Globalization and Disciplinary Neoliberal Governance

Jarrod Wiener

The debate over globalization has engendered at least three ideal-type interpretations.[1] The first two are polar opposites. At one end of the spectrum is the outright denial of the process of globalization, due to uneven geographical patterns of integration into transnational systems, continuing divergence in national perspectives on economic and social strategies, the denial of novelty through empirical studies showing transnational flows to have been greater prior to 1914, and an ideological bias against the liberal disaggregation of 'high' and 'low' politics and the conceptual prioritization of economic and social issues over security issues.[2] At the other end of the spectrum is the 'strong thesis' of globalization. This holds that states have diminished capacity to 'gate-keep' due to the increased 'permeability' of borders to transnational private systems of decision-making, reduced capacity to insulate, provide domestic stability, and offer public goods due to heightened susceptibility to external shock, and lost autonomy in policy-making due to the disciplinary function of the market.[3] This view is further divided along ideological lines between those who either lament or welcome the shift from Keynesian 'embedded' liberalism and Fordist economic management to neoliberal deregulation and privatization, and those who view the shift as 'natural' and inevitable or as a state-driven process. The third ideal type, including diverse views on global governance, argues that the role of the state is changing, and that significant governance functions are undergoing a relocation from the state to supranational, intergovernmental, transnational, non-governmental, sub-state, and increasingly private marketized mechanisms, each implying a greater or lesser shift in political authority.[4]

For the purposes of this exposition, globalization is defined to mean a high degree of privatized interlinkage among domestic systems. Its essential features are: increased speed and volume of *private* transborder transactions – especially in *economic* and *social* relations (particularly in capital and communication systems) – that leads to a qualitative transformation of economic and social geographies, or 'spaces' of economic and social interaction; for practical purposes, such relations are 'de-bordered.' This understanding of globalization assumes that the mobility of private cross-border flows is assisted by technology (electronic clearing systems, the Internet), as well as by the deregulation and liberalization of government policy that relaxes the significance of state borders for private actors. It does not assume a particular geographical scope (i.e., an

Constellations Volume 8, No 4, 2001. © Blackwell Publishers Ltd., 108 Cowley Road, Oxford OX4 1JF, UK and 350 Main Street, Malden, MA 02148, USA.

already-extant 'globality'), but rather relates to highly integrated private transnational *systems* (among states of the OECD, and for purposes of this exposition, particularly the trans-Atlantic area).

The argument developed here falls within the third camp on the transformation of political authority in the governance of globalization. This article argues that domestic laws – of different kinds, including regulatory and criminal – are evolving from their traditional role as coordinating domestic (or 'internal') governance within territorially bounded spaces to essential components of transnational governance. The essay develops this argument as follows:

First, I acknowledge the claim that neoliberal economic management (deregulation and privatization) has empowered private actors whose transnational activities can cause risk to the state and which demand some form of re-regulation. For instance, the high volume of capital flows in the private banking system and the empowerment of bankers in decisions in international finance can increase the risk of contagion and even systemic crisis unless control mechanisms are implemented to ensure adequate safety and soundness in the system (i.e., capital reserves and regulatory supervision). Similarly, the risk of transnational money laundering being undetected is heightened in the privatized transnational electronic funds transfer systems unless controls are put in place. Finally, the risk of copyright infringement has increased along with the proliferation of individualized transnational communications systems, particularly the ease of use, speed of transactions, and low costs of sharing material on the Internet.

Building on this, and arguing against the thesis that states are simply surrendering their sovereign capacities, I then show that states are implementing control mechanisms in these transnational privatized systems through a form of multi-level governance that begins with transnationally assimilated domestic laws. This takes shape in two steps. The first is a process of localization, or 'domestication,' of transnational risk onto the territories of states through the enactment of domestic law, the traditional means of controlling individuals. Second, as the privatized systems cross borders, states that are highly integrated into the transnational systems are harmonizing their domestic laws to extend the coercive reach of the law across jurisdictions commensurate with the reach of transnational actors.

Internationally harmonized systems of domestic law are becoming important mechanisms of governance – both on the domestic and the transnational level – in neoliberal globalization. Importantly, this mechanism of governance turns the 'disciplinary' argument on its head. In the cases under investigation here, it is states that are engaged in disciplining transnational systems, not the other way around, where 'de-territorialized' systems are seen as disciplining government. Interestingly, the form of discipline also follows the neoliberal agenda of privatization: the governance of the international financial system for the proceeds of crime has been privatized through criminal law sanctions on banks which force them to police the system; and the governance of copyright regime on the Internet gravitates towards liability of service providers. It is also self-enforcing: with the governance of international banks through assimilated domestic law comes a form of surveillance where domestic regulators assess each other; the supervisors become supervised across borders.

Along with the privatization of governance underpinned by states' assimilated domestic laws comes a system of governance that is transnationally uniform in its rationality, form, and function, as private actors come to exercise self-discipline. As states act in concert, however, the performance of this system of governance is characterized by a diffusion of the coercive apparatus of the state. This form of neoliberal, multi-level governance internalizes a mode of discipline acting through domestic law. Yet it simultaneously diffuses that rationality such that state borders are losing practical relevance for domestic law.

Globalization and the Harmonization of Law

Harmonization among states as a strategy of regulatory cooperation is not new. Harmonization is a political process of regulatory and legislative cooperation designed to mitigate difference among states' public policies. It has been defined as "institutionalized policy adjustments and alignments, often on the basis of some superordinate norm or standard . . . [and] compatible parallel legislation or practices are separately instituted by different actors in order to reduce the impact of boundaries."[5] Harmonization has long been a corollary to cooperation – bilateral, multilateral, and in international organizations – since by definition cooperation requires adjustments to domestic policies, regulations, and laws, as a means of bringing them into conformity with agreed standards.

However, heightened interdependence is prompting a qualitative change in the nature of harmonization, in two ways. First, it requires a shift away from 'external-oriented' policies at the states' 'edges' to harmonization of legislation that is 'internally oriented' and designed to control the activities of individuals located within the state whose actions have international consequences, e.g., environmental regulation, competitive practices, etc. Therefore, as issues of a 'domestic' nature spill over borders, international cooperation to mitigate the negative effects of heightened interdependence is requiring that harmonization take place in areas heretofore considered purely 'domestic.'

