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STANDARDS, LAW, AND GOVERNANCE*

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ABSTRACT

The last several centuries have been marked first by a tendency toward the use of standards to standardize, and then by the use of standards to differentiate. Both have been built on the legal edifice of the state. More recently, in response to the rapid rise of neoliberalism, standardized differentiation has increased in scope and has become part of a larger Tripartite Standards Regime (TSR) consisting of standards, certifications, and accreditations. Over the last half century, the TSR has grown to cover nearly every aspect of social life. In many ways this new form of governance replaces and transmutes positive law, which is a product of the state, with its market equivalent. Yet, the TSR leaves much to be desired as a form of governance. The recent financial collapse should give us pause to ask whether the path we have constructed for ourselves can lead us to the desired destination.

As Michel Callon (1998; Callon, Millo, and Muniesa 2007) and others (e.g., MacKenzie, Muniesa, and Siu 2007) have argued, economies are performed. Put differently, without people engaged in certain relatively well-defined and organized activities, economies simply do not exist. Moreover, from this perspective, economists not only study economies, measuring various aspects of their performance; through their theoretical perspectives, measurement devices, and policy initiatives, they propose and enact particular ways to perform the economy. Thus, there is a necessarily reflexive character to economics. The words and actions of economists tend themselves to be used to (re)shape the economy. Furthermore, just as a play may be performed in a way that is faithful to the script, may be performed well or badly, may be a brilliant production or a dismal failure, so may economic performances.

Markets have been around since the beginnings of recorded history and perhaps before. People produced various things for their own use. Whatever was left over, despite quality, they attempted to sell in the market if a buyer were available. If not, they kept those things so that they might try to sell them again later.

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Then, much later, after the invention of money, some people determined that they could produce *for the market*, using the money they received to purchase the means of subsistence. To do this, they had to have expectations, however vague, about what a *typical* potential buyer might wish to buy. These expectations were based on everyday knowledge about their community and about those desiring and having the means to purchase a given item.

It is this form of market that was central to (the various enactments of) classical liberalism (i.e., a market in which producers of a given good produce for the market and prices are set by virtue of their competition). This is the market of Hobbes's ([1651] 1991) 'harmless liberties,' of Locke's ([1690] 1955) *Civil Government*, and especially of Smith's ([1776] 1994) *Wealth of Nations*.

It is one in which the state provides a legal framework designed to ensure, among other things, (1) enforcement of contracts, (2) a citizenry made up of free laborers, perhaps with some minimal amount of formal education, (3) a good system of transport (to ensure that goods and people can move freely), and (4) prohibition or regulation of monopolies. By the late nineteenth century, the older feudal legal systems in which 'just price' had prevailed had been abandoned. Most of these conditions were met throughout the industrialized world. Arbitrary seizure was abolished; laborers were no longer bound to the land; canals, railroads, and roads became commonplace public goods; and many monopolies were either broken up or regulated. Of course, writing long after Smith, Marx (1906) was quick to note that such markets were unstable and tended toward monopoly, that the owners of capital were far better served in such a system than were workers, and that the very process of work itself was transformed by the market in often undesirable ways.

By the late nineteenth century, this type of market was beginning to show signs of wear. Large companies were commonplace. While some goods were still produced for the market, others were beginning to be tailored for particular market segments, for certain target groups. And, as Mitchell (2008) argued, in the mid-twentieth century the economy was invented, the product of new measurement tools and forms of calculation, new property rights and other legal frameworks, and new prescriptions as to the proper forms of economic behavior – in short by remaking the world such that 'the economy' could be performed. Yet that is to get ahead of the story.

Of particular importance for the story I wish to tell here are two profound but largely unnoticed changes that have occurred over the last several centuries that have transformed both markets and law: the use of 'voluntary' standards first to *standardize*, and then to *differentiate*.[1] Both were very much helped along by changes in our understanding and practice of markets themselves, understandings and practices very much central to the discipline of economics. In this paper I attempt to document those changes. First, I examine the use of standards to standardize. Then, I turn to how standards have been used to differentiate. Next, I examine how responses to the rise of neoliberalism triggered the rise of what is called the Tripartite Standards Regime (TSR) of standards, certifications, and accreditations. I conclude by arguing that the recent financial collapse should give us pause to ask whether the path we have constructed for ourselves can lead us to the desired destination. I begin by discussing the rise of standardization.

