# THE MIRAGE OF NON-STATE GOVERNANCE

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*Maybe what is really important for our modernity—that is, for our present—is not so much the statization [*étatisation*] of society, as the "governmentalization" of the state.*[1]

*[I]f that collective force, the State, is to be the liberator of the individual, it has itself need of some counter-balance; it must be restrained by other collective forces . . . . It is not a good thing for the groups to stand alone, nevertheless they have to exist. And it is out of this conflict of social forces that individual liberties are born.*[2]

## I. BEYOND THE STATE

In a story that does not lose its appeal merely because it is apocryphal, the adolescent Luis Buñuel tries to convince his friend to go pee with him at the altar in their staunchly catholic village. The friend says no. "Come on, let's pee on the altar," says Buñuel. No, says the friend. "What's the matter?" insists Buñuel. "Are you a coward? Are you afraid of the priest? Are you afraid of God's wrath?" The friend says no. "Then why won't you pee on the altar?" "I have no need to pee at the altar," replies the friend. "I do not believe in God."

The fascination with non-state governance reminds me of this story. The debate about global governance and the corresponding role of the state has had its fair share of altar-peeing and offered challenges (sometimes adolescent, sometimes brilliant) to the state's overarching authority. Some of this work has been pathbreaking—as have, of course, the films of Buñuel, who has certainly been more influential than his apocryphal friend. But in the end, Buñuel's filmmaking always displayed, in its strongest atheist provocations, a deep ultimate faith, so nicely expressed in Buñuel's famous quote that he is "still an atheist, thank God."[3] The same is true with much of the state-opposing and state-denying literature in globalization. Its greatest weakness is that, by putting the object of its opposition and its denial at the center of analysis, it cannot escape it.

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[1] MICHEL FOUCAULT, *Governmentality*, *in* POWER: ESSENTIAL WORKS OF FOUCAULT, 1954–1984, at 201, 220 (Robert Hurley et al. trans., James D. Faubion ed., The New Press 2000) (1978).

[2] EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 63 (Cornelia Brookfield trans., 2d ed. 1992).

[3] Michèle Manceaux, *Luis Buñuel: athée grâce à Dieu*, L'EXPRESS, May 12, 1960, at 41–43.

This is not for lack of trying. During the heyday of globalization discourse, in the 1990s, there was much talk of a "decline of the state,"[4] which in turn spurred an intense search for alternatives to state law and state-based government. Non-state governance was suddenly chic. Markets, corporations, industries, religious communities, ethnic communities, Internet users—diverse groups of all kinds—were praised (or damned) for their ability to self-govern without interference from the state. After the wars in Iraq and Afghanistan and the bailout of the financial system, some of this excitement has decreased, and now we are said to be witnessing a return of the state, of some sorts.[5] If global capital markets once served as the most impressive example of extensive governance structures allegedly outside the state—with private regulators in the Basle Committee, private rule-makers in corporate law offices[6]—then the massive bailout reactions by governments after the collapse of the financial system reminded everyone of the remaining central position of the state. As a consequence, "non-state governance" sounds outdated again.

The problem is not just the rise and fall of the non-state in parallel with the fall and rise of the state in the world. A bigger problem in discussions over the rise and fall of the relative position of the state in the world, as well as with discussions over the "proper mix" of public and private governance structures, is that the core elements—the state, public, and private governance—are abstract entities taken to be constant over space and time. Is "the state" always the same over time and space? What exactly is the difference between public and private governance? Issues of method—whether the state still presents the paradigm of our research into

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[4] *See, e.g.*, MARTIN VAN CREVELD, THE RISE AND DECLINE OF THE STATE 336–414 (1999) (arguing that forces exerting pressure will inevitably cause the collapse of nation states); KENICHI OHMAE, THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES 141–49 (1995) (proposing governments de-regulate regional and cross-border economic development to maximize the global economy); SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY 3–66 (1996) (positing the world economy is now driven by private actors, not international politicians).

[5] *See, e.g.*, DAVID HELD & ANDREW MCGREW, GLOBALIZATION/ ANTIGLOBALIZATION: BEYOND THE GREAT DIVIDE 1–10 (2d ed. 2007) (discussing changes in globalization in the wake of the September 11 attacks); *Leviathan Stirs Again*, ECONOMIST, Jan, 23, 2010, at 23–25 (discussing the reemergence of big government in the wake of the economic crisis); Donald Nordberg, *Return of the State? The G20, the Financial Crisis and Power in the World Economy* (2009), *available at* http://ssrn.com/abstract=1375387 (discussing how states have become individually weak following the current financial crisis and "that power lies dispersed in the network—the mesh of states and markets, of corporations, non-state organizations and institutions").

