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Introduction to "New Governance and the Business Organization" Special Issue of Law and Policy

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Introduction to "New Governance and the Business Organization" Special Issue of *Law and Policy*

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SCOPE AND OBJECTIVES OF THIS SPECIAL ISSUE

The point of departure for this exciting collection of articles is to advance the scholarly treatment of "new governance" by shifting its focus away from what regulators do or how they do it, and towards examining the encounter between new governance and business organizations, within those organizations themselves.[1] As is evident from this issue, this shift still provides a broad canvas on which to work, as the types of business activity examined here through the lens of new governance encompass railways, food safety, corporate privacy, and bank lending, as well as securities and derivatives trading. A particular strength of the articles in this issue is the presentation of original empirical research, ranging from surveys of business in the UK food sector (Hutter) and a case study of corporate restructuring (Sarra) to interviews with privacy officers

(Bamberger and Mulligan), bankers (Conley and Williams), and corporate monitors (Ford and Hess). While most of the papers focus on specific domestic contexts for business activity, Conley and Williams' paper is pitched at the global take up of the Equator Principles for project lending, and Ford and Hess comment on comparisons between Canada and the United States in the implementation of corporate monitorship programmes.

The editors of this issue are committed to the idea that the analysis of new governance needs to move beyond theory into practice and implementation. Accordingly, we do not engage in an exhaustive description of the contours of the phenomenon in this introduction. We also do not engage with the distinctions between discrete versions of new governance or between new governance and related regulatory approaches. Much of this mapping has been ably undertaken elsewhere (see, e.g., Gilad 2010; *Wisconsin Law Review* 2010; de Búrca and Scott 2006, 2007). What is relevant for our purposes is the broad agreement in the literature around several elements central to new governance. The first is a restructured and more collaborative relationship between the state and regulated entities, based on the recognition that regulation may operate most effectively when it incorporates private actors' context-specific experience and relevant expertise (Freeman 1997; Grabosky 1995), as well as potentially the experience and expertise of other nonstate actors (Parker 2002). This may extend to public recognition and enforceability of "rules" developed by nonstate actors (Meidinger 2006; Ayres and Braithwaite 1992). Second, new governance imagines giving regulated entities greater autonomy to design their own internal processes to meet broadly defined outcomes (Lobel 2004; Coglianese and Lazer 2003). This freedom is counterbalanced by mechanisms designed to force transparency and accountability. Specifically, the articles in this issue connect to new governance from the particular vantage point of business organizations' compliance functions, internal governance mechanisms, and/or self-regulation. New governance has special relevance to such functions because it envisions a dynamic and endogenously developed understanding of governance and compliance (Ford 2008). The focus on developing regulatory strategies that place responsibility on organizations for their own compliance, and that try to foster or engage with authentic compliance-supporting internal motivations, is of central importance to the current project.

Third, the theoretical new governance approach emphasizes problem-solving and experimentation in the ongoing design of regulatory strategies (Sabel and Simon 2004; Sparrow 2000). Moreover, because of our preoccupation with implementation, this issue has a particular affinity with the most explicitly pragmatic, learning-by-doing versions of new governance, notably experimentalism (Dorf and Sabel 1998). Finally, some new governance and related scholarship incorporates broader emancipatory, democratic, or neo-republican concerns (Shearing and Wood 2003; Dorf and Sabel 1998; Ayres and Braithwaite 1992). While that more ambitious agenda is not fully engaged here, broad stakeholder participation and "voice" is a fourth theoretical underpinning, essential to both legitimacy and effectiveness, and it is touched on in some form by all of the authors in this issue.

The authors each take as his or her point of departure a specific set of features of new governance in which they ground their specific analyses. For example, while Hutter emphasizes the decentralization of regulation and changing notions of the degree to which the regulated are held responsible for developing internal governance processes, both Bamberger and Mulligan, as well as Ford and Hess, foreground the revisability and experimentation aspects of new governance thinking. It is possible therefore that, as some argue, the definition of new governance itself is constituted and reconstituted during evolving interactions among organizations around specific governance mechanisms (Huising and Silbey 2009).