TOWARD UNIFORMITY

The advent of standardization was already foreseen in the work of Adam Smith ([1776] 1994). Much has been said about Smith's description of the division of labor, and in particular his description of a pin factory. Yet, most commentators have ignored two peculiar aspects of Smith's analysis. First, the division of labor Smith described was unusual at the time; most non-agricultural goods were produced at the request of a particular buyer and often to the specifications demanded by the buyer. Hence, if Smith had looked at other industries of his day – cabinet making, wrought iron work, wagon manufacture – nowhere would he have found the minute division of labor that he described. Second, the pins that Smith described were standardized. Each had to be of approximately the same length. Each had to have a head of approximately the same size. Each had to be sufficiently sharp at one end to penetrate the cloth and not so wide as to tear it. It is to Smith's credit that he understood that the world that would follow him would be a world in which the minute division of labor would be employed to produce standardized commodities *for the market*, rather than singularities for particular persons. It would be an industrial world (Boltanski and Thévenot [1991] 2006).

Not surprisingly, it was the military that first expressed an interest in standardization. Standards for uniforms made it easy to distinguish friend from foe and were widely used by 1800. Simultaneously, they presented the illusion that soldiers were themselves 'uniform' and hence replaceable. Similarly, standards for armaments would restrict the power of the guilds, permit control of vast armies of workers, and produce interchangeable parts, to ensure that bullets were of a

[1] Clearly, this is not the sole story that can be told of the last several centuries. Marx (1906) told that story as one of class struggles, while Weber ([1922] 1978) emphasized the role of bureaucracy.

standard caliber and that firearms could be easily repaired on the battlefield.[2] In 1790, Honoré Blanc demonstrated the interchangeability of musket parts to an astonished audience at the Hôtel des Invalides in Paris. Similarly, in 1815, the U.S. Congress contracted with Simeon North to produce 100 pistols with standard parts (Coulson 1944). However, the difficulties involved are illustrated by the difficulties faced by James Watt, who struggled to find someone who could bore a cylinder with sufficient accuracy to make his steam engine function.

Still, despite those costly and heroic efforts, it was not until the mid-nineteenth century that standardization began to take hold – standardization that became widely known as the American system (Coulson 1944; Habakkuk 1962). Before then, producing standard parts for anything was simply both too difficult and too costly. Hence, manufacturers produced items that looked the same, that functioned in the same way, but that were anything but the same.

Simultaneously, by the mid- to late-nineteenth century a move was afoot to transform markets such that they began to resemble those in the textbooks of economics. Likely the transformation was partly the result of economic theorizing, and the theorizing was partly a response to these changes. In any case, a series of discrete events took place in industrial nations that transformed the nature of markets. These included *state action* to: 1) produce a single currency for each nation, backed by a national bank, 2) ensure the precision and accuracy of weights and measures used in commerce, 3) prohibit or regulate monopolies, and 4) regulate stock markets by establishing clear trading rules. Simultaneously, but largely beyond the province of the state, 5) prices were marked on consumer goods to suppress haggling and speed up the pace of sales,[3] 6) national standards bodies were created, beginning in 1900 with the formation of the British Standards Institution, and 7) mass production of a vast array of intermediate and consumer products became commonplace. By 1900, the enthusiasm for standardization was nearly unbounded. Moreover, it ran across the political spectrum. Consider the positions of three typical proponents of standardization: Ford, Hoover, and Veblen.

Obviously, Henry Ford saw standardization as a means of increasing the efficiency and turnover rate in his rapidly growing automobile business. Ford's enthusiasm for standardization was perhaps best summed up in his well-known comment that buyers could have any color vehicle they wanted, as long as it was

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[2] For a detailed analysis of the changes and the resistance they encountered in France, see Adler (1997; 1998).

[3] This is still noted in the names of French retailers such as Monoprix and Prisunic.

black. Yet it went far beyond that. Workers would perform tasks repeatedly in a standardized way, based on Frederick Winslow Taylor's (1911) notions of scientific management. Moreover, they would live standardized lives, monitored by the company's Sociological Department (Hooker 1997). In short, Ford would have standardized vehicles, standardized workers, and standardized production processes. Ford saw himself as engaged in a process of social uplift, providing the astounding wage of five dollars per day to unskilled workers, and helping them to live clean, upright, moral, American lives. Charlie Chaplin (1936) may have effectively satirized this approach in his film *Modern Times*, but Ford's profits overshadowed Chaplin's critique.

At the opposite end of the political spectrum stood radical economist Thorstein Veblen. As he put it (1904:10), ". . . modern industry has little use for, and can make little use of, what does not conform to the standard. What is not competently standardized calls for too much of craftsmanlike skill, reflection, and individual elaboration, and is therefore not available for economical use in the processes." Moreover, Veblen did not stop at the production of manufactured goods. He was quite convinced of the need to standardize all of the services associated with commerce – accounting, billing, and contracting. Even consumers would be standardized, conforming to the choices posed by the new markets for mass-produced consumer goods. Everyone, everything would be interchangeable.

