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## Summary

This essay re-examines the concepts of Law and New Governance with a view to pursuing three cumulative objectives. First, it emphasizes that both law and new governance are deeply contested concepts whose meaning and inter-relationship cannot just be assumed or taken for granted, as is the tendency in some empirical studies of their interconnection. Second, it suggests that both concepts be situated and understood within an explicitly normative framework, one that takes account of the different implicit value assumptions underpinning many existing definitions. Thirdly, from this starting point it seeks to sketch a new framework of the relationship between Law and New Governance. This framework notes first, the tendency of Law to give priority to the meta-value of "social regularity" and of New Governance to give priority to the meta-value of "social responsiveness"; but it notes also the inevitability of some balanced recognition of both of these overarching values within all species of normative order, including Law and New Governance.

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## I. Introduction: Three Objectives

We seek in this essay to pursue three cumulative objectives in examining the concepts of law and new governance. First, and most simply, we argue that these are deeply contested concepts whose meaning and inter-relationship cannot just be assumed or taken for granted. Second, we argue that they are concepts which need to be situated and understood within an explicitly normative, value-based framework. Thirdly, we aim to sketch an outline of our own version of a possible framework within which to understand them and their intersection.

In the now considerable literature on these forms of regulation that have come to be characterised as new governance (NG), we find increasing interest in what connects NG to law. In the main, however, the focus of that interest is upon their relationship understood in *causal* terms. What is deemed to be of importance is how in the empirical world of law and politics either single instances or broad structures of law and NG affect one another. Questions are asked, for example, as to whether in a particular context, a specific legal norm may prevail over a new governance instrument or vice versa. Or the inquiry is as to whether one may authorise, facilitate, complement or otherwise influence and dictate the terms of the other, or whether it may recognise or fail to acknowledge the other. Alternatively, at the level of broader structures, the questions tend to be whether either law or new governance is likely to prefigure, pre-empt or usurp the other, or whether they may co-exist in a framework of mutual influence underpinned by relations of competition and/or of co-ordination.<sup>1</sup>

Much less attention has been paid to the other dimension of the relationship between law and NG, namely the *conceptual* dimension. The conceptual dimension concerns the connection, if any, between the very idea of law on the one hand and the very idea of NG on the other. This is an important omission, since any causal investigation is dependent upon and is augmented by conceptual inquiry in at least three ways. First, and most basically, causal investigation into the relationship between law and NG plainly presupposes operational definitions of both law and NG, for without these working definitions we have no sense of what the entities are between which the putative causal relationship holds. Secondly, the conceptual inquiry complements and completes the causal inquiry. As noted above, some of the candidate types of causal relationship between law and NG involve unilateral or mutual influence, and such influence may extend not just to the immediate *content* of the norm or norms in question but to the very *form* of law or of NG, and so to their conceptual limits. Thirdly, and perhaps most importantly of all, without conceptual inquiry we will be unable to evaluate the significance of our causal theses. Unless we have a clear sense of what values and what capacities are contained within the conceptual boundaries of law and NG respectively we will be unable to make judgements about what is gained or lost by virtue of the casual relationship between law and NG unfolding in this way rather than that way.

Of course, that most authors have little to say about the conceptual underpinnings of their investigation of the relationship between law and NG does not mean that in practice they are unable to locate or draw upon them. Rather, it simply means that such conceptual underpinnings are passed over in silence or with minimal ceremony. They are either left implicit, or, if made explicit, their correctness - and so how they help to frame, contribute to and draw normative inferences from the causal inquiry - is simply taken for granted.

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<sup>1</sup> Overviews include J. Scott and D. Trubek, “Mind the Gap: Law and New Approaches to Governance in the European Union” (2002) 8 ELJ; G. de Búrca, “The Constitutional Challenge of New Governance in the European Union” (2003) 28 ELR, 814-839

The point of departure of the present essay lies in the conviction that this concept-lite approach provides an inadequate basis for pursuing the study of the relationship between law and NG. Closer scrutiny of conceptual foundations is necessary and productive to our understanding of what is importantly at stake in the law-NG debate. More specifically, the essay pursues three linked – indeed cumulative - ambitions.

In the first place, it seeks simply to show that, however much they may be taken for granted, there are in fact many and controversial answers to the question of the conceptual relationship between law and NG. Too often, we simply talk past one another when we reach for our favoured background assumptions and start to discuss law and NG at the broadest conceptual level. This is not just because our understandings of law and NG are awkwardly aligned, but, more fundamentally, because both law and NG are – albeit in very different ways and to different degrees - deeply contested concepts. In the second place, the essay argues that if there is any prospect of going beyond the polyphony of self-confirming and mutually-disregarding perspectives and prejudices and developing a common framework of premises and understandings within which to pursue the question of the relationship between law and NG, it involves rendering explicit and taking seriously the various and necessarily value-laden concerns that underlie each position, and factoring them into a more open and explicitly value-oriented theoretical framework. In the third place, we seek in a preliminary fashion to apply our own methodological guidelines, and to provide a rudimentary sketch of what we hope is a more inclusive and productive heuristic framework for looking at the connection between law and NG.<sup>2</sup>

We may gain some initial sense of what such a theoretical framework might look like by comparing it, within a tripartite framework,<sup>3</sup> with the two approaches that dominate in the present ‘inarticulate’ phase of conceptualisation of law and NG. A first approach assumes that law and NG inhabit quite distinct conceptual worlds (the separation orientation), and that they respond to quite different logics of action and opposing values or value priorities. A second approach takes the opposite tack, assuming that there is *no* necessary conceptual boundary separating law and NG. Rather, NG is something that may in principle be fully incorporated within our understanding of law (the absorption, or merger, orientation). The separation orientation and the absorption orientations we find both counterintuitive in terms of our initial sense of what is at stake in the debate on the relationship between law and NG and also – corroborating that intuition – ultimately uninteresting or inadequate in terms of their capacity to formulate novel explanatory insights and suggest new normative projects. A third approach – our preferred approach - holds neither that law and NG are bound to inhabit separate conceptual universes nor that the full and final absorption of NG within law is conceivable. Rather, it holds them to be in a relationship of conceptual overlap, to possess certain common or similar traits but also some quite distinct features, with the boundary between them – the delimitation

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<sup>2</sup> Here we follow Dworkin’s argument that there are not only different and controversial *conceptions* of law, but that there also quite different *concepts* of law (to each of which a variety of controversial conceptions apply) which, unlike conceptions, need not be considered controversial *inter se*. Rather, they may simply perform quite different and unrelated functions, Dworkin gives the example of doctrinal, sociological, taxonomical and aspirational concepts of law. See R. Dworkin *Justice in Robes* (Cambridge: Harvard University Press, 2006) 2-5. Accordingly, we would argue that the discussion we develop below about the concept of law in the sociological or more broadly social scientific register that is our immediate focus of inquiry has no necessary implications and should not be considered controversial for the idea of law as conceived within any other register.