[6] *See, e.g.*, Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739 *passim* (2007) (examining how Wal-Mart is able to legislate its suppliers' behavior through its contractual relationships and how outside influences, such as the media and civil society, shape this private lawmaking); Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 167–68, 183–88 (2005) (describing private lawmaking).

governance—are intermingled with matters of history, i.e., what role "the state" actually plays in the world.[7]

But the biggest problem is, why does all of this matter? Simply put, do we not care more about good versus bad governance than we care about state versus non-state governance? And if we do, is the difference state/non-state or the difference public/private really the prime criterion by which to assess governance?

The state has long been the most important political myth to determine and constrain our political thinking.[8] Yet non-state governance is, if anything, more, not less, mythical: an ideologically laden concept, a romantic idea. It looks attractive to those who oppose the state—free market proponents on the political right, advocates for local indigenous communities on the left. But from this perspective, the idea of non-state law and non-state governance appears rather antiquated. Of course, the broadened focus on non-state structures is crucial, and any attempt, in legal studies as well as in political science, to integrate such traditionally neglected structures is to be welcomed. However, non-state is the false perspective for these phenomena. Non-state governance is a mirage, a mere mirror image of the state—its opposite or its copy. Instead of overcoming the state, the perspective on non-state governance essentializes the state. If we want to overcome our traditional focus on the state, we must overcome our focus on the non-state, too. Instead of the formal and artificial differentiation state/non-state, we should look for functional differentiations between different modes of governance.

In this Essay, I offer three theses, all of which are critical. First, non-state governance is *conceptually* unattractive; it is a concept that makes little sense.[9] Second, non-state governance is *empirically* unattractive; meaningful non-state governance rarely exists.[10] Third, meaningful non-state governance is *normatively* unattractive; we would rarely want it, and people postulating it usually expect the state to play an important role.[11] However, I also have something constructive: a proposed trajectory. Talk about the state and the non-state can only be an

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[7] This concept relates to the equation of historical and theoretical methodological nationalism, where historical methodological nationalism is directed at the historical phenomenon of the nation state as a "container" of society (Giddens) and methodological nationalism is the equation of society and state.

For a general discussion on methodological nationalism, see DANIEL CHERNILO, A SOCIAL THEORY OF THE NATION-STATE *passim* (2007), and the discussion and references in Ralf Michaels, *Welche Globalisierung für das Recht? Welches Recht für die Globalisierung?* [Which Globalization for the Law? Which Law for Globalization?] (review essay), 69 RABELSZ 525, 537–40 (2005); *see also* HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 275 (1977) ("[O]ne reason for the vitality of the states system is the tyranny of the concepts and normative principles associated with it.").

[8] Still enlightening is ERNST CASSIRER, THE MYTH OF THE STATE *passim* (2009) (2d ed. 1946) (describing the history of the idea of the state as a powerful myth in Western thought).

[9] *See infra* Part II.

[10] *See infra* Part III.

[11] *See infra* Part IV.

intermediary stage in a trajectory of a theory of governance that might lead to a new paradigm of governance. This trajectory would move from state centralism via a state/non-state dichotomy and a state/non-state hybridity toward a new paradigm of governance *beyond* the state.[12]

## II. CONCEPTS

What exactly is meant by non-state governance? It makes sense to start with governance, a notoriously unclear term, though not an entirely useless one. Current usage of the term emerges from the search in the 1970s and 1980s for a broader concept than that of government, which was seen to be too focused on the state.[13] Such a broader concept appeared necessary for empirical and normative reasons. Empirically, it had become clear that traditional ideas about regulation that focused on direct state regulation were not working, a situation sometimes referred to as the crisis of governability.[14] Normatively, it seemed desirable to focus on broader reforms than merely those of state institutions in order to bring about change and progress. Governance thus provided an alternative to government in the sense that it was more encompassing: it included non-state actors in addition to state actors, and it included additional tools to that of top-down regulation.

The term governance, however, is as old as government. The roots of both terms lie in Greek (κυβερνήτης) and Latin (gubernare); usage in English goes back to at least Chaucer, as evidenced by the Oxford English Dictionary.[15] More important, both governance and government were long used interchangeably, because government meant largely what we today refer to as governance. Foucault, in his lecture on governmentality, reminds us that the virulent debates in the sixteenth century on "good government" were not at all confined to state government, but concerned all aspects of public and private life:

> One has, for example, the question of the government of oneself, that ritualization of the problem of personal conduct characteristic of the sixteenth century Stoic revival. There is the problem too of the government of souls and lives, the entire theme of Catholic and Protestant pastoral doctrine. There is government of children and the great problematic of pedagogy that emerges and develops during the sixteenth century. And, perhaps only as the last of these questions to be taken up, there is the government of the state by the prince.[16]

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[12] *See infra* Part V.