One might ask how a committed radical could find this situation at all desirable. Nevertheless, Veblen was convinced that the revolution would be led by the engineers. The capitalists distrusted the engineers, and the engineers were more concerned about efficiency than they were about profits (Veblen 1921). With rising class consciousness among the engineers, they would take over and increase productivity by 300-1200 percent. Workers would align themselves with an 'Executive Council of Engineers,' a 'Soviet of technicians' who would push aside the absentee owners of capital, ushering in a new era of worker control and material abundance.

Between the positions taken by Ford and Veblen was that of Herbert Hoover. An engineer by training, Hoover also appreciated the importance of standardization. He was concerned about class divisions and saw standardization as a means to overcome them. Instead of class war, standardization would resolve class divisions by eliminating waste and ushering in a new age of abundance. In short, by lowering the costs of goods, standardization would make wages go further without lowering the profits of capitalists. Hoover (1952:28-29) explained it best in his memoirs:

> It involved increasing national efficiency through certain fundamental principles. They were (a) that … social progress required, as a first step, lowering the costs of production and distribution by scientific research and transformation of its discoveries into labor-saving devices and new articles of use; (b) that we must constantly eliminate industrial waste; (c) that we must increase the skill of our workers and managers; (d) that we must assure that these reductions in cost were passed on to consumers in lower prices; (e) that to do this we must maintain a competitive system; (f) that with lower prices the people could buy more goods, and thereby create more jobs at higher real wages, more new enterprises, and constantly higher standards of living [that would] … provide every safeguard of health and proper leisure.

Moreover, as a public servant, Hoover could put many of his ideas into practice. He was Food Administrator during World War I, Secretary of Commerce under Harding, and finally President (1929-1933). In each instance, he encouraged the use of voluntary standards to standardize or simplify production[4] and to eliminate waste. Importantly for our purposes here, Hoover emphasized the limits of law and how voluntary standards, enacted by industry, might supplement the law. Indeed, from his perspective, voluntary standards arrived at through democratic means would instill in persons the necessary moral obligations they had to society, thereby solving most problems if sufficiently encouraged; the state would need to intervene only to deal with those persons and organizations that were somehow incorrigible.

This is not to say that there were no detractors. Some noted that standardization would rapidly lead to monopolies by reducing all competition to price competition (Hoyt 1919). Whichever company had the greatest economies of scale would capture the market. Others argued that standardization under capitalism would be far more stifling than it would be under socialism (Robson 1926).

Still, standardization was also pushed because of mishaps in the First World War on both sides (Tate 2001). All too frequently the combatants discovered that parts or ammunition were of the wrong dimensions. As a result, most industrialized nations began to see standardization as central to their national security. As the

[4]Many persons on both the left and right were uncomfortable with Hoover's emphasis on standardization, fearing a tedious, boring existence. Hoover used the term 'simplification' as a means to overcome those concerns.

(U.S.) National Industrial Conference Board (1929:14) noted, " . . . national standardization committees are associations that have been organized, largely since the war, in practically every important industrial country." They bolstered private efforts to standardize.

It should be noted here that the very processes of enactment of new legal regimes (e.g., antitrust, anti-fraud) and of standardization of products often made actual markets resemble more closely those described in idealized form in political economy and later economics texts, irrespective of the political persuasions of their authors. Consider, for example, the equivalence among market objects that were commodified. Mid-nineteenth century Chicago provides several examples (Cronon 1991). First, by developing standard grades for grain and treating it as a liquid, it became possible to trade grain sight unseen, as well as to develop futures markets (Lee 1937). Second, animals could be slaughtered in standardized ways in (dis)assembly line fashion, and shipped vast distances in refrigerated rail cars (Giedion [1948] 1975; Swift 1927). Finally, by switching from post and beam to balloon frame construction, lumber could be cut in standard sizes such that materials for a standard home could be bought as a package and delivered to a construction site far from any forest (Sprague 1981).

Similarly, the work needed to engage in production of standardized goods was itself standardized. Henceforth, the equivalence among workers in fields as diverse as slaughtering and machine production made it possible to measure something as abstract as 'labor.' Finally, the equivalence of units of land was made possible by cadastral surveys that divided land into standard units and by the development of crop and even varietal monocultures over vast areas of land (Hill 1991; Willis 1938).

