *Employment Standards Act* not be awarded a lucrative telecommunications contract from the Nashville government. See "Oshawa Closure: A matter of worker rights", *The Toronto Star* (20 July 2011), online: <<http://www.thestar.com/opinion/editorials/article/1028006--oshawa-closure-a-matter-of-worker-rights>>.

101. See Estlund, *Regoverning*, *supra* note 7 at 219-21.

102. The Ontario government is already moving in this direction. See *Employment Standards Act*, SO 2000, c 41, s 138.1. This recently enacted provision empowers the Ministry of Labour to publish the names and offences of persons and companies that have committed offences

However, an even more novel and powerful set of incentives can be built into our dual regulatory track model that would help achieve both key objectives cited above: encouraging compliance with the Code, and ensuring that employees of high-risk employers are able to secure access to collective bargaining despite predictably hostile resistance from their law-breaking employers. The law could create a distinction in the bundle of rights available to employers to participate in the union organizing process. As noted earlier, employers are presently granted a considerable arsenal of legal rights to resist their employees' attempts to gain access to collective bargaining. These rights could be treated as earned rights available only to responsible, law-abiding employers, rather than unconditional entitlements as the law currently treats them.

The rights I am referring to include: speech rights to campaign against unionization; property rights to exclude union organizers from non-working areas of employer property; and the right to insist on a certification ballot in the face of documentary union membership evidence representing a majority of bargaining unit employees. All of these rights to resist unionization have been restricted in Canada (and abroad) at one time or another, so nothing in this proposal is revolutionary. However, making these rights contingent upon a demonstration of responsible employment practices does require a new way of thinking. There is much to commend the idea.

Consider more closely the rights our existing laws confer on employers to resist their employees' efforts to secure access to collective bargaining. First, common law and trespass to property legislation grant employers the right to exclude union organizers from any place on employer property.<sup>103</sup> Second, in most Canadian jurisdictions employers have broad rights to proselytize against collective bargaining through "captive audience meetings" in which employees are ordered to stop work and listen to the employer's message through one-on-one discussions, by email, in literature, on bulletin boards, and even at an employee's home.<sup>104</sup> Laws impose restrictions on the content of the speech—there cannot be threats, intimidation, or promises of rewards for rejecting unionization. However,

---

under the Act. Each month the government publishes a list of offenders, including their offence and fine.

103. See Patrick Macklem, "Property, Status, and Workplace Organizing" (1990) 40 UTLJ 74; Dianne Avery, "Federal Labor Rights and Access to Private Property: The NLRB and the Right to Exclude" (1989) 11:2 Indus Rel LJ 145.

104. The federal Labour Board restricts employer speech to a much greater extent than its provincial counterparts, generally denying a right of employer anti-union speech. See *Union Bank of Employees (Ontario), Local 2104 v Bank of Montreal* (1985), 10 CLRBR (NS) 129 (WL) [*Bank of Montreal*].

the law's preference for employer communicative access to workers during the union organizing campaign has long been noted as a peculiarity of the Wagner Act model.<sup>105</sup>

Contrast this model with the British approach to governing certification elections. The British statutory certification system assumes that a purpose of a legal model governing a unionization election should be to promote parity of access to employees to produce a relatively balanced presentation of the issues.<sup>106</sup> The law requires that unions be given access to the workplace during working hours to address the workers to an amount roughly equal to the time spent by the employer communicating with workers. It also facilitates union communication with employees outside of work. The employer must provide the government with the employees' home addresses so that the state can mail union literature to the employees. Canadian laws confer no such rights on unions during organizing campaigns.