[13] *See generally* Joan Corkery, *Governance: Evolution of the Meaning of the Word*, *in* GOVERNANCE: CONCEPTS AND APPLICATIONS, 9–19 (Joan Corkery ed., 1999).

[14] MICHEL CROZIER ET AL., THE CRISIS OF DEMOCRACY: REPORT ON THE GOVERNABILITY OF DEMOCRACIES TO THE TRILATERAL COMMISSION *passim* (1975).

[15] (Governance) OXFORD ENGLISH DICTIONARY (2d ed. 1989).

[16] FOUCAULT, *supra* note 1, at 87.

In other words, neither governance nor government was confined in any particular way to the state. Only with the rise of the nation-state as an organizing concept of politics and of society did a hierarchical system emerge, and the state maintained an important stage at the top of the hierarchy of different governments ("the last of these questions to be taken up"): self-government (morality), family government (or economy, in the old sense of *oiko-nomia*, literally house[hold] administration), and state government (politics).[17]

Notably, this hierarchy, established in political theory, mirrors the hierarchy established in the legal theory of natural law system. A famous example is the hierarchy of laws established by Pufendorf, which also runs up from the individual (law of persons) via family law to state law.[18] Just as government was not confined to the state for sixteenth century political theory, likewise, law was not confined to state law for the natural law tradition.[19]

This has, of course, changed dramatically. Foucault describes the struggle in the seventeenth century to establish the economy within the (state) governmental sphere, and it did not take long until the individual level, including morality, also came to be viewed as a function of state government.[20] In fact, the detailed rules in the Prussian Civil Code on such seemingly private matters as how often a mother should nurse her child[21] were possible because the Code was based on Pufendorf's hierarchical system.[22] Simultaneously, law was more and more connected to the emerging nation state—first public law (as the idea, quite radical at first, that the government should be bound by rules),[23] later private law.[24] When Justice Holmes, in 1917, derided the idea of a law that transcends political authority as "a brooding omnipresence in the sky,"[25] law had become necessarily tied to a political entity, and that entity could at the time be only the state. This is, in a nutshell, how we have come to think of both government and law as tied to the state—as the

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[17] *Id.* at 206–07 (referring to François de La Mothe Le Vayer).

[18] See the table of contents in SAMUEL PUFENDORF, DE JURAE NATURAE ET GENTIUM LIBRI OCTO (1672).

[19] *See* Nils Jansen & Ralf Michaels, *Private Law and the State: Comparative Perceptions and Historical Observations*, 71 RABELSZ 345 *passim* (2007); *see generally* Charles Donahue, Jr., *Private Law Without the State and During Its Formation*, 56 AM. J. COMP. L. 541 *passim* (2008) (analyzing the development of private law and its relation to the state in Europe in the medieval and early modern periods).

[20] As one of many examples, see D.G. RITCHIE, THE MORAL FUNCTION OF THE STATE: A PAPER READ BEFORE THE OXFORD BRANCH OF THE GUILD OF ST. MATTHEW ON MAY 17TH, 1887 (1887).

[21] Allgemeines Landrecht für die preuβischen Staaten [A.L.R.], Feb. 5, 1794, §§ 67–69, II, 2 (regulating maternal nursing).

[22] The code is based on the work of Suarez, who in turn was taught by Pufendorf. *See* FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 264 (Tony Weir trans., 1995).

[23] *See* MICHAEL STOLLEIS, 1 GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND *passim* (1988).

[24] Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 *passim* (1982).

[25] S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

consequence of convergent developments in politics (the rise of the nation state), ideology (the desire to delegitimize authority outside the government, a continuous theme between absolutism and representative democracy) and theory. From this perspective, the introduction of governance beyond the state is not a revolution, but a counterrevolution, directed against the revolutionary redefinition of government as exclusively resting in the state.

However, the idea of governance does not fully turn back the clock; it remains, in its contemporary emanations, defined by its relation to state government. Governance is what the state does, even if other groups do it, too. Non-state governance is what these other groups and institutions do like the state, just minus the state. Consider, for example, the variety described in Stewart Macaulay's important essay on private government:

> If governing involves making rules, interpreting them, applying them to specific cases, and sanctioning violations, some of [*recte*: or] all of this is done by such different clusters of people as the Mafia, the National Collegiate Athletic Association, the American Arbitration Association, those who run large shopping centers, neighborhood associations, and even the regulars at Smokey's tavern.[26]

True, interesting, and important. But nothing, it appears, holds these groups together apart from a characteristic they share—making rules, etc.—that is borrowed from the state, and from a negative quality they have: they are not the state. We should pay more attention to these groups, but it is unclear how any comprehensive concept of governance can leave the state out while keeping everything else in. Whatever these groups are doing, it seems, is defined by what the state does.

