LABOUR LAW AS VACCINE:
HARNESSING RISK TO REGULATE SUPPLY CHAIN LABOUR PRACTICES

David J. Doorey

York University, Toronto

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EARLY D R A F T VERSION

David J. Doorey[1]
York University, Toronto
LLRN, Barcelona, 2013

Vaccine: any preparation of weakened viruses introduced into the body to prevent a disease by stimulating antibodies against it.

– Random House Webster's College Dictionary, 2010

Crisis can provoke new demands for law in unexpected places. Labour lawyers know this to be true. In recent times, monumental management failures have caused scores of preventable worker deaths. In Canada, the death of 26 miners led recently to knew criminal law provisions expanding criminal liability to directors and corporations when workers are killed in circumstances that were preventable. Throughout the world, workers have been killed, harmed, or otherwise mistreated in the factories and workplaces that comprise modern complex global supply chain, leading to calls for greater governmental or 'private' regulation of corporate sourcing practices. The supply chain has become a space for labour regulation, and a source of risk for many global corporations.[2]

'Risk regulation' is a catchphrase used in scholarly literature to describe systems of rules aimed at controlling, reducing, or eliminating social or economic risks that confront societies, markets, or economic actors. In this common story, risk is cast as the villain, as something to be avoided. However, like any versatile actor, risk can play multiple roles. This article considers the potential for risk to be harnessed by law in pursuit of social or economic policy objectives, such as improving labour practices within complex global supply chains. Building on insights from 'decentred' regulation theory, or what American

[1] Ph.D, Associate Professor. I am grateful to the Social Science and Research Council of Canada (SSRHC) for funding in support of this project, and for research assistance from Fenner Stewart, Ryan Foster, and Jacqueline Medalye, and advice and guidance on survey design and collection from Dr. Marie-Helene Budworth, York University.

[2] I have developed this argument fuller in D. Doorey, "Who Made That?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation" (2005), 43 Osgoode Hall LJ 353; D. Doorey, "In Defense of Transnational Domestic Labor Regulation" (2010), 43 Vanderbilt J. Trans. L. 953. See also: D. Weil ... M. Rawling ...., etc.

scholars more often refer to as 'New Governance", I examine the concept of the 'risk vaccine" as instrumental labour policy regulation.

The story goes something like this. Economic actors, such as corporations, operate within an economic system that is sensitive to external disturbances that appear in the form of economic, 'operational', or 'reputational' risk.[3] Through a variety of risk management processes, these actors seek to control or reduce risks to acceptable levels, considering cost and benefit analysis. The greater the perceived risk posed to individual or organizational goals by an external event, or potential event, the greater is the probability that an actor will engage in risk management. Risk management responses can, and often do, provoke organizational 'self-reflection' and learning through information gathering, and make organizations more responsive to factors in their external environment that pose risks to the organization's goals. These outcomes of the risk management process create an opportunity for law to influence internal management systems in ways that could steer organizations in directions desired by the state.

The regulatory device involves *injecting a 'risk virus' into organizational systems* in order to provoke useful risk management responses. It draws on the imagery of a vaccine, which injects a virus into the body in order to trigger internal organizational systems changes (antibodies) intended to prevent more serious and destructive strands of the virus from attacking the body in the future. If we treat a global supply chain as an organism, then we can imagine how legal signals or commands might appear as a risk virus and vaccine. For example, a rule requiring corporations to adopt a supplier code of conduct, disclose the identity of their suppliers, or allow independent monitoring and reporting of audit results, would introduce new risks associated with global sourcing. Workplace disasters, such as the recent collapse of the Rana Plaza garment factory in Bangladesh, could more easily be linked to specific brands and the role that sourcing corporations played in pushing down costs or encouraging health and safety corners to be cut. Private actors, including media, academics, unions, and other activists could use this information in their campaigns to hold corporations to account for the conditions under which their goods are produced.[4] A law permitting inspectors to embargo goods made in violation of labour laws creates real

[3] M. Power, *Organized Uncertainty: Designing a World of Risk Management* (Oxford U. Press, 2007)

[4]

and substantive risk of reputational harm, with possible associated loss of market share and profits associated with poor supply chain labour practices.

If corporate leaders associate operational risk with supply chain labour practices, then we can hypothesize that an elevation in that risk will provoke organizational reflection and consideration of steps towards mitigating that risk. Introducing new risks will provoke risk management self-defense strategies, in a similar manner to antibodies that respond to a virus contained within a vaccine. In the organizational context, these responses might include: better information gathering and monitoring processes about problematic activities or externalities; clearer role definition and assignment of functions to responsible individuals within the organization; internal rule and norm generation; and greater engagement with external actors and stakeholders, both private and public.[5] In theory, supply chain management systems that include such measures would have greater capacity to identify and remedy legal abuses and unsafe conditions in their supplier factories than those that do not. A law that encouraged more organizations to adopt them would be worth exploring. That law would be promoting and spreading best practices.

A decentred regulatory strategy to steer corporations towards adopting best supply chain sourcing practices requires a different orientation than more typical command and control (CAC) regulation. An initial challenge is to identify what risk virus to include in the vaccine in order to produce the desired antibodies. This is not a dissimilar exercise from that required of lawmakers deploying CAC regulation: lawmakers need to identify policy objectives (what do they want the law to *do*?), and they need to think about what legal signal will tend to produce the desired change in behavior necessary to achieve those outcomes. However, consistent with the decentred approach to governance, the 'risk vaccine' approach to regulation seeks to influence behavior in more a subtle manner. The aim is to use legal signals to infiltrate the organizational matrix in order to erect signposts to steer the organizations' decision-makers towards adopting the desired risk management responses, not for fear of a monetary fine, but because it makes good business sense to do so.

Identifying the correct virus requires an understanding of how the individuals who make supply chain management decisions perceive their world. What risks to their own professional ambitions or their organization's goals most concern them? What challenges

[5] Ibid.

do they face in performing their SCM functions? How do labour issues and the rise of labour codes of conduct since the 1990s affect them in the performance of their jobs, if at all? Do they even perceive supply chain labour problems as a risk to the SCM function, to the organization's goals, or to their own professional reputation and ambitions? Only by learning how the SCM subsystem operates and perceives its external environment can we begin to understand how law—legal signals—might penetrate the SCM subsystem to provoke changes of the sort we believe might lead to overall improvements in labour conditions down through a global supply chain.