<sup>3</sup> Arguably, we can also include here, for present purposes, a fourth position – a ‘denial’ orientation which contends that there is no such thing as NG – no significant identifiable rise in distinctive forms of governance with the characteristics claimed for NG.

of the areas of similarity and difference - subject to ongoing adjustment (the mutual penetration orientation).<sup>4</sup> However, even to state such a broad orientation or preference at the outset may seem to run ahead of ourselves. Let us begin, then, a little further back, by saying something more about the hinterland of theoretical understatement and diversity that we take as our starting point, and how this informs the way in which we pursue our cumulative objectives.

A *first* point to make is simply to underline that there are indeed no theoretically innocent or neutral answers to the question of the relationship between law and NG – any answer brings to bear its own assumptions or ‘theoretical premises’ as to what we mean when we use the various terms “‘new’ governance’ and ‘law’”, and as so what is importantly at stake in their relationship. This point is worth re-emphasizing on both general and specific grounds. To begin with, not only in the groves of academia but also in the practical world of the politics of ‘law’ and ‘NG,’ as in so many other areas of public affairs, theoretical premises do nevertheless tend to be set before and beyond discussion, whether as the natural reflex and ‘common sense’ of the unreflective politician or bureaucrat, or as a strategically knowing way of setting the terms of debate in a favourable manner. Moreover, in the area of the relationship of law and NG more specifically, there are certain amplifying factors at work which treat the relevant concepts as either *rootless* or as immovably *rooted* - and in either case beyond theoretical challenge. On the one hand, the breathless novelty of the treatment of NG as a policy tool and as a presentational device in many policy circles or as a new specimen to be located and bagged in empirical social science circles is not conducive to theoretical reflection as to its conceptual foundations and limits. On the other hand, aided by the contrast with just this rhetorical emphasis on the fast-moving “newness” of New Governance, there is a powerful additional temptation to treat the “old” category of law as the ‘invariant variable’ - as something deeply entrenched and relatively immune from contestation.<sup>5</sup>

It follows, *secondly*, that, to think about the relationship between Law and NG constructively and inclusively and without ourselves assuming the superiority of any particular set of assumptions for which we criticise others - we should conduct our discussion across and between different possible theoretical frameworks as well as in terms of the particular logic of each. Indeed, just that ‘double exposure’ is the hinge that connects the critical and the constructive objectives of the essay. We begin simply by showing that whoever addresses the question of the relationship between law and New Governance and wherever they address it, they start with a specific conception of law in mind, with a certain assumption about what it is and what it does or should do, as well as with certain – often derivative - assumptions about

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<sup>4</sup> Precisely because they tend to be inarticulate assumptions rather than closely argued theoretical positions, these positions tend not to attract self-conscious labels in the literature. Rather, as further developed in the text below, we must first construct the theoretical-conceptual positions we intend to critique. For earlier attempts along similar lines, albeit more concerned with the causal rather than the conceptual relationship between law and NG, see e.g. G. de Burca and J. Scott, “Introduction: new Governance, Law and Constitutionalism” in G de Búrca and J. Scott (eds) *Law and New Governance in the EU and the US*, (Hart Publishing, 2006) 1-14; N. Walker, “EU Constitutionalism and New Governance” in de Búrca and Scott (eds) 15-36. The ‘mutual penetration’ orientation overlaps with the positions covered by de Burca and Scott’s ‘hybridity’ and ‘transformation’ theses; and also by Walker’s ‘mutual (re)engagement’ approach. (see) The ‘separation’ orientation is more or less equivalent to de Búrca and Scott’s ‘gap’ thesis. The ‘absorption’ orientation would be that of those lawyers who, while they do not deny the emergence or increased intensity of NG, either see no interestingly new developments, or even any prospect of interestingly new developments, in the concept of law in the face of this particular phase of “new” governance, or (and shading into the ‘denial’ orientation mentioned at n3 above) believe that the reach of law can be flexibly interpreted or expanded as necessary to meet the new horizons.

<sup>5</sup> See further n8 below.

what the ‘New Governance’ phenomenon is, about when and why it emerged, and again, about what it does and should do. Depending on what these starting assumptions are, they are likely to arrive at different kinds of conclusions to the question posed. In order to conduct this ‘double-exposure’ (i.e. to expose this point, and equally to expose ourselves to it), our inquiry should be as much meta-theoretical as theoretical – it should reveal the premises underlying different starting points as well as comparing and evaluating the outcomes or knowledge-products of these different starting points.

In the *third* place, just because different meta-theoretical assumptions often do not announce themselves as such<sup>6</sup> - they are often left unstated, and in the relatively recent if burgeoning field of NG scholarship this may be particularly true - we have to construct our own mental map of different possible theoretical positions. This, of course, carries the double risk of misrepresentation or distortion of what is in fact ‘out there’ on the theoretical landscape, and so of misrepresenting or distorting the different implicit or explicit theoretical assumptions which may underpin the analysis of NG to date, as well as of neglecting orientations that may be worthy of consideration but are in fact unrepresented or under-represented. To address this double risk head-on, and again mindful of the need to be inclusive, we proceed not by trying to hold a faithful mirror to the ‘actual world’ of theoretical ground-staking, but instead by setting out an ideal-typical range of positions – call them ‘theoretical possible worlds’. In so doing, we take and develop two important and regularly assumed axes of differentiation – an indirectly relevant temporal-spatial axis, and a directly focused ‘conception-of-law’ axis - and we begin to elaborate different positions along each of these. The spatio-temporal axis concerns *when* (now? over the last few decades? in the 20<sup>th</sup> C?) and *where* (within certain states? across the transnational/international sphere? in Europe? in the US?) the question of the “novelty” of NG and the arguably mutually overlapping and penetrative properties of law and NG should be posed. Secondly, and going to the theoretical heart of the matter, there is the conception-of-law axis. What kind of entity is law that we seek to comprehend in its relationship with NG, and what, as regards the nature and implications of that relationship, turns on our understanding of law as one kind of entity rather than another? In thinking about these two axes of differentiation, we should recall that our first priority is one of exposure and deconstruction. We should not set out to investigate the phenomena addressed by law and NG without being aware of the perspective from which we are asking questions, either in terms of time-frame or geography. And we should not set out to examine how NG and law relate to one another without being aware of the specific conception of ‘law’ we are utilising.

