Rethinking Reflexive Law for the Information Age

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Environmental Law in the ‘Information Age’

- Reflexive and Informational Regulation
- Third generation ‘new governance’ approaches
  - Process-based
  - Systems-based
  - Management-based

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Informational Regulation

- Mandatory reporting and disclosure, e.g. Toxics Release Inventory
- Voluntary disclosure, e.g. FAIRTRADE, Forest Stewardship Council labels
- Fence-line monitoring, e.g. ‘Bucket brigades’
- Product labelling
Reflexive Regulation

- Environmental Impact Assessment
  - e.g. NEPA
- Voluntary approaches
  - e.g. codes of practice
- Eco-Management and Audit Schemes (EMAS)
Examples of Regulation by Disclosure

- Toxics Release Inventory
- Proposition 65 (California)
- Pollution and Transfer Registries
  - e.g. European Pollutant Emission Register
    (prtr.ec.europa.eu)
Possibilities of Regulation by Disclosure

- Focuses management attention
- Reduces transaction costs for outsiders
- Significant external pressure
  - ... from customers, shareholders, financial institutions ...
- Benchmarks performance and facilitates feedback loops
Criticisms of Regulation by Disclosure

- Theory over substance
- Procedure over substance
- Misleading for consumers
- Cannot guarantee particular outcomes
Practical Difficulties with Regulation by Disclosure

- Replicating the problems of command-and-control?
- System can be ‘gamed’
- Unpredictable results
- Excessive costs
Practical Difficulties with Regulation by Disclosure

- Limited understanding of sustainability
- Intractable individual habits
- Privacy and confidentiality
- Muddying the rule of law
Avoiding Technological Determinism

- Is there really an ‘Information Revolution’?
- Power does not disappear
- ICT opens new opportunities and challenges
- Information and power become intertwined
Improving Disclosure-Based Schemes

- Use as part of hybrid strategy
- Be aware of limitations in information
- Follow good institutional design
- Standardize results
Design Principles

★ Match disclosure to risk
★ Design for accuracy
★ Recognize disclosure as a continuum
★ Construct dynamic systems that can incorporate feedback
★ Increase use, accuracy, and scope
★ ‘Everyone else is doing it’

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Questions?

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