This paper begins, in Part I, with a review of the theoretical insights of decentred regulation. Part II builds on this discussion by considering some core implications for regulatory design and scholarly research flowing from the decentred literature. The insights of decentred regulation are particularly useful to the challenge of designing a governance scheme to influence behavior within complex, supranational supply chains. Because the virus enters the organizational bloodstream and targets internal organizational dynamics and structures, it can in theory at least, circulate throughout the organization unencumbered by jurisdictional boundaries. That is, a risk vaccine introduced through American law might reverberate through organizational systems in ways that ultimately alter behavioral practices and norms in Asia, Europe, and Africa.

Part III of the paper provides a brief overview of existing SCM literature examining global supply chain labour concerns. What stands out from this review is the paucity of attention paid to labour issues by SCM academics, in stark contrast to the depth of work exploring these issues in the legal scholarly literature. Part IV introduces the early results of a survey of Canadian supply chain management professionals. The survey explored the perceptions and experiences of SCM professionals on issues relating to risk in general, and risks associated with supply chain labour practices in particular. This sort of qualitative research provides an empirical foundation to the study of decentred regulation, by burrowing into the SCM system in order to better understand how actors within that system perceive their external environment. This knowledge can guide discussions about what sorts of legal signals might prove most effective at influencing change within that system of the sort desired by the regulator.

Finally, in Part IV, we conclude with some preliminary observations based on early findings from the survey about what sorts of legal signals might most effectively provoke useful change in the management of labour practices within global supply chains.

I. The Decentred Understanding of Regulation[6]

'Decentred' regulation is an umbrella term intended that captures a subset of regulatory strands that share key premises or insights, which in turn guide their advocates towards a similar set of regulatory prescriptions.[7] Decentred regulation is often positioned as the 'other' to more direct, top-down Command-and-Control (CAC) regulation. CAC is frequently described in the decentred literature as too rigid and too blunt an instrument to effectively influence behaviour in complex modern societies. The reasons given for the failure of CAC vary, but there is a common basic narrative that emphasizes law's evolutionary character.[8] Legal systems are said to 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.[9] 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".[10] At this point, a further evolution towards a third model 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.

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[6] Sections II and III of the paper is lifted largely from D. Doorey, "A Model of Responsive Workplace Law" (2012), 50 Osgoode Hall L.J. 47

[7] The work of Julia Black (decentred regulation) and Orly Lobel (new governance) are particularly useful in synthesizing this literature. See J. Black: "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory World" (2001), 53 Cur. Leg. Problems 103 [hereinafter *Decentring*]; "Critical Reflections on Regulation" (2002), 27 Aust. J. Leg. Phil. 1; "Proceduralizing Regulation, Part 1", (2000) 20 Oxford J. Leg. Stud. 597; and Lobel, *Renew Deal, supra* note 7; O. Lobel, "National Regulation in a Global Economy: New Governance Approaches to 21st Century Work Law" in *Encyclopedia of Labor & Employment Law and Economics*, Dau-Schmidt, Harris, and Lobel (eds.) (Edward Elgar, 2008) [hereinafter *New Governance*]; Lobel, *Setting the Agenda*, *supra* note 7.

[8] N. Luhmann, *The Differentiation of Society* (N.Y.: Columbia U. Press, 1982); G. Teubner, *Law as Autopoietic System* (Oxford: Blackwell, 1993)

[9] For an account of the evolutionary trajectory of legal systems in reflexive law, see Teubner, *supra* note 9. Lobel sets out a similar narrative in her description of New Governance theory in Lobel, *supra* note 16 at 381-386. See also W. Sage, "Regulating Through Information: Disclosure Laws and American Health Care" (1999), 99 Colum. L.J. 1701; Orts, supra note 9; C. Estlund, "Rebuilding the Law of the Workplace in an Era of Self-Regulation," (2005), 105 *Columbia Law Review* 319.

[10] Teubner, *supra* note 9.

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 'decentring' analysis is counter posed. It is 'centred' in that it assumes the state to have the capacity to command and control, to be the only commander and controller, and to be potentially effective in commanding and controlling. It is assumed to be unilateral in its approach (governments telling, other doing), to be based on simple cause-effect relations, and to envisage a linear progression from policy formation through to implementation. Its failings are variously identified as including the following: that the instruments used (laws backed by sanctions) are inappropriate and unsophisticated (instrument failure), that the government has insufficient knowledge to be able to identify the causes of problems, to design solutions that are appropriate, and to identify non-compliance (information and knowledge failure), that implementation of the regulation is inadequate (implementation failure), and that those being regulated are insufficiently inclined to comply, and those doing the regulating are insufficiently motivated to regulate in the public interest (motivation failure and capture theory).[11]

Black identifies a number of common insights or 'aspects' that together comprise a 'decentred' understanding of regulation.

Firstly, the causes of modern social problems are said to be complex, and shaped by interactions between a variety of forces which are poorly understood.[12] Secondly, 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").[13] Thirdly, 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 or even

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[11] Black, *Decentred, supra* note 10 at 106.
[12] Ibid. at 106-107. See also, e.g., P. Capps & H. Olsen, "Legal Autonomy and Reflexive Rationality in Complex Societies" (2002), 11 Soc. & Leg. Stud. 547 at 551
[13] Black, "Proceduralizing Regulation", *supra* note 10 at 602.; Lobel, *New Governance, supra* note 10 at 300 (noting that a premise of the New Governance model is "that no one institution possesses the ability to regulate all aspects of contemporary public life.")

more significant determinants of behaviour than government regulation.[14] Thus, 'decentrists' are also legal pluralists.

Fourthly, a decentred orientation to regulation recognizes that the targets of regulation are complex, autonomous actors, with their own objectives, world-views, and discourses. Since lawmakers cannot possibly know how every actor perceives their environment, and in any event, the targets of regulation are not homogeneous in this regard, it is anticipated that regulation will cause behavioural changes and outcomes that are unintended.[15] 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.[16]

A fifth aspect of a decentred approach to regulation is the observation that regulation is a process that fosters and relies upon interdependencies between regulator and regulated. Rather than conceiving the state as commander, and the targets of regulation as 'commanded' in a sort of linear, subordinate relationship, a decentred orientation embraces the notion that "interdependencies and interactions exist between government and social actors", and that each is dependent on the other for the resolution of complex social problems.[17]

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

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[14] Black, ibid. 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."

[15] See Tuebner, supra note 9 at 255, noting that because under a regime of reflexive law the "legal control of social action is indirect and abstract", it may produce unpredictable outcomes.