In the *fourth* place, in line with our constructivist, theory-driven understanding of law and NG and of the relationship(s) between law and NG, we should be aware that the theorisation of law and the theorisation of NG are bound up with each other, and properly so. It is typically not the case, and in the name of meta-theoretical or methodological coherence should not be the case, that we construct law from one set of theoretical premises, NG from another, and then proceed in a further stage to theorise the relationship between the two. Rather, this tends to be a single exercise, governed by a single set of assumptions or methodological premises. Yet, because of law’s comparatively venerable and presumptively “settled” status, as well doubtless on account of law’s particular reputation as a *dominant* form of normative order within any particular social formation, the price of methodological coherence is often a one-sided perspective. Law is often posited as the governing factor (particularly in the work of

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<sup>6</sup> This is by no means universally true in legal or political science. There are many more self-consciously theoretical debates – think for example of the deeply entrenched and seemingly interminable “theory wars” of international relations, where theoretical self-consciousness is acute. However, in the emergent, interdisciplinary, event-led world of NG research this is simply not the case.

legal scholars, though also, even if less explicitly, within some political science accounts)<sup>7</sup> in the internal theoretical relationship between it and NG.<sup>8</sup> In turn, this methodological one-sidedness helps to account for two of the three major orientations we have identified in answer to the question of the conceptual relationship between law and NG – the separation orientation and the absorption orientation.

As regards the separation orientation, there have by now been a great many attempts to define NG, particularly in some of the recent European literature, in ways which tend to be in negative thrall to the received understanding of law. New governance in that sense is defined as something which is not only *different from* but actually in *contrast with* law<sup>9</sup> (e.g. because of its different sources, or symbolic associations, or cluster of institutional features and associated values or functions – being ‘softer’, *less* coercive, *less* hierarchical, *more* revisable, *more* flexible, *more* experimental, *more* inclusive of non-traditional institutional actors, *less* reliant on courts and formal legislation, etc)<sup>10</sup> and so, it follows, different from and in contrast with hitherto prevalent forms of government and governance which relied to a greater extent on law. The absorption orientation, on the other hand, indicates an alternative way for law to manifest its prior monopolisation of the conceptual space. This is through an expansive conception – an understanding of the dominant order *qua* dominant precisely in its capacity to embrace through recognising and ratifying all other forms of ordering within its purview, including those emergent under NG. In either case – definition-by-contrast or definition-by-subsumption – something is lost in the derivative “passivity” of the supposedly more fixed conception.

It is only by embracing at the methodological level the notion that law and NG be situated within a framework of understanding which is both integrated and equally balanced – one that does *not* depend upon a one-sided privileging of one concept over the other – that we can hope to develop at the level of conceptual orientation an approach that does justice to the possibilities of the mutual overlap and penetration of our two basic ideas, and that, accordingly, opens us to a potentially more dynamic understanding of the relationship between law and NG. And only thus can we address the problem of diverse conceptual presuppositions with which we introduced our discussion and begin to achieve a fuller understanding of what is fundamentally at stake behind the shifting terminology of law and NG.

## II. The Two axes of explanation

As already noted, in the case of each of our two axes of explanation – spatio-temporal, and conception-of-law - we want to encourage greater explicitness about underlying assumptions

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<sup>7</sup> See e.g. the influential work of A. Heritier, e.g., “New Modes of Governance In Europe: Policy-making Without Legislating?” in A. Heritier (ed) *Common Goods: Reinventing European and international Governance* (Boston: Rowman and Littlefield, 2002) 185-206. Her formalistic conflation of law with pedigree-prescribed legislation is in part a function of her wish to bracket off the legal world quickly and cleanly from the main focus of her research – NG – but the very terseness of her approach runs the risk of simply endorsing an understanding of law that reflects conventional understandings of its social and political centrality.

<sup>8</sup> Ever since the pioneering work of the sociological “Founding Fathers” –Emile Durkheim and Max Weber - inquiry into law as a social phenomenon has been shadowed both by the temptations of “legocentric” bias - an attitude which assumes law to be at the centre of social life and normative arrangements – as well as by recurrent meta-level discussion of the scope and avoidability of just this problem. See e.g. G. Frankenberg “Critical Comparisons: Rethinking Comparative Law” (1985) 26 *Harvard International Law Journal* 411-455.

<sup>9</sup> And, equally, as different from and in contrast with the market as a means of ordering

<sup>10</sup> See in detail section 2(b) of the text below.

and starting points. As also noted, awareness of the diversity of time-spans and places in relation to which the investigation of NG and law is undertaken is less directly relevant to our conceptual-contestation thesis than awareness of the diversity of conceptions of law in question. This is in part because there is nothing in-principle fixed or exclusionary about a particular geographic or temporal inquiry, and several different perspectives might be compatible with one another and simultaneously pursued. We can scrutinise the rise of particular forms of governance in the EU over the last ten years, for example, without purporting to deny the significance and spread of experimentalist governance in the US over the last half of the 20<sup>th</sup> century, or we can conduct both inquiries at the same time. However, we cannot slip between different conceptions of law, or indeed of NG, in the same way. These conceptions - just because they are *conceptions* - are finally mutually exclusive, even if, as we ourselves intend, we can learn from and borrow from one or more conceptions in constructing and developing the premises of another conception.

