NEW GOVERNANCE & LEGAL REGULATION: COMPLEMENTARITY, RIVALRY, AND TRANSFORMATION

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New approaches to regulation have emerged to deal with inadequacies of traditional command and control systems. Such "new governance" mechanisms are designed to increase flexibility, improve participation, foster experimentation and deliberation, and accommodate regulation by multiple levels of government. In many cases, these mechanisms co-exist with conventional forms of regulation. As new forms of governance emerge in arenas regulated by conventional legal processes, a wide range of configurations is possible. The purpose of this Article is to provide a preliminary mapping of such relationships, using examples drawn from the European Union and the United States. When traditional law and new governance are yoked together in a hybrid form, we might speak of a real transformation in the law. In other cases, systems of law and new governance may exist in parallel but not fuse together. Where both systems co-exist but do not fuse, there are numerous possible configurations and relationships among them. One might launch the other, as when formal law is used to mandate a new governance approach. Or, they might operate independently yet both may have an effect on the same policy domain. Finally, in some areas one system may take over the field, either because new governance methods replace traditional law altogether, or because opposition to innovation halts efforts to employ new approaches.

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INTRODUCTION

The European Union (EU) has regulated water quality for over 30 years[1]. In 2000, the EU launched a new and radical approach with the Water Framework Directive (WFD). The WFD emphasizes flexibility; takes account of Member State differences; adapts the regulatory program to the multi-level nature of EU governance; facilitates mutual learning, benchmarking, and peer review; makes use of scoreboards to measure progress; and mixes binding legal rules and standards with non-binding forms of cooperation, information pooling, and guidance. The Directive also mandates a process and structure for Member State action on water quality, requires that Member States achieve "good water status" in 15 years, but leaves the task of defining good status and many other key terms to subsequent action by Member States and the European Commission. The Directive set in motion a number of informal, horizontal processes, while also initiating efforts to create more detailed legislation in some areas.[2]

In a similar vein, the State of Wisconsin has introduced a novel approach to environmental law. Wisconsin's environmental regulators are experimenting with a new approach to ensuring that air remains clean and waters pure. While maintaining

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[1] The first water directive, passed in 1975, dealt with drinking water. *See* Council Directive 75/440/EEC, 1975 O.J. (L 194) 26.

[2] *See infra* notes 38 to 58 and accompanying text.

detailed clean air and water regulations, the Department of Natural Resources, under its "Green Tier" program, will waive or defer standard enforcement procedures for regulated industries that agree to develop different ways to achieve environmental goals, as long as the chosen methods lead to results that exceed legally mandated standards. The result is a hybrid system in which innovation, negotiation and self-monitoring are fore-grounded, while regulatory enforcement remains in the background as a default option.[3]

The WFD and Wisconsin's Green Tier are just two examples of how new processes to carry out public objectives are changing the law. Where regulatory goals have traditionally been pursued exclusively through statutory enactments, administrative regulation, and judicial enforcement, we now see new processes emerging, which range from informal consultation to highly formalized systems that seek to affect behavior, but differ in many ways from traditional command and control regulation. These processes, which we will collectively label "new governance", may encourage experimentation; employ stakeholder participation to devise solutions; rely on broad framework agreements, flexible norms and revisable standards; and use benchmarks, indicators and peer review to ensure accountability.

New governance is currently the subject of vigorous debate. Some argue that its innovations should be used only in a very limited way to supplement traditional forms of regulation in areas in which command and control processes have not been effective. Others think that we are witnessing a major transformation in law and policy, and that the new governance "revolution" will end up changing all law as we know it. [4]

We do not attempt to resolve this debate. But we recognize that we are experiencing a period of significant change. The purpose of this Article is to help us understand the nature of that change and its implications for a yet-to-be-glimpsed legal future.

In this Article, we begin the task of mapping relationships between conventional forms of regulation and a number of new governance approaches. As new forms of governance emerge in arenas regulated by conventional legal processes, a wide range of configurations between the different regulatory mechanisms is possible. When the two processes become yoked together in a hybrid form and interact, as in the WFD and Green Tier, we might speak of a real *transformation* in the law. In

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[3] WIS. STAT. § 299.83 (2004), *created by* 2003 Wisconsin Act 276; Scott Bernstein, Kate Davis, David Loring & Vilan Odekar, *New Governance and The Green Tier Charters: Benchmarks for Evaluating the Process*, *available at* http://law.wisc.edu/webshare/02qQ/green_tier_paper.pdf.

[4] Scholars have expressed very different views on the significance of new governance and its potential to transform the law. For example, Adrienne Héritier notes that new governance techniques constitute only a small percent of EU regulatory actions and work best when they operate in the shadow of conventional regulation. For Héritier new governance is a useful supplement to more traditional approaches, not the precursor of major changes. Adrienne Héritier, *New Modes of Governance in Europe: Policy-Making without Legislating?*. *in* COMMON GOODS: REINVENTING EUROPEAN AND INTERNATIONAL GOVERNANCE, 185, 206 (Adrienne Héritier, ed., 2002). On the other hand, Charles Sabel and Jonathan Zeitlin believe that the appearance of new techniques of governance presage a radical transformation of the structure and functioning of the EU. *See* Charles Sabel & Jonathan Zeitlin, *Learning From Difference: The New Architecture of Experimentalist Governance* (2007), *available at* http://www2.law.columbia.edu/sabel/papers/EU%20governance%20paper%20060406.pdf. Sabel and William Simon see these developments as leading to a transformation of law. *See* Charles F. Sabel & William H. Simon, *Epilogue: Accountability Without Sovereignty*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 395 (Gráinne de Búrca & Joanne Scott eds., 2006).

other cases, the two systems may exist in parallel but not fuse together in a single system. Where both systems co-exist, there are numerous possible configurations and relationships between them. Thus, one might simply be used to launch the other, as when formal law is used to mandate a new approach. Alternatively, they might operate independently yet both may have an effect on the same policy domain. Finally, in some areas one system may take over the field, either because new governance methods replace traditional law altogether, or because opposition to innovation halts efforts to employ new approaches. The purpose of this Article is to examine all such relationships, drawing on examples from the EU and the United States.

I. THE EMERGENCE OF NEW GOVERNANCE

Much has been written on the reasons for the emergence of new governance. Its development may be attributed to very basic changes in economy, polity and society, as well as to more technical innovations in public administration. In these accounts, as society becomes more complex and problems harder to solve, there is a need for more experimentation. Because stakeholders often have the requisite knowledge to design an appropriate solution to a particular regulatory issue, increased participation becomes not only desirable, but also necessary. The continual change and expansion of knowledge which characterize society means that all solutions should be regarded as provisional. Given this situation, it seems preferable for legislators to develop broad frameworks, but let stakeholders develop concrete solutions based on easily revisable rules. However, because traditional forms of democratic legitimacy cannot be readily applied to new governance, it becomes necessary to provide other methods to ensure accountability. New technologies which make it easier to secure data, obtain input from stakeholders, and monitor progress have made available new methods of accountability. Finally, as more and more processes spread across traditional geographic boundaries and a need for coordination grows, new ways to manage multi-level regulatory processes are demanded.[5]

As a result, policy makers have introduced a number of reforms. For example, as Scott and Trubek point out, in the EU we can see a wide range of policy innovations designed to:

- Create more effective forms of participation
- Coordinate multiple levels of government
- Allow more diversity and decentralization
- Foster deliberative arenas
- Permit more flexibility and revisability
- Foster experimentation and knowledge creation[6]

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[5] *See, e.g.* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 468–470 (2004); Sabel & Zeitlin, *supra* note 4; Gráinne de Búrca, *EU Race Discrimination Law: A Hybrid Model?*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 4, at 97; Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L. REV. 1, 18 (2002); David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*, 11 EUR. L. J. 3, 343 (2005).

[6] Scott & Trubek, *supra* note 5.