[16] See, e.g., Lobel, *New Governance, supra* note 10 at 397-98 (noting that New Governance "advocates...the adoption of cooperative governance based on continuous interaction and sharing of responsibility"); M. Baer, "Governing Corporate Compliance" (2009), 50 Boston College L. Rev. 949 at 1004; C. Bennett & M. Howlett, "The Lessons of Learning: Reconciling Theories of Policy Learning and Policy Change" (1992), 25 Pol'y Sci. 275 at 276 (noting that "state can learn from their experiences and...can modify their present actions on the basis of their interpretation of how previous actions have fared in the past"); Capps & Olsen, *supra* note 21 at 550.

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

authority in governance and regulation."[18] It requires the state to move towards a regulatory strategy that encourages self-reflection and continuous learning by the targets of regulation, and that influences the contextual conditions of self-regulation and 'co-regulation' with the aim of encouraging the private creation of substantive norms from the periphery of social and economic interactions by discovering ways to use law to influence communications and interactions between private actors.[19]

B. Decentred Regulation as Instrumental Law

The idea of 'regulated self-regulation", often associated with the decentred approach, usefully captures a key philosophical foundation of the decentred orientation.[20] Firstly, it emphasizes that 'regulation' includes more than just orders issued by governments and backed by state-imposed penalties: it includes also *private systems of rules* that emerge outside of the state. This includes norms developed through 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.

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.[21] The state still decides what policies to pursue. Decentred regulation, like CAC regulation, is instrumental law. There is a big difference between 'self-regulation' and 'decentred regulation', although this is a point often misunderstood, as Karkkainen has noted:

> One of the persistent and pervasive misconceptions about New Governance is that it is wholly reliant on 'soft law', and therefore ultimately dependent on the good intentions and voluntary actions of parties who heretofore have shown little inclination toward acting in the desired directions. On those grounds, it is easily dismissed by the misinformed as so much wishful thinking.[22]

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[18] Black, *Decentring, supra* note 10 at 110.
[19] Ibid. at 112. Tuebner, *supra* note 17 at 67; Lobel, *New Governance, supra* note 10 at 373.
[20] The idea that states should 'regulate self-regulation' for instrumental purposes is now a common theme in decentred scholarship. See e.g. Estlund, *supra* note 12 at 622: "...the only way law can effectively regulate complex organizations in modern society is by shaping those organizations' own processes of self-regulation and inducing organizations to internalize public values—that is, by regulating self-regulation."
[21] Lobel, *Setting the Agenda supra* note 10 at 3 ("[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, Chapter 4.
[22] B. Karkkainen, "New Governance in Legal Thought and in the World" (2004), 89 Minn. L. Rev. 471 at 488.

"Self-regulation" describes self-imposed and self-defined rules by private actors that may or may not be consistent with government policy objectives, and which may or may not be backed by some form of legal, moral or social, or market-based sanction.[23] Decentred regulation, on the other hand, is government regulation in pursuit of public policy objectives, although the form of regulation that is expected to be effective varies from that in a CAC regime due to the very different perceptions of the operational relationship between legal signals, on the one hand, and human and firm behaviour, on the other hand.[24]

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 labour law. I will focus on three key insights associated with the decentered orientation: (1) an emphasis on how regulation can be used to influence the decision-making processes within firms; (2) an awareness that non-state actors and networks of actors might be harnessed in pursuit of public policy goals; and (3) the potential benefits of risk-based regulation towards influencing firm behaviour.

A. Internal Management Systems as a Target for Regulation

In the decentred understanding, the process through which legal signals penetrate firms' decision-making processes is perceived as highly complex. There are mechanisms, pressures, incentives, personalities, cultures, social norms, histories, and discourses within firms that muddy legal signals, or re-translate them to better fit the firm's own worldview, or those 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.[25] To use a familiar and simple example, the legal signal "pay the minimum wage" is reinterpreted by economic actors according to the language of the economic subsystem—pay or do not pay,

[23] See J. Black & R. Baldwin, "Really Responsive Regulation" (2007), LSE Legal Studies Working Paper No. 15, available on-line at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1033322, for a discussion of the distinction between state-based regulation that aims to influence behaviour indirectly, and purely private regulatory systems in which the state plays no direct role.
[24] S. Deakin & R. Rogowski, "Reflexive Labour Law, Capabilities, and the Future of Social Europe" University of Warwick School of Law Legal Studies Research Paper No. 2011-04 at 7.
[25] Teubner, supra note 9.

profit or not profit.[26] Perceived from the perspective of CAC style 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 building 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 chose to comply.

A decentred approach to the problem might also support higher fines and better enforcement (if the government were prepared to fund this), particularly for persistent offenders[27], but holds out little hope that this alone will transform overall compliance levels. As Teubner asserts, a direct legal command (like 'pay the minimum wage') has 'little chance of being obeyed when it comes into direct conflict with the profit motive."[28] The higher that fines are raised for non-compliance, the greater the incentive for firms to hide their non-compliance from the state or to "exit" altogether from the regulating jurisdiction, if feasible. Conscious of these limits of CAC, decentrists emphasize strategies intended to realign the firms' economic interests so that they overlap with the state's interest in improving compliance with the legal standards. In Parker's words, the objective is to use regulation to get "companies to want to do what they should do."[29]

Note that in this discussion, the state does not cease to set hard standards; it still determines whether a minimum wage is appropriate and what level it should be set at. We are not talking about replacing fixed government standards (minimum wage) 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

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[26] See, for example, the discussion in H. Collins, "Reflexive Labour Law: Book Review" (1998) 61 Mod. L. Rev. 91

[27] For example, Ayres and Braithwaite proposed the idea of the 'benign big gun', by which they meant that a responsive regulatory model required serious sanctions be in place to punish persistent offenders and to act as the ultimate incentive for firms to opt for the more cooperative regulatory options: *supra* note 8 at 47-49. See also Collins, *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 371-72; D. Dana, "The New Contractarian Paradigm in Environmental Regulation" (2000), U. Ill. L. Rev. 35 at 47 (noting that New Governance-style regulatory models still depend upon the existence of a strong government penalty to act as a threat to those businesses that do not participate meaningful in the new approach).

[28] Tuebner, *Autopoietic Systems, supra* note 17 at 91.

[29] C. Parker, "Meta-regulation: Legal Accountatbility for Corporate Social Responsibility" in *The New Corporate Accountability: Corporate Social Responsibility and the Law* , D. McBarnet, *et al.* (eds.), 207 at 208. See also C. Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002), 207 at 208.