Nevertheless, the spatio-temporal axis of difference does offer us something of importance, all the more so as it has been relatively neglected - or more accurately submerged - in the law and NG literature. That it is neglected speaks to the somewhat myopic nature of some of the emerging body of NG research, in particular in Europe. The history of the study of law-and-society is replete with attempts to think about both the historical stages of legal transformation and the geographical plurality of legal forms.<sup>11</sup> To neglect or ignore the historical depth and variation in the landscape of law is to court an impoverished understanding of the concept of law.<sup>12</sup> In particular, it may risk either (spatio-)timelessness or excessive (spatio-)timeliness – a reification of law as an eternal and fixed category or, alternatively, an over-specification of law as a series of still frames, with little sense of how it evolved in the past or how it might evolve in and from the here-and-now. If nothing else, therefore, an awareness of the spatio-temporal dimension offers a corrective to any such temptation. If NG is to be contrasted to, incorporated within or otherwise ‘related’ to law, then we should bear in mind the richness and plurality of understandings of ‘law’ and its relationship to society that have preceded the current political and intellectual moment.

## II.1 Spatio-temporal frames of explanation

Four distinct *spatio-temporal* frameworks of explanation of the supposed relationship between law and NG can be identified.

### II.1.1 *longue durée* frameworks of explanations

These would situate contemporary law within the long perspective of modernity, and instead of asking whether the law-NG nexus looks distinctive in terms of contemporary history would inquire whether it looks familiar in terms of a secular or longer-term pattern of development. Such frameworks would not be concerned with whether these particular forms of regulation were prevalent or not 20 years ago, but with whether they bear a relevant structural similarity to other developments over a longer time frame; for example, in terms of the general trans-

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<sup>11</sup> Again the Founding Fathers are both instructive and (resiliently) influential; see e.g. M. Weber, *Law in Economy and Society* (Cambridge: Harvard University Press, 1954, M.Rheinstein transl.); E. Durkheim, *The Division of Labor in Society*. (New York: The Free Press, 1984, W.D. Halls transl.) . See also D. Kennedy “Two Globalizations of Law and Legal Thought: 1850-1968” (2003) 36 *Suffolk University Law Review* 631

<sup>12</sup> See e.g. W. Heydebrand “Process Rationality as Legal Governance: A Comparative Perspective” (2003) 18 *International Sociology* 325.

formation towards ‘procedural’ or ‘responsive’ or ‘reflexive’ law in late modernity noted by discourse and system theorists.<sup>13</sup>

### II.1.2 conjunctural frameworks of explanation

Unlike the first these are not predominantly concerned with long historical patterns but would concentrate instead on emphasising the distinctiveness and discontinuity of the present moment; focusing on the confluence of particular factors at this time. This is arguably a (more or less self-conscious) default position that governs much NG work,<sup>14</sup> and relates to the key role of the NG label in current policy agendas and empirical social science circles mentioned earlier. But conjunctural frameworks of explanation can also be coherent in their own terms. The sacrifice of deep historical perspective can allow us instead to highlight the radical and accelerated nature of a particular shift, or the specific congruence of current conditions. It may, for example, illuminate the striking departure (at least in the eyes of lawyers) from the ‘young’ EU as a polity built upon and constrained through legal discipline<sup>15</sup> - a new ‘legal order’ consecrated in the image of state ‘legal order’<sup>16</sup> - to the more ‘mature’ EU in which much of that conventional legal perspective is being transformed by recognition of the prevalence of NG<sup>17</sup>; or more generally, the rapid transformation in much of Western Europe from the post-war command-and-control social welfare state – perhaps *the* high point of modern state functional centralisation - to a framework of social responsibility for collective action which in many sectors is much less state-law-centric.

### II.1.3 geographically specific frameworks of explanation:

The questions raised by this kind of framework concern the extent to which NG could be said to be, if at all, peculiar in intensity or form to the EU in particular, or to the transnational domain more generally. This question was raised by the comparison between studies of NG in the US and EU that formed part of the recent de Búrca and Scott volume on law and NG within these jurisdictions.<sup>18</sup> Are the common/similar regulatory patterns and experiments on each side of the Atlantic in fact a species of a single genus “New Governance”, or are they

<sup>13</sup> See e.g. J Habermas, *Between Facts and Norms* (Boston: MIT Press; 1996, W. Rehg transl.); G. Teubner “Substantive and Reflexive Elements in Modern Law” (1983) *Law & Society Review* 239; P. Nonet and P. Selznick, *Law and Society in Transition: Towards Responsive Law*, (Transaction Publishers, 2001)

<sup>14</sup> This is perhaps more true in the EU than in the US, where there has been some debate about the antecedents of what might be called new governance: see O. Lobel, “The Renew Deal, The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought” and B. Karkkainen, “Reply: New Governance in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping” and O. Lobel “Surreply: Setting the Agenda for New Governance research”. (2004) 89 *Minnesota Law Review*, 342 et seq. See also the comments by David Kennedy at <http://www.law.harvard.edu/faculty/dkennedy/speeches/Remarks.pdf>

<sup>15</sup> For an account of the ‘Integration-through-law’ literature, see U. Haltern, “Integration through Law” in in A. Wiener and T. Diez (eds) , *European Integration Theory* (Oxford: OUP, 2004) ch.8; See also G. de Búrca “Rethinking Law in Neo-functional Theory” (2005) 12 *Journal of European Public Policy* 312.

<sup>16</sup> See W. Hallstein, *Europe in the Making*, (London: George Allen & Unwin, 1972) N. Walker “Legal Theory and The European Union” (2005) 25 *OJLS* 581.

<sup>17</sup> For a sceptical view of NG arguing, to the opposite effect, that legalization is in fact on the rise in the EU, see T. Idema and R.D. Kelemen “New Modes of Governance, the Open Method of Coordination, and other Fashionable Red Herring”. [http://government.politics.ox.ac.uk/projects/kelemen/New\\_modes\\_of\\_governance.pdf](http://government.politics.ox.ac.uk/projects/kelemen/New_modes_of_governance.pdf). See also, questioning in empirical terms any rise in the use of NG in the EU environmental sphere, K. Holzinger, C. Knill and A. Schäfer “Rhetoric or Reality? New Governance in EU Environmental Policy” (2006) 12 *ELJ* 403

<sup>18</sup> *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006).

more loosely related? Are the differences deep or cosmetic? What seems to be the significance of geographic location, of local political and polity context? In turn, this raises the question of whether there is anything in the *federal or multi-level* condition, or, alternatively or additionally, anything in the *transnational* condition that provides a distinctive transformative opportunity for NG? Some of the European analyses of NG might imply the latter,<sup>19</sup> with the EU being treated as the most intense manifestation of a transnational conjectural shift, where the absence of a formal state apparatus has increased the opportunities for heterarchical and experimental governance. The alternative hypothesis – perhaps reflected in the existence of a substantial US literature on forms of experimental governance – is that differences in ‘top-down’ authority and hierarchy conditions – whether statal, federal, transnational – are marginal or irrelevant to the ‘bottom-up’ potential of NG to develop and spread as an alternative system of policy-making.<sup>20</sup>

### **II.1.4 projective frameworks of explanation.**

Here the significance of NG lies less in its achievements, which on most accounts remain ambiguous, uneven and limited, than in its latent transformative potential.<sup>21</sup> The spread of NG forms, on this analysis, prefigures a possible deep transformation in how we think about the regulation of collective action, one for which history can offer only limited guidance, conjunctural specificity can provide only catalytic and so partial explanation, and geographical location can afford no special destiny.