Third, employers in most (though not all) Canadian jurisdictions may now insist upon a certification ballot (mandatory ballot) conducted by the state, even when a clear majority of workers have already signed union membership cards indicating their support for collective bargaining.<sup>107</sup> Until the 1990s, the more common model in Canada required only that unions demonstrate majority support in the form of documentary evidence (card-check model). Empirical evidence demonstrates that workers have a much more difficult time getting access to collective bargaining when the process requires unions to collect union membership cards and then also win a subsequent ballot.<sup>108</sup> Scholars attribute this result in large measure to the anti-union campaigns (both lawful

---

105. Macklem, *supra* note 103; Julius G Getman, Stephen B Goldberg & Jeanne B Herman, *Union Representation Elections: Law and Reality* (New York: Russell Sage Foundation, 1976) at 97, 157; Karl E Klare, "Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform" (1988) 38:1 *Cath U L Rev* 1; and David J Doorey, "Union Access to Workers during Organizing Campaigns: A New Look Through the Lens of *BC Health Services*" (2009-2010) 15:1 *CLELJ* 1 [Doorey, "Union Access"].

106. Alan L Bogg, "The Political Theory of Trade Union Recognition Campaigns: Legislating For Democratic Competitiveness" (2001) 64 *Mod L Rev* 875 at 886; Ruth Dukes, "The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?" (2008) 37 *Ind LJ* 236 at 248.

107. The Federal jurisdiction, along with Manitoba, New Brunswick, Prince Edward Island, and Quebec still permit unions to be certified without a ballot upon demonstrating majority support in the form of documentary evidence.

108. See Chris Riddell, "Union Certification Success under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998" (2004) 57 *Indus & Lab Rel Rev* 493; Susan Johnson, "Card Check or Mandatory Representation Vote? How the Type of Union Recognition Procedure Affects Union Certification Success" (2002) 112:479 *Econ J* 344.

and unlawful) waged by employers in the days preceding the ballot.<sup>109</sup> In a card-check system, the opportunity for employers to campaign against collective bargaining is more limited.

When North American unions and employers bargain private contracts governing union campaigns, often referred to as “neutrality agreements,” they focus on these legal rights the North American model confers on employers to resist their employees’ efforts to unionize. Neutrality agreements emerged in the United States in the 1980s and subsequently crossed the border into Canada.<sup>110</sup> They are designed to facilitate a less combative process than that envisioned by the public legal model. The most common terms in these agreements include a requirement for the employer to remain ‘neutral’ and to refrain from arguing against unionization, union access to the workplace and to information enabling it to contact workers outside of the workplace, and a card-check certification process that permits a union to prove majority support by submitting union membership cards alone, rather than also winning a vote.<sup>111</sup> All of these were components of the recently negotiated *Framework of Fairness* neutrality agreement between Magna International, Inc. and the Canadian Auto Workers, for example.<sup>112</sup>

Recall that one of the lessons of the decentred approach is that governments should observe and learn from private norm-making processes. If we want to know how the law could better facilitate unionization of law-breaking, high-risk employers, we need look no further than what unions have bargained themselves in neutrality agreements.

To summarize, therefore, the rights that responsible, law-abiding employers should *earn* in the low-risk stream, and conversely, the legal rights law-breaking, irresponsible employers should *forfeit* in the high-risk stream would include the following:

- 
109. *Ibid*; See also Weiler, *Governing*, *supra* note 72 at 13-15; Karen J Bentham, “Employer Resistance to Union Certification: A Study of Eight Canadian Jurisdictions” (2002) 57:1 RI 159.
110. See discussion in David J Doorey, “Neutrality Agreements: Bargaining for Representation Rights in the Shadow of the State” (2006-2007) 13 CLELJ 41; James J Brudney, “Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms” (2005) 90:3 Iowa L Rev 819. The best known Canadian neutrality agreement involved the 2007 Canadian Auto Workers-Magna International *Framework of Fairness*. See analysis in Martin H Malin, “The Canadian Auto Workers-Magna International, Inc Framework of Fairness Agreement: A US Perspective” (2010) 54:2 Saint Louis ULJ 525.
111. Adrienne E Eaton & Jill Kriesky, “Union Organizing under Neutrality and Card Check Agreements” (2001) 55:1 Indus & Lab Rel Rev 42.
112. See Malin, *supra* note 110.