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 *internal management systems* and the decision-making processes within firms by influencing the context and processes through which complex decisions are made.[30]

For example, Black observes that a goal of reflexive law, one strand in the decentred regulatory literature, "is to set the decision-making procedures within organizations in such a way that the goals of public policy are achieved."[31] 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.[32] 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."[33]

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.*[34] 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"* included: (1) adoption of a code of conduct that includes 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

[30] See, e.g., Deakin & Rogowski, *supra* note 27 at 6.
[31] Black, *Decentring*, *supra* note 10 at 126.
[32] C. Scott, "Regulation in the Age of Governance: The Rise of the Post-Regulatory State" in J. Jacint & D. Levi-Faur (eds.) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar Publishing, 2004), 145 at 152.
[33] Orts, *supra* note 9 at 1267. See also D. Fiorino, "Rethinking Environmental Regulation: Perspective on Law and Governance" (1999), 23 Harv. Env. L. Rev. 441 at 448, noting how reflexive law seeks to "strengthen reflexion mechanisms within the 'targeted' entity to encourage the desired behaviour."
[34] See discussion in C. Parker, *The Open Corporation* (Cambrige U. Press, 2002), 259-261; Estlund, *Regoverning, supra* note 7 at 77-78.

without fear of reprisals.[35] 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 also the research agenda for lawmakers and regulatory scholars. Regulation that looks inside the managerial 'black box', to borrow Estlund's phrase, takes on greater prominence.[36] 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 rules 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 focuses 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 a development that has paralleled recent interest in decentred approaches to regulation.[37] The lens of legal pluralism opens our eyes to the complex environment in which many firms operate, to the many sources of push and pull that act upon firms at any given moment. These sources of influence are central to understanding why firms behave as they do. As Rod Macdonald has noted, the "rediscovery of legal pluralism" means that, "to understand the role that State law actually plays in a given social field, it is necessary to understand the character and operation of multiple regimes of unofficial law in the same field."[38]

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 actor, but legal clinics and worker centres, faith-based organizations, activist

[35] Ibid.
[36] Estlund, ibid. at 133.
[37] Lobel, *supra* note 10 at 294 (noting that the New Governance approach is "based on engaging multiple actors and shifting citizens from passive to active roles. The exercise of normative authority is pluralized).
[38] R. MacDonald, "Metaphors of Multiplicity: Civil Society, Regimes, and Legal Pluralism" (1998), 15 Ariz. J. Int.'l & Comp. L. 69 at 76.

shareholders, non-government organizations, and consumers might also be interested in labour practices. Dunsmire explains the regulatory technique of putting private sources of pressure to work in pursuit of government objectives as "colliberation", the goal of which is to:

> ...identify in any area what antagonistic forces already operate, what configuration of them provides the current stability, and what intervention would help to change the stability to an alternate one which is more in line with the policy makers' objectives, not by laying down a standard, but by giving that degree of *ad hoc* support to the side that it needs to do the trick.[39]

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 investigate. 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 between the various actors. By investigating and mapping these relationships, the decentrist can then begin to identify what legal signals deployed into the milieu might cause the sorts of changes in behaviour the state desires.

C. *Injecting Risk as a Regulatory Tool*

The third insight flows from the first two. By recognizing that firms can be induced or provoked by 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 (brand reputation, market share, share price, profitability), or to their own personal interests and ambitions (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

[39] A. Dunsmire, "Modes of Governance" in J. Kooiman (ed.), *Modern Governance: New Government-Society Interactions* (London, 1993) at 34. See also, Black, Decentring, *supra* note 10 at 127.

the states' own policy objectives. This creates the possibility of using regulation to agitate or induce internal management systems change by "injecting risk".[40]

Michael Power notes that risk management processes seek to normalize or embed into the "habits and routines" of firms greater responsiveness to potential sources of risk.[41] By deploying legal signals that economic actors will perceive as 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.[42] 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*.

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

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[40] Doorey, *supra* note 9.

[41] M. Power, "Risk Management and the Responsible Organization" in R. Ericson (ed.), *Risk and Morality* (U. Toronto Press, 2003) 145 at 153.

[42] Ibid. 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.

III. Literature Review: Supply Chain Management and Labour Practice Issues

There has been little research into the perceptions and attitudes of SCM professionals toward the emergence of labour codes of conduct in the 1990s as a new consideration within purchasing and management of supplier relationships. At first glance, this seems surprising because purchasing and SCM professionals are key decision making agents within supply chains. They are involved in selecting the sourcing factories, maintaining the frontline personal relationships with factory owners, and are ultimately responsible for the ensuring products of specified quality and design make it to market in a timely way, and on budget. Labour problems in supplier factories can threaten these performance measures in any number of ways.

However, the SCM profession, and the academic community that studies it, has treated labour issues as periphery to their field of concern. Historically, there was little empirical evidence that supply chain labour issues pose a substantial risk to the operation of supply chains, or to corporate profitability. Even today, after many years of protests and negative media reports linking abusive labour practices to multinational corporations, supply chain labour issues appear to have had little, if any negative impact on corporate bottom-lines, beyond the occasional high-profile exception.[43] Epistemologically, the argument that SCM professionals should make key decisions based on factors other than cost, quality, and deliverability also runs up against years of practice and academic orthodoxy.

In a highly influential paper published in the Harvard Business Review in 1983, Kraljic encouraged purchasing managers to act strategically in their sourcing decisions in order to maximize business value through supply chain management and to minimize risks to the organization associated with supplier relations.[44] Kraljic argued that the fundamental objective of purchasing function was to 'exploit the company's full buying and purchasing

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[43] Swindley, D.: 1990, UK Retailers and Global Responsibility, The Service Industries Journal 10(3), 589–598; Sethi, S. P., Veral, E. A., Shapiro, H. J., & Emelianova, O. (2011). Mattel, inc.: Global manufacturing principles (GMP) - a life-cycle analysis of a company-based code of conduct in the toy industry. *Journal of Business Ethics, 99*(4), 483-517; Ki-Hoon, L., & Ji-Whan, K. (2009). Current status of CSR in the realm of supply management: The case of the Korean electronics industry. *Supply Chain Management, 14*(2), 138-148; Welford, R., & Frost, S. (2006). Corporate social responsibility in Asian supply chains. *Corporate Social Responsibility and Environmental Management, 13*(3), 166-176. [Add others....]