Second, it is often the case that international commitments require that states achieve certain agreed ends, or desired results, through parallel national action. They do not normally stipulate in detail the means, and it is left to the states to decide on the most appropriate method for achieving that result depending on domestic circumstances. However, the deepening of harmonization to domestic laws entails fine-tuning to an extent that requires a 'model law' form be adopted. This section elaborates on the nature of this qualitative change, before considering, in the following section, more detailed cases of the manner in which domestic legislation has become a mechanism of international governance.

Harmonization at the 'Edges' of States

Any form of international cooperation requires adjustment of some kind to national policies to bring them into greater conformity with each other.[6] Cooperation can be prompted by a number of things, for instance the desire to foster international exchange and private transactions across borders. Indeed, the advent of international organization as a means of fostering policy coordination was itself a response to the rapid increase in cross-border flows of goods, people, money, and ideas following the industrial revolution and in particular the growth of the liberal international economy from the mid-1800s.[7] States acting as gate-keepers in the nineteenth and early twentieth centuries cooperated in a number of areas to foster such exchanges – by agreeing on common weights and measures, international post and telecommunications, and tariff levels. International cooperation can also be prompted by the desire of states to collectively address common problems that each state cannot address alone, such as terrorism and the drugs trade; these examples date at least to the League of Nations.[8] Cooperation does not always follow from interdependence – it can lead to conflict – and there has been a wealth of scholarly attention devoted to the question of under what conditions states will pursue cooperation, unilateral action, or attempt to thrust the burden of adjustment onto the environment.[9] However, it is the case that interdependence puts more issues on the international agenda, and when cooperation is undertaken, the corollary is the harmonization of states' policies.

However, it has normally been the case that harmonization has related to the measures that states adopt at their 'edges,' as the metaphor of the state as 'gatekeeper' implies. The manner in which Bretton Woods institutions managed cooperation over the early postwar international economy is a classic example of this kind of gate-keeping. Cooperation in trade through the General Agreement on Tariffs and Trade focused on border measures, largely the kinds and levels of permissible tariffs and quotas. Cooperation in international finance under the IMF gold standard similarly entailed international adjustments of currency valuations and the erection of capital controls. Cooperation through the Bretton Woods system substantially nationalized control over the international economy, not only through devising means for the collective determination of the pace of economic liberalization, but through providing control instruments at the water's edge. Of course, the Bretton Woods system caused internal changes to states' policies and systems of regulation, but this was secondary, a side-effect of the harmonization adopted at the borders. The system of economic border controls was designed to insulate the national economy from shock, to provide a greater degree of control over the national economy, and, importantly, to provide freedom to undertake policies best suited to the national context without reference to economic conditions prevailing elsewhere.

Deepening Harmonization

Heightened interdependence, often referred to as globalization, is causing the dynamics of harmonization to change qualitatively. Harmonization is *widening* in scope, in terms of the issue areas that come onto the international agenda, and *deepening*, in terms of a shift away from the use of barriers at the edges of states to the assimilation of laws and regulations that traditionally have been conceived of as purely domestic. In international trade, the harmonization of national laws has come increasingly to occupy the attention of economists and lawyers as the agenda has shifted from border measures to issues of 'market access.'[10] As the international trade agenda of the Uruguay Round illustrated, further progress in fostering the increase of international trade flows has come to imply overcoming 'deeper' differences in a range of national policies and regulations that heretofore had been considered to be of purely domestic concern, for instance systems of intellectual property rights, health and safety, consumer protection, and environmental policies. Also, as the separation between international trade and foreign direct investment (FDI) has become increasingly blurred over the past decades – with the flow of FDI outstripping that of international trade, and multinational corporations increasingly dominating the trade system[11] – regulatory cooperation, ranging from competition policy to taxation, has come to occupy center-stage in the management of international trade and production. Indeed, the OECD has identified no fewer than 227 policy areas requiring harmonization, ranging from competition, biotechnology, health and safety, to the environment.[12]

This widening and deepening of harmonization is sparking increased interest in, and scholarly attention on, globalization and mechanisms of governance – both domestic and international, and the relationship between the two. While in legal studies the analysis of harmonization used to be confined largely to the domain of comparative law,[13] and in the field of international relations to studies of policy convergence in international organizations and 'regimes,'[14] the research agenda has broadened significantly.[15] There is a burgeoning literature in the fields of comparative politics and public administration concerned with the harmonization of public policy, often termed 'policy transfer,' which appears to have increased due to heightened interdependence.[16] Indeed, this qualitative shift in harmonization away from the 'edges' of states to their key embedded domestic – economic, administrative, and increasingly social – systems of governance demands the adoption of a multi-level methodology that appreciates the interconnection of domestic policies and international coordination, and of domestic laws and international governance. It also requires the adoption of an interdisciplinary approach that brings legal and policy analysis to bear within the field of international relations.

Disciplinary Harmonization

This section expands on the argument that the harmonization of domestic legislation is becoming an increasingly important aspect of international regulation. It concentrates on the international financial system and the Internet as systems that have been deregulated and privatized.[17] Neoliberal globalization has frustrated the ability of states to regulate through traditional means of policy coordination at their 'edges,' and deeper harmonization is occurring as a result. First, deregulation and privatization have empowered private actors (bankers, money launderers, Internet users); as these private individuals are subject to domestic law, the task of regulation has shifted to the disciplinary function of regulatory and criminal law. Second, these private actors are either transnationally mobile or their actions have transnational effects. Thus, effective discipline requires the harmonization of domestic laws of states that are highly integrated into the systems.

There is a two-fold process whereby states are, first, 'domesticating' risk by bringing threats to stability under national law – domesticating in the sense of taming a wild animal, and domesticating by bringing transnational threats under national law. It is a process of both localizing threats and 'internalizing' the application of a particular mode of governance. The second facet is the harmonization of domestic legislation so that the means of discipline – often the letter of the law – are the same, leading to the 'diffusion' of this mode of governance. This section therefore adds, importantly, that harmonization is a means of ensuring the continued relevance of domestic laws: ensuring the effectiveness of the measures taken at the national level increasingly *requires* that other states adopt the same measures.