The problem thus described—that non-state governance, far from being independent from the state, is defined by it—is enhanced by another finding. "The state" (and thus the non-state) is an abstract entity, abstracted both from the institutions that it combines and from the great variation of actual states we find over space and time. This abstraction is to some degree justified, even necessary, in law, especially where, as in continental European thinking, the state is often equated with the law.[27] It also correlates, at least in the past, to popular ideas of common identity[28] and in findings of relatively great value coherence within

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[26] Stewart Macaulay, *Private Government*, *in* LAW AND THE SOCIAL SCIENCE 445, 445 (1986).

[27] On different meanings of state in European and U.S. legal discourse, see Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 851–56 (2006).

[28] *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 5–6 (Verso 2003) (1983); CAROL J. GREENHOUSE, A MOMENT'S NOTICE: TIME POLITICS ACROSS CULTURES 56–60 (1996) (emphasizing the idea of the state as embodiment of community).

states.[29] Beyond this, the abstract idea of the state is deeply problematic in social scientific research of governance. Over space, the similar treatment of big Western states and small postcolonial states as "states" is at best unhelpful. Over time, the ever-changing nature of the state has been an important factor in its longevity. Saskia Sassen has rightly emphasized that globalization is not an occurrence outside the state but instead that the state is an active participant in it and in its own transformation.[30] As a consequence, the state under conditions of globalization is different from the state prior to globalization, and any category of non-state governance must be updated constantly to take account of this changing character. It may thus be that certain new governance institutions are incompatible with the traditional states of the nineteenth and twentieth centuries, but this suggests only that we should leave those traditional ideas of the state behind, not the state altogether.

## III. EMPIRICS

The conceptual unattractiveness of non-state governance as a purely negative category is enhanced by the empirical insight that real non-state governance—governance in the absence of a state—may indeed exist, but it is exceedingly rare.[31] Almost all governance combines public and private, or governmental and non-governmental, aspects. This is hardly ever denied, but it is often forgotten. The starkest example is the incessant invocation of a *lex mercatoria* as an alleged self-made and autonomous law of international trade, created and administered by merchants (and their lawyers) in the absence of the state. Once a topic mainly for lawyers, *lex mercatoria* is now increasingly being discussed in the social sciences, too.[32] But the autonomous *lex mercatoria* is a myth, both in its ancient and in its

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[29] *See* GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS *passim* (2d ed. 2001).

[30] *See, e.g.*, SASKIA SASSEN, A SOCIOLOGY OF GLOBALIZATION 46 (Jeffrey C. Alexander ed., 2007):

> [F]ar from being mutually exclusive, the state is one of the strategic institutional domains in which critical work on the development of globalization takes place. . . . The state becomes the site for foundational transformations in the relationship between the private and the public domains, in the state's internal balance of power, and in the larger field of both national and global forces within which the state now has to function.

*See also* Clyde W. Barrow, *The Return of the State: Globalization, State Theory, and the New Imperialism*, 27 NEW POL. SCI. 123, 125 (2005) (arguing that the state has rebounded in the form of American Empire).

[31] It is worth pointing out that the opposite is also true. Pure state governance in the absence of other institutions involved in the governance does not exist, either. This insight, hardly counterintuitive, was what led to the shift from government to governance discussed before.

[32] *See generally* A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY:

modern form.[33] The purported autonomous and trans-European commercial law of the middle ages consisted, at best, of procedural rules; substantive commercial law rules were built on those of the European common law, sometimes referred to as the mother of the law merchant.[34] The contemporary *lex mercatoria* combines rules from domestic and international law with those emerging in commerce; institutionally, the need to enforce arbitral awards and the possibility to nullify them in state court are evidence not of the autonomy of *lex mercatoria* but instead of the entwinement between transnational commerce and the state.[35] Participants in global commerce seem to have no interest in an autonomous non-state law, and why would they? They pick and choose between state and non-state laws and institutions on the basis of functionality.[36] *Lex mercatoria* as non-state law is a myth.