Similar developments can be seen in the United States as the rise of new governance is facilitated by such factors as devolution to the states, increased public-private partnerships, attacks on the use of litigation, and the emergence of new managerial technologies. [7]

II. VARIETIES OF COEXISTENCE

Our analysis uses stylized concepts of "new governance" and legal regulation or "law".[8] We contrast systems that rely on top-down control using fixed statutes, detailed rules, and judicial enforcement on the one hand, with a wide range of alternative methods to solve problems and affect behavior, on the other. We recognize that these stylized concepts mask real complexities and empirical variation. We use them provisionally and recognize that substantial further work needs to be done to clarify terminology, secure empirical information, and develop a more sophisticated typology. We hope this Article points the way to such work.[9]

There are now many instances in which we can see new governance and law operating in the same policy domain. We call that situation *coexistence.* There are three basic ways in which new governance and law can coexist. When each is operating at the same time and contributing to a common objective but the two have not merged, we describe them as *complementary.* When the newer forms of governance are designed to perform the same tasks as legal regulation and are thought to do it better, or otherwise there seems to be a necessary choice between systems, we speak of *rivalry* between the co-existing systems.

There is also a third category which we refer to as *transformation.* In this Article, we use that term to describe configurations in which new governance and traditional law are not only complementary; they are also integrated into a single system in which the functioning of each element is necessary for the successful operation of the other. Because such hybrids represent the emergence of a new form of law, they are of special interest. The WFD and Green Tier are examples of such hybridity and thus of transformation.[10] Table 1 shows these options.

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[7] Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 IND. HEALTH L. REV. 140, 151 (2006).

[8] Note that "new governance" as defined in this Article includes what others and we have sometimes called "soft law." *See* Trubek & Trubek, *supra* note 5.

[9] It is important to note that the term "new" does not necessarily mean that the techniques so labeled are all recent in origin. Some of these techniques have existed for some time, often as informal processes. What is new really is the self-conscious and regularized use of these approaches as an alternative or supplement to traditional forms.

[10] It is important to note that some others, including us in earlier papers, use the term hybridity to refer to a broader range of situations including all forms of complementarity. *See* Trubek & Trubek, *supra* note 5; Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism, in* LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 4, at 1. In this Article we use the term to refer only to situations of real integration and mutual dependence in order to highlight the transformative potential of hybridization.

Table 1: Varieties of Coexistence

Complementarity	Two systems working for common goals
Rivalry	Two systems competing for dominance
Transformation (hybridity)	Systems merge into new hybrid process

In situations where new governance and traditional legal regulation co-exist, complex dynamics come into play. The introduction of new modes of governance may be part of a conscious design to get the best of the old and the new, by yoking the two together in an integrated process. Such integration may or may not succeed; various forces can destabilize planned integration. On the other hand, new processes may emerge independently but gradually be seen as complementary, leading to *ex post* forms of integration. In other situations, coexistence may lead to the displacement of one of the modes. Sometimes this happens by design, as when a new mode of governance is introduced with the intent of displacing older forms. But it can also occur unintentionally, as when the creation of a newer mode makes it so difficult to deploy traditional modes that they wither away. In such situations, we speak of rivalry.

In this Article, we look at the dynamics of coexistence and explore complementarity, rivalry, and transformation. In this analysis, we have classified EU and United States examples according to the typology in Table 1. This classification, based often on limited data, is provisional and subject to correction as we secure further information regarding these developments.[11]

III. COMPLEMENTARITY

We can speak of the complementarity of new governance and legal regulation when both systems co-exist in the same policy domain and promote the same goals.[12] This configuration may occur in situations in which a complex social problem requires a variety of different forms of intervention.[13]

A leading example of complementarity can be seen in the EU's efforts to combat discrimination against women in the workplace. Here, we can see the operation of three distinct systems that initially emerged independently of one another. These systems include a series of binding treaty articles and directives dealing with equality in the workplace and facilitating female participation, the

[11] While there has been considerable speculation about new governance and its relationship to legal regulation, there is very little empirical work on how these systems relate to one another.

[12] This analysis draws heavily on de Búrca & Scott, *supra* note 10, in which the authors analyze various forms of "hybridity" between law and new governance. Their typology employs a similar functional analysis and identifies many of the forms of complementarity noted here. But they employ a broader definition of hybridity. For the reasons we have chosen to narrow the term and refer to hybrids as instances of transformation. *See supra* note 9 and accompanying text; *supra* note 2.

[13] A somewhat similar situation occurs when various "soft" or non-binding mechanisms are being used to develop normative commitments that eventually lead to the creation of "hard law" either though judicial interpretation or statutory innovation situations where new governance leads to new forms of traditional law. This is the classic use of "soft law" in international and EU Law. *See generally* Francis Synder, *Soft Law and Institutional Practice in the European Community*, *in* THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOR OF EMILE NOËL (Stephen Martin, ed. 1994). As these functions succeed one another, they don't neatly fit into the category of "co-existence."

European Employment Strategy (EES), and the European Structural Funds. Treaty articles make equality between the sexes an "essential task" of the Community,[14] oblige the Community to "mainstream" gender issues,[15] grant the Council the right to prevent discrimination,[16] and demand equal opportunities at work.[17] The Charter of Fundamental Human Rights reaffirms the ban on all forms of discrimination, including those based on sex.[18] The directives establish legal rights to be free from discrimination in the workplace and mandate that Member States create such rights as a matter of national law binding on employers and enforceable in national courts.[19] The EES, on the other hand, is a new governance process that employs non-binding guidelines, periodic reporting, multilateral surveillance, and exchange of best practices to increase employment and the quality of work. One of the goals of the EES is to foster national policies that will discourage gender discrimination and increase female labor market participation. While the directives operate at the level of individual cases, the EES operates to change national policy and employer attitudes.[20] Finally, the EU Structural Funds can be used in a way that complements both the directive and the EES by providing funding for projects that further the general goal of equal access for women, such as improved day care facilities.[21] In a study of the operation of these three processes, Claire Kilpatrick has argued that not only are they operating in a complementary fashion, but, as their potential interaction becomes clearer to policy makers at the EU and Member State levels, conscious efforts are being made to increase complementarity. [22]

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[14] Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty], art. 2.

[15] EC Treaty, art. 3(2).

[16] EC Treaty, art. 13.

[17] EC Treaty, art. 137, 141. Together, these articles establish equal opportunities in the labor market, equal treatment at work, and equal pay for equal work or equal value.

[18] Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 [hereinafter Charter].

[19] On anti-discrimination in the workplace, see the following directives: Council Directive 75/117/EEC on Approximation Of Member States' Equal Pay Laws, 1975 O.J. (L 45) 19; Council Directive 76/207/EEC, 1976 O.J.(L 039) 40, and Council Directive 2002/73/EC on Implementation of Equal Treatment of Sexes Regarding Employment, Advancement and Working Conditions, 2002 O.J.(L 269) 15; Council Directive 79/7/EEC, 1979 O.J. (L 006) 24, and Council Directive 86/378/EEC on Equal Treatment in Social Security Schemes, 1986 O.J. (L 225) 40; Council Directive 86/613/EEC, on Equal Treatment of Self-employed Men and Women, 1986 O.J. (L 359) 56; Council Directive 92/85/EEC on Protection of Pregnant and Breastfeeding Workers and New Mothers, 1992 O.J. (L 348) 1; Council Directive 96/34/EC on Parental Leave, 1996 O.J. (L 145) 4; Council Directive 97/80/EC on The Easing of the Burden of Proof in Non-criminal Sex Discrimination Cases, 1997 O.J. (L 014) 6.