The neoliberal agenda entails the deregulation, privatization, and marketization of essential functions in the provision of international public goods. International flows of liquidity to a great extent are no longer dependent on the management functions of states or international institutions, but are carried out by private lending.[18] Currency valuations are derived largely from the market-led international monetary system (dirty float) rather than through international public policy coordination (fixed exchange), with coordinated central bank intervention occurring rarely. International standardization is undertaken by such bodies as the ISO and other professional groups such as IOSCO, leading to 'privatized international governance.'[19] The Internet, also a highly privatized transnational system, places the power of knowledge and information transfer in the hands of individuals, and as this section will show, relies to a great extent on 'self-regulation' and discipline of Internet Service Providers (ISPs). Neoliberalism therefore entails the empowerment of private, market actors, guided by the rationale that market efficiency is not only best at allocating resources, but leads to a rationalization of a good deal of governance functions as well.

However, instability can arise. A deregulated international financial system governed by market actors is more prone to instability and contagion risk across borders than the highly stable system that prevailed under the early years of Bretton Woods. A privatized banking system characterized by a large volume of transactions undertaken at great speed across national jurisdictions can conceal transfers of money of illicit origin. A deregulated Internet renders borders porous to the transmission of ideas and images. There is no question that deregulation and privatization have empowered private actors at the same time that they have enabled transnational mobility. There is also little dispute over the fact that there are risks inherent in market-based, deregulated systems. However, these systems are not without governance, and harmonized systems of domestic law to discipline private actors have become an important part of the neoliberal mechanism for governance, both domestic and international.

The Discipline of International Banking

The strong thesis of globalization points to the risks to state sovereignty, and the difficulty if not impossibility of regulatory control over an international financial system that is 'stateless' or 'delinked' in fundamental ways from the control and oversight of states.[20] However, there has always been a tension within state policies between the need for liquidity to underwrite economic growth and the need to minimize risk and maintain social stability and confidence in the finance system. Sometimes this tension is resolved in favor of the market, sometimes in favor of stability, and each age has its problems. The fundamental difficulties experienced in regulating a liberal finance system was manifest from the earliest gold standard, and the improper management of this tension between liquidity and confidence was seen in numerous booms and busts (catastrophically in 1929); it was also instrumental in the breakdown of the Bretton Woods arrangements in 1971.[21] The principal difficulties of management today are:

1) excess international liquidity provided by private lending, leading to
2) competition among banks and other non-bank financial institutions that can lead to imprudent lending (i.e., over-exposure);
3) the phenomenal speed at which mistakes – including contagion risk from default, for instance – can be transmitted across borders, increasing the specter of systemic risk;
4) the fact that banking regulation has largely been a national prerogative while the consequences of shock can be transmitted widely throughout the system; and
5) transnational actors seeking 'regulatory arbitrage.'[22]

Without appropriate standards for safety and soundness, especially prudent minimum reserve requirements, the increase in liquidity and competition among banks and other financial institutions can lead to instability. Such competition is cited as one of the reasons for the imprudent loans to developing countries that underlay the Latin American Debt Crisis.[23] The international inter-bank lending market stands at approximately $7.5 trillion, and an estimated $6 trillion passes daily through international inter-bank payments and settlement networks.[24] Coupled with the speed of electronic clearing systems, the imprudence of a banker in one state can therefore very quickly become an international concern. With such a high volume of activity at such speed, the borders of states can hardly act as firewalls to contain contagion risk; it threatens to become systemic risk given the intricate nexus of the settlement system. As Richard Dale has commented, "It is becoming more difficult to ensure banking stability, partly because the internationalization of the financial services industry has removed the protective bulkheads separating one banking jurisdiction from the other. The implication is that there is increasing potential for cross-border contagion within the global banking system."[25] Finally, there is the potential for regulatory arbitrage, or competition in regulatory laxity: as one state deregulates, financial industries in another state feel they are at a competitive disadvantage and lobby for deregulation. In a similar vein, international banks, unless otherwise prevented, can exploit differences in national regulations. Depositors seek out the highest rates of interest, and borrowers seek the lowest interest rates, meaning that there can be a strong 'race to the bottom' among national legislations. Will Hutton likens this competition in regulatory laxity to a 1990s version of Gresham's Law, whereby good regulation is driven out by bad regulation: "deregulated banking drives out regulated banking and all of us pay the price,"[26] particularly since many governments maintain depositor insurance safety nets.

The member-states of the OECD, where 80% of international banking is concentrated, welcome the increase in private liquidity, and competition in the financial market is seen as desirable to rationalize the efficiency of financial institutions and to create a competitive credit sector. Taking the United States as an example of a capital importer, the number of foreign banking establishments in the US doubled from 345 offices in 1980 to 738 in 1991; foreign establishments increased their assets in the US by 320%, from $198 billion to $832 billion, which then accounted for approximately 25% of the US lending market. It has been estimated that US corporations borrowed a total of $222.4 billion from foreign banks during that time – approximately half the amount that US banks have listed in commercial and industrial loans.[27] Foreign capital is an important source of liquidity.

The policy equation in the current market-led international credit system is therefore in essence no different than at other times – to ensure that sufficient stability accompanies welcome liquidity – though this is expressed in the current neoliberal system as the need to discipline the private banks to ensure that they behave prudently. The governance of the diffuse market-led system therefore requires the discipline of private actors – banks – which manage the bulk of international financial flows. As banks are subject to the laws of the state in which they operate, domestic law is the medium for control. However, the rapid increase in the internationalization of banking has not only been in cross-border lending, but in cross-border establishment. The status of cross-border branches of international banks caused a good deal of regulatory confusion about the national authority responsible for supervision and for acting as lender of last resort, which finally was resolved in 1992.[28] As contagion risk does not respect political borders, it is necessary to ensure that similar legislation prevails in the states that are highly integrated into the system, lest there be a 'weak link' that can harbor pockets of instability that can spread to the rest of the system, and frustrate the efforts of those states which do maintain prudential supervision.