These changes were noticed by commentators as different as Karl Marx and Alfred Marshall. In each instance, these new equivalences made it possible to calculate, to employ the tools of mathematics so successfully used in the natural sciences, not merely to analyze the dynamics of markets but to bring them into being. Simultaneously, the results of these analyses could be and were used to justify various actions by both legislators and the owners and managers of companies.

By 1930, the advantages of standardization were so well-established that nearly every industrialized nation had a national standards development organization; today nearly every nation on earth has one (Loconto and Busch 2010). Moreover, they are linked together by the International Organization for Standardization (ISO), thereby ensuring a certain level of standardization globally.

DIFFERENTIATING THROUGH STANDARDS

Yet, even as the great obsession with standardization was getting underway in the late-nineteenth century, a countertrend was emerging: the use of standards to differentiate. The beginnings can be found in Henry J. Heinz's 1892 decision to advertize that his company processed 57 different varieties of pickles, and in the creation of mail order businesses, especially the extremely profitable Montgomery Ward, founded in 1872 (Cronon 1991), and Sears, Roebuck, & Company, which began catalogue sales in 1897 (Anderson 2006). In both cases, they permitted the sale of a vast variety of goods, each of which was standardized. For Sears, some 200,000 different items, many of them variants on the same product, were made available to the residents of rural America. By the 1930s, Alfred Sloan of General Motors would use the same approach to produce a wide range of automobiles, each of which was standardized, yet differed from the others in myriad ways. Even the paints used in the production of automobiles were subjected to standardized differentiation, shifting from the black pioneered by Henry Ford, and then briefly to 11,500 uncontrolled colors, before finally settling on 290 "carefully selected hues" (Blaszczyk 2007).

Importantly, this new form of differentiation did not hearken back to the days of craft production. Instead, it depended on the use of standardized industrial methods to produce differentiated goods. Differentiated standard goods could be made sufficiently different from others as to make price comparison difficult. Moreover, differentiated goods, could (partially) escape the tyranny of price competition by fragmenting the market.

Finally, standardized differentiation allowed – indeed, encouraged – people to differentiate themselves from others, although this was initially true only of the upper classes. The buyer of a Cadillac could differentiate him or herself from the buyer of a Chevrolet, but even in industrialized nations the average person still had few choices.

Responses to the Great Depression considerably slowed the emergence of standardized differentiation, promoting instead the growth of the welfare state in democratic nations and eventually promoting Nazism and fascism as well. Put differently, the depression and the Keynesian response increased the demand for cheap, standardized products (sometimes produced in nationalized factories) as well as for standard government services, rather than encouraging further use of standards to differentiate.

Of course, not everyone was comfortable with the growing role of the state.[5] Among those concerned was University of Chicago economist Henry C. Simons ([1934] 1948). He argued that simply keeping the state out of the market as asserted by the classical liberals was insufficient; *a program of positive law was needed* to ensure that most goods and services would be distributed by the market rather than the state. A few years later, American journalist Walter Lippmann (1938) proposed a renewed liberalism that would provide an alternative to both Nazism and Soviet Communism. Philosopher Louis Rougier was sufficiently impressed by Lippmann's work that he had it translated into French (Lippmann 1937) and organized a conference in 1939 to discuss it (Travaux du Centre International d'Etudes Pour la Rénovation du Libéralisme 1939). There the word 'neoliberalism' was coined, and there was widespread agreement on several points. First, the failures of liberalism were not due to an inherent tendency of capitalism toward monopoly, but rather to special interests using the state to meddle in markets. Second, there was a slippery slope between the welfare state and totalitarian regimes. Finally, promoting a *laissez-faire* economy was no longer sufficient; what was needed was state intervention "*au sens contraire.*"

Of course, World War II plunged Europe, and eventually much of the world into chaos and destruction. Moreover, by the end of the war, it appeared that the welfare state – based in large part on large-scale, mass production of standardized goods and services as well as equally standardized state services – was unchallenged. Not only were unemployment and education the provinces of the state, but a complex tangle of subsidies, price ceilings, public monopolies, direct state ownership, and other regulation organized economies in important ways.

After the war, the neoliberals regrouped as the Mont Pelerin Society (2006).[6] Its key theorists, F. A. Hayek (1973; 1976; 1979) and Milton Friedman (1962), were both convinced that the antidote to Statism was the market. What was needed was a return to the principles of classical liberalism, but with a twist: constitutional principles needed to be put into place that would ensure the dominance of the market even as they limited the role of the state.

What eventually came to pass in the performance of the neoliberal model was neither a conspiracy launched by a few economists, nor a perfect enactment of the theories themselves, but a mostly satisfactory performance of the model largely

[5] For an overview of the rise of neoliberalism, see Harvey (2005). For an analysis of the distinction between American and German versions, see Foucault (2008) and Megay (1970).