## **II.2 Different Conceptions of Law**

Importantly, as we have said, it is possible to imagine the different spatio-temporal frameworks of explanation as complementing one another and so not mutually exclusive. Indeed, our understanding of the relationship between law and NG would tend to be less skewed to the extent that we pursue all four empirical paths, thereby gaining a more historically informed, geography- and context-sensitive, but nonetheless currently situated and forward-looking understanding of the interaction of these various systems of collective regulation. This is not to deny, of course, that *in practice* more partial vistas and more selective perspectives are much more common than panoramic overviews, or that as such they tend to favour certain theoretical conclusions in advance, or even that the choice of these partial vistas may

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<sup>19</sup> According to Renate Mayntz “the literature on globalization suggests that beyond the nation states and the European Union, there exists only „governance *without* government“, regulation achieved by horizontal co-operation and negotiation... The dominant concern in analyzing these transnational structures is with their problem solving potential, or more precisely the conditions under which they might be able to identify and put a problem on the agenda, to agree on a solution, and to implement it successfully.”, in ‘Global Governance and the Challenge to Political Science’, a paper delivered at the workshop on Global Governance in 2000, European University Institute, Florence.

<sup>20</sup> See J. Cohen and C. Sabel “Global Democracy” (2006) 37 *NYU Journal of International Law and Politics* 762

<sup>21</sup> C Sabel and W. Simon, “Epilogue”, in *Law and New Governance in the EU and the US*, in n.18 above, capture this potentially transformative spirit when they argue against the modest ambitions of some NG scholarship: “the suggestion at the core of much new governance discussion that societies can and should innovate at the margin without profoundly perturbing the arrangements that enable the innovations ignores the enduring insight of nineteenth-century social theory that great innovations only arise in conditions that undermine their antecedents.”... and “[T]he relevant worry for our time is likely to be that the ‘local’ successes of new governance—made possible partly by the availability of institutions that check discretion without directly renewing democracy— provoke broad crises of legitimacy, not that the absence of a new account of legitimacy checks the spread of new governance. An explosion, not a logjam, is likely to be the signal that discussion of the democratic legitimacy of new governance can no longer be deferred.”

itself not be innocent of the possibility of theoretical bias. Rather, it is simply to indicate that in principle this need not be the case.

However, the same is not true of the different conceptions of law considered below. They may contingently overlap in the sense that their different premises happen to point to some of the same features as indicia of law, but beyond this these different conceptions of law are also competing conceptions of law. And since all of our spatio-temporal frameworks are themselves only somewhat different horizons onto which we project our different conceptions of law, it is with the latter that the deepest and most important source of contestation is to be found, and on which we must concentrate our efforts.

Again, four different candidate conceptions of law may initially be set out, each of which is either explicit – or more often implicit - in current debates. These are in turn *pedigree*, *institutional*, *symbolic* and *functional* conceptions. In turn, these four conceptions may be arranged into two more general categories – namely *formal* conceptions of law and *sociological* conceptions of law. Formal conceptions, which include the first two types, reduce law to one or more canonical formal criteria, however abstractly or specifically couched. Sociological criteria, which include the latter two types, by contrast see law as grounded in and defined by cultural meaning or social utility. Finally, our critique of these four conceptions, and of their incompleteness in exploring the nuances of the relationship between law and NG, points to the need for an additional way of thinking about law in relation to NG which can incorporate the insights and concerns located in each.

### **II.2.1 pedigree conceptions**

Pedigree-based conceptions concentrate in the classical positivist tradition on whether law is made in some canonical form or comes from some privileged source. They tend to be fairly conservative. Where something lacks the pedigree - and a pedigree is not only backward-looking and complete rather than forward-looking and emergent, but also a self-referential rather than an environmentally sensitive characteristic, it cannot be law. The question of the relationship between law and NG, then, is inevitably framed in static terms, as a classic one of reach and of gaps. Law either reaches and absorbs NG, or it does not bridge the divide. Within this synchronic black-or-white paradigm, there is no conceptual scope for shades of grey—for hybridity or overlap – nor for any externally motivated transformation in what counts as law. The motive or “knowledge-constitutive interests”<sup>22</sup> behind this kind of approach is a concern to acknowledge and to protect or at least to see as worthy of continuing consideration certain ways of making and identifying and stabilising law – whether because of their democratic pedigree, or their deliberative depth and inclusiveness, or the simple transparency of their foundations, etc. However, this motive tends to be both one-sided in what it (implicitly) values and to display an exaggerated belief in the capacity to infer substantive value from pedigree form.