The supervision of international banking has been coordinated by national banking regulators primarily through the Bank for International Settlements, and particularly through the Basle Committee on Banking Regulation and Supervisory Practices.[29] The Basle Committee enunciates "Concordats," non-binding expressions of "best practice," which states then transpose into their municipal legislation. There have been a series of Concordats (including a Capital Adequacy Accord), which culminated in the 1992 Basle Committee's Minimum Standards for the Supervision of International Banking Groups and Their Cross-Border Establishments.[30] An important requirement of the Minimum Standards is that an international bank must obtain permission from both its home and host country regulators prior to opening a cross-border establishment. Particularly important is that host country regulators must first determine whether the bank operates prudentially, that is, whether it has sufficient capital and risk-management procedures. The host regulator must also determine whether the home country has given its permission to the establishment of the cross-border operation, and whether the home country has the capacity to exercise consolidated supervision – that is, oversight of the amalgamated position of the bank's global activities – prior to permitting the bank to establish in its jurisdiction. If the bank regulators are not satisfied, they should prevent the establishment of the bank in its jurisdiction. Therefore, as cross-border branches of international banks weave the international finance system into an integrated web, the Concordat on Minimum Standards permits national bank regulators to spy on, assess, and judge other national bank regulators across the filaments of that web.

The 1991 US Foreign Bank Supervision Enhancement Act (FBSEA) was enacted to be in conformity with the emerging Minimum Standards.[31] The FBSEA requires the Federal Reserve Board to regulate all foreign banks, even if they operate under a state charter. In particular, the FBSEA establishes uniform standards for the entry of foreign banks into the US, including mandating that the 'home' country supervisor of the foreign bank meet supervisory and managerial operational standards that are the *same* as those of the US. The FBSEA grants US regulators the power to refuse entry of a bank or to expel a bank from the US if they are not satisfied that the bank is subject to consolidated supervision by a home state authority that is capable of such supervision, and if the home country supervisor does not apply the *same* supervisory standards it applies to US banks. The European Union also has enacted a Directive that requires all member states to transpose into domestic law the provisions of the Minimum Standards. The Directive on the Supervision of Credit Institutions on a Consolidated Basis[32] requires supervision of international banks on a consolidated basis and provides states with the power to reject the establishment of banks less stringently regulated by home authorities.

Domestic laws governing bank supervision in both the US and EU, as well as in other states of the Basle Committee, therefore attempts to 'domesticate' control over risks in the privatized international financial system. It 'localizes' control over international banks within the territory of a state in two important ways. The first is by closing the state's borders to banks deemed not prudently supervised. Market power thereby provides the incentive for conformity. The second aspect of domestication is establishing legal mechanisms for bank regulators of different states to supervise each other. The Basle standard is a 'Trojan Horse' through which banking supervisors of different states assess each other's supervision according to a core standard. The discipline therefore operates at two levels: vertically, as supervisors discipline private banks; and horizontally, as supervisors supervise each other across borders – the watchers both watch and are watched. The governance in this issue area also expresses a uniform transnational rationality in belief about market efficiency and uniform transnational rationality in the manner of governing risk.

The problematic of governance in private international finance has thus shifted from one that is amenable to institutionalized regulation (through the IMF) to one that disciplines private actors through domestic law, and requires that states enact, and national bank regulators implement, transnationally assimilated laws. Neoliberal discipline therefore both internalizes and diffuses a transnational rationality of governance into national legislation, which becomes the coercive force of the logic of a transnational market civilization.

Money Laundering

This same logic of internalization and diffusion can be seen in criminal legislation relating to transnational money laundering. Deregulation and advances in technology have empowered not only banks, but also transnational criminals. The large volume and high speed of activity through electronic funds transfers conceals rather effectively transnational money laundering; it is estimated to hide the ownership of $1 trillion annual profit from organized crime.[33] Edward Kelly, Governor of the Federal Reserve Board, testified in 1996 to the House Banking and Financial Services Committee on Organized Crime and Banking that "it is indeed a problem in the electronic age to be able to effectively monitor the enormous number of very, very rapid transactions that take place."[34] Once dirty and hot money is in flight in the electronic system, distinguishing it from legitimate transactions becomes akin to finding a needle in a haystack. Determining the beneficial ownership of the funds is equally problematic. Intermediary banks in an electronic fund transfer often do not know the name of the originator or the payee, only the name of the two banks at either end of the chain. Through complicated transfers that traverse multiple national jurisdictions, criminals use state sovereignty – meaning the differentiated systems of bank secrecy – in order to frustrate the efforts of law enforcement officials to construct a paper trail.[35]

It is for these reasons that states of the Basle Committee have attempted to localize control by policing the money that is deposited into banks. All money in flight in the transnational system must originate through a deposit at a bank in some state's territory; the rationale is that money laundering operations are more noticeable, and therefore easier to stop, when money is first introduced into the system, at the 'placement' stage. Bank tellers are deemed to be in a position to distinguish a deposit for a bona fide commercial reason from one that is not. The Basle Committee has therefore enunciated a 'Know Your Customer' rule that has been adopted into national legislation. In essence, the national laws place the burden of policing the international financial system on the banks, under pain of criminal sanction. If the banks do not report suspicious deposits, they are held liable under criminal law for 'assisting' in money laundering.

In the United States, banks are obliged to obtain proper identification of customers and to report all large transactions.[36] Under the Currency and Foreign Transactions Reporting Act (CFTA), all financial institutions are required to file a Currency Transaction Report (CRT) for any transactions totaling more than US$10,000. It is a criminal offence for the banks to fail to file a CRT, irrespective of whether this failure is willful or negligent. Member states of the EU have also enacted legislation in conformity with the Council Directive on Prevention of the Use of the Financial System for the Purposes of Money Laundering.[37] Under United Kingdom law enacted in conformity with the Directive, banks are similarly required to report to the authorities suspicious transactions, under pain of criminal sanction.[38] Again, it is a criminal offence for the bank – meaning both the management and the individual bank tellers – to fail to report any suspicions to the authorities, whether this failure is willful or negligent. Because 'suspicion' and 'negligence' are defined loosely, banks have erred on the side of caution and have been inclined to file a large number of reports. In their attempt to demonstrate their 'due diligence' to the authorities, they have also implemented a series of internal reporting procedures.