[20] On the EES, see, e.g., Robert J. Franzese & Jude C. Hays, *Strategic Interaction among EU Governments in Active Labor Market Policy-making: Subsidiarity and Policy Coordination under the European Employment Strategy*, 7 EU POL. 167, 189 (2006); THE OPEN METHOD OF CO-ORDINATION IN ACTION: THE EUROPEAN EMPLOYMENT AND SOCIAL INCLUSION STRATEGIES (Philippe Pochet & Jonathan Zeitlin eds., with Lars Magnusson, 2005); Scott & Trubek, *Mind the Gap*, *supra* note 5, at 18. For a more complete bibliography on the EES and other similar processes, refer to the Open Method of Coordination Online Forum, hosted by the University of Wisconsin's EU Center of Excellence, *available at* www.eucenter.wisc.edu.

[21] The Funds are designed to further the goal of economic and social cohesion, as laid out in Article 158 EC Treaty.

[22] Claire Kilpatrick, *New EU Employment Governance and Constitutionalism*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 4, at 121. Furthermore, in its proposal for reform to the Funds for 2007–2013, the Commission writes that the Funds are to support policies "which are in line with the guidelines and recommendations made under the European Employment Strategy and with the agreed objectives of the Union in relation to social inclusion and education and training." *Commission*

Another example of possible complementarity can be seen in efforts to reduce racial disparities in health in the United States. It has long been clear that some racial minorities have poorer health than the population as a whole. For some time, lawyers have sought to attack this situation using litigation aimed at various racially discriminatory practices. In the past, these efforts have not proven particularly effective.[23] For example, the Supreme Court's holding in *Alexander v. Sandoval* stated that there is no private right of action to enforce disparate impact regulations issued under Title VI.[24] In the meantime, efforts by the medical profession to use "total quality" types of new governance techniques have begun to show results in one specific area of racial inequality. Certain racial minorities suffer disproportionably from various chronic diseases such as asthma and diabetes. In recent years, processes designed to improve the quality of health services using new governance techniques such as benchmarking, nationally accepted protocols for best practice, and patient self-management have been introduced in some healthcare systems. Preliminary results show that these processes may be effective in reducing racial disparities in relation to those suffering from these ailments. [25]

Contemporaneously, the civil rights community has become increasingly active on issues relating to equality in access to and in the provision of healthcare services. The potential for legal remedies to advance this cause remains. Civil rights networks, community organizations and scholars are developing strategies that recognize that implementation of evidence-based medical practices at the local and state level can reduce disparities between different groups.[26] Framing the disparities as a deviation from the needs-based standard allows an alliance between the medical experts and the rights advocates. As new governance techniques such as benchmarks, protocols and public data dissemination are accepted, it may be possible to use litigation to create pressure on health providers to adopt these new processes.[27] The coexistence of the legal remedies and new governance are in play in local communities, state health initiatives, as well as in national organizations.[28]

Proposal for a Regulation of the European Parliament and of the Council on the European Social Fund, COM (2994) 493 final (2004).

[23] Mariane Engleman Lado, *Unfinished Agenda: The Need for Civil Rights Litigation to Address Race Discrimination and Inequalities in Health Care Delivery*, 6 TEX. F. ON C.L. & C.R. 1, 16 (2001); Maya Das & Louise Trubek, *Achieving Equality: Healthcare Governance in Transition*, 29 AM. J.L. & MED. 395 (2003).

[24] Das & Trubek, *supra* note 23, at 398; 532 U.S. 275, 289 (2001).

[25] Das & Trubek, *supra* note 23.

[26] Rose Cuison Villazor, *Community Lawyering: An Approach to Addressing Inequalities in Access to Health Care for Poor, of Color, and Immigrant Communities*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 48, 54–55 (2005) (describing how a community group used a complaint with the state attorney general's office to improve services for limited English language patients).

[27] *See generally* Deborah Stone, *Reframing the Racial Disparities Issue for State Governments*, 31 J. HEALTH POL. POL'Y & L.127 (2006).

[28] Gail Christopher, *Towards a "Fair Health" Movement, in* POVERTY & RACE (Poverty & Race Research Action Council, Sept.–Oct. 2005), *available at* http://www.prrac.org (urging the development of a "Fair Health" movement that combines civil rights enforcement with efforts to improve access and quality of care).

IV. RIVALRY

In some cases, new governance and legal regulation coexist as alternatives, and potentially as rivals. This may occur in cases where a conscious decision has been made to offer a new governance alternative to legal regulation where each route is considered equally valid, or in situations in which new governance processes are being developed as a preferred solution, but the older forms remain in place. In both cases, the different systems may be seen as actual or potential rivals, rather than complementary.[29]

A. Alternative Routes of Equal Value: The EU's Social Dialogue

The EU's Social Dialogue is a good example of the creation of an alternative route to conventional legal regulation that is neither designed to work with, nor to displace, the traditional legal route.[30] The Social Dialogue is a process by which representatives of workers and employers (referred to as the "social partners") can negotiate rules governing employment relations and similar matters: negotiated agreements can become binding law by being subsequently adopted as directives by the European Council. The Social Dialogue can be seen as a new governance approach – at least relative to the way EU Law was made in the past. Unlike the traditional EU Community Method route of Commission initiative, occasional Parliamentary co-decision, and Council approval, the Dialogue relies on bargaining by private actors to set norms. The Dialogue does not foreclose the Community Method route which remains available for the same forms of regulation that can be developed through the Dialogue. But if it were to be used in a significant number of cases, it has the potential to entirely replace the Community Method in the domains in which it operates.[31]

B. New Governance as a Substitute for Regulation: Dealing with Medical Error in the United States

A second example of coexistence and rivalry can be seen in the United States' effort to reduce medical errors and compensate the victims of such errors. Traditionally, this has been handled through two forms of legal regulation: the tort

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[29] Some commentators see much of new governance as a covert form of deregulation, designed to mask reduction of environmental standards and social protection. They see the introduction of such systems as a "poisoned chalice." *See* Trubek & Trubek, *supra* note 5, at 364.

[30] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, arts. 138–139, Oct. 2, 1997, O.J. (C 340) 1 [hereinafter Treaty of Amsterdam].

[31] It should be noted that the kind of bargaining between workers and employers over work-related issues is widespread in Europe and goes back a long way. It is "new" at the EU level, however, having only been established formally in 1985, and having first been used successfully in 1995 to create a directive on parental leave. *See* Council Directive 97/81/EC, 1998 O.J. (L 014) 9. For more information, see Berndt Keller & Bernd Sörries, *The New European Social Dialogue: Old Wine in New Bottles?* 9 J. EUR. SOC. POL'Y 111, 125 (1999); R. de Boer, H. Benedictus, & M. van der Meer, *Broadening Without Intensification: The Added Value of the European Social and Sectoral Dialogue*, 11 EUR. J. IND. REL. 51, 70 (2005); W.K. Roche, *The End of New Industrial Relations?*, 6 EUR. J. IND. REL. 261, 282 (2000); Wolfgang Streeck, *European Social Policy after Maastricht: The 'Social dialogue' and 'Subsidiarity'*, 15 ECON. & IND. DEMOC'Y 151, 177 (1994).

system and physician licensing. Medical malpractice litigation uses tort law to secure compensation for victims and the licensing process is supposed to weed out doctors with significant records of medical error. However, many think malpractice litigation is an excessively costly way to compensate victims which has little overall impact on the quality of health care, and the licensing process has been largely ineffective in reducing error.

As a result, efforts have been made to create a rival system to deter negligent conduct, compensate victims, and improve the quality of medical treatment. This system uses such new governance techniques as "regulation by information" through the publication of data on physicians' results, fiscal incentives for good performance by hospitals and clinics, alternative forms of victim compensation through administrative processes similar to workers compensation, and conflict avoidance through informal methods to explain and apologize for error. [32]

These two systems currently operate as rivals. Some tout the new governance approach as an improvement on the traditional legal regulatory and litigation mechanisms and urge that it be expanded and consolidated, while others see it as a way to displace the traditional remedies and weaken patient protection. Presently, however, the systems offer rival routes to error reduction and compensation.