Another reason for the focus in this issue on understanding the implementation of new governance ideas is that the global financial crisis of 2007–2009 arguably exposed some shortcomings both in regulatory capacity and in financial firms' willingness to self-monitor towards the end of systemic stability. The articles presented in this issue provide a vantage point for a more nuanced assessment of the possibilities and limits of new governance going forward. We note the interesting diversity of views, ranging from scepticism to cautious optimism, ultimately expressed in these articles concerning the continued salience of new governance approaches after the crisis. The articles presented here individually contain rich seams of analysis bearing on the question of the extent to which, and how, new governance becomes embedded in a variety of organizational locations. However, a number of cross-cutting themes may also be identified.

I. STRUCTURAL CONDITIONS FOR THE EMERGENCE OF NEW GOVERNANCE PROCESSES

In its own way, each article recognizes that background conditions impact the way in which new governance processes get implemented, which may point towards the ultimate success or failure of such initiatives. Some iterations of the new governance literature derive from the idea of "regulatory capitalism," that is, the proposition that regulation has adopted a middle road between pure state service provision and extensive deregulation, pushing the state to adopt a facilitative and cooperative stance towards business in regulating its activities (Levi-Faur 2005, 2009). In an article originally presented at the conference that sparked this special issue, Christine Parker (2009) argued that new governance style "enforceable undertakings," or corporate monitorships, are a logical consequence of regulatory capitalism's need to navigate around the "traps" of potentially ill-fitting compliance strategies and potentially ill-fitting deterrence ones. Meanwhile, Hutter identifies a shift away from a controlling and towards a "constitutive" conception of regulatory action with respect to business activity (Shearing 1993). She also pays attention to the specifics of industry structure (how many sophisticated organizations, how many small actors) as relevant conditions for the uptake of new governance initiatives. Ford and Hess tease out the notion of "organizational culture" (including fears of liability and patterns of expertise-based homogeneity) as both a motivation for the creation of corporate monitorships in the first place and, ultimately, an obstacle to their success (as Ford and Hess define success). Finally, Conley and Williams acknowledge that the difficulties of imposing command-and-control–type regulation on multinational companies are part of the landscape in which the Equator Principles have flourished.

II. RISK MANAGEMENT AS NEW GOVERNANCE

In a number of these articles, risk management emerges as an overarching form of new governance, involving as it does a shift away from a preoccupation with compliance with external legal norms and towards an enterprise of containing and managing risks to an organization emanating from a variety of sources (including, of course, the risk of various legal liabilities). Condon has noted that the scholarship on risk regulation and that on new governance has tended not to extensively converge; the articles in this issue are emerging examples of that valuable cross-pollination (Condon 2007). Accordingly, Hutter's article most explicitly recognizes both risk regulation and the risk management responses of organizations as forms of new governance, while her empirical research demonstrates the difficulties of actually implementing risk management strategies throughout even sophisticated organizations. Bamberger and Mulligan frame their discussion of emerging corporate practices around privacy in terms of the increasingly pervasive understanding of privacy "as a risk to be managed rather than a matter of legal compliance." In contrast to Hutter, their research points to an optimistic outcome whereby the "integration of privacy into existing decision making structures . . . promotes privacy's consideration as a systemic risk, consistent practices across firm units, and the commitment of employees from across the firm" (p. 504).

Meanwhile, Conley and Williams are cautiously optimistic about the progressive role to be played by the market-based Equator Principles as a form of quasi-regulation, in large part because adherence to these principles allows lending banks to manage their own financial risks. Finally, Sarra considers the increasing use of equity derivatives by financial market participants, in terms of the implications of that trading strategy for traditional understandings of the rationale for shareholder "voice" in corporate decision-making. To the extent that entering into derivatives transactions is an exercise in risk management for those shareholders, Sarra's article suggests that shareholders are increasingly signalling that derivatives transactions are a more effective market-based strategy for risk management than the capacity to exercise "voice" in corporate decision making. More generally, however, an increasing focus on risk management as a strategy of governance in business organizations raises difficult issues about who will ultimately be able to participate in governance processes, since risk management has been conceived in the academic literature as a process that privileges technocratic and "expert" knowledge (Power 2007; Beck 1992).