This represents, in essence, the privatization of policing the international financial system for money laundering. States have 'localized' control over transnational flows of dirty and hot money within their territories, giving expression to the transnational rationality of governance in this area through assimilated systems of domestic criminal law. The regulators therefore 'discipline' the banks through the coercion of criminal sanction, the banks discipline the money launderers through reporting, and the banks also discipline themselves through their internal reporting mechanisms. The banks become both watchers and watched in this system of transnationally assimilated, privatized governance.

Copyright on the Internet

Like the system of electronic funds transfers, the Internet is a transnational system utilized by private actors whose actions permeate borders and have transnational effect. The digitalization of information – sound, images, video, and text – increases the volume of copies that can be made of a work without a great loss of quality, and increases the number of directions and the speed with which those copies can traverse the system.[39] Copyrighted work can be traded among individuals, and possibly inserted into other works without attribution – both of which violate the spirit of western systems of copyright protection. As with money laundering, it is difficult if not impossible to identify or to apprehend those infringing copyrights. Internet users can upload material to bulletin boards or trade the material among themselves, which is much less costly and more stealthy than traditional means of distributing copyright infringing material; there is no Internet equivalent of post office inspectors. While governments in the US and the EU are attempting to develop the Internet for a host of reasons, including promotion of the burgeoning 'e-commerce' sector, they also are quite aware that the medium will likely be stunted if it is not able to provide the same guarantees as the traditional market place, particularly guaranteeing property rights. A European Commission IMPACT assessment on the Information Society emphasized as early as 1995 that "the fear of copying is probably the single biggest factor discouraging information providers from making their services available over networks such as the Internet."[40] The US Task-Force on the National Information Infrastructure (NII) also saw early on that "the most significant area of intellectual property law impacting the NII concerns copyright protection."[41] The recent 'Napster' and 'MP3' cases illustrated the great extent to which copyrights can be infringed using electronic communications.

The resolution of the problems of governing the diffuse, private, and otherwise stealthy nature of the Internet that gives rise to problems of identification of copyright violators has gravitated towards holding responsible service providers, who are more easily 'localized' on the territory of a state and therefore identifiable. As early cases were developing in the United States,[42] the government argued for strict liability to be placed on Internet Service Providers (ISPs), since "they – and perhaps only they – are in a position to know the identity and the activities of their subscribers and stop unlawful activities,"[43] in an obvious variant of the "Know Your Customer" rule. Placing strict liability on the ISPs would permit the identification of violators out of as many as 100 million users; it would localize those responsible more easily on the territory of a state, enabling injured parties to have recourse to law; and it would privatize the task of policing the system by requiring the ISP to know crucial information about its users. It might also lead to market-based corrective devices, whereby the ISPs require a series of private contracts with individuals as a condition of using the service, thereby further diffusing the privatized disciplinary function of domestic law.

Associated with this logic of governance have been moves towards the transnational assimilation of domestic legislation according to an international standard. The emerging international norm based on this logic of discipline was expressed through the 1996 WTO Copyright Treaty,[44] to which both US law[45] and emerging legislation in the EU[46] are meant to conform. While there are limitations to ISP liability in the WIPO treaty and domestic legislation, its thrust is to hold the service providers responsible, placing the burden of liability onto systems of private contracts with the users of the systems. The logic of disciplining private actors in this case is clear: once the WIPO treaty is fully implemented, it will again be a system of privatized governance, localizing transnational risks through domestic law while at the same time harmonizing copyright standards.

Neoliberal Governance, Discipline, and Law

> Shift the object and change the scale. Define new tactics in order to reach a target that is now more subtle but also more widely spread in the social body. Find new techniques for adjusting punishment to it and for adapting its effects. Lay down new principles for regularizing, refining, universalizing the art of punishment. Homogenize its application. Reduce its economic and political cost by increasing its effectiveness and by multiplying its circuits. In short, constitute a new economy and a new technology of the power to punish.
>
> Michel Foucault[47]

Stability is the primary goal of the vast majority of public policy and public regulation.[48] 'Governance,' as a purposive act of providing stability, normally entails more or less coercive systems of regulation.[49] Stability in the era of 'embedded liberalism' arose from international institutional coordination for the provision of international public goods; this arguably continues to be the case in the trade system. But in the financial system, this is so only in situations of crisis. In the privatized international banking system, states are no longer in a position to provide stability through public policy coordination at their 'edges,' through border (capital) control mechanisms. This is hardly surprising, since they deregulated and privatized transnational systems following a neoliberal agenda.[50] However, the shift to neoliberalism has been a managed process, and complex mechanisms of governance are emerging, described by Phil Cerny as "a complex aggregate of multilevel games played on multilayered institutional playing fields, *above* and *across*, as well as *within*, state boundaries."[51]

Neoliberal disciplinary governance – taming transnational risk by localizing it in a territory and subjecting it to domestic law, and harmonizing the law across states highly integrated into systems – is one such mechanism of governance of globalization. The provision of domestic and international stability continues to require international cooperation, though the mechanism for attaining that stability is more deeply embedded in domestic control mechanisms since the project now is the discipline of private actors. Those actors, to turn a phrase of Foucault, are now spread *across* social bodies (states), and the art of universalizing and homogenizing control mechanisms has entailed the assimilation of domestic legislation.