- *The right of employer speech intended to dissuade workers from supporting collective bargaining and unions.* High-risk employers would be prohibited from proselytizing against unionization.
- *The right to exclude union organizers from non-working areas of the workplace.* High-risk employers would be required to grant some level of access to union organizers to address workers in non-working areas, and/or a means of communicating with the workers outside of the workplace (as already occurs in both the United States and Britain<sup>113</sup>).
- *The right to insist on a secret ballot, even when the union has submitted documentary evidence of majority support.* In other words, a card-check system of certification would replace a mandatory ballot model for high-risk employers.

In practice, since these rights already exist as embedded entitlements in many Canadian jurisdictions, the new model would presumably operate as a forfeiture system: Once an employer was found in violation of the Code by an appropriate adjudicating body, it would forfeit the special rights that low-risk employers have earned. For an even stronger model, the state could go further and make access to first contract arbitration easier in the case of employees governed by the high-risk stream on the theory that an employer that violates employment laws is also at high-risk of trying to avoid a first collective agreement.<sup>114</sup>

The proposal to remove rights to resist unionization and to enable unions to be certified by means of membership evidence would no doubt be met with strong opposition by many employers and opponents of collective bargaining. We are already familiar with the arguments against restricting employer participation in organizing campaigns. Paul C. Weiler described them succinctly more than twenty years ago:

[The] argument for designing a representation procedure that invites extensive employer participation rests not on a principle of fairness to employers as such, but

---

113. In the United States, unions are entitled to receive the home addresses and email addresses of bargaining unit employees prior to a state-conducted ballot. See *supra* note 104 for discussions of the British model.

114. See *OLRA*, *supra* note 99, s 43(2). Existing Canadian labour legislation already conditions access to first contract arbitration on the employer's behaviour. For example, in determining whether to order first contract arbitration in Ontario, the Labour Board can consider the employer's refusal to recognize the authority of the union, the employer's uncompromising bargaining position, or "any other reason the Board considers relevant." A simple amendment could make explicit that a previous violation of employment-related legislation would be a factor the Board should consider in deciding whether to order arbitration.

rather on the practical judgment that only the employer and its management can defend the statutory rights of the antiunion employees.<sup>115</sup>

The argument is that there is a need for employers to make the case to employees for why they are better off dealing directly with their employer, without professional union representation and collective bargaining, since unions certainly will not make that case. Employers are cast in the role of protector of workers, who otherwise are prone to being misled by union organizers. The same basic premise underlies the argument for mandatory ballots; without a vote, employees may be duped or pressured into signing a union membership card without full knowledge of the implications. A vote ensures that the employer will have a chance to present the argument against collective bargaining and guarantees that the employees are completely free of any undue influence when they cast their ballots.

However, as Weiler and many others since have noted, if employers never engaged in threats or intimidation designed to influence votes, those arguments might be persuasive. But in the real world, too many employers cannot resist the temptation to suggest to their employees that bad things might happen if they vote in favour of collective bargaining. Weiler explained:

[A]ll other things being equal, a more informed employee choice would be a freer one, [but] the problem is that when we extend an opportunity to the law-abiding employer to illuminate the issues for its employees, we inevitably create both the opportunity and the incentive for the law-violating employer to intimidate its workers in their decision...<sup>116</sup>

The decentred model discussed in this section strikes at this fundamental dilemma inherent in the majoritarian system established by the Wagner Act model. It distinguishes law-abiding from law-violating employers by placing the latter under stricter state control in order to protect the right of workers to freely access collective bargaining.

There is also a moral justification for the dual regulatory model. An employer that lacks the decency to comply with the state's base Code of decent employment practices demonstrates a high level of disrespect for its employees' interests and a lack of respect for legal authority. The argument that the employer's voice is needed during an organizing campaign in order to inform employees of the supposed benefits of dealing with the employer directly, rather than as a collective, rings particularly hollow when applied to a law-breaking employer. Employers

---

115. *Governing*, *supra* note 72 at 260-61.