III. AGENCY, VOICE, AND EXPERTISE IN NEW GOVERNANCE

The articles in this issue deal with a cluster of issues revolving around where agency for new governance initiatives is or is not located in organizational contexts. A related issue, mentioned above, is charting the significance of particular bodies of "expertise" in implementing or shaping such initiatives. Hutter's article contains a valuable assessment of different stakeholders' relative agency within the food safety sector. Interestingly, her research on that sector in the UK domestic context did not accord much agency to nongovernmental organizations (NGOs) as an influence on business practices. This is in contrast to Conley and Williams' article, which accords high significance to the role of environmental NGOs as a factor in pushing financial institutions to adopt the Equator Principles into their lending practices. Ford and Hess describe the corporate monitorship process as one in which the corporate entity seeks to retain as much agency as possible over the scope of the work conducted by the monitors, though their dissatisfied view of the outcomes to date is ultimately connected to the lack of enthusiasm they find among ex-prosecutor corporate monitors to achieve expansive goals.

Meanwhile, Sarra's article spans several different locations for addressing questions of agency in new governance: her case study of the Algoma Steel corporate restructuring and her analysis of the role of equity derivatives in corporate governance. With respect to the former, she finds the capacity of the corporation's employees to exercise agency in that restructuring to be partial and contingent. With respect to the latter, she ultimately locates agency for corporate governance outcomes in the market innovation of equity derivatives themselves. Finally, while Bamberger and Mulligan focus primarily on internal actors (privacy officers) as agents of change in the privacy context, they also see a significant role for the "activist regulator" in promoting the responsibilization of these internal change agents.

A recurring theme is scepticism about the possibilities for broad citizen involvement in new governance processes, even while the importance of striving towards this goal is reinforced. While Hutter's article references the importance accorded to consumers as an influence on the activities of food managers, Conley and Williams find that "[A]t almost every turn in corporate social responsibility practice, including the EPs project, someone else speaks for the local communities that are its presumed beneficiaries" (p. 568). As noted above, Sarra's findings with respect to the role of employees in the Algoma Steel restructuring were that that influence was highly contingent on a temporary and politically supported possession of economic leverage. Finally, responding to their concerns about the expertise-based and insular world of enforced corporate monitorships, Ford and Hess examine the possibilities for achieving increased public participation in the monitorship regime.

In implementing new governance processes, the significance to be accorded to specific bodies of "expertise" is highly contextual and situation dependent. Here again we see several different stories. For Hutter, there is a lesson from her research on the railway industry related to the difficulty of implementing effective strategies for dealing with occupational health and safety problems throughout the organization. She notes, in characterizing the experience of

British Rail (BR) with self-regulation around these requirements as “more procedural than substantive,” that “BR was a complex organization comprising a diversity of professions, encompassing a variety of businesses . . . This led potentially to a great source of variation” (p. 468). Meanwhile, Bamberger and Mulligan point to the development of a new profession of “chief privacy officer,” as well as the integration of a “network of specially trained employees into business lines as a means of identifying and addressing privacy concerns,” as critical to successfully governing privacy in the business organizations studied (p. 488). Conley and Williams also point to the emerging role of consulting firms used to prepare environmental and social impact assessments for those seeking loans from global banks.

Ford and Hess reflect on the poor fit between the professional expertise of the ex-prosecutors who typically become corporate monitors, and the expansive role intended for those monitors, especially with respect to the ongoing development of learning about best practices that may be gleaned from specific examples of implementation. On the other hand, Ford and Hess remain cautious about whether a complete solution to this problem would lie in the development of a profession of “corporate monitor” with more organizational compliance expertise, because of the potential for insularity, homogeneity, and lack of public accountability that may result.

IV. MOTIVATIONS FOR ORGANIZATIONAL BEHAVIOUR

A number of the articles speak to whether it is possible to identify factors that motivate organizations to embed new governance processes internally. There is some convergence evident in the Conley and Williams, Bamberger and Mulligan, and Hutter articles, as they all reference external pressures, whether from consumers, the public, or the idea of "reputational risk." Conley and Willams and Sarra also reference economic self-interest as a driver of participation in new governance initiatives. This point bears further examination, however, because one of the key insights of Sarra's article is indeed that shareholders' self-interest with respect to debates about optimal corporate governance has changed with the decoupling (via derivatives) of an economic interest from the legal rights traditionally embedded in the shareholding relationship. In other words, the economic interests of shareholders are not static but are themselves reconstituted in the process of negotiating corporate governance norms (Hutter, this issue; Condon 1998). Ford and Hess find a general lack of enthusiasm among the businesses researched to embrace the fundamental organizational changes proposed by monitorships—thereby reinforcing their conviction that meaningful enforcement matters—though, since these initiatives follow on the heels of regulatory enforcement processes, their organizational subjects are unlikely to be "compliance leaders" anyway (Thornton, Gunningham, and Kagan 2005). This lack of enthusiasm may also in part speak to the question of "capacity" noted by Hutter as a key predictor of the likely success of new governance initiatives.