### **II.2.2 institutional conceptions**

These are by far the most common in the field, perhaps due to the influence of much political science (the discipline which has played the dominant role in mapping and defining NG in the EU so far) for whom the important variable is “institutionalization” –in the sense of any form of embedded normative reference that mediates and qualifies interested or strategic behaviour

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<sup>22</sup> J. Habermas *Theory and Practice* (London: Heinemann, 1974)

regardless of its legal pedigree.<sup>23</sup> Here “lawness” is a gradation on a continuum of greater or lesser formal institutionalization – of rigidity of protection and intensity and extent of application - of the norm(s) in question, rather than an either-or status. The standard of formalisation in turn depends upon matters such as generality of scope, ease of revisability, locality of sites, fixity of procedure and methodology of interpretation, flexibility of measure of successful application, and severity and negotiability of form of sanction. Again on this conception, NG is defined by contrast with law, the latter being associated with rigidity, coerciveness, hierarchy, and formality. The danger here, paradoxically, is that the replacement of a dichotomy with a continuum reinforces the incorrigibility of the distinction between old and new, law and non-law. This is so because the conceptual variation tends to be seen as corresponding with a moral divide - with “new” in many cases seen as being on the side of the angels by comparison with rigid older (law-based) governance,<sup>24</sup> and in other cases a similarly categorical judgement being made in the opposite direction.<sup>25</sup> In some such accounts of NG there can be, moreover, a tendency towards decontextualization and a reification of institutional form – a sense that a particular institutional matrix is superior in all possible worlds.<sup>26</sup>

### II.2.3 Symbolic conceptions

On this view law is neither a pedigree nor an institutional category – but a semantic category. There is a key sub-division here between what we might call thin and thick symbolic views. On the thin version, law is a purely rhetorical category and we are mere spectators and chroniclers of the competition over meaning. What anyone decides to attach the label ‘law’ to enters the rhetorical ring on equal terms as a candidate for the prize. The background motivation to this kind of exercise may be twofold. First, there is an ideological argument. What is successfully presented as law carries the social legitimacy of law - the amplified accreditation of “double institutionalization.”<sup>27</sup> Secondly, there is an ideational or moral argument. Good regulation is worth the bonus of legal accreditation just because it is good regulation. We should award our best efforts at regulation the title of law. But this of course entirely begs the question what the standards of good regulation should be, as well as the question of whether the law imprimatur is necessary or even helpful for some kinds and contexts of ‘good’ regulation.

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<sup>23</sup> For many contemporary public lawyers too, institutional design is of vital and increasing importance – regardless of narrow questions of pedigree –and this of course is bound up with the increasing propensity of public law and political science to cross-fertilize (as, for example, in the burgeoning trans-disciplinary domain of ‘regulation studies’).

<sup>24</sup> As a very broad generalization, we may say that there is a tendency for those who study new governance to favour its institutional virtues over law: see N. Walker, in “EU Constitutionalism and New Governance”, *ibid.* n. 18

<sup>25</sup> One example is the fears expressed on the left that NG in social policy marks a shift away from firmer policy commitments and an undermining of rights: see D. Trubek and L. Trubek “Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination” (2005) 11 ELJ 343. For other skeptical voices about the virtues of NG, see D. Chalmers and M. Lodge, “The Open Method of Co-ordination and the European Welfare State” (2003) CARR discussion paper No. 11, London, LSE; T. Idema and R.D. Kelemen “New Modes of Governance, the Open Method of Coordination, and other Fashionable Red Herring” (2006) [www.eucenter.wisc.edu/OMC/Papers/kelemenIdema.pdf](http://www.eucenter.wisc.edu/OMC/Papers/kelemenIdema.pdf) and S. Smismans “New Modes of Governance and the Participatory Myth”, European Governance Papers No. N-06-01, [www.connex-network.org/eurogov/pdf/egp-newgov-N-06-01.pdf](http://www.connex-network.org/eurogov/pdf/egp-newgov-N-06-01.pdf)

<sup>26</sup> See N. Walker, n. 18 above.

<sup>27</sup> P. Bohannon “The Differing Realms of the Law”, in P. Bohannon (ed), *Law and Warfare: Studies in the Anthropology of Conflict* (1967) 43–56 at 45.

Alternatively, the thick version is concerned with how certain activity is conventionally coded as law within particular contexts of social practice, whether in the state, or the church, or the bowling club.<sup>28</sup> Here, unlike the thin version, there is a definitional discipline, but it is one of social success – having succeeded in attracting the denomination of law - and of the obscure and variable matrix of preference and power which contributes to social success. Again, the relationship of success to virtue is left unexplicated.

## II.2.4 functional conceptions

The other sociologically inflected register of conceptualisation is a functional one. Law may be deemed to be that which performs the functions of maintaining social order, or other enabling, facilitative, performative, conflict-resolving, status-conferring, legitimating, distributive, power-conferring or indeed symbolic ends<sup>29</sup> On the one hand, a functional conception has the decided advantage of seeking to marry positive evaluation to social effectiveness - endorsed practice to good practice – and to that extent speaks not only to law's ideal or conventional dimension, but also, unlike the other conceptions, to law's instrumental dimension. On the other hand, a functional conception risks being either indiscriminately over-inclusive or arbitrarily exclusive. It can be over-inclusive because of the famous problem of functional equivalence, which concerns how, if at all, we can distinguish between legal and non-legal means of producing the same functional effects. Family therapy and divorce courts are both intended to serve the function of resolving marital conflict, but only in the case of one is the product conventionally considered as law. The problem of over-inclusiveness is reinforced where, as is often the case, the broadest possible view of law's social function – as being about social control or even the reproduction of social order more generally - is taken. On the other hand, a functional definition can be arbitrarily exclusive to the extent that in response to the fear of over-inclusiveness the functional remit is narrowed. In this way, law may be rendered distinctive by the fact that it is defined as pursuing a very limited number of specific functions<sup>30</sup> rather than, say, being defined in more procedural terms according to the way in which the functions are performed and processes followed. Again, this is likely to offend our conventional understanding of law as well as devaluing those elements of an ideal conception of law that are linked to means rather than ends. In a nutshell, if law is conceived as being only about producing consequences (resolving conflict, enforcing agreements etc) - as being primarily about functional output rather than also about process and form - we risk overlooking an important terrain of investigation of law as a distinctive *medium* of social activity.

## III. Beyond The Conceptual Imperialism of Law

### III.1 Challenging Law's conceptual hegemony

What is the answer to the problems posed by frozen pedigree, institutional fetishism, question-begging semantics or form-and-process-blind consequentialism? For all their distinctive origins and structure, both the formal pair and the sociological pair of conceptions of law tend towards similarly blinkered understandings of the relationship between law and NG. The first two (formal) conceptions, in a manner often exacerbated by spatio-temporal myopia, are

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<sup>28</sup> See B Tamanaha 'A Non –Essentialist Version of Legal pluralism' (200) 27 Jnl LS 296-321.

<sup>29</sup> For critical discussion, see B. Tamanaha, *ibid*.