[6] For an excellent history of the Mont Pelerin Society, see Mirowski and Plehwe (2009).

embraced by the owners of financial and corporate capital. Of particular import for our purpose is the rise of a new legal framework for international governance consisting of, for example, the World Trade Organization, the International Monetary Fund, the World Intellectual Property Organization, and the World Bank.[7] Simultaneously, regional trade organizations began to appear (e.g., NAFTA, Mercosol, ASEAN) that further limited state power.

Together these organizations have used international law to significantly limit national sovereignty in the name of free trade. Simultaneously, various leaders in each of the industrialized nations have themselves attempted, with varying degrees of success, to dismantle the welfare state – Reagan in the United States, Thatcher in the United Kingdom, and more recently (and less successfully) Sarkozy in France. In each instance, the assertion has been that the state was itself an impediment to economic growth, the source of many economic problems plaguing the economy, and notoriously inefficient when compared (usually) to an idealized conception of the private firm.

Despite Reagan and Thatcher, arguably the neoliberal perspective(s) remained one contender among several until the collapse of the Soviet Union in 1991. That collapse profoundly affected Western elites. Lacking competition from the Soviets, there was little reason to maintain the welfare state. In particular, owners of financial and industrial capital began to understand that many changes proposed by Hayek and Friedman would have direct positive financial consequences for them. Put differently, neoliberal theory justified removal of postwar welfare state policies, growth of *freedom to operate* (FTO) in the marketplace, and creation of a nearly global marketplace.

In short, the rise of neoliberalism has involved both the dismantling and rewriting of national laws and the development of new bodies of law that are often international in scope. Still, even as FTO has been welcomed by multinational firms and those firms aspiring to become multinational, it tended toward destabilization even before the recent global financial crisis. Put differently, the largest firms have found themselves faced with issues of governance that were largely unforeseen by either management experts or neoliberal theorists. Similarly, NGOs have found it necessary to change their tactics considerably. Standards have been a central feature of that response.

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[7]The World Bank was of trivial importance until the debt crisis. In recent years, it has become particularly effective at dismantling the state structures of so-called developing nations in the name of development. What this has meant, in large part, is the opening of these nations to new forms of penetration by private capital. See Goldman (2005) for a detailed analysis.

WHO NEEDS LAW? GOVERNANCE BY THE MARKET

From the perspective of the neoliberals – and unlike classical liberals – the market is the most effective and efficient governing mechanism. Unlike the state, which requires central planners and planning, the market operates based on a different epistemology. Specifically, central planning requires that the planner understand all the relevant variables and how they interact to produce a given outcome. Yet, as the numerous critics of Enlightenment philosophies have pointed out, knowledge is not so constructed. That is to say, the knowledge held by any individual or group is always limited, incomplete, and error-ridden. In contrast, to act in a market one need not know how a given price was arrived at; the market does its magic resulting in a particular price. Whether that price is the result of poor weather, transport difficulties, or inadequate supply is of no consequence. It is this feature of markets that makes them attractive to neoliberal thinkers.[8]

Nevertheless, in a world in which markets are given (relatively) free reign, in which large, multinational firms have their FTO, in which state intervention is limited *by law*, greater volatility and a greater focus on short-term profits are the order of the day. Over the last 25 years, firms have developed two parallel and interrelated strategies to adapt to this new economic regime: (1) the organization of firms into supply chains, and (2) the growing use of standards, certifications, and accreditations as flexible means of building on the market-friendly regulations now enshrined in black letter law (i.e., the law found printed in legal tomes). Together they avoid the *horror vacui* of the market. In short, while an increasing interest in standards can be traced back to the late-nineteenth century, the use of standards to differentiate became an imperative as neoliberalism was enacted.

As I have discussed supply chain management (SCM) elsewhere at length (Busch 2007), I will only mention it briefly here. SCM involves management at the level of the supply chain rather than the firm. Some supply chains are managed by downstream actors (usually retailers) and others by upstream actors (usually suppliers). The idea is relatively simple: to manage the flow of goods and services through the entire chain to maximize efficiencies within the chain, to offload unprofitable and uncontrollable aspects to others, and (usually) to optimize the profits of the so-called supply chain captain (i.e., the firm that organizes the chain itself).

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[8]Long before most of the contemporary postmodern thinkers, Hayek rejected Hobbes's all-knowing Leviathan and understood that knowledge is distributed. But at the same time, Hayek believed that the price system provided a solution to this dilemma, by distributing both knowledge and incentives to action in an efficient manner. See, in particular, Hayek (1945).