Neoliberal disciplinary governance is multi-leveled. Insofar as the reach of private actors blurs the domestic and the international, we must look at the blurring levels of governance as domestic laws become mechanisms of international governance. Within a state, there are hierarchies of governance mechanisms. At a meta-theoretical level, Kiser and Ostrom identify three such levels of governance: the constitutional, at which the fundamental norms and principles are decided; the collective, at which decision-making on laws and rules are made; and the operational, at which routine actions take place within the framework structured by the other two levels.[52] In the areas investigated here, decisions at the collective level of governance are spilling out of borders and being made across states that are highly integrated into transnational networks. As states resort to domestic law solutions to transnational problems, this entails greater international cooperation in domestic lawmaking.[53] Indeed, it requires that the collective level of domestic governance be conceived increasingly in transnational rather than purely domestic terms.

Neoliberal disciplinary governance is also a partly 'privatized' governance: one might call it 'neoliberal discipline.' Foucault's analysis of the shift in the organization of discipline in the eighteenth century from "the vengeance of the sovereign to the defence of society"[54] is instructive for the analysis of states' attempts to discipline globalization (transnational private actors) in order to maintain social stability. It rests on what Foucault called 'enclosure,' or what I have called 'domestication,' such that the diffuse risks of a liberal society can be reigned in, identified, mapped, and governed. It rests on individualization, whereby the individual transgressor in the amorphous polity – those stealthy transnational systems – of individuals can be identified. It rests on surveillance, whereby individuals become part of the production of their own discipline and surveillance is the tactic of supervisors both supervising and being supervised. Increasingly, it relies on systems of self-management, on internal mechanisms of reporting and control, and on the auditing of control systems.[55] Under pain of market sanction, bank supervisors survey each other across borders to ensure the adequacy of each other's supervisory remits, the *sameness* of their legislations and their functional capacities. Under pain of the *similar* criminal sanction, bankers in different states survey the transnational flows of money for dirty and hot funds, 'localize' it at the placement stage, 'know' the identity of the individual customer, and maintain a host of internal reporting procedures that can be audited. And, under pain of civil sanction, Internet service providers 'know' the identity of their users, localize the individual within the amorphous electronic web, and have incentives to create webs of private contracts guaranteeing acceptable behavior.[56]

Individuals therefore act upon themselves and each other to reinforce structures of coercion on a stage set by the coercive mechanisms of law. As Foucault explained, "the disciplines are the techniques for the ordering of human multiplicities . . . they try to define in relation to the multiplicities a tactics of power" that is economically efficient and legitimated through the ideology of liberal freedom. Importantly, for Foucault, this form of discipline arose at a particular historical juncture arising from the liberal philosophy of the Enlightenment, the development of a capitalist economy, and an increase in population.[57] Disciplinary power involves "modes of regularizing activities in time-space."[58] As neoliberalism extends to the international sphere, and the relations of private individuals become 'de-bordered' for practical purposes, should there be any surprise that the mechanisms of governing a domestic liberal economy and polity should also spill over their borders?

NOTES

1. See generally, David Held, Anthony McGrew, David Goldblatt, and Jonathn Perraton, *Global Transformations: Politics, Economics and Culture* (London: Polity, 1999); Jan Aart Scholte, *Globalization: A Critical Introduction* (London: Macmillan, 2000); Patrick O'Meara, Howard D. Mehlinger, and Matthew Krain, eds., *Globalization and the Challenges of a New Century: A Reader* (Bloomington and Indianapolis: Indiana University Press, 2000); and Eleonore Kofman and Gillian Youngs, *Globalization Theory and Practice* (London: Pinter, 1996).

2. Paul Hirst and Grahame Thompson, *Globalization in Question: The International Economy and the Possibilities of Governance* (Cambridge: Polity, 1996); Linda Weiss, *The Myth of the Powerless State: Governing the Economy in a Global Era* (Cambridge: Polity, 1998); and Kenneth Waltz, "Globalization and Governance," *PS: Political Science and Politics* (December 1999), available: http://www.apsanet.org/PS/dec99/waltz.cfm.

3. Richard O'Brien, *Global Financial Deregulation: The End of Geography* (London: Pinter, 1990); Kenichi Ohmae, *The Borderless World: Power and Strategy in the Interlinked Economy* (London: Fontana, 1990); Malcolm Waters, *Globalisation* (London: Routledge, 1995); Susan Strange, *The Retreat of the State* (Cambridge, Cambridge University Press, 1996); Thomas L. Friedman, *The Lexus and the Olive Tree* (New York: Farrar, Straus, Giroux, 1999).

4. Aseem Prakash and Jeffrey A. Hart, eds., *Globalization and Governance* (London: Routledge, 1999); James Rosenau, "Governance in the Twenty-First Century," *Global Governance: Review of Multilateral and International Organization* 1, no.1 (1995): 13–43; Martin Hewson and Timothy Sinclair, eds., *Approaches to Global Governance Theory* (Albany: SUNY Press, 1999); and Raimo Vayrynen, ed., *Globalization and Global Governance* (Oxford: Rowman & Littlefield, 1999).

5. A.J.R. Groom and Alexis Heraclides, "Integration and Disintegration," in Margot Light and A.J.R. Groom, eds., *International Relations: A Handbook of Current Theory* (London: Pinter, 1985), 177.

6. 'Cooperation' by definition requires mutual adjustment, though it can be uneven and asymmetric (as opposed to 'harmony,' for instance, which does not require change). See Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984).

7. See A.J.R. Groom, "The Advent of International Organisation," in Paul Taylor and AJR Groom, eds., *International Institutions at Work* (London: Pinter, 1988), 3–19.

8. See F.S. Northedge, *The League of Nations: Its Life and Times, 1920–1946* (Holmes & Meier, 1986).

9. See, for instance: Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984); David Baldwin, *Neorealism and Neoliberalism: New Directions in World Politics* (New

York: Columbia University Press, 1993); John A.C. Conybeare, *Trade Wars: The Theory and Practice of International Commercial Rivalry* (New York: Columbia University Press, 1987); Keohane, *After Hegemony*; Keohane, ed., *International Institutions and State Power: Essays in International Relations Theory* (London: Westview, 1989); Keohane and Joseph Nye, *Power and Interdependence*, 2nd ed. (New York: Harper-Collins, 1989); and Kenneth Oye, ed., *Cooperation Under Anarchy* (Princeton: Princeton University Press, 1985).