C. Law Creates Unacceptable Standards; New Governance Is Available as a Way to Avoid Them

This is an idea put forth by Sabel and Zeitlin.[33] They refer to situations in which the legally mandated outcomes are so undesirable that regulated entities have very strong incentives to choose to use new governance as a way to opt out. Although in some cases the imposition of draconian legal results via the traditional legal and regulatory channels has been intentional, it seems the authors are referring largely to cases where the inability of traditional law to frame workable solutions forces stakeholders to seek ways out of the regulatory vise.[34]

V: TRANSFORMATION—A FUNCTIONAL TYPOLOGY

The most interesting area of coexistence is when law is, in effect, transformed by its relationship with new governance. We can identify several such constellations. In some cases, law creates new governance procedures and mandates basic parameters. Such a move to new governance is linked to a shift to "proceduralism" in legal regulation, in which the law simply structures procedures for conflict resolution or problem-solving.[35] The EU's Environmental Impact Assessment Directive can be seen as a process-mandating form of law.[36]

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[32] Louise G. Trubek, *supra* note 7, at 165.

[33] Sabel & Zeitlin, *supra* note 4.

[34] One could see the resort to the Social Dialogue by social partners as an example. The partners know that if they do not agree on directives, the Commission can propose legislation without their consent. This may encourage them to reach negotiated solutions they otherwise might not have been willing to entertain. For a discussion of the Social Dialogue, see *supra* notes 29–30 and accompanying text.

[35] Günther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW. & SOC'Y REV. 239, 286 (1983); Günther Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's*

A second situation exists when new governance solves problems and law provides a safety net. Many of the new governance processes are designed to foster collective problem-solving by stakeholders in a policy domain. These processes may have been added to areas that were exclusively covered by traditional legal processes and rights-based systems. In this situation, the rights-based structures are retained as a safety net available to rights-holders, should the new governance processes prove ineffective.[37] Thirdly, the law may create minimal standards while new governance is available for those who exceed the standards. In this configuration, legal regulations set minimal standards but allow actors to "opt out" of the legal regime on condition that they use new governance processes such as self-regulation and self-monitoring to exceed the minimal standards. This use of law as the default position creates incentives for regulated entities that seek more flexible approaches to meeting and exceeding the standards. De Búrca and Scott call this configuration "default hybridity."[38] Examples can be found in Green Tier and OSHA.

Finally, law may provide general norms while new governance is used to help make them concrete. In some cases, the law may establish a very general norm without spelling out how it applies in specific instances, or it may mandate a broad result without specifying the kinds of laws required to achieve that result. In cases where concretization requires consideration of substantial diversity, demands revisablity, and benefits from widespread participation, new governance methods can be used to give specific meaning to the general norms. This process occurs under the WFD and other EU Framework Directives.[39]

VI. TRANSFORMATION—CASE STUDIES

In this Part we discuss several cases where the merger of traditional legal tools and new governance approaches have led to a new type of law making and application of the law. Such transformation can be part of a conscious design and built into the legislative structure *ex ante*, or it may emerge in the course of

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Hierarchy, 31 LAW. & SOC'Y REV. 763, 788 (1997). For a more critical take, see Tony Prosser, *Theorising Utility Regulation*, 62 MOD. L. REV. 196 (1999).

[36] Jane Holder & Joanne Scott, *Law and New Environmental Governance in the European Union*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 4.

[37] The EU's anti-race discrimination efforts may be considered as an example here. Article 13 EC Treaty allows the Council to act to prevent race discrimination, among other forms. Council Directive 2000/43/EC, 2000 O.J. (L 180) 22, obliges Member States to implement equal treatment laws. Council Directive 2000/78/EC 2000 O.J. (L 303) 16, establishes the principle of equal treatment in employment and occupation. Simultaneously, Community Action Programs serve to support more proactive efforts by Member States.

[38] de Búrca & Scott, *supra* note 10.

[39] Gráinne de Burca suggests it could also be used to develop fundamental rights in the EU. *See* Gráinne de Búrca, *EU Race Discrimination Law: A Hybrid Model?* *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 4. For a similar process in the United States, see Cary Coglianese & D. Lazar, *Management-based Regulation: Prescribing Management to Achieve Public Goals*, 37 L. & SOC'Y REV. 691 (2003). For other examples of framework directives, see Council Directive 89/391/EEC on Health and Safety at Work, 1989 O.J. (L 183) 1, and Council Directive 2000/78/EC on Combating Discrimination in Employment on Grounds of Religion or Belief, Disability, Age, or Sexual Orientation, 2000 O.J. (L 303) 16. The Commission has also proposed a *Framework Directive on Legal Migration*. *See* COM (2005) 669 final.

implementation. Consciously designed complementarity may occur when a new governance process is established as a prerequisite to the employment of legal regulation, or when new governance is allowed as an opt-out from legal regulation on certain conditions. However, some hybrids emerge *ex post* in the course of the implementation process. In such cases, while transformation may not have been consciously planned, it evolves as a particular need is perceived and new processes are crafted as a response to it.

A. The EU's Water Framework Directive

One of the most significant examples of how a mixed system of new governance and more traditional legal approaches creates a new type of law can be found in the WFD.[40] It is an ambitious piece of legislation which launched an innovative approach to maintaining and improving water quality throughout the EU. Designed to replace a series of centralized and traditional command and control directives that dealt separately with groundwater, surface water, drinking water etc, the WFD mixes classic top-down regulatory modes and legally binding requirements with decentralized, bottom-up, participatory and deliberative processes; iterative planning; horizontal networks; stakeholder participation; information pooling; sharing of best practices; and non-binding guidance.

1. Comparing Framework Directives with Other Forms of EU Governance

In order to fully understand this case, it is first necessary to understand the difference between EU Framework Directives and two other governance tools: directives promulgated using the "Classic" Community Method (CCM) on the one hand, and the Open Method of Coordination (OMC), which is the quintessential example of EU new governance, on the other.[41]

In the CCM, the Commission proposes and the European Council promulgates a directive which contains a more or less detailed set of rules. In many cases the Parliament participates in developing the legislation. Once approved by the Council and Parliament, directives are legally binding and Member States are obligated to transpose and enforce the rules they contain. The system is relatively centralized with the Commission playing a major role. The Commission may be given delegated authority to flesh out details of the legislation operating through the comitology process, which requires consultation with representatives of the Member States.[42] The Commission also monitors performance and can initiate enforcement action in the European Court of Justice (ECJ) if a country fails to follow the directive. The final word on the meaning of the directive lies with the ECJ.

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[40] Council Directive 2000/60/EC, 2000 O.J. (L 327) 1 [hereinafter WFD].

[41] For a discussion of the CCM and its relation to new governance, see Scott & Trubek, *supra* note 5.

[42] Comitology refers to a process by which the Commission can make binding rules pursuant to a delegation from the Council and in consultation with Member States' representatives. For a general discussion, see EU LAW 150–51 (Paul Craig & Gráinne de Búrca eds., 2003). Comitology under the WFD takes place within the Committee established by Article 21 WFD. This process is regulated according to the rules set forth in Council Decision 2006/512, 2006 O.J. (L 2000) 11.

The OMC, on the other hand, is much more decentralized.[45] It employs non-binding guidelines which may be either very general or highly specific. Formal and informal horizontal networks play an important role in devising the guidelines. The guidelines are easily changed and have been periodically revised to take advantage of new knowledge. Efforts are made to ensure participation by the public and stakeholders as well as Member State officials in the preparation and revision of the guidelines. The OMC includes benchmarking and peer review processes, which are designed to foster mutual learning and provide accountability. Member States are required to prepare national plans and report on progress. Progress may be measured by "league tables" comparing levels of national performance using quantitative indicators where possible. The planning process is iterative as plans are revised periodically to take advantage of new knowledge. The Council can draw attention to cases where Member State performance is thought to be sub-par and laggards are exposed to public scrutiny. But there are no formal sanctions for non-performance and since the operation of the OMC does not give rise to a "legal act", there is no role for the ECJ.