[44] Kraljic, P. "Purchasing Must Become Supply Management" (1983), 61 Harvard Business Review. 109-117

power', while managing risk to ensure the critical supply of goods and competitive prices. A generation of SCM scholars and practitioners were raised on a diet of cost minimization and risk management consistent with Kraljic's formulation. However, their emphasis was on the key measures of SCM priorities, including: quality, cost, deliverability, and flexibility. Suppliers' labour practices were not treated in the SCM literature as a source of risk to the buying corporation. Those practices were the responsibility of the supplier, and of the local government officials responsible for enforcing employment related laws.[45] Insofar as labour unrest might destabilize the supply chain, orders could always be moved to another contractor. When SCM scholars study risk, they are concerned with threats to product quality, overall sourcing costs, and disruptions in the factory-to-shelve timeline.

The notion that suppliers' labour practices, beyond the cost of labour, are a distinct issue of concern for SCM professionals took form only in 1990s. This corresponded with widespread negative attention directed in the media and in boycott and corporate shaming campaigns organized by social activists and the labour movement. The category of *ethical* SCM emerged as a corporate defense mechanism to negative public relations and the threat to corporate reputation, or the threat of these things.[46] However, this development was driven mostly from outside of the SCM system itself, by communications professionals and the burgeoning field of 'corporate social responsibility'. Our interest is in the extent to which these contemporary concerns with supply chain labour issues have penetrated the SCM profession and the actual practices of those people who make key sourcing decisions and who manage supplier relations on a day-to-day basis.

We conducted a literature review of leading academic journals in the SCM field, defined broadly to include SCM, logistics, purchasing, transportation, operations, and business ethics, looking for consideration of labour practice issues through the lens of SCM. While academic interest is growing, at least in terms of published articles, the volume of research looking specifically at labour issues remains small, particularly research

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[45] This sentiment is captured in the following quotation of a Nike office from the early 1990s: "We don't pay anybody at the factories and we don't set policy within the factories; it is their business to run.": D. Katz, *Just Do It: The Nike Spirit in the Corporate World* (1994), 191. See similarly the comments of Nike's general manager for Indonesia: "I don't that I need to know [of labor disturbances]...It's not within our scope to investigate..", cited in R. Barnett & J. Cavanaugh, "Just Undo It: Nike's Exploited Workers", *New York Times* (13 Feb. 1994), F11.

[46] B. Kytle & J. Ruggie, "Corporate Social Responsibility as Risk Management", Working Paper 10, CSR Initiative, Harvard University, (March 2005); Power, *supra* note at 146.

examining how SCM professionals and systems respond to the introduction of codified labour standards, the extent to which SCM professionals perceive labour issues as a source of personal or organizational risk, and how labour codes affect their work lives in practice.

A survey of the business literature located wide-ranging terminology to identify SCM practices that take 'social issues' into account. Craig Carter, on his own[47], and with Marianne Jennings[48] developed the concept of *purchasing social responsibility* (PSR). PSR pulled together extant literature focused on socially responsible supply chain management, which includes ethical purchasing[49], environmentally responsible purchasing[50], human rights issues[51], and racial and ethnic diversity in sourcing[52], which they then tested across a wide variety of industries to confirm the existence of PSR in practice among supply chain managers. PSR is defined by Carter and Jennings as, "a multidimensional, higher order construct consisting of [purchasing] activities relating to the environment, diversity, human rights, safety, and philanthropy" that is found within purchasing decision making across a wide variety of multinational companies[53].

Ciliberti, *et. al*, combined PSR with sustainable transportation, sustainable packaging, sustainable warehousing, and reverse logistics under the heading of *logistics social responsibility*.[54] Seuring and Müller drew on a large literature review (191 papers) of peer-reviewed publications in developing a framework they call *sustainable supply chain management* (SSCM), which they define as "the management of material, information and

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[47] C. Carter, "Purchasing and social responsibility: A replication and extension", (2004) 40(4) *Journal of Supply Chain Management*" 4-16; Carter, C. R., "Purchasing social responsibility and firm performance: The key mediating roles of organizational learning and supplier performance", (2005) 35 *International J. of Physical Distribution & Logistics Management* 177-194.

[48] Carter, C. R., & Jennings, M. M. (2002). Social responsibility and supply chain relationships. *Transportation Research: Part E: Logistics and Transportation Review, 38*(1), 37-52; Carter, C. R., & Jennings, M. M. (2004). The Role of Purchasing in Corporate Social Responsibility: A Structural Equation Analysis. *Journal of Business Logistics, 25*(1), 145-186.

[49] Tumer, G. B., G, Taylor, S., and Hartley, M.F., (1994), "Ethics Policies and Gratuity Acceptance by Purchasers," International Journal of Purchasing and Materials Management, Vol, 30, No, 3, pp, 43-47.

[50] Carter. C. R. and Carter, J.R. (1998). "Interorganizational Determinants of Environmental Purchasing: Initial Evidence from the Consumer Products Industries." Decision Sciences, Vol. 29, No. 3, pp. 659-685.

[51] Emmelhainz, M. A., & Adams, R. J. (1999). The apparel industry response to "sweatshop" concerns: A review and analysis of codes of conduct. *Journal of Supply Chain Management, 35*(3), 51-57.

[52] Doilinger, Marc J., Cathy A. Enz, and Catherine M. Daily (1991), "Purchasing From Minority Small Business," International Journal of Purchasing and Materials Management, Vol. n, No. 2, pp. 9-14.

[53] Carter & Jennings (2004), supra note __ at 152

[54] Egals-Zanden, N., "Supplier's Compliance with MNCs' Codes of Conduct: Behind the Scenes at Chinese Toy Suppliers" (2007), 75 J. Bus. Ethics 45-62

capital flows as well as cooperation among companies along the sustainable supply chain while taking goals from all three dimensions of sustainable development i.e. economic, environment, and social, into account which are derived from customer and stakeholder requirements".[55] Other terminologies used in the business literature to describe SCM functions that consider ethical and social issue include: *socially responsible buying*[56], *ethical sourcing*[57], *ethical supply chains*[58], *ethical supply chain management*[59], *socially responsible purchasing*[60], and *sustainable global supplier management*[61] (Reuter et al, 2010).