<sup>30</sup> See for example the restrictive notion of law underpinning the definition of 'legalization' used in *Legalization and World Politics* in Judith L. Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter (Boston: MIT Press, 2001).

prone to rigidify and petrify the definition of law such that NG either becomes, by conceptual fiat, law's negative, or something which can only be embraced on law's prior terms. This makes it difficult to move beyond either the 'separation' orientation - with law and NG as two distinct species and NG being understood as a deliberate departure from the constraints of, or disregarding the virtues of, the former; or the 'absorption' orientation - with law being inclined to annex other domains of normative order. A similar analysis can be made of the second (sociological) pair. Law is either ideationally, ideologically or functionally a highly permissive category, capable of embracing other domains of normative order; or it is cut back on the basis of some ultimately 'given' and self-justifying notion of ideological selection or conventional recognition (the symbolic conception), or instrumental capacity (the functional conception). The sociological approach would thus again tend, in its more expansive versions, towards the absorption thesis – that law can accommodate all such new regulatory developments and therefore NG *is* or can become law. And in its more restrictive versions, the sociological approach would tend towards further variants of the separation thesis; if law's ideological remit, or its domain of conventional practice, or its functions, are limited to stabilising expectations, enforcing sanctions or resolving disputes, and NG is deemed to meet a different set of rhetorical objectives or conventional understandings or to serve a different set of functions than law, then NG by definition cannot be law. In both the formal and sociological sub-categories, therefore, we find a methodological predilection towards a kind of conceptual imperialism. We observe a one-sided colonising of other terrains of normative ordering from the perspective of law, which is either unrestricted or self-restricting only, and which in turn explains the hegemony of the separation and absorption orientations at the level of the substantive relations between the concepts of law and NG.

In order to remove these blinkers, we must proceed in a number of steps. To begin with, as the fault may ultimately be traced to methodological roots, unless we treat and eradicate the basic one-sidedness at this deepest level we cannot hope to develop a fuller understanding of the mutual overlap and implication of law and NG at the substantive theoretical level. In order to redress that methodological imbalance, we must, therefore, find a way of thinking about both law and NG at a level of abstraction sufficient to embrace them both on equal terms. Yet in so doing, mindful also of the requirements of 'double exposure' – of the need to recognise and take seriously the value concerns or knowledge-constitutive interests which underscore the often inarticulate conceptual premises of the various other approaches when developing our own conceptual frame - we must also find a way of incorporating these partial concerns within our own. Let us then attempt these two theoretical moves – abstraction and incorporation.

### **III.2 Towards reflexive universalisability**

What the species law and NG have most generally in common is membership of the genus normative order. That is to say, each denotes a special rule-based form of practical reasoning – a method of arriving at conclusions as to what to do in the world that relies on the provision and application of general norms. Furthermore, both law and NG have in common two supplementary traits that fall under the umbrella of accessibility. First, unlike what may be referred to as tacit knowledge or "practical consciousness,"<sup>31</sup> the norms referred to under the rubric of both law and NG must be articulated and so realised and recognised at the level of "discursive consciousness."<sup>32</sup> They must, it follows, be capable of being the subject of an "in-

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<sup>31</sup> A. Giddens *The Constitution of Society* (Cambridge: Polity, 1984) 7, 41.

<sup>32</sup> *Ibid.*

ternal point of view”<sup>33</sup> - the focus of a conscious attitude of acknowledgement by affected social actors of the putative force of the norm’s claim to bindingness or authoritative guidance, which may in turn result in compliance by these actors with the norm, or in their knowing violation of its requirements, or in their strategy of reinterpretation or reform of its acknowledged terms.<sup>34</sup> Secondly, the norms must be publicly promulgated in a timely fashion. Their availability as discursively realised rules should be neither selective nor retrospective; rather, they must be accessible to all concerned in all contexts of their possible application.

Putting these various common attributes together, we may think of both law and NG as normative orders operating within a framework of publicly demonstrable and demonstrated *reflexive universalisability*. In either case, the basic requirement of normativity necessarily entails a commitment to universalizability – to the particular practical conclusion or prior guidance in the particular case presupposing and implying a like conclusion or prior guidance in all like cases.<sup>35</sup> Equally, in either case, the discursive and public quality of legal and NG rules in combination with the adjustability (in principle) of all rules to each new context of application both furnishes the capacity and provides the opportunity for a communicated and deliberated process of reflexivity – for a consideration of the rule afresh in each context of application in the light of past experience.

Crucially implicit in the idea of normativity as reflexive universalisability is the idea that each quality presupposes the other. There can be no universalisability without a measure of reflexivity, since otherwise a normative order would become ossified – custom or habit rather than a system of practical reasoning. Equally, there can be no reflexivity without a context of universalisability, for if there were not such a context there would be nothing extensive in and over time to be reflexive about, and we would be left with the mere flow of strategic action. What this means is that any definition of law which tends towards the practical imperatives associated with the ‘universalisability’ pole and any definition of NG that tends towards the ‘reflexive’ pole – and it is precisely a caricatured version of this kind of distinction which underpins the separation orientation - has to be significantly qualified, since the two characteristics are and must remain symbiotically related within any and all particular species of normative order. Yet to accept that both law and NG are about the relationship between universalisability and reflexivity is not to endorse the opposite proposition - as would be the case with the absorption thesis - that there need ultimately be no difference in kind between them. Rather, if we wish to embrace and develop the mutual overlap and penetration orientation, we must see law and NG as each encapsulating a differently and shiftingly balanced commitment to two different clusters of social values associated with the respective poles of universalisability and reflexivity, with law continuing to find its equilibrium closer to the universalisability pole<sup>36</sup> and NG striking the balance closer to the reflexivity pole.

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<sup>33</sup> H.L.A. Hart *Concept of Law* (Oxford: Clarendon, 2<sup>nd</sup> ed.) 89-91. See also S. Shapiro “What is the Internal Point of View” Available at SSRN: <http://ssrn.com/abstract=937337> (2006).

<sup>34</sup> In principle, although all NG should be so capable, not all law is capable of explicit reform or repeal - think of the so-called eternity clause we find in some Constitutions. However, all law *is* capable of adjustment and refinement through the contextual interpretation of its general rules by judges or other duly authorized actors

<sup>35</sup> See N. Walker “The Burden of Universalism” in Z. Bankowski and J. MacLean (eds) *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2006) 53-68..