A framework directive like the WFD may combine these two very different types of governance. Like the CCM, framework directives are binding on Member States which can be held to account by the Commission in ECJ proceedings. However, like the OMC, frameworks may employ more open-ended standards instead of detailed rules while setting in motion horizontal and deliberative processes designed to craft both non-binding guidance and detailed and binding rules. Framework directives may lead to further, more detailed "daughter directives" promulgated under the CCM and to delegated legislation by the Commission using comitology. But they also may include informal cooperation and techniques usually associated with the OMC such as non-binding guidelines, horizontal networking, iterative planning, benchmarking, league tables, deliberative fora, mandated participation, and peer review. Table 2 sets forth in ideal-typical form the differences and similarities among these three forms of EU governance.

[45] For a detailed discussion of the OMC, see Jonathan Zeitlin, *Introduction: The Open Method of Co-ordination in Question, in* Pochet & Zeitlin, *supra* note 20. *See also* Trubek & Trubek, *supra* note 5; J.S. Mosher & Dave Trubek, *Alternative Approaches to Governance in the EU: EU Social Policy and the European Employment Strategy*, 41 J. COMM. MKT. STUD. 63, 68 (2003).

Table 2: Three Types of EU Governance

	Classic Community Method Directive	Framework Directive + New Governance	Open Method of Coordination
Normative Source and Form	Law—detailed, closed, binding rules	Law—mix of fixed obligations and binding, but open, standards	Non-binding, revisable guidelines and targets
Member State Duties	Transpose and enforce rules	Transpose framework, meet obligations, develop plans, meet standards	Develop plans, carry out measures needed to meet guidelines and targets
How is it implemented?	Comitology, monitoring, enforcement	Legislation, comitology, horizontal cooperation, standard definition, monitoring, enforcement	Planning, program development, legal and institutional reform
Degree of Centralization	High—major role of Commission	Medium—mix of centralized (Commission, Council, Parliament), decentralized and linked horizontal elements	Low—Member States have primary role subject to peer review and limited centralized monitoring
Participation in Norm Specification	Limited—Commission, comitology, judiciary	Broad—Member States, horizontal networks, experts, stakeholders, public, comitology, commission, judiciary	Broad--Member States, experts, stakeholders, public, comitology, commission
Horizontal Information Pooling	Minimal—reporting to Commission	Substantial—formal reports, informal pooling practices	Substantial—orchestrated information sharing
Revisable National Plans	No	Yes	Yes
Structured Benchmarking	No	Yes	Yes
Use of Informal Guidance	No	Yes	Yes
Deliberative Decision Making	Low	High	High
Accountability Mechanisms	Commission monitoring, judiciary	Scoreboards, organized stakeholder & public input, peer review, Commission monitoring, judiciary	Scoreboards, organized stakeholder & public input, peer review, Commission monitoring, Council

2. The Water Framework Directive and the Transformation of Law

The WFD includes both traditional regulation and new governance. It is this combination, and the way the two elements may interact, that has led several scholars to see the WFD as a leading example of a hybrid form of governance and thus effecting a transformation of law.[44]

The WFD arose out of dissatisfaction with traditional methods of EU environmental law-making. The EU has been regulating water quality for some time using classical directives and the CCM. By the late 1990s there were 11 separate water directives in place. However, there was at this time widespread dissatisfaction with EU environmental law in general, and water quality regulation in particular. It was thought that the centralized and detailed directive approach failed to take into account the differences in local conditions, was not well suited to the reality of multi-level governance in which most implementation is done by the Member States, did not make proper use of economic incentives, and put too much strain on the EU's limited capacity both to issue rules and to secure compliance with detailed directives.[45]

All the abovementioned concerns were present in the area of water quality management in the EU. The task of regulating water quality has always been complex due to the great difference in the ecologies of the various Member States and their divergent approaches to environmental protection. It was becoming more complex due to increased public awareness, growing demand for water by users, the privatization of water distribution systems in many countries, the emergence of new scientific knowledge, and controversies concerning the impact of chemical discharge and agricultural run-off on ground and surface waters.[46]

The WFD emerged from a lengthy developmental process involving a complex interaction among the Commission, Parliament and Council.[47] The resulting document includes broad standards and objectives as well as specific requirements. Member States are required to avoid any deterioration of water quality and achieve "good water status" within a defined timeframe. They must take measures "with the aim of achieving good water status" but the measures are described in rather general terms and the Directive does not define precisely what "good water status" means.[48] To be sure, an Annex provides guidance for determination of what constitutes "good" status for different types of water. This Annex is very complex and contains a number of detailed factors that should be taken into account in assessing the status of any body or type of water.[49] However, it does not set final, uniform, and technically verifiable standards—that work is left for further development by the

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[44] This discussion draws heavily on Holder & Scott, *supra* note 36. We are especially indebted to Joanne Scott for bring the WFD to our attention and helping us understand its complexities. For another discussion of the WFD and the transformation of law, see Sabel & Zeitlin, *supra* note 4, at 54–56.

[45] Katharina Holzinger, Christoph Knill & Ansgar Schäfer, *Rhetoric or Reality? "New Governance" in EU Environmental Policy*, 12 EUR. L. J. 403, 420 (2006).

[46] Maria Kaika, *The Water Framework Directive: A New Directive for a Changing Social, Political, and Economic European Framework*, 11 EUR. PLAN. STUD. 299, 316 (2003); Maria Kaika & Ben Page, *The EU Water Framework Directive: Part 2. Policy Innovation and the Shifting Choreography of Governance*, 13 EUR. ENV. 328, 343 (2003).

[47] Kaika, *supra* note 46; Kaika & Page, *supra* note 46.

[48] WFD, art. 4.

[49] WFD, annex V.

Commission and Member State authorities in the implementation phase through a series of iterative, multi-level processes described below.

Far from being a single piece of legislation as that term is normally understood, the WFD is better viewed as the initiation of a comprehensive program designed to guide further action by the EU and the Member States. The program seeks to ensure that over a period of time the Member States set up a new and holistic approach to water quality management, adapt overall EU requirements to local conditions, develop detailed metrics for measuring water quality, survey all waters in their territory to determine their status, institute various forms of national level laws and regulations that are consistent with existing EU law and the overall objectives of the WFD, and report regularly on progress. And it mandates further legislative action by the Council and Parliament, delegated legislation by the Commission using comitology, and support and monitoring by the Commission including the possibility of enforcement actions in the ECJ.[50]

The WFD introduced many innovations into EU Environmental Law. Instead of a series of separate regulations dealing with each aspect of water quality, it envisioned a holistic approach managed primarily by the Member States and based on the principle of integrated river basin management. Instead of detailed and centralized rules, it launched a process of constructing separate but coordinated national processes and regulations that would meet common objectives but could take somewhat different forms in each of the Member States. Rather than laying out precise measures of ecological and chemical quality, it set up processes through which Member States and the Commission could develop such measures in a collaborative fashion.

It is important to note that the WFD includes detailed rules as well as open-ended standards and employs binding legal obligations as well as non-binding guidance and peer review. The system for classifying water status is open-ended. The general concept of good water status is not fully defined in the Directive or the Annex. Rather, the Directive indicates that specific, harmonized and binding standards for "good" status are a long term goal to be reached though subsequent processes and horizontal collaboration. But the WFD also contains some specific requirements of the type found in classical directives. The Directive requires that countries adopt a strategy of integrated management based on all waters within each river basin and create river basin authorities for each basin by a specific date. It specifies that Member States promulgate a series of measures that deal with various types of waters and risks.