This insight applies not only to *lex mercatoria* but also to various other alleged sites of non-state governance. The self-regulation of corporations comes with the strong protection and enforcement of the state with its law; the internal affairs doctrine is just that—not a social reality of self-governance, but instead a rule of state law necessary for corporate self-governance. The self-regulation of industries is often a way to stave off or to replicate state regulation.[37] Early fantasies of an autonomous Internet with its own legal order have given way to realization of the role played by detailed regulation by the state.[38] Global Islam

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TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY *passim* (2003) (offering a critical analysis of the role international economic law plays in creating and maintaining of global power relations); Alec Stone Sweet, *The New* Lex Mercatoria *and Transnational Governance*, 13 J. EUR. PUB. POL'Y 627 *passim* (2006) (discussing how the transnational business community has evolved and uses "'a-national' principles of contract and a system of private 'courts' to organize and regulate cross-border commercial exchange").

[33] *See* Ralf Michaels, *The True* Lex Mercatoria*: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL. STUD. 447, 452–60 (2007).

[34] *See* Albrecht Cordes, *The Search for a Medieval* Lex Mercatoria, OXFORD U. COMP. L. F. (2003), http://ouclf.iuscomp.org/articles/cordes.shtml, text accompanying nn. 11, 12, & 13; Charles Donahue, Jr., *Medieval and Early Modern* Lex Mercatoria*: An Attempt at the* Probatio Diabolica, 5 CHI. J. INT'L L. 21, 27–29 (2004); Jansen & Michaels, *supra* note 19, at 368; Oliver Volckart & Antje Mangels, *Are the Roots of the Modern* Lex Mercatoria *Really Medieval?*, 65 S. ECON. J. 427, 446–47 (1999).

[35] *See* Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 ARB. INT'L 179, *passim* (2006).

[36] Michaels, *supra* note 33, at 462–64.

[37] Jürgen Basedow, *The State's Private Law and the Economy—Commercial Law as an Amalgam of Public and Private Rule-Making*, 56 AM. J. COMP. L. 703, 711–12 (2008). Here, as elsewhere, the impact goes both ways: as the state influences business, so business influences the state. *See* Gregory Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147, 169–72 (2009).

[38] *See* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD 10 (2006). The insight of the state's continuing control over Internet governance is older. *See* James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty*

may look like a powerful non-state network, but in reality it is so intimately linked with existing states that claiming it as non-state governance would be bold.[39] Religious groups in the United States enjoy a large degree of autonomy from the state and consequent freedom to self-regulate, but the basis for this autonomy, at least from the perspective of the state, is the First Amendment, and the boundaries of the autonomy are a matter of adjudication in secular courts. The Catholic Church, far from being a non-state institution, has even been characterized as the precursor to the first modern Western state.[40] The allegedly autochthonous non-state legal orders in colonies have been shown to be largely constructs by and for the purpose of the colonizing state.[41]

Actually, we find real non-state governance only in areas where no functioning state exists, and there are few such areas in our world of states. One candidate is local communities that remain untouched by civilization; but even here the state is anything but absent. Take the news of the uncontacted tribe found in the Amazon jungle in Brazil in 2008.[42] That tribe is nowhere autonomous from the state; quite the contrary, the very reason we have pictures of the tribe is that the Brazilian government department for Indian affairs (together with non-governmental organizations) uses them to advocate their position in the ongoing struggle over land rights in Brazil.[43] Autonomy from the state is a direct consequence of protection by the state. Another example is governance in failed states—Taliban in Afghanistan, terrorists in Somalia, the Mafia in Sicily. Here we may be able to speak of non-state governance simply because no effective state exists (although the actual role of the respective state in the protection of these groups, especially in Afghanistan and Somalia, is not irrelevant). But even this is not governance independent from the state; it is governance enabled by the absence of a state that can hardly yield generalizable insights.

One might argue that governance without the state must be possible because governance existed prior to the modern state.[44] But the fact that governance

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*and Hardwired Censors*, 66 U. CIN. L. REV. 177, 178 (1997) ("[T]he conceptual structure and jurisprudential assumptions of digital libertarianism lead its practitioners to ignore the ways in which the state can often use privatized enforcement and state-backed technologies to evade some of the supposed practical (and constitutional) restraints on the exercise of legal power over the Internet.").

[39] *See* CLARK BENNER LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT 1 (2006) (explaining that Muslim nations incorporate the law of Islam into their state constitutions). Another issue is the Islamic theory of the (Islamic) state itself and of the ummah.

[40] HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 113–15 (1983).

[41] *See* Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243, 245–46 (2009) with references.

[42] *Isolated Tribe Spotted in Brazil*, BBC NEWS, May 30, 2008, http://news.bbc.co.uk/2/hi/americas/7426794.stm.

[43] *Id*.