10. Bhagwati and Srinavasan, in Jagdish Bhagwati and Robert Hudec, *Fair Trade and Harmonization: Prerequisites for Free Trade?* (Cambridge, MA: MIT Press, 1996).

11. See, for instance, Susan Strange and John Stopford, *Rival States, Rival Firms: Competition for World Market Shares* (Cambridge: Cambridge University Press, 1991).

12. The OECD also maintains a database of regulatory policies of member states in a wide range of areas. On what the OECD calls the "emerging multi-governmental regulatory system," see OECD, "International Regulatory Cooperation," OECD, Paris, available: http://www.oecd.org// puma/regref/coopern.htm, visited 8/9/2000.

13. See, for instance, Wolfgang Wiegand, "The Reception of American Law in Europe," *American Journal of International Law* 39 (1991): 236–46.

14. For instance: R.J. Harrison and Stuart Mungall, "Harmonization," in A.J.R Groom and Paul Taylor, *Frameworks for International Cooperation* (London: Pinter, 1990); and Robert Cox, ed., *International Organisation: World Politics* (London: Macmillan, 1969); Stephen Krasner, *International Regimes* (Ithaca: Cornell University Press, 1981).

15. See, for instance, the contributions to the specialist journal launched in 1993, the *Indiana Journal of Global Legal Studies*, available: www.law.indiana.edu/glsj/.

16. Diane Stone, "Learning Lessons and Transferring Policy across Time, Space and Disciplines," *Politics* 19, no.1 (1999): 51–-59. See also, M. Evans and J. Davies, "Understanding Policy Transfer: A Multi-Level, Multi-Disciplinary Perspective," *Public Administration* 77, no.2 (1999): 361–85.

17. More detailed case studies are presented in Wiener, *Globalisation and the Harmonization of Law* (London: Pinter, 1999).

18. Save for situations of crisis, with the role of the IMF having changed to largely a lender of last-resort. Yet there is little of the kind of conscious counter-cyclical policies pursued by Britain in the mid 1800s or by the United States following the Second World War. See Andrew Walter, *World Power and World Money: The Role of Hegemony and International Monetary Order* (London: Harvester Weatsheaf, 1993).

19. I chose these examples of international public good with Charles Kindleberger's classic statement on the issue in mind, which includes a countercyclical flow of liquidity, a stable international currency, and standards for weights and measures. See Kindleberger, "International Public Goods Without International Government," *American Economic Review* 76, no. 1: 1–13; and Kindleberger, "Dominance and Leadership in the International Economy: Exploitation, Public Goods, and Free Rides," *International Studies Quarterly* 25, no. 2 (1981): 242–54.

20. See Phil Cerny, "The Political Economy of International Finance," in Cerny, ed., *Finance and World Politics* (Edward Elgar, Aldershot, 1993); and Eric Helleiner, "States and the Future of Global Finance," *Review of International Studies* 18, no. 1 (1992).

21. David Ricardo's thoughts on the gold standard are astonishingly similar to Robert Triffin's analysis of the problems with the IMF. See Richard Dale, *International Banking Deregulation: The Great Banking Experiment* (Oxford: Blackwell, 1992).

22. See: "Remarks by Chairman Alan Greenspan Before the 34th Annual Conference on Bank Structure and Competition of the Federal Reserve Bank of Chicago, May 7, 1998," available: http://www.federalreserve.gov/boarddocs/speeches/19980507.htm

23. Dale cites "one prominent central banker" as saying: "There is . . . undoubtedly overcapacity in the financial sector which is leading to unrealistic undercutting of fees and margins in much the same way as we saw the very low spreads being offered to Third World borrowers in the 1970s." Cited in Dale, *International Banking Deregulation,* 174.

24. Bank for International Settlements, "BIS Consolidated International Banking Statistics for

End-March 2000," Bank for International Settlements, Basle, Switzerland. Available: http://www.bis.org/publ/r_hy0008.pdf

25. Dale, *International Banking Deregulation,* 192.

26. *The Guardian* (London), 10 September 1990, 10.

27. *Industry and Trade Summary, Commercial Banking* (USITC Publication, 2638, SV-4, June 1993, 26). The statistics were chosen from the early 1990s to complement the following discussion of the United States Foreign Bank Supervision Enhancement Act of 1991. See also Timothy A. Canova, "The Transformation of US Banking and Finance: From Regulated Competition to Free-Market Receivership," *Brooklyn Law Review* 60 (1995).

28. On the successive measures for international cooperation on these issues, see: Duncan E. Alford, "Basle Committee Minimum Standards: International Regulatory Response to the Failure of BCCI," *George Washington Journal of International Law and Economics* 26 (1992); Daniel M. Laiffer, "Putting the Super Back in the Supervision of International Banking, Post-BCCI," *Fordham Law Review* 60 (1990); Thomas F. McInerney III, "Towards the Next Phase in International Banking Regulation," *DePaul Business Law Journal* 7 (1994); and J.J. Norton, "The Work of the Basle Supervisors Committee on Bank Capital Adequacy and the July 1998 Report on 'International Convergence of Capital Measurements and Capital Standards,'" *International Lawyer* 23 (1989).

29. Known as the Basle Committee, this is an informal consultative group under the auspices of the Bank for International Settlements, comprised of representatives of the central banks of Belgium, Canada, France, Germany, Great Britain, Italy, Japan, the Netherlands, Switzerland, the United States, Luxembourg, and Sweden.

30. Enunciated in 1992. Available www.bis.org. The Basle Committee has since issued guidelines that build on the Minimum Standards. The *Core Principles for Effective Banking Supervision,* released for comment on 9 April 1997, detail 25 basic principles which the Committee deems necessary for a prudential supervisory system to be met.

31. On which, see L. Todd Gibson, "The Foreign Bank Supervision Enhancement Act of 1991: Short-Run Consequences En Route to the Long Term Goal," *Case Western Reserve Journal of International Law* 27 (1995).

32. Council Directive 92/30 of 6 April 1992 on the Supervision of Credit Institutions on a Consolidated Basis, *Official Journal of the European Communities,* 1992 (L110), 52.

