# New Governance, Decentring & Unionization as the Default Option

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David Doorey, *Decentring Labor Law* (June 14, 2010), available on SSRN.

There is a cadre of terrific Canadian labor and employment scholars, many of whom have received insufficient recognition in the U.S. As a group, these scholars bring interesting and sharp insights into the general problems of employment law not only in Canada but also around the world. They are much better versed in U.S. law than we generally are about Canadian law. Their insights are particularly useful for us since Canada and the U.S. share the basic "Wagner" model of union-management law. Among a long list of Canadian scholars, I want to focus on David Doorey, Professor of Labour and Employment Law, York University. His current piece on decentring workplace law is clever, bold, and interesting. He synthesizes a considerable range of theory, from the U.S. and elsewhere, to support a very provocative proposal.

The background for his article is the continuing decline of union membership which, with only a couple of exceptions–the Scandinavian countries and, curiously, China–is a worldwide phenomenon. With economic globalization reducing the significance of separate national economies and the laws of nation-states tied to the regulation of those economies, the decline should be no surprise because unionism and labor law are paradigmatically national. Other factors, especially the ideological rejection of unionization by management, also play an important role in the decline. There is, of course, a tremendous amount of interesting and valuable scholarship addressing the situation and frequently calling for reforms aimed at reversing that trend. The now failed Employee Free Choice Act ("EFCA") was considered to be justified on the basis that it would help shift the momentum away from decline. The EFCA has been the subject of considerable scholarship, much of it aimed at evaluating its potential for turning momentum towards greater union density. (For what it is worth, my view is that EFCA would make only a marginal difference because, the decline in unionism being worldwide, it has to be based on much more than the weaknesses of the NLRA to protect the right of workers to organize.)

David Doorey takes a very different tack. His piece is provocative because he takes as given the decline of unionism and the lack of political will to do anything to directly counter that decline. Instead, he focuses on the role unionism would be able to play in an employment system that is generally non-union and where compliance with labor standards is low. He starts by discussing what we call "new governance" theory and what he calls "decentring" or "legal pluralism" theory. The starting point for decentring is that traditional, top-down, control-and-command legal regulation has failed to be efficacious. Decentring theory looks instead to how those subject to regulation operate and how legal regulations can be framed to create incentives for the regulatees to voluntarily comply. In other words, regulations should, to the extent possible, align the interest of the state in having its employment law implemented with other incentives to the firm. He rejects the critique that the new governance or decentring theories are a pollyannaish call for purely voluntary compliance that simply turn "hard" into "soft" law which equates to no enforcement. For Doorey, decentring theory focuses on constructing regulations that do lead to private actors conforming their conduct to the goals of the law but doing so by figuring ways in which the regulations can be structured to enhance voluntary compliance.

Looking at the role unionization can play in a world of much reduced union density, Doorey devises a regulatory scheme that has unionism operate as a default position available to workers unhappy with their treatment by their employers. What differs from the present system in the U.S. is that Doorey's proposal would create a dual regulatory system. One track would be for "good" employers and would remain unchanged from the present law. The change would occur in the second track for employers found to be "bad," based on their failure to comply with a defined set of

employment standards–"targeted employment laws." His proposal for the new track applicable to bad employers essentially channels the Employee Fair Choice Act–card check recognition and first contract interest arbitration–but adds more elements, including requiring employers to provide more information to unions, mandating unions access to workers at the workplace, and assigning a labor official to each organizing campaign by a union at one of these bad employers. Since he acknowledges the fierce resistance management has toward unionization, he utilizes the risk of unionization as the primary incentive for employers to comply with these targeted employment laws. Management's antiunionism is the driving force pushing the employer to comply with the law to avoid being categorized as a bad employer that faces an increased risk of unionization. In other words, his proposal relies on "risk as labour law." Management's risk analysis should lead them to increase compliance with labor standards, despite the burdens of compliance because of their desire to avoid an increased risk of unionization. Incorporated into that risk analysis would be the fact that workers generally favor unionization or at least some sort of independent representation vis-à-vis their employers. What I like so much about this article is that it is a concrete application of decentring theory. It avoids the rather abstract scholarship that has been all too common among its theorists.

Doorey's intriguing proposal raises several questions. First, would such a dual regulatory system have any greater chance of enactment than the Employee Free Choice Act has had?  Employers would still prefer managerial slack, but perhaps it would be harder for them to mount opposition because the question of unionization or not would depend on their compliance with the law. Raising the risk of unionization for lawbreakers but not law abiders is quite a different situation from increasing the general risk of unionization by, for example, adopting card check recognition that gives employers the argument that workers should hear the employer's side before deciding whether or not to support a union. In other words, Doorey's proposal would undercut the high road argument that card check recognition interferes with employee free choice. Second, if adopted, Doorey's system would essentially turn the right to organize into an instrumental rather than a basic right. While increasing the chance of employees of bad employers to get union representation, it would consign the workers of good employers to the diminished chance to exercise their rights that the present woefully inadequate laws provide. Third, traditional enforcement techniques would seem to be required to establish which employers were bad and which are good. While it might be possible to rely on data about employer compliance to establish which ones were bad, employers would presumably fight long and hard to avoid being characterized as bad employers and so the system might be hard to get into operation.

In sum, David Doorey is inventive and knowledgeable in his scholarship. His approach in his decentring article should stimulate new and interesting avenues for scholarly and political debate and development. His proposal essentially bridges the gap between new governance theorists and more traditional labor law scholars. He is just one example of the Canadian labor law scholars who can enrich our own, all too often, parochial vision of labor and employment law.

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