A variety of tactics may be employed to further the aims of the chain, including lobbying governmental bodies, suing competitors, alignment with NGOs, displays of Corporate Social Responsibility (CSR), and, most importantly for the discussion here, enactment of standards for all actors in the chain. In short, SCM is a *strategic* approach to performing the neoliberal economy. It eschews the spot market, links all suppliers tightly together through legally binding contracts and/or the promise of continuing sales, and relies heavily on standards.

Standards play a particularly important and growing role in the new neoliberal economy as they often replace formal legal frameworks with far more flexible and responsive (from the perspective of the firms employing them) law-like rules and regulations (cf. Anderson 2006). These differentiated standards allow firms to discipline suppliers as well as to reduce the pressures of price competition. The key, from the vantage point of a given firm, is to buy standardized and sell differentiated. In so doing, one can have many firms compete to provide a standardized product to you, but sell a differentiated product at a premium to whomever is next in the supply chain.

Political scientists have labeled these sorts of relationships 'Non-State Market-Driven' (Bernstein and Cashore 2007; Cashore, Auld, and Newsom 2004). They are non-state in that those promulgating the standards are firms, consortia of firms, or NGOs. They are market-driven in that the sanctions involved for noncompliance are not enforced by the state, but by the market. Yet it is precisely this fact that has to date made this form of governance largely invisible. After all, jurists and political scientists often focus their research on the state and its (usually singular) legal frameworks, while most sociologists and anthropologists often focus on issues other than governance. Economists do study markets, but whether neoclassical or neoliberal in their perspective, they rarely acknowledge that different forms of market governance might yield different outcomes (cf. Samuels 2004).

However, standards by themselves are hardly sufficient to constitute a new governance regime. Increased international sourcing and competition combined with standardized differentiation bring with them a renewed concern with the quality of goods (Thévenot 1997). Thus, effective governance through standards requires several additional features usually found in legal regimes. These include clear sanctions and a system for governance of the standards themselves. Over the last thirty years, just such a system has arisen, paralleling the formal legal system. We call this the Tripartite Standards Regime (TSR) (Loconto and Busch 2010).

TRIPARTITE STANDARDS REGIMES

TSRs consist of standards, certifications, and accreditations. Over the years, a complex network of institutions has arisen that produces each of these. As noted above, by the mid-twentieth century, nearly every nation then extant had a national standards body creating a virtual alphabet soup of acronyms (e.g., AFNOR, ANSI, BSI, DIN, NIN),[9] in addition to hundreds of specialized standards-development organizations. The status of these bodies was and remains variable, with some state agencies, some private, and some recipients of substantial state aid. Moreover, in the aftermath of World War II, international standards bodies were established (e.g., ISO). As these bodies were established, some system obviously had to be put into place to certify that those who claimed to follow the standards actually did so. Three parallel approaches were developed, each of which is still in use today. First-party certification involves the seller certifying to the buyer that the product meets the standard. Second-party certification involves the buyer checking to ensure that the good or service offered by the seller meets the standard. Third-party certification (TPC) involves an apparently disinterested third party doing the checking and reporting those results to both buyer and seller. It is this latter form, TPC, that has become dominant (Hatanaka, Bain, and Busch 2005). It has the distinct advantage of separating the process of certification from the negotiations over the sale itself. Put differently, it allows the buyer to avoid being both buyer and policeman simultaneously. However, the very process of TPC poses another problem: How are we to know that a given certifier is reliable?

The solution to this problem has been to create accreditation bodies (i.e., organizations that accredit certifiers, attesting to their conformity to the proper standards of certification). Initially, accreditors were often product- or industry-specific (e.g., for education, health care, electrical equipment). While the first national general accreditation body was established in Australia in 1947, their numbers only began to increase in the early 1980s; today more than 60 exist (Donaldson 2005). Like national standards bodies, some of these are public, some private, and others quasi-private. In addition, several international general accreditation bodies have emerged including the International Accreditation Forum (IAF) and the International Laboratory Accreditation Cooperation (ILAC). The former accredits national accreditation bodies, while the latter accredits national accreditors of scientific laboratories.

In a particularly ironic move, the very international institutions created to limit the power of the state have promoted the development of these national and

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[9] For a list of national standards organizations, see WorldwideStandards.com (2010).

international bodies to regulate the global flow of goods by assuring their identity! In other words, trade between Firm α in Country A and Firm β in Country B is made far easier if both know that what each calls a blue widget is, in fact, a blue widget. Yet, given the proliferation of many *different* standards, this requires a complex bureaucracy and an ever-growing structure of rules to ensure that this is the case. As Adler (1998:528) has argued, "The price of standards is eternal vigilance."