Some of the requirements are quite general, allowing Member States significant discretion in shaping river basin management and developing a series of measures which will ensure continuing compliance with the WFD and existing law. On the other hand, some of the required measures are detailed and specific: thus, for example, the Directive requires that Member State programs must include "a prohibition of direct discharges of pollutants into groundwater." Certain exceptions

[50] The Commission has instituted several proceedings in the ECJ against Member States accused of failing to comply with aspects of the WFD. For example, the ECJ ruled against Germany (C-67/05) and Belgium (C-33/05) in two of these cases. *See Commission Staff Working Document*, SEC (2006) 1143, at 10.

to this direct requirement are permitted and enumerated in detail in the Directive.[51] Similarly, Annex VI creates binding obligations by requiring that all measures contained in the 11 extant specific water directives must also be included in the measures that Member States are legally obligated to adopt under the WFD.

In addition to very general and open-ended standards and detailed and specific requirements, the WFD also includes a mandate for the production of further EU legislation in certain areas. Thus, Article 16 mandates further and specific legislation on pollution, including the designation of hazardous substances that are to be phased out over time.[52] Article 17 requires the adoption by the Parliament and Council of "measures to prevent and control groundwater pollution." This has led to a recent "daughter directive" providing detailed rules and procedures Member States must follow to protect groundwater against pollution and deterioration.[53]

Another important feature of the WFD is the requirement for public participation. Article 14 states that "Member States shall encourage the active involvement of all interested parties in the implementation of this Directive."[54] The authors of the Directive have recognized that many key decisions will be made in the implementation phase. To ensure democratic legitimacy and secure insights from stakeholders and other interested parties, they have required that public participation be built in at all stages.[55]

Such a multi-faceted and programmatic form of legislation presented a major challenge for national authorities charged with implementing the WFD, as well as for the Commission which has been assigned both continuing legislative tasks and executive responsibilities. Facing this challenge, the Commission and the Member States decided to create a Common Implementation Strategy (CIS) to manage their immense set of responsibilities. The CIS, which seems to have arisen organically from efforts to grapple with all these complexities, introduces several new governance features into the Framework's processes.[56] According to several scholars, it is the existence of the CIS that makes this Directive into a true hybrid and an example of the transformation of law.[57]

There are several elements of the CIS that constitute new governance and contribute something unique to the overall governance of water quality in Europe. These include metrics to measure progress; scoreboards; horizontal networking and information pooling; river basin management plans; non-binding guidance documents produced collectively by the Member States and the Commission with expert input; non-binding guidelines produced by the Commission following comitology procedures; and specific requirements for stakeholder and public participation in all aspects of implementation.

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[51] WFD, art. 11(3)(j).

[52] WFD, art. 17.

[53] Council Directive 2006/118, 2006 O.J. (L 372) 12 (EC).

[54] WFD, art. 14.

[55] A detailed guidance document has been prepared to help Member States manage their public participation requirements: *Public Participation in Relation to the Water Framework Directive* (European Commission, Guidance Document No. 8, 2000).

[56] *See* Holder & Scott, *supra* note 36; *infra note* 71 and accompanying text.

[57] Holder & Scott, *supra* note 36; Sabel & Zeitlin, *supra* note 4.

The WFD employs two types of non-binding guidance. The first is non-binding *guidelines* that can be set forth by the Commission using comitology procedures.[58] As far as we can tell, this authority has not been used to date. The second are *guidance documents* prepared by horizontal working groups under the CIS. They have been used extensively.

Guidance documents are the core of the CIS and one of its most interesting features. These are detailed, non-binding, and revisable documents that provide guidance for the performance of specific tasks that are mandated by the WFD. They provide suggestions on how to carry out various implementation tasks as well as outlining possible common approaches to key technical matters. They can be very long and quite detailed.[59]

The documents are created by Working Groups made up of representatives of the Member States and experts. They deal with issues such as how to organize public participation, how to classify lakes and coastal waters, and how to establish precise and common definitions for open-ended terms like "good water quality" and "good ecological status."[60] The EC currently lists 14 such documents that have been completed.[61]

To illustrate the role of guidance documents as well as the complexity of the implementation process under the WFD, look at what is called *intercalibration*. This process is outlined in the Guidance Document entitled "Towards a guidance on establishment of the intercalibration network and the process on the intercalibration exercise." This exercise was instituted to ensure that all Member States employ a common methodology when determining if a given body of water has reached the level of "good ecological status" mandated by the Directive.[62] Since the 27 Member States, not the Commission, are responsible for assessing all the relevant waters within their territory, it is necessary for them to have a common standard for ecological quality assessment and other aspects of water status. But as the States have differing ecological conditions and employ different assessment methods, it was important to create a system that allowed national differences and required uniformity only on those issues that demand it and then only after the standard had been agreed upon through horizontal and deliberative processes.

The ultimate goal of intercalibration is to produce such a uniform standard. To reach that goal, the WFD and the CIS set in motion a process of networking and deliberation in which officials from all Member States, experts, stakeholders and the public, work together to harmonize methods and agree upon a common standard for determining when waters have reached or exceeded "good" status. This process involves sharing of experience, deliberation over specific aspects of the standard, learning through applying provisional standards at test sites, and iterative review of

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[58] See e-mail from European Commission's WFD Group to Mark Nance (research assistant to the authors) (Feb. 7, 2007, 08:29 CST) (on file with authors).

[59] For example, Guidance Document No.1 is 274 pages long, No. 8 is 214 pages, No. 9 is 166 pages.

[60] European Commission, *The EU Water Framework Directive—Integrated River Basin Management for Europe*, (2007), *available at* http://ec.europa.eu/environment/water/water-framework/index_en.html.

[61] *Available at* http://forum.europa.eu.int/Public/irc/env/wfd/library?l=/framework_directive/guidance_documents&vm=detailed&sb=Title.

[62] The mandate is for "good surface water status," WFD, art. 4(1)(a), which is defined as when "both its ecological status and its chemical status are at least 'good.'" WFD, art. 2(18).

progress. Although the guidance document is flexible and non-binding, the final goal of the intercalibration process will be a binding determination produced by the Commission working with the Article 21 comitology committee and setting out the standard to be followed by all states when they determine water status.[63]

Intercalibration is just one example of the way the WFD has combined two types of legal norms and several forms of new governance to achieve a result not possible under either system working alone. Thus in this case the Directive introduced a very general and open-ended goal — good water status — which Member States are legally bound to achieve within specified times and with certain specified exceptions. Broad parameters for measuring water status and classifying waters as "good" or better are contained in an Annex. But the WFD left to the Member States and the Commission the task of deciding how that concept was to be defined.

Through the CIS, the task of developing a precise definition has been approached through the use of a horizontal network made up of Member State representatives and experts, with public participation. This network and non-binding guidance documents on intercalibration should facilitate information pooling, benchmarking, and deliberation over means and ends. While intercalibration will eventually lead to a central and binding standard promulgated through the Commission's delegated legislative powers, in many other areas covered by the CIS there is no "hard law" end point and the process remains non-binding and easily revisable.

For these reasons, it is easy to see why several leading scholars think that the WFD illustrates the emergence of hybrid forms and the potential of such forms to lead to better problem-solving and law-making. By allowing as much national diversity as possible while holding Member States to measurable results in the long run; by tapping into the expertise of 27 Member States; by ensuring widespread public participation; and by facilitating information pooling and peer review; the WFD creates the potential for better environmental law and more effective management of water quality. Although the WFD process is still underway and much more needs to be done before the structures and measures it mandates are fully operational, and while we lack the detailed empirical evidence needed to determine if the system really will achieve all its ambitious goals, nonetheless the WFD stands as a strong example of how new governance ideas and methods are transforming the law.