116. *Ibid* at 261 [emphasis added].



who violate the Code have demonstrated their unfitness to play the role of employee protectorate, and they should get out of the way so that employees can decide for themselves if the non-union model is serving them adequately. The concern about unions stating mistruths to employees in order to trick or pressure them into signing union cards could be dealt with by the creation of a dedicated neutral government labour relations officer with responsibility to answer employee queries directly.

## VI. EVALUATION AND CONCLUSIONS

I have been discussing an application of decentred regulation at a rather general level. Naturally, there are details that would need to be worked out to fill in the model that are beyond the space limitations of this paper. For example, lawmakers would need to determine the rules governing union access and the card-check model for the employers who have violated Code rules. This should not be difficult, given that there are existing precedents for both. They would need to determine the penalty for employers who exercise rights that they have not earned. For example, what if an employer who by breaching the Code has forfeited the right to argue against collective bargaining nevertheless does so in a captive audience meeting? Perhaps remedial certification would be appropriate in these cases to send a strong message to employers and serve as a deterrent.<sup>117</sup>

The state would also need to decide whether the forfeiture of the legal rights is permanent or temporary. It would probably make sense to allow an employer in the high-risk stream to re-qualify for the low-risk stream after a specified violation-free period and following an inspection by the state. Would a single violation of the state's *Base Code of Responsible Employment Practices* lead to forfeiture of legal rights, or should the two-track model be progressive? Perhaps a single violation could cause the employer to lose some legal rights (like employer speech rights) as a sort of shot across the bow and signal to the employer to get help learning how to comply, but a second violation could lead to a total forfeiture.

These are details that could be worked out without too much difficulty. At a more general level, the model discussed in Part V has several benefits. First, it has the potential to attract broader support than proposals that more aggressively promote collective bargaining, such as the proposal for across the board card-check certification and first contract arbitration found in the failed American

---

117. See *e.g.* *OLRA*, *supra* note 99, s 11. The certification remedy is usually applied only when, due to unlawful employer conduct, it is no longer possible to test the employees' wishes through other means such as card-check or ballot.

*Employee Free Choice Act*.<sup>118</sup> The fact that the dual regulatory stream model draws its inspiration and learns from privately negotiated agreements between unions and employers may allow it to attract support from the labour movement, particularly union organizing departments, and therefore from politicians aligned with the labour movement.

However, unlike many other reform proposals that envision a positive role for unions and collective bargaining, this one has the potential to attract support beyond the labour movement and industrial pluralists. Neoclassicalists who perceive no value in employment standards laws or collective bargaining will never be persuaded. But the model discussed above could find support among managerialists, or at least attract a less hostile response than most other reforms advanced by industrial pluralists. The model incorporates into law the managerialist prediction that employers who treat their employees with respect and decency will face little demand for unionization, but that employers who fail to do so should anticipate an organizing campaign. The model targets only those employers who reject the HRM philosophy that legal compliance and high levels of respect towards employees are necessary to produce efficient workplaces. As a result, politicians and others who argue against the dual regulatory stream would be cast in the role of defending the rights of employers who lack the capacity or decency to comply with even the most basic of minimum employment standards laws. They may not cherish that position. In addition, although unions rank low in recent public opinion polls, the public may be more sympathetic to the argument that unions are helpful in protecting workers from ‘bad’ employers.