Together, these standards, certification, and accreditation bodies form what we call a TSR. They engage collectively in what is known within the industry as 'conformity assessment,' and they use the denial of access to a given market as the sanction enforcing conformity. Hence, it is reasonable to argue that they consist of a system of market-led governance that is parallel to, although ultimately dependent on, the legal frameworks provided by states. Moreover, the very existence of TSRs shows the limits of the neoliberal perspective: Instead of limiting the state, the state-led promotion of 'the market' and market-like institutions has created a Hydra-like form of governance that is fully dependent on the state but that largely escapes the confines of law. This is hardly the kind of 'spontaneous order' about which Hayek wrote.

One reaction to this turn of events has been that NGOs, acknowledging the limits of their efforts to lobby a more restricted state, have opted to confront the larger firms directly. Some observers believe that this new mode of governance may tame global corporations (Conroy 2007). Hence, organizations as diverse as the Rainforest Alliance and the Fairtrade Labeling Organization have shifted their energies toward pressuring large firms and even aligning themselves with those firms when it appears prudent. Yet, as NGOs have rushed to embrace the TSR, they have ironically opted to accept the essential outlines of the neoliberal model of the state and market (Guthman 2008; Nawyn 2011).

LAW GONE SOFT: LAW AND THE NEOLIBERAL UTOPIA

Despite these profound changes, most lawyers and jurists have been particularly uncomfortable going beyond black letter law. While a great deal of effort has been expended to explicate and clarify such black letter law, in terms of both court decisions as well as legal hermeneutics, it has been largely assumed that only nation-states can make law. Hence, standards and the entire TSR have been largely invisible to the legal profession as a whole. Yet, simultaneously, more lawyers are involved in (1) rewriting positive law such that it restructures institutions as markets or quasi-markets, (2) interpreting standards for larger organizations, especially insofar as they are embedded in contracts, and (3) in settling the growing number of legal actions growing out of standards disputes.

Yet, to paraphrase Shakespeare, a law by any other name is still a law. The entire Anglo-American terminology for standards as 'soft law,' now commonly used in the international community, is quite misleading. While doubtless there are aspects of soft law that are unenforced or unenforceable, this is hardly the case for the TSR. Those who violate the rules of the TSR are heavily penalized by a denial of market access; they are often forced out of business. As Higgins and Tamm Hallström (2007:686) put it, "[s]tandards bodies now rank with global market mechanisms and the hierarchical organizations they spawn, to form a power triangle that produces the coordination and orderliness in socio-economic affairs which were once the responsibility and privilege of state functionaries."

Furthermore, while democratic states generally have some sort of Montesquieuian division of powers, TSR rules-formulation, execution, and appeals processes are often centralized and rarely open to those outside the corridors of corporate power. For example, when NGOs or journalists find that a Wal-Mart supplier is not enforcing labor standards, Wal-Mart simply ends the relationship, thereby avoiding a public relations disaster, but also closing a factory and putting many persons out of work. In contrast, Ikea works with its suppliers to remedy the problem, but certainly not going as far as to encourage an independent employee union (Christopherson and Lillie 2005).

In addition, the apparent intent behind various certifications is often lost as conformity to the rules trumps resolution of a problem (e.g., Ponte 2009). The result is what Michael Power (1997) calls 'rituals of verification.' Such verifications include the use of checklists and paper audits to determine whether standards are followed (Marsden, Flynn, and Harrison 2000), as well as writing the rules so that key problems are ignored. For example, Bain (2010) has shown how conformity to pesticide-exposure standards is easily achieved, but leaves most female temporary workers virtually unprotected. Similarly, Hatanaka (2010) showed the lack of objective and effective governance in an organic shrimp network.

Moreover, as should be apparent to the reader by now, the entire neoliberal assertion that the political state must be reduced in size is undermined by the growth of (1) new international regulatory bodies of enormous scope and complexity, (2) market-based regulatory bodies whose operation has the force of law, even if nominally described in terms of voluntary standards, and (3) the rewriting of extant bodies of law to enclose more of the commons and to make more markets and market-like structures possible. Furthermore, these newly emergent institutions are often far less accountable than comparable institutions in democratic states.

There is something Orwellian here. The market utopia of neoliberalism in which each of us is, as suggested in the title of Milton and Rose Friedman's (1980) book, "free to choose," at the very same time a burden imposed on each of us that has the potential to be far more sinister – even if largely unintended – than many a nation state. If freedom from the relatively straightforward and often redressable burdens of state regulation means submission to the myriad burdens of market regulation, then we may have lost more than we have gained. Standards are laws; the market is the state.