[44] *See* Fernanda Pirie, *Law Before Government: Ideology and Aspiration*, 30 OX. J. LEGAL STUD. 207 (2010).

without a state was possible in a world without states has few direct implications for a world with states.[45] Macaulay's article on "private government" demonstrates this point. The entire article is devoted to the question of how private governance relates to that of the state—whether it stands in harmony or conflict with it,[46] to what extent structures of private governance are an impediment to effective state regulation,[47] whether private governance can fulfill the role traditionally reserved for state law in different social theories,[48] and whether private governance can fulfill the legitimacy criteria traditionally used for the state.[49] In other words, in an article ostentatiously devoted to private governance, Macaulay displays an almost obsessive focus on the state. He himself hastens to add that a sharp line between public and private governments such as these cannot be drawn.[50] But then his analysis becomes murky. When he advocates "a 'private government perspective' which both recognizes private associations that affect government and also treats distinctions between public and private spheres as doubtful rather than as given,"[51] he manages, in one sentence, to proclaim the need of a distinction between a public and a private perspective, and the impossibility of that very distinction. We need a private perspective, he seems to be saying, precisely because the private cannot be distinguished from the public. We need to isolate non-state governance because we cannot separate it from state government.

Although state governance and non-state governance rarely exist in isolation, this does not mean that they are similar. Quite the contrary: if almost all governance is a mix between private and public—or state and non-state—governance, the relative distribution of labor between state and non-state is not random. The state has strategic advantages: "a technical administrative capacity that cannot be replicated at this time by any other institutional arrangement[,] . . . military power, which for some states is global power," as well as unmatched financial means to save an ailing financial system,[52] as we know after the bailout. At the same time, the state still faces strategic disadvantages: relative immobility

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[45] *See* Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1, 5–11 (2005) ("We can . . . identify law with a diffuse . . . notion of normative order. But that characterization of the understandings and practices of 'stateless' societies, as constituting legal orders, does not tell us much we might want to know about them."); *cf.* A. Claire Cutler, *Globalization, the Rule of Law, and the Modern Law Merchant: Medieval or Late Capitalist Associations?*, 8 CONSTELLATIONS 480, 486–87 (2001) (arguing that the analytical utility of an analogy between the modern "global business civilization" and the medieval law merchant system is limited because of the lack of regulation of international commerce in medieval societies).

[46] Macaulay, *supra* note 26, at 449–54.

[47] *Id.* at 454–67.

[48] *Id.* at 470–85.

[49] *Id.* at 485–502.

[50] *Id.*

[51] *Id.* at 446; *see also id.* at 449 ("[A] private government perspective requires that we both see the amount and nature of private governing and recognize at the same time that public and private governments are interpenetrated rather than distinct entities.").

[52] *See* SASSEN, *supra* note 30, at 38.

and locality, transparency of decision making, and the ensuing relative inflexibility. Legally the state combines advantages—its rules are generally hierarchically superior to privately made rules like contracts, and the state maintains the monopoly of violence to enforce its laws—and disadvantages; it is bound to a Constitution, unlike private actors. Effective governance aims at combining the advantages of the state with the advantages of the respective private groups and institutions. Private actors find it attractive to invoke the state for enforcement because of its monopoly of power. The state, by contrast, sometimes finds it attractive to outsource certain state functions to escape scrutiny. The fact that private groups rely on the state for the enforcement of private rights is a well-known argument against the idea of an autonomous private sphere.[53] By contrast, the outsourcing of state functions like military functions suggests that privatization is not just the release of power from the state to the private realm; it is at least as much a strategic move by the state and thus an explicit state government policy, the privatization of the state by the state.[54]

Often then, questions as to non-state governance are really questions about a particular form of state governance, namely that of deference.[55] For example, when we ask whether it is appropriate to limit freedoms, such as speech, religion and association, if members of non-state communities are at risk, we ask not about these groups' autonomous governance but about the state's role in it, because it is the state that would limit these freedoms, and it is usually the state that we ask to prevent such limitations. The question whether the state should interfere in the self-governance of a religious group engaged in discrimination against its female members is not a question about state governance versus non-state governance; it is a question as to one kind of state governance (enforce the woman's claim to non-discrimination) versus another (enforce the group's right to self-determination).[56] The problem in the debate is not whether "we" should assign a greater role to non-state institutions; the problem is that the "we" almost invariably refers to the state and its policies.

This suggests that it is not enough to replace the state/non-state dichotomy with an unspecified hybridity. To say that all governance is somehow public/private is trivial. To dig deeper, we would have to analyze the specifics and modalities of this hybridity—the modes, processes, and institutions that enable a

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[53] *See* Julian D. Lew, *Achieving the Dream: Autonomous Arbitration*, ARB. INT'L, July 2006, at 179, 194.