Despite this large body of academic work that has emerged over the past decade, social issues in general, and labour issues in particular, have yet to receive systematic study. Both Seuring and Müller[62] and Gimenez and Tachizawa[63] conducted extensive literature reviews of the field and found that socially oriented practices in the SCM function are rarely studied, and tend to be lumped under the umbrella of CSR practices, which includes both social and environmental issues. Labour practice issues, when mentioned at all, are often subsumed under the broader category of 'human rights'. This lack of attention to labour issues in SCM and business research is interesting when we consider that labour

[55] Seuring, S., & Müller, M. (2008). From a literature review to a conceptual framework for sustainable supply chain management. *Journal of Cleaner Production, 16*(15), 1699-1710, at 1700. Pagell, M. and Wu, Z. (2009), "Building a more complete theory of sustainable supply chain management using case studies of 10 exemplars", Journal of Supply Chain Management, Vol. 45 No. 2, pp. 37-56.

[56] Maignan, I. and McAlister, D.T. (2003), "Socially responsible organizational buying: how can stakeholders dictate purchasing policies?", Journal of Macromarketing, Vol. 23 No. 2, pp. 78-89.

[57] Roberts, S. (2003), "Supply chain specific? Understanding the patchy success of ethical sourcing initiatives", Journal of Business Ethics, Vol. 44, pp. 159-70. Salam, M. A. (2009). Corporate social responsibility in purchasing and supply chain. *Journal of Business Ethics, 85*(2), 355-370.

[58] New, S. (2004), "The ethical supply chain", in New, S. and Westbrook, R. (Eds), Understanding Supply Chains: Concepts, Critiques, and Future, Oxford University Press, New York, NY, pp. 253-80.

[59] Millington, A. (2008), "Responsibility in the supply chain", in Crane, A., McWilliams, A.,Matten, D., Moon, J. and Siegel, D.S. (Eds), The Oxford Handbook of Corporate Social Responsibility, Oxford University Press, New York, NY, pp. 363-83.

[60] Mont, O. and Leire, C. (2009), "Socially responsible purchasing in supply chains: drivers and barriers in Sweden", Social Responsibility Journal, Vol. 5 No. 3, pp. 388-407.

[61] Reuter, C., Foerstl, K., Hartmann, E., & Blome, C. (2010). SUSTAINABLE GLOBAL SUPPLIER MANAGEMENT: THE ROLE OF DYNAMIC CAPABILITIES IN ACHIEVING COMPETITIVE ADVANTAGE. *Journal of Supply Chain Management, 46*(2), 45-63.

[62] Supra note __

[63] Gimenez, C., & Tachizawa, E. M. (2012). Extending sustainability to suppliers: A systematic literature review. *Supply Chain Management: An International Journal, 17*(5), 531-543.

abuses were one of the single largest concerns driving the adoption of CSR practices and codes of conduct in the 1990s and 2000s.[64]

The few studies that have examined labour codes of conduct have focused on the content of codes, the process of implementation at the factory level, and occasionally, on the efficacy of labour codes for improving labour practices.[65] Little attention has been directed specifically on the 'black box' issue of how a code moves from conception to implementation within the supply chain, or on how SCM professionals perceive or interact with labour codes in daily management decisions and functions.[66] Wellford and Frost's 2006 study of labour codes in Asian supply chains probably comes closest.[67] The authors interviewed SCM professionals working for large well-known brand name companies, as well as factory managers, and other CSR experts working with Asian supply chains. The interviews revealed the many challenges managers encounter in incorporating labour concerns into decision making processes, such as the methodology of inspections, training of inspectors, and dealing with suppliers who have a high incentive to cheat. The authors concluded that the primary driver for the implementation of codes was to increase surveillance and monitoring of suppliers in order to reduce risk to the buying corporation's reputation.[68] The authors found that CSR professionals were driven by the overriding objective of reducing the risk of reputational harm to the buyer.

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[64] Emmelhainz, M. A., & Adams, R. J. (1999). The apparel industry response to "sweatshop" concerns: A review and analysis of codes of conduct. *Journal of Supply Chain Management, 35*(3), 51-57; Panapanaan, V. M., L. Linnanen, M.-M. Karvonen andV. T. Phan: 2003, Roadmapping Corporate Social Responsibility in Finnish Companies, Journal of Business Ethics 44(2/3), 133–148.

[65] See, e.g., Emmelhainz & Adams, supra note __ (examining the content of labour codes); Frenkel, S., & Kim, S. (2004). Corporate codes of labour practice and employment relations in sports shoe contractor factories in South Korea. *Asia Pacific Journal of Human Resources, 42*(1), 6-31, Yu, X. (2008). Impacts of corporate code of conduct on labor standards: A case study of reebok's athletic footwear supplier factory in china. *Journal of Business Ethics, 81*(3), 513-529, Lau, A. K. (2011). The implementation of social responsibility in purchasing in Hong Kong/Pearl river delta. A case study. *Strategic Outsourcing: An International Journal, 4*(1), 13-46 (considering implementation issues in the shoe industry); Doilinger, Marc J., Cathy A. Enz, and Catherine M. Daily (1991), "Purchasing From Minority Small Business," International Journal of Purchasing and Materials Management, Vol. n, No. 2, pp. 9-14, Sobczak, A. (2006). Are codes of conduct in global supply chains really voluntary? from soft law regulation of labour relations to consumer law. *Business Ethics Quarterly, 16*(2), 167-184, Barrientos, S., & Smith, S. (2007). Do workers benefit from ethical trade? assessing codes of labour practice in global production systems. *Third World Quarterly, 28*(4), 713-729: (exploring the effects of labour-related codes via case studies)

[66] Though see D. Murphy & D. Mathew, "Nike and Global Labour Practices: A Case Study" (Unpublished, New Academy of Business Innovation Network for Socially Responsible Business"; Doorey, *supra* note __, reviewing the processes that led Nike and Levi-Strauss to move from resistance to acceptance of public transparency of their supply chain as part of their CSR strategy.

[67] Welford, R., & Frost, S. (2006). Corporate social responsibility in Asian supply chains. *Corporate Social Responsibility and Environmental Management, 13*(3), 166-176.

[68] Ibid. at 168-169.

IV. Synopsis of Our Survey of SCM Professionals

Results were not received in time for processing and interpretation for this paper. What follows are basic observations of raw response rates. With more time, we will be able to parse responses more finely to find linkages and patterns not visible in a quick review of raw response results.