B. Other Cases

There are several other examples in the EU and the United States that demonstrate that hybridity and transformation are underway. Take, for example, the EU's Stability and Growth Pact (SGP). The SGP is designed to ensure that EU Member States maintain fiscally sustainable budgetary processes. It includes a "soft

[63] Article 8 requires that technical specifications and standardized methods for analysis and monitoring of water status must be established following comitology procedures. It appears that the final standard will include a numerical scale to measure ecological quality that will be used by all Member States: *Towards a Guidance on Establishment of the Intercalibration Network and the Process on the Intercalibration Exercise* 41, 42 (European Commission, Guidance Document No. 6, 2003).

governance" system and hard law with specific obligations and sanctions for non-compliance. The soft governance part of the system employs non-binding guidelines, periodic reporting indicators, and multi-lateral surveillance to put pressure on countries to avoid excessive deficits and unsustainable levels of government debt. But the structure also includes the Excessive Deficit Procedure by which the European Council can impose sanctions if a country exceeds the Pact's strict quantitative deficit and debt limits.[64]

In theory, the two parts of the system complement each other. Soft processes allow flexibility in the ways that the goals of the Pact are to be reached, something harder to do through formal regulation. At the same time, the threat of sanctions should provide an incentive for countries to follow the non-binding guidelines. While the system has proven less effective in practice than it seems in theory, it remains a paramount example of complementarity by conscious design. [65]

Another example can be seen in Green Tier. Green Tier allows regulated industries and other entities to opt out of a variety of environmental regulations if they agree to construct a self-regulatory regime and use it to achieve higher standards of environmental performance that is required under existing regulations. Entities that enter "the Green Tier" are given much more flexibility in finding ways to meet and exceed existing standards than could be provided under standard command and control regulatory norms.[66] The systems complement one another: without the standard regulatory framework entities might lack incentives to self-regulate, while without the more flexible new governance processes they would not be able to carry out some innovative strategies.[67] The hope is that the resulting hybrid will lead to a higher degree of environmental protection than could be achieved with only command and control methods.

A similar situation exists in the interrelation between the EU's Race Discrimination Law and the Action Plan Against Discrimination. Gráinne de Búrca notes that these initiatives were originally conceived and executed separately but over time have begun to coalesce into what might become a genuine hybrid.[68] The Race Directive contains a very broad requirement that Member States pass legislation to combat racial discrimination, but leaves many decisions on how to define discrimination and deal with it to the Member States. At the same time,

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[64] For full information on the SGP, see David M Trubek, Patrick Cottrell, & Mark Nance, *"Soft Law," "Hard Law," and EU Integration*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 4, at 65, 94.

[65] Although the SGP as originally conceived failed to accomplish the overriding goal of deterring excessive deficits, reforms in the process and changes in national economic policies have been made in an effort to improve effectiveness. The most important changes broadened the kinds of economic data to be used in determining the existence of an excessive deficit and loosened the supposedly automatic nature of the corrective procedures. For a more or less optimistic analysis, see the speech on the subject given by the European Central Bank's Vice-President, Lucas Papademos, The Political Economy of the Reformed Stability and Growth Pact: Implications for Fiscal & Monetary Policy, Address at the European Central Bank Conference: The ECB and its Watchers VII (June 3, 2005), *available at* http://www.ecb.int/press/key/date/2005/html/sp050603_1.en.html. For a more technical and more critical discussion, see Roel M.W.J. Beetsma & Xavier Debrun, *The New Stability and Growth Pact: A First Assessment*, 51 EUR. ECON. REV. 453, 477 (2006).

[66] Bernstein et. al., *supra* note 3.

[67] This is similar to what Sabel & Zeitlin, *supra* note 4, refer to as "penalty default," but here the penalty is merely strict scrutiny by the regulator under traditional law.

[68] de Búrca, *supra* note 5.

through the Action Program the EU has helped create networks of regulators and NGOs, supported the production of data and indicators, and established fora in which Member States and others can discuss progress toward the broad goals of the directive and exchange ideas on obstacles and best practices. These processes should affect the way the Member States define discrimination and enforce the rules it requires.

It is important to note the ways the race discrimination case seems to differ from the employment discrimination story as told by Kilpatrick. These differences allow us provisionally to classify the former as an instance of transformation and the latter merely as complementarity. In both cases, the two systems were initially developed independently. In employment discrimination, they seem to *operate* independently as well, performing different but complementary functions. Each could do its work without the other. But in the race case, one system seems to be needed for the other to become fully effective. In this situation, the open-ended nature of the legal obligations created a need for mechanisms to give these concepts effective meaning and specificity. The several new governance modalities described by de Búrca create a process in which specific obligations and rules can be developed and changed over time.[69] As the Directive's broad norms and various new governance processes become more integrated, a true hybrid system of new governance and traditional regulatory law methods could emerge.

Table 3 shows that that there are examples of complementarity, rivalry, and hybridity on both sides of the Atlantic.

Table 3: Coexistence in the EU and United States

	EU	United States
Complementarity	- EES & the Employment Discrimination Directive	- Racial and Ethnic Disparities Litigation and Medical Quality
Rivalry	- Social Dialogue	- Tort Litigation vs. Quality & Administration
Transformation (hybridity)	- Water Quality - Stability and Growth Pact - Race Discrimination	- Green Tier

VII. DYNAMICS

In developing a general theory of new governance and legal regulation, it is important both to identify the possible range of outcomes when these two systems co-exist and understand the dynamics that may lead to each outcome. A provisional list of outcomes includes:

- conscious integration succeeds
- conscious integration fails
- co-existing systems become integrated *ex post*
- co-existing systems continue to operate independently

[69] de Búrca, *supra* note 5.

- rival new governance forms displace traditional regulation
- traditional regulation blocks emergence of rival forms of new governance

To develop a robust theory of the relationship between new governance and legal regulation, one would need to refine these categories, explore cases in which each of these outcomes has occurred, and chart the factors that have led to one or the other of these results. This process will require careful delineation of variables and substantial empirical work. "Success" and "failure", "displacement" and "transformation" are themselves complex notions. And there is very little hard data available on most of the cases we have identified. In this Article, we merely indicate a few examples, make a preliminary assessment of actual or likely outcome, and suggest some of the factors that may explain the various outcomes.

A. The Success or Failure of Conscious Designs

The mixture of old and new forms of governance seems to have been quite successful in environmental regulation. There are examples, like the WFD and Wisconsin's Green Tier, in which the coexistence of command and control regulation and more flexible forms of governance may lead to better environmental outcomes. The apparent success of these systems can be explained by a variety of factors, including political and administrative support for innovation, stakeholder buy-in, and collaborative planning.

On the other hand, a conspicuous example of failed integration is the SGP, at least as originally designed. The SGP combined soft methods and hard sanctions in the effort to maintain sustainable budgetary policies in the Member States. It appears that the soft methods have not worked to deter excessive deficits while it has proven impossible to deploy the Pact's sanctions against powerful countries like Germany and France. This failure may have come about because the hard law sanctions were never credible: the offending states have ways to block the process and the sanctions chosen may be counterproductive.[70]

B. The Success and Failure of Ex Post *Integration*

Gráinne de Búrca describes ways in which the EU's Race Directive and Action Plan Against Discrimination, initially designed as separate systems, appear to be moving together in ways that could lead to a hybrid system *ex post*. In this system, new governance methods are combined with a broad framework directive to develop standards, encourage experimentation, and monitor progress. While this process of integration is not complete, de Búrca thinks it may well lead to true hybridity and transformation.[71]

On the other hand, there is evidence that an effort to bring together old and new governance in the field of occupational health and safety in the United States is not faring very well. For two decades, OSHA has experimented with a variety of new governance strategies in response to internal and external critiques of its traditional regulation. It is now planning to move beyond the experimental phase and

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[70] Recent changes in the Pact may have made it more effective. *See* Papademos, *supra* note 65.