Second, the model, although novel in its orientation, is actually quite modest. As noted, the legal rights that law-breaking employers would forfeit are common in private neutrality agreements already being bargained by employers and unions, and none of the restrictions are legislatively novel. Canadian governments have at various times required employers to remain neutral during union organizing campaigns.<sup>119</sup> There are plenty of precedents in Canadian, British, and American

---

118. William B Gould, IV, “The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States” (2008) 43:2 USF L Rev 291.

119. For example, in the federal sector, an employer that attempts to persuade employees to reject collective bargaining is unlawfully “interfering in the formation of a union.” See *e.g.* *American Airlines Inc (Toronto) v BRAC*, [1981] 3 CLRBR 90, 90 CLS 6-3095; *Bank of Montreal*, *supra* note 102. Complete neutrality has also been the rule in Saskatchewan (see *e.g.* *SuperValu v Alberta Food & Commercial Workers, Local 401*, [1981] 3 CLRBR 412 (WL); *Saskatchewan Joint Board (RWDSU) v Brown Industries (1976) Ltd* [1995], SLRBD No 19) and British Columbia (see *e.g.* *IWA Local 1-357 v Consumer Pallet Ltd*, [1974] BCLRBD No 37 (QL)).

labour law for rules requiring that unions be granted access to workers both at the workplace and at their homes.<sup>120</sup> The Ontario *Labour Relations Act* already employs mandatory ballots for some workplaces and card-check for others, and the two models coexist throughout Canada.<sup>121</sup> The novelty in the approach discussed here lies only in bundling these restrictions on employer discretion and then linking them with illegal employer behaviour.

Third, the dual regulatory model has the potential to harness the energy and expertise of private actors in improving workplace practices. Since the result of proving a breach of the Code would include a more preferential union-organizing climate, the model includes a built-in incentive for unions and other worker advocates to help the state uncover and enforce employment law violations. Consistent with a core objective of the decentred approach, the model aims to harness private actors in the inspection and enforcement process of public obligations.

Unions might create hotlines for non-union employees to report employment standards violations if they believed helping those employees prove the violations will lead them to new members and new bargaining units. Unions might also represent non-union workers in bringing complaints forward, which would benefit those workers and improve the quality of representation before the employment tribunals. If the “sunshine list” of Code violators is posted, unions could use it to target their organizing resources. Poverty law clinics and worker activists are already involved in searching out abusive employers and advocating on employees’ behalf.<sup>122</sup> The proposed model creates an incentive for these private actors to form a private inspectorate and to build bridges to non-union workers

120. For example, there are Canadian laws that require: employers operating in some remote areas to permit union organizers onto company property for the purposes of conversing with employees; mall owners to waive property rights to enable unions to contact employees of mall tenants; and employers of distance workers to provide contact information to enable union organizing. See discussion in Doorey, “Union Access,” *supra* note 105. In addition, labour boards in Canada have ordered employers to grant unions access to the workplace as a part of a remedial order for violations of labour relations legislation. See *e.g.* *USWA v Baron Metal Industries Inc*, [2001] OLRB Rep 931, 73 CLRBR (2d) 301.

121. Construction employers are governed by a card-check system, whereas other employers are subject to a mandatory model. See *OLRA*, *supra* note 99, ss 128.1 (providing for card-check certification in the construction sector), 7-10 (providing for governing of all other workplaces by mandatory ballots).

122. See *e.g.* Cranford et al, *supra* note 64; Janice Fine, “Community Unions and the Revival of the American Labor Movement” (2005) 33:1 *Pol & Soc’y* 153; Amanda Tattersall, “A Little Help from Our Friends: Exploring and Understanding when Labor-Community Coalitions are Likely to Form” (2009) 34:4 *Lab Stud J* 485; and Janice Fine & Jennifer Gordon, “Strengthening Labor Standards Enforcement through partnerships with Workers’ Organizations” (2010) 38:4 *Politics & Soc’y* 552.

who are in need of skilled advocacy.<sup>123</sup> Canadian unions have already recognized the need to be more active in defending the interests of non-union workers.<sup>124</sup> The proposed model would assist in that regard.

Fourth, there is a good basis to believe that the proposed model could improve overall compliance with employment standards legislation. Consider an employer like Wal-Mart. In the United States, Wal-Mart has been found to be in violation of employment standards laws on multiple occasions amounting to illegal nonpayment of wages totaling millions of dollars.<sup>125</sup> The remedies assessed consist mostly of monies that should have been paid the employees in the first place. Although large on their face, these amounts are relatively insignificant to the most profitable retailer in the world. Despite its violations of employment laws, Wal-Mart retained all of the rights available to American employers to campaign against their employees' unionization efforts, and it exercises these rights vigorously.