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We conducted a survey of supply chain management professionals that was designed to explore their perceptions of risk generally, and risks and experiences related to supply chain labour practice issues in particular. The sample was drawn from membership lists of the three major professional associations in the supply chain management in Canada: (1) Purchasing Management Association of Canada; (2) Canadian Supply Chain Sector Council; and (3) Supply Chain Sector Council. The link to the electronic Survey Monkey survey was distributed by the organizations via email or newsletter with an introductory summary of the study. Potential respondents were informed that the survey was anonymous, and that there would be no way for the researchers to link a response to a particular individual or company. We received 162 fully or partially completed surveys, which represents a response rate of approximately __ percent.

Approximately 30 percent of respondents said they worked primarily in Procurement, and another 28 percent worked in Logistics. Only 2 percent identified themselves as employed in a CSR function. Most work for large organizations: 56 percent for companies with greater than 500 employees, and 21 percent for companies with between 100-499 employees. More than half (57 percent) of respondents said that their supply chains were spread over many countries, and nearly half (44 percent) said that there were many intermediaries between the purchasing department of their company and the actual production site. About 44 percent used a code of conduct that includes labour standards for All suppliers, while 12 percent used such a code for Some suppliers. Of those who do have a labour code to deal with, 91 percent are using internally developed codes. Only 5 percent use a code developed by an external third-party organization.

In terms of the content of the codes, labour-related issues range in prominence, as demonstrated in Table 1.

Table 1: Content of Code Dealing with External Suppliers

85%	Environmental issues
85%	**Health and Safety**
81%	**Human Rights**
80%	Ethics- Accepting Gifts
74%	Ethics – Bribery
74%	**Anti-discrimination (race, gender, disability)**
66%	**Child Labor**
50%	**minimum wage laws**
46%	disclosure of supplier identity to stakeholders or public (?)
44%	**maximum hours of work**
44%	rules about remediation & penalties for non-compliance
39%	**unions and collective bargaining**
33%	third party monitoring of code
31%	public reporting of code compliance
29%	**overtime pay**
28%	**'living wage' standard**

We asked about their perceptions of risks that threaten the organization's goals. Traditional concerns identified in SCM literature dominated, as demonstrated in **Table 2.**

Table 2: Risks Facing *Organization* (Responses Indicating a Moderate, High, or Extremely High Risk)

60%	Late delivery
59%	Communication difficulties with supplier
58%	Political instability
50%	Cost overrun
46%	Low Quality
44%	Products inconsistent with order
38%	*Supplier creates a reputational risk to organization*
25%	*Supplier violates a code of conduct*
21%	*Supplier violates a local law*

Late delivery of goods from the supplier was perceived to pose the greatest organizational risk. Sixty percent of respondents said that late delivery posed a Moderate, High, or Extremely High Risk. About the same amount of respondents said that Communication Difficulties with Suppliers (59%) and Political Instability in the sourcing country (58%) created risks for the organization. Fifty percent identified Costs Overruns as either Moderate, High, of Extremely High risk, while 46 percent said that Low Quality was a risk.

For our purposes, it is interesting that concerns about violations of corporate codes and local laws were perceived as less risky to the organization. Only 25 percent of respondents agreed that Suppliers Violating a Corporate Code posed either a Moderate, High, or Extremely High Risk to the organization, and only 21 percent identified a Supplier Violating Local Laws as a risk to the organization. About 38 percent agreed that Suppliers Create a Reputational Risk to the organization.

Interestingly, the responses varied when we asked SCM professionals about risks to their *own* professional reputation, as opposed to risks to their employers or the corporations they serve. These results of presented in Table 3. Lateness of products was still perceived as posing the greatest personal risk, with 70 percent saying that late goods posed a Moderate, High, or Extremely High Risk to them personally. Next came Cost Overruns (60 percent). However, more than half (53 percent) said that Violations of Corporate Codes created a personal risk to their reputation, and 47 percent violations by suppliers of local laws did so. That's up from 25 and 21 percent, respectively, when the respondents were asked about risks to organizations.

Table 3: Risks to *Personal* Reputation (Moderate, High, or Extremely High Risk)

70%	Lateness
60%	Cost overrun
53%	*Violation of code of conduct by supplier (including 33% High or Extreme High Risk)*
52%	Poor quality products
47%	Supplier violates their own country's laws

The SCM professionals we surveyed play a small role in the actual design and implementation of the labour codes. About a third of the respondents were not employed by the organization when the code was developed. However, of those who were, 29 percent said that their opinion was not solicited about the development of the code; only 7 percent were 'integral' in the design of the code, while 20 percent said they were asked for input. Half of the respondents have no responsibility for implementing or monitoring the code, while 20 percent responded that they are 'held personally responsible by senior management if a supplier violates the code'.

We explored the respondents' perceptions of working with codes, as well as their opinions on whether codes make a difference in terms of actual supplier labour practices. Overall, the respondents are supportive of labour codes. Some results are surprising. For example, most (about 57%) indicated that codes are not difficult to monitor (30% say they are difficult to monitor). And most (about 79%) believe that codes do not result in unnecessary costs, delays, or loss of otherwise good suppliers. Almost 80% strongly disagreed or disagreed with the statement that the code 'makes my job more difficult'. In other words, they appear to believe that codes do NOT complicate their jobs. This is the case even though 41 percent said the introduction of a code required new training for suppliers, and 38 percent said new monitoring systems needed to be developed. About 24 percent had to drop at least one supplier who could not meet the code. And 34 percent said they now perform a factory audit before accepting a supplier.

This apparent inconsistently between the new tasks that are required post-code and the very strong belief that codes do not complicate their jobs might be explained by the fact that the respondents are not themselves responsible for performing these additional tasks. Fifty-eight percent of respondents indicated that codes of conduct have had no impact on their day-to-day responsibilities, whereas 41 percent said codes have impacted their jobs in a *positive* way. Only 5.6 percent of respondents said codes have had a negative impact on their jobs.

The SCM professionals we surveyed also believe that codes produce positive outcomes. Almost 75 percent Disagreed or Strongly Disagreed with the statement that codes are 'ineffective in solving the problems' they seek to address. This is consistent with similar strong rejection (72% Disagree or Strongly Disagree) of the claim that codes are a public relations exercise. In other words, SCM professionals believe labour codes make a substantial contribution to improving their suppliers' labour practices, although 60 percent agreed that it is difficult to know what the labour practices are at a given supplier at any moment in time. Most (57 percent) agree that supplier labour practices can have an impact on their company's reputation.