V. NEW GOVERNANCE AND ENFORCEMENT

Some scholars of new governance are quick to point out that the horizontal and experimental approach they advocate will not be successful in the absence of a rigorous enforcement regime (Ford 2005; Karkkainen 2004). For example, Hutter insists that states are required to assess whether or not to take drastic action against businesses that are "persistently incapable" of managing risk. Some of the articles in this issue take on the question of what a new governance-inspired enforcement program for regulation might look like. As we have noted above, Ford and Hess's article on corporate monitorships is an example of the kind of cultural experimentation that new governance advocates in the enforcement sphere. Interestingly, Conley and Williams' article raises the issue of whether the Equator Principles analysed therein could work as a substitute for the lack of enforcement of environmental norms by particular jurisdictions. New governance engages with the broader socio-legal debate about enforcement effectiveness by pointing to the need for creativity and remaining sensitive to context, while acknowledging enforcement's continued importance in the regulatory toolkit.

CONCLUSION

A final question for an introduction that seeks to synthesize the findings of a diverse set of articles is whether there are generalizable insights to be derived therein. In our view, the "thick descriptions" (Geertz 1973, 6) of specific organizational contexts that these articles provide are precisely the point. Generalizable conclusions—in the sense of “off the rack” theoretical recommendations that can be applied with minimal regard to context and situation—do not present themselves here. This should not be a surprise at this stage. Rather, these case studies and others like them are the context-rich material required to develop a set of relevant *questions* that those involved in new governance efforts could be considering. Taken together, these articles reinforce a conviction that we alluded to at the beginning of this introduction: that granular stories about actual new governance efforts shed crucial light on how programs are implemented within business organizations.

We might even imagine a provisional matrix of sorts going forward, which tries to draw out learning from these and other accounts. Among other elements it would consider extant context—the nature of the industry in question (Hutter) or of an enforceable background rule of law norm (Conley and Williams). It would demand conscious attention to the location of agency, the precise nature of different actors’ capacities, and power. Particular forms of expertise will be salient in particular contexts. Our provisional matrix would therefore call for an intimate understanding of the relevant actors—of why internal actors can be effective change agents in the Federal Trade Commisison (FTC) privacy context, for example (Bamberger and Mulligan); of why ex-prosecutors do not function perfectly as corporate monitors (Ford and Hess); and of the conditions under which a broader group of stakeholders is accorded a voice in high-stakes decisions, such as the Algoma Steel restructuring (Sarra). Equally important would be a clear-eyed appraisal of what particular factors, beyond the sphere of short-term self-interest, are expected to stimulate change in a particular situation. Given the apparently recurring problems incorporating broad, direct stakeholder participation, new governance scholars and practitioners also have to ask themselves how important broad participation is to the approach (likely very important) and whether and how the problem can be remediated in any particular situation. The question is directly posed through these case studies and demands a response.

Making new governance successes replicable across business organizations requires not generality, but specificity, experimentalism, and pragmatism. This is the kind of work called for in order to continue to deepen our understanding of why new governance methods work when they do, what their essential preconditions are, what considerations should be explicit in formulating a new governance effort, and what some of the most perilous steps may be in the translation from theory to practice.

NOTE

1. The origin of this special issue on new governance and the business organization lies in a symposium held at The University of British Columbia in Vancouver, Canada in May 2009, sponsored by the Canadian Social Sciences and Humanities Research Council, the Law Foundation of British Columbia, and the National Centre for Business Law at the University of British Columbia. The symposium brought together an exciting and eclectic group of scholars from Canada, the United States, England, and Australia, who collectively represented disciplines such as law, business, information studies, sociology, and political science.

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