[71] de Búrca, *supra* note 5.

regularize the new governance techniques into the mainstream system of regulation. The shift would be from a primarily command and control model of risk regulation to a model that fosters public/private partnerships, encourages industry cooperation, and allows flexibility in policy implementation. Critics, however, suggest that the *ex post* integration of the old and new may fail as it will lead to a decline in public oversight and monitoring of the new techniques and participation of workers in the new processes will be both limited and weak.[72]

C. Coexistence without Integration

Another type of complementarity is the continuing presence of law and new governance in the same domain, with each performing separate functions that contribute to a common goal. This can be seen in the EU in the combination of hard law and soft governance aimed at combating discrimination against women in the workplace. There appears to be convergence towards this goal under the classic Community Method through the Employment Discrimination Directive, the EES, and the Structural Funds. While evidence is needed to show the actual impact of this three-pronged approach in one or more Member States, some observers believe the strategy is working.[73]

D. Rivalry Leads to Displacement of One or the Other Mode

We have not found any case in which complete displacement of one or other mode has occurred, however we are aware of several situations in which this appears possible or even probable. Take the emergence of the OMC as a tool of social policy in the EU. Some commentators fear that this development will effectively preempt efforts to use hard law to create an EU-wide social safety net. They believe that if soft law methods are permitted in key policy domains, it will be harder to garner support for efforts to create truly effective forms of EU regulation. While it is not at all clear that this is the case, or that it would indeed undermine social goals if it were, this situation exemplifies the possibility of displacement.[74]

Another area of potential displacement can be seen in the treatment of medical error in the United States. Although the traditional route of tort law and physician licensing still exists, the newer processes that combine managerial/quality improvement methods to reduce error, and alternative processes for victim compensation are gaining strength and may at least partially displace the older system.[75]

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[72] Orly Lobel, *Governing Occupational Safety in the United States*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 4.

[73] Kilpatrick, *supra* note 22.

[74] The view that "soft law" drives out hard law in this area is discussed in Trubek & Trubek, *supra* note 5.

[75] *See* MEDICAL MALPRACTICE AND THE U.S. HEALTH CARE SYSTEM (William M. Sage & Rogan Kersh eds., 2006).

E. Rivalry Leads to a Transformation

This is an important issue in the analysis of hybridity and transformation but one that remains speculative. The idea is that in some cases rivalry may lead to the transformation of law and/or new governance and thus to the creation of a hybrid. Thus, for example, it might be that tension between a new governance system and traditional ideas of legitimacy leads to the restructuring of new governance processes by the addition of justiciable rights to participation and to more effective forms of accountability. [76]

VIII. WHAT EXPLAINS THE OUTCOME?

For those who are interested in both the theory and the practice of the coexistence of new governance and law, the most important questions are: What explains the success and failure of integrated or "hybrid" configurations? What factors lead one mode to displace the other? Answers to these questions will require significant empirical research. At this early stage, we can list just a few factors which seem especially salient.

A. Integrated Systems

There are several factors that help explain the success of efforts to yoke new governance process and traditional legal regulation in areas that have previously been regulated by command and control systems. They include:

1. Inclusion of Key Stakeholders in New Participatory Mechanisms

If important and affected groups are left out of the decision-making process, it is likely to lose legitimacy. This may mean that special efforts have to be made to ensure participation of under-organized and under-represented groups. This could include ensuring transparency of the process, mandating participation, supporting groups that represent under-organized interests, providing guidelines for how the mandate should be carried out, and monitoring compliance.[77] It also may be necessary to ensure that well-organized groups see it to be in their interest to participate.[78] The failure to include workers in the new OSHA processes may

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[76] For a discussion of such a transformation, see Louise G. Trubek, *supra* note 7, at 166–69.

[77] For a general discussion, see LouiseG. Trubek, *supra* note 7, at 169. Both the WFD and Green Tier have requirements for participation. The EU has often provided support for public interest groups who participate in EU processes such as the OMC. Garrett and Liebman suggest that participation can be monitored by requiring explicit measures of participation of disadvantaged groups. *See* Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*. 22 YALE L.& POL'Y REV 261, 321 (2004).

[78] The EU has tried to get the "social partners"—i.e. representatives of labor and capital—to participate in the European Employment Strategy Process. *See* Caroline de la Porte & Philippe Pochet, *Participation in the Open Method of Co-ordination: The Cases of Employment and Social Inclusion, in* Pochet & Zeitlin, *supra* note 20.

explain their limited success. Similarly, the failure to get the social partners to engage fully in the EES may have hindered its effectiveness.[79]

2. Genuine and Effective Commitment to Social Objectives

In some cases, it may appear that the move to new governance is not a way to increase the effectiveness of social protection, but rather a smokescreen obscuring deregulation and abandonment of commitments. To the extent this is perceived to be the case, the effort at integration is likely to fail. One way to ensure that that perception does not take hold is to demonstrate the effectiveness of the new procedures. Thus the Wisconsin Department of Natural Resources which administers Green Tier has an excellent website that provides information on the advantages of using its procedures.[80]

3. Maintenance of Legal Remedies as a Default Position

Often, new governance mechanisms are introduced as an alternative to command and control regulation because they appear to be more flexible, revisable, experimental, and/or participatory than traditional legal remedies. One way to guarantee that these processes are not a form of covert deregulation is to keep the legal remedies in place as a fall-back so that those who currently benefit from legal rights have the confidence that they will not lose out if they accept the new governance alternatives.

B. Displacement

There are a number of factors that can explain why coexistence fails and one system is displaced by the other. Among them are:

1. Low Cost-effectiveness of One System Compared to the Other

This can explain why new governance displaces law, or vice versa. New governance systems may prove to be significantly more cost-effective than traditional regulation. But the opposite can also be the case: new governance processes can seem time-consuming and not sufficiently effective to serve as a viable alternative.

2. Resistance of Key Actors to Change

When new governance is put forward, whether as part of an integrated system or as an alternative to legal regulation, key actors may sabotage the effort either because they fail to understand the new processes or think they will lose if they are introduced. Such "foot-dragging" may come from bureaucracies that play a central

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[79] *Id. See also* Jonathan Zeitlin, *The Open Method of Co-ordination in Action: Theoretical Promise, Empirical Realities, Reform Strategy*, *in* Pochet & Zeitlin, *supra* note 20.

[80] *Available at* http://dnr.wi.gov/org/caer/cea/environmental/.

role in legal regulation or from interest groups convinced that the governance innovations are disguised efforts to weaken their position.

IX. TOWARDS A "NEW GOVERNANCE THEORY OF LAW": RETHINKING FUNCTIONS, VALUES, AND ACTORS

This Article has argued that the emergence of new governance is in some cases transforming law by advancing the creation of new forms of legal regulation that differ from traditional top-down, command and control systems. We have offered a preliminary typology that would allow us to identify and analyze such "transformed" systems and have described a few examples of the new forms of law that are emerging.

We hope this Article will lead to a more thorough and ambitious inquiry that would in turn allow us to better understand these developments and assess their significance. We see such an effort as having several dimensions. These include a critical analysis of the failures of traditional regulation, an empirical inquiry to identify transformations, a sociological analysis that would explain why these changes are occurring and trace their impact on various interests and groups, a theoretical analysis that would explain the relationship between new forms of law and traditional legal values, and a policy analysis that explores both the feasibility and desirability of greater use of such hybrid forms and the role of various actors in such efforts.

In any such inquiry, we would need to examine values traditionally associated with law such as accountability, transparency, fairness, equality, participation and the stabilization of expectations. At the same time, we have to look at the values said to flow from deploying new governance. These include: an ability to handle diversity, facilitating experimentation, promoting learning, and allowing flexibility and revisablity. And we would have to rethink some of the traditional categories in legal thought such as principal-agent accountability and separation of powers, while asking what role traditional legal actors, from courts and agencies to practicing lawyers, might play in a transformed legal order.