V. Analysis and Observations

Some very preliminary observations can be drawn from the survey results. The survey appears to confirm that the historical risk concerns for SCM professionals persist

and dominate, including late arrival of goods, poor quality, inconsistency with design or other specifics of an order, and cost overruns. However, over a third of respondents in our survey said that suppliers create a 'reputational risk' to the organization, while a quarter perceived risk to the organization associated with the violation of a supplier code of conduct. Interestingly, though, over half of respondents believed that supplier violations of codes presented *a personal risk* to their own career. This suggests that SCM professionals distinguish their own situation from that of the organization for which they work. They perceive their own reputation to be more closely tied to the code compliance levels of the suppliers than the organizations. The other point worth noting is that the reputation of the SCM professional appears to rest in large measure on the ability to get the products to market in a timely manner. About 70 percent of respondents listed 'late deliveries' as a threat to their personal reputation in the company.

We can stop there and use these basic finding as our example. In a rough manner, we have tapped into the psyche of the SCM professional. We have a sense of what risks and fears they perceive to be lurking in their environment. Many are concerned about sourcing from suppliers at high risk of code violation, or at least, at high risk of being caught in code violation, not so much because they fear this will harm their employer, but because they fear it will reflect poorly on them as SCM professionals. We have also confirmed the (not surprising) finding that factors that threaten the timeliness of deliveries pose a great risk to the SCM professional.

A question for law is whether this raw glimpse into the SCM subsystem produces any insights into what sorts of legal signals might provoke *useful* 'risk management responses'. By useful, we mean organizational changes that would tend to improve the probability that illegal, dangerous, indecent, or abusive labour practices in supplier workplaces might dissipate. One obvious conclusion is that elevating the risk of products getting to market late is likely to provoke the strongest reaction within the SCM system, particularly in industries that are subject to seasonal markets and that utilize lean manufacturing processes. We already have examples of laws that act on this impulse. Probably the most well known is the 'hot goods' provision of the American *Fair Labor*

Standards Act, which allows for the embargo of goods produced in violation of the law.[69]

As Cindy Estlund has observed: "The interdiction of goods, unlike traditional sanctions, hits the large manufacturers at the top of the supply chain, at least in time-sensitive retail markets like fashion apparel."[70] Weil notes that the ability to 'stop the flow of goods dramatically raises the penalty faced by contractors by creating private penalties—the market based costs of failing to deliver orders in a timely manner."[71] The so-called 'hot goods' provision of the *FLSA* is an example of the regulatory 'risk vaccine' concept in action. It exploits the risk of time-sensitivity within many supply chains in order to provoke companies to pay closer attention to the conditions under which their products are manufactured. This might be achieved by the introduction of better monitoring of suppliers, or more careful screening, for example. The strength of the vaccine will still depend on the risk being perceived as real and substantial by decision-makers within the SCM function. To use the language of Ayres and Braithwaite, the regulatory model must come accompanied by a 'Big Gun", some form of real and substantial punishment for laggards.[72] Identifying and deploying that gun is more difficult in the context of global, as opposed to domestic supply chain activity.

One insight of the decentred approach to regulation, as noted above, is that private systems of regulation and monitoring can be harnessed as part of the governance project. Our survey found that a majority of SCMs believe that violations of codes or local laws by their suppliers will reflect poorly on them personally. Therefore, we can hypothesize that elevating the risk that such non-compliance will be discovered will introduce greater motivations for SCM to learn about their suppliers' labour practices and put in place systems to reduce the potential for those suppliers to be found in violation. One way to elevate the risk of non-compliance by a supplier is through disclosure regulation. I (and others) have made this point before.[73]

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[69] *FLSA,* Section 15(a). See discussion in S. Lung, "Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers" (2003), 34 Loyola U. Chi. L. J. 291; C. Estlund, *Regoverning the Workplace* (Yale U. Press, 2010) at 111; J. Esenshade, *Monitoring Sweatshops* (Temple U. Press, 2004), 6-7; D. Weil, "Compliance With the Minimum Wage: Can Government Make a Difference?" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=368340

[70] Ibid.

[71] Weil, supra note at 17-18.

[72] I. Ayres & J. Braithwaite, *Responsive Regulation* (Oxford U. Press,) at 40.

[73] Doorey, "Who Made That?", supra note __.

Thus, another example of the 'risk vaccine' approach to influencing labour practices within global supply chains was a law proposed by an NGO (the Ethical Trading Action Group) in Canada in 2003 relating to product labeling. Already, Canadian laws require labeling on goods of various information, including 'country of origin'. The proposed new law would have expanded the information required to include the factory address where the good was manufactured.[74] A law requiring companies to track and make public the identify and address of their suppliers increases the risk to SCM professionals that code and law violations will be discovered and linked to specific buyers. The risk vaccine theory predicts that SCM professionals and systems would respond to this elevated risk by introducing risk management measures designed to lower the probability that the company will be linked to low road suppliers who violate codes and laws.[75]

As this is a preliminary paper, I will stop here. More analysis is needed of the full survey results. The purpose of this essay has been to make a contribution to the regulatory literature by developing a framework I called 'labour law as risk vaccine'. I have used the global supply chain as my working case study in this paper. However, the risk vaccine framework has broader applicability. I have argued elsewhere that governments could promote greater compliance with employment standards laws by harnessing the risk employers feel in the threat of unionization.[76] But much more theoretical and empirical research is needed. The basic idea is that business risk can, in some circumstances, be harnessed by lawmakers to provoke useful internal organizational systems changes. This becomes feasible because of business sensitivity to reputational risks that lurk in their environments. Risk management is developing as a field of business study, and regulators would do well to think about how this development could be deployed to attain public policy goals.

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[74] Ibid. See also a summary of the law and its design in D. Doorey, "Disclosure of Factory Locations in Global Supply Chains: A Canadian Proposal to Improve Global Labour Practices" (2005), 55 Can. Rev. Soc. Pol'y 104.

[75] There is some support for this prediction in my earlier qualitative study of the internal steps taken by Nike and Levi-Strauss leading up to their decision to publicly disclosure their global supply chain. Both organizations introduced: centralized, computer tracking of all suppliers; new systems for screening suppliers for capacity to comply with codes; new monitoring processes for existing suppliers; new protocols for dealing with suppliers found to be in violation of codes; clear assignment of code compliance responsibility to specific individuals and departments within the organization; and greater willingness to engage external stakeholders and critics in constructive dialogue about how to improve practices: Doorey, "The Transparent Supply Chain: From Resistance to Implementation at Nike and Levi-Strauss" (2011), 103 J. Bus. Ethics 587

[76] D. Doorey, "A Model of Responsive Workplace Law" (2012), 50 Osgoode Hall L.J. 47.