Given Wal-Mart's well-known aversion to collective bargaining, there is good reason to believe that the potential of losing the right to campaign against unionization and to insist on a ballot would have a greater deterrent impact than the existing threat of back-wage orders and fines.<sup>126</sup> The possibility of forfeiting the rights to campaign against unionization would be expected to influence how a company like Wal-Mart sets its internal management policies. For example, in a recent decision, a Wal-Mart manager was dismissed for altering payroll records to avoid recording overtime pay earned by employees. A Canadian appellate court confirmed a jury finding that the employee was dismissed without cause because he believed he was properly implementing a "zero overtime" directive set by Wal-Mart's head office.<sup>127</sup>

---

123. To make these organizations more effective in this role, the state could set aside additional funding, something Professor Arthurs recommended in *Fairness at Work*, *supra* note 2 at 199.

124. For example, in a draft discussion paper issued by the Canadian Auto Workers and the Communications, Energy, and Paperworkers Union in 2012, included as a key objective for the labour movement in the future must be finding ways to better advocate on behalf of "all workers" and not just union members. See "CAW-CEP Discussion Paper" (11 November 2011), online: Communications, Energy and Paperworkers Union of Canada <[http://www.cep.ca/sites/cep.ca/files/docs/en/120126\\_CAW-CEP\\_Discussion\\_Paper.pdf](http://www.cep.ca/sites/cep.ca/files/docs/en/120126_CAW-CEP_Discussion_Paper.pdf)>.

125. See Joe Schneider & Margaret Cronin Fisk, "Wal-Mart to Pay \$54 Million to Settle Minnesota Suit" *Bloomberg News* (9 December 2008), online: <<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aTBVXI48DYGQ>>. This article reviews several American decisions in which Wal-Mart was found to have violated employment standards laws, including a Minnesota judgment finding "over 2 million violations" of wage laws.

126. For a discussion of Wal-Mart's efforts to resist unionization in Canada and the United States, see Roy J Adams, "Organizing Wal-Mart: The Canadian Campaign" (2005) 6&7 *Just Lab* 1.

127. *Day v Wal-Mart Canada Inc*, 2000 NSCA 127, 188 NSR (2d) 69.

If the remedy for non-payment of statutory overtime included forfeiting all rights to campaign against unionization at the store, and perhaps a switch to a card-check model, we can reasonably anticipate that a union-averse employer (like Wal-Mart) would adjust its policies to emphasize to managers the need to comply with overtime laws at all costs. For example, a zero overtime policy might be revised to instruct managers to pay overtime if there is any doubt about whether an employee is entitled to it. That is a subtle shift in internal policy, but it can have the effect of shifting the default rule from “do not pay unless ordered to by an adjudicator” to “err on the side of payment, unless it is clear that overtime is *not* payable.” This would be an extremely useful shift in emphasis if the goal is to improve compliance with overtime laws.

Finally, since the outcome of a finding of non-compliance with employment laws would be an organizing climate more favourable to union organizing, the model may facilitate access to collective bargaining. This could energize union organizers and assist in the slow process of rebuilding the institution of collective bargaining. Moreover, since only law-breaking employers will experience the new restrictions on their legal rights to resist unionization, the model specifically targets the worst workplaces, where workers can most benefit from the protections offered by unionization and collective bargaining.

For all of these reasons, the model discussed in Part V could improve compliance with employment laws while facilitating collective bargaining. Now the bad news: A threat of being unionized will be a hollow one for many employers who violate employment standards, so the risk of losing legal rights to resist unionization may have little effect on them. Employers with less than twenty employees may have little to fear given the persistently low rates of union density in small workplaces, though perhaps the model could help address this issue.<sup>128</sup> Similarly, the thousands of employees who are excluded from collective bargaining statutes altogether would not be expected to receive much benefit from a model that draws power from the risk of unionization, although the information disclosure requirements could still be useful.