33. B.A.K. Rider, "The Financial World at Risk: The Dangers of Organized Crime, Money Laundering, and Corruption," *Managerial Auditing Journal* 8, no.7 (1993): 3–14.

34. Testimony of Edward Kelly before the House Banking and Financial Services Committee (Rep. Jim Leach, Chair), *Federal News Wire,* 28 February 1996.

35. See Sarah Jane Hughes, "Policing Money Laundering Through Funds Transfers: A Critique of the Regulation Under the Bank Secrecy Act," *Indiana Law Journal* 67 (Winter 1992).

36. The Money Laundering Act of 1986, the Anti-Drug Abuse Act of 1990, the Annunzio-Wiley Anti-Money Laundering Act of 1992, and the Money Laundering Suppression Act of 1994. For commentary, see: Jonathan J. Rusch, "Hue and Cry in the Counting-House: Some Observations of the Bank Secrecy Act," *Catholic University Law Review* 37 (Winter 1988): 465–88; and Frank C. Razzano, "American Money Laundering Statutes: The Case for a Worldwide System of Banking Compliance Programs," *Detroit College of Law Journal of International Law and Practice* 3 (1994): 277–307.

37. Council Directive 91/308, *Official Journal of the European Communities* (L-166) 1991, 77.

38. The Criminal Justice Act 1993. For commentary, see Robert Finney, "UK Money Laundering Law After the Reports of 1993," *Butterworths Journal of International Banking and Finance Law* (December 1993): 530–37; Monica Bond, "Money Laundering," *Accountants Digest* 324 (September 1994); and Michael Clarke, "How Will the Money Laundering Regulations Work?," *Journal of Financial Regulation and Compliance* 31, no. 1 (1995): 36–42.

39. An appropriate case emerging as I write are the 'Napster' and 'MP3' cases of copyright infringement of musical artistic works. On Napster, see http://www.nwfusion.com/news/

2000/0726napster.html, visited 1 August 2000; and on MP3, see www.findarticles.com/m3018/26_111/55008175/p1/article.jhtml, visited 1 September 2000.

40. European Commission, "Key Regulatory Issues," IMPACT Work Programme, 1995.

41. Executive Office of the President, "Technology for America's Growth: New Directions to Build Economic Strength," US Government Printing Office, Washington D.C, 1993.

42. For instance, *Playboy Enterprises v. Frena* (839 F.Supp. 1552, M.D. Fla, 1993). For commentary, see Dan Burk, "Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks," *Tulane Law Review* 68, no. 1 (1993). See also *Sega Enterprises Ltd. v. MAPHIA, Frank Music Corp. v. Compuserve, and Religious Technology Center v. NETCOM,* commentaries of which can be found in William Galkin, "Jumping the Gun on Sysop Liability," *The Computer Law Report* 13, no. 6 (1995), distributed by Galkin@aol.com.

43. Information infrastructure Task Force, "Intellectual Property and the National Information Infrastructure: The Report of the Working Group in Intellectual Property Rights," Department of Commerce, 1995, 123.

44. World Intellectual Property Organization, "WIPO Copyright Treaty," Adopted by Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, CRNC/DC/94, Geneva, 23 December 1996.

45. WIPO Copyright Treaties Implementation Act, H.R.2281, 105th.C., 29 July 1997, introduced in the Senate as "Digital Millennium Copyright Act of 1998," S.2037, 12 May 1998, passed. Available http://thomas.loc.gov/

46. The formulation of the European Directive has been slow, as it is accompanying the internal project of harmonising European systems of copyright at the same time. Nevertheless, the Member States also party to WIPO are implementing the WIPO Copyright Treaty. For EU documentation, see in particular: Council Directive 93/98/EEC of 29 October 1993 to Harmonise the Term of Protection of Copyrights and Certain Related Rights; and Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission. Available: http://europa.eu.int.

47. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995 (1977)), 89.

48. M. Aglietta, *A Theory of Capitalist Regulation* (London: New Left Books, 1979).

49. J. Kooiman, ed., *Modern Governance: New Government-Society Interactions* (London: Sage, 1993).

50. Helleiner, *op. cit.*; and Phil Cerny, "Paradoxes of the Competition State: The Dynamics of Political Globalization," *Government and Opposition* 32, no. 2 (1997): 251–74.

51. Phil Cerny, "Political Globalisation and the Competition State," in Richard Stubbs and Geoffrey Underhill, *Political Economy and the Changing World Order*, 2nd ed. (Oxford: Oxford University Press, 1999), 300. See also Cerny, "Globalization, Governance, and Complexity," in Prakash and Hart, *Globalization and Governance*, 188–212.

52. L.L. Kiser, and E. Ostrom, "The Three Worlds of Action: A Metatheoretical Synthesis of Institutional Approaches," in Ostrom, ed., *Strategies of Political Enquiry* (London: Sage, 1982).

53. Alfred C. Aman, Jr. argued that globalization involves "not only a shift in the *scale* of law, but also (and especially) the *dynamics* of legal processes." See Aman, "Indiana Journal of Global Legal Studies: an introduction," *Indiana Journal of Global Legal Studies* 1, no.1 (1993), available: http://www.law.indiana.edu/glsj/vol11.aman.html.

54. Michel Foucault, *Discipline and Punish* and "Politics and Reason," in L. Kritzman, ed., *Politics, Philosophy, Culture: Interviews and Other Writings, 1977–1984* (London: Routledge, 1988), 82.

55. Gerald Spindler, "Market Processes, Standardisation, and Tort Law," *European Law Journal* 4, no. 3 (1998): 317.

56. I am not the first to recognize the relevance of Foucault to this strategy for Internet regulation. See, for instance, James Boyle, "Foucault in Cyberspace: Surveillance, Sovereignty, and

Hard-Wired Censors, available at: http://www.law.duke.edu/boylesite/foucault.htm What is striking is that the logic is generalizable to other highly integrated systems such as private finance.

57. Foucault, *Discipline and Punish*, 218.

58. Anthony Giddens, *The Nation-State and Violence* (Berkeley: University of California Press, 1987), 183.