[54] *See* PHILIP BOBBIT, THE SHIELD OF ACHILLES 667 (2002); PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS (Simon Chesterman & Angelina Fisher eds., 2009); SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS 179 (2006) (stating that President Bush used military secrecy to accumulate power in the executive).

[55] *See* Ralf Michaels, *The Re-state-ment of Non-State-Law*, 51 WAYNE L. REV. 1209, 1233–34 (2005).

[56] *Cf., e.g.*, AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 130 (2001) (noting that a dominant majority group in government has "undeniable power to impose cultural conformity on its minorities").

fruitful cooperation between state and non-state groups. In what specific way is governance shared among institutions, some belonging to the state and some not? What are the exact hierarchies between these institutions? Are they in conflict or in consensus? Etc.

## IV. LEGITIMACY

Such closer analyses are not merely analytical and empirical, they also have a normative dimension. If the debate on non-state governance were confined to Taliban and Mafia, we would probably not hesitate to condemn it. Instead, however, non-state governance is praised as superior to state government in a variety of areas. Religious groups should be left alone from state intervention; markets can best regulate themselves; codes of conduct developed by corporate actors are more fine-tuned and more appropriate than state regulation; indigenous populations should be allowed to devise their own norms instead of having to adopt official state norms, etc. This raises a normative question. Regardless of conceptual and empirical problems, would non-state governance actually be desirable, and under what conditions? Is state governance desirable? Or what public-private combination would be legitimate?

Such questions have become popular, but they are far too general and broad to yield any meaningful answers—the non-category of the non-state does not allow for any but the most general assessments. The question whether non-state governance is legitimate or not cannot be answered in the abstract, just as the question what kinds of governance actions are legitimate cannot be answered in the abstract. More important, even whether such governance is instituted or administered by the state or by other groups is a criterion of very limited relevance for questions of legitimacy. Of course, there are some specific legitimacy criteria for state action, and there are other legitimacy criteria for non-state action. For example, state action must comply with certain constitutional requirements from which private action is free, while private action must comply with state law while the state can change sub-constitutional law. But these legal standards of legitimacy are extremely contingent. They were created at a particular point in time for a particular constellation of state and society, and as this constellation changes, such legitimacy standards may change as well. The more deterritorialized the economy becomes, the more willing we are to consider extraterritorial regulation by the state justified.[57] The less able the state becomes to provide proper frameworks for corporate governance, the more legitimate private concepts become. In the United States, private enforcement of product standards (through tort actions) may be

[57] KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? 123 (2009); Tonya L. Putnam, *Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere*, 63 INT'L ORG. 459, 487 (2009).

more justified than in Europe simply because state institutions other than courts are less successful at regulating such standards in the United States.[58]

Nonetheless, what we can see in the debate is how the state and our experience with it permeate much of the debate.[59] Thus, on the one hand, we see attempts to replicate the legitimacy strategies within the state, to ask how non-state governance can be similar to the state, for example how to constitutionalize the private sphere. However, given that state constitutionalization took place in a very specific constellation—that of the state—it is neither clear that it can be achieved in the private sphere, nor certain that, if it can be achieved, it confers the same legitimacy to the non-state group as does the constitution to the state. More promising are attempts to show how non-state mechanisms are superior to the state insofar as they avoid its shortcomings.[60] However, not infrequently these mechanisms cannot fulfill these functions, while at the same time they weaken the state.[61]

The methodological problem is the same here as elsewhere: the state is used as a benchmark. In one, it provides the criteria of legitimacy; in the other, it provides what we want to get away from. Yet it is not clear why criteria of legitimacy developed within one particular global constellation—that of the nation state of the nineteenth and twentieth centuries—should be applicable to a twenty-first-century world. There is no doubt that our criteria of legitimacy must be informed by our experience with and in the state. But it also cannot be doubtful that these criteria must be dislodged from the nation state. In the public sphere, we see this in debates on the legitimacy of the European Union, which, because it is not a state, is now increasingly (and rightly) being judged with criteria other than those against which nation states are held.[62]

## V. BEYOND THE NON-STATE

Many disciplines—political science, sociology, international relations, law—have too long been focused exclusively on the state. The attention currently given in these disciplines to different emanations of non-state governance is a welcome development insofar as it broadens our field of study by requiring us to develop more general theories of governance. These theories, however, will not make significant progress unless they help us leave our focus on the state behind. To

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[58] *See* Paul D. Carrington, *The American Tradition of Private Law Enforcement*, 5 GERMAN L.J 1413, 1413–15 (2004).