IS THE PARTY OVER? PROSPECTS FOR A JUST WORLD

The recent events that have now led to global recession and perhaps worse may signal the death knell for neoliberalism. Their destabilizing effects are now becoming painfully apparent. Ironically, many of the very same politicians who enthusiastically embraced neoliberal policies have since found themselves forced to address some of its excesses. The securitization of mortgages was in itself a brilliant idea. It made mortgages available at reasonable rates to millions of persons. Adherents to the neoliberal position had an abiding belief in the idea that there is simply 'the market' which is by definition efficient. For them, there were not myriad forms that markets might take, each the result of perhaps carefully-crafted, but never perfect, rules and regulations. Hence, bankers were encouraged to accept securities on what amounted to little more than blind faith. The complex financial TSRs simply did not alert bankers (or anyone else) to the dangers ahead. As it turned out, the entire edifice of mortgage lending in the United States and the United Kingdom turned out to have been a house of cards. The incentive structure that was developed encouraged ill-advised behavior at best, and illegal behavior at worst. The privatized Fannie Mae (originally the Federal National Mortgage Association) and Freddie Mac (originally the Federal Home Loan Mortgage Corporation), once no longer U.S. government entities, instead became interested parties eager to gobble up the seemingly endless volume of financial paper emanating from the banking sector. Recently, the U.S. government had to renationalize these entities – entities that should have never been privatized in the first place.[10]

[10] Another complementary view was recently proposed by André Orléan (2009). He argued that financial markets can never be 'efficient' in the same way as product markets, because those who run

Furthermore, while there is little doubt that a small global elite has become extremely wealthy, and that the middle class has benefitted from lower prices for a cornucopia of goods and services produced in the volatile global economy, income distribution in many nations has become far more skewed after decades of moving toward greater equality. Moreover, those at the very bottom of the economic ladder have recently experienced hunger and even starvation as food prices soared largely (although certainly not entirely) because of speculation in a poorly regulated global food market. In short, it may be that the party is over, that the ebullience expressed by proponents of neoliberalism will now be far more muted.

Yet, we do not have the luxury of going back to the world of the 1960s. Nor was that world ideal in any sense. However, there are lessons to be learned from the excesses brought on by neoliberalism. I suggest the following:

1. The neoliberal attempt to use law to minimize the state has been largely a failure in its own terms. Although states have been reorganized such that many functions are now delegated to the private sector, government bureaucracies have hardly withered. Furthermore, non-state bureaucracies have grown. Yet, all modern markets must depend on states to protect against fraud, enforce contractual relations, limit monopolies, and protect the rights of participants. In addition, a myriad of regulations are necessary to protect us from dangerous products, unsafe foods and pharmaceuticals, quack physicians, and the like. The current crisis illustrates the central role that the state must play in the financial sector.
2. It is far from clear that the TSR as presently constituted offers a solution to the problems of governance that confront us collectively. To the extent that we cede aspects of governance to the TSR, it appears that we also cede to a small group of experts and other interested parties any semblance of democratic control. Hoover's belief that standards can be developed by democratic means – despite claims by standards bodies to the contrary – has to date not been borne out in practice. Indeed, various consortia and alliances have arisen to short-circuit the far-from-perfect standards-development organizations (Cargill and Bolin 2007).
3. Since markets are human creations like all other institutions, they can take many forms. Markets can promote virtues or vices according to how they are institutionalized. Indeed, some markets are clearly criminogenic (Ericson, Barry, and Doyle 2000; Farberman 1975). Enacting markets involves iteratively

them have little or no incentive to look more carefully at what they are trading.

developing legal, regulatory, and standards frameworks that are more nuanced, that recognize that the devil is truly in the details.

4. The distinction between law and 'voluntary' standards is at best overwrought. Standards now often have the force of law (and some laws are far weaker than many standards). Thus, it is imperative that jurists and social scientists ask new questions that transcend the arbitrary boundary between black letter and soft law.
5. Finally, we need to abandon the absurd notion that a single vision, a single imaginary, a single image of the future will resolve the world's problems. Hayek was clearly right in stressing the finitude of human understanding; he was equally wrong in thinking that markets would provide the singular best possible solution to all human ills. Despite our best attempts to escape judgment, to develop singular solutions to all problems that can be achieved by market or state formulae, judgment appears to be part of the human condition; we need to learn to live with it.

AUTHOR BIOGRAPHY

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