<sup>36</sup> This is true of law even in its relatively responsive or reflexive contemporary phase (see respectively Nonet and Selznick, and Teubner, at n13 above). In many accounts, these included, modern law - or law in modernity - is indeed defined in contrast to earlier forms of customary or natural law by its ‘posited’ quality and by the increased reflexivity which this permits or demands, as typified in Hart’s famous distinction between the universal scope of “primary rules” and the self-conscious recognition of the contingency and adjustability of

We can flesh out this proposition by making our second theoretical move and re-incorporating some of the concerns animating the definitions of law concerned above. For if we look at the underlying preoccupations that we may associate with positivist, institutionalist, conventionalist and functionalist perspectives, they speak precisely to many of the practical imperatives clustered at the universal end of the continuum. More specifically, these preoccupations suggest the imposition of constraints due to the general structure of law as a form of normative order broadly understood as unique in its claim to a level and scope of authority that frames and trumps all others within a particular social formation. Three kinds of constraint in particular are relevant: input-constraints (who has a say in the choice and contestation of rules and, more modestly, whether the endorsement as rules of those affected by rules counts towards their authority as rules); process-constraints (how to ensure that the process of rule-making, rule-application, rule-interpretation and rule-amendment is adequate to and reflective of these input concerns); and output-constraints (how to ensure that the legal means also be sufficient effectively to achieve the ends contemplated).

Narrow positivists, with their accent on the broad social foundations of pedigree rules, and broader conventionalists, with their emphasis on the importance of the social recognition of law *qua* law, tend to be interested in grounding the input legitimacy of law in broad, ‘socially-universal’ frameworks of social authorisation or support. In addition, formalists of all stripes - not only positivists but also wider institutionalists - tend to be concerned with the integrity of process; with whether the procedures for formulating and amending rules, for structuring and monitoring their accuracy and fairness of application, and for their interpretation, are cognisant of these broad foundations and faithful to the minimally democratic and individual-egalitarian concerns that animate them. For their part, functionalists are concerned with output constraints, and often with the economies of scale, enforcement efficiencies and issue linkages and co-ordination benefits associated with wide-ranging, bureaucratically administered and broadly integrated forms of social regulation.

At the risk of over-generalisation, then, we may suggest that the cluster of practical imperatives that we tend to associate with law’s dominant universalising tendency at the level of the social formation as a whole answers to a meta-value of *social regularity*. That is to say, it speaks to the way in which law may ensure normative “stretching” and continuity over both space and time, and in so doing produce certain benefits within a framework of political community expansively conceived. These include a sense of a pedigree grounded in a broad idea of popular sovereignty and in the promise of balanced representation of social interests in legislation and government; a certain distributive fairness in treating like cases alike; the uniform and sustained protection of due process rights and other rights relevant to private autonomy; the guarantee of a settled law that channels and resolves social conflict; and the co-ordination that comes from secure reliance upon certain common/shared regulatory means as calculated to serve our diverse ends.

NG, on the other hand, and again at the risk of over-generalisation, in focussing on a cluster of practical imperatives located closer to the reflexivity end of the spectrum answers to a meta-value of *social responsiveness*. It speaks to the close tracing of particular interests allowed by the timely adjustment of shifting preferences in local contexts of practice, the epistemic premium of continuously developing and refining best practice, the dignity and compliance-value of participation and negotiated settlement, and the competitive dividend and diver-

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these primary rules within a structure of “secondary rules” of recognition, adjudication and change. However it is one thing to acknowledge this secular trend, and another to assume that law can accommodate the radical reflexivity of some variants of NG.

sity-respecting importance of the coexistence and coalition of differentiated frameworks of regulation.

In the last analysis, it is the balance between these two clusters of practical imperatives which is most clearly at stake in the conceptual debate around law and NG and which in turn informs and gives meaning to the many causal analyses of their relationship which are now pursued. Yet, in conclusion, it is important to insist that in suggesting this notion of distinctive clusters we are not intending to replace one kind of binary logic – the law/non-law distinction that underpins the separation or absorption orientation - with a similarly dichotomous form of reasoning. Rather, we want to demonstrate that law and NG have more in common than is often appreciated, that their relationship around the area of overlap and shifting boundaries<sup>37</sup> is one of mutual influence and penetration rather than one-sided conceptual empire-consolidation or empire-building, and that their optimal combination has to be thought of in positive sum terms even if difficult choices and trade-offs remain.

The rejection of a binary logic is underscored by a number of points. In the first place, both law and NG, like all forms of normative order - of reflexive universalizability - are subject to an internal tension between two clusters of practical imperatives, rather than being the ‘pure’ representative of one or the other. In the second place, given that each framework is structured by the same two poles (universalisability and reflexivity) but with the relations of domination and subordination reversed, then the form of normative order prominent in one is constantly under internal conceptual challenge from characteristics associated with the other framework; that is to say, the meta-value of regularity is always/already qualified in some measure by the meta-value of responsiveness, or vice-versa, *within* any rule context. In the third place, in consequence of their mutual overlap and penetration at the conceptual level, causal relations *between* law and NG need not be seen as necessarily antagonistic or negative-sum. Rather, it is possible to imagine the meta-values of regularity and of responsiveness and the practical imperatives associated with universalisability and reflexivity as being combined in all sorts of different ways – as being to some degree *compossible*. We can, for example, envisage specific governance processes as simultaneously thoroughly reflexive – committed to revisability of ends as well as means, to the ongoing development of best practice, to keep constantly open the ‘list’ of relevant stakeholders etc - while ensuring a degree of loyalty towards the extant ‘universal’ imperatives of the wider political community – through general accountability to the public, fairness to all concerned, commitment to reasonable reliance etc. In the fourth place, and this is something which needs to be explored through the ‘bottom-up’ studies increasingly being undertaken, the optimal relationship between law and NG may depend on context – policy area, institutional history, polity level - more than some deeper and irresolvable disagreement as to the relative value of the clusters of practical imperatives primarily associated with each. Which is, finally, just a way of re-iterating that at root our appreciation of the transformability of the very idea of law – and thus our understanding of the limits and opportunities of law - in the face of new governance is and must remain deeply normative, but is far from reducible to a sterile and timeless ideological cleavage or to a fantasy of unlimited embrace.

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<sup>37</sup> See R. Dworkin, n2 above at 3, noting that sociological definitions of law, unlike doctrinal definitions, may not require sharp boundaries.