[59] For a more detailed typology of reactions to the change of the role of the state (revolution, resistance, regression, reproduction, renovation), see Michaels & Jansen, *supra* note 27, at 882–89.

[60] *See supra* Part III.

[61] *See, e.g.*, Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 970–87 (2007) (discussing some of the shortcomings of extralegal activism).

[62] *See* James A. Caporaso, *The European Union and Forms of State: Westphalian, Regulatory or Post-Modern*, 34 J. COMM. MKT. STUD. 29, 31–34 (1996).

focus on the non-state as a category will not help us in this endeavor. What needs to be done is to put the state in perspective in order to overcome it.

A first step is to deny the state its point at the top of the hierarchy. I pointed out earlier the parallel hierarchies between French government studies and Pufendorf's natural law system, both of which move from the individual upward to the state.[63] Yet, the parallel is not complete. The state is the peak of the hierarchy only for the authors that Foucault discusses—and, ultimately, also for Foucault himself, who does not address the supranational and international realms.[64] For Pufendorf, by contrast, the state is merely one level in the hierarchy below the higher level of international law.[65] His system of law was not particularly focused on the state; the state had only one of several functions to play in it.[66] Granted, the state later achieved a more central position, as Foucault shows, that justified, for the time being, a focus on the "governmentalization" of the state. As such, it was long central also for an "internationalized world."[67] But this may be changing.

A more important step concerns the very hierarchy of levels. If it is correct that we are observing a move in the world from a political segmentary differentiation along state borders toward a functional differentiation along different societal groups, then this suggests that the methodologically central position of the state is wavering, too.[68] Note that in a world that shifts from territoriality to functionality, the territorial state does not automatically lose its role, but it must now justify that role on functional grounds.

A trajectory of theoretical accounts of governance should enable us to overcome this focus on the state. We have already left behind a first stage of this trajectory, namely the exclusive focus on the state, something that is sometimes called methodological nationalism.[69] The idea of non-state governance suggests a second stage, that of a dichotomy of state and non-state, including the possibility of hybridity. However, as I have argued, this is not a very fruitful stage, so a third stage will be a more specific analysis of the particular modes and structures of that hybridity, or of the particular mix of public and private governance. This makes it

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[63] *See* discussion *supra* Part II.

[64] On the limitations of Foucault as a theorist of world politics, see Jan Selby, *Engaging Foucault: Discourse, Liberal Governance and the Limits of Foucauldian IR*, 21 INT'L REL. 324 *passim* (2007). Interestingly, Foucault acknowledges Pufendorf's request for limits on sovereign discretion but does not put it in the context of supranational or natural law. FOUCAULT, *supra* note 1, at 210.

[65] *See Editor's Introduction*, *in* THE POLITICAL WRITINGS OF SAMUEL PUFENDORF 16 (Craig L. Carr ed., 1994).

[66] A modern pyramid that bears obvious similarities has been proposed by RAFAEL DOMINGO, THE NEW GLOBAL LAW 147–53 (2010).

[67] SASSEN, *supra* note 30, at 15; *see also id*. at 49 ("The centralized national state acts as an interface between national and supranational forces and as a 'container' for the former.").

[68] *Id*. at 57. The foundational formulation of this development is Niklas Luhmann, *Die Weltgesellschaft*, *in* Niklas Luhmann, II SOZIOLOGISCHE AUFKLÄRUNG 71 (1975).

[69] *See supra* note 7 and accompanying text.

possible, at last, to deny the state its central position in the analysis and to develop, on a fourth level, a governance theory beyond the state. On that level, the state's institutions exist on an equal level, analytically, with non-state institutions.

Postulating non-state governance challenges the state's monopoly on the creation and adjudication of law, but it does not challenge the framework in which we think of governance, or government, as related and linked to the state. Non-state governance is merely the flipside of a state government. Ironically, such a conception does not weaken the importance of the state for governance, but perpetuates it. It changes the state from a tacit background assumption to the prime criterion with which we differentiate between kinds of governance. This limits in crucial ways our ability to think creatively about governance. When we talk of non-state governance, we imagine governance that either reproduces the way in which we know law from the state, or provides its counterpart. A governance concept that transcends the distinction between state and non-state laws, by contrast, should enable us truly to imagine governance not only outside the state, but outside even the dichotomy of state/non-state, outside the state framework altogether. Non-state governance may once have been a necessary concept to overcome the idea that all law is state law. However, as the mere negation of that idea, it lacks constructive potential; its implications collapse into either the negation or the replication of law within the state. We should leave this behind and devote our attention to a governance concept that transcends these boundaries and presents a more credible candidate for globalization and a functionally differentiated global system: governance *beyond* the state.