In addition, even if the dual regulatory model did facilitate union organizing, there is no guarantee that this would translate into long-term

---

128. For example, the 2009 union density rate in Canada for workplaces with fewer than 20 employees was only 13.3%, compared to 29.7% for workplaces with between 20-99 employees, 40.9% for workplaces with 100-500 employees, and 52.2% for workplaces with over 500 employees. See Sharanjit Uppal, “Table 2 Union Membership, 2009” *Unionization 2010* (29 October 2010), online: Statistics Canada <<http://www.statcan.gc.ca/pub/75-001-x/2010110/tables-tableaux/11358/tbl002-eng.htm>>.

sustainable collective bargaining relationships. We need only look to the history of successful certifications at companies like Wal-Mart or Canada's chartered banks, and the subsequent decertifications and closures, to recognize that there is no necessary correlation between obtaining bargaining rights and achieving a durable collective bargaining relationship.<sup>129</sup> Furthermore, some particularly union-averse employers might simply shut down if they lost the legal right to resist unionization or if their employees unionize. Some businesses might be so concerned about losing their right to resist unionization, and have so little confidence in their capacity to comply with the Code, that they would just avoid a jurisdiction that passed laws like these altogether.

These issues reflect systemic limitations of the labour relations model itself, which are not overcome by the proposal discussed here. More fundamentally, since that proposal does not alter the power relations in capitalist societies that permit, if not encourage, a subordinated worker class, it may be that little of substance will change in terms of employment outcomes. This is a criticism directed from the left at most modest proposals for workplace law reform. Any legal proposal pragmatic enough to attract broad political support will be so watered down that its usefulness is at best limited. Therefore, such proposals simply divert attention away from more fundamental campaigns to overhaul power relations throughout society.

Indeed, the left's objection to the specific decentred approach described in this paper may run deeper than just the usual criticism against modest reforms to employment-related statutes. The dual regulatory stream approach does not challenge the existing premise inherent in the Wagner Act model that it is acceptable for employers to resist unionization. It simply creates an exception to that presumption for high-risk employers. This could be seen as legitimizing employer resistance to collective bargaining precisely at a time when unions and human rights advocates are deeply engaged in a campaign to push labour rights as human rights. Many employers and those on the political right would also be expected to resist the model discussed here. They would reject the premise that collective bargaining is a valuable and important means for assisting vulnerable workers. In some corners, the right to resist unionization is considered so

---

129. In the United States, only 56% of newly certified bargaining units are successful at bargaining first collective agreements. See John-Paul Ferguson, "The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004" (2008) 62:1 *Indus & Lab Rel Rev* 3 at 5; See also Anne Forrest, "Securing the Male Breadwinner: A Feminist Interpretation of PC 1003" (1997) 52:1 *RI* 91; and Rosemary Warskett, "Bank Worker Unionization and the Law" (1988) 25 *Stud in Pol Econ* 41.

sacrosanct that there can be *no* justification for its restriction, even in the case of the worst law-breaking employers.

However, on the one hand, reforms to workplace law are always controversial, so the presence of strong resistance from some stakeholders should never itself be a reason to dismiss a reform proposal. On the other hand, there may be good reasons not to adopt any particular legal reform, whether they take the form of a decentred regulatory approach or not. The potential contribution of the decentred approach to regulation is not that it will end heated debates about the efficacy of workplace laws.

The objective of this article is not to persuade readers that the particular model discussed in Part V is the only, or even the best, possibility for workplace law reform. The objective is far more modest. It is to investigate whether there are any useful insights that can be drawn from the decentred regulation literature for the future of workplace law. My own conclusion is that the literature does open up some new ways of thinking about old problems. For that reason alone, there is value in exploring further how decentred regulation might contribute to the challenge of identifying ways to move forward with workplace law reform at a time when there is so little